In the Supreme Court of the State of California

JOHN DOE,
Plaintiff and Appellee,
v.
KAMALA D. HARRIS,
Defendant and Appellant.

Case No. S191948

Ninth Circuit Court of Appeals, Case No. 09-17362
United States District Court for the Northern District of California,
Case No. C 07-03585 JL

REQUEST FOR JUDICIAL NOTICE IN LIEU OF ATTACHMENT OF UNPUBLISHED OPINIONS

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REQUEST FOR JUDICIAL NOTICE IN LIEU OF ATTACHMENT OF UNPUBLISHED OPINIONS

Pursuant to Evidence Code section 452(d), Defendant and Appellant Kamala Harris ("Harris") hereby requests that this Court take judicial notice of the following unpublished opinions issued by the United States District Courts for the Northern, Central, and Eastern Districts of California.

1. *Price v. Ollison* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 53203

2. *Muhammed v. Runnels* (E.D. Cal. 2011) 2011 U.S. Dist. LEXIS 10443

3. *Meier v. Haviland* (E.D. Cal. 2010) 2010 U.S. Dist. LEXIS 117743

4. *Echols v. Pliler* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 110955

5. *Piper v. Adams* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 104065

6. *Felton v. Ayers* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 73201

7. *Anderson v. Felker* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 66714

8. *Owens v. Lamarque* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 61198

9. *Castleberry v. Lewis* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 94415

10. *Frize v. Hernandez* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 32387

11. *Watkin v. Adams* (E.D. Cal. 2010) 2010 U.S. Dist. LEXIS 22601

12. *Zaragosa v. Marshall* (C.D. Cal. 2009) 2009 U.S. Dist. LEXIS 75160

13. *Escalera v. Almager* (E.D. Cal. 2009) 2009 U.S. Dist. LEXIS 25601

14. *Gamble v. Subia* (E.D. Cal. 2009) 2009 U.S. Dist. LEXIS 19233

15. *Clark v. Marshall* (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 110445

16. *Aiyedogbon v. Ayers* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 111829

17. *Thompson-Bonilla v. Marshall* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 90701

18. *Garren v. Kramer* (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 54241

19. *Callegari v. County of San Joaquin* (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 51043

20. *Joshua v. Dexter* (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 39536

21. *Travalini v. California* (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 18081

22. *Burleson v. Kernan* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 86964

23. *Walker v. Carey* (E.D. Cal. 2007) 2007 U.S. Dist. LEXIS 37537

24. *Oberg v. Carey* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 21347

25. *Seiler v. Brown* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 66412

MEMORANDUM OF POINTS AND AUTHORITIES

The California Supreme Court has held that the citation of unpublished federal cases does not violate state rules. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18, citing Cal. Rules of Court, rule 8.1115.)

Rule 8.1115(c) of the California Rules of Court provides, in pertinent part, that "[a] copy of . . . a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited."

Rule 452(d) of the Rules of Evidence provides that judicial notice may be taken of "[r]ecords of . . . (2) any court of record of the United States."

Harris has cited 25 unpublished federal district court cases in the opening brief in this case. Such cases may be cited and also may be judicially noticed, but the citing party must provide copies of the unpublished cases. On recommendation of the California Supreme Court clerk, in lieu of attaching all of the unpublished cases to the opening brief, we have provided them separately in this request for judicial notice.

Dated: August 15, 2011

Respectfully submitted,

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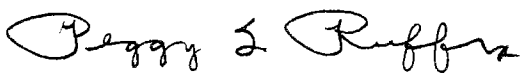

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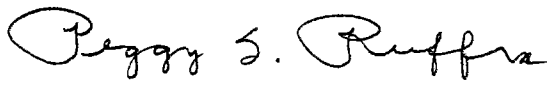
CERTIFICATE OF COMPLIANCE

I certify that the attached **REQUEST FOR JUDICIAL NOTICE** uses a 13 point Times New Roman font and contains 738 words.

Dated: August 15, 2011

KAMALA D. HARRIS
Attorney General of California



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*2011 U.S. Dist. LEXIS 53203, **

STEVEN VINCENT PRICE, Petitioner, v. DERRICK OLLISON, Warden, Respondent

Case No. CV 07-569 DSF(JC)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2011 U.S. Dist. LEXIS 53203

February 25, 2011, Decided
February 25, 2011, Filed

SUBSEQUENT HISTORY: Adopted by, Corrected by, Objection overruled by, Writ of habeas corpus denied, Dismissed by Price v. Ollison, 2011 U.S. Dist. LEXIS 55147 (C.D. Cal., May 17, 2011)

PRIOR HISTORY: Price v. California, 541 U.S. 1015, 124 S. Ct. 2080, 158 L. Ed. 2d 629, 2004 U.S. LEXIS 3153 (2004)

CORE TERMS: prosecutor, citation omitted, juror, sentence, ineffective, trial counsel, federal habeas, defense counsel, carjacking, peace officer, prior convictions, petitioner's claims, misconduct, voluntary intoxication, red, conflict of interest, innocence, federal law, petitioner contends, ineffective assistance, convicted, patrol, evidence presented, assault, habeas corpus, voir dire, reasonable doubt, pursuit, street, stolen

COUNSEL: [*1] Steven Vincent Price, Petitioner, Pro se, Blythe, CA.

For Derrick Ollison, Warden, Respondent: Ryan B McCarroll, LEAD ATTORNEY, CAAG - California Attorney General Office, Los Angeles, CA.

JUDGES: Honorable Jacqueline Chooljian, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Jacqueline Chooljian

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dale S. Fischer, United States

District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On January 24, 2007, Steven Vincent Price ("petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254, and an accompanying memorandum ("Petition Memo") with an attachment ("Petition Att.") and exhibits ("Petition Ex."). Petitioner challenges his 2002 convictions for carjacking, evading a police officer, and assault on a peace officer in the Los Angeles County Superior Court on multiple grounds, including insufficiency of the evidence.

On July 14, 2008, respondent filed an Answer and a supporting memorandum ("Answer"). **[*2]** [1] On November 17, 2008, petitioner filed a Traverse.

FOOTNOTES

1 On May 24, 2007 and July 14, 2008, respondent lodged multiple documents ("Lodged Doc.") including the Clerk's Transcript ("CT") and the Reporter's Transcript ("RT") in support of the Answer and an earlier motion to dismiss.

For the reasons stated below, the Petition should be denied, and this action should be dismissed with prejudice. [2]

FOOTNOTES

2 Although respondent addresses the merits of petitioner's claims, he also argues that petitioner's claims are time-barred. The Court declines to address the potential time-bar since the Petition is without merit. See Van Buskirk v. Baldwin, 265 F.3d 1080, 1083 (9th Cir. 2001) (court may properly deny petition on merits rather than reaching "the complex questions lurking in the time bar of the AEDPA."), cert. denied, 535 U.S. 950, 122 S. Ct. 1347, 152 L. Ed. 2d 250 (2002).

II. PROCEDURAL HISTORY

On April 8, 2002, a Los Angeles County Superior Court jury convicted petitioner of carjacking in violation of California Penal Code ("P.C.") § 215(a) (count 1), unlawful driving or taking of a vehicle in violation of California Vehicle Code ("V.C.") § 10851(a) (count 3), evading an officer in violation of V.C. § 2800.2(a) (count 4), and three counts **[*3]** of assault upon a peace officer in violation of P.C. § 245(c) (counts 5-7). (CT 193-201). On April 9, 2002, the jury found true allegations that petitioner had six prior serious or violent felonies within the meaning of California's Three Strikes law, P.C. §§ 667(b)-(i), 1170.12(a)-(d) and two prior convictions within the meaning of P.C. § 667(a)(1), and that he had served one prior prison term within the meaning of P.C. § 667.5(b). (CT 218-26).

On June 19, 2002, the trial court sentenced petitioner to 85 years to life in state prison, consisting of three consecutive 25 years to life sentences on counts 1, 4, and 5 under the Three Strikes law, as well as five additional years for each of the two P.C. § 667(a)(1) enhancements. [3] (CT 496-99, 503).

FOOTNOTES

3 The trial court stayed petitioner's sentence on count 3 pursuant to P.C. § 654, and ordered petitioner's sentences on counts 6 and 7 to run concurrently with petitioner's sentences on

counts 1, 4 and 5. (CT 496-99, 503).

On August 26, 2003, the California Court of Appeal affirmed the judgment in a reasoned decision. (Lodged Doc. A). On November 12, 2003, the California Supreme Court denied review without comment. (Lodged Doc. C). On April 26, **[*4]** 2004, the United States Supreme Court denied certiorari. (Lodged Doc. E).

Petitioner thereafter sought and was denied habeas relief in the Los Angeles Superior Court, the California Court of Appeal, and the California Supreme Court. (Lodged Docs. F-K).

III. FACTS

On July 5, 2000, at about 7:30 a.m., Kimberly Guzman ("Guzman" or "the victim") was alone in her vehicle, a 1999 four-door Daewoo Nubira, [4] stopped at a traffic light at the corner of Nordhoff Street and Langdon Avenue when a man [5] approached her car. The man opened the passenger door, said "something to the effect of, excuse me, ma'am" and quickly got inside the victim's vehicle. The victim tried to prevent him from entering the car and told him to get out of the vehicle. (RT 70-73, 79-80). The victim then rapidly exited the vehicle, not bothering to put the car in park and leaving behind her purse, which contained her identification and credit cards. (RT 73-75, 81, 86). She got out of the car as quickly as she could because she was afraid. (RT 86). She did not see a weapon in the man's hands. (RT 73, 83-84). When the victim left the car, the man immediately moved to the driver's seat and "zoomed away" in the vehicle. (RT 75, **[*5]** 86).

FOOTNOTES

4 The victim stated the car's color was "listed as khaki[,]" but could be described as tan or gold. (RT 70).

5 The victim described the man as being approximately 5'9" tall and about 190 pounds. (RT 74).

On the same day, Los Angeles Police Officer Michael Braun and his partner went to 15611 Superior Street in North Hills, California, in response to a call regarding a man (later identified as petitioner) in a gold Daewoo sedan "with possibly dynamite or some kind of fireworks strapped to his chest[.]" (RT 88-89, 93-94). When they arrived, Officer Braun and his partner parked their vehicle and approached the vehicle in question, which was parked facing towards a dead end on a cul-de-sac. [6] (RT 89-91, 109). When Officer Braun was approximately 30 or 35 feet away from the vehicle, he saw petitioner seated in the vehicle, and yelled at petitioner "this is the police, show me your hands." (RT 91-92). Petitioner appeared startled, quickly looked at the officers, started the vehicle and accelerated backwards, driving within 10 feet of Officer Braun, before turning the vehicle around and driving away past a police vehicle driven by Los Angeles Police Officer Craig Kojima. (RT 92-95).

FOOTNOTES

6 The portion **[*6]** of Superior Street where petitioner had stopped the stolen car was a short cul-de-sac with the only exit to the east. (RT 89, 146-47, 154).

Officer Kojima and his partner had driven to 15611 Superior Street to provide back-up to the responding officers. (RT 145-46). Officer Kojima was in uniform and driving a marked patrol car with a forward-facing red light. (RT 146). Upon arriving at the location, Officer Kojima and his partner had pulled their vehicle over to the side of Superior Street just east of Orion Avenue,

which is the first cross-street when heading east from the cul-de-sac. (RT 146-47, 154). Seconds after Officer Kojima and his partner arrived, Officer Kojima saw Officer Braun approach the gold Daewoo sedan, and saw petitioner reverse eastbound on Superior Street, accelerating backwards past Officer Kojima's vehicle and through the stop signs at Orion Avenue and the next street, Langdon Avenue, before turning his car forward and heading north on Langdon Avenue. (RT 148-49, 155, 157).

Officer Kojima activated his red lights and siren, turned his vehicle around and pursued petitioner, who drove down Langdon Avenue, a residential area, at approximately 80 miles an hour, ignoring **[*7]** at least three stop signs on Langdon. (RT 149-50, 157-59). Officer Kojima pursued petitioner, closing to within approximately 100 feet, before eventually losing petitioner. (RT 150, 159-61). Officer Kojima lost petitioner because petitioner was driving recklessly through intersections without slowing, while Officer Kojima had a duty to public safety to slow down and clear the intersection before proceeding. (RT 160-61).

At about 11:55 a.m., California Highway Patrol Officer ("CHP") Eddie Zubyk, who was in uniform driving northbound along Interstate 5 in a marked patrol car equipped with lights and a siren, noticed a tan four-door Daewoo compact car enter the freeway from the Paxton on-ramp at an excessive rate of speed — approximately 65-70 miles per hour. (RT 163-65). Officer Zubyk followed the vehicle, which accelerated to 75 miles per hour and entered the Brand Boulevard off-ramp before swerving to the left across a gore point, [7] reentering the freeway, accelerating, and causing other vehicles to take evasive action. (RT 164-65, 191-92). Officer Zubyk activated his red, blue and yellow overhead emergency lights and siren, but the driver, who was later determined to be petitioner, **[*8]** continued to accelerate, changing lanes and using the right shoulder area to pass other vehicles. (RT 97, 166, 187-89, 245). Officer Zubyk notified his dispatch center that he was in pursuit of the vehicle, provided its license plate number, and was informed the car was stolen and the driver was possibly armed and dangerous. (RT 166-67). Officer Zubyk continued to follow the Daewoo, which reached speeds of over 100 miles per hour before the vehicle exited on the Roxford off-ramp, slowed down, entered the dirt shoulder adjacent to the off-ramp to avoid vehicles occupying both off-ramp lanes, and made a right turn without stopping, even though the traffic light was red. (RT 166-68). Officer Zubyk continued to pursue the vehicle on surface streets, with the Daewoo reaching speeds of over 75 miles per hour, making turns as rapidly as possible to avoid the patrol car, and running through at least three or four stop signs and three red lights. (RT 168-72). Officer Zubyk pursued the vehicle until it turned on Florentine Street — a dead end. (RT 171-72). At that point, the Daewoo made a u-turn and accelerated toward the patrol vehicle, with the left side of the Daewoo striking the front end **[*9]** of the patrol car and disabling the patrol car's siren. (RT 173, 200-06). The Daewoo accelerated past the patrol car and drove away with Officer Zubyk in pursuit. (RT 173-74).

FOOTNOTES

[7] Officer Zubyk explained that a gore point is "an area that is painted by white lines basically separating the off-ramp from the freeway lanes." (RT 165).

Petitioner continued to drive through stop signs and Officer Zubyk eventually lost sight of him until approaching a small street and seeing the stolen vehicle accelerating directly toward the patrol car. (RT 174-77). At the last moment, petitioner swerved the stolen vehicle to the right, striking the front end of the patrol car, jumping a curb and ending up on the front lawn of a home. (RT 178). Officer Zubyk reversed his patrol car to try and block petitioner's path, and petitioner backed the stolen vehicle up the home's driveway and then accelerated forward and again struck the patrol car before the Daewoo came to a stop, with petitioner fleeing the vehicle and eventually being apprehended by other officers. (RT 178-88).

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment **[*10]** of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). [8] 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, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam).

FOOTNOTES

[8] The California Supreme Court's denial of review without comment is generally presumed to constitute an adjudication on the merits of any federal claims, thereby subjecting such claims to review in federal **[*11]** habeas proceedings. See Harrington v. Richter ("Richter"), 131 S. Ct. 770, 784-85, 178 L. Ed. 2d 624 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992) (California Supreme Court's unexplained denial of habeas petition constitutes decision on the merits of federal claims subjecting such claims to review in federal habeas proceedings), cert. denied, 510 U.S. 887, 114 S. Ct. 240, 126 L. Ed. 2d 194 (1993).

"[C]learly established Federal law" under section 2254(d)(1) is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade ("Andrade"), 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). In the absence of a Supreme Court decision that "squarely addresses the issue" in the case before the state court, Wright v. Van Patten ("Van Patten"), 552 U.S. 120, 125, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (per curiam), or establishes an applicable general principle that "clearly extend[s]" to the case before a federal habeas court to the extent required **[*12]** by the Supreme Court in its recent decisions, Van Patten, 552 U.S. at 123; see also Panetti v. Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007); Carey v. Musladin ("Musladin"), 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), a federal habeas court cannot conclude that a state court's adjudication of that issue resulted in a decision contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Moses v. Payne, 555 F.3d 742, 760 (9th Cir. 2009) (citing Van Patten, 552 U.S. at 126).

A state court decision is "contrary to" clearly established federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "'confronts a set of facts . . . materially indistinguishable'" from a decision of the Supreme Court but reaches a different result. See Early, 537 U.S. at 8 (quoting Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. Williams v. Taylor, 529 U.S. at 413.

"In order for a federal court **[*13]** to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id.

at 520-21 (citation omitted); see also Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir.) (under "unreasonable application" clause, federal habeas court may not issue writ simply because it concludes in its independent judgment that relevant state court decision applied clearly established law erroneously or incorrectly; rather, application must be objectively unreasonable), cert. denied, 540 U.S. 968, 124 S. Ct. 446, 157 L. Ed. 2d 313 (2003). The habeas petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Visciotti, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam).

In applying these standards, federal courts look to the last reasoned state court decision. See Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding **[*14]** that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); see also Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (federal courts "look through" unexplained rulings of higher state courts to the last reasoned decision). However, to the extent no such reasoned opinion exists, courts must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000), abrogated on other grounds, Andrade, 538 U.S. at 75-76 (2003). The Court must also conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

Accordingly here, in addressing petitioner's challenge to the sufficiency of the evidence supporting his carjacking and evading an officer convictions, the Court has conducted an independent review of the record and has considered the reasoning of the California Court of Appeal — the only state court to issue a reasoned decision **[*15]** addressing such claims. (Lodged Doc. A). As to the remainder of petitioner's claims — which have been rejected on the merits but as to which there is no reasoned state decision — this Court has conducted an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the state court's decision was objectively unreasonable.

V. DISCUSSION

Petitioner claims he is entitled to federal habeas relief based on the following multiple and somewhat overlapping grounds:

> (1) He is actually innocent of carjacking, evading a police officer, and assault on a peace officer (Ground One);
>
> (2) There was insufficient evidence to sustain his carjacking, evading a police officer and assault on a peace officer convictions (Ground Two);
>
> (3) CHP officers used excessive force in arresting petitioner in violation of his Fourth, Eighth and Fourteenth Amendment rights (Ground Three);
>
> (4) He received ineffective assistance of trial counsel in violation of the Fifth, Sixth and Fourteenth Amendments (Ground Four);
>
> (5) He was denied the effective assistance of counsel and due process of law when the trial court reappointed previously **[*16]** dismissed trial counsel during an improper Marsden [9] hearing in violation of the Fifth, Sixth and Fourteenth Amendments (Ground Five);
>
> (6) The trial court improperly denied petitioner his right to discharge his attorney and represent himself in violation of the Fifth, Sixth and Fourteenth Amendments

(Ground Six);

(7) He was the victim of prosecutorial misconduct and vindictiveness for asserting his rights in violation of the Sixth and Fourteenth Amendments (Ground Seven);

(8) He was denied a fair trial because the trial judge was biased and denied petitioner his reciprocal discovery rights, a Marsden hearing, and the right to represent himself, jury instructions were incomplete, and he did not receive a public trial in violation of the Fifth, Sixth and Fourteenth Amendments (Ground Eight);

(9) He was denied the right to a fair and impartial jury because jurors gave intentionally false answers during voir dire, the prosecutor committed misconduct throughout the trial, and his trial counsel was ineffective in violation of the Fifth, Sixth and Fourteenth Amendments (Ground Nine);

(10) His sentence violated the Double Jeopardy and Ex Post Facto Clauses, breached a plea agreement, was excessive **[*17]** and disproportionate, and contained illegal enhancements, and he received ineffective assistance of counsel at sentencing in violation of the Sixth, Eighth and Fourteenth Amendments (Ground Ten);

(11) He was deprived of due process and equal protection of the law when he was denied a free trial transcript in violation of the Fifth and Fourteenth Amendments (Ground Eleven);

(12) He was denied the right to testify on his own behalf, present witnesses with significant probative value, to have his mental state considered, and to have the jury instructed on his theory of the case in violation of the Fifth, Sixth and Fourteenth Amendments (Ground Twelve);

(13) He received ineffective assistance of appellate counsel when his appellate counsel failed to raise the issue of his trial counsel's ineffectiveness and other issues in violation of the Fifth, Sixth and Fourteenth Amendments (Ground Thirteen); and

(14) There were cumulative errors in violation of the Eighth and Fourteenth Amendments (Ground Fourteen).

(Petition at 5; Petition Att. at 1-2; Petition Memo at xxxvi-xxxviii and 1-654).

FOOTNOTES

9 People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970).

Petitioner is not entitled to habeas relief on any of his claims. The **[*18]** Court notes that the Petition is rambling, disjointed, repetitive, unfocused and prolix, that it jumps from topic to topic and that it often combines diverse and unrelated claims under the same heading. Even so, the Court has read, considered and rejected on the merits all of petitioner's contentions. In so doing, the Court makes several preliminary determinations.

First, a federal court, in conducting habeas review, is limited to deciding whether a state court decision violates the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Federal habeas corpus relief "does not lie for errors of state law." Lewis v. Jeffers ("Jeffers"), 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); Estelle v. McGuire, 502 U.S. at 67; see also Dugger v. Adams, 489 U.S. 401, 409, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989) ("[T]he availability of a claim under state law does not of itself establish that a claim was available

under the United States Constitution."); Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) ("A federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law."). Nor may a petitioner "transform a state-law issue into a federal one merely by asserting **[*19]** a violation of due process." Langford v. Day, 110 F.3d 1380, 1389 (9th Cir.), cert. denied, 522 U.S. 881, 118 S. Ct. 208, 139 L. Ed. 2d 144 (1997). Thus, to the extent petitioner raises alleged violations of state law, or contends that the trial court abused its discretion, his claims are not cognizable in this proceeding, and they will not be further addressed. See Williams v. Borg, 139 F.3d 737, 740 (9th Cir.) (Federal habeas review is available "only for constitutional violation, not for abuse of discretion."), cert. denied, 525 U.S. 937, 119 S. Ct. 353, 142 L. Ed. 2d 292 (1998).

Second, to the extent petitioner has cited constitutional provisions irrelevant to a particular ground for relief, the Court has ignored the inapposite citation and analyzed the ground under the appropriate constitutional provision. For example, although petitioner alleges an excessive force claim under the Fourth, Eighth and Fourteenth Amendments, petitioner's excessive force claim is properly brought under the Fourth Amendment, and the Court addresses it as such. See Brosseau v. Haugen, 543 U.S. 194, 197, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) ("[C]laims of excessive force are to be judged under the Fourth Amendment's objective reasonableness standard.") (citation and internal quotation marks omitted); Albright v. Oliver, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) **[*20]** ("Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of governmental behavior, 'that Amendment . . .' must be the guide for analyzing these claims.") (quoting Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

Third, petitioner repeatedly attempts to support his claims by reference to "transcripts" that may or may not exist, are not in the Reporter's Transcript on Appeal, and are not included in the voluminous exhibits petitioner has submitted. Since the Court has not been provided with these "transcripts," petitioner cannot rely on them to provide evidentiary support for his claims. If petitioner wishes the Court to consider these "transcripts," he must lodge them with any Objections he files to this Report and Recommendation. Absent the lodging of such "transcripts" by petitioner, the Court will assume no such "transcripts" exist.

With the foregoing in mind, the Court addresses petitioner's contentions, albeit in a different order and manner than presented by petitioner for ease of analysis.

A. Petitioner is Not Entitled to Federal Habeas Relief on His Sufficiency of the Evidence Claims

In Ground Two, petitioner contends **[*21]** there was insufficient evidence to support his carjacking, evading a peace officer and assault on a peace officer convictions. (Petition at 5; Petition Att. at 1; Petition Memo at 13-105).

To review the sufficiency of the evidence in a habeas corpus proceeding, the Court must determine whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Jeffers, 497 U.S. at 781 (citation omitted; emphasis original); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). All evidence must be considered in the light most favorable to the prosecution, Jeffers, 497 U.S. at 782; Jackson, 443 U.S. at 319, and if the facts support conflicting inferences, reviewing courts "must presume ? even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326; McDaniel v. Brown, 130 S. Ct. 665, 673, 175 L. Ed. 2d 582 (2010). Furthermore, federal courts reviewing a state prisoner's habeas petition must "apply the standards of Jackson with an additional layer of deference." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005), cert. denied, 546 U.S. 1137, 126 S. Ct. 1142, 163 L. Ed. 2d 1000 (2006); **[*22]** Briceno v. Scribner, 555 F.3d 1069, 1078 (9th Cir. 2009). These standards are applied to the substantive elements of the criminal offenses under state law. Jackson, 443 U.S. at 324 n.16; Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir.) (en banc), cert. denied, 543 U.S. 956, 125 S. Ct. 415, 160 L. Ed. 2d 318 (2004).

1. Carjacking

Under California law, carjacking is: (1) the felonious taking of a motor vehicle in the possession of another; (2) from his or her person or immediate presence; (3) against his or her will; (4) with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession; (5) accomplished by means of force or fear. P.C. § 215 (a) (2000); People v. Medina, 41 Cal. 4th 685, 693, 61 Cal. Rptr. 3d 677, 161 P.3d 187 (2007); see also People v. Magallanes, 173 Cal. App. 4th 529, 534, 92 Cal. Rptr. 3d 751 (2009) (same).

Petitioner contends there was insufficient evidence to support his carjacking conviction because there is no evidence he took the vehicle from the victim by force or fear. (Petition Memo at 15-20). The California Court of Appeal, the last state court to issue a reasoned decision addressing this claim, rejected the claim on its merits. (Lodged Doc. A at 2-4). Noting that the elements and language **[*23]** of the carjacking statute are virtually identical to those of the robbery statute, P.C. § 211, and that principles applicable to robbery are relevant to carjacking, the Court of Appeal stated:

> In the robbery context, it is well-established that fear may be inferred from the surrounding circumstances. Fear may be shown by proof of conduct, words or circumstances reasonably calculated to produce fear. The robber need not assault or verbally threaten the victim, nor need he use or display a weapon.
>
> In [People v. Brew, 2 Cal. App. 4th 99, 2 Cal. Rptr. 2d 851 (1991)], the defendant pretended to purchase an item at a drugstore. While the cashier was placing Brew's money into her cash register, Brew stepped into the cashier's work area and stood two and one-half to three feet from her. Brew's actions intimidated the cashier, who moved away from the open cash drawer, thereby permitting Brew to take money and checks from the drawer. Although Brew never displayed a weapon, touched the cashier, or said anything threatening to her, the appellate court found sufficient evidence that the money was taken through fear or intimidation.
>
> Similarly, [petitioner] intimidated Guzman by entering her car as she sat at a stop light. **[*24]** At best, his behavior was bizarre and socially unacceptable. In the Los Angeles area, however, an uninvited entry by a stranger into an occupied car is most likely to be the first step in a carjacking or attempted carjacking. The prevalence of carjackings and the public's awareness of the crime establishes the psychological backdrop against which [petitioner's] conduct must be evaluated. A reasonable trier of fact could readily conclude that [petitioner's] sudden, surprise entry into Guzman's car and his refusal to leave it when she ordered him to do so were reasonably calculated to produce fear. There can be little doubt that [petitioner's] conduct actually placed Guzman in fear of death or injury. She testified that when [petitioner] entered her car, she got out as fast as she could because she was frightened. Indeed, she got out so quickly that she did not shift her car into park, put on the emergency brake, or take her briefcase, which contained her wallet.
>
> [Petitioner's] arguments on appeal that Guzman's fear may have been based on a fear of being late to work or that [petitioner] would stain the car's upholstery fail to explain why Guzman would abandon her car and wallet. Abandoning **[*25]** her car could only make Guzman later for work and would not prevent [petitioner] from staining the upholstery. [Petitioner's] further argument that Guzman left the car before [petitioner] could explain himself is based upon speculation that [petitioner] would have explained himself and that the explanation would have been innocuous. As [petitioner] did not testify, nothing in the record suggests an innocuous explanation for his conduct. [Petitioner's] remarkably swift transfer to the driver's seat and rapid departure with the car provides strong evidence that [petitioner]

> intended to either take the car from Guzman or commandeer it while kidnapping Guzman.
>
> We conclude substantial evidence supports [petitioner's] carjacking conviction.

(Lodged Doc. A at 3-4) (internal citations omitted).

This Court agrees with findings and analysis of the Court of Appeal. Although petitioner argues that there was no evidence he expressly threatened the victim, was armed, or used force against her, under California law, "[t]he requisite fear need not be the result of an express threat or the use of a weapon." People v. Morehead, 191 Cal. App. 4th 765, 119 Cal. Rptr. 3d 680, 688 (2011); [10] Magallanes, 173 Cal. App. 4th at 534; **[*26]** Lavea v. Woodard, 555 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008). Rather, the element of fear "is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for [her] property." People v. Bordelon, 162 Cal. App. 4th 1311, 1319, 77 Cal. Rptr. 3d 14 (2008); Morehead, 119 Cal. Rptr. 3d at 688; Lavea, 555 F. Supp. 2d at 1041. "It 'makes no difference whether the fear is generated by the perpetrator's specific words, or actions designed to frighten, or by the circumstances surrounding the taking itself.'" Lavea, 555 F. Supp. 2d at 1042 (quoting People v. Flynn, 77 Cal. App. 4th 766, 772, 91 Cal. Rptr. 2d 902 (2000)).

FOOTNOTES

[10] Morehead and several other cases cited herein involve robbery rather than carjacking convictions. Nevertheless, California cases apply principles relevant to robbery in assessing carjacking convictions. In re Travis W., 107 Cal. App. 4th 368, 376-77, 132 Cal. Rptr. 2d 135 (2003), cert. denied, 540 U.S. 1010, 124 S. Ct. 548, 157 L. Ed. 2d 420 (2003); People v. Gray, 66 Cal. App. 4th 973, 984, 78 Cal. Rptr. 2d 191 (1998).

Here, the victim was sitting alone in her vehicle, which was stopped at a stoplight, when she was suddenly confronted by petitioner who was concededly under the influence of drugs (Petition Memo at 17) and who aggressively opened the front passenger **[*27]** side door of her car and clambered into the vehicle despite the victim's best efforts to stop him opening the door and her commands to get out of her car. Faced with this unwanted intrusion, the victim frantically abandoned her vehicle without stopping the engine, putting the car in park, or taking her purse because she was afraid. [11] Once the victim exited the car, petitioner immediately drove away in her vehicle. "Under the circumstances, [the victim's] fear was not irrational or unreasonable[,]" Lavea, 555 F. Supp. 2d at 1042, and viewing the evidence in the light most favorable to the prosecution, Jeffers, 497 U.S. at 782; Jackson, 443 U.S. at 319, the evidence set forth herein is more than sufficient for a rational trier of fact to have found beyond a reasonable doubt that the victim was placed in sufficient fear to satisfy the requirements of P.C. § 215. See Lavea, 555 F. Supp. 2d at 1042-43 ("[T]here was sufficient evidence that the car was taken by fear to support the verdict on the carjacking" when petitioner approached the victim, opened her car door, and said "Give me the key[,]" which the victim did because she was afraid); Magallanes, 173 Cal. App. 4th at 534 ("The evidence **[*28]** that the carjacking was accomplished by the use of fear was sufficient to support defendant's conviction" when defendant got into the driver's seat of the victim's car and attempted to drive away as the victim leaned into the backseat to put her son into his child car seat, causing the victim to fear for her safety and pull her son out of the car); People v. Brew, 2 Cal. App. 4th 99, 104, 2 Cal. Rptr. 2d 851 (1991) (sufficient evidence supported finding offense was committed through fear when defendant, who smelled of alcohol, approached cashier, and "without saying anything, interjected himself physically between [the cashier] and the cash register drawer causing the cashier to step back in fear").

FOOTNOTES

[11] Although the victim did not specifically state it was petitioner's actions that had terrified her, it was certainly reasonable for the jury to make this inference based on the facts presented. See United States v. Bernhardt, 840 F.2d 1441, 1448 (9th Cir.) ("[I]t is the jury's exclusive function to . . . draw reasonable inferences from proven facts."), cert. denied sub nom., McCarthy v. United States, 488 U.S. 954, 109 S. Ct. 389, 102 L. Ed. 2d 379 (1988). Therefore, petitioner's absurd argument that "[s]he may have been 'afraid' that having **[*29]** to deal with petitioner would cause her to be late for work" or "his sitting down would stain her seat upholstery" (Petition Memo at 17) is without merit. Moreover, the California Court of Appeal pointed out the frivolousness of this argument by noting that "[a]bandoning her car could only make [the victim] later for work and would not prevent [petitioner] from staining the upholstery." (Lodged Doc. A at 4).

Based upon an independent review of the record and the California Court of Appeal's decision on direct review, this Court concludes that the California Supreme Court's rejection of this sufficiency of the evidence claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

2. Evading an Officer

California V.C.§ 2800.2, "makes it a crime for a motorist to flee from, or attempt to elude, a pursuing peace officer's vehicle in 'violation of [V.C. §] 2800.1' and 'in a willful or wanton disregard for the safety of persons or property.'" People v. Hudson, 38 Cal. 4th 1002, 1007, 44 Cal. Rptr. 3d 632, 136 P.3d 168 (2006). **[*30]** Section 2800.1 criminalizes the actions of:

> Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle . . . if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform.

V.C. § 2800.1(a) (2000); see also Hudson, 38 Cal. 4th at 1008 (Section 2800.1(a) "requires four distinct elements, each of which must be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform.") (citation omitted). A "willful or wanton disregard for the safety of persons or property" may be shown "by proof of property damage or by proof that the defendant committed three Vehicle Code violations." People v. Pinkston, 112 Cal. App. 4th 387, 392, 5 Cal. Rptr. 3d 274 (2003), **[*31]** cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004); V.C. § 2800.2(b) (2000).

Petitioner contends the evidence was insufficient to support his conviction for violating V.C. § 2800.2 because there was no evidence suggesting he was aware of any police officers' presence and attempted to elude them or that he saw or reasonably should have seen the red lights from Officer Kojima's vehicle. (Petition at 5; Petition, Att. at 1; Petition Memo at 21-42). The California Court of Appeal, the last state court to issue a reasoned decision addressing this claim, rejected the claim on the merits, reasoning:

> The evidence showed two police chases potentially supporting the Vehicle Code section 2800.2 charge and conviction. Because the evidence did not show that Officer Zubyk's patrol car exhibited at least one lighted red lamp visible from the front, as required by Vehicle Code section 2800.1, subdivision (a)(1), the chase by Zubyk cannot support [petitioner's] evasion conviction. [12] With respect to the

> remaining chase, [petitioner] argues there was no evidence he saw or reasonably should have seen the red lights on Officer Kojima's car. [¶] Although there was no evidence [petitioner] actually saw the red lights on **[*32]** Kojima's car, the jury could reasonably conclude he reasonably should have seen them. [Petitioner] looked directly at the officers who approached him on foot and ordered him to put his hands up. His startled expression and speedy departure after encountering them establishes that he saw the officers and realized their attention was focused upon him. Because [petitioner] fled from the officers, instead of complying with their instructions to put his hands up, the jury could reasonably infer [petitioner] intended to escape from the officers. As he drove away from those officers, [petitioner] drove straight toward Kojima's marked police car. The jury could reasonably infer he saw Kojima's car, realized it was a police car, and its presence was related to that of the officers who approached him on foot. The jury could further reasonably infer that [petitioner's] apparent desire to escape from the officers would cause him to look at Kojima's car to see whether it was following him. Although Kojima did not immediately activate his siren or red lights, he did so early in the pursuit, as soon as [petitioner] ran two stop signs on the same street, one block apart. Thus, Kojima was following **[*33]** [petitioner] with his red lights activated before [petitioner] began making turns or "duck[ing] down behind corners." The evidence therefore supports an inference that [petitioner] reasonably should have seen the red lights on Kojima's police car.

(Lodged Doc. A at 6-7) (footnote added; footnote and citations omitted).

FOOTNOTES

12 The Court disagrees with this conclusion. As discussed above, Officer Zubyk testified his overhead lights, which were red, blue and yellow in color, were activated during his pursuit of petitioner (RT 166, 189), and the jury could reasonably determine that the red light was visible from the front based on the pictures of Officer Zubyk's distinctively marked patrol car that were entered into evidence (RT 117, 203, 215, 227-28, 238, 256, 261) and that petitioner reasonably should have seen the red lamp based on Officer Zubyk's testimony. See Darling v. Cate, 2010 U.S. Dist. LEXIS 58090, 2010 WL 2404694, *7 (C.D. Cal. Apr. 23, 2010), adopted as modified, 2010 U.S. Dist. LEXIS 58089 , 2010 WL 2403047 (C.D. Cal. Jun. 11, 2010); People v. Copass, 180 Cal. App. 4th 37, 41, 102 Cal. Rptr. 3d 476 (2009).

Petitioner argues that the evidence was insufficient to support his convictions because he assertedly was not aware of any police officer presence before, **[*34]** during or after the first police pursuit. [13] (Petition Memo at 38-39). However, the evidence presented at trial supports a contrary inference consistent with the jury's verdict. Officer Braun testified that when he and his partner approached petitioner and identified themselves, petitioner appeared startled, looked at the two officers, and quickly started the stolen Daewoo and drove away from the officers, reversing the stolen vehicle eastbound on Superior Street, driving past Officer Kojima [14] and through stop signs at Orion Avenue and Langdon Avenue before backing slightly southbound on Langdon Avenue, stopping, and heading northbound on Langdon Avenue. (RT 91-95, 148-49, 157-58). When petitioner passed Officer Kojima, Officer Kojima turned his vehicle around and activated the police car's red lights and siren as soon as petitioner failed to stop at the second stop sign. (RT 149-50, 158). Officer Kojima then pursued petitioner, but was unable to get closer than 100 feet to petitioner. (RT 159). Under these circumstances, from which it is evident that petitioner desired to avoid police contact, it was reasonable for the jury to infer that petitioner would look at Officer Kojima's **[*35]** marked police car to see if it was following him, and observe the red lights and hear the siren Officer Kojima had activated. See Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) ("Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction.") (citation omitted); Copass, 180 Cal. App. 4th at 41 (reasonable inference that defendant who drove at high rate of speed and took evasive action as officer approached was aware of the pursuit). Moreover, Officer Kojima's testimony about

petitioner's erratic driving, including driving through a residential area at approximately 80 miles per hour and ignoring at least three stop signs (RT 149-50, 157-59), provided sufficient evidence to support a determination that petitioner acted with a willful or wanton disregard for the safety of persons or property. V.C. § 2800.2(b) (2000); Copass, 180 Cal. App. 4th at 42.

FOOTNOTES

13 Even if the California Court of Appeal correctly determined the chase involving Officer Zubyk cannot support petitioner's evasion conviction, the conviction must nevertheless be upheld if supported by sufficient evidence derived from the chase involving Officer Kojima. See Griffin v. United States, 502 U.S. 46, 59-60, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) **[*36]** (A verdict may not be negated "'merely on the chance . . . that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.'") (citation omitted); Keating v. Hood, 191 F.3d 1053, 1062 (9th Cir. 1999) ("When two theories are presented to a jury and one is *factually* insufficient, a conviction may be upheld, because a jury is 'equipped to analyze the evidence' and so a court may assume that it rested its verdict on the ground that the facts supported.") (citation omitted; emphasis in original), cert. denied, 531 U.S. 824, 121 S. Ct. 69, 148 L. Ed. 2d 34 (2000), overruled on other grounds by, Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003) (en banc), reversed by, Brown v. Payton, 544 U.S. 133, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005).

14 There is no dispute that Officer Kojima was wearing a distinctive uniform and in a distinctly marked police vehicle that was equipped with a forward-facing red light. (RT 146; see also Petition Memo at 40 (conceding "Officer Kojima was wearing a distinctive uniform" and driving a "marked police vehicle")).

Petitioner also contends that the evidence was insufficient to support his convictions because Officers Braun and Kojima assertedly **[*37]** lied during their testimony. (Petition Memo at 21-36). However, a federal court in a habeas corpus proceeding cannot redetermine the credibility of witnesses when the demeanor of the witnesses was not observed by the federal court. Marshall v. Lonberger ("Lonberger"), 459 U.S. 422, 434, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983). "The reviewing court must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Jones v. Wood, 114 F.3d at 1008 (quoting Walters, 45 F.3d at 1358).

Based upon an independent review of the record and the California Court of Appeal's decision on direct review, this Court concludes that the California Supreme Court's rejection of this sufficiency of the evidence claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

3. Assaulting a Police Officer with a Deadly Weapon

At the time **[*38]** of petitioner's offenses, P.C. § 245(c) punished "an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter . . . when the peace officer or firefighter is engaged in the performance of his or her duties," and when the defendant "knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties." P.C. § 245(c) (2000). A deadly weapon as used in P.C. § 245 "is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury[,]'" People v. Aguilar, 16 Cal. 4th 1023, 1028-29, 68 Cal. Rptr. 2d 655, 945 P.2d 1204 (1997) (citation omitted); People v. Lochtefeld, 77 Cal. App. 4th 533, 538-39, 91 Cal. Rptr. 2d 778 (2000), such as a vehicle. See,

e.g., People v. Russell, 129 Cal. App. 4th 776, 782, 28 Cal. Rptr. 3d 862 (2005) ("The law makes clear a person who operates or drives a vehicle in an attempt to injure another person has committed assault with a deadly weapon, to wit, the car."); People v. Wright, 100 Cal. App. 4th 703, 706, 123 Cal. Rptr. 2d 494 (2002) ("[A]ny operation of a vehicle by a person knowing facts that would lead a **[*39]** reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon.").

The testimony of a single witness is sufficient to uphold a conviction. United States v. Larios, 640 F.2d 938, 940 (9th Cir. 1982). Here, viewing the evidence presented in the light most favorable to the prosecution, Officer Zubyk's testimony that petitioner on three occasions drove the stolen Daewoo directly at Officer Zubyk's patrol car and crashed into it (RT 173, 177-78, 180-81, 200-06) more than suffices to support petitioner's three P.C. § 245(c) convictions. See Ney v. Yates, 2008 U.S. Dist. LEXIS 120754, 2008 WL 2490398, *9 (E.D. Cal. June 17, 2008) (sufficient evidence supported conviction for violating P.C. § 245(c) when petitioner reversed vehicle and drove directly backwards towards officer, who was standing directly behind vehicle and had to quickly jump out of the way to avoid being hit).

Nevertheless, petitioner contends there is insufficient evidence to support his conviction because he was voluntarily intoxicated and suffering from a "blackout" and therefore could not have formed the intent necessary to violate P.C. § 245(c). (Petition Memo at 43-47). Petitioner's argument **[*40]** is specious since evidence of voluntary intoxication, even if it induced unconsciousness, cannot negate the general intent necessary to violate P.C. § 245(c). See People v. Boyer, 38 Cal. 4th 412, 469, 42 Cal. Rptr. 3d 677, 133 P.3d 581 (2006) (voluntary intoxication not a defense to crime, but can prevent formation of any *specific* intent requisite to offense at issue) (emphasis added), cert. denied, 549 U.S. 1021, 127 S. Ct. 556, 166 L. Ed. 2d 413 (2006); People v. Hood, 1 Cal. 3d 444, 458-59, 82 Cal. Rptr. 618, 462 P.2d 370 (1969) (evidence of intoxication not appropriate for consideration in determining whether defendant committed assault with deadly weapon on peace officer); see also P.C. § 22 (a) ("No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act."); People v. Brown, 46 Cal. 3d 432, 444 n.7, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988) ("'As a matter of public policy, defendant's voluntarily becoming intoxicated to the extent of his being unable **[*41]** to perceive the identities of uniformed peace officers driving marked patrol cars with lights and sirens operating is sufficiently culpable conduct to warrant criminal liability for the crime of assault with a deadly weapon on a police officer.'") (citation omitted), cert. denied, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989).

Petitioner also argues the evidence is insufficient to support his P.C. § 245(c) convictions because Officer Zubyk lied during his testimony, falsely stating, among other things, that petitioner rammed Officer Zubyk's police car when it was Officer Zubyk who acted outside the scope of his duties in ramming the stolen Daewoo. (Petition Memo at 48-105); see also People v. White, 101 Cal. App. 3d 161, 164, 161 Cal. Rptr. 541 (1980) ("[W]here excessive force is used in making what otherwise is a technically lawful arrest, the arrest becomes unlawful and a defendant may not be convicted of an offense which requires the officer to be engaged in the performance of his duties."). There is no merit to this argument. The jury was specifically instructed that "[i]n a prosecution for violation of [P.C. §] 245(c)[,] the People have the burden of proving beyond a reasonable doubt that the peace officer was engaged in **[*42]** the performance of his duties" and "[a] peace officer is not engaged in the performance of his duties if he . . . uses unreasonable or excessive force in making or attempting to make the arrest [or] detention." (CT 178; RT 316-17). The jury is presumed to have followed the trial court's instructions. Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000). In light of the jury's conviction of petitioner, the Court must presume that the jury found Officer Zubyk to be credible and rejected petitioner's argument that it was Officer Zubyk who struck the stolen Daewoo in his police vehicle. (See RT 281-89). It was the jury's province to assess Officer Zubyk's credibility, and this Court cannot second-guess that determination.

The California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this claim.

B. Petitioner is Not Entitled to Federal Habeas Relief on His Actual Innocence Claim

In Ground One, petitioner contends he is actually innocent of carjacking, evading a **[*43]** police officer, and assault on a peace officer because: (1) he had blacked out due to voluntary intoxication and therefore could not form the requisite intent necessary to commit the crimes; and (2) exculpatory evidence supports his innocence. (Petition Memo at 1-13).

1. Pertinent Law

The United States Supreme Court has expressly left open the question of whether a freestanding claim of actual innocence is cognizable on federal habeas review. See District Attorney's Office v. Osborne ("Osborne"), 129 S. Ct. 2308, 2321, 174 L. Ed. 2d 38 (2009) (whether federal constitutional right to be released upon proof of "actual innocence" exists "is an open question"); House v. Bell, 547 U.S. 518, 554-55, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (declining to resolve whether freestanding actual innocence claim can be maintained); Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (assuming without deciding "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim").

The Ninth Circuit has assumed that freestanding actual innocence claims are cognizable in both capital **[*44]** and non-capital cases, and has articulated a minimum standard of proof applicable to such claims. Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1133, 118 S. Ct. 1827, 140 L. Ed. 2d 963 (1998). "[A] habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Id. (citing Herrera, 506 U.S. at 442-44 (Blackmun, J., dissenting)). The petitioner's burden in such a case is "'extraordinarily high'" and requires a showing that is "'truly persuasive.'" Id. (quoting Herrera, 506 U.S. at 417); see also Spivey v. Rocha, 194 F.3d 971, 979 (9th Cir.1999) (denying habeas relief where "the totality of the new evidence [did] not undermine the structure of the prosecution's case"), cert. denied, 531 U.S. 995, 121 S. Ct. 488, 148 L. Ed. 2d 461 (2000); Swan v. Peterson, 6 F.3d 1373, 1384-85 (9th Cir. 1993) (denying habeas relief where newly discovered evidence did not contradict materially the evidence presented at trial, did not demonstrate that the state's evidence was false, and was merely equivocal), cert. denied, 513 U.S. 985, 115 S. Ct. 479, 130 L. Ed. 2d 393 (1994).

2. Analysis

To the extent petitioner intends to assert a freestanding actual innocence **[*45]** claim, he is not entitled to relief because, as noted above, the United States Supreme Court has expressly left open the question of whether a freestanding actual innocence claim based on newly discovered evidence constitutes grounds for habeas relief in a non-capital case. Osborne, 129 S. Ct. at 2321. In the absence of Supreme Court authority establishing the cognizability of a freestanding actual innocence claim on federal habeas review, the California Supreme Court's rejection of petitioner's freestanding actual innocence claim cannot be contrary to, or involve an unreasonable application of, "clearly established" Supreme Court authority. See Musladin, 549 U.S. at 77 ("Given the lack of holdings from this Court regarding the [issue in dispute], it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (quoting 28 U.S.C. § 2254(d)(1)); Brewer v. Hall, 378 F.3d 952, 955 (9th Cir.) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.") **[*46]** (citation omitted), cert. denied, 543 U.S.

1037, 125 S. Ct. 814, 160 L. Ed. 2d 602 (2004).

Even assuming petitioner's claim is cognizable, petitioner is not entitled to relief because the evidence he presents does not affirmatively prove that he is probably innocent. Although petitioner contends he was voluntarily intoxicated and in a "blackout" state while he committed his crimes, as discussed above, evidence of voluntary intoxication, even if it induced unconsciousness, cannot negate the general intent required for assaulting a police officer in violation of P.C. § 245(c). Boyer, 38 Cal. 4th at 469; Brown, 46 Cal. 3d at 444 n.7; Hood, 1 Cal. 3d at 458-59; P.C. § 22 (a).

Furthermore, while evidence of intoxication may be relevant to a determination of whether petitioner "actually formed a required specific intent," P.C. § 22(b), such as the specific intent required to violate P.C. § 215(a) or V.C. § 2800.2(a), see Reneau v. Evans, 2009 U.S. Dist. LEXIS 105764, 2009 WL 3806264, *11 (C.D. Cal. Nov. 12, 2009) ("Vehicle Code § 2800.2(a) requires that a person have the specific intent to evade an officer . . . [and] voluntary intoxication can be relevant to whether a defendant formed the specific intent for a particular crime."); Juarez v. Adams, 2008 U.S. Dist. LEXIS 108026, 2008 WL 5481118, *5, *9 (C.D. Cal. Sep. 10, 2008) **[*47]** (carjacking requires specific intent "'to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession'" and "evidence of voluntary intoxication is relevant 'to the extent it bears upon the question whether the defendant actually had the requisite specific mental state required for commission of the crimes at issue.'") (citations and emphasis omitted), adopted as modified, 2009 U.S. Dist. LEXIS 1043, 2009 WL 57528 (C.D. Cal. Jan. 8, 2009), the evidence petitioner presents, including his own self-serving statements about his mental state, [15] and the declaration of Gary Fowler (Petition Ex. D), are simply insufficient to meet the "extraordinarily high" standard of showing petitioner is probably innocent of carjacking or evading a police officer. See also Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002) ("'[S]elf-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions.'") (quoting Cuppett v. Duckworth, 8 F.3d 1132, 1139 (7th Cir. 1993) (en banc), cert. denied, 510 U.S. 1180, 114 S. Ct. 1226, 127 L. Ed. 2d 571 (1994)); Reneau, 2009 U.S. Dist. LEXIS 105758, 2009 WL 3806264 at *11-*12 (no **[*48]** reasonable probability that jury would have concluded that evidence of petitioner's voluntary intoxication negated petitioner's specific intent to evade officer when facts underlying pursuit clearly demonstrated petitioner's specific intent to evade officer).

FOOTNOTES

[15] Moreover, petitioner's claim that he was in a "blackout" state while committing the crimes is belied by his argument that Officers Kojima and Zubyk testified untruthfully about their pursuits of petitioner, an argument petitioner attempts to support by providing his own detailed recollections of the route the police chase took. (See, e.g., Petition Memo at 33-34, 48-49).

Nor does the other new evidence petitioner cites demonstrate petitioner is actually innocent. For instance, the insurance and police reports petitioner cites (Petition Memo, at 4; Petition Exs. J, Q), provide absolutely no support for his actual innocence claim. Likewise, the declaration of Kathy Wells, a neighbor of petitioner's parents, who states she saw the end of the police pursuit on television and saw petitioner beaten by the police (Petition Memo at 5; Petition Ex. D (Declaration of Kathy Wells ("Wells Decl.")), simply does not in any manner demonstrate **[*49]** petitioner's innocence of the charges against him. In short, even assuming an actual innocence claim is cognizable on federal habeas review, the "new evidence" petitioner proffers falls well short of meeting the "extraordinarily high" threshold of demonstrating that petitioner is "probably innocent."

The California Supreme Court's rejection of petitioner's actual innocence claim was not contrary to, or an objectively unreasonable application of, any clearly established federal law, and did not

involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this claim.

C. Petitioner Is Not Entitled to Federal Habeas Relief on His Excessive Force Claim

In Ground Three, petitioner contends CHP officer Edwin Olavi used excessive force in apprehending petitioner in violation of petitioner's Fourth Amendment rights. (Petition at 5; Petition Att. at 1; Petition Memo at 145-66). [16] However, this claim does not merit federal habeas relief since an "illegal arrest or detention does not void a subsequent conviction." Gerstein v. Pugh ("Pugh"), 420 U.S. 103, 119, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (citations omitted); see also United States v. Crews, 445 U.S. 463, 474, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980) **[*50]** ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction.") (citations omitted).

FOOTNOTES

16 Petitioner also engages in a lengthy disquisition repeating his allegations that Officer Zubyk used excessive force in attempting to arrest petitioner. (Petition Memo at 111-44). However, these allegations are discussed above and that analysis will not be repeated here.

The California Supreme Court's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this claim.

D. The Trial Court's Denial of Petitioner's Alleged Motion to Represent Himself Does Not Merit Habeas Relief

In Ground Six, petitioner contends he was denied his Sixth Amendment right to represent himself at trial in violation of Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). (Petition at 5; Petition Att. at 1; Petition Memo at 219-30).

1. Pertinent Law

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial **[*51]** in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 154, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). These amendments also guarantee a criminal defendant the right to proceed without counsel when he voluntarily and intelligently elects to do so. Indiana v. Edwards, 554 U.S. 164, 170, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008); Iowa v. Tovar ("Tovar"), 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004); Faretta, 422 U.S. at 832-35. A defendant who elects to represent himself must first be made aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation. Faretta, 422 U.S. at 835; McCormick v. Adams, 621 F.3d 970, 977 (9th Cir. 2010). "Warnings of the pitfalls of proceeding to trial without counsel . . . must be 'rigorous[ly]' conveyed." Tovar, 541 U.S. at 89 (citation omitted). Moreover, a request for self-representation must be unequivocal, timely, and not a tactic to secure delay. Stenson v. Lambert, 504 F.3d 873, 882 (9th Cir. 2007), cert. denied, 129 S. Ct. 247, 172 L. Ed. 2d 188 (2008); Sandoval v. Calderon, 241 F.3d 765, 774 (9th Cir. 2000), cert. denied, 534 U.S. 847, 122 S. Ct. 112, 151 L. Ed. 2d 69 (2001) **[*52]** and 534 U.S. 943, 122 S. Ct. 322, 151 L. Ed. 2d 241 (2001).

2. Analysis

Petitioner claims that on November 1, 2001, he informed the trial court that he was dissatisfied with his trial counsel, public defender Brad Siegel, [17] and wanted to represent himself, and the

trial court held a hearing on petitioner's request. (Petition Memo at 219-29). Petitioner claims that during the hearing, the trial court "coerced him into not representing himself by telling him, among other things, that: "They [the prosecution] are going to do the best job they can to get you convicted of these charges, get the strikes found true"; "[There is] no way you are going to be able to battle wits with this trained prosecutor. . . . No way in the world"; "I'm sure [defense counsel] would do all kinds of things in this case, if you let him do it"; "You are looking at spending the rest of your life in prison"; "You shouldn't try to represent yourself because you hear some jailhouse talk, guys talking about this, and you should file this motion, and that motion, and this motion, and that motion. You can file motions from morning until night. Unless they apply to something, unless they have some meaning, nothing. Just paper. You know. So you got [sic] **[*53]** to have some meat"; "You are going to get slaughtered"; "Look, Mr. Price, you want to go pro per, I will let you go pro per and you go right to your slaughter"; "A stupid thing to do. I wouldn't do it"; "Want to represent yourself, you want to go to slaughter, go ahead and do it"; and when petitioner responded he didn't "want to go to slaughter," the trial court stated "Well, you are going to do that. You are going to do that. That's what's going to happen to you. You are going to be at a huge disadvantage and you are going to be cut up to pieces by this prosecutor in court in front of a jury." (Petition Memo at 222-27).

FOOTNOTES

17 Several attorneys, including Mr. Siegel, represented petitioner during pretrial proceedings, and Mr. Siegel represented petitioner at trial. Unless otherwise indicated, any reference to "trial counsel," "defense counsel" or "petitioner's counsel" in this Report and Recommendation refers to Mr. Siegel.

Initially, petitioner's claim is unsupported by the record, which does not reflect that petitioner ever asked to proceed *pro se* or that any Faretta hearing occurred on November 1, 2001 (or any other date). [18] (CT 131); see also Morris v. Castro, 270 Fed. Appx. 476, 478 (9th Cir. 2008) **[*54]** (rejecting Faretta claim when "the record does not support the contention that the state or the trial court denied Morris's right to represent himself under [Faretta]."). [19]

FOOTNOTES

18 Neither party has provided this Court with a transcript of the alleged proceeding. Although petitioner provides citations to a Reporter's Transcript in the Petition, the pages petitioner references are not contained in the Reporter's Transcript that is part of the record before this Court. Nor is this Reporter's Transcript among the numerous documents petitioner has submitted supporting his more than 650-page Petition. The Court further notes that to the extent petitioner suggests that on November 1, 2001, he was not afforded a Marsden hearing relative to his expressed dissatisfaction with Mr. Siegel — something he either confuses or improperly conflates with his Faretta claim — neither the Clerk's Transcript nor the Reporter's Transcripts provided to this Court evidence that any Marsden request was made relative to Mr. Siegel on November 1, 2001 or on any other date.

19 The Court may cite unpublished Ninth Circuit opinions issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

In **[*55]** any event, even assuming *arguendo* that events occurred as petitioner alleges, petitioner has not shown his constitutional rights were violated simply because he withdrew his request to represent himself after the trial court warned him, as it was required to do, of the dangers and disadvantages of self-representation. Faretta, 422 U.S. at 835; see also Oliver v. Evans, 2010 U.S. Dist. LEXIS 106856, 2010 WL 3928752, *4 (C.D. Cal. Aug. 16, 2010) (no Faretta violation when petitioner withdrew his only unequivocal request to represent himself), adopted by, 2010 U.S. Dist. LEXIS 106702, 2010 WL 3928744 (C.D. Cal. Oct. 6, 2010).

For the foregoing reasons, the California Supreme Court's rejection of petitioner's Faretta claim was not contrary to, or an unreasonable application of, any clearly established Supreme Court law. Nor did it constitute an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to relief on this claim.

E. Petitioner Is Not Entitled to Federal Habeas Relief on His Prosecutorial Misconduct Claim

In Ground Seven, petitioner contends he was the victim of prosecutorial misconduct and vindictive prosecution. (Petition at 5; Petition App. at 1; Petition Memo at 230-328). There is no merit **[*56]** to these claims.

1. Prosecutorial Misconduct

Prosecutorial misconduct rises to the level of a constitutional violation only where it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). Determining whether a due process violation occurred requires a consideration of the context in which the alleged misconduct occurred. Boyde v. California, 494 U.S. 370, 384-85, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); Greer v. Miller, 483 U.S. 756, 765-66, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). Moreover, "[p]rosecutorial misconduct which rises to the level of a due process violation may provide the grounds for granting a habeas petition only if that misconduct is deemed prejudicial under the 'harmless error' test articulated in [Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)]," Shaw v. Terhune, 380 F.3d 473, 478 (9th Cir. 2004), which provides for habeas corpus relief only if the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 623 (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

Here, petitioner engages in a rambling approximately **[*57]** 100-page narrative in which he alleges numerous instances of prosecutorial misconduct. (Petition Memo at 230-328). None of these claims has merit.

a. Brady claim

The prosecution's willful or inadvertent suppression of evidence which is favorable to the accused violates due process when the evidence is material to guilt or punishment, Banks v. Dretke, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), whether the evidence is exculpatory or impeaching. Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood v. West Virginia, 547 U.S. 867, 870, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006) (per curiam) (citations and internal quotation marks omitted); Strickler, 527 U.S. at 280. The petitioner has the "burden of showing that withheld evidence is material[,]" United States v. Si, 343 F.3d 1116, 1122 (9th Cir. 2003) (citation omitted), and this Court must assess whether the withheld evidence is material "in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); United States v. Jernigan, 492 F.3d 1050, 1054 (9th Cir. 2007) **[*58]** (en banc) (citations omitted).

Although not entirely clear, petitioner appears to contend the prosecutor violated Brady by failing to turn over to him news media videos of the police pursuit. (See, e.g., Petition Memo at 244). This claim is without merit. The government's suppression of evidence is a necessary element of a Brady claim. Strickler, 527 U.S. at 281-82. The government has no obligation to produce information which it does not possess or of which it is unaware. United States v. Price, 566 F.3d 900, 910 n.11 (9th Cir. 2009) (citation omitted). Here, however, petitioner has provided no evidence demonstrating the government ever had or was aware of news media

videotapes of the police pursuit. Moreover, since petitioner was clearly aware of the existence of these videotapes well before the start of his trial, (See, e.g., Petition Memo at 233, 276), no suppression occurred. See United States v. Bond, 552 F.3d 1092, 1096 n.4 (9th Cir. 2009) ("'Since suppression by the Government is a necessary element of a Brady claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails.'" (citation omitted); United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) **[*59]** ("When, as here, a defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression by the government.") (citation omitted).

Moreover, to the extent petitioner alleges the prosecutor violated Brady by turning over evidence to defense counsel during pre-trial proceedings as opposed to an earlier time (See, e.g., Petition Memo at 244-45), petitioner has not established a Brady violation. Lamere v. Risley, 827 F.2d 622, 625 (9th Cir. 1987) ("'Due process . . . requires only that disclosure of exculpatory material be made in sufficient time to permit defendant to make effective use of that material.'") (citations omitted).

Finally, to the extent petitioner's argument that the prosecutor "failed to disclose 'Brady' (exculpatory) material that was in the hands of investigating agencies" is meant to encompass evidence beyond that discussed above, petitioner's does not further identify the specific material evidence to which he refers. (See, e.g., Petition Memo at 232, 244-45, 314-16). Accordingly, petitioner's Brady claim is conclusory and manifestly insufficient to warrant habeas corpus relief. [20] See Jones v. Gomez, 66 F.3d 199, 204-05 & n.1 (9th Cir. 1995) **[*60]** ("It is well-settled that '[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.'") (citation omitted), cert. denied, 517 U.S. 1143, 116 S. Ct. 1437, 134 L. Ed. 2d 559 (1996); James v. Borg, 24 F.3d 20, 26 (9th Cir.) (same), cert. denied, 513 U.S. 935, 115 S. Ct. 333, 130 L. Ed. 2d 291 (1994).

FOOTNOTES

[20] Likewise, petitioner's bald and unsubstantiated allegation that the prosecutor failed to preserve evidence favorable to the defense, "resulting in destruction/disappearance of exculpatory evidence and crucial witnesses by prosecutor" (Petition Memo at 314) is conclusory and insufficient to warrant habeas corpus relief since petitioner has not identified any exculpatory evidence the prosecutor failed to preserve.

b. Napue claim

The Brady rule applies when "the prosecution's case includes perjured testimony and . . . the prosecution knew, or should have known, of the perjury." Agurs, 427 U.S. at 103. Thus, "a conviction obtained by the [prosecutor's] knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103 (footnotes omitted); see also Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) **[*61]** (Under the Fourteenth Amendment, a conviction may not be obtained through use of false evidence, known to be such by representatives of the State.); Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005) (en banc) (same). Furthermore, "[a] prosecutor . . . has a constitutional duty to correct evidence he or she knows is false, even if it was not intentionally submitted." Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002); see also Napue, 360 U.S. at 269 (conviction obtained through false evidence must fall under Fourteenth Amendment when State, although not soliciting false evidence, allows it to go uncorrected when it appears); Hayes, 399 F.3d at 978 (same). "To prevail on a claim based on [the prosecutor's knowing use of false evidence], the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) [ ] the false testimony was material." United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003), cert. denied, 540 U.S. 1208, 124 S. Ct. 1483, 158 L. Ed. 2d 132 (2004).

Here, petitioner claims throughout the Petition that all the police witnesses lied and conspired against him in their testimony. (See, e.g., **[*62]** Petition Memo at 275, 277-85, 316-20). In large part, petitioner bases this argument on his own self-serving assertions about the facts underlying his convictions. For instance, petitioner claims he did not enter Interstate 5 at the Paxton Street on-ramp, as Officer Zubyk testified, but instead entered the 405 freeway at the Devonshire off-ramp. (Petition Memo at 277). Likewise, petitioner claims Officer Zubyk "blatantly lie[d]" when he stated there was a stop light at the end of the Roxford off-ramp off of Interstate 5; instead, petitioner contends there is a stop sign. (Petition Memo at 278). Petitioner also claims Officer Zubyk rammed the stolen Daewoo three times with his police cruiser, and then lied and said petitioner had rammed him. (See, e.g., Petition Memo at 271, 284-85). Petitioner's allegations regarding these and other allegedly "false" statements simply do not demonstrate a Napue violation as petitioner has not shown that the evidence in question was false or that the prosecutor reasonably should have known it was false. See Mancuso, 292 F.3d at 957 (rejecting Napue claim where there was no evidence prosecutor presented false testimony); Murtishaw v. Woodford, 255 F.3d 926, 959 (9th Cir. 2001) **[*63]** (rejecting claim that prosecution suppressed evidence that witness' testimony was false because, even assuming testimony was false, petitioner presented no evidence that prosecution knew it was false), cert. denied, 535 U.S. 935, 122 S. Ct. 1313, 152 L. Ed. 2d 222 (2002); United States v. Sherlock, 962 F.2d 1349, 1364 (9th Cir.) (rejecting claim that prosecutor, by presenting witnesses with contradictory stories, necessarily presented perjured testimony because defendant failed to allege that prosecutor knew which story was true or false and absent such knowledge, prosecutor could not have knowingly presented perjured testimony), cert. denied sub nom., Charley v. United States, 506 U.S. 958, 113 S. Ct. 419, 121 L. Ed. 2d 342 (1992); see also Hayes v. Ayers, 632 F.3d 500, 2011 WL 61643, *16 (9th Cir. 2011) ("The government could not, and was not required to, correct a supposed misstatement that it did not know was false.").

Petitioner also alleges the prosecutor had constructive notice of the contents of CHP reports "that would have indicated perjury by government witnesses" (Petition Memo at 319); however, this allegation is conclusory because petitioner does not properly identify the reports in question or explain exactly why the prosecutor reasonably **[*64]** should have known based on these reports that any witness testified untruthfully. [21] Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26.

FOOTNOTES

21 Indeed, Officer Zubyk's police report is consistent with his testimony. (See Petition Ex. Q).

c. Interfering With Attorney-Client Relationship

The Sixth Amendment right to counsel, which attaches to state court prosecutions through the Fourteenth Amendment, Gideon v. Wainwright, 372 U.S. 335, 342-45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), is implicated when the government interferes with the confidential relationship between a criminal defendant and his counsel. Weatherford v. Bursey, 429 U.S. 545, 554-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985), cert. denied, 475 U.S. 1088, 106 S. Ct. 1474, 89 L. Ed. 2d 729 (1986). However, "'mere government intrusion into the attorney-client relationship, although not condoned by the court, is not itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant.'" United States v. Danielson, 325 F.3d 1054, 1069 (9th Cir. 2003) (quoting United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (footnote omitted)); see also Williams v. Woodford, 384 F.3d 567, 584-85 (9th Cir. 2004) **[*65]** ("When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant."), cert. denied, 546 U.S. 934, 126 S. Ct. 419, 163 L. Ed. 2d 319 (2005). "Substantial prejudice results from the

introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial." Williams v. Woodford, 384 F.3d at 585.

Petitioner theorizes that because certain information petitioner provided his defense counsel — including a stolen car report and a police report — was later turned over by the prosecutor to the defense in discovery, defense counsel must have shared this information with the prosecutor in violation of petitioner's attorney-client relationship with defense counsel. (See, e.g., Petition Memo at 250-51, 253, 262-63, 301). There is no factual basis for this claim since law enforcement officials provided the evidence in question to the prosecutor, who turned it **[*66]** over to the defense in conformance with the prosecutor's discovery obligation. (RT 45-47, 52).

d. Sarcastic Comments

Petitioner also claims the prosecutor attacked the integrity of defense counsel and made "sarcastic and critical comments demeaning petitioner and defense counsel[.]" (Petition Memo at 273, 311-12). "A personal attack on defense counsel's integrity [can] constitute misconduct." United States v. Santiago, 46 F.3d 885, 892 (9th Cir.), cert. denied, 515 U.S. 1162, 115 S. Ct. 2617, 132 L. Ed. 2d 860 (1995). Here, however, petitioner's claim is conclusory and without merit because he does not identify any such comments. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26.

e. Misstating the Law

Petitioner contends the prosecutor misstated the law during closing argument. (Petition Memo at 312, 317). "Obviously, a prosecutor should not misstate the law in closing argument." United States v. Moreland, 622 F.3d 1147, 1162 (9th Cir. 2010) (citation and internal quotation marks omitted). Nevertheless, "'[i]mproper argument does not, per se, violate a defendant's constitutional rights.'" Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir. 2002) (citations omitted), amended by, 315 F.3d 1062 (9th Cir. 2002). Here, **[*67]** however, petitioner does not identify any particular legal misstatement the prosecutor made during closing argument. Accordingly, this claim too is conclusory and insufficient to warrant habeas corpus relief. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26.

Moreover, the trial court instructed the jury that statements the attorneys made are not evidence, and that "[i]f anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with [the trial court's] instructions on the law, [the jury] must follow [the court's] instructions." (CT 152, 155; RT 300-02). "A jury is presumed to follow its instructions[,]" Weeks, 528 U.S. at 234 (2000), and "to accept the law as stated by the court, not as stated by counsel." United States v. Medina Casteneda, 511 F.3d 1246, 1250 (9th Cir.), cert. denied, 554 U.S. 908, 128 S. Ct. 2946, 171 L. Ed. 2d 874 (2008); see also Boyde, 494 U.S. at 384-85 ("[P]rosecutorial misrepresentations . . . are not to be judged as having the same force as an instruction from the court."). These presumptions have not been overcome here. See, e.g., Medina Casteneda, 511 F.3d at 1250 (presumption that jury obeyed instructions not overcome); **[*68]** see also Hansen v. Woodford, 229 Fed. Appx. 608, 609 (9th Cir. 2007) (prosecutor's misstatement of the law during closing argument did not deprive petitioner of due process when trial court correctly instructed jury on the law). Nor has petitioner identified any error in the trial court's instructions to the jury. [22]

FOOTNOTES

22 Petitioner also claims the prosecutor misstated facts while questioning witnesses, and deliberately misled the defense about unspecified evidence it intended to introduce. (See, e.g, Petition Memo at 272, 279, 311-12, 314, 317, 323). However, these conclusory claims do not warrant habeas corpus relief. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24

F.3d at 26.

f. Vouching

Petitioner suggests the prosecutor engaged in improper vouching. (Petition Memo at 318, 322). While prosecutors have considerable leeway to strike "hard blows" during closing argument based on the evidence and all reasonable inferences therefrom, United States v. Henderson, 241 F.3d 638, 652 (9th Cir.), cert. denied, 532 U.S. 986, 121 S. Ct. 1634, 149 L. Ed. 2d 494 (2001), a prosecutor may not "vouch" for a witness' credibility or state a belief in the guilt of the accused or his personal opinion of the evidence. United States v. Young, 470 U.S. 1, 17-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); **[*69]** see also Dubria v. Smith, 224 F.3d 995, 1004 (9th Cir. 2000) (en banc) ("[I]t is clear that prosecutors cannot express their opinion about a defendant's guilt or vouch for government witnesses[.]), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001). Moreover, a prosecutor may not employ improper vouching to rebut improper attacks by defense counsel. Young, 470 U.S. at 11-14. When assessing the impact of a prosecutor's vouching on petitioner's right to a fair trial, the remarks must be viewed in the context of the entire trial. Greer, 483 U.S. at 765-66 (1987).

Here, petitioner claims the prosecutor engaged in improper vouching but cites no instances of improper vouching. Therefore, this claim is also conclusory and insufficient to warrant habeas corpus relief. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26.

g. Objections

Petitioner contends the prosecutor committed misconduct when she raised objections — some of which were sustained — to various questions defense counsel asked. [23] (See, e.g., Petition Memo at 283, 285, 289-91, 296-97, 324-25). Petitioner's claim is specious. A prosecutor does not commit misconduct simply by doing her job. Cf. United States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994) **[*70]** (prosecutor does not commit misconduct by presenting admissible evidence), cert. denied, 513 U.S. 1100, 115 S. Ct. 773, 130 L. Ed. 2d 669 (1995); Slagle v. Bagley, 457 F.3d 501, 518 (6th Cir. 2006) (prosecutor does not commit misconduct by asking witnesses relevant questions), cert. denied, 551 U.S. 1134, 127 S. Ct. 2977, 168 L. Ed. 2d 708 (2007).

FOOTNOTES

23 For instance, petitioner contends the prosecutor committed misconduct in making the following objection during defense counsel's cross-examination of Officer Zubyk:

[Def. Counsel]: You are saying that a dent same height as the push bar here near the passenger door of the suspect vehicle, that is not consistent with you ramming the vehicle?

[Prosecutor]: Objection as to characterization of a dent. That's testimony by counsel.

[Court]: All right. I will sustain the objection just to the form of the question. [¶] Rephrase your question.

(RT 240).

h. Failure to Testify

Petitioner contends the prosecutor and trial court improperly commented on his right not to testify at trial when they questioned jurors during voir dire about whether they would hold it against petitioner if he did not testify. [24] (Petition Memo at 603-18).

FOOTNOTES

24 This claim is set forth in Ground Twelve but addressed here for ease of analysis.

The Fifth Amendment's self-incrimination clause, **[*71]** made applicable to the states by the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); see also Cook v. Schriro, 538 F.3d 1000, 1019 (9th Cir. 2008) ("Comment on the refusal to testify at trial violates a defendant's Fifth Amendment right against self-incrimination."), cert. denied, 129 S. Ct. 1033, 173 L. Ed. 2d 301 (2009). Thus, "'Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.'" United States v. Robinson, 485 U.S. 25, 32, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988) (quoting Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976)). However, Griffin does not prevent the trial court and counsel from questioning prospective jurors on voir dire to determine whether they will hold it against a defendant if he chooses not to testify. See Lakeside v. Oregon, 435 U.S. 333, 338-39, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978) ("It is clear from even a cursory review of the facts and the square holding of the Griffin case that the Court was there concerned only with *adverse* comment, whether by the prosecutor or the trial judge. . . .") (emphasis **[*72]** original); Green v. Johnson, 160 F.3d 1029, 1038 (5th Cir. 1988) ("During voir dire, . . . the prosecution may attempt to determine if a prospective juror will be prejudiced against the state by the absence of live testimony from the defendant."), cert. denied, 525 U.S. 1174, 119 S. Ct. 1107, 143 L. Ed. 2d 106 (1999). Since, petitioner alleges that nothing other than inquiry during voir dire regarding the jury's views relative to the absence of testimony from petitioner (Petition Memo at 603-18), there was no Griffin error.

Furthermore, even assuming *arguendo* that the trial court's and/or the prosecutor's comments had somehow infringed petitioner's constitutional rights, reversal would not be required because petitioner has not shown that either the prosecutor or the trial court stressed to the jury an inference of guilt from petitioner's silence. See Beardslee v. Woodford, 358 F.3d 560, 587 (9th Cir.) ("[C]omments on failure to testify only require reversal 'where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal.'") (citations omitted), cert. denied, 543 U.S. 842, 125 S. Ct. 281, 160 L. Ed. 2d 68 (2004). To the contrary, **[*73]** the jury was specifically instructed:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that the defendant did not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(CT 163; RT 307-08). The jury is presumed to have followed its instructions. Weeks, 528 U.S. at 234.

2. Vindictive Prosecution

Petitioner contends the prosecutor committed misconduct by initially "stacking" the charges against him "in an attempt to terrify, coerce, and manipulate petitioner into accepting a plea bargain and cause this matter to look more aggravat[ed] than it factually and truthfully was." (Petition Memo at 230, 252). Petitioner also alleges the prosecutor vindictively filed an amended information on January 16, 2002, after petitioner refused to plea bargain, complained about his attorney and sought to proceed pro se. [25] (Petition Memo at 244, 247-49, 252, 301, 305-09). These claims are without merit.

FOOTNOTES

25 Petitioner also claims the prosecutor acted vindictively in providing him with further discovery during the pre-trial process. (Petition Memo at 253-55, 259-60, **[*74]** 288-89, 307). This claim is specious. A prosecutor does not act vindictively by meeting her discovery obligations. Cf. Hinton, 31 F.3d at 824; Slagle, 457 F.3d at 518.

a. Additional Facts

On September 6, 2000, an information was filed charging petitioner with: (1) carjacking, in violation of P.C. § 215; (2) grand theft auto, in violation of P.C. § 487(d); (3) unlawful driving or taking of a vehicle, in violation of V.C. § 10851(a); (4) evading an officer, in violation of V.C. § 2800.2(a); and (5-7) three counts of assault on a peace officer, in violation of P.C. § 245(c). (CT 81-87). The information also alleged that petitioner had been convicted of two felonies within the meaning of P.C. § 1203(e)(4), had suffered two prior convictions within the meaning of P.C. §§ 667(a)(1) and 667.5(b), and had suffered two prior strikes within the meaning of P.C. §§ 667(b)-(i), 1170.12(a)-(d). (CT 81-87).

On January 16, 2002, the prosecutor filed an amended information, deleting the grand theft auto charge and alleging petitioner had been convicted of six felonies within the meaning of P.C. § 1203(e)(4), had suffered two prior convictions within the meaning of P.C. §§ 667(a)(1) and 667.5(b), and had **[*75]** suffered six prior strikes within the meaning of P.C. §§ 667(b)-(i), 1170.12(a)-(d). (CT 88-93).

b. Pertinent Law

A prosecutor violates due process when she seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right. United States v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000) (citing Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)); see also United States v. Kent, 633 F.3d 920, 2011 WL 383977, *4 (9th Cir. 2011) (same). Such vindictive prosecution can be established by actual vindictiveness, United States v. Goodwin, 457 U.S. 368, 380-81, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), which may be evidenced by an expressed hostility or threat to petitioner for having exercised a constitutional right. United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982). Absent direct evidence of actual vindictiveness, a presumption of vindictiveness may arise if petitioner "provides '[e]vidence indicating a realistic or reasonable likelihood of vindictiveness [.]'" Nunes v. Ramirez-Palmer, 485 F.3d 432, 441-42 (9th Cir.) (citations omitted), cert. denied, 552 U.S. 962, 128 S. Ct. 404, 169 L. Ed. 2d 283 (2007). The prosecution then has the burden to show a non-vindictive reason for bringing the charges. **[*76]** Nunes, 485 F.3d at 442.

c. Analysis

Petitioner has presented absolutely no evidence of actual vindictiveness in the prosecutor's charging decisions, and the record reveals none. United States v. Van Doren, 182 F.3d 1077, 1082 (9th Cir. 1999). Nor has petitioner provided evidence establishing a realistic or reasonable probability the prosecutor acted vindictively in amending the information. Nunes, 485 F.3d at 442. "'[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in [her] discretion.'" Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) (quoting Bordenkircher, 434 U.S. at 364) (internal quotation marks omitted). Moreover, the prosecution's exercise of her charging discretion is presumed to be lawful, and "this presumption can only be overcome with exceptionally clear proof[.]" Nunes, 485 F.3d at 442. Here, petitioner's claim fails because he has provided absolutely no proof to support his claim that the initial charges were improper.

Moreover, to the extent petitioner complains the prosecutor amended the information because

petitioner **[*77]** refused to plead guilty, the prosecution's decision to change or add charges against a defendant as part of the plea-bargaining process, or as a result of the failure of that process, does not give rise to a presumption of vindictiveness. See Goodwin, 457 U.S. at 382-83 ("[T]he mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified."); Bordenkircher, 434 U.S. at 364 ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' — and permissible —'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'") (citation omitted); Kent, 633 F.3d at 927, 2011 WL 383977 at *5 ("[D]efendants challenging pretrial charging enhancements cannot avail themselves of a presumption of vindictiveness."); United States v. Gastelum-Almeida, 298 F.3d 1167, 1172-73 (9th Cir.) ("'Vindictiveness claims are, . . . evaluated differently when the additional charges are added **[*78]** during pretrial proceedings, particularly when plea negotiations are ongoing, than when they are added during or after trial.' In the context of pretrial negotiations, 'vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.' Prosecutors often threaten increased charges and, if a guilty plea is not forthcoming, make good on that threat. Such prosecutorial actions as part of plea negotiations do not violate due process.") (internal citations omitted), cert. denied, 537 U.S. 986, 123 S. Ct. 461, 154 L. Ed. 2d 352 (2002)

Moreover, the record reveals the prosecutor amended the information after reviewing the charges against petitioner and noticing that not all of petitioner's prior strikes had been alleged in the initial information. (RT 37-39). This action simply does not constitute vindictive prosecution. "'When **[*79]** increased charges are filed in the routine course of prosecutorial review or as a result of continuing investigation there is no realistic likelihood of prosecutorial abuse, and therefore no appearance of vindictive prosecution arises merely because the prosecutor's action was taken after a defense right was exercised.'" Gamez-Orduno, 235 F.3d at 463 (quoting Gallegos-Curiel, 681 F.2d at 1169).

Thus, the California Supreme Court's rejection of petitioner's prosecutorial misconduct and vindictive prosecution claims was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on these claims.

F. Petitioner is Not Entitled to Federal Habeas Relief on His Judicial Bias, Jury Instruction, Public Trial, and Reciprocal Discovery Claims

In Ground Eight, petitioner contends he was denied a fair trial because the trial judge was biased against him, jury instructions were incomplete, [26] and he did not receive a public trial or reciprocal discovery. [27] (Petition at 5; Petition App. at 1; Petition Memo at 329-478). These **[*80]** claims are without merit.

FOOTNOTES

26 Petitioner also raises jury instruction claims in Ground Twelve. Those claims are discussed herein.

27 The caption of Ground Eight also cites denial of a Marsden hearing and the right to represent himself, while the body of this ground discusses issues pertaining to alleged prosecutorial misconduct and ineffective assistance of counsel. Such claims are addressed elsewhere in this Report and Recommendation and will not be discussed here.

1. Judicial Bias

"[T]he Due Process Clause clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) (citation omitted); see also Ungar v. Sarafite, 376 U.S. 575, 584, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964) (stating that a petitioner has a "right to be tried by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing."). "Moreover, [this Court must] abide by the general presumption that judges are unbiased and honest." Ortiz v. Stewart, 149 F.3d 923, 938 (9th Cir. 1998), cert. denied, 526 U.S. 1123, 119 S. Ct. 1777, 143 L. Ed. 2d 806 (1999); see also Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (noting "presumption **[*81]** of honesty and integrity in those serving as adjudicators"). On habeas corpus review of a state conviction, judicial misconduct will warrant habeas relief only where "the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1996), cert. denied, 517 U.S. 1158, 116 S. Ct. 1549, 134 L. Ed. 2d 651 (1996).

Petitioner's complaints of judicial bias are clearly unfounded, as they rely almost entirely on pretrial and evidentiary rulings with which he disagrees. (See, e.g., Petition Memo at 361, 367, 370, 388, 448-50, 459, 470-71). However, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion[,]" Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), and they do not do so here. See Liteky, 510 U.S. at 556 ("[J]udicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" do not evidence judicial bias "that would render fair judgment impossible.").

Petitioner also complains the trial court was biased against him because it made "abusive" statements at his sentencing hearing. **[*82]** (Petition Memo at 466-69). In particular, petitioner complains that when discussing why he was denying petitioner's motion to strike his prior convictions, the trial court stated:

> [Petitioner] is a very interesting individual. I know I have received in [his] case more communications from both him and his family members than I have ever received from any other individuals in any other case since I have been on the bench. . . . I have received constant communications, from both [petitioner] and various family members, everybody attesting to his drug problem, . . . which he's had for a number of years. [¶] **He has been through more different programs. He could probably be teaching the programs. He has been through more programs, hasn't done anything about it. I don't know if there is a program on the face of this Earth that would help [petitioner] in his addiction problems**. I think that's something that he has to face himself. Keeps on blaming other people, they are not giving him programs. I don't know of any other programs that can be given him. [¶] [Petitioner] in the eyes of this court is exactly the type of person that the Three Strikes law was designed to lock up [for] the longest **[*83]** possible period of time. In this court's mind a very dangerous individual. [¶] I look[ed] through his record of course, and it started in . . . 1982, where he was . . . [a]rrested for a burglary, convicted of some trespass. And in 1983, again, I note it is very significant with all of his alleged drug problems, the only time that he's ever been convicted of a drug offense was back in 1983, and he was arrested for being under the influence of a controlled substance and he ended up getting convicted of just disorderly conduct. Then in 1987 was the first time he really came in and got a felony conviction. And he was sentenced to three years in prison, and ultimately paroled in 1989. And then . . . , of course, then he was just out a few months and the next thing he was arrested for this kidnapping and robbery, and all these charges, and he was convicted of all these charges, three counts of robbery, two counts of kidnapping, and was sentenced to 20 years in prison. That was . . . ultimately on October the 4th of 1991. And he was paroled finally on January the 29th of . . . 2000. And then this case arose . . . July the 5th of . . . 2000. So he was out just a few months when he gets involved **[*84]** now in this case. [¶] Now this

> case the court views [to be an] extremely serious case. He scared a woman out of her wits when he jumps into her car. . . . [He drove the vehicle with] [e]xtreme menace. Could have killed — thank God, he didn't kill a number of people there, cause a number of accidents. [¶] . . . And he tries to run over the highway patrolman on various occasions, three separate, different occasions and the jury found him guilty of each charge. Tried to hit the highway patrol officer. [¶] If you are saying [petitioner] is not a dangerous man, this is a dangerous man that should be off the street as long as possible. That would be the court's intention to sentence him, to keep him off the street as long as possible. I feel to strike any of the strikes would be an extreme abuse of discretion. And he is, as I say, exactly the person that comes in here with prior convictions of violence, and everything he did in this case demonstrated he is an extremely violent individual. [¶] **And he could write about these religious things to me from morning until night, which he has over the months, his family. I find he's a great hypocrite to do that. Somebody that has all these religious [*85] professions and professes to be as godly as he claims, to do these, to take part in this activity is really [hypocritical] in the eyes of the court.** [¶] But I find him to be an extremely violent individual; and so accordingly the motion to strike any of the strikes will be denied.

(RT 389-92) (emphasis added).

Petitioner objects to the statements highlighted above. However, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555; Crater v. Galaza, 491 F.3d 1119, 1132 (9th Cir. 2007) (quoting Liteky, 510 U.S. at 555), cert. denied, 554 U.S. 922, 128 S. Ct. 2961, 171 L. Ed. 2d 892 (2008). Here, the trial judge's statements reveal no such deep-seated favoritism or antagonism. Rather, the trial judge was simply discussing his reasons for denying petitioner's motion to strike his prior convictions and sentencing petitioner to a lengthy prison term, and such comments, which were based on the evidence the judge heard and opinions formed from that evidence **[*86]** and submissions by defendant and his family in connection with his sentencing, simply do not support petitioner's judicial bias claim. Cf. United States v. Martin, 278 F.3d 988, 997, 1005 (9th Cir. 2002) (judge's comments at sentencing hearing that defendant's testimony was incredible and "a crock of baloney" did not warrant recusal).

2. Jury Instructions

A faulty jury instruction will constitute a violation of due process only where the instruction by itself so infected the entire trial that the resulting conviction violates due process. Middleton v. McNeil ("McNeil"), 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004); Estelle v. McGuire, 502 U.S. at 71-72. The petitioner must show there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." McNeil, 541 U.S. at 437 (citations and internal quotation marks omitted); see also Cupp v. Naughten ("Naughten"), 414 U.S. 141, 146, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973) ("Before a federal court may overturn a conviction resulting from a state trial in which [an allegedly faulty] instruction was used, it must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned,' but that it violated **[*87]** some right which was guaranteed to the defendant by the Fourteenth Amendment."). Further, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. at 72 (citation omitted). Where the alleged error is the failure to give an instruction, the burden on the petitioner is "especially heavy." Henderson v. Kibbe, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977); Clark v. Brown, 450 F.3d 898, 904 (9th Cir.), cert. denied, 549 U.S. 1027, 127 S. Ct. 555, 166 L. Ed. 2d 423 (2006).

Petitioner contends the jury instructions were "inadequate and faulty" because the jury was not instructed with the reasonable doubt standard. [28] (Petition Memo at 464, 472, 475). Petitioner also argues the jury was not instructed with his theory of defense. (Petition Memo at 449). Neither claim has merit.

FOOTNOTES

28 To the extent petitioner intends to raise a jury instruction claim beyond those discussed herein, such claim is conclusory and without merit. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26. Likewise, petitioner's public trial and reciprocal discovery claims, in which he does not explain how his right to **[*88]** a public trial was impaired or what discovery he was denied, (Petition Memo at 476-78), are wholly conclusory and insufficient to warrant to warrant habeas corpus relief.

a. Reasonable Doubt

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Victor v. Nebraska, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor, 511 U.S. at 5. So long as the trial court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Id. "Rather, 'taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.'" Id. (quoting Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954)) (internal brackets omitted).

Petitioner's reasonable doubt claim is specious. **[*89]** The trial court instructed petitioner's jury with CALJIC 2.90 on the presumption of innocence, the definition of reasonable doubt, and the prosecution's burden of proof, as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(CT 165; RT 308-09). This instruction correctly defines reasonable doubt in a manner that satisfies due process. See Victor, 511 U.S. at 14-15 (reasonable doubt instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states government's burden of proof); **[*90]** Lisenbee v. Henry, 166 F.3d 997, 999-1000 (9th Cir.) (same), cert. denied, 528 U.S. 829, 120 S. Ct. 82, 145 L. Ed. 2d 70 (1999).

b. Theory of Defense

A criminal defendant is entitled to have the court instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence. Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988); Bradley v. Duncan, 315 F.3d 1091, 1098 (9th Cir. 2002), cert. denied, 540 U.S. 963, 124 S. Ct. 412, 157 L. Ed. 2d 305

(2003). Here, petitioner conclusorily asserts that he was denied jury instructions on his theory of defense, voluntary intoxication. (Petition Memo at 449, 589). However, since petitioner did not present any evidence supporting a voluntary intoxication defense, this argument is without merit. United States v. Washington, 819 F.2d 221, 225 (9th Cir. 1987) (evidence that defendant appeared disheveled, "lost," and "confused," that he had red eyes and had soiled his pants, that he had an odor of alcohol on his person, and that he multiple empty beer bottles and a wine glass in his vehicle, was insufficient to support diminished capacity and voluntary intoxication defenses, and the refusal to give such instructions was correct). Similarly, petitioner's argument that the jury **[*91]** should have been instructed on self-defense as a defense to the assault with a deadly weapon upon a peace officer is without merit since petitioner presented no evidence supporting a self-defense instruction. Rather, petitioner's defense at trial was that the physical evidence demonstrated petitioner was not guilty of assault with a deadly weapon upon a peace officer because he did not run into Officer Zubyk; rather, Officer Zubyk crashed into him.

Finally, petitioner argues the jury instructions "should have included the explanation that where excessive force is used in making what otherwise is a technically lawful arrest, the arrest becomes unlawful and the petitioner may not be convicted of an offense which requires the officer to be engaged in the performance of his duties." (Petition Memo at 589). However, this argument is specious since the trial court did so instruct the jury. (CT 176, 178; RT 315-17).

The California Supreme Court's rejection of these claims was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled **[*92]** to habeas relief on these claims.

G. Petitioner is Not Entitled to Federal Habeas Relief on His Impartial Jury Claim

"The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process." Turner v. Murray, 476 U.S. 28, 36 n.9, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (citations omitted); Daniels v. Woodford, 428 F.3d 1181, 1210 (9th Cir. 2005) (citing Irvin, 366 U.S. at 722), cert. denied, 550 U.S. 968, 127 S. Ct. 2876, 167 L. Ed. 2d 1152 (2007); see also Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."). "The bias or prejudice of even a single juror would violate [the] right to a fair trial." Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.) (en banc), cert. denied, 525 U.S. 1033, 119 S. Ct. 575, 142 L. Ed. 2d 479 (1998).

In Ground Nine, petitioner contends he was denied an impartial jury due to various events that happened **[*93]** during voir dire, and because one juror made a comment to defense counsel during trial. (Petition at 5; Petition Att. at 2; Petition Memo at 479-95). These claims are without merit.

1. Voir Dire

Voir dire examination serves to protect the right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984); see also Fields v. Brown, 503 F.3d 755, 766 (9th Cir. 2007) (en banc) (same), cert. denied, 552 U.S. 1314, 128 S. Ct. 1875, 170 L. Ed. 2d 752 (2008). "[T]o obtain a new trial [on a claim of juror untruthfulness during voir dire], a party

must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equipment, Inc., 464 U.S. at 556; **[*94]** Fields, 503 F.3d at 767 (quoting McDonough Power Equipment, Inc., 464 U.S. at 556). "Additionally, a litigant must show that the fairness of his trial was affected either by the juror's 'motives for concealing [the] information' or the 'reasons that affect [the] juror's impartiality.'" Conaway v. Polk, 453 F.3d 567, 585 (4th Cir. 2006) (quoting McDonough Power Equipment, Inc., 464 U.S. at 556). "The presence of a biased juror is a structural error not subject to harmless error analysis." Estrada v. Scribner, 512 F.3d 1227, 1240 (9th Cir.), cert. denied, 554 U.S. 925, 128 S. Ct. 2973, 171 L. Ed. 2d 898 (2008).

Petitioner raises several complaints regarding voir dire in his case. Initially, petitioner alleges the trial court "failed to investigate, examine, or resolve [an] issue regarding [a] 'lady' juror who approached [defense counsel] and was 'very unhappy' about something." (Petition Memo at 486). Petitioner also complains that Juror No. 6 was biased because he had a facetious attitude and he did not answer questions truthfully because he responded "no" to every question he was asked. (Petition Memo at 479-80). Petitioner also alleges the trial court did not adequately question Juror No. 11 about bias since this juror **[*95]** had family members "associated with [the] 'Prosecutor's Office[,]'" and Prospective Juror No. 2 "clearly" had a problem remaining unbiased toward petitioner. (Petition Memo at 481-82, 484-85). Furthermore, petitioner complains the trial court erred in denying petitioner's challenges to Prospective Juror Nos. 4, 7 and 9. (Petition Memo at 486-88).

a. The Unhappy Juror

During jury voir dire and outside the presence of prospective jurors, the following colloquy occurred:

[Def. Counsel]: I informed the court earlier and [the prosecutor] separately that a potential juror came to the court and wanted to speak with the deputy. The deputy indicated no. I heard this, because I was waiting for the elevator. She got in the elevator with me and wanted to talk to me. I told her go talk to the court. This was after I believe your honor had made it a pretty clear order not to speak to us. So I would ask the court to address this individual in the courtroom, while every one is in the box, and the 50 or so people are in the courtroom, and have her rise and address, your honor, indicate why it is that she refuses to follow your order.

The Court: I don't want to talk to her in front of all the other jurors. **[*96]** I'm aware of the fact that ? . . . as happens so often . . . now, jury selection, when we get the panels in, and we start generally the initial selection of jurors, and when we close for the day, and have the jurors come back the following day, and order them, there are always several people [who] . . . stay back and rush the bailiff. [¶] Sometimes they want to come up here . . . and speak to me, but they end up speaking to the bailiff. And they offer all sorts of excuses, legitimate, not legitimate, but they have all sorts of reasons indicating why they cannot return, why they want to be excused.

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> In any event, [the bailiff] advised me yesterday of this lady [who] indicated that she could not come back today, gave her reasons why she could not come back . . . . And I told [the bailiff] to tell her she had to return today. And [I] assume he did do that. And so then she just continued apparently her diatribe out with you out in the hallway yesterday. [¶] So I am not going to make a big issue of that. I'm assuming she's here. I don't know whether she will be here or not. We'll soon find out. She was instructed to return back here today. And I'm not going to single her out or anything. **[*97]** She's very unhappy. Obviously did not want to come back today. Was told to come back. We will see if she is here or not. If she is not here, then I'll deal with that. . . . If she is here, I'm not going to make a big issue of it.'

> [¶] I've already advised them not to talk to you. I'm not going to make a big issue out of that. She certainly was not discussing any of the facts of the case with you or anything like that. So she just doesn't want to come back, we'll see if she comes back. We'll see.

(RT 54-56).

Petitioner complains he was denied a fair trial because the trial court did not further address this issue. (Petition Memo at 486). However, petitioner does not explain how the trial court's handling of the prospective juror's complaint violated his constitutional rights. The trial court had already learned the prospective juror in question was upset because she had to return the next day, and the trial court had no desire to further embarrass her by singling her out in front of the rest of the prospective jurors. Moreover, petitioner has not even alleged the "unhappy" juror was ultimately seated on the jury. Thus, petitioner's bare and conclusory allegation is manifestly insufficient **[*98]** to warrant habeas corpus relief. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26.

b. Other Voir Dire Claims

Petitioner's remaining voir dire claims are unsupported by the record, which does not include the transcript of the voir dire proceedings. [29] Nevertheless, even accepting petitioner's allegations as true, petitioner's claims are without merit. Initially, petitioner's claims regarding Prospective Juror Nos. 4, 7 and 9 are conclusory and insufficient to merit habeas corpus relief. Jones v. Gomez, 66 F.3d at 204-05 & n.1; James, 24 F.3d at 26. Indeed, it is unclear from the Petition whether any of these jurors were ever seated on petitioner's jury. Moreover, petitioner has not shown any juror answered any voir dire question dishonestly or that any prospective juror was biased against him. Accordingly, petitioner's voir dire claims are without merit.

FOOTNOTES

[29] The voir dire process in this case was reported but not transcribed, since petitioner did not raise any voir dire issues on appeal. (See RT 50, 57; Lodged Doc. N). Nevertheless, petitioner has cited an alleged Reporter's Transcript of the proceedings without providing the Court with a copy of this transcript.

2. Juror No. [*99] 6's Comment to Defense Counsel

Finally, petitioner complains the trial court abused its discretion in failing to remove Juror No. 6 after the juror made an inappropriate comment to defense counsel during trial. (Petition Memo at 488). Specifically, defense counsel complained that when he entered the courtroom, Juror No. 6 "looked at [him] and made a comment along the lines of, there is my guy, there is my boy[,]" which defense counsel "deemed . . . hostile and demeaning." (RT 113). Defense counsel then asked the court to excuse Juror No. 6 because defense counsel questioned Juror No. 6's ability to follow the trial court's instructions. (RT 113-14). The trial court refused, stating "I am not going to excuse him at this time just for that comment[,]" which is "an innocuous comment." (RT 113-14).

Petitioner's claim that the trial court abused its discretion in failing to excuse Juror No. 6 does not state a valid ground for habeas corpus relief. See Williams v. Borg, 139 F.3d at 740 (federal habeas courts review only for constitutional violation, not for abuse of discretion). Moreover, petitioner has not shown how Juror No. 6's "innocuous" comment to defense counsel demonstrated he was **[*100]** in any manner biased against petitioner.

The California Supreme Court's denial of petitioner's juror misconduct claims was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly,

petitioner is not entitled to habeas relief on these claims.

H. Petitioner Is Not Entitled to Federal Habeas Relief on His Sentencing Error Claims

In Ground Ten, petitioner contends his sentence violated the Double Jeopardy and Ex Post Facto Clauses, breached a plea agreement, was excessive and disproportionate, and contained illegal enhancements. [30] (Petition at 5; Petition Att. at 2; Petition Memo at 496-562). These claims are without merit.

FOOTNOTES

30 Petitioner also argues he received ineffective assistance of trial counsel during sentencing. This claim will be addressed below.

1. Prior Convictions

On January 19, 1988, in Los Angeles County Superior Court Case No. A709133, petitioner pleaded guilty to, and was convicted of, one count of second degree robbery in violation of P.C. § 211. [31] (CT 209; Petition Ex. P). On October 2, 1990, in Los Angeles County Superior Court case no. **[*101]** PA000740, petitioner pleaded guilty to, and was convicted of, three counts of second degree robbery in violation of P.C. § 211 and two counts of kidnapping in violation of P.C. § 207(a). (CT 207; Petition Ex. P). Petitioner alleges his prior convictions were unconstitutionally obtained, and therefore, should not have been used to enhance his current sentence. (Petition Memo at 496-97, 535-38).

FOOTNOTES

31 That same day, in Los Angeles County Superior Court Case No. A708260, petitioner pleaded guilty to, and was convicted of, one count of grand theft auto in violation of P.C. § 487.3. (CT 208).

A petitioner seeking federal habeas corpus relief under 28 U.S.C. § 2254 generally cannot challenge his current sentence on the ground it was enhanced by an allegedly unconstitutional prior conviction which "'is no longer open to direct or collateral attack in its own right because the [petitioner] failed to pursue those remedies while they were available (or because the [petitioner] did so unsuccessfully). . . .'" Lackawanna County Dist. Attorney v. Coss ("Coss"), 532 U.S. 394, 402, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001) (quoting Daniels v. United States, 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001)); see also Nunes, 485 F.3d at 443 ("[T]here is no federal **[*102]** constitutional right to attack a prior state conviction, 'once a conviction is no longer open to direct or collateral attack in its own right.'") (citation omitted). An exception to this rule is when "the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment. . . ." Coss, 532 U.S. at 404. However, petitioner clearly does not fall within this exception since he was represented by counsel when he pleaded no contest in Los Angeles County Superior Court Case Nos. A709133 and PA000740, (Petition Ex. P), as petitioner correctly concedes. (Petition Memo at 538).

2. Ex Post Facto

Petitioner next argues his sentence violates the Ex Post Facto Clause because he was sentenced under the Three Strikes law even though his prior convictions occurred before the Three Strikes law went into effect. (Petition Memo at 497, 545-53).

Pursuant to Article I of the United States Constitution neither Congress nor any state shall pass

an ex post facto law. U.S. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized **[*103]** . . . that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) (citations omitted). The Ex Post Facto Clause is "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" California Dep't of Corr. v. Morales, 514 U.S. 499, 504, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) (citations omitted). Thus, an ex post facto law "punishes as a crime an act previously committed, which was innocent when done[,] which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed. . . ." Collins, 497 U.S. at 42 (quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925)); see also Stogner v. California, 539 U.S. 607, 612, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003) (same). However, a change in law is not an "ex post facto violation . . . if [it] does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.'" Miller v. Florida, 482 U.S. 423, 430, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (citations omitted).

The Ex Post Facto Clause is not **[*104]** violated when a trial court enhances a sentence on a current offense committed after the effective date of an enhancement statute based on an offense committed before the effective date of the enhancement statute. Parke v. Raley, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992); United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999), cert. denied, 529 U.S. 1056, 120 S. Ct. 1561, 146 L. Ed. 2d 465 (2000); United States v. Ahumada-Avalos, 875 F.2d 681, 684 (9th Cir.), cert. denied, 493 U.S. 837, 110 S. Ct. 118, 107 L. Ed. 2d 79 (1989). Rather, "[f]or purposes of analyzing repeat offender statutes and statutes increasing penalties for future crimes based on past crimes, the relevant 'offense' is the *current* crime, not the predicate crime." United States v. Arzate-Nunez, 18 F.3d 730, 734 (9th Cir. 1994) (citations omitted; emphasis added). In this case, the Three Strikes law went into effect on March 7, 1994, People v. Helms, 15 Cal. 4th 608, 611, 63 Cal. Rptr. 2d 620, 936 P.2d 1230 (1997), and petitioner committed his current offense on July 5, 2000. Therefore, there is no ex post facto violation.

3. Double Jeopardy

Petitioner contends his sentence violates the Double Jeopardy Clause since he has been punished multiple times for the same criminal acts. (Petition Memo at 498).

The Double Jeopardy Clause of the Fifth Amendment, **[*105]** applicable to the States through the Fourteenth Amendment, protects against successive prosecutions for the same offense after acquittal or conviction, and against multiple punishments for the same offense. Monge v. California, 524 U.S. 721, 727-28, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). However, the use of prior convictions to enhance a later sentence under a recidivism statute, such as the Three Strikes law, does not offend double jeopardy principles because "the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" Witte v. United States, 515 U.S. 389, 400, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995) (quoting Gryger v. Burke, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948)); see also Moore v. Missouri, 159 U.S. 673, 677, 16 S. Ct. 179, 40 L. Ed. 301 (1895) (under a recidivist statute, "the accused is not again punished for the first offense" because "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself") (citation omitted).

Petitioner also argues sentencing him under both **[*106]** the Three Strikes law and P.C. § 667 (a)(1) violated double jeopardy principles by imposing a sentence greater than allowed by California law. (Petition Memo at 519-21). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter ("Hunter"),

459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983); see also Plascencia v. Alameida, 467 F.3d 1190, 1204 (9th Cir. 2006) ("The key to determining whether multiple charges and punishments violate double jeopardy is legislative intent.") (citation omitted). Sentencing enhancements that increase the penalty for a crime based on the offender's conduct do not offend double jeopardy principles where "a legislature specifically authorizes cumulative punishment under two statutes. . . ." Hunter, 459 U.S. at 368; see also Plascencia, 467 F.3d at 1204 (same). Here, petitioner's claim is without merit since California law specifically authorizes petitioner's punishment under the Three Strikes law and P.C. § 667(a)(1). See People v. Acosta, 29 Cal. 4th 105, 131, 124 Cal. Rptr. 2d 435, 52 P.3d 624 (2002) ("[U]sing one of [defendant's] prior convictions first **[*107]** as a strike . . . and then under section 667, subdivision (a), to impose a five-year enhancement, conforms to the language of the Three Strikes law. . . ."); People v. Cartwright, 39 Cal. App.4th 1123, 1138-39, 46 Cal. Rptr. 2d 351 ("We conclude the Legislature intended a defendant's sentence under the three strikes law should include a doubled term or life term, as appropriate under section 667, subdivision (e), plus an enhancement under section 667, subdivision (a) for each prior serious felony conviction.").

4. Breach of Plea Agreements

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Davis v. Woodford, 446 F.3d 957, 960-61 (9th Cir. 2006) (quoting Santobello, 404 U.S. at 262). "Plea agreements are contractual in nature and measured by contract law standards." In re Ellis, 356 F.3d 1198, 1207 (9th Cir. 2004) (en banc) (citation omitted). The government's breach of a plea agreement implicates the constitutional guarantee of due process. Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003).

Petitioner contends his **[*108]** current sentence breached his plea agreements in Los Angeles County Superior Court Case Nos. A709133 and PA000740 because he was previously advised he was subject to, at most, a five-year enhancement if he was convicted of another crime. (Petition Memo at 522-35, 538-544g); see also Petition Ex. P (petitioner advised in Case No. A709133 that his robbery conviction was a serious felony prior "and that means it's worth five years which would be tacked onto any conviction that you get in California in the future of another serious felony"). However, as discussed above, the use of petitioner's prior robbery and kidnapping convictions to enhance his current sentence under the Three Strikes law, *i.e.*, a recidivist statute, did not increase petitioner's punishment for the prior convictions, but is instead a stiffened penalty for petitioner's latest crime. Monge, 524 U.S. at 728 (citations omitted). Moreover, although petitioner asserts he was promised his robbery conviction in Case No. A709133 could be used to enhance any future sentence by no more than five years, petitioner has not presented any evidence supporting his claim. That is, petitioner has made no showing that the prosecutor agreed, **[*109]** in 1988, that petitioner's robbery conviction could not be used to enhance any subsequent conviction under a recidivist statute which had not yet then even been enacted. Further, the Three Strikes law did not change the terms of petitioner's plea, thereby rendering it invalid. See Davis, 446 F.3d at 962 ("[I]n California, contracts (including plea bargains) are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws.'") (citing People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004)); cf. United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) (rejecting contention that guilty plea involuntary because defendant not made aware that conviction could be used to enhance sentence in subsequent case as possibility that defendant would be convicted of another offense in future and would receive enhanced sentence based on instant conviction not a direct consequence of guilty plea).

5. Consecutive Sentences

Petitioner contends the trial court erred when it sentenced him to consecutive sentences on counts 1, 4 and 5. (Petition Memo at 515-19). However, this alleged sentencing error raises only a state law **[*110]** claim not cognizable on federal habeas corpus review. See Souch v.

Schaivo, 289 F.3d 616, 623 (9th Cir. 2002) ("[N]either an alleged abuse of discretion by the trial court in choosing consecutive sentences, nor the trial court's alleged failure to list reasons for imposing consecutive sentences, can form the basis for federal habeas relief."), cert. denied, 537 U.S. 859, 123 S. Ct. 231, 154 L. Ed. 2d 98 (2002) (citations omitted); Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) ("The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus.") (citation omitted), cert. denied, 514 U.S. 1026, 115 S. Ct. 1378, 131 L. Ed. 2d 232 (1995).

6. Apprendi Claim

Petitioner argues the use of his prior convictions to sentence him under the Three Strikes law violated his rights under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) since his sentence was "not based on jury findings of all essential facts beyond a reasonable doubt." (Petition Memo at 498). This claim is specious. The Apprendi rule does not apply to prior convictions. See Apprendi, 530 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond **[*111]** the prescribed maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added). In any event, petitioner received a jury trial on his prior convictions. (CT 218-21; RT 348-80). [32]

FOOTNOTES

32 In Wilson v. Knowles, 631 F.3d 1295, 2011 WL 383961 (9th Cir. 2011)), the Ninth Circuit held a sentencing judge exceeded the bounds of Apprendi's prior conviction exception when the judge resolved disputed issues of material fact pertaining to one of Wilson's prior convictions, including "the extent of [a surviving] victim's injuries and how [an] accident occurred[,]" that increased Wilson's sentence to 25 years to life under California's Three Strikes law. 631 F.3d 1295, Id. at *2. The Ninth Circuit found the trial judge violated Apprendi because the disputed facts in question were "not historical, judicially noticeable facts" but instead "require[d] a jury's evaluation of witnesses and other evidence." Id. Wilson is inapposite here, however, since, among other reasons, petitioner's prior convictions were submitted to the jury. (CT 218-21; RT 348-80).

7. Eighth Amendment

"The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' **[*112]** that 'applies to noncapital sentences.'" Ewing v. California, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 996-97, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring)); see also Andrade, 538 U.S. at 72 (under "clearly established" Eighth Amendment jurisprudence, "[a] gross disproportionality principle is applicable to sentences for terms of years"). However, "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case." Andrade, 538 U.S. at 77; see also Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.").

Petitioner contends his 85 years to life sentence violations the Eighth Amendment's prohibition against cruel and unusual punishment. (Petition Memo at 554-62). This claim is without merit.

"The threshold determination in the eighth amendment proportionality analysis is whether [petitioner's] sentence was one of 'the rare case[s] in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" United States v. Bland, 961 F.2d 123, 129 (9th Cir.) **[*113]** (quoting Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring)), cert. denied, 506 U.S. 858, 113 S. Ct. 170, 121 L. Ed. 2d 117 (1992). In addressing this issue, the Court compares the harshness of the penalty imposed

upon petitioner with the gravity of his triggering offenses and criminal history. Ewing, 538 U.S. at 28; Norris v. Morgan, 622 F.3d 1276, 1290 (9th Cir. 2010), cert. denied, 131 S. Ct. 1557, 179 L. Ed. 2d 321, 2011 WL 589144 (U.S. 2011) (No. 10-7876). Here, in light of the serious nature of petitioner's current offenses, [33] and his significant and violent criminal history, which includes multiple robbery and kidnapping convictions, petitioner has not shown his sentence is grossly disproportionate to his crimes. See Andrade, 538 U.S. at 76 (state court not objectively unreasonable in concluding that two consecutive terms of 25 years to life for petty theft convictions under Three Strikes law not grossly disproportionate); Ewing, 538 U.S. at 30-31 (sentence of 25 years to life in prison for felony grand theft under Three Strikes law not grossly disproportionate); see also Harmelin, 501 U.S. at 1002-04 (affirming sentence of life without parole for first offense of possession of 672 grams of cocaine); Rummel, 445 U.S. at 265 **[*114]** (upholding life sentence under recidivist statute for obtaining $120.75 by false pretenses, where two earlier felonies involved theft of less than $110.00); Hawkins v. Dexter, 2009 U.S. Dist. LEXIS 16124, 2009 WL 399986, *9 (N.D. Cal. Feb. 18, 2009) ("[Petitioner's] sentence of 80-to-life for a recidivist with current convictions for burglary, robbery, evading arrest, and assault with a deadly weapon is not that "'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'") (citation omitted).

FOOTNOTES

33 Petitioner's characterization of his crimes as "minor" (Petition Memo at 559) is seriously misguided.

The California Supreme Court's denial of petitioner's sentencing claims was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented, and petitioner is not entitled to habeas relief on these claims.

I. Petitioner Is Not Entitled to Federal Habeas Relief on His Free Transcript Claim

In Ground Eleven, petitioner contends he was denied due process and equal protection of the law when he was denied a free trial transcript **[*115]** of proceedings relating to his prior convictions. (Petition at 5; Petition App. at 2; Petition Memo at 563-80).

A "State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners[,]" Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971), including providing "an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." Britt, 404 U.S. at 227; Boyd v. Newland, 467 F.3d 1139, 1150 (9th Cir. 2006) (quoting Britt, 404 U.S. at 227), cert. denied, 550 U.S. 933, 127 S. Ct. 2249, 167 L. Ed. 2d 1089 (2007). The Supreme Court has identified two factors relevant to the determination of whether a transcript is needed for an effective defense or appeal: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as the transcript." Britt, 404 U.S. at 227.

Here, petitioner's claim is without merit since petitioner has provided absolutely no evidence demonstrating the trial court denied a "clear and unequivocal" request **[*116]** to provide him with a free copy of the transcripts of his prior convictions. Roberts v. La Vallee, 389 U.S. 40, 42, 88 S. Ct. 194, 19 L. Ed. 2d 41 (1967) (per curiam). To the contrary, petitioner points to no evidence in the record suggesting he ever sought any transcripts from his prior convictions to aid in his defense or his appeal. [34]

FOOTNOTES

34 Petitioner alleges he attempted to file a *pro se* Application for Order Directing Trial Counsel to Furnish Trial Files to Appellant on Appeal on February 17, 2003, but this document was returned to him because he was represented by counsel on appeal. (Petition Ex. G; Petition Memo at 574). Even had it been filed, however, this document did not seek the prior proceeding transcripts about which petitioner now complains.

Moreover, in "a federal habeas corpus case brought by a state prisoner, the absence of a perfect transcript does not violate due process absent a showing of specific prejudice." Quintero v. Tilton, 588 F. Supp. 2d 1121, 1128 (C.D. Cal. 2008) (citing White v. State of Fla., Dep't of Corrs., 939 F.2d 912, 914 (11th Cir. 1991), cert. denied, 503 U.S. 910, 112 S. Ct. 1274, 117 L. Ed. 2d 500 (1992); Mitchell v. Wyrick, 698 F.2d 940, 941-42 (8th Cir.), cert. denied, 462 U.S. 1135, 103 S. Ct. 3120, 77 L. Ed. 2d 1373 (1983); Scott v. Elo, 302 F.3d 598, 604 (6th Cir. 2002) **[*117]** ("[F]ederal habeas relief based on a missing transcript will only be granted where the petitioner can show prejudice."), cert. denied, 537 U.S. 1192, 123 S. Ct. 1272, 154 L. Ed. 2d 1026 (2003)). Here, since petitioner's mother was concededly able to obtain the transcripts for him (Petition Memo at 568), and since petitioner has not been able to show how these transcripts would in any way have benefitted him, he cannot demonstrate he was in any manner prejudiced by the failure to receive such transcripts.

The California Supreme Court's rejection of petitioner's free transcript claim was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

J. Petitioner Is Not Entitled to Federal Habeas Relief on His Right to Testify Claim

In Ground Twelve, petitioner contends he was denied his right to testify on his own behalf. [35] (Petition at 5; Petition App. at 2; Petition Memo at 581-618).

FOOTNOTES

35 Petitioner also raises several other claims that have been addressed above, and also claims his trial counsel denied him the right to put on **[*118]** a complete defense. This claim will be addressed in Part K below.

"[A] defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." Rock v. Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); Gill v. Ayers, 342 F.3d 911, 919 (9th Cir. 2003) (quoting Rock, 483 U.S. at 49). This right has its sources in several constitutional provisions, including the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. Rock, 483 U.S. at 51-52; United States v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir.) (citations omitted), cert. denied, 528 U.S. 989, 120 S. Ct. 453, 145 L. Ed. 2d 369 (1999). "The right is personal, and 'may only be relinquished by the defendant, and the defendant's relinquishment of the right must be knowing and intentional.'" Pino-Noriega, 189 F.3d at 1094 (quoting United States v. Joelson, 7 F.3d 174, 177 (9th Cir.), cert. denied, 510 U.S. 1019, 114 S. Ct. 620, 126 L. Ed. 2d 584 (1993)).

However, "waiver of the right to testify . . . need not be explicit[,]" Pino-Noriega, 189 F.3d at 1094 (citation omitted), and "[t]he trial court has no duty to advise the defendant of his right to testify, **[*119]** nor is the court required to ensure that an on-the-record waiver has occurred." Joelson, 7 F.3d at 177 (citation and internal quotation marks omitted). Rather, "waiver of the right to testify may be inferred from the defendant's conduct and is presumed from the

defendant's failure to testify or notify the court of his desire to do so." Joelson, 7 F.3d at 177 (citation omitted). "When a defendant remains 'silent in the face of his attorney's decision not to call him as a witness,' he waives the right to testify," Pino-Noriega, 189 F.3d at 1095 (citation omitted), and to claim ineffective assistance of counsel due to his counsel's failure to call him as a witness. United States v. Nohara, 3 F.3d 1239, 1244 (9th Cir. 1993); McElvain v. Lewis, 283 F. Supp. 2d 1104, 1117 (C.D. Cal. 2003).

Here, the record reflects that petitioner remained silent when his trial counsel stated he was resting and would not present an affirmative defense, and petitioner did not insist on testifying in his own defense or otherwise advise the trial court he disagreed with counsel's decision. (RT 259-61). As such, petitioner waived his right to testify, and cannot now claim ineffective assistance of counsel due **[*120]** to his counsel's failure to call him as a witness.

The California Supreme Court's denial of petitioner's right to testify claim was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

K. Petitioner Is Not Entitled to Federal Habeas Relief on His Conflict of Interest and Ineffective Assistance of Trial Counsel Claims

In Ground Four, petitioner contends he received ineffective assistance of counsel at trial. (Petition at 5; Petition App. at 1; Petition Memo at 167-210). In Ground Five, petitioner contends he was denied his Sixth Amendment right to counsel when the trial court allegedly conducted an improper Marsden hearing, relieving petitioner's retained counsel due to an asserted conflict of interest, and reappointing public defender Brad Siegel to represent him. (Petition at 5; Petition App. at 1; Petition Memo at 211-18). Addressing the conflict of interest claim first, the Court concludes petitioner's claims are without merit.

1. Conflict of Interest

a. Additional Facts

Petitioner **[*121]** was initially represented by public defender Brad Siegel. (CT 1-80, 95-110; RT 1-3). On October 25, 2000, retained counsel Ira Chester was substituted for Mr. Siegel as counsel for petitioner, and Mr. Chester continued to represent petitioner until April 12, 2001, when retained counsel Peter Knecht replaced him. (CT 111-119; RT 4-13). Mr. Knecht represented petitioner until October 1, 2001, when Mr. Siegel was again appointed to represent petitioner due to an asserted conflict of interest between Mr. Knecht and petitioner. (CT 120-29; RT 14-35).

b. Pertinent Law

The Sixth Amendment right to counsel includes a correlative right to representation that is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir.) (en banc), cert. denied, 546 U.S. 1036, 126 S. Ct. 735, 163 L. Ed. 2d 578 (2005). "Upon notification that an actual or potential conflict of interest exists, a trial court has the obligation 'either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.'" Campbell, 408 F.3d at 1170 (quoting Holloway v. Arkansas, 435 U.S. 475, 484, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)). "If the trial court fails to undertake **[*122]** either of these duties, the defendant's Sixth Amendment rights are violated." Campbell, 408 F.3d at 1170 (citing Holloway, 435 U.S. at 484). "Even if a defendant's Sixth Amendment rights have been violated in this manner, though, the defendant cannot obtain relief unless he can demonstrate that his attorney's performance was 'adversely affected' by the conflict of interest." Campbell, 408 F.3d at 1170 (citing Mickens v. Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)).

To prove an ineffective assistance of counsel claim premised on an alleged conflict of interest, a petitioner must "establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan ("Sullivan"), 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Washington v. Lampert, 422 F.3d 864, 872 (9th Cir. 2005) (quoting Sullivan, 446 U.S. at 335), cert. denied, 547 U.S. 1074, 126 S. Ct. 1778, 164 L. Ed. 2d 525 (2006); see also Morris v. State of Cal., 966 F.2d 448, 455 (9th Cir. 1991) (same), cert. denied, 506 U.S. 831, 113 S. Ct. 96, 121 L. Ed. 2d 57 (1992); Mickens, 535 U.S. at 172 n.5 (2002) ("[T]he Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a **[*123]** conflict of interest that adversely affects counsel's performance."). That is, petitioner "must demonstrate that his attorney made a choice between possible alternative courses of action that impermissibly favored an interest in competition with those of the client." McClure v. Thompson, 323 F.3d 1233, 1248 (9th Cir.), cert. denied, 540 U.S. 1051, 124 S. Ct. 804, 157 L. Ed. 2d 701 (2003); see also United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005) ("[T]o prove an adverse effect, the defendant must show that 'counsel was influenced in his basic strategic decisions' by loyalty to another client or former client.") (citation omitted); Rich v. Calderon, 187 F.3d 1064, 1069 (9th Cir. 1999) (An adverse impact must be one "that significantly worsens the client's representation."), cert. denied, 528 U.S. 1092, 120 S. Ct. 827, 145 L. Ed. 2d 696 (2000). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Sullivan, 446 U.S. at 349-50 (internal citation omitted); see **[*124]** also Washington, 422 F.3d at 872 (same) (citations omitted). "An actual conflict must be proved through a factual showing on the record." Morris, 966 F.2d at 455.

c. Analysis

First, to the extent petitioner contends he was denied his Sixth Amendment right to counsel because retained counsel Peter Knecht had a conflict of interest, petitioner's claim fails because he makes no showing that Mr. Knecht had an actual conflict of interest which adversely affected Mr. Knecht's performance. Moreover, as noted above, the trial court held a hearing and relieved Mr. Knecht as counsel well before trial. (CT 129-30; RT 24-32).

Second, to the extent petitioner contends that the hearing at which the trial court relieved Mr. Knecht and reappointed Mr. Siegel constituted an improper Marsden hearing, he is not entitled to relief. Petitioner appears to complain that the trial court conducted the hearing to relieve Mr. Knecht as counsel in a manner that violated California law (See Petition Memo at 211-18). However, such a claim is not cognizable in this proceeding. Estelle v. McGuire, 502 U.S. at 67-68; see also Esmay v. Runnels, 2007 U.S. Dist. LEXIS 80870, 2007 WL 3105072, *6 (N.D. Cal. Oct. 23, 2007) ("[T]he trial court's alleged **[*125]** failure to apply the correct standard in evaluating the Marsden motion is largely beside the point because it would be a state law error for which federal habeas relief is not available."). In any event, as noted above, the trial court granted the motion to relieve Mr. Knecht as counsel well before trial.

Third, to the extent petitioner intends to suggest that a conflict of interest existed between petitioner and trial counsel, Mr. Siegel, petitioner points to absolutely nothing in the trial record indicating the trial court was notified of any such conflict of interest. Nor has petitioner demonstrated an actual conflict of interest. See Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir.) (en banc) (Actual conflict of interest means "legal conflicts of interest — an incompatibility between the interests of two of a lawyer's clients, or between the lawyer's own private interest and those of the client."), cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008). Rather, petitioner asserts only his dissatisfaction with his attorney and a disagreement about potential avenues of research and trial strategies. However, the Sixth Amendment does not "guarantee[] a 'meaningful relationship' between an accused and his **[*126]** counsel[,]" Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir.) (quoting Morris, 461 U.S. at 14), cert. denied, 129 S. Ct. 171, 172 L. Ed. 2d 123 (2008), and petitioner has not shown a violation of his Sixth

Amendment rights. See, e.g., Larson, 515 F.3d at 1067 (When defendant "complained solely about his counsel's strategic decisions and lack of communication with him, including that his counsel did not make motions that he requested, contacted witnesses without his consent and did not present him the list of defense witnesses for his approval[,]" he did not establish a Sixth Amendment violation since "no Supreme Court case has held that 'the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust.'") (citation omitted); Plumlee, 512 F.3d at 1210 ("[Petitioner] has cited no Supreme Court case — and we are not aware of any — that stands for the proposition that the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because **[*127]** of dislike or distrust. . . .").

2. Ineffective Assistance of Trial Counsel

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel." Yarborough v. Gentry, 540 U.S. 1, 4, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (per curiam). To succeed on an ineffective assistance of trial counsel claim, a habeas petitioner must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner bears the burden of establishing both components. See Smith v. Robbins (Robbins), 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); Strickland, 466 U.S. at 687. "To be deficient, an attorney's conduct must fall below an 'objective standard of reasonableness' established by 'prevailing professional norms.'" Rossum v. Patrick, 622 F.3d 1262, 1270 (9th Cir. 2010) (quoting Strickland, 466 U.S. at 687-88). Prejudice "focuses on the question whether counsel's deficient performance renders the results of the trial unreliable or the proceeding fundamentally unfair." Williams v. Taylor, 529 U.S. at 393 n.17 (citation omitted).

To establish deficient performance, the petitioner must show his counsel "made errors so serious that **[*128]** counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. at 391. In reviewing trial counsel's performance, the courts will "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will the petitioner meet this initial burden. Strickland, 466 U.S. at 690.

If the petitioner makes this showing, he must then establish there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial, but must result in a fundamentally unfair proceeding, Williams v. Taylor, 529 U.S. at 393 n.17, and "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792. However, a court need not determine **[*129]** whether counsel's performance was deficient before examining the prejudice the alleged deficiencies caused the defendant. See Robbins, 528 U.S. at 286 n.14 ("'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed'") (quoting Strickland, 466 U.S. at 697).

Petitioner identifies at least 33 ways in which he alleges his counsel was ineffective. [36] (See Petition Memo at 201-03). Many of these claims are conclusory, meritless, and without evidentiary support and will not be discussed in detail here. See Jones v. Gomez, 66 F.3d at 205 (petitioner's "conclusory suggestions that his trial . . .counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation."); James, 24 F.3d at 26 ("Conclusory [ineffective assistance of counsel] allegations which are not supported by a statement of specific facts do not warrant habeas relief."). Other claims, such as the failure to object to alleged prosecutorial misconduct (See Petition Memo at 180, 202) and jury instructions (Petition Memo at 202), have been previously rejected and will not be rehashed in the ineffective assistance

[*130] of counsel context. See Rupe v. Wood, 93 F.3d 1434, 1444-45 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance[.]"), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997); Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance."), cert. denied, 474 U.S. 1085, 106 S. Ct. 860, 88 L. Ed. 2d 899 (1986). The remaining claims are discussed herein.

FOOTNOTES

36 As with much of his Petition, petitioner presents his ineffective assistance of counsel claims in a stream-of-consciousness manner. Many of his statements are irrelevant; others are redundant. All his claims are without merit.

a. Duty to Investigate

Petitioner primarily alleges his trial counsel was ineffective in failing properly to investigate the facts surrounding the charges against him, to contact witnesses, to obtain evidence, and to present a voluntary intoxication defense.

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; see also Cox v. Ayers, 613 F.3d 883, 893 (9th Cir. 2010) ("Counsel's investigation must, at a minimum, permit informed decisions about **[*131]** how best to represent the client.") (citation omitted). This includes a duty to investigate the prosecution's case and to follow up on any exculpatory evidence. Kimmelman v. Morrison, 477 U.S. 365, 384-85, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); Duncan v. Ornoski, 528 F.3d 1222, 1234-35 (9th Cir. 2008), cert. denied, 129 S. Ct. 1614, 173 L. Ed. 2d 1001 (2009); see also Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (defense counsel's duties include "a duty to investigate the defendant's 'most important defense,' and a duty adequately to investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict") (citations omitted). However, "'the duty to investigate and prepare a defense is not limitless,' and . . . 'it does not necessarily require that every conceivable witness be interviewed or that counsel must pursue every path until it bears fruit or until all conceivable hope withers.'" Hamilton v. Ayers, 583 F.3d 1100, 1129 (9th Cir. 2009) (citation omitted). A lawyer's performance is deficient if evidence exists that might show a defendant's innocence or raise sufficient doubt to undermine confidence in a guilty verdict, and **[*132]** the lawyer did not investigate the evidence. Riley v. Payne, 352 F.3d 1313, 1318 (9th Cir. 2003), cert. denied, 543 U.S. 917, 125 S. Ct. 39, 160 L. Ed. 2d 200 (2004). To show prejudice, the petitioner must demonstrate that further investigation would have revealed favorable evidence. See Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996) (petitioner failed to show prejudice resulting from alleged deficient investigation as he failed to explain what compelling evidence additional investigation would have yielded or how it would have negated incriminating evidence), cert. denied, 522 U.S. 971, 118 S. Ct. 422, 139 L. Ed. 2d 324 (1997); Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995) (absent an account of what beneficial evidence investigation would have turned up, petitioner could not meet prejudice prong of Strickland test), cert. denied, 517 U.S. 1111, 116 S. Ct. 1335, 134 L. Ed. 2d 485 (1996). Moreover, "ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." Rhoades v. Henry, 611 F.3d 1133, 1142 (9th Cir. 2010) (citation omitted).

1. Media Videotapes

Petitioner contends his trial counsel was ineffective in failing to obtain videotapes from the media who filmed the pursuit. (Petition Memo at 175, 197, **[*133]** 590). To support this claim, petitioner has submitted the declaration of Kathy Wells, a neighbor of petitioner's parents, who states she watched the last part of the police pursuit on television, and saw "police vehicles not directly involved in the pursuit and arrest were driving recklessly, spinning out of control trying

to respond to the actual pursuit." (Wells Decl. ¶ 9). Ms. Wells also viewed petitioner being arrested by numerous officers, and observed petitioner "laying there handcuffed curled up in a fetal position with his face to the ground covering up from the strikes and blows of the officers, clubs, hands, and feet" before he was placed in a patrol car. (Wells Decl. ¶¶ 10-12).

Ms. Wells's allegations, though disturbing, are of no benefit to petitioner since events following the police chases in question had no bearing on any issue in petitioner's case. See Crews, 445 U.S. at 474 (illegal arrest, without more, has never been viewed as bar to subsequent prosecution, nor as defense to valid conviction); Pugh, 420 U.S. at 119 (illegal arrest or detention does not void subsequent conviction). Since petitioner has presented no evidence demonstrating that videotapes of the actual **[*134]** police pursuit existed, and has offered nothing more than mere speculation as to what relevant evidence the videotapes, if they existed, might have depicted, he has demonstrated neither deficient performance nor prejudice. See Gonzalez v. Knowles, 515 F.3d 1006, 1014-16 (9th Cir. 2008) (claims "grounded in speculation" establish neither deficient performance nor prejudice); Bragg, 242 F.3d at 1088-89 (speculation that further investigation might have been helpful insufficient to demonstrate ineffective assistance of counsel for failure to investigate).

2. CHP Communications

Petitioner also claims his trial counsel was ineffective in failing to seek CHP communications showing that news helicopters had been asked to leave the area. (Petition Memo at 180-81, 590). The Court disagrees. Any such communications would not have been relevant to the issues in petitioner's case. Indeed, when petitioner's trial counsel questioned CHP Officer Olavi about whether any CHP officer instructed media helicopters to leave the area for safety purposes, the trial court sustained the prosecutor's relevancy objection to this question. (RT 251). "An attorney need not pursue an investigation that would be fruitless[.]" **[*135]** Richter, 131 S. Ct. at 789-90; see also Stanley v. Schriro, 598 F.3d 612, 620 (9th Cir. 2010) ("No prejudice is suffered when counsel declines to pursue the development of testimony that would be inadmissible at trial.") (citation omitted).

3. Insurance Reports

Petitioner asserts his trial counsel was ineffective in failing to obtain insurance reports regarding the stolen Daewoo that petitioner alleges contradict Officer Zubyk's version of events. (Petition Memo at 180-81, 590). However, petitioner has not shown how the insurance reports in question would have contradicted Officer Zubyk's testimony. Moreover, petitioner's trial counsel utilized accident scene photographs to extensively question Officer Zubyk about inconsistencies between his version of events and damage to his police cruiser and the stolen Daewoo, (RT 189-236, 239-42), and the insurance reports would have been, at best, cumulative evidence. See Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) ("[I]t was not unreasonable for counsel not to pursue [evidence] when it was largely cumulative of [evidence that was] offered [.]"), cert. denied, 525 U.S. 1159, 119 S. Ct. 1068, 143 L. Ed. 2d 72 (1999).

4. Events Preceding the Carjacking

Petitioner contends **[*136]** his trial counsel was ineffective in failing to present evidence explaining why he was at the location where the carjacking occurred. (Petition Memo at 177, 197, 590, 599). In particular, petitioner complains his trial counsel failed to interview Susan Vanleuwen, who petitioner claims was with him "at the motel [and] involv[ed in] drug/alcohol and prostitution activities" prior to the carjacking and "who stole [petitioner's] wallet and [C]amaro while he was under a blackout condition, revealing why petitioner was at the location where [the] victim's car was taken as he was hitchhiking a ride home . . . and his state of mind as a result of drug/alcohol intoxication." (Petition Memo at 590). Petitioner also claims trial counsel was ineffective in not obtaining an insurance report regarding petitioner's allegedly stolen Camaro. (Petition Memo at 590).

When the failure to investigate involves the failure to interview and/or call a particular witness,

the petitioner must identify the witness and state with specificity what the witness would have testified to and how that testimony might have altered the outcome of the trial. United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987). Further, **[*137]** the petitioner must show that the witness was actually available and willing to testify. United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir.), cert. denied, 488 U.S. 910, 109 S. Ct. 264, 102 L. Ed. 2d 252 (1988). Generally, these requirements are satisfied by an affidavit or declaration from the witness. Dows v. Wood, 211 F.3d 480, 486 (9th Cir.), cert. denied, 531 U.S. 908, 121 S. Ct. 254, 148 L. Ed. 2d 183 (2000).

Petitioner's claim fails because he has not presented a declaration from Ms. Vanleuwen stating the substance of her proposed testimony and that she would have been willing and able to testify on petitioner's behalf at his trial. See Bragg, 242 F.3d at 1088 (speculation that witness might have given helpful information if interviewed is not enough to establish ineffective assistance); Dows, 211 F.3d at 486 (rejecting claim of ineffective assistance for failure to call witness based upon lack of affidavit from witness regarding substance of testimony); Morris, 966 F.2d at 455-56 ("[W]ishful suggestions" as to what a witness might say "cannot substitute for declaratory or other evidence.").

Moreover, even if Ms. Vanleuwen was able and willing to testify on petitioner's behalf at trial, it would not have benefitted petitioner. First, it should **[*138]** be obvious that the alleged theft of petitioner's car and wallet provides no excuse for petitioner carjacking another person and leading the police on a high speed chase. [37] Thus, evidence regarding the alleged theft of petitioner's car was completely irrelevant to petitioner's case, and defense counsel was not ineffective in failing to pursue it. See Richter, 131 S. Ct. at 789-90 (attorney need not pursue an investigation that would be fruitless). Second, as for any possible testimony regarding drug and alcohol use, for the reasons discussed below, petitioner cannot demonstrate a reasonable probability that he would have prevailed on a voluntary intoxication defense. See Knowles v. Mirzayance ("Mirzayance"), 129 S. Ct. 1411, 1422, 173 L. Ed. 2d 251 (2009) (law does not require counsel to raise every available nonfrivolous defense).

FOOTNOTES

[37] Although petitioner now claims his car was stolen, he previously told Stephen J. Wilson, M.D., that he sold the car for crack cocaine (Petition Ex. F), and petitioner's attorney was undoubtedly aware of this. (See Id. (Dr. Wilson's report addressed to defense counsel)).

Additionally, petitioner alleges his trial counsel was ineffective for not interviewing his friend and **[*139]** employer, Jack Tabor, who could have testified about the good job petitioner did at work, problems petitioner was having at home and his purchase of the Camaro. (Petition Memo at 590-91; Petition Ex. D (Declaration of Jack Tabor)). However, such information was irrelevant, and defense counsel was not ineffective in failing to pursue it. See Richter, 131 S. Ct. at 789-90.

5. Expert Testimony

Petitioner contends his trial counsel was ineffective in failing to seek expert testimony regarding a voluntary intoxication defense. (Petition Memo at 182). Petitioner is incorrect. Initially, petitioner's claim fails at the outset because he has provided no evidence, such as declarations, demonstrating that any expert was available and willing to testify on his behalf, or discussing the manner in which an expert would have testified and how such testimony would have benefitted petitioner. Petitioner's mere "[s]peculation about what an expert could have said is not enough to establish prejudice." Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997); see also Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (same; citing Grisby, 130 F.3d at 373).

Moreover, contrary to petitioner's claims, defense **[*140]** counsel did investigate the viability

of a voluntary intoxication defense for petitioner. Indeed, defense counsel filed a motion to have Dr. Gordon Plotkin appointed to evaluate petitioner, which was granted on December 12, 2001. (CT 134-36; Petition Ex. F). In a letter written that day, defense counsel outlined the purpose of Dr. Plotkin's examination of petitioner:

> The instant matter involves allegations that Mr. Price committed a carjacking. . . , felony evading; and assault on a peace officer with his vehicle. I have sought and obtained your services to assist the Defense. **The issue I intend to utilize your services for is that of Voluntary Intoxication/Diminished actuality**. [¶] Please interview Mr. Price . . . and contact Counsel. Additionally, if possible, please forward Counsel any pertinent information regarding Methamphetamine intoxication [the effects on an individual's judgement, etc.]. Finally, please contact Counsel prior to generating any reports in this matter.

(Petition Ex. F (letter from Public Defender Brad Siegel to Dr. Gordon Plotkin dated December 12, 2001)) (emphasis added). Since Dr. Plotkin examined petitioner on December 26, 2001 (Petition Memo at 570), but did **[*141]** not testify at trial, a reasonable inference may be drawn that his testimony would not have assisted petitioner. [38] Thus, petitioner simply has not shown his trial counsel was ineffective in failing to further pursue expert evidence on voluntary intoxication.

FOOTNOTES

[38] Apart from Dr. Plotkin, petitioner was examined by several other mental health professionals to ascertain his competency. (See Petition Ex. F).

6. Voluntary Intoxication Defense

Petitioner contends his trial counsel was ineffective in failing to investigate petitioner's history of drug and alcohol abuse and present the jury with a voluntary intoxication defense due to petitioner's "blackout" condition. (Petition Memo at 180, 192-94, 599-600). In support of this claim, petitioner presents the declaration of Gary Fowler, who states that at around 11:00 a.m. on July 5, 2000, he observed petitioner run into his backyard and, before petitioner ran off over a fence, Mr. Fowler determined petitioner was "clearly under the influence of drugs and/or alcohol" and "could not talk or think clearly." (Petition Ex. D (Declaration of Gary Fowler ["Fowler Decl."] ¶¶ 2-9)). Mr. Fowler further opined petitioner "was clearly not of a sound, reasonable **[*142]** mind at this time, and in my view without any capacity of formulating the intent to commit crime." (Fowler Decl. ¶¶ 16-17). Petitioner also refers to the 911 transcript in which Gustavo Tepetla indicated petitioner seemed like he was under the influence. (Petition Memo at 594; Petition Ex. A (Transcription of Taped 911 call)).

Initially, as discussed above, evidence of voluntary intoxication, even if it induced unconsciousness, cannot negate the general intent required for such crimes as assaulting a police officer in violation of P.C. § 245(c). Boyer, 38 Cal. 4th at 469; Brown, 46 Cal. 3d at 444 n.7; Hood, 1 Cal. 3d 444, 458-59, 82 Cal. Rptr. 618, 462 P.2d 370 (1969); P.C. § 22(a). Furthermore, while evidence of intoxication may be relevant to a determination of whether petitioner "actually formed [the] required specific intent," P.C. § 22(b), to support his convictions under P.C. § 215 and V.C. § 2800.2(a), in petitioner's case, it can be inferred that trial counsel made a reasonable tactical decision not to present any such evidence.

As discussed above, trial counsel did consider a voluntary intoxication defense, and appointed Dr. Plotkin to examine petitioner so trial counsel could determine whether a voluntary **[*143]** intoxication defense was viable. Since no such defense was propounded, it is reasonable to infer Dr. Plotkin's opinion was not favorable to the establishment of a voluntary intoxication defense. [39] Moreover, defense counsel had also investigated petitioner's extensive

drug history and ability to drive while intoxicated and spoken to people who informed him that petitioner was heavily into drugs and was high "all the time," he could drive "like a race car driver" while using drugs and would street race for money to buy drugs, he would lie, cheat, steal and trade anything, including cars, for drugs, and he had been in rehab many times. (See Petition Ex. H (Public Defender's Investigative Reports)). Furthermore, the record contains extensive evidence, which is discussed in Part A above and need not be repeated here, demonstrating petitioner acted with the specific intent to deprive the victim of her vehicle as well as the specific intent to evade pursuing police officers. See People v. Lindberg, 45 Cal. 4th 1, 27, 82 Cal. Rptr. 3d 323, 190 P.3d 664 (2008) ("The jury may infer a defendant's specific intent to commit a crime from all of the facts and circumstances shown by the evidence."), cert. denied, 129 S. Ct. 2799, 174 L. Ed. 2d 299 (2009). **[*144]** Under these circumstances, petitioner cannot demonstrate his trial counsel was ineffective in declining to pursue a meritless defense at trial. See Mirzayance, 129 S. Ct. at 1422; see also Red v. Runnels, 2009 U.S. Dist. LEXIS 116881, 2009 WL 4251562, *7-*8 (N.D. Cal. Nov. 23, 2009) (defense counsel not ineffective for failing to investigate voluntary intoxication as negating specific intent to permanently deprive a victim of property and specific intent to evade an officer given the strength of the evidence against petitioner); Reneau, 2009 U.S. Dist. LEXIS 105758, 2009 WL 3806264 at *11-*12 (petitioner could not show prejudice due to counsel's alleged recommendation to plead guilty to evading an officer under V.C. § 2800.2(a) rather than asserting a voluntary intoxication defense at trial when record contained extensive evidence that petitioner specifically intended to flee and elude pursuing peace officer such that it was not reasonably probable that jury would have concluded that evidence of petitioner's intoxication negated his specific intent).

FOOTNOTES

39 In addition, trial counsel was aware that in finding petitioner competent to stand trial, Ronald Markman, M.D., had opined that "the carjacking, the high speed chase, the ramming of police vehicles, **[*145]** though erratic and impulsive, and secondary to substance abuse and intoxication, reflects an appreciation of the nature and quality of his acts." (Petition Ex. F (Report of Ronald Markman, M.D.)).

b. Failing to Meet and Confer with Petitioner

"'Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant.'" Summerlin v. Schriro, 427 F.3d 623, 633 (9th Cir. 2005) (citation omitted), cert. denied, 547 U.S. 1097, 126 S. Ct. 1880, 164 L. Ed. 2d 567 (2006); Correll v. Ryan, 539 F.3d 938, 943 (9th Cir. 2008) (citation omitted), cert. denied, 129 S. Ct. 903, 173 L. Ed. 2d 108 (2009). Indeed, "limited consultations may constitute deficient performance by a criminal defense attorney." Summerlin, 427 F.3d at 633-34; see also Turner v. Duncan, 158 F.3d 449, 457 (9th Cir. 1998) (counsel's admission that he spent at most forty-five minutes with petitioner prior to trial demonstrates deficient performance). "While the amount of consultation required will depend on the facts of each case, the consultation should be sufficient to determine all legally relevant information known to the defendant." United States v. Tucker, 716 F.2d 576, 581-82 (9th Cir. 1983); see also Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) **[*146]** ("[T]here is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'") (citation omitted), cert. denied, 546 U.S. 1108, 126 S. Ct. 1060, 163 L. Ed. 2d 885 (2006); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir.) ("A lawyer . . . experienced . . . in criminal law can get more out of one conference with his client than a less well-trained lawyer could get out of several."), cert. denied, 488 U.S. 850, 109 S. Ct. 131, 102 L. Ed. 2d 104 (1988).

Petitioner complains his trial counsel failed sufficiently to meet and confer with him. (Petition Memo at 171-73). However, petitioner's complaint throughout his Petition is not that his trial counsel was unaware of the issues petitioner wanted to raise, it is that trial counsel opted to not

to raise the issues petitioner wanted even though petitioner provided trial counsel with the necessary information. (See, e.g., Petition Memo at 172 (complaining conference with defense counsel was "futile" because it had "absolutely [no] results pursuant to petitioner's defense)). Thus, petitioner has not shown "what purpose additional consultation . . . would have served[,]" and he has not demonstrated his trial counsel **[*147]** was ineffective in failing to meet with him more often. United States v. Lucas, 873 F.2d 1279, 1280 (9th Cir. 1989) (per curiam); see also Murray v. Maggio, 736 F.2d 279, 282-83 (5th Cir. 1985) ("[B]revity of consultation time between a defendant and his counsel, alone, cannot support a claim of ineffective assistance of counsel" and petitioner did not demonstrate his counsel was ineffective when he "has not shown what additional evidence could have been produced had additional conversations taken place.") (citation omitted).

c. Failing to Challenge the Admissibility of Petitioner's Prior Convictions

Petitioner argues his trial counsel was ineffective in failing to challenge the admissibility of his prior convictions as improper rebuttal evidence. (Petition Memo at 206-07). This contention is specious. Petitioner's prior convictions were not admitted as rebuttal evidence, but instead were admitted into evidence during the second portion of petitioner's bifurcated trial in which the prosecutor was required to prove beyond a reasonable doubt that petitioner had been convicted of the prior convictions alleged in the amended information. (RT 348-68). Defense counsel was not required to make **[*148]** the futile objection petitioner suggests. Rupe, 93 F.3d at 1445 (failure to take futile action can never be deficient performance).

The California Supreme Court's rejection of petitioner's conflict of interest and ineffective assistance of trial counsel claims was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on these claims.

L. Petitioner Is Not Entitled to Federal Habeas Relief on His Ineffective Assistance of Appellate Counsel Claim

The standards for determining whether trial counsel was ineffective apply equally to determining whether appellate counsel was ineffective, Robbins, 528 U.S. at 285; Cockett v. Ray, 333 F.3d 938, 944 (9th Cir. 2003) (citation omitted), and petitioner bears the burden of establishing both components of the Strickland standard, *i.e.*, "that counsel's performance fell below an objective standard of reasonableness, . . . and that there is a reasonable probability that, but for counsel's unprofessional errors, [the petitioner] would have prevailed on appeal." Cockett, 333 F.3d at 944 **[*149]** (citation and internal citation omitted).

Appellate counsel has no constitutional duty to raise every issue, where, in the attorney's judgment, the issue has little or no likelihood of success. Jones v. Barnes, 463 U.S. 745, 751-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (limited on other grounds in Robbins, 528 U.S. at 287); Turner, 281 F.3d at 872. Indeed, as an officer of the court, appellate counsel is under an ethical obligation to refrain from wasting the court's time on meritless arguments. McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 436, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988). Thus, in reviewing appellate counsel's performance, the Court will presume that appellate counsel used reasonable tactics; otherwise, it "could dampen the ardor and impair [counsel's] independence . . . , discourage the acceptance of assigned cases, and undermine the trust between attorney and client." Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997) (citing Strickland, 466 U.S. at 690).

In Ground Thirteen, petitioner claims his appellate counsel rendered ineffective assistance by only challenging the sufficiency of the evidence to support petitioner's carjacking and evading an officer convictions, and not raising the other claims petitioner sets **[*150]** forth in the pending Petition, particularly the ineffective assistance of trial counsel claims. (Petition at 5; Petition App. at 2; Petition Memo at 619-39).

However, since none of the ineffective assistance of trial counsel claims petitioner raises in his pending Petition are meritorious, appellate counsel's failure to raise these claims on appeal cannot be deemed ineffective assistance. See Turner, 281 F.3d at 872 ("A failure to raise untenable issues on appeal does not fall below the Strickland standard."); Wildman, 261 F.3d at 840 ("[Petitioner] cannot sustain his claim for ineffective assistance of appellate counsel because the issues he raises are without merit."). Accordingly, the California Supreme Court's denial of petitioner's ineffective assistance of appellate counsel claim was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence presented, and petitioner is not entitled to habeas relief on this claim.

M. Petitioner Is Not Entitled to Federal Habeas Relief on His Cumulative Error Claim

"The cumulative error doctrine in habeas recognizes that, even if no single **[*151]** error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Parle v. Runnels, 387 F.3d 1030, 1045 (9th Cir. 2004) (citation and internal quotation marks omitted), cert. denied, 544 U.S. 1041, 125 S. Ct. 2274, 161 L. Ed. 2d 1073 (2005). In Ground Fourteen, petitioner claims that the alleged errors in Grounds One through Thirteen had a cumulative prejudicial effect. (Petition at 5; Petition Att. at 2; Petition Memo at 640-54). However, this Court has found no merit to petitioner's claims. Thus, petitioner has not shown cumulative error. See Hayes v. Ayers, 632 F.3d 500, 2011 WL 61643 at *19 ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.") (citation omitted); Mancuso, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.").

The California Supreme Court's rejection of petitioner's cumulative error claim was not contrary to, or an unreasonable application of, clearly established federal law, and did not involve an unreasonable determination of the facts in light of the evidence **[*152]** presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

VI. RECOMMENDATION

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

DATED: February 25, 2011

/s/

Honorable Jacqueline Chooljian

UNITED STATES MAGISTRATE JUDGE

* Click on any *Shepard's* signal to *Shepardize*® that case.

In

*2011 U.S. Dist. LEXIS 10443, **

ANSAR MUHAMMAD a/k/a NICOLAS RAMONE EDWARDS, Petitioner, vs. D.L. RUNNELS, et al., Respondents.

2:04-cv- 1127 - TJB

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2011 U.S. Dist. LEXIS 10443

January 26, 2011, Decided
January 26, 2011, Filed

PRIOR HISTORY: Edwards v. Runnels, 2007 U.S. Dist. LEXIS 10304 (E.D. Cal., Feb. 6, 2007)

CORE TERMS: belt, stun, react, bailiff, felony, constitutional rights, courtroom, chain, jail, battery, shock, belly, law library, corpus, federal habeas, discovery, custody, opening, deputy, prior conviction, misdemeanor, assault, firearm, plea agreement, closing argument, physical restraints, presentation, unexhausted, robbery, wearing

COUNSEL: [*1] Ansar Muhammad, also known as Nicholaus Ramone Edwards, Petitioner, Pro se, Susanville, CA.

For D. L. Runnels, Respondent: Brian Roy Means, LEAD ATTORNEY, Attorney General's Office for the State of California, Sacramento, CA.

JUDGES: TIMOTHY J BOMMER, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: TIMOTHY J BOMMER

OPINION

ORDER

I. INTRODUCTION

Petitioner is a state prisoner proceeding *pro se* with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner consented in June 2004 to have a United States Magistrate Judge conduct all further proceedings in this case.

Respondents consented on December 9, 2009.

Following a 2001 jury trial where Petitioner represented himself pro per, Petitioner was convicted of two counts of second degree robbery, attempted murder, assault with a firearm on a police officer and being a felon in possession of a firearm along with several enhancements under these charges. The jury also found true that the Petitioner was previously convicted of battery with serious bodily injury in 1992. Petitioner was sentenced to fifty years and four months imprisonment.

Petitioner raises several claims in this federal habeas petition; specifically: (1) **[*2]** the trial court violated Petitioner's constitutional rights when it required him to wear a stun belt during portions of his trial as well as a belly chain during the trial ("Claim I"); (2) Petitioner's constitutional rights were violated when he was denied access to the prison law library in preparing for trial ("Claim II"); (3) the trial court violated Petitioner's due process rights when it denied Petitioner's request for a live pre-trial lineup ("Claim III"); (4) the trial court erred when it refused to allow Petitioner to impeach a prosecution witness on a prior misdemeanor conviction ("Claim IV"); and (5) several claims involving Petitioner's 1992 prior battery conviction with serious bodily in violation of Cal. Penal Code § 243(d) including: (a) the prosecution failing to meet their burden of proof that the 1992 conviction satisfied the prior felony element on a conviction for being an ex-felon in possession of a firearm (see Pet'r's Traverse at p. 47.), (b) the 1992 prior conviction constituting a strike as a serious prior felony under California Three Strikes Law (see id.); (c) the trial court failing to conduct a jury trial that Petitioner had a prior conviction and that the **[*3]** 1992 conviction constituted a prior serious felony under California's Three Strikes Law (see id. at p. 49.); and (d) the use of the 1992 battery conviction as a strike violated the 1992 plea agreement (collectively "Claim V"). [1] For the foregoing reasons, the petition is denied.

FOOTNOTES

1 In his Traverse, Petitioner reiterated that he "has never waivered concentrating his argument(s)" on these issues with respect to Claim V. (Pet'r's Traverse at p. 47.)

II. FACTUAL BACKGROUND [2]

FOOTNOTES

2 The factual background is taken from the California Court of Appeal, Third Appellate District opinion dated May 19, 2003. Respondents filed this opinion in this Court on March 22, 2010 as lodged document number 4 (hereinafter "Slip Op.").

> Kishor Patel and Jagit Bhandal were working behind the counter at Day's Market about 1:15 p.m. on July 1, 1998. A man entered the store wearing a mask. He walked behind the counter, pointed a black gun at Patel and Bhandal, and demanded money from the cash register. Bhandal put paper bills totaling approximately $400 in a blue bag the robber took from his pocket. The robber told Patel and Bhandal to go to a back room, then fled on a blue bike. Patel called 911 and gave the operator a description **[*4]** of the robber. Meanwhile, Sacramento Police Officer Charles Husted was on patrol in the Oak Park area in a K-9 unit. He received a radio dispatch about the robbery that described the suspect as a Black adult male, armed with a firearm, wearing a white t-shirt and black shorts, and riding a blue bicycle. Because the suspect had already left the robbery scene, Husted decided to look for him in the surrounding neighborhood. He saw defendant, a black male, on a blue bike near the corner of 16th Avenue and Temple. Husted was not "100 percent convinced" that defendant was the robbery suspect, because he was wearing a white multi-colored t-shirt and light-colored pants. As Husted

> approached, defendant got on his bike and started to ride away. At that point, Officer Husted grabbed defendant by the armah to stop him from leaving. Defendant resisted and drew a gun from his pocket as Husted was calling for backup. A struggle ensued but Officer Husted was unable to take defendant's gun. Defendant aimed and fired at Husted from close range and the officer shot back. Defendant's second shot hit Husted in the shoulder as he was retreating to safety behind his patrol car. As defendant continued to **[*5]** fire, Husted released his dog and the dog subdued the defendant.
>
> Officer Joseph Kuzmich took Patel to the place defendant had been detained. Paramedics had started cutting off defendant's pants, revealing a blue zipped bag filled with money, and the same clothes the robber had worn. Recognizing the man's eyes, forehead and dress, Patel identified defendant as the robber. He stated the gun carried by defendant was similar to the one used in the robbery. Patel also identified the blue bag. The bag contained $333 in cash and two $5 food stamps.

(Slip Op. at p. 3-4.)

III. PROCEDURAL HISTORY

A jury trial convened in 2001 and Petitioner was convicted on two counts of second degree robbery, one count of attempted murder, assault with a firearm of a police officer and being a felon in possession of a firearm. Petitioner appealed his convictions to the California Court of Appeal, Third Appellate District. That Court denied Petitioner's direct appeal in a written opinion on May 19, 2003. On July 30, 2003, the California Supreme Court summarily denied the petition for review.

Petitioner first filed a federal habeas petition in 2004. Subsequently several amended habeas petitions were dismissed/stayed **[*6]** so that Petitioner could fully exhaust his claims in state court. In April 2005, the California Supreme Court summarily denied Petitioner's state habeas petition. Between 2004 and 2009, Petitioner filed several state habeas petitions all of which were denied. Petitioner filed his fourth federal amended habeas petition in June 2009. The Respondents answered Petitioner's fourth amended federal habeas petition on March 9, 2010. With respect to Claim V, Respondents alleged that it was not exhausted. (See Resp'ts' Answer at p. 12.) Respondents also argued that Petitioner was not entitled to federal habeas relief on all of his claims on their merits.

IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

An application for writ of habeas corpus by a person in custody under judgment of a state court can only be granted for violations of the Constitution or laws of the United States. See 28 U.S.C. § 2254(a); see also Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). Petitioner filed this petition for writ of habeas corpus after April 24, 1996, thus the Antiterrorism and Effective Death Penalty **[*7]** Act of 1996 ("AEDPA") applies. See Lindh v. Murphy, 521 U.S. 320, 326, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Under AEDPA, federal habeas corpus relief is not available for any claim decided on the merits in the state court proceedings unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U.S.C. 2254(d).

As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer v. Andrade, 538 U.S.

63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (quoting 28 U.S.C. § 2254(d)(1)). "'[C]learly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" Id. (citations omitted). Under the unreasonable application clause, a federal habeas court making the unreasonable application inquiry should ask whether the state court's **[*8]** application of clearly established federal law was "objectively unreasonable." See Williams v. Taylor, 529 U.S. 362, 409, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Thus, "a federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is an objectively unreasonable application of clearly established federal law. See Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003) ("While only the Supreme Court's precedents are binding . . . and only those precedents need be reasonably applied, we may look for guidance to circuit precedents.").

The first step in applying AEDPA's standards is to "identify the state court decision that is appropriate for our review." See Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005). When more than one court adjudicated Petitioner's claims, a federal habeas court analyzes the last reasoned decision. Id. (citing Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)). **[*9]** The California Court of Appeal analyzed Claims I-IV on the merits in its decision on direct appeal. [3]

FOOTNOTES

3 As discussed in infra Part V.A, Claim I was only exhausted with respect to the stun belt issue.

With respect to Claim V, Respondent argues that it is unexhausted as Petitioner never raised this Claim to the California Supreme Court. A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. See Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004); Fields v. Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005). Petitioner never raised Claim V to the California Supreme Court so it is deemed unexhausted. Nevertheless, unexhausted claims may "be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies in the courts of the State." 28 U.S.C. § 2254(b)(2). A federal court considering a habeas corpus petition may deny an unexhausted claim on the merits when it is perfectly clear that the claim is not "colorable." See Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005).

V. PETITIONER'S CLAIMS FOR REVIEW

A. Claim I

In Claim I, Petitioner alleges that his **[*10]** due process, fair trial, presumption of innocence and counsel rights were violated when the trial court required Petitioner to wear an electric stun device during trial. The California Court of Appeal analyzed this Claim in its opinion on direct appeal and stated the following:

> The court granted a sheriff's department request for security measures to include the use of a belly chain while defendant was seated and the use of a "REACT" belt while defendant was standing to present opening and closing argument to the jury. [FN2] Based on defendant's prior violent and insubordinate conduct and "most notably, assaultive conduct on a peace officer," it found "a demonstrative need for additional security precautions above and beyond those typically used . . . ."

[FN2] "REACT" stands for "Remote Electronically Activated Control Technology." (People v. Mar (2002) 28 Cal.4th 1201, 1214, 124 Cal. Rptr. 2d 161, 52 P.3d 95 (Mar).) The belt is described as follows: "'Stun belts are used to guard against escape and to ensure courtroom safety. . . . The type of stun belt which is used while a prisoner is in the courtroom consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. This band wraps around **[*11]** the prisoner's waist and is secured by a Velcro fastener. The belt is powered by two 9-volt batteries connected to prongs which are attached to the wearer over the left kidney region. . . . [Citations.] [¶] The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [Citations.]'" (Id. at pp. 1214-1215.)

Defendant did not challenge the belly chain at trial and does not attempt to do so here. Instead, he argues the court abused its discretion in ordering use of the REACT belt based on a showing he had engaged in violent behavior *outside* the courtroom. **[*12]** Defendant says its use — involving the threat of a severe shock -hampered his ability to represent himself in propria persona at trial and violated his constitutional rights to due process, counsel, and a fair trial. We conclude the record supports the court's ruling and there was no abuse of discretion.

"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (People v. Duran (1976) 16 Cal.3d 282, 290-291, 127 Cal. Rptr. 618, 545 P.2d 1322 (Duran); see also Mar, supra, 28 Cal.4th at p. 1205 ("general principles set forth in Duran that apply to the use of traditional types fo physical restraints also apply to the use of a stun belt"].) A record of violence does not alone justify restraints. (People v. Cunningham (2001) 25 Cal.4th 926, 986, 108 Cal. Rptr. 2d 291, 25 P.3d 519.) Instead, the record must demonstrate violence or a threat of violence or other nonconforming conduct. (Duran, supra, 16 Cal.3d at p. 291.) Nonconforming conduct may include "a showing that he plans . . . to disrupt proceedings by nonviolent means. Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial **[*13]** process if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such restraints are necessary." (Id. at pp. 292-293, fn. 11.) Manifest need is demonstrated in a variety of circumstances (id. At p. 291), and we will affirm the trial court's ruling absent abuse of discretion (People v. Medina (1995) 11 Cal.4th 694, 731, 47 Cal. Rptr. 2d 165, 906 P.2d 2).

Defendant maintains he never "became violent, abusive, or threatening" in the trial court proceedings and notes that on one occasion he himself asked to be removed to a holding cell when he became upset about a court ruling. The record generally supports defendant's characterization of his behavior in court up to the time of the sentencing hearing. However, defendant's actual conduct at trial is irrelevant to the question whether the pretrial record supports a finding of "manifest need" for the REACT belt during opening and closing argument.

Sheriff's Deputy William Imhof, the trial bailiff, represented that defendant had "a local history of convictions for batteries with great bodily injury, resisting arrest and obstructing justice . . . ." While in custody for the offenses at issue in this appeal, he had 11 jail write-ups. **[*14]** The most recent, in February 2001, involved an assault on another inmate while both were wearing belly chains. Imhof said that

"when officers were wanting to break it up and separate them, [defendant] still continued to try to fight and was kicking the other inmate, so he didn't just stop." One write-up was for an assault on an officer at the jail "in which [defendant] beat him enough where they had to transport him to the hospital." Another write-up involved inciting a riot. Deputy Imhof stated that defendant was a member of a prison gang known for its violence and resistence to authority. We conclude this evidence supports the court's determination there was a danger that defendant's nonconforming conduct would disrupt the trial proceedings if unrestrained. (Duran, supra, 16 Cal.3d at p. 292, fn. 11.)

In any event, defendant was not prejudiced by the use of the REACT belt during his opening and closing argument. "The guidelines imposed by People v. Duran, supra, 16 Cal.3d at page 290, are intended, in large part, to avoid prejudice in the minds of jurors where a defendant appears or testifies in obvious restraints, or where the restraints deter him from taking the stand in his own **[*15]** behalf." (People v. Tuilaepa (1992) 4 Cal.4th 569, 583, 15 Cal. Rptr. 2d 382, 842 P.2d 1142.) There is ordinarily no prejudice where the jury has only brief glimpses of the defendant in shackles inside or outside of the courtroom. (Duran, supra, 16 Cal.3d at p. 287, fn.2.) Here, we find nothing in the record to show that the jurors were aware defendant was wearing a REACT belt while addressing them from the podium. The REACT belt was not activated during defendant's statements to the jury.

At the hearing on the sheriff's department request for restraints, defendant complained about a different kind of prejudice: "[H]aving something like [the REACT belt] attached to my person while I am under a very serious point in my life, fighting for my life, and he places a belt that will deliver shock, that will be on my mind the whole time I am here. [¶] I don't see how I will focus on the case to deliver myself a fair trial or presentation in trial while I am siting here worrying about this belt or if this officer believes that I am beginning to get hostile or something. [¶] At certain times in my delivery of opening statements or closing arguments, I may raise my voice. This officer might give me a shock. I am going to be worried **[*16]** about that, and it will affect my presentation and how I present my case." Citing Mar, supra, 28 Cal.4th at page 1225, footnote 7, defendant emphasizes on appeal that in "the improper use of a stun belt, . . . the greatest danger of prejudice arises from the potential psychological effect of the device upon the defendant rather than from the visibility of the device to the jury." We conclude defendant fails to show that he was, in fact, prejudiced by being required to wear the REACT belt.

In Mar, the court required the defendant to wear the REACT belt during his trial testimony. (Mar, supra, 28 Cal.4th at pp. 1208, 1213.) The trial court ruled it was in defendant's best interest "to testify as a reasonable person, without exhibiting any lapses in self-control." (Id. at p. 1213.) The Supreme Court held this was insufficient grounds for restraint under Duran, and concluded the trial court abused its discretion in overruling defendant's objection to the REACT belt. (Id. at p. 1223.) Turning to the question of prejudice, the Supreme Court noted that it was "impossible to determine with any degree of precision what effect the presence of the [REACT] belt had on the substance of defendant's **[*17]** testimony or on his demeanor on the witness stand," but concluded it had "at least some effect on his demeanor. . . ." (Id. at p. 1225.) The Supreme Court cited the relative closeness of the evidence, which turned completely on the jury's evaluation of defendant's credibility, and the crucial nature of defendant's demeanor while testifying and ruled the trial court's error was prejudicial under either the Watson or Chapman standards. (Mar, supra, at p. 1225.)

This case differs from Mar in several respects. First, defendant wore the REACT belt only during argument and did not testify at trial. Second, apart from defendant's comment at the start of opening statement that he was "a little nervous today,"

> there is nothing in his presentations to the jury to suggest he was overly anxious or that his nervousness was caused by the REACT belt. In a lengthy closing argument, defendant presented his theories of defense using detailed references to trial testimony and a visual presentation of the exhibits. Third, this was not a close case that turned on defendant's credibility. There were witnesses to the robbery at Day's Market and the assault on Officer Husted. In addition, the blue bag containing **[*18]** $333 in cash plus food stamps was found in defendant's possession.

(Slip Op. at p. 4-10.)

Respondents argue in their answer that Petitioner "is barred from obtaining relief in light of the absence of clearly established Supreme Court precedent concerning the use of stun belts that are not visible to the jury." (Resp'ts' Answer at p. 18.) A similar argument was made in Gonzalez v. Pliler, 341 F.3d 897 (9th Cir. 2003). In Gonzalez, 341 F.3d at 904, the issue was whether restrictions on the use of stun belts constituted a "new rule" as used in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). As the Ninth Circuit explained, under Teague, "a new rule of criminal procedure is retroactive if it 'places certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe,' or if the rule 'requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.'" Gonzalez, 341 F.3d at 904 (quoting Teague, 489 U.S. at 311). Where "the rule a habeas petitioner seeks to assert can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final, the rule is a 'new' one, typically **[*19]** inapplicable on collateral review." Id. (internal quotation marks and citations omitted). However, if "the rule cannot be so distinguished, the rule is not of 'new' ilk and is, as a result, applicable in the habeas context." Id. (citing Torres v. Prunty, 223 F.3d 1103, 1110 (9th Cir. 2000); Graham v. Collins, 506 U.S. 461, 469, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993); Bailey v. Newland, 263 F.3d 1022, 1030 (9th Cir. 2001)). Ultimately, the Ninth Circuit held that the Supreme Court has long imposed constitutional limits on the use of physical restraints at trial, and determined that Supreme Court precedent was not just confined to a particular type of restraint. See id. Otherwise, the Ninth Circuit reasoned:

> a new rule of criminal procedure would obtain every time there was a technological advance in the design of prisoner restraints. The form of the physical restraint, however, is irrelevant to the application of the constitutional standards. It matters not whether the restraint takes the form of handcuffs, gags, leg shackles, ropes, straight jackets, stun belts or force fields. The relevant constitutional questions are identical and dictated by a long line of case law. In short, the applicable rule in this case was **[*20]** dictated by precedent existing at the time [Gonzalez's] conviction became final.

Id. at 904-05 (internal quotation marks and citations omitted).

Even though the Ninth Circuit's reasoning in Gonzalez seems to foreclose Respondents' argument that there is no clearly established Supreme Court precedent on the use of non-visible stun belts at trial, Respondents argue that Gonzalez is no longer controlling in light of the Supreme Court decision in Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). In Musladin, the Supreme Court analyzed whether the state court holding was contrary to or an unreasonable application of clearly established federal as determined by the Supreme Court when it held that a defendant's fair trial rights were not violated when the victim's family wore buttons of the victim at defendant's trial. See 549 U.S. at 72. Ultimately, the court differentiated previous cases involving state-sponsored courtroom practices, such as wearing identifiable prison clothing at trial, see Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) as well as the seating of uniformed state troopers immediately behind the defendant at trial, compared to the effect of a defendant's fair trial rights on spectator conduct **[*21]** at trial. See Musladin, 549 U.S. at 76. The Supreme Court stated that it:

> has never addressed a claim that such private-actor courtroom conduct was so

> inherently prejudicial that it deprived a defendant of a fair trial. And although the Court articulated a test for inherent prejudice that applies to state conduct in Williams and Flynn, we have never applied that test to spectator's conduct. Indeed, part of the legal test of Williams and Flynn — asking whether the practices furthered an essential state interest — suggest that those cases apply only to state-sponsored practices.

Id. Ultimately, the Supreme Court determined that:

> [g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of Williams and Flynn to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

Id. at 77.

As previously stated, Respondents **[*22]** assert that Musladin narrowed what is to be considered "clearly established Federal law." However, the Supreme Court in that case was clear to delineate the difference between state-sponsored courtroom practices and spectator courtroom conduct. Here, the Ninth Circuit in Gonzalez laid out the Supreme Court precedent regarding the use of physical restraints and applied this "clearly established" law to the use of a stun belt. Furthermore, the Ninth Circuit determined that the applicable rule was not barred by Teague, and was dictated by existing precedent. See Gonzalez, 341 F.3d at 904-05. Respondents' arguments notwithstanding, for the reasons outlined in Gonzalez, Petitioner's stun belt claim rises to the level of an issue asserting that the state court's decision was contrary to or an unreasonable application of clearly established federal law. See, e.g., Hill v. Campbell, Civ. No. 05-4514, 2010 U.S. Dist. LEXIS 124958, 2010 WL 4696636, at *5 (N.D. Cal. Nov. 10, 2010). Thus, the merits of this Claim will be analyzed.

Petitioner asserts that wearing the stun belt during the opening and closing arguments hampered his ability to represent himself at trial due the profound psychological effects of wearing the belt. **[*23]** Stun belts are an alternative method of prisoner restraint to shackles. See Gonzalez, 341 F.3d at 899. "As with all forms of physical confinement during trial, the use of stun belts raises a number of constitutional concerns." Id. For example, the sight of physical restraints might have a significant effect on the jury and could impede a defendant's ability to communicate with his counsel and participate in his defense. See id. at 899-900. Furthermore, the use of physical restraints might also confuse and embarrass a defendant which would impair his mental faculties. See id. at 900. (citations omitted). As noted by the Ninth Circuit: "'[i]n all [ ] cases in which shackling has been approved,' we have noted, there has been 'evidence of disruptive *courtroom* behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a *pattern* of defiant behavior toward corrections officials and judicial authorities.'" Id. (quoting Duckett v. Godinez, 67 F.3d 734, 749 (9th Cir. 2003).

In Gonzalez, the Ninth Circuit stated the following with respect to stun belts:

> The use of stun belts, depending somewhat on their method of deployment, raises all of the traditional concerns **[*24]** about the imposition of physical restraints. The use of stun belts, moreover, risks "disrupt[ing] a different set of a defendant's constitutionally guaranteed rights." United States v. Durham, 287 F.3d 1297, 1305 (11th Cir. 2002). Given "the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences." Mar, 124 Cal.Rptr.2d 161, 52 P.3d at 97. These "psychological consequences," id., cannot be understated. Stun belts, for example, may "pose[ ] a far more substantial risk of interfering with a

> defendant's Sixth Amendment right to confer with counsel than do leg shackles." Durham, 287 F.3d at 1305. We have long noted that "one of defendant's primary advantages of being present at trial[ ] [is] his ability to communicate with his counsel." Spain [v. Rushen], 883 F.2d [712], 720 [(9th Cir. 1995)]; see also Kennedy v. Cardwell, 487 F.2d 101, 106 (6th Cir. 1973) (asserting that restraints confuse mental faculties and thus abridge a defendant's constitutional rights). Stun belts may directly derogate this "primary advantage[ ]," Spain, 883 F.2d at 720, impacting a defendant's **[*25]** right to be present at trial and to participate in his or her defense. As the Eleventh Circuit . . . observed, "[w]earing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case." Durham, 287 F.3d at 1306. "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely" hinders a defendant's participation in defense of the case, "chill[ing] [that] defendant's inclination to make any movements during trial - including those movements necessary for effective communication with counsel." Id. at 1305

341 F.3d at 900. A decision to use a stun belt at trial is subjected to the same close judicial scrutiny required for imposing other physical restraints. See id. at 901. Before a court orders the use of a physical restraint on the defendant at trial, "'the court must be persuaded by compelling circumstances that some measure [is] needed to maintain the security fo the courtroom," and, as noted, "the court must pursue less restrictive alternatives before imposing physical restraints.'" Id. (quoting Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994)).

Before **[*26]** trial, the trial judge heard arguments from the bailiff and the Petitioner on the request to use a stun belt:

> THE BAILIFF: Judge, Mr. Muhammad, also known as Nicholas Edwards, just in addition to the charges in this case, 211 and attempted murder on a Sac PD officer, he has a local history of convictions for batteries with great bodily injury, resisting arrest and obstructing justice, quite a few arrests and convictions for that. And in this custody period, which has extended from, I think, July of 1998, he has 11 jail write-ups; and those are violations of jail rules, so what happens is, you get written up and administrative action is taken.
> The latest one was on February 9th of this year, which was an assault on another inmate; and basically the gist of that write-up was, while Mr. Edwards and another inmate were both in belly chains, they got into a fight.
> And when officers were wanting to break it up and separate them, inmate Edwards still continued to try to fight and was kicking the other inmate, so he didn't just stop. It was a continuous thing. Of those 11 write-ups, six were for insubordinate behavior. That is the kind of behavior — whether to fail to lock down when the officer **[*27]** orders him to lock down, comply with nurses, come in from recreation or quit visits, disruptive behavior, stuff like that, that tends to totally disrupt the jail functions.
> I think — not in this custody period that I can recall but in his previous custody period, he had a number of the same type of write-ups, same type of behavior problems. In fact, one was for an assault on an officer in the jail in which he beat him enough where they had to transport him to the hospital.
> Another one was for inciting a riot. I don't recall the specifics of that, other than he was encouraging other inmates to act out like he was, to disrupt whatever activity was going on. I don't know if it was lunch or feed or what.
> Let's see. He also is a member of a prison gang, Anasar El Muhammad. What happens, members take on that name, the aka. That gang is known for their violence and their resistence to authority . . . .
> And it's well-known throughout the jails and prisons that that's the type of behavior exhibited by these gangs and encouraged by their members.
> So we would request that he remain - some kind of security measures remain for

the safety and security of the courtroom. Many times we are short-handed **[*28]** so we can't necessarily have two escort officers. Sometimes it is hard enough just to get one.
So measure that I would request would be like for proceedings like today, days that we are just doing testimony or motions, that he remain chained to the chair, both hands free, shackles off but still remain chained to the chair.
Maybe it will encourage him to maintain his composure and if something was to happen, then whatever escort officer and myself, if I am the bailiff, you know, it will give us time to react.
If he does opening statements and you decide to let him stand at the podium or closing arguments, something of those natures, I think the options would be . . . the react belt . . . . It is the same type of react belt we used to have. We could have that. It fits under the type clothes on the legs so it is not visible, intrusive of his looking like an out-of custody person at the time.
And probably having two deputies escort, one in the back so he is not readily — you know, eyes look beyond the jury and myself also.
I could be in the well.
Just those precautions to take to prevent anything from happening or to encourage composure in the court.
THE COURT: All right, Deputy Imhof is the **[*29]** regularly assigned bailiff for this court, and you secured that information in view of the Court's records?
THE BAILIFF: The jail computer system for all the write-ups, local criminal history.
THE DEFENDANT: I would just like to say the write-ups that he is referring to, where are they? Write-ups that you are referring to, do you have them?
THE BAILIFF: Yeah, I have copies and they are on the computer. There is always a permanent record.
THE COURT: It is my understanding that the deputies at the time of any incident make a record that is maintained by the Sheriff's Department. Is that correct?
THE BAILIFF: Yes, as a matter of fact, a copy is given to the inmate when they have their administrative hearing; and they sign it and it is kept in their permanent jail file.
If they refuse to sign it, they put it in the permanent jail file so there is a permanent copy on file.
THE DEFENDANT: Deputy, have you ever had any problems with me in the past?
THE BAILIFF: No, I never met you.
THE DEFENDANT: Have you seen any indication I would be wild or outbursts here in the courtroom?
THE BAILIFF: Personally seen in so far you have been pretty well composed. I saw you get heated with the D.A. a little while **[*30]** ago but that was a mutual type.
THE DEFENDANT: I stayed in my seat.
THE BAILIFF: You stayed seated.
THE DEFENDANT: Didn't use any profanity?
THE BAILIFF: Did not at all.
THE DEFENDANT: You made reference to some kind of a belt or something.
THE BAILIFF: It is called a react belt.
THE DEFENDANT: As you say it would deliver some shock to me?
THE BAILIFF: Correct.
THE DEFENDANT: If you felt I was doing something that was a threat? If you felt I was a threat in the courtroom or endangering anybody or something like that, then I would receive some kind of shock?
THE BAILIFF: The deputy that is trained to operate that and is proficient that would be escorting, yeah, they would. It gives you a warning to let you know that —
THE DEFENDANT: You haven't seen any behavior from me exhibiting that type of behavior that would warrant that type of precaution on me?
THE BAILIFF: In the last two hours, no.
THE DEFENDANT: Any time you have been in this jail?
THE BAILIFF: I have never seen you before.
THE DEFENDANT: You are just going off of write-ups?

THE BAILIFF: Correct.
THE DEFENDANT: How do you feel that I would warrant this kind of shock worn on my person in a trial? If you are going to put that belt on me, you **[*31]** might as well leave it for the jury to see.
THE COURT: Don't argue with him. If you have any request for information or you think he needs to provide more information to the Court, you can certainly make your statement to me as to why you should or should not have that type of measure imposed or what alternative measure I could consider if I felt measures were necessary.
THE DEFENDANT: I don't have any problems with basically anything he is saying. I was trying to get a feel if he felt I was a threat at any time dealing with me.
THE COURT: What he is saying, there are officers that are trained specifically. Not every officer is trained in the operation of the react belt. They received some training regarding its use and included in that training, as I understand, is essentially a warning signal, an indication to you if your behavior — you are not complying.
THE DEFENDANT: I am shocked.
THE COURT: Right. There is an initial signal, basically, that lets you know you need to rein yourself in or else you will receive a shock.
THE DEFENDANT: Okay.
THE COURT: But you can avoid it entirely if. [sic] No. 1, you are complying and, No. 2, you heed any warning issues. I think what he is suggesting, **[*32]** that simply be used on the days when there is some necessity for you to move about.
Several of the days we are talking about it would be typically off. Counsel will remain seated for the most part as well, and that is during the questioning of the witnesses from counsel table where you are understandably relying on your notes or notebook and just questioning witnesses.
But is common and the Court is concerned about you having an ability to address and stand up as any attorney would in the well, behind a podium and address the jury directly during opening statements if you choose to make them, and, of course, during closing arguments, should that also be something that you wish to make.
THE DEFENDANT: Actually, what I am trying to get at is that having something like that attached to my person while I am under a very serious point in my life, fighting for my life, and he places a belt that will deliver shock, that will be on my mind the whole time I am here.
I don't see how I will focus on the case to deliver myself a fair trial or presentation in trial while I am sitting here worrying about this belt or if this officer believes that I am beginning to get hostile or something.
At certain **[*33]** times in my delivery of opening statements or closing arguments, I may raise my voice. This officer might give me a shock. I am going to be worried about that, and it will affect my presentation and how I present my case. If he —
THE COURT: You don't have any objection to the belly chain while you are seated at the table? You just object to the belt —
THE DEFENDANT: And I don't have any objection — I don't know what the name is, reaction belt or whatever it is, if I exhibited that kind of behavior, it would warrant it; but at this point in time, I haven't exhibited that.
I understand if I do exhibit that behavior, I have it coming but at the present time, I haven't. If you assume ahead of time that I need that belt, I will be worried about it right here in trial.
That all will be on my mind, is that this dude is going to give me a shock. He doesn't know me. He doesn't know anything personally about me. He can jump the gun or anything. If I get a shock in front of the jury, what is that going to do to my jury?
THE COURT: Deputy Imhof?
THE BAILIFF: When the officer does the react, he explains to you exactly how it works. You have an instruction sheet that he will go over with you.
The particular **[*34]** officer that runs it is Deputy Skip Huber, who has been around for many years. He is not a jump-the-gun type officer. He is laid-back, low-

keyed. I don't think he has ever had to use it after they have explained what would happen.
It's — it would just be a precaution because of the history that Mr. Edwards has exhibited over the last — since 1984 is when I researched to. We need that kind of precaution.
THE DEFENDANT: 1984? I was 14 years old. I wasn't even in the county jail.
THE BAILIFF: I think that is when it goes back to YA.
THE COURT: Let me indicate that the Court does view, based on the presentation of Deputy Imhof and the research of his background, although he admits his personal contact is brief, he relayed information that he received from the jail's records, including your current course of incarceration and previous course.
I am aware of the alleged facts in this case; and, apparently, there has been assaultive conduct and certainly insubordinate conduct but most notably, assaultive conduct on a peace officer.
In the Court's view, that does raise concern about the ability to maintain a peaceful courtroom environment. We have legitimate concerns, Mr. Muhammad, I understand, **[*35]** regarding the react belt.
The Court has legitimate concerns.
I feel an obligation to the individuals that work and will be in the courtroom throughout this case. It is my hope that nothing will happen. I have no way of predicting the future. Past behavior sometimes is the best indication of what one can expect for fear.
I do find that there's been a demonstrative need for additional security precautions above and beyond those typically used, utilized by the Court, among and including those of assaultive conduct and the nature of the charge and a serious assault on a peace officer in the jail during your previous incarceration.
I believe that the recommendation and request for a chain to the belly, you have no objection to that. That can be done in an unobtrusive fashion. That will be ordered.
In terms of your presentations and opening and closing, if you wish to have movement and be able to stand in front of the jury, I will grant the request for the react belt; but I will request that the deputy present that information to you as indicated by the deputy, outlining the use and manner in which such belt would be used.
Alternatively, I would consider, if you wish to make your statement from **[*36]** the table — I don't know if there is an alternative security measure we can have to have him stand at the table without the react belt if you felt that that was an option you would prefer Mr. Muhammad.
The react belt, I have seen it. I have seen it used in court. I talked to other judicial officers. I never heard of anyone actually having to send the shock signal, but it can be one that the Court does not see and restrict your movement, not detected by the jury when they are looking at you.
It has been fairly successful at maintaining a peaceful demeanor on behalf of those who wear it. Unless you have an alternative in terms of what we can do in terms of security measures when you have movement in the court, I will grant the request for the react belt. That is granted.

(Reporter's Tr. at p. 137-47.)

As illustrated above, the trial court conducted a hearing where it heard arguments from the bailiff and Petitioner regarding the purported use of the stun belt. After hearing these arguments and considering the evidence, the trial court independently determined that there was a demonstrative need for additional security precautions in light Petitioner's assaultive conduct while incarcerated. **[*37]** In Gonzalez, 341 F.3d at 902, the Ninth Circuit quoted Mar, 28 Cal.4th at 1221 124 Cal. Rptr. 2d 161, 52 P.3d 95 which stated that:

> [W]hen the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct

> must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others.

Here, the trial court was presented with evidence of Petitioner's conduct outside the presence of the court to allow the trial court to make its determination of the nature and the seriousness of the conduct. The trial court did not simply rely on the judgment of the bailiff in determining that there was a manifest need for Petitioner to wear a stun belt during opening and closing arguments as other incidents were recited by the bailiff before the trial judge made her decision. [4]

FOOTNOTES

4 In Gonzalez, the Ninth Circuit explained that the psychological consequences of wearing a stun belt **[*38]** include the interference with counsel as well as impairing a defendant's ability to follow the proceedings. See 341 F.3d at 900. In this case, the stun belt was only applied during opening and closing statements. (See Slip Op. at p. 9 ("defendant wore the REACT belt only during argument and did not testify at trial).); cf. 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Petitioner's ability to follow the proceedings during testimony would not have been hampered by the psychological effects of the stun belt as it was not applicable during live testimony.

Additionally, the court considered less restrictive alternatives to using the stun belt. See Gonzalez, 341 F.3d at 901 (stating that "the court must pursue less restrictive alternatives"). For example, the trial judge stated that she would consider an alternative to the stun belt if Petitioner would agree to stand at his table. (See Reporter's Tr. at p. 146-47.) Thus, Petitioner is not entitled to federal habeas relief that the use of the stun belt violated **[*39]** his constitutional rights.

Within Claim I, Petitioner also argues that the use of the belly chain at trial violated his constitutional rights. (See Pet'r's Fourth Am. Pet. at p. 9-10 and Pet'r's Traverse at p. 2.) Petitioner did not raise this claim to the California Supreme Court. [5]

FOOTNOTES

5 In Petitioner's counseled petition for review to the California Supreme Court, he argued that: "[t]he trial court deprived petitioner of his Fourteenth Amendment due process rights to a fair trial and to the presumption of innocence, and to his Sixth Amendment right to counsel, when it ordered he be restrained throughout trial by an electric stun device (a "REACT belt"), without a showing of 'manifest need' for any restraints; as the use of this device psychologically hampered petitioner's ability to conduct his 'pro per' defense at trial, his convictions must be reversed." (Resp'ts' Lodged Doc. 5 at p. 5.)

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. See 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity **[*40]** to correct the state's alleged constitutional deprivations. See Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. See Duncan v. Henry, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (per curiam); Picard v.

Connor, 404 U.S. 270, 276, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. See Duncan, 513 U.S. at 365. Nevertheless, a federal court has the power to deny an unexhausted habeas claim on the merits. See 28 U.S.C. 2254(b). The Ninth Circuit has explained that a federal court considering a habeas corpus petition may deny an unexhausted claim on the merits when it is perfectly clear that the claim is not "colorable." See Cassett, 406 F.3d at 624.

Visible shackling of a criminal defendant during trial "undermines the presumption of innocence and the related fairness of the factfinding process" and "'affront[s]' the 'dignity and decorum of judicial proceedings that **[*41]** the judge is seeking to uphold.'" Deck v. Missouri, 544 U.S. 622, 630-31, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) (quoting Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)); see also Larson v. Palmateer, 515 F.3d 1057, 1062 (9th Cir. 2008). The United States Supreme Court has held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Deck, 544 U.S. at 629. To protect this right, criminal defendants have "the right to be free of shackles and handcuffs in the presence of the jury, unless the shackling is justified by an essential state interest." Ghent v. Woodford, 279 F.3d 1121, 1132 (9th Cir. 2002).

Shackling is not unconstitutionally prejudicial per se. See Allen, 397 U.S. at 343-44; Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995) ("shackling is inherently prejudicial, but is not per se unconstitutional"). For a petitioner to prevail on the merits of a constitutional claim for shackling, the "court must find that the petitioner was physically restrained in the presence of the jury, that the shackling was seen by the jury and **[*42]** that the physical restraint was not justified by state interests." Ghent, 279 F.3d at 1132. Even if these circumstances are present, unjustified shackling does not rise to the level of constitutional error unless the defendant makes a showing that he suffered prejudice as a result. See id. (citing United States v. Olano, 62 F.3d 1180, 1190 (9th Cir. 1995); United States v. Halliburton, 870 F.2d 557, 561-62)); see also Larson, 515 F.3d at 1064 (holding that requiring petitioner to wear security leg brace during trial was harmless). In a federal habeas case, if the petitioner establishes prejudice, the court must determine whether the error had a "substantial and injurious effect" on the jury's verdict." Id.; see also Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Petitioner does not assert nor does it appear in the record that the jury saw the belly chain worn by Petitioner during trial. The following colloquy took place during the hearing regarding possibly restraining Petitioner during trial:

> THE COURT: And the request that you are making that he have a chain around his waist or belly and be chained to the chair can be effectuated so it is not visible to the jury.
> THE BAILIFF: Yes. Standing **[*43]** right here, you can't see it. He can pull his shirt down around him. There is a flap in the back of the chair so it doesn't look any different than a regular chair, no chains visible, no chains on his feet so they wouldn't be visible. [¶] So long as he doesn't pull his shirt up and actively show anybody, it wouldn't be visible at all.

(Reporter's Tr. at p. 140.) Further, the use of the belly chain was justified for similar reasons as discussed regarding the use of the stun belt. There is no evidence that the use of the belly chain prevented Petitioner from effectively examining witnesses. As Petitioner does not allege nor show that the jury observed the belly chain, nor does the record indicate that it prevented him from effectively examining witnesses, Petitioner is not entitled to relief on this argument. He also failed to show that the use of the belly chain had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623. Thus, he is not entitled to federal habeas relief that the use of the belly chain at trial violated his constitutional rights as

well.

B. Claim II

In Claim II, Petitioner argues that his constitutional rights were violated **[*44]** when he was denied the right of access to the prison law library leading up to trial. The Court of Appeal set forth the relevant facts that giving rise to this claim and ultimately denied relief:

> On May 11, 2001, approximately six weeks before trial, the court granted defendant's request to represent himself and signed a standard order which provided defendant access to legal materials at the county jail. The order included the following provision: "Legal Research: The defendant shall be authorized the use of legal research materials. The Sheriff may in his discretion either allow the defendant the use of the law library for at least two hours per week or provide to the defendant legal research materials in his/her cell. The defendant shall be limited to copies of five cases per week and five code section[s] per week in his his/her cell. Upon submission by the defendant of a list of legal research material by 8:00 a.m. of a business day, the Sheriff will be obliged to obtain and deliver these materials to the defendant by 5:00 p.m. on the next business day."
>
> On June 25, 2001, defendant complained that he had been denied access to the jail law library because they had no record of his **[*45]** "pro per status." The court confirmed defendant's status with the law librarian. Thereafter, on June 29, 2001, defendant sought continuation of the July 3, 2001, trial date, arguing that the denial of law library privileges violated his constitutional rights. The district attorney acknowledged there had been "a glitch in [the] paperwork," but pointed out that defendant waited several weeks to raise the issue. He noted the case had been pending for three years and maintained defendant received adequate help from numerous attorneys and investigators during that time. The court questioned defendant outside the presence of the district attorney and denied the motion for lack of substantial prejudice. Defendant raised the issue unsuccessfully in his motion for new trial.
>
> On appeal, defendant argues that "[e]ven though [he] acted as his own counsel, he nevertheless continued to have a Sixth Amendment right 'to counsel,'" a right which included access to legal materials in the law library or in his cell. He says the "'counsel' who was prevented from providing adequate representation was [defendant] himself." Defendant acknowledges he had access to the law library "at some point in time," but **[*46]** insists he was prejudiced by denial of access for the six weeks immediately before trial began. He maintains the lack of access prevented him from filing certain discovery motions, resulted in his making an untimely request for a ruling on a "critical suppression motion," and "may also have" prevented him from preparing arguments for and against certain jury instructions.
>
> We consider and reject each of defendant's claims of prejudice in turn. First, defendant told the court he wanted to file a discovery motion to obtain fingerprint analysis and officer reports the district attorney said did not exist. These items were encompassed by the discovery motion granted by the court in January 1999. In addition, defendant told the court he wanted tests performed on Husted's vest and the gun found at the scene of the assault. Defendant also wanted to take pictures of Officer Husted's shoulder. In June 1999, while representing himself, defendant successfully moved for production and independent defense testing of physical evidence, including the vest and gun. Apart from the fact the court had previously granted similar discovery requests, this record suggests defendant was well aware of the legal **[*47]** grounds for discovery. Thus, he fails to show how lack of access to the library for the six weeks immediately before trial prevented him from filing

> discovery motions that should have been resolved earlier in the proceedings.
>
> Next, on the second day of trial, defendant represented that he had previously filed a motion to suppress which was withdrawn without consent by former defense counsel Higgins. The court appointed Higgins to represent defendant on December 12, 2000, and relieved him when it granted defendant's Faretta [v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)] motion on May 11, 2001. Defendant does not specify the date he had filed the suppression motion. In ruling that defendant's motion was untimely, the court explained it was his "responsibility as [his] own representative to make sure that those issues [were] raised before trial." In any event, denial of access to the law library after May 11, 2001, cannot have had any effect on defendant's ability to have the earlier suppression motion heard in a timely fashion.
>
> Finally, defendant does not say lack of access to the law library did, in fact, prevent him from addressing legal issues relating to the jury instructions. On the ninth day **[*48]** of trial, defendant complained that he was unable to review the proposed instructions in the jail law library because it was closed when he returned from the courthouse. Before discussing jury instructions, the court provided defendant with a book containing the form criminal instructions, along with the prosecution's proposed instructions, for review in the holding tank during the lunch recess. There is no indication the procedure proposed by the court was inadequate.

(Slip Op. at p. 10-14 (footnote omitted).)

The United States Supreme Court has held that the denial of access to a law library cannot provide the basis for federal habeas corpus relief because no Supreme Court case clearly establishes a *pro se* petitioner's constitutional right to law library access. See Kane v. Garcia Espitia, 546 U.S. 9, 10, 126 S. Ct. 407, 163 L. Ed. 2d 10 (2005) (per curiam); see also Mendoza v. Carey, 449 F.3d 1065, 1070-71 (9th Cir. 2006) (explaining that Kane "held that the denial of access to a law library cannot provide a basis for a *pro se* petitioner's habeas relief because no Supreme Court case clearly establishes a *pro se* petitioner's constitutional right to law library access"). Therefore, in this case, the state court decision **[*49]** denying this claim was not contrary to or an unreasonable application of clearly established federal law to warrant federal habeas relief.

C. Claim III

In Claim III, Petitioner argues that his constitutional rights were violated when the trial court denied his motion for a live pre-trial lineup. The California Court of Appeal discussed the facts underlying this Claim in Petitioner's direct appeal:

> Defendant argues he is entitled to reversal of his robbery convictions because the court erred in denying his March 1999 motion for a live lineup. The attorney declaration that accompanied the motion merely stated that the eyewitnesses to the robbery at Day's Market did not have sufficient opportunity to observe the suspect because the robber wore a mask. It also cited inconsistencies in descriptions of the robber and a question whether the clerk identified defendant in the field show-up. Counsel noted at the hearing that defendant was wounded and lying on the ground when the clerk arrived to view him. The court found there were no facts showing a substantial or reasonable likelihood of misidentification, and denied the motion. On appeal, defendant argues the *trial record* demonstrates that eyewitness **[*50]** identification was a material issue and there was a reasonable likelihood of mistaken identification in the field show-up.

(Slip Op. at p. 14-15.)

In Evans v. Superior Court, 11 Cal. 3d 617, 625, 114 Cal. Rptr. 121, 522 P.2d 681 (1974), the California Supreme Court held that "due process requires in an appropriate case that an accused, upon timely request thereof, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct criminal conduct can participate." Unlike Evans, the United States Supreme Court has never held that a criminal defendant has a constitutional right to a pretrial lineup. The Ninth Circuit has explicitly rejected any constitutional dimension to a defendant's request for a pretrial lineup. See United States v. Robertson, 606 F.2d 853, 857 (9th Cir. 1979) ("An accused has no absolute or constitutional right to a lineup."); see also Allen v. Smelosky, Civ. No. 08-1782, 2010 U.S. Dist. LEXIS 115498, 2010 WL 4366108, at *11 (C.D. Cal. May 17, 2010), report and recommendation adopted by, 2010 U.S. Dist. LEXIS 114861, 2010 WL 4363476 (C.D. Cal. Oct. 26, 2010); Sanders v. Director of CDC, Civ. No. 05-2250, 2009 U.S. Dist. LEXIS 63049, 2009 WL 2136935, at *9 (E.D. Cal. July 15, 2009) ("There is no constitutional right to a lineup."); Johnson v. Giurbino, Civ No. 03-6013, 2007 U.S. Dist. LEXIS 63800, 2007 WL 2481789, at *20 (E.D. Cal. Aug. 29, 2007), **[*51]** report and recommendation adopted by, 2007 U.S. Dist. LEXIS 71492, 2007 WL 2793309 (E.D. Cal. Sep. 26, 2007). For the foregoing reasons, Petitioner is not entitled to federal habeas relief on Claim III.

D. Claim IV

In Claim IV, Petitioner argues that the trial court committed reversible error when it refused Petitioner from impeaching a prosecution witness with a prior misdemeanor conviction. The California Court of Appeal discussed the facts underlying this claim in its decision on direct appeal:

> At trial, Joseph Rojas described the struggle between Officer Husted and defendant. Among other things, he said defendant shot first. The court granted the prosecution's motion to exclude any reference to Rojas's prior misdemeanor convictions for vandalism and burglary on grounds they were "not sufficiently probative to be admitted for the issue of credibility . . . ." Defendant argues he was entitled to impeach Rojas with the prior burglary conviction because it was a crime of moral turpitude. He maintains the error deprived him of his Sixth and Fourteenth Amendment rights to confront witnesses and present a complete defense.

(Slip Op. at p. 16.) At trial, the court concluded the following:

> My view is this: A misdemeanor **[*52]** or a misdemeanor conduct is viewed in the law, understandably, as less probative, less impact, if you will, than a felony conviction for obvious reasons. When the conduct constitutes moral turpitude, it can be relative; but under the circumstances of this case, where there has been almost 18, maybe more than 18 years since the conduct itself, no indications of any untoward contact with law enforcement, the indication is that he is a very productive member of society at this point and has been for some time.
> There are no specifics regarding the particulars of the case that make that — the value of that prior conviction to be particularly meaningful.
> I agree with the People's argument, that it is not sufficiently probative to be admitted for the issue of credibility in this case. It is a preliminary matter under 352.

(Reporter's Tr. at p. 86.) On direct appeal, the Court of Appeal affirmed this ruling and stated:

> The prosecution represented that Rojas's prior misdemeanor conviction for burglary occurred 18 or 19 years before trial, when he was 19 years old. Rojas had no criminal history since that time and was currently employed by the state. The prosecution argued the prior had no probative **[*53]** value for purposes of impeachment and "would be simply to embarrass the witness." The court

> acknowledged that a misdemeanor is less probative than a felony conviction, cited the date of the prior and noted there were no details to show that the prior was particularly meaningful for purposes of impeachment. We conclude there was no abuse of discretion on this record.

(Slip Op. at p. 17-18.)

Criminal defendants have a constitutional right to present relevant evidence in their own defense. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The right comes from both the right to due process under the Fourteenth Amendment, see Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), and the right "to have compulsory process for obtaining witnesses in his favor" provided by the Sixth Amendment. See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The Confrontation Clause of the Sixth Amendment does not prevent a trial judge from imposing reasonable limits on cross-examination based on concerns of harassment, prejudice, confusion of issues, witness safety or interrogation that is repetitive or only marginally relevant. See Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The Confrontation Clause guarantees **[*54]** an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent the defense might wish. See Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (per curiam). A petitioner meets his burden of showing a Confrontation Clause violation by showing that "[a] reasonable jury might have received a significantly different impression of [a witness'] credibility . . . had counsel been permitted to pursue his proposed line of cross-examination." Van Arsdall, 475 U.S. at 680. In determining whether a criminal's right to confrontation has been violated by the exclusion of evidence on cross-examination, a court must inquire whether: "(1) the evidence was relevant; (2) there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness." United States v. Beardslee, 197 F.3d 378, 383 (9th Cir. 1999).

Rojas appeared at trial and was extensively cross-examined by Petitioner. Petitioner attempted to attack Rojas' credibility with his prior statements. Even if the evidence of Rojas's misdemeanor conviction **[*55]** was relevant, there were other legitimate interests outweighing Petitioner's interests in presenting the evidence of the conviction as noted by the California Court of Appeal and the jury had sufficient information to assess the credibility of Rojas. Thus, under these circumstances, the fact that the trial court excluded evidence of Rojas' prior misdemeanor conviction did not violate Petitioner's Confrontation Clause rights.

Furthermore, even assuming *arguendo* that the trial court erred in not allowing Petitioner to impeach Rojas with his prior misdemeanor conviction, the error was harmless. The improper denial of a defendant's opportunity to impeach a witness is subject to harmless-error analysis. See Van Arsdall, 475 U.S. at 684 (stating that Confrontation Clause errors are subject to Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) analysis). Petitioner is not entitled to federal habeas relief unless he can establish that the trial court's error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637; see also Forn v. Hornung, 343 F.3d 990, 999 (9th Cir. 2003) (finding that Confrontation Clause error did not have a "substantial and **[*56]** injurious" effect on the verdict and that the error was therefore harmless). Determining whether the error was harmless depends on a host of factors which include: (1) the importance of the witness' testimony in the prosecution case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. See Van Arsdall, 475 U.S. at 684.

In this case, Rojas' testimony concerning the shooting was corroborated by Husted. Petitioner was able to fully cross-examine Rojas on what he observed on the date of the incident. Any purported error in failing to allow Petitioner to impeach Rojas with an eighteen year old

misdemeanor conviction would be considered harmless under these circumstances. Therefore, Petitioner is not entitled to habeas relief on Claim IV.

E. Claim V

In Claim V, Petitioner makes several arguments; specifically he argues that: (1) the prosecutor failed to meet his burden of proof regarding his conviction for being an ex-felon in possession of a firearm because it did not satisfy **[*57]** the prior felony element of that charge; (2) the 1992 conviction of battery with serious bodily injury did not constitute a strike for sentencing purposes because it was not a serious prior felony; (3) a jury rather than the trial judge should have determined that the 1992 battery conviction was a serious prior felony for purposes of constituting a strike; and (4) using the 1992 battery conviction as a strike for sentencing purposes violated the 1992 plea agreement. It does not appear that Petitioner raised these issues to the California Supreme Court.

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. See 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. See Coleman 501 U.S. at 731. A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. See Duncan, 513 U.S. at 365; Picard, 404 U.S. at 276. A federal **[*58]** court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. See Duncan, 513 U.S. at 365.

Even though Petitioner's arguments as enunciated in Claim V are unexhausted because the factual and legal basis giving rise to the claims were not argued to the California Supreme Court, unexhausted claims may "be denied on the merits, notwithstanding the failure of the applicant to exhaust remedies in the courts of the State." 28 U.S.C. § 2254(b)(2). A federal court considering a habeas corpus petition may deny an unexhausted claim on the merits when it is perfectly clear that the claim is not "colorable." See Cassett 406 F.3d at 624.

In his first argument within Claim V, Petitioner argues that there was insufficient evidence to convict him of being an ex-felon in possession of a firearm because there was insufficient evidence of his prior conviction at trial. (See Pet'r's Traverse at p. 47 ("The People did not meet their burden of proving Petitioner's [prior conviction] of [Cal. Penal Code §] 243(d) satisfied the "prior felony" element prerequisite to a conviction **[*59]** of Count (5) (ex-felon in possession)") (internal quotation marks omitted).)

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). There is sufficient evidence to support a conviction, if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d at 982 (quoting Jackson, 443 U.S. at 318). A petitioner for a federal writ of habeas corpus "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. V. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005).

The amended information charged Petitioner with violating Section 12021(a) [6] of the Penal Code and stated as follows:

> That on **[*60]** the 1st day of July, 1998, at and in the County of Sacramento,

> State of California, the defendant then and there before the filing of this information, did willfully and unlawfully own, possess and have custody and control of a firearm, to wit, a .22 caliber revolver, the said defendant having theretofore been duly and legally convicted of a felony, to wit, the crime of battery with serious bodily injury, in violation of Section 243(d) of the Penal Code, on or about the 29th day of June, 1992, by and before the Consolidated Superior and Municipal Court of the State of California for the County of Sacramento.

(Clerk's Tr. at p. 146.) In this case, the prosecution presented evidence in the form of judicial documents (including his plea) that were admitted into evidence regarding Petitioner's 1992 § 243(d) conviction. (See Reporter's Tr. at 1115 and Clerk's Tr. at 906.) Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence in the record such that any rational trier of fact could have found that Petitioner was a convicted ex-felon so as to satisfy that element to support the conviction for being an ex-felon in possession of a firearm. Petitioner **[*61]** is not entitled to federal habeas relief on this argument.

FOOTNOTES

6 California Penal Code § 12021(a)(1) states:

> Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country . . . who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

Next, Petitioner argues that there was insufficient evidence for the trial judge to determine that the 1992 battery conviction constituted a serious prior felony for purposes of California's Three Strikes Law. To qualify as a strike under the Three Strikes Law, a prior conviction must be either a "serious" or a "violent" felony. See Cal. Penal Code § 667(d)(1). A serious felony is defined (amongst other definitions) as "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice." Id. § 1192.7(c)(8). In this case, there was sufficient evidence in determining that Petitioner's 1992 conviction for battery with great bodily injury constituted a serious prior felony for purposes of constituting a strike. In California, the term "serious bodily injury" **[*62]** contained in California Penal Code § 243(d) "is essentially equivalent to or synonymous with 'great bodily injury' for the purpose of a 'serious felony' sentence enhancement pursuant to Penal Code sections 667, subdivisions (a) and (d), and 1192.7, subdivision (c)(8)." People v. Moore, 10 Cal. App. 4th 1868, 1871, 13 Cal. Rptr. 2d 713 (1992). Thus, Petitioner's offense of battery with serious bodily injury fell "under the statute's general category of 'any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice.'" Id. Therefore, Petitioner is not entitled to federal habeas relief on this argument.

Next, Petitioner argues that the issue of whether his 1992 battery conviction constituted a strike for sentencing purposes should have been determined by a jury rather than the trial judge. (See Pet'r's Traverse at p. 51.) In support of this argument, Petitioner relies on Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). At the outset, it is worth noting that the jury specifically found that Petitioner was previously "convicted of a felony namely battery with serious bodily injury in violation of Penal Code Section 243(d)." (Clerk's Tr. **[*63]** at p. 818.)

Additionally, contrary to Petitioner's reliance on Apprendi, there is no federal constitutional right to a jury trial on the fact that a prior conviction might increase a sentence. See Apprendi, 530 U.S. at 489 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a

crime beyond the prescribed statutory maximum must be submitted to the jury.") (emphasis added); see also Cunningham v. California, 549 U.S. 270, 282, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) ("Other than a prior conviction, see Almendarez-Torres v. United States, 523 U.S. 224, 239-247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), we held in Apprendi, 'any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); People v. McGee, 38 Cal. 4th 682, 685-86, 42 Cal. Rptr. 3d 899, 133 P.3d 1054 (2006) (finding no right to a jury trial to determine whether a prior conviction qualifies as a strike "[u]nless and until the high court directs otherwise").

Finally, Petitioner asserts that using a 1992 conviction as a strike in determining his sentence violated the 1992 plea agreement on that conviction. The Sacramento County Superior Court discussed **[*64]** the factual circumstances of this argument in analyzing one of Petitioner's state habeas petitions:

> Petitioner next claims that the use of his prior conviction from Case No. CR 111662 in Case No. 98F05829 violated his plea agreement in Case No. CR 111662, and that no mention was made at the time that the conviction could be used in future prosecutions, and that counsel was ineffective in failing to advise him of those consequences.
>
> Petitioner is correct, that no mention was made at the change of plea hearing in Case No. CR 111662, as is borne out by the reporter's transcript for that hearing that is contained in the court's underlying file for the matter. However, that does not entitle him to relief. The use of a prior conviction in a future prosecution for enhancement purposes is a collateral matter that need not be disclosed by the court to a defendant when entering a guilty or no contest plea (People v. Gurule (2002) 28 Cal.4th 557, 123 Cal. Rptr. 2d 345, 51 P.3d 224, People v. Crosby (1992) 3 Cal.App.4th 1352, 5 Cal. Rptr. 2d 159), nor may a defendant attack a plea on the ground that his counsel failed to advise him of that collateral consequence (United States v. Fry (9th Cir. 2003) 322 F.3d 1198). Rather, only if petitioner had been **[*65]** affirmatively promised as part of the plea itself, that the conviction could not be sued in the future to enchance a sentence imposed on a future crime (see generally Davis v. Woodford (9th Cir. 2006) 446 F.3d 957; Buckley v. Terhune (9th Cir. 2006) 441 F.3d 688; Brown v. Poole (9th Cir. 2003) 337 F.3d 1155; In re Honesto (2005) 130 Cal.App.4th 81, 29 Cal. Rptr. 3d 653; People v. McElwee (2005) 128 Cal.App.4th 1348, 27 Cal. Rptr. 3d 448) or if counsel had misadvised him on the matter (In re Moser (1993) 6 Cal. 4th 342, 24 Cal. Rptr. 2d 723, 862 P.2d 723), would he appear to be able to set forth an argument that might possibly have merit.

(Resp'ts' Lodged Doc. 12 at p. 3.)

A criminal defendant's right to due process entitles him to enforce the terms of a plea agreement. See Santobello v. New York, 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). "Plea agreements are contractual in nature and are measured by contract law standards." United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993). As the Ninth Circuit has explained:

> In California, "[a] negotiated plea agreement is a form of contract, and is interpreted according to general contract principles," People v Shelton, 37 Cal. 4th 759, 37 Cal. Rptr. 3d 354, 125 P.3d 290 (2006) and "according to the same rules as other contracts," **[*66]** People v. Toscano, 124 Cal. App.4th 340, 344, 20 Cal. Rptr. 3d 923 (2004) (cited with approval in Shelton along with other California cases to same effect dating back to 1982). Thus . . . California Courts are required to construe and interpret plea agreements in accordance with state contract law.

Buckley v. Terhune, 441 F.3d 688, 695 (9th Cir. 2006). Under California law, a plea bargain is

"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004) (citation omitted). Absent an express promise that convictions resulting from a petitioner's plea agreement would not be used to enhance Petitioner's sentence for future convictions in a way other than proscribed by the then existing version of California's Penal Code, the plea agreement vested no rights other than those which related to the immediate disposition of the case. See id.

In this case, Petitioner fails to show that his plea agreement had such a promise. The plea colloquy for the 1992 conviction states that beyond those **[*67]** promises mentioned in open court, Petitioner was not promised anything else which caused him to enter his plea. (See Resp'ts' Lodged Doc. 11 at p. 59.) He has not shown that he was promised anything with regard to the fact that the 1992 battery conviction would only be used to enhance future sentences in accordance with the then-existing sentencing regime. Thus, Petitioner is not entitled to federal habeas relief on any of his arguments within Claim V.

VI. PETITIONER'S REQUESTS

A. Request for an Evidentiary Hearing

Petitioner requests an evidentiary hearing on his Claims. (See Pet'r's Pet. at p. 37.) Pursuant to 28 U.S.C. § 2254(e)(2), a district court presented with a request for an evidentiary hearing must first determine whether a factual basis exists in the record to support a petitioner's claims and, if not, whether a factual basis exists in the record to support a petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999); see also Earp v. Ornoski, 431 F.3d 1158, 1166 (9th Cir. 2005). A petitioner requesting an evidentiary hearing must also demonstrate that he has presented a "colorable claim for **[*68]** relief." Earp, 431 F.3d at 1167 (citations omitted). To show that a claim is "colorable," a petitioner is "required to allege specific facts which, if true, would entitled him to relief." Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998) (internal quotation marks and citation omitted). In this case, an evidentiary hearing is not warranted for the reasons stated in supra Part V. Petitioner failed to demonstrate that he has a colorable claim for federal habeas relief.

B. Request for Discovery

Petitioner also has filed a motion for discovery. (See Dkt. No. 49.) In the motion, Petitioner seeks "one true original copy of latent print request form dated: 2-2-01 Log # 50460 (case report # 98-50733)." Petitioner asserts that this request relates to the rights associated with representing himself at trial.

Parties to a habeas proceeding are not entitled to discovery as a matter of course. See Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). Rather, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Rule 6(a), Rules Governing § 2254 Cases; see also Bracy, 520 U.S. at 904. Good cause is shown "where **[*69]** specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." Id. at 908-09 (internal quotation marks and citation omitted); see also Pham v. Terhune, 400 F.3d 740, 743 (9th Cir. 2004). In this case, Petitioner has failed to show good cause to warrant his request for discovery as he has not shown reason to believe that he would be entitled to relief if facts are more fully developed.

VII. CONCLUSION

For the reasons discussed in this Order, Petitioner is not entitled to federal habeas relief. Should petitioner wish to appeal to appeal the court's decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1); Hayward v. Marshall, 603 F.3d 546, 554 (9th Cir. 2010) (en banc). A

certificate of appealability may issue where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is "'debatable **[*70]** among jurists of reason,'" could be resolved differently by a different court, or is "'adequate to deserve encouragement to proceed further.'" Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). [7] In this case, however, petitioner failed to make a substantial showing of the denial of a constitutional right with respect to any issue presented.

FOOTNOTES

[7] Except for the requirement that appealable issues be specifically identified, the standard for issuance of a certificate of appealability is the same as the standard that applied to issuance of a certificate of probable cause. See Jennings, 290 F.3d at 1010.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's request for an evidentiary hearing is DENIED;

2. Petitioner's motion for production of documents (Dkt. No. 49) is DENIED;

3. Petitioner's Petition for writ of habeas corpus is DENIED;

4. A certificate of appealability shall not issue; and

5. The Clerk is directed to close this case.

DATED: January 26, 2011

/s/ Timothy J Bommer

TIMOTHY J BOMMER

UNITED STATES MAGISTRATE JUDGE

*2010 U.S. Dist. LEXIS 117743, **

BRADLEY MEIER, Petitioner, vs. JOHN W. HAVILAND, Respondent.

No. 2: 09-cv-0551 KJN P

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 117743

October 21, 2010, Decided
October 22, 2010, Filed

CORE TERMS: plea agreement, sentence, enhance, ineffective, prior conviction, undersigned, certificate, appealability, habeas corpus, assistance of counsel, deference, breached, Strikes Law, federal law, petitioner's claim, controlled substance, objectively unreasonable, robbery conviction, trial counsel, enhancement, probability, sentencing, conducting, felony, facto, sentencing laws, counsel's performance, claim of ineffective assistance, plea bargain, federal authority

COUNSEL: [*1] Bradley Meier, Petitioner, Pro se, VACAVILLE, CA.

For John W. Haviland, Warden, Respondent: Barton Elwell Bowers, LEAD ATTORNEY, Attorney General's Office for the State of California, Sacramento, CA; Brian G. Smiley, LEAD ATTORNEY, Attorney General's Office of the State of California, Sacramento, CA.

JUDGES: KENDALL J. NEWMAN, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: KENDALL J. NEWMAN

OPINION

ORDER

I. Introduction

Petitioner is a state prisoner proceeding without counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Both petitioner and respondent have consented to the jurisdiction of the undersigned.

This action is proceeding on the original petition filed February 26, 2009. Petitioner challenges his 2006 conviction for three counts of possession of a controlled substance (Cal. Health & Safety Code § 11377(a)), one count of display of an altered license plate tag (Cal. Vehicle Code § 4462.5), and one count of being under the influence of a controlled substance (Cal. Health and Safety Code § 11550(a)). Petitioner's sentence was enhanced by his prior conviction for a serious or violent felony (Cal. Penal Code §§ 667(b)-(i), 1170.12) and his commission of two felony offenses while on bail (Cal. Penal Code § 12022.1). **[*2]** Petitioner is serving a sentence of nine years and four months.

The petition raises three claims: 1) breach of plea agreement; 2) ineffective assistance of counsel; and 3) ineffective assistance of appellate counsel. After carefully reviewing the record, the undersigned orders the petition denied.

II. Anti-Terrorism and Effective Death Penalty Act ("AEDPA")

In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. Id. at 405. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law; or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application **[*3]** of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Id. at 407-08. It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law. . . .[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410-11 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Visciotti, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

"Clearly established" law is law that has been "squarely addressed" by the United States Supreme Court. Wright v. Van Patten, 552 U.S. 120, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008). Thus, extrapolations of settled law to unique situations will not qualify as clearly **[*4]** established. See e.g., Carey v. Musladin, 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (established law not permitting state sponsored practices to inject bias into a criminal proceeding by compelling a defendant to wear prison clothing or by unnecessary showing of uniformed guards does not qualify as clearly established law when spectators' conduct is the alleged cause of bias injection).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority, in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002). Nevertheless, a state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. Id. An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. at 9.

However, where the state courts have not addressed the constitutional **[*5]** issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of

that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

When reviewing a state court's summary denial of a claim, the court "looks through" the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000)

III. Discussion

A. Claim One: Alleged Breach of Plea Agreement

Petitioner contends that use of his 1992 robbery conviction to enhance his sentence breached the terms of his 1992 plea agreement. Pursuant to the Three Strikes Law, petitioner's prior 1992 robbery conviction was used to double the base terms for his convictions for possession of a controlled substance. (Reporter's Transcript ("RT"), at 93-95.)

Petitioner argues that in 1994, California Penal Code § 667 was amended to permit doubling of the base sentence based on a prior conviction. Petitioner argues that doubling his base terms in 2006 based on **[*6]** a law that was not in effect when he plead guilty to the prior conviction in 1992 violated the terms of the 1992 plea agreement. The Sacramento County Superior Court rejected this claim in an order denying petitioner's habeas corpus petition:

> Petitioner argues that the plea agreement in his 1992 conviction for robbery included a promise that if he re-offended, he would only receive a one-year or a five-year enhancement for the prior conviction. Petitioner has not attached any documents to support this claim. On August 18, 1992, petitioner plead guilty to first degree robbery. There is no evidence in the petition or in the court file that any promises were made to petitioner regarding future use of the conviction for sentencing purposes. In addition, as decided in Gipson, using petitioner's 1992 conviction to enhance the sentence in his 2005 case does not violate the plea bargain of the earlier case.

(Respondent's Lodged Document 8, Appendix D.)

A criminal defendant has a due process right to enforce the terms of his plea agreement. Santobello v. New York, 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). The party asserting the breach bears the burden of proving the underlying facts establishing a breach. **[*7]** United States v. Laday, 56 F.3d 24, 26 (5th Cir. 1995); United States v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988).

To determine if a plea agreement has been breached, courts look to state contract law and consider what was reasonably understood by the defendant when he entered his plea of guilty. See Davis v. Woodford, 446 F.3d 957, 962 (9th Cir. 2006); Gunn v. Ignacio, 263 F.3d 965, 970 (9th Cir. 2001). In California, contracts (including plea bargains) are deemed to incorporate and contemplate not only the existing law, but the reserve power of the state to amend the law or enact additional laws. Davis, 446 F.3d at 962 (citing People v. Gipson, 117 Cal.App.4th 1065, 12 Cal.Rptr.3d 478 (2004)).

Petitioner has failed to establish a breach of the 1992 plea agreement. Petitioner does not demonstrate that the 1992 plea agreement contained terms that petitioner would not be subject to future California sentencing laws as amended, or that such laws would not be changed. Attached to the petition is a copy of the transcript from petitioner's 1992 change of plea hearing. This transcript does not contain any evidence in support of petitioner's claim. Similarly, petitioner does not allege **[*8]** that the prosecutor failed to abide by any express term in that

agreement which effectively provided either of the same protections. Petitioner's belief that only 1992 sentencing provisions would govern future enhancements based on his prior conviction does not constitute a term of the 1992 plea agreement, and thus the use of his 1992 conviction to enhance his 2006 sentence in the instant case, does not constitute a breach of the 1992 plea agreement. See Owens v. Lamarque, 2010 U.S. Dist. LEXIS 61198, 2010 WL 2557552 (C.D. 2010) (same). In this case, petitioner fails to demonstrate that the use of his 1992 conviction as a strike to enhance his 2006 sentence constituted a breach of the 1992 plea agreement or otherwise deprived him of due process.

Petitioner may also be raising an Ex Post Facto claim regarding use of the 1992 conviction to enhance his 2006 conviction based on the Three Strikes Law.

Under well settled Supreme Court law, the constitution forbids states to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed[,] or imposes additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) (quoting Cummings v. Missouri, 71 U.S. 277, 4 Wall. 277, 325-26, 18 L.Ed. 356 (1867)). **[*9]** However, the ex post facto prohibition does not preclude states from enacting recidivist statutes which enhance a criminal sentence based on prior criminal convictions if those statutes were in effect when the current triggering offense was committed. Parke v. Raley, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). This is because "a charge under a recidivism statute does not state a separate offense, but goes to punishment only." Id.

Petitioner's triggering offenses were committed in 2005 (Clerk's Transcript ("CT"), at 120-21), eleven years after the Three Strikes Law was enacted. Thus, petitioner had ample warning that his 1992 robbery conviction could be used as a "strike" to increase the sentence for any subsequent felony. Therefore, enhancement of his sentence by reason of the prior conviction and operation of the Three Strikes law was neither unexpected nor unconstitutional. See Parke, 506 U.S. at 27 ("[W]e have repeatedly upheld recidivism statutes against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." **[*10]** (internal quotation marks and citations omitted)).

For the reasons discussed above, petitioner's claim challenging use of his 1992 conviction to enhance his 2006 sentence is without merit. After conducting an AEDPA review, the undersigned denies claim one.

B. Claim Two: Alleged Ineffective Assistance of Counsel

Legal Standard

The test for demonstrating ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a petitioner must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Id. at 688. To this end, the petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at 690. The federal court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Id. "We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689).

Second, **[*11]** a petitioner must affirmatively prove prejudice. Strickland, 466 U.S. at 693. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

In extraordinary cases, ineffective assistance of counsel claims are evaluated based on a

fundamental fairness standard. Williams v. Taylor, 529 U.S. 362, 391-93, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (citing Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

The Supreme Court has emphasized the importance of giving deference to trial counsel's decisions, especially in the AEDPA context:

> In Strickland we said that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. Thus, even when a court is presented with an ineffective-assistance claim not subject to § 2254(d)(1) deference, a [petitioner] must overcome the "presumption **[*12]** that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Ibid. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).
>
> For [petitioner] to succeed, however, he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. See Williams, supra, at 411.[1] Rather, he must show that the [ ]Court of Appeals applied Strickland to the facts of his case in an objectively unreasonable manner.

Bell v. Cone, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

FOOTNOTES

1 This internal citation should be corrected to Williams v. Kaiser, 323 U.S. 471, 477, 65 S. Ct. 363, 89 L. Ed. 398 (1945).

Analysis

Petitioner alleges that his trial counsel was ineffective for failing to argue at sentencing in 2006 that use of the 1992 conviction to enhance his sentence breached the 1992 plea agreement. As discussed above, petitioner has not demonstrated that the 1992 plea agreement contained terms that petitioner would not be subject to future California sentencing laws as amended, or that such laws would **[*13]** not be changed. Nor has petitioner demonstrated that the prosecutor failed to abide by any express term in that agreement which effectively provided either of the same protections. Petitioner has also failed to demonstrate a violation of the Ex Post Facto clause. For these reasons, trial counsel was not unreasonable for failing to challenge use of the 1992 conviction to enhance petitioner's 2006 sentence on these grounds. Accordingly, petitioner's claim of ineffective assistance of counsel is without merit. After conducting an AEDPA review, the undersigned denies claim two.

C. Claim Three: Alleged Ineffective Assistance of Appellate Counsel

A claim of ineffective assistance of appellate counsel uses the same Strickland standard that is applied to trial counsel. Smith v. Robbins, 528 U.S. 259, 287, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

Petitioner alleges that his appellate counsel should have raised on appeal the claim that use of

his 1992 conviction to enhance his 2006 sentence breached the terms of the 1992 plea agreement. As discussed above, petitioner has not demonstrated that use of the 1992 conviction to enhance his sentence violated the 1992 plea agreement, nor has he demonstrated a violation of the Ex Post Facto Clause. **[*14]** For these reasons, the California Court of Appeal would have rejected such a claim had appellate counsel raised it on appeal. Accordingly, this claim of ineffective assistance of appellate counsel is without merit.

After conducting an AEDPA review, the undersigned denies claim three.

IV. Conclusion

For all of the above reasons, the undersigned recommends that petitioner's application for a writ of habeas corpus be denied. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22 (b).

For the reasons discussed above, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should not issue in this action.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's application **[*15]** for a writ of habeas corpus is denied;

2. A certificate of appealability shall not issue in this action.

DATED: October 21, 2010

/s/ Kendall J. Newman

KENDALL J. NEWMAN

UNITED STATES MAGISTRATE JUDGE

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*2010 U.S. Dist. LEXIS 110955, **

JOHNNY A. ECHOLS, Petitioner, v. CHERYL K. PLILER (Warden), Respondent.

No. CV 00-270-CBM(CW)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 110955

June 2, 2010, Decided
June 2, 2010, Filed

SUBSEQUENT HISTORY: Accepted by, Writ of habeas corpus denied, Dismissed by Echols v. Pliler, 2010 U.S. Dist. LEXIS 110954 (C.D. Cal., Oct. 19, 2010)

PRIOR HISTORY: People v. Echols, 1998 Cal. LEXIS 6099 (Cal., Sept. 16, 1998)

CORE TERMS: sentence, habeas petition, convicted, ex post facto, prior convictions, years to life, self-representation, untimely, parole, federal habeas, defense counsel, continuance, theft, jury trial, probation, invalid, cruel, supplemental, summary denial, objectively unreasonable, disproportionality, proportionality, ineffective, sentencing, sentenced, cocaine, reasonable doubt instruction, unusual punishment, criminal history, plea agreement

COUNSEL: **[*1]** For Johnny A Echols, Petitioner: Elizabeth A Newman ▾, LEAD ATTORNEY, Federal Public Defenders Office, Los Angeles, CA.

For Cheryl K Pliler, Warden, Respondent: Elizabeth A Newman ▾, LEAD ATTORNEY, Federal Public Defenders Office, Los Angeles, CA; Stephanie A Miyoshi ▾, Susan D Martynec, LEAD ATTORNEYS, CAAG - Office of Attorney General of California, Los Angeles, CA.

For Bill Lockyer, Respondent: Stephanie A Miyoshi ▾, Susan D Martynec, LEAD ATTORNEYS, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: CARLA M. WOEHRLE ▾, United States Magistrate Judge.

OPINION BY: CARLA M. WOEHRLE ▾

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Consuelo B. Marshall, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For reasons stated below, the petition for habeas corpus relief should be denied and this action dismissed with prejudice.

I.PROCEDURAL HISTORY

Petitioner, a prisoner in state custody, challenges a conviction in California Superior Court, Los Angeles County, Case No. YA029631. [Petition ("Pet.") at 3.] Petitioner was charged **[*2]** with possession of cocaine base for sale, and, on March 12, 1997, a jury convicted him of the lesser included offense of possession of cocaine base. [Return ("Ret.") Exhibit ("Ex.") A.] Petitioner waived trial on allegations of prior convictions, and admitted two prior "strike" convictions in Los Angeles Superior Court: a 1982 conviction for kidnaping (Case No. A084601) and a 1990 conviction for negligent discharge of a firearm (Case No. BA002945). [Id.] On May 13, 1997, the superior court imposed a "third strike" sentence of twenty-five years to life imprisonment under California's "Three Strikes" law. [Id.]

On appeal, Petitioner, with counsel, asserted two substantive claims (on the trial court's refusal to reinstate his self-representation and on the reasonable doubt instruction used), and noted that the abstract of judgment wrongly showed him as convicted of possession for sale. In an unpublished opinion filed June 30, 1998, the California Court of Appeal remanded for the trial court to correct the abstract, but otherwise affirmed the judgment of conviction. [No. B113681, Opinion, Lodged Document ("L. Doc.") No. 1, lodged October 24, 2005.] [1] Petitioner, with appellate counsel, **[*3]** filed a petition for review addressing only the reasonable doubt instruction. [No. S072332, Petition, L. Doc. No. 1, lodged April 12, 2000.] The California Supreme Court denied review, without comment or citation, on September 16, 1998. [No. S072332, Order, Ret. Ex. C.]

FOOTNOTES

1 Several of the state court documents cited herein have been lodged or submitted as exhibits more than once. Here, only one submission for each document is cited.

On March 9, 1999, Petitioner filed a pro se habeas petition in the California Supreme Court, challenging, on several grounds, the application of the Three Strikes law in his case. [No. S077151, Petition and Exhibits, L. Doc. No. 2, lodged April 12, 2000.] The state supreme court summarily denied the petition on June 30, 1999. [No. S077151, Order, L. Doc. No. 2, lodged October 24, 2005.] As discussed below, Petitioner filed a second pro se habeas petition on May 8, 2000, which the state supreme court denied on August 9, 2000. [No. S088174, Petition and Order, L. Doc. No. 3, lodged October 24, 2005.]

Petitioner filed the present pro se habeas petition (28 U.S.C. § 2254) on January 7, 2000, asserting seven grounds for federal habeas relief. [Pet. and Petitioner's **[*4]** Brief (P. Brf.), docket no. 1.] On April 12, 2000, Respondent filed a return arguing only that the petition should be dismissed as "mixed" because Petitioner had not exhausted ground six (on the trial court's refusal to allow Petitioner to proceed with representation of choice). [Ret., docket no. 11.] In a motion filed July 7, 2000, Petitioner conceded that he had not exhausted ground six, and asked the court either to stay proceedings while he did so, or to delete ground six and proceed. [Docket no. 14.] In an order filed August 25, 2000, the court granted the second alternative request, deleted ground six, and ordered further briefing. [Docket no. 16.]

On September 18, 2000, Respondent filed a supplemental return. [Sup. Ret., docket no. 17.] Petitioner filed a supplemental traverse on October 23, 2000. [Sup. Tra., Docket no. 23.] In a minute order filed April 12, 2002, the court determined that additional briefing was required in

light of recent Ninth Circuit law, and ordered that a member of the Federal Public Defender's office be appointed as counsel for Petitioner. [Docket no. 31.] The following additional briefing for Petitioner was all filed through counsel.

Petitioner's supplemental **[*5]** brief was filed on September 10, 2002. [P. Sup. Brf., Docket no. 36.] Respondent's supplemental brief was filed on October 31, 2002. [R. Sup. Brf., Docket no. 37.] Petitioner's supplemental reply was filed on December 12, 2002. [Sup. Rep., Docket no. 38.]

Petitioner's second supplemental brief was filed on August 30, 2005. [2d P. Sup. Brf., Docket no. 85.] Petitioner also filed an unopposed application for leave to address ground six and to vacate the court's order deleting the claim. [2] [Docket no. 86.] The court granted Petitioner's application (without deciding the question of exhaustion) on September 7, 2005. [Docket no. 87.] Respondent's second supplemental return was filed on October 24, 2005. [2d Sup. Ret., Docket no. 88.] Petitioner's second supplemental reply was filed on August 28, 2006. [2d Sup. Rep., Docket no. 108.] The matter has been taken under submission.

FOOTNOTES

2 Petitioner provided evidence that a habeas petition was filed in the state supreme court on May 8, 2000, and denied on August 9, 2000, with citations to In re Clark (1993) 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729, and In re Dixon (1953) 41 Cal. 2d. 756, 759, 264 P.2d 513. [No. S088174, Petition and Order.]

II.PETITIONER'S PRESENT CLAIMS

Petitioner has stated **[*6]** six claims for federal habeas relief:

1. The trial court committed ex post facto and due process violations in sentencing Petitioner under the Three Strikes law. [Pet. at 6; P. Brf. at 7-9; Ret. at 2; Sup. Ret. at 2-9; Sup. Tra. at 4-6.]

2. Petitioner's trial counsel was ineffective when she withdrew a motion challenging the priors, when she advised Petitioner to waive a jury trial on the priors, and when she advised him to admit the priors. [Pet at 6, P. Brf. at 9-12; Ret. at 2; Sup. Ret. at 9-13; Sup. Tra. at 6-8.]

3. The trial court was required to strike an invalid prior and misunderstood its discretion to strike priors. [Pet. at 7, P. Brf. at 13-15; Ret. at 2; Sup. Ret. at 13-17; Sup. Tra. at 8-13.]

4. Petitioner's sentence was disproportionate and amounted to cruel and unusual punishment. [Pet. at 7, P. Brf. at 15; Ret. at 2; Sup. Ret. at 17-20; Sup. Tra. at 13-15; P. Sup. Brf.; R. Sup. Brf.; Sup. Rep.; 2d P. Sup. Brf. at 1-21; 2d Sup. Ret. at 6-11; 2d Sup. Rep. at 3-7.]

5. The trial court committed an ex post facto violation in sentencing Petitioner under a "new statute allowing increased punishment." [Pet. at 7, P. Brf. at 16-17; Ret. at 2; Sup. Ret. at 20; Sup. Tra. at 15-18.]

6. **[*7]** The trial court violated Petitioner's rights when it refused to allow him to proceed with representation of choice. [Pet. at 7, P. Brf. at 18-26; Ret. at 2, 4-6; Sup. Tra. at 18-21; 2d P. Sup. Brf. at 21-26; 2d Sup. Ret. at 11-21; 2d Sup. Rep. at 8-21.]

7. The trial court gave an improper reasonable doubt instruction. [Pet. at 7, P. Brf. at 27-30; Ret. at 2; Sup. Ret. at 20-22; Sup. Tra. at 22-25.]

Petitioner raised present grounds six and seven on direct appeal, and the court of appeal denied ground six with a reasoned opinion and ground seven summarily. [No. B113681, Opinion.]

Petitioner raised only ground seven in his petition for review, and the state supreme court issued a summary denial. [No. S072332, Petition, Order.] Petitioner raised grounds one, two, three, four, and five in his first state habeas petition, and the California Supreme Court again issued a summary denial. [No. S077151, Petition, Order.] Petitioner again raised ground six in his second state habeas petition (along with part of ground one), and the state supreme court denied relief with citations. [S088174, Petition, Order.]

III.STANDARD OF REVIEW

Review of the petition in this case is governed by provisions of the **[*8]** Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "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).

"Clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). "Habeas relief is unavailable if the Supreme Court has not 'broken sufficient legal ground' on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue." Pinholster v. Ayers, 590 F.3d 651, 662 (9th Cir. 2009) (en banc) (quoting Williams v. Taylor, 529 U.S. 362, 381, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)), petition for cert. filed, 78 U.S.L.W. 3549 (U.S. Mar. 9, 2010) **[*9]** (No. 09-1088). Although "only Supreme Court authority is binding, circuit court precedent may be 'persuasive' in determining what law is clearly established and whether a state court applied that law unreasonably." Pinholster, 590 F.3d at 662 (citing Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir.2003)).

A state court decision is "contrary to" clearly established Supreme Court law if it "'applies a rule that contradicts the governing law set forth in [Supreme Court] cases'" or if it reaches a result different from Supreme Court precedent on "materially indistinguishable" facts. Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003) (quoting Williams, 529 U.S. at 405-06); see also Frantz v. Hazey, 533 F.3d 724, 734 (9th Cir. 2008) (en banc)(state court decision using "the wrong legal rule or framework" constitutes error under "contrary to" prong of § 2254(d)(1)).

A decision involves an "unreasonable application" of Supreme Court law "'if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir. 2004)(quoting **[*10]** Andrade, 538 U.S. at 75). "To show that a state court's application of Supreme Court precedent was 'unreasonable,' the petitioner must establish that the state court's decision was not merely incorrect or erroneous, but 'objectively unreasonable.'" Pinholster, 590 F.3d at 662 (citing Williams, 529 U.S. at 409-10). Similarly, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, U.S. , 130 S. Ct. 841, 849, 175 L. Ed. 2d 738 (2010)(citing Williams, 529 U.S. at 411); see also Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004)("objectively unreasonable" standard applies to state court factual determinations).

The phrase "adjudicated on the merits" means that the state court's "grant or denial rest[ed] on substantive, rather than procedural, grounds." Pinholster, 590 F.3d at 662 (citing Lambert v. Blodgett, 393 F.3d 943, 966 (9th Cir.2004)). In reviewing a state court adjudication, a federal habeas court looks to the last reasoned state decision on a claim as the basis for the state court's final judgment on that claim. Pinholster, 590 F.3d at 662. When there **[*11]** is no state court decision articulating a rationale for judgment on the merits of a claim, a federal habeas court independently reviews the record to determine whether the state court's decision was contrary to, or an unreasonable application of, controlling law. Pinholster, 590 F.3d at 663 and

n.4; Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000). "Such '[i]ndependent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable.'" Pinholster, 590 F.3d at 663 (quoting Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.2003)). [3]

FOOTNOTES

3 When a claim was rejected by the state court on procedural rather than substantive grounds, de novo review is required. See Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)(citations omitted). De novo review is also required if it is clear that the state court has not decided an issue. Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006)(citing Rompilla v. Beard, 545 U.S. 374, [390], 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)).

IV.DISCUSSION

A. GROUND SEVEN: REASONABLE DOUBT INSTRUCTION

In ground seven Petitioner claims that **[*12]** he was denied due process of law because of the reasonable doubt instruction given to the jury in his case. [Pet. at 7, P. Brf. at 27-30; Sup. Ret. at 20-22; Sup. Tra. at 22-25.]

Although the Constitution does not require the use of any specific words to advise a jury of the government's burden of proof in a criminal case, the instructions as a whole must correctly convey the concept of reasonable doubt. Victor v. Nebraska, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

The trial court instructed Petitioner's jury using the 1994 version of California Jury Instructions: Criminal ("CALJIC") No. 2.90, defining "reasonable doubt" as follows:

> It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

[Reporter's Transcript ("RT"), No. YA029631, L. Doc. No. 1, lodged September 18, 2000, at 271-72; see also Sup. Ret. Ex. A at 25.]

The definition of reasonable doubt in CALJIC 2.90 mirrors the **[*13]** statutory definition in California Penal Code section 1096. Until 1994, CALJIC 2.90 and Penal Code Section 1096 both defined "reasonable doubt" as follows (emphasis added):

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

In 1994, the Supreme Court found this instruction constitutionally permissible, but expressed doubt about the continuing validity of the phrases "moral evidence" and "moral certainty" considering that the historical meaning of those terms might be lost on "a modern juror." Victor,

511 U.S. at 12-13. Accordingly, the California Supreme Court recommended amending the model instruction by deleting the phrases in question, and the CALJIC Commission did so by deleting the wording underlined above. California v. Freeman, 8 Cal. 4th 450, 882 P.2d 249, 34 Cal. Rptr. 2d 558 (1994); see **[*14]** California Jury Instructions: Criminal (CALJIC), 6th Ed. (1996), App. B, p. 671. In 1995, the California legislature followed suit by similarly amending Penal Code Section 1096. CALJIC, App. B, id.

Petitioner contends that, in the revised version of CALJIC 2.90, the remaining phrase, "abiding conviction," did not suffice to properly define the reasonable doubt standard, and that the use of the revised version violated due process. [P. Brf. at 27-30; Sup. Tra. at 22-25.] The California Supreme Court summarily and silently denied this claim on direct review. [No. S077151, Order.] Previously, the court of appeal denied the claim as follows:

> We summarily reject [Petitioner's] complaint that the reasonable doubt instruction (CALJIC No. 2.90) inadequately states the prosecution's burden of proof. (People v. Padilla (1995) 11 Cal. 4th 891, 970, 47 Cal. Rptr. 2d 426, 906 P.2d 388, overruled on other grounds in People v. Hill (1998) 17 Cal. 4th 800, 823, fn. 1, 72 Cal. Rptr. 2d 656, 952 P.2d 673.)

[No. B113681, Opinion at 9.]

Although the Supreme Court has not specifically considered the post-Victor revision of CALJIC No. 2.90, the Ninth Circuit has held that it is constitutional. Lisenbee v. Henry, 166 F.3d 997, 999 (9th Cir. 1999)(use of "abiding conviction" in defining **[*15]** reasonable doubt is constitutionally sound); see also Drayden v. White, 232 F.3d 704, 715 (9th Cir. 2000)(rejecting claim of ineffective assistance of counsel for not objecting to revised CALJIC 2.90 in light of Victor). Given the dicta of the Supreme Court in Victor (suggesting revising the instruction) and the holdings of the Ninth Circuit in Lisenbee and Drayden (upholding the revised instruction), it cannot be said that the state appellate court's decision rejecting this claim was contrary to, or an unreasonable application of, clearly established federal law. See also, e.g., Pratt v. Evans, No. 2:02-cv-872-MCE-JFM, 2010 U.S. Dist. LEXIS 16382, 2010 WL 682340, at *3 (E.D. Cal. Feb. 24, 2010)(upholding revised version of CALJIC 2.90 on AEDPA review in light of Victor, Lisenbee, and Drayden). Accordingly, this court should defer to the California courts and deny Petitioner's claim with respect to CALJIC 2.90.

B. GROUND FIVE: EX POST FACTO VIOLATION

In ground five Petitioner claims that his rights under the Ex Post Facto Clause were violated when he was sentenced under a "new statute allowing increased punishment." [Pet. at 7, P. Brf. at 16-17; Sup. Ret. at 20; Sup. Tra. at 15-18.] Specifically, Petitioner contends **[*16]** that sentencing him under the Three Strikes law based on prior convictions (in 1982 and 1990) sustained before the Three Strikes law was enacted (in 1994) was an ex post facto violation because it imposed a punishment greater than that in effect at the time of the prior offenses. [P. Brf. at 16; Sup. Tra. at 15-18.] Petitioner raised ground five in his first state habeas petition, and the California Supreme Court issued a silent denial, construed as a summary denial on the merits. [No. S077151, Petition, Order.]

Under well settled Supreme Court law, the constitution forbids states to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed[,] or imposes additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)(quoting Cummings v. Missouri, 71 U.S. 277, 4 Wall. 277, 325-26, 18 L. Ed. 356 (1867)). However, the ex post facto prohibition does not preclude states from enacting recidivist statutes which enhance a criminal sentence based on prior criminal convictions if those statutes were in effect when the current triggering offense was committed. Parke v. Raley, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992) **[*17]** ;

Weaver, 450 U.S. at 30. This is because "a charge under a recidivism statute does not state a separate offense, but goes to punishment only." Parke, 506 U.S. at 27; accord McDonald v. Commonwealth of Massachusetts, 180 U.S. 311, 312, 21 S. Ct. 389, 45 L. Ed. 542 (1901)("The punishment is for the new crime only, but it is heavier if he is an habitual criminal.")

Petitioner's triggering offense — possession of cocaine base —was committed in 1996, after the Three Strikes Law was enacted and went into effect (in 1994). Thus, Petitioner had ample warning that his 1982 and 1990 convictions could be used as "strikes" to increase the sentence for any subsequent felony. Thus, the enhancement of Petitioner's current sentence based on prior convictions and the Three Strikes law was neither unexpected nor unconstitutional. See Parke, 506 U.S. at 27 ("[W]e have repeatedly upheld recidivism statutes against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." (internal quotation marks and citations omitted)); see also United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999) **[*18]** (en banc)(rejecting ex post facto challenge to federal Three Strikes law); Garren v. Kramer, No. CV 07-2401-R(E), 2008 U.S. Dist. LEXIS 54217, 2008 WL 2704342, at *21 (C.D. Cal. July 10, 2008)(following Kaluna in rejecting ex post facto challenge to California Three Strikes law).

In light of the precedent cited above, the California court's denial of this claim was neither contrary to, nor an unreasonable application of clearly established Supreme Court law, and this court should deny habeas relief on this claim.

C. GROUND ONE: EX POST FACTO AND DUE PROCESS VIOLATIONS

In ground one Petitioner claims that the sentence imposed based on his prior convictions and the Three Strikes law violated his rights under the Ex Post Facto and Due Process Clauses. [Pet. at 6; P. Brf. at 7-9; Sup. Ret. at 2-9; Sup. Tra. at 4-6.] Petitioner's claims in ground one parts a and c — asserting an ex post facto violation when the trial court imposed an enhanced sentence based on the Three Strikes law and prior convictions pre-dating that law — **[*19]** apparently duplicate the ex post facto claim discussed above, under ground five. In any event, these ex post facto claims are without merit for the same reasons discussed in relation to ground five.

Petitioner asserts a different claim in ground one, part b, in which he apparently contends that, in light of the Three Strikes sentence on his current offense, either his prior guilty pleas were invalid or the plea bargains in the prior cases were violated. [P. Brf. at 8.] Petitioner raised ground one in his first state habeas petition, and the California Supreme Court issued a silent denial, construed as a summary denial on the merits. [No. S077151, Petition, Order.] In his second state habeas petition Petitioner again addressed ground one, part b, and the state supreme court denied relief with citations to In re Clark (1993) 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729, and In re Dixon (1953) 41 Cal. 2d. 756, 759, 264 P.2d 513. [S088174, Petition, Order.]

As Respondent has pointed out, the claim in ground one, part b, cannot apply to Petitioner's 1990 conviction for negligent discharge of a firearm (Case No. BA002945), in which Petitioner did not plead guilty, but waived a jury trial and stipulated to a bench trial on the transcript **[*20]** of the preliminary hearing. [Sup. Ret. at 6-7 and Ex. C.]

Petitioner did plead guilty in the 1982 kidnaping case (No. A084601). [Sup. Ret. Ex. B; Reporter's Transcripts ("1982 Transcripts"), No. A084601, August 31, 1982, September 28, 1982, L. Doc. No. 2, lodged September 18, 2000.] However, the 1982 transcripts indicate that Petitioner was represented by counsel, that his waivers and plea appear to have been knowing and voluntary, and that there was no provision in the agreement about the 1982 conviction not being used to enhance a possible future conviction. [See 1982 transcripts.]

Insofar as Petitioner may be seeking to directly challenge the validity of his 1982 conviction, he is precluded from doing so because he was no longer in custody on that conviction, on which the sentence had fully expired, before his present conviction or the filing of the present petition. See

Lackawanna v. Coss, 532 U.S. 394, 401, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001)(citing Maleng v. Cook, 490 U.S. 488, 489-94, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989)(per curiam)). Insofar as Petitioner seeks to challenge the use of the allegedly invalid 1982 conviction as a strike enhancing his present sentence, **[*21]** his claim is barred by the holding in Lackawanna, 532 U.S. at 403-04 (if a prior conviction, which "is no longer open to direct or collateral attack in its own right," "is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained."). See also Clark v. Marshall, No. CV 04-481-DDP (MAN), 2009 U.S. Dist. LEXIS 93938, 2009 WL 3270923 at *7 (C.D. Cal. Oct. 8, 2009)(applying Lackawanna).

The Lackawanna Court allowed an exception to this rule if a "petitioner can demonstrate that his current sentence was enhanced on the basis of a prior conviction that was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment ..." Lackawanna, 532 U.S. at 404. That exception does not apply in Petitioner's case. Here, Petitioner has not claimed that he was denied counsel in the 1982 case, and, on the contrary, the record indicates that Petitioner was represented by counsel when he pled guilty in 1982. [Sup. Ret. Ex. B and 1982 Transcripts.]

Moreover, although Petitioner claims that the state breached his 1982 plea agreement, he does not claim that the 1982 **[*22]** agreement included a provision that the conviction would not be used to enhance a future conviction, and the record would not support such a claim. Cf. Davis v. Woodford, 446 F.3d 957, 961-62 (9th Cir. 2006)(when prosecutor expressly promised that only one prior conviction would be placed in defendant's criminal record, later use of eight counts as eight strikes violated plea agreement); Garren, 2008 U.S. Dist. LEXIS 54217, 2008 WL 2704342 at *21 and n.22 (distinguishing Davis). Instead, Petitioner appears to be claiming that the state violated the 1982 plea agreement simply because it used the 1982 conviction to enhance his present sentence under the Three Strikes law. However, under California law, "contracts (including plea bargains) are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws.'" Davis, 446 F.3d at 962 (quoting People v. Gipson (In re Gipson), 117 Cal. App. 4th 1065, 12 Cal. Rptr. 3d 478, 481 (2004)(internal quotation marks omitted)); accord Clark, 2009 U.S. Dist. LEXIS 93938, 2009 WL 3270923 at *7 (petitioner could not reasonably have understood plea agreement "as a representation that Petitioner was insulated forever from future changes **[*23]** in California's sentencing laws"); Zaragoza v. Marshall, No. CV 08-1029-GW(RC), 2009 U.S. Dist. LEXIS 75157, 2009 WL 2488060 at *5 (C.D. Cal. Aug. 12, 2009)(finding no breach of plea agreement when petitioner was not specifically promised that conviction would not be considered a future strike); Oberg v. Carey, No. C 04-5446-PJH(PR), 2007 WL 3225442 at *4-6 (N.D. Cal. Oct. 30, 2007)(no implied incorporation of the law as it was at the time of the plea bargain); see also Garren, 2008 U.S. Dist. LEXIS 54217, 2008 WL 2704342 at *21, n.23 ("Petitioner had no constitutional right to be advised of the possibility of future enhancements prior to entering his plea." (citing United States v. Brownlie, 915 F.2d 527, 528 (9th Cir.1990)("'The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea.'"))).

Accordingly, Petitioner's claim that the state violated his plea agreement in the 1982 case by using it as a strike in calculating his present sentence is without merit, and the state court decisions denying this claim were neither contrary to, nor an unreasonable application of, clearly established Supreme Court **[*24]** law.

D. GROUND THREE: TRIAL COURT'S FAILURE TO STRIKE A "STRIKE"

In ground three Petitioner makes two contentions: (a) that the trial court was "required" to strike a prior conviction sustained before the 1994 enactment of the Three Strikes law; and (b) that the trial judge in his case did not understand the trial court's discretion to strike a prior "strike" conviction. [Pet. at 7, P. Brf. at 13-15; Ret. at 2; Sup. Ret. at 13-17; Sup. Tra. at 8-13.] Petitioner raised ground three in his first state habeas petition, and the California Supreme Court issued a silent denial, construed as a summary denial on the merits. [No. S077151,

Petition, Order.]

In ground three Petitioner does not explicitly state a claim cognizable on federal habeas corpus review. A federal court may entertain a habeas petition on behalf of a person in state custody only on the ground that the petitioner is in custody in violation of the Constitution, laws, or treaties of the United States. See 28 U.S.C. §§ 2254(a), 2241(c)(3); Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Federal habeas relief is not available for state court error in interpreting or applying state law. Estelle v. McGuire, 502 U.S. at 67-68; **[*25]** Bonin v. Calderon, 77 F.3d 1155, 1161 (9th Cir. 1996)(no federal habeas relief for state law error not amounting to denial of federal constitutional right). In ground three Petitioner does not assert any violations of the federal constitution or laws. On the face of this claim he asserts at most violations of state law.

Furthermore, in ground three, part a, Petitioner offers no support, under state or federal law, for his contention that the trial court was "required" to strike a prior "strike" conviction sustained before the enactment of the Three Strikes law. On the contrary, as discussed at length above, there is ample Supreme Court precedent supporting the constitutionality of recidivist laws increasing the sentences imposed on a current offence based on prior offenses, including offenses committed before the enactment of the recidivist law. See, e.g., Parke, 506 U.S. at 27 ("we have repeatedly upheld recidivism statutes"); see also, e.g., People v. Leslie, 47 Cal. App. 4th 198, 205-06, 54 Cal. Rptr. 2d 545 (1996)(rejecting the argument that the Three Strikes law does not apply to prior offenses predating its enactment "as have all of the other appellate courts which have published **[*26]** opinions on the issue").

On the other hand, Petitioner's claim, in ground three, part b, that the trial judge misunderstood his discretion to strike a "strike," is simply not supported by the record. The transcript shows that the judge understood his discretion to strike a "strike" pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). [RT at 314-16.] Rather, the judge noted his discretion under Romero and discussed at length his reasons for not exercising that discretion in Petitioner's case. [Id.]

In light of this discussion, the state court decision denying Petitioner's claims in ground three was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law, and Petitioner does not merit federal habeas relief.

E. GROUND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL

In ground two Petitioner contends that he was denied his right to effective assistance of counsel because his trial counsel withdrew a motion challenging his prior convictions, advised him to waive a jury trial on the priors, and advised him to admit the priors. [Pet at 6, P. Brf. at 9-12; Ret. at 2; Sup. Ret. at 9-13; Sup. Tra. at 6-8.] Petitioner raised ground **[*27]** two in his first state habeas petition, and the California Supreme Court issued a silent denial, construed as a summary denial on the merits. [No. S077151, Petition, Order.]

On a claim of ineffective assistance of counsel, a petitioner must show both that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A reviewing court may reject the claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. Strickland, 466 U.S. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.")(citation omitted).

A reviewing court must examine the reasonableness of counsel's challenged conduct under all the circumstances, including the facts of the particular case as viewed at the time of the conduct. Strickland, 466 U.S. at 688, 690. Scrutiny of counsel's performance must be "highly deferential," and a petitioner **[*28]** must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689.

To prove prejudice, "[i]t is not enough for the [petitioner] to show that [counsel's] errors had some conceivable effect on the outcome of the proceeding" because "[v]irtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland, 466 U.S. at 693 (citation omitted). Rather, a petitioner has the heavier burden of showing a "reasonable probability," sufficient to undermine confidence in the outcome, that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The Strickland standard is the clearly established Supreme law, under 28 U.S.C. § 2254(d)(1), for federal habeas review of a claim of ineffective assistance of counsel. See Williams v. Taylor, 529 U.S. at 391.

At the beginning of his trial Petitioner's counsel moved to bifurcate the trial on the priors. [RT at 18.] When the jury retired to deliberate, Petitioner waived the right to a jury trial on the **[*29]** priors, and asked for a bench trial. [RT at 287 et seq.] On March 12, 1997, after the jury returned a verdict, Petitioner's counsel requested, and was granted, a continuance of the bench trial on the priors until the probation officer's report had been prepared. [RT at 296.] Several additional continuances were granted. [RT at 298 et seq.] At an appearance on April 16, 1997, Petitioner stated that he intended to admit the priors. [RT at 301.] At a hearing on May 13, 1997, Petitioner admitted the two "strike" priors. [RT at 303 et seq.] Petitioner, through counsel, also withdrew a previously filed motion to strike the priors as constitutionally invalid. [4] [RT at 307.] The court then proceeded on sentencing and the discretionary strike motion. [RT at 307 et seq.] After argument by counsel and discussion by the court of Petitioner's extensive criminal record, the court declined to strike either of the priors, and imposed a third strike sentence of twenty-five years to life imprisonment. [RT at 316.]

FOOTNOTES

4 On April 16, 1997, Petitioner, through counsel, filed one motion to strike the priors as constitutionally invalid ("Constitutional Strike Motion") and a second motion to strike the priors **[*30]** on the court's discretion ("Discretionary Strike Motion"). [L. Doc. No. 2 and No. 3, lodged September 18, 2000.] The Constitutional Strike Motion appears to be, in effect, a "boiler plate" motion listing all the grounds on which a waiver and plea could be invalid.

As noted above, Petitioner contends that his trial counsel was ineffective when she advised him to waive a jury trial on the priors, advised him to admit the priors, and withdrew one of two motions to strike the priors. [P. Brf. at 9-12; Sup. Tra. at 6-8.] Insofar as Petitioner argues, in support of ground two, that the use of the priors as "strikes" was invalid because they were sustained before enactment of the Three Strikes law, that argument is without merit for the reasons discussed above. [P. Brf. at 12.] Petitioner offers no other reasons why his priors were invalid. On the contrary, as noted above, the record shows that Petitioner received the correct admonitions before waiving his rights and pleading guilty in the 1982 case. [1982 Transcripts.]

The record indicates that there was ample evidence that Petitioner did sustain the two prior "strike" convictions in 1982 and 1990. [See, e.g., RT at 306 ("Just so the record **[*31]** is clear, the People do have in their possession your prior prison package, which includes those priors, including your fingerprints and photograph.").] Moreover, in the present proceeding, Petitioner does not contest that he was, in fact, convicted of the priors in question.

On the record, it is reasonable to presume that Petitioner's trial counsel made a tactical decision to waive jury trial and bench trial on the priors, to admit them, to withdraw the Constitutional Strike Motion, and to address the priors on the basis of the Discretionary Strike Motion and the fact that the jury acquitted Petitioner on the more serious charge of possession for sale and

convicted him only on the lesser included charge of simple possession in a vigorous argument to the trial court. [See RT at 308-311.] Accordingly, Petitioner cannot meet the competence prong under the Strickland standard.

Furthermore, in light of the record as discussed above, and counsel's failure to persuade the judge on a discretionary strike motion specifically addressing Petitioner's case, there is no basis for concluding that counsel would have fared better arguing a generic and groundless constitutional strike motion. Nor is **[*32]** there any reasonable probability that Petitioner would have prevailed in a jury trial or bench trial on the priors. Thus, Petitioner cannot meet the prejudice prong of the Strickland standard either, and this court should deny relief on the claim of ineffective assistance of counsel.

F. GROUND FOUR: CRUEL AND UNUSUAL PUNISHMENT

In ground four Petitioner claims that his third strike sentence of twenty-five years to life imprisonment was disproportionate to his offense of simple possession of cocaine base and amounted to cruel and unusual punishment. [Pet. at 7, P. Brf. at 15; Ret. at 2; Sup. Ret. at 17-20; Sup. Tra. at 13-15; P. Sup. Brf.; R. Sup. Brf.; Sup. Rep.; 2d P. Sup. Brf. at 1-21; 2d Sup. Ret. at 6-11; 2d Sup. Rep. at 3-7.] Petitioner raised ground four in his first state habeas petition, and the California Supreme Court issued a silent denial, construed as a summary denial on the merits. [No. S077151, Petition, Order.]

This court appointed counsel and ordered additional briefing in light of the decision in Andrade v. Attorney General, 270 F. 3d 743 (9th Cir. 2001). That Ninth Circuit decision was reversed in Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)(a **[*33]** case on habeas review), in which, along with the companion case of Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)(a case on direct review), the Supreme Court applied Eighth Amendment proportionality analysis to California's Three Strikes law.

1. Legal Standard

"The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Graham v. Florida, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 78 U.S.L.W. 4387, 2010 WL 1946731 at *7 (U.S. May 17, 2010) (NO. 08-7412)(quoting Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). Among the Supreme Court's cases on Eighth Amendment proportionality, one class of cases involve "challenges to the length of term-of-years sentences given all the circumstances in a particular case." Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731 at *8.

In such cases, "the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." Id. For example, the Court found unconstitutional a sentence of life without parole for passing a worthless check. **[*34]** Id. (citing Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)). In such cases, however, challengers have usually failed to establish disproportionality. Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731 at *8 (citing Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)(upholding sentence of life without parole for possessing a large quantity of cocaine); Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (upholding sentence of life with possibility of parole for obtaining money by false pretenses); Hutto v. Davis, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam)(upholding sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana)).

The controlling opinion in Harmelin found that the Eighth Amendment contains a "narrow proportionality principle," that "forbids only extreme sentences that are 'grossly disproportionate' to the crime." Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731 at *8 (citing Harmelin, 501 U.S. at 997, 1000-1001 (Kennedy, J., concurring in part and concurring in judgment). Harmelin explained the approach for determining whether a sentence

is "grossly disproportionate" to a defendant's crime: **[*35]** the reviewing court first compares "the gravity of the offense and the severity of the sentence"; in the "rare case" in which this initial comparison "leads to an inference of gross disproportionality," the reviewing court then compares the sentence in question with sentences received by other offenders in the same jurisdiction and sentences imposed for the same crime in other jurisdictions, and if a comparative analysis confirms the initial inference of gross disproportionality, "the sentence is cruel and unusual." Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731 at *8 (citing Harmelin, 501 U.S. at 1005 (opinion of Kennedy, J.).

In the specific context of AEDPA review of a California Three Strikes law sentence, the Supreme Court has held that the relevant clearly established law on applying the Eighth Amendment proscription against cruel and unusual punishment is the "gross disproportionality" principle of Harmelin, and that gross disproportionality will be found only in "exceedingly rare" and "extreme" cases. Lockyer, 538 U.S. at 73-76; see also Ewing, 538 U.S. at 23; United States v. Meiners, 485 F.3d 1211, 1213 (9th Cir. 2007)(citing Ewing, 538 U.S. at 22, on the exceeding rarity of "successful challenges **[*36]** to the proportionality of particular sentences"); Taylor v. Lewis, 460 F.3d 1093, 1098 (9th Cir. 2006)(citing Solem, 463 U.S. 277, 289-90, 103 S. Ct. 3001, 77 L. Ed. 2d 637, on the same point).

Accordingly, as noted in Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731 at *8, the Supreme Court generally has upheld prison sentences challenged as cruel and unusual, and in particular has approved recidivist punishments similar to Petitioner's twenty-five-years-to-life sentence, for offenses of equivalent or lesser severity. See Lockyer, 538 U.S. at 77 (upholding California third strike sentence of two consecutive terms of twenty-five years to life for stealing $150 in videotapes when petitioner had lengthy but nonviolent criminal history); Ewing (upholding third strike sentence of twenty-five years to life for theft of gold-clubs worth $1,200 when defendant previously had been convicted of residential burglaries and robbery); Rummel, 445 U.S. at 285 (upholding mandatory life sentence with possibility of parole for obtaining $120 by false pretenses when offender had two prior theft convictions); cf. Solem v. Helm, 463 U.S. at 280-81 (holding unconstitutional life sentence without possibility of parole for uttering "no account" check for $100, as a **[*37]** seventh nonviolent felony).

Moreover, following the Supreme Court's decisions in Lockyer and Ewing, the Ninth Circuit has frequently rejected Eighth Amendment challenges to California Three Strikes law sentences, finding that state court decisions upholding the sentences were not contrary to or an unreasonable application of the clearly established "gross disproportionality" principle. See, e.g., Nunes v. Ramirez-Palmer, 485 F.3d 432, 439 (9th Cir. 2007)(upholding sentence of twenty-five years to life for petty theft with a prior when petitioner had extensive and serious felony record); Taylor, 460 F.3d at 1101-02 (upholding sentence of to twenty-five years to life for possession of thirty-six milligrams of cocaine when petitioner had prior offenses involving violence); Rios v. Garcia, 390 F.3d 1082, 1086 (9th Cir. 2004)(upholding sentence of twenty-five years to life for petty theft with a prior when petitioner had two prior robbery convictions); but see Ramirez v. Castro, 365 F.3d 755, 775 (9th Cir. 2004)(as amended) (finding habeas relief warranted in "exceedingly rare" case in which petitioner with minimal criminal history and no prior state prison sentence received third strike **[*38]** sentence for petty theft with a prior); Gonzalez v. Duncan, 551 F.3d 875, 889 (9th Cir. 2008)(finding twenty-eight years to life sentence for failure to update sex offender registration grossly disproportionate because of relatively harmless nature of offense, despite a "not insignificant" criminal history).

2. Application to Petitioner's Claim

When the facts and circumstances relevant to Petitioner's sentence are considered in light of these authorities, it cannot be said that the state court's summary rejection of Petitioner's Eighth Amendment claim was inconsistent with or an unreasonable application of established Supreme Court law. First, Petitioner's sentence of twenty-five years to life is less than that of the petitioner in Lockyer, equal to the sentence affirmed in Ewing, and, unlike the sentence disapproved in Solem, allows for the possibility of parole. See Lockyer, 538 U.S. at 74; Rummel, 445 U.S. at 278 (hinging holding in part on availability of parole); Taylor, 460 F.3d at 1098

(noting that eligibility for parole, even if after twenty-five years, made California third strike sentence "considerably less severe than the one invalidated in Solem"); Rios, 390 F.3d at 1086 **[*39]** (overturning grant of habeas petition, observing that petitioner's third strike sentence for two counts of petty theft with a prior and second-degree commercial burglary "presents a less compelling case for relief" than petitioner in Lockyer "because the trial court stayed one of [petitioner's] sentences, so he need serve only twenty-five years (rather than fifty) before being eligible for parole").

Second, Petitioner's primary offense, possession of a controlled substance, i.e., cocaine, is identical to the underlying offense in Taylor. As the Ninth Circuit noted in that case, the fact that the underlying offense involved the possession of illegal drugs, even in a relatively small amount, makes it arguably more serious and dangerous than the property offenses for which similar or lengthier sentences were imposed in Lockyer, Ewing and Rummel. See Taylor, 460 F.3d at 1099. The fact that Petitioner's offense did not involve violence does not necessarily diminish its seriousness in the context of proportionality review. See id. at 1099 (rejecting argument that the gravity of petitioner's drug possession offense was lessened because it was "victimless"); Rummel, 445 U.S. at 275 (the "presence **[*40]** or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal"); cf. Gonzalez, 551 F.3d at 884-85 (noting that petitioner's failure to update annual sex offender registration, when he had recently twice updated his registration and was subject to police surveillance, was "purely a regulatory offense" that "posed no danger or harm to anyone").

Finally, Petitioner's criminal history, coupled with the circumstances of his current offense, make it reasonable to conclude that the sentence imposed was not unconstitutional. See Ewing, 538 U.S. at 29 (recognizing that State's legitimate concern in imposing third strike sentence includes interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law" (quoting Rummel, 445 U.S. at 276)); Ramirez, 365 F.3d at 768 ("'[I]n weighing the gravity' of [petitioner's] offense in our proportionality analysis, 'we must place on the scales not only his current felony,' but also his criminal history." (quoting Ewing, 538 U.S. at 29)).

As **[*41]** detailed by Petitioner's probation report, and addressed by the sentencing judge, Petitioner had a lengthy and continuous criminal record, comprised primarily of narcotics-related and theft-related offenses. [See Probation Report, lodged under seal September 18, 2000.] Petitioner's record begins with juvenile offenses starting when he was fourteen (theft and drug offenses), and continues with an adult history in which the present conviction was Petitioner's sixth felony conviction in fifteen years. [Probation Report at 2-4, 6-7; RT at 315-16.] In the 1982 "strike," discussed above, Petitioner was convicted of kidnaping, sentenced to seven years imprisonment, and paroled in January of 1986. [Probation Report at 3.] He was arrested again in June of 1986, convicted of narcotics possession, sentenced to two years imprisonment, and paroled in September of 1987. [Id.] He was arrested again in August of 1987, convicted of negligent discharge of a firearm and possession of a firearm by a felon in 1990 (his second "strike"); he was sentenced to three years, and also sentenced to two years in state prison on another count of felon in possession in 1990. [Id.] Petitioner was arrested again in **[*42]** August of 1993 on a felon in possession charge, convicted, sentenced to sixteen months, and paroled in December of 1995. [Id.] Finally, Petitioner was arrested in June of 1996, convicted of misdemeanor evading arrest, and given a suspended sentence and three years' probation, and was on probation when he committed the present offense. [Id. at 4, 8.] The sentencing judge noted that, over the fifteen year period between 1982 and 1997, Petitioner had received felony sentences totaling more than fifteen years. [RT at 315.]

On the whole, Petitioner's lengthy criminal record is at least comparable to the criminal histories considered by the Supreme Court in approving the recidivist sentences at issue in Lockyer and Rummel and is readily distinguishable from those of the rare defendants whose sentences have been found unconstitutional. Petitioner's history includes instances of illegal weapon's possession and negligent discharge of a weapon, along with a significant history of substance abuse and narcotics offenses, including the transport or sale of a controlled substance. See

Taylor, 460 F.3d at 1099 (addressing the relatively more serious penalties that attach to drug offenses, and noting **[*43]** that "fundamentally, we think that the State was entitled to the view that '[p]ossession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our population.'" (quoting Harmelin, 501 U.S. at 1002 (Kennedy, J., concurring)). Moreover, Petitioner had served several state prison terms and committed some of his crimes while on probation or parole, including the current one. Cf. Ramirez, 365 F.3d at 757 (holding twenty-five years to life third strike sentence for petty theft with a prior unconstitutional when petitioner's only two prior crimes were second-degree robberies involving a minimal amount of force but no weapons or violence, and petitioner had never been sentenced to or served time in state prison).

In light of the foregoing, it cannot be said that Petitioner's sentence was "exceedingly rare," "extreme," or "extraordinary," so as to raise an inference of gross disproportionality under the standard imposed by controlling Supreme Court law. Accordingly, the state court's rejection of Petitioner's Eighth Amendment claim is entitled to AEDPA deference, and federal habeas relief should be denied.

G. GROUND SIX: REPRESENTATION [*44] OF CHOICE

In ground six Petitioner claims that the trial court violated his rights when it denied him the right to proceed with "representation of choice." [Pet. at 7, P. Brf. at 18-26; see also Sup. Tra. at 18-21; 2d P. Sup. Brf. at 21-26; 2d Sup. Ret. at 11-21; 2d Sup. Rep. at 8-21.]

Petitioner raised present ground six on direct appeal, and the California Court of Appeal denied the claim in a reasoned opinion. [No. B113681, Opinion.] He did not raise ground six in his petition for review or his first state habeas petition. [No. S072332, Petition; No. S077151, Petition.] Petitioner again raised ground six in his second state habeas petition, and the state supreme court denied relief with citations to In re Clark (1993) 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729, and In re Dixon (1953) 41 Cal. 2d. 756, 759, 264 P.2d 513. [S088174, Petition, Order.] Respondent has argued that ground six should be denied on the merits (in deference to the court of appeal's decision), and, alternatively, that it is unexhausted (with respect to factual allegations not presented to the state supreme court) and procedurally barred (as indicated by the state supreme court's citations of In re Clark and In re Dixon in denying the second state habeas **[*45]** petition. [5] [2d Sup. Ret. at 11-21.]

FOOTNOTES

5 Because this claim fails on its merits, this court need not address the issues of exhaustion and procedural default.

The court of appeal set forth and decided this claim as follows:

> After being represented by the public defender, [Petitioner] was allowed to represent himself. The trial court said it would not grant a continuance if [Petitioner] elected pro. per. status. [Petitioner] said he needed a continuance to prepare for trial. Faced with going to trial without a continuance or continued representation by retained counsel, [Petitioner] chose the latter.
>
> We set forth the litany of events: [Petitioner] was arrested on July 28, 1996. The record does not show when the complaint was filed, but the preliminary hearing took place on August 13, 1996. [Petitioner], represented by the public defender, was arraigned that day. The matter was set for trial on October 15, 1996. On September 30, 1996, the trial court granted [Petitioner's] request to represent himself.
>
> On the trial date, [Petitioner] filed a written discovery motion. The minute order for

that date shows that the trial court granted [Petitioner's] "motion for a legal runner" and for an investigator. **[*46]** The order approved fees for both. Trial was rescheduled for November 15, with a pre-trial hearing set for November 1. On the 1st, [Petitioner] asked for additional funds. The court granted his request. November 15 arrived and the court "called [the case] for jury trial[.]" [Petitioner] had retained counsel, who, as it turns out, he could not afford. She offered to the court that "[w]hile I understand . . . it is the day set for trial, certainly the client is entitled to have the attorney of his choice." Counsel substituted into the case and [Petitioner] relinquished his pro. per. status. The matter was set for a trial setting conference on December 6.

On the 6th, the trial setting conference was moved to January 8, 1997. The record does not reveal who asked for the continuance, but [Petitioner] waived time. On the January date, trial was set for February 3, then trailed to February 20. On the latter date, defense counsel was otherwise engaged and the matter, with [Petitioner] present and someone standing in for defense counsel, trailed to the next day. On the 21st, "Ms. Wallace's [defense counsel] office contacted the court at least 3 times during the day and indicated that she was **[*47]** in Riverside court and was engaged, but that she would be here today. Counsel did not appear." Defendant was present. The matter was trailed over the weekend to the 24th.

On February 24, defense counsel appeared and filed a written motion asking for leave to withdraw. The motion claimed that "[Petitioner] has failed to replenish a trust deposit pursuant to an agreement to do so, and by such and other conduct renders it unreasonably difficult for [counsel] to carry out employment effectively. [Petitioner] wishes to continue his case in Pro[.] Per." A supporting declaration by counsel stated that she and [Petitioner] "have a difference of opinion on strategy" and that "[Petitioner] can no longer afford to pay the agreed upon retainer fee."

The trial court pointed out that [Petitioner] had gone from being represented by appointed counsel to pro. per. to being represented by retained counsel. It said it was not granting any further continuances and that [Petitioner] would have to be ready to start the trial on March 3, the 10th and final day within which to bring [Petitioner] to trial. [Petitioner] replied, "Well, there was something that I read that you could find so you would give me time **[*48]** to at least prepare for trial." The trial court pointed out that [Petitioner] had several weeks to prepare when he was pro. per. and concluded: "You delayed it. And it appears to me your whole endeavor in this matter is to delay going forward with the trial."

[Petitioner] replied: "Well, my financial status prevents me taking [defense counsel] Miss Wallace any further. And that fact that, well, my financial status and the simple fact I wasn't happy with the communication. Communication barrier." He said he needed more preparation and the "[l]ast thing that I will need would be an investigator in order to get copies of the last papers that I need" — "copies of the transcript. Copy of the transcript of the preliminary hearings . . . ." When the court pointed out that those were already in hand, [Petitioner] said he had "to interview one witness to my defense. And he [investigator] has to go find him. And no way we can have that done by the 3rd." [Petitioner] observed: "Looks like I better stay with Miss Wallace. She already know the case."

The trial court denied counsel's motion to be relieved and [Petitioner's] motion to represent himself. The trial court trailed the matter to March 3. **[*49]** At that point, defense counsel pointed out that she had another matter on that date. "You honor, I actually have a trial beginning in Barstow on Monday. [1] Oh, goodness. I'm sorry. It is just that March 3rd date." [Footnote omitted.] The trial court replied: "All I can suggest, Miss Wallace, if you have a legitimate motion for continuance, file your motion [forty-eight] hours in advance, or whatever the rules are, and we'll consider it at that time."

We do not know what happened on March 3, except that [Petitioner] and Ms. Wallace were present, [Petitioner] waived time, and the matter was continued to March 10 as "[d]ay 10 of 10." Jury selection began on March 10.

In the federal courts, "a motion for self-representation is normally timely as a matter of law if made before the jury is impaneled, so that the motion must be granted unless it is shown that the motion is made for purposes of delay. [Citations.]" (People v. Burton (1989) 48 Cal. 3d 843, 853, 258 Cal. Rptr. 184, 771 P.2d 1270.) In California, a motion brought before commencement of trial can, nevertheless, be untimely. The California Supreme Court has "not fix[ed] any particular time at which a motion for self-representation is considered untimely, other than **[*50]** it must be [brought] a reasonable time before trial. [Citations.] Nor, despite invitations to do has, [has the [California] Supreme Court adopted a rigid rule that any [such] motion made before the actual commencement of trial is deemed timely. [Citation.]" (People v. Clark (1992) 3 Cal. 4th 41, 99, 10 Cal. Rptr. 2d 554, 833 P.2d 561.)

". . .' [O]nce a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court.' [Citations.]" (People v. Nicholson (1994) 24 Cal. App. 4th 584, 591, 29 Cal. Rptr. 2d 485.) A motion not brought a reasonable time before trial "is addressed to the sound discretion of the trial court. [Citation.] The court should consider such factors as the "quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.."' [Citations.]" (People v. Frierson (1991) 53 Cal. 3d 730, 742, 280 Cal. Rptr. 440, 808 P.2d 1197.)

A motion brought six days before trial is not necessarily timely, but **[*51]** can fall "within that period of time . . . in which the trial court may exercise its sound discretion in considering whether to grant or deny the motion." (People v. Ruiz (1983) 142 Cal. App. 3d 780, 791, 191 Cal. Rptr. 249.) In the instant matter, [Petitioner] brought his motion five court days before the scheduled start of trial.

"The federal rule, though it calls motions timely until the jury is impaneled, may in practice differ little from our own rule. It is within the court's discretion to deny a motion made before the jury is impaneled if the court finds the motion is made for purpose of delay. [Citation.]" (People v. Burton, supra, 48 Cal. 3d at p. 854.)

The net result of all this is that in California, a motion brought several days before the scheduled date of trial can be found untimely, depending on the circumstances. If it is untimely, the trial court has discretion to grant or deny the motion. Independent of this concept, a pre-trial motion is entrusted to the court's discretion, under both federal and California law, if it is brought for purposes of delay. The trial court here found just such a purpose. We find its conclusion justified.

Every time this case came up for trial, [Petitioner] had **[*52]** a maneuver designed for delay. He waited until the first trial date (October 15) to file a discovery motion and ask for appointment of a runner and investigator. The next time the case came up for trial (November 15), [Petitioner] had retained counsel and waited until the last moment to so notify the court. As it turned out, he retained counsel he knew he could not pay for the entire case. ("[M]y financial status prevents me from taking Miss Wallace any further.") The next trial date, February 3, was trailed to the 20th (reason not shown), then the 21st (defense counsel engaged), then the 24th (counsel never appeared on the 21st). On the 24th, [Petitioner] admitted he could not afford counsel and moved for self-representation. He claimed he needed a

> continuance to get transcripts. Told the transcripts were on hand, [Petitioner] changed course and said he needed an investigator to find and interview a witness. All this demonstrates a strategy of trying to throw sand into the gears each time trial appeared imminent. The trial court appropriately found intent to delay and properly denied the motion for self-representation.
>
> We find it of no consequence that the trial was ultimately continued **[*53]** one more week before jury selection began. The March 3 minute order does not show why the matter was continued to the 10th. There is no reporter's transcript of those proceedings. We do know that defense counsel had a matter scheduled for the 3rd in another court. In any event, [Petitioner] made it plain on February 24 that he wanted a delay of more than a few extra days. The record amply demonstrates that he would not have announced ready for trial by March 10. Thus, granting him self-representation would have meant a further delay from when the trial ultimately started.
>
> We reject any implication that the trial court, on its own initiative, should have conducted a hearing pursuant to People v. Marsden (1970) 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44. [Petitioner] brought no such motion. His request was aimed solely at self-representation.

[No. B113681, Opinion at 2-9.]

Under the Sixth and Fourteenth Amendments a state criminal defendant has an absolute right to be represented by counsel. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Jackson v. Ylst, 921 F.2d 882, 888 (9th Cir. 1990). If a defendant was **[*54]** entitled to counsel at trial, the failure to provide counsel results in automatic reversal of a conviction. Gideon, 372 U.S. at 339.

In Faretta, the Supreme Court "held that the Sixth and Fourteenth Amendments include a 'constitutional right to proceed without counsel when' a criminal defendant 'voluntarily and intelligently elects to do so.'" Indiana v. Edwards, 554 U.S. 164, , 128 S. Ct. 2379, 2383, 171 L. Ed. 2d 345 (2008)(quoting Faretta, 422 U.S. at 807); see also Iowa v. Tovar, 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004)(an effective waiver of the right to counsel must be knowing, voluntary, and intelligent); Stenson v. Lambert, 504 F.3d 873, 882 (9th Cir. 2007) (quoting Faretta, 422 U.S. at 806); Florez v. Marshall, 674 F. Supp. 2d 1133, 1136-37 (C.D. Cal. 2009)(citing Edwards, Tovar, Faretta, and Stenson)(additional citations omitted).

The right to self-representation is not absolute. "While the right to counsel attaches unless affirmatively waived, the right to self-representation does not attach until asserted." Sandoval v. Calderon, 241 F.3d 765, 773-74 (9th Cir. 2001). A request for self-representation under Faretta must also be unequivocal. See Robinson v. Kramer, 588 F.3d 1212, 1216-17 (9th Cir. 2009)(citing **[*55]** Stenson, 504 F.3d at 882; Faretta, 422 U.S. at 833-36). Moreover, a Faretta motion must be timely, and not a tactic to secure delay, and may properly be denied as untimely or brought for purposes of delay. Faretta, 422 U.S. at 835; Stenson, 504 F.3d at 882; United States v. McKenna, 327 F.3d 830, 844 (9th Cir. 2003).

Here, the court of appeal correctly identified the controlling federal standard under which a Faretta motion may properly be denied if untimely or brought for purposes of delay. Applying this standard the court of appeal determined that "[t]he trial appropriately found intent to delay and properly denied the motion for self-representation." [No. B113681, Opinion at 8.] Based on the record, the court of appeal's determination was not an objectively unreasonable application of the Faretta standard, and was not based on an objectively unreasonable determination of the facts. [6] Accordingly, this court should defer to the state court decision, under 28 U.S.C. § 2254

(d), and deny habeas relief on ground six as well. [7]

FOOTNOTES

6 Petitioner contends that the court of appeal's decision was based, at least in part, on an unreasonable factual determination, because several of the delays in **[*56]** bringing Petitioner's case to trial were attributable to defense counsel rather than Petitioner himself. [See, e.g., 2d P. Sup. Brf. at 22 et seq.] However, this point does not refute the court of appeal's observation that, whenever the case came up for trial, Petitioner "had a maneuver designed for delay," nor does Petitioner's contention demonstrate that the court of appeal's conclusion, that "[t]he trial court appropriately found intent to delay" was objectively unreasonable. [No. B113681, Opinion at 7-8.] Petitioner also notes that Petitioner's counsel, Ms. Wallace, was subsequently disciplined by the state bar and convicted in state court of grand theft, fraud, forgery, and perjury. [2d P. Sup. Brf. at 24-25.] However, there is no indication that Ms. Wallace's offenses were in any way related to Petitioner's case, or that they were known to the trial court or the court of appeal. Accordingly, these facts do not establish that the court of appeal's decision was objectively unreasonable.

7 In Petitioner's case, the court of appeal found that Petitioner's Faretta motion was untimely under state law, and was brought for purposes of delay under federal law. In Marshall v. Taylor, 395 F.3d 1058 (9th Cir. 2005), **[*57]** the Ninth Circuit found that, although the Supreme Court has found that a Faretta motion is timely if brought weeks before trial, it has not clearly established when such a motion becomes untimely. Marshall, 395 F.3d at 1060-61. "Because the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request "weeks before trial" is timely." Id. at 1061. The Marshall panel found that the California standard, under which a Faretta motion must be brought "a reasonable amount of time before trial," "comports with Supreme Court precedent." Id. Accordingly, as in Marshall, the court of appeal's determination that Petitioner's Faretta motion was untimely, was also not "contrary to clear Supreme Court precedent." Id.

V.RECOMMENDATION

For the reasons discussed above, it is recommended that the court issue an order: (1) approving and accepting this Report and Recommendation; and (2) denying the petition and dismissing this action with prejudice.

DATED: June 2, 2010

/s/ Carla M. Woehrle

CARLA M. WOEHRLE

United States Magistrate Judge

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In

*2010 U.S. Dist. LEXIS 104065, **

CHARLES M. PIPER, Petitioner, v. D. ADAMS, Warden, Respondent.

Case No. CV 05-5984 AHM (JC)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 104065

May 28, 2010, Decided
May 28, 2010, Filed

SUBSEQUENT HISTORY: Adopted by, Judgment entered by, Writ of habeas corpus denied, Dismissed by Piper v. Adams, 2010 U.S. Dist. LEXIS 104049 (C.D. Cal., Sept. 28, 2010)

PRIOR HISTORY: People v. Piper, 2004 Cal. LEXIS 238 (Cal., Jan. 14, 2004)

CORE TERMS: juror, prosecutor, felony, citation omitted, federal habeas, peremptory challenges, ineffective, race-neutral, evasion, objectively unreasonable, amend, plea agreement, prospective jurors, sentence, evading, evidence presented, sentencing, quotation, petitioner's claims, preliminary hearing, misdemeanor, prior convictions, discriminatory, firearm, abused, facie, peremptory challenges, traffic, enhance, federal law

COUNSEL: [*1] Charles M Piper, Petitioner, Pro se, Imperial, CA.

For D Adams, Warden, Respondent: G Tracey Letteau, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: Honorable Jacqueline Chooljian, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Jacqueline Chooljian

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable A. Howard Matz, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On August 16, 2005, Charles M. Piper ("petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2001 conviction in the Los Angeles County Superior Court on the following grounds: (1) the trial court unconstitutionally erred in denying petitioner's Wheeler/Batson motion; [1] (2) the trial court denied petitioner due process and a fair trial by permitting the prosecution to amend the charges to add a new count in the middle of trial; (3) the admission of evidence derived from an unconstitutional traffic **[*2]** stop deprived petitioner of his constitutional rights; (4) the trial court abused its discretion and violated due process by refusing to strike all but one of petitioner's prior strike convictions; (5) the trial court abused its discretion and violated due process by denying petitioner's motion to reduce his convictions from felonies to misdemeanors; (6) the use of 1993 prior convictions as strikes to enhance petitioner's sentence in this case constituted a breach of a 1993 plea agreement and violated petitioner's right to due process; (7) petitioner's trial counsel was ineffective; and (8) petitioner's appellate counsel was ineffective. [2]

FOOTNOTES

1 People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) is the California counterpart to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1996), which held that purposeful discrimination in the jury selection process violates the Equal Protection Clause of the Fourteenth Amendment. See Paulino v. Castro, 371 F.3d 1083, 1088 n.4 (9th Cir. 2004) (noting that a Wheeler motion is the procedural equivalent to a Batson challenge in California), appeal after remand, Paulino v. Harrison, 542 F.3d 692 (9th Cir. 2008).

2 The court lists and addresses petitioner's claims in a different order **[*3]** than presented by petitioner.

On November 7, 2005, respondent filed a Return and a supporting memorandum ("Return"). [3] On January 24, 2006, petitioner filed a Traverse. [4]

FOOTNOTES

3 Respondent concurrently lodged multiple documents in support of the Return ("Lodged Doc.") including the Clerk's Transcript ("CT") and the Reporter's Transcript ("RT"). The court notes, based upon a review of the docket of petitioner's direct appeal in the California Court of Appeal available at www.appellatecases.courtinfo.ca.gov, that the version of petitioner's opening brief on direct appeal that was filed in the Court of Appeal on March 4, 2003, and has been lodged with this court (Lodged Doc. C), was ordered withdrawn on March 11, 2003, and was replaced with a different version of the opening brief, filed in the Court of Appeal on April 16, 2003. The correct version of the opening brief has not been lodged with the court and is not essential to the court's resolution of this matter.

4 On January 26, 2006, petitioner filed a Supplemental Traverse which appears to correct various clerical errors in the Traverse.

For the **[*4]** reasons stated below, the Petition should be denied, and this action should be dismissed with prejudice.

II. PROCEDURAL HISTORY

On November 5, 2001, a Los Angeles County Superior Court ("LASC") jury found petitioner guilty of unlawful possession of ammunition (count 7), and evading a police officer in willful or wanton disregard for safety (count 10). [5] (CT 298, 300; RT 1300, 1361-62). Petitioner waived his right to a jury trial with respect to allegations that he had suffered multiple prior convictions that qualified as strikes under California's Three Strikes law. (RT 539-40). On May 8, 2002, a court trial was held regarding petitioner's prior convictions, and the trial court found that petitioner had suffered five prior convictions which qualified as strikes under California's Three Strikes law. [6] (CT 327-28; Lodged Doc. F at 2).

FOOTNOTES

5 The jury acquitted petitioner of six other charges: (1) shooting at an inhabited dwelling (count 1); (2) assault/assault with a firearm (counts 2 and 3); (3) discharge of a firearm with gross negligence (count 4); (4) possession of a firearm by a felon (count 5); and (5) unlawfully carrying a loaded firearm (count 8). (CT 292-97, 299, 301, 302; RT 1286-87, **[*5]** 1290-95, 1297, 1359, 1363-64). The jury further found "not true" an allegation that petitioner had been armed with a firearm in evading the police as charged in count 7. (CT 298).

6 More specifically, the trial court found that petitioner had suffered the following prior convictions which qualified as strikes: one conviction on a plea of guilty to arson of inhabited property, a violation of California Penal Code section 451(b), and four convictions on pleas of guilty to making terrorist threats, violations of California Penal Code section 422. (CT 312-36, 327). All of the strike convictions occurred on June 3, 1993 in Los Angeles County Superior Court Case No. NA015203. (CT 322).

The trial court sentenced petitioner to a total of 25 years to life in state prison. (CT 364-67; RT 1429).

On October 28, 2003, the California Court of Appeal affirmed the judgment in a reasoned decision. [7] (Lodged Doc. F at 2). On January 14, 2004, the California Supreme Court denied review without comment. (Petition at 3). [8]

FOOTNOTES

7 The Court of Appeal did, however, order the trial court to prepare a corrected abstract of judgement to reflect that petitioner was convicted in count 7 of unlawful possession of ammunition, **[*6]** instead of a firearm. (Lodged Doc. F at 13).

8 Although not separately lodged, a copy of the California Supreme Court's denial of review without comment is attached to petitioner's petition for writ of habeas corpus filed in the California Supreme Court, and is the fourth to the last page of such document. (Lodged Doc. M).

Petitioner also sought, and was denied habeas relief in the California Court of Appeal and the California Supreme Court. (Lodged Docs. G, I-K, M-N).

III. FACTS[9]

FOOTNOTES

9 Unless otherwise indicated by citation to the record, the facts set forth are drawn from the California Court of Appeal's decision on direct appeal. (Lodged Doc. F at 2-3). Such factual

findings are presumed correct. 28 U.S.C. § 2254(e)(1).

On January 24, 2001, at about 12:20 a.m., Los Angeles Police Sergeant Danny Contreras ("Sergeant Contreras") effected a traffic stop of a car on Pacific Coast Highway which matched a description given in a radio dispatch call of a car used in connection with a nearby shooting. (CT 69, 91-92; RT 547-55). After petitioner, the driver, pulled over, Contreras ordered petitioner to show his hands. Petitioner complied by sticking both hands and his head out of the window. Contreras **[*7]** then made eye contact with petitioner and Andre Luzano, the passenger in the car and petitioner's co-defendant at trial ("Luzano"), and requested a police backup unit.

After the backup unit arrived, the uniformed police directed petitioner to exit the car. He responded by asking, "Why are you stopping me? Why are you hassling me?" Petitioner then abruptly drove off. The two police patrol cars gave chase with their lights and sirens activated. During the ensuing pursuit, petitioner drove on the wrong side of the road, went through stop signs and a red light, changed lanes without signaling, and drove about 40 to 45 miles per hour in a 25-mile-per-hour zone. At one point, "a dark item" which appeared to be a handgun flew out of the passenger's window and went over the edge of a bridge. After stopping his car, petitioner and Luzano fled on foot.

Police subsequently arrested petitioner and Luzano. Petitioner was discovered crouching under a plastic tarp. A pager, and seven live rounds of .45-caliber ammunition fell out of petitioner's pocket. During a post-arrest search, a live round of .45-caliber ammunition and a plastic baggie containing marijuana were recovered from petitioner's front **[*8]** pants pocket.

Petitioner did not present an affirmative defense.

IV. STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). [10] 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, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

FOOTNOTES

10 The **[*9]** California Supreme Court's denial of review without comment generally constitutes an adjudication on the merits of any federal claims, thereby subjecting such claims to review in federal habeas proceedings. Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992), cert. denied, 510 U.S. 887, 114 S. Ct. 240, 126 L. Ed. 2d 194 (1993).

"[C]learly established Federal law" under section 2254(d)(1) is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). In the absence of a Supreme Court decision that "squarely addresses the issue" in the case before the state court, Wright v. Van Patten ("Van Patten"), 552 U.S. 120, 125, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008), or establishes an applicable general principle that "clearly extend[s]" to the case

before a federal habeas court to the extent required by the Supreme Court in its recent decisions, Van Patten, 552 U.S. at 123; see also Panetti v. Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007); Carey v. Musladin ("Musladin"), 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), a federal habeas court cannot conclude that a state court's adjudication of that issue resulted in a decision contrary to, or an unreasonable application of, clearly **[*10]** established Supreme Court precedent. Moses v. Payne, 555 F.3d 742, 760 (9th Cir. 2009) (citing Van Patten, 552 U.S. at 126).

Ninth Circuit precedent may be persuasive authority for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law, and may also help determine what law is clearly established. Sims v. Rowland, 414 F.3d 1148, 1151 (9th Cir.), cert. denied, 546 U.S. 1066, 126 S. Ct. 809, 163 L. Ed. 2d 637 (2005) (citations and quotation marks omitted). However, in light of Van Patten and Musladin, circuit law may not be used to fill open questions in the Supreme Court's holdings for purposes of federal habeas analysis. Moses, 555 F.3d at 760 (citing Musladin, 549 U.S. at 76 and Crater v. Galaza, 491 F.3d 1119, 1126 & n.8 (9th Cir. 2007) (explaining that, in Musladin, the Supreme Court "discussed and accepted" the principle that § 2254(d)(1) imposes "limits on the relevance of circuit precedent"), cert. denied, 554 U.S. 922, 128 S. Ct. 2961, 171 L. Ed. 2d 892 (2008)).

A state court decision is "contrary to" clearly established federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision **[*11]** of the Supreme Court but reaches a different result. See Early, 537 U.S. at 8 (quoting Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. Williams v. Taylor, 529 U.S. at 413.

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir.) (under "unreasonable application" clause, federal habeas court may not issue writ simply because it concludes in its independent judgment that relevant state court decision applied clearly established law erroneously or incorrectly; rather, application must be objectively unreasonable), cert. denied, 540 U.S. 968, 124 S. Ct. 446, 157 L. Ed. 2d 313 (2003). **[*12]** The habeas petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

In applying these standards, federal courts look to the last reasoned state court decision. See Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (citation and quotations omitted). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); see also Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (federal courts "look through" unexplained rulings of higher state courts to the last reasoned decision). However, to the extent no such reasoned opinion exists, courts must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

V. DISCUSSION[11]

FOOTNOTES

11 The court has read, considered and rejected **[*13]** on the merits all of petitioner's contentions. The court discusses petitioner's principal contentions herein.

Petitioner asserts that he is entitled to federal habeas relief because: (1) the trial court unconstitutionally erred in denying petitioner's Wheeler/Batson motion; (2) the trial court denied petitioner due process and a fair trial by permitting the prosecution to amend the charges to add a new count in the middle of trial; (3) the admission of evidence derived from an unconstitutional traffic stop deprived petitioner of his constitutional rights; (4) the trial court abused its discretion and denied petitioner due process by refusing to strike all but one of petitioner's prior strike convictions; (5) the trial court abused its discretion by denying petitioner's motion to reduce his convictions from felonies to misdemeanors; (6) the use of 1993 prior convictions as strikes to enhance petitioner's sentence in this case constituted a breach of a 1993 plea agreement and violated petitioner's right to due process; (7) petitioner's trial counsel was ineffective; and (8) petitioner's appellate counsel was ineffective.

A. The Trial Court's Denial of Petitioner's Wheeler/Batson Motion [*14] Does Not Merit Relief

Petitioner claims that he is entitled to federal habeas relief because the trial court denied petitioner's Wheeler/Batson pursuant to which petitioner argued that the prosecutor exercised peremptory challenges in a discriminatory manner. (Petition at 6A; Traverse at 4-6). The California Court of Appeal, the last state court to issue a reasoned decision on this claim, rejected the claim on its merits. (Lodged Doc. F at 4-8). Petitioner is not entitled to federal habeas relief on this claim.

1. Pertinent Facts

During jury selection, the prosecutor exercised two of her first three peremptory challenges against African-Americans — Juror No. 5[6108] and Juror No. 7[3741]. (RT 239, 240). This prompted petitioner's counsel to make a Wheeler/Batson motion alleging, *inter alia*, that the prosecutor's peremptory challenges of the two African-American prospective jurors established a prima facie case of racial discrimination. 12 (RT 240-41).

FOOTNOTES

12 Petitioner's defense counsel argued, in pertinent part, as follows:

> On behalf of [petitioner], I'd be making a Wheeler motion. The prosecutor has excused two black jurors plus a disabled juror as her three peremptories. So she has targeted **[*15]** three suspect classes in three peremptories. . . .
>
> I think that the burden is on [the prosecutor] to demonstrate why she's doing that, particularly when I look out in the audience, for the record, both [petitioner] and Mr. Luzano are Black Americans. We have very few Black Americans in the grand veneer [sic] and a few in the petite [sic], and of those few, [the prosecutor has] now taken off two, which is approximately 40 percent of the Black Americans that were on our petite veneer [sic]. And I think that demonstrates a prima facie case that requires justification on the part of [the prosecution].

(RT 240-41). (Petitioner does not challenge the denial of his Wheeler motion on the ground

that the prosecutor excused a prospective juror who was disabled). Although petitioner's references to the "grand" venire and "petite" venire are not entirely clear, he appears to use the former term to reference all prospective jurors in the venire and to use the latter term to reference the 18 prospective jurors whose numbers had already been called and were in the jury box for questioning. If the court is correct in this assumption, this suggests that petitioner's counsel was conveying that 5 of the **[*16]** first 18 jurors called were African-Americans, and that after the prosecution exercised two peremptory challenges against African-Americans (40 percent of 5), three African-American prospective jurors then remained seated in the jury box.

In response to the trial court's request to explain the reasons for the challenges, the prosecutor stated:

> The first individual that I asked to be excused was Juror No. 5[6108] [an African-American man]. . . . The reason for that is because he indicated he had a cousin who had been accused of a shooting. He had gone to court — or gone and spoken on behalf of that cousin. He also indicated that — oh, it was nothing further that he indicated, but that as he — I watched the jurors as they would come in and out, and yesterday I noticed him making — I don't know if Mr. Cole [petitioner's counsel] noticed this, but I noticed — him making eye contact with Mr. Cole, which made me feel uncomfortable. I feel he could not be a fair juror based on those reasons. . . . [P] [P] [P]
>
> [Juror No. 7[3741], an African-American woman,] indicated that she was unemployed. And I felt that she does not have the stability in the community to be able to sit as a juror in this **[*17]** matter.

(RT 241-42).

The trial court denied petitioner's motion, noting that "[w]ith respect to the African-American[s] which have been discharged, [the prosecutor] has given sufficient reasons that [the court] believe[s] are sufficient to withstand the Wheeler motion." (RT 243). When asked whether he had observed any "unusual eye contact" between Juror No. 5[6108] and petitioner's counsel, the trial judge said he had not. [13] (RT 243).

FOOTNOTES

[13] The trial judge stated: "To be very candid, I don't pay that much attention as people are coming and going. I have my own agenda, which, quite frankly, isn't so much watching what's going on there, it's just — I just don't watch you folks when you come and go." (RT 243).

Petitioner later renewed his Wheeler/Batson motion after the prosecutor exercised her seventh peremptory challenge against Juror No. 2[8836], another African-American woman. [14] (RT 284, 330, 331, 333). The trial court asked the prosecutor "to justify the peremptory as to [Juror No. 2[8836]]." (RT 334). The prosecutor gave the following explanation:

> There are numerous reasons, actually, Your Honor. We went to side-bar with this juror, and she indicated that her son had been accused of similar **[*18]** offenses, and that's discharge of a firearm is what he was accused of. He in fact pled guilty. And while explaining that, she said that she felt that these defendants who are on trial were on trial because something was missing. I felt that she could not be fair

> because of that, because of that statement she made. She further indicated that her husband had in fact been accused of theft, and she indicated that her nephew was shot in Hawthorne.
>
> Your Honor, . . . I feel with respect to this particular juror . . . I don't think she could be fair given her background with respect to the numerous contacts she's had with the criminal justice system through family members.

(RT 334-35). Petitioner's counsel disagreed, stating he felt that "a distinct, clear pattern [had] been presented [] of exclusion based on race," especially since Juror No. 2[8836] otherwise seemed favorable to the prosecution. [15] (RT 335).

FOOTNOTES

14 Petitioner's counsel stated, in pertinent part:

> Juror No. 2[8836], [] just most recently excused, is another African-American woman. That's now three African-Americans . . . . There are very few African-Americans in this overall jury pool, and this is getting ridiculous, Your Honor. Our **[*19]** client's [sic] are African-American, and I just don't see how we can allow this to persist. And I'd like the prosecutor to explain once again why she has exercised a peremptory against African-Americans knowing the defendants are African-Americans.

(RT 333-34).

15 Petitioner's counsel argued, in pertinent part:

> Well, the fact of the matter is, Your Honor, a distinct, clear pattern has been presented here of exclusion based on race. Now, this particular juror at the side-bar, and there is a clear record as to what her comments were, seemed all very pro-prosecution in that she said her son was guilty; and like a man, he accepted responsibility. He [pleaded] guilty to his offense of discharging a firearm, and she admired him for that. Those are all prosecution-type responses. There's nothing in her response that indicated that she in any way thought there would be a gap in the evidence or that somehow she favored [petitioner]. All she said was that if someone plead not guilty, then she respects that as well; And she's going to wait and hear the evidence and judge this case on its own, having nothing to do with her son and having nothing to do with her husband, who I believe she indicated **[*20]** also [pleaded] guilty to his particular charge. [P] So it just seems to me that these peremptories are directed exclusively against African-American members of our jury, and it's just not right. It's, to me, a clear, obvious violation of Wheeler and Batson.

(RT 335-36).

The trial court denied the motion, ruling as follows:

> I'm going to deny the defense motion[]. To state the obvious, the purpose of this

> hearing is to determine whether the peremptory challenges were used systematically to exclude any cognizable group of jurors . . . . In this instance, the claim is the prosecution is doing this to exclude members of the African-American community. [P] The Court has listened to the prosecution's bases for exercising peremptory challenges, and I'm, on that basis, going to find the prosecution has given the Court justifiable reasons for exclusion of the three African-American jurors. . . .

(RT 336-37).

On direct appeal, the Court of Appeal rejected petitioner's claim of discrimination in jury selection, stating that "the record contains ample evidence to support the trial court's finding that the prosecutor's explanations for excusal of the three Black jurors were based on specific bias, not **[*21]** impermissible group bias." (Lodged Doc. F at 7). The Court of Appeal further explained:

> Juror No. 5's responses reflected the prosecutor was entitled to infer that he might be unsympathetic to the prosecution based on that juror's negative experience with the criminal justice system. Not only had his cousin twice been a suspect in a crime, one possibly an attempted murder charge, Juror No. 5 in fact had testified on his behalf in court in one instance. [citations]. Also, the prosecutor had observed Juror No. 5 making eye contact with [petitioner's] counsel, which raises a reasonable inference that he might be sympathetic towards [petitioner]. [citations].
>
> The prosecutor's excusal of Juror No. 7 also was based on a race-neutral reason. Her response that she was unemployed supports the prosecutor's conclusion that she "did not have the stability in the community to be able to sit as a juror in this matter." [citation].
>
> Juror No. 2's responses, even more so than Juror No. 5's, indicate substantial negative experience with the criminal justice system with respect to family members, i.e., her son, her ex-husband, and a nephew. [citations]. Additionally, she appeared to be sympathetic to [petitioner] **[*22]** based on her statement that [petitioner] was on trial "because of the fact there's some information that is missing or. . . ."

(Lodged Doc. F at 7-8).

2. Pertinent Law

In Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court held that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." A trial court faced with a Batson challenge undertakes a three-step analysis to determine whether the State has improperly excluded members from the jury. Snyder v. Louisiana, 552 U.S. 472, 476-77, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). First, the defendant must make out a prima facie case showing that a peremptory challenge has been exercised on the basis of race. Id. at 476 (citation and quotation marks omitted). Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id. at 476-77 (citation and quotation marks omitted). Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id. at 477 (citation and quotation marks omitted). "[T]he ultimate burden of persuasion regarding racial motivation **[*23]** rests with, and never shifts from, the opponent of the strike." Purkett v. Elem, 514 U.S.

765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995); see generally Paulino v. Harrison, 542 F.3d 692, 698-703 (9th Cir. 2008) (discussing Batson analysis).

At step one of the Batson analysis a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts give rise to an inference of discrimination. Johnson v. California, 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (citing Batson, 476 U.S. at 94). A defendant may establish a prima facie case solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Id. (quoting Batson, 476 U.S. at 96). To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Id. (quoting Batson, 476 U.S. at 96). [16] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Id. (quoting Batson, 476 U.S. at 96). **[*24]** Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of their race. Id. (quoting Batson, 476 U.S. at 96). A defendant can make a prima facie showing based on a statistical disparity alone. United States v. Collins, 551 F.3d 914, 921 (9th Cir. 2009) ("We have found an inference of discrimination where the prosecutor strikes a large number of panel members from the same racial group, or where the prosecutor uses a disproportionate number of strikes against members of a single racial group.") (citation omitted); Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006) (prima facie showing made where prosecutor used three of first four peremptory challenges to remove African-Americans and, at pertinent time, only four of 49 potential jurors were African-American); Paulino v. Castro, 371 F.3d at 1090 (inference of bias established where prosecutor struck five out of six possible African-American jurors and used five out of six — over 83% — of its peremptory challenges, to strike African-Americans). However, a prima facie inference of bias arising **[*25]** from a statistical disparity may be dispelled by other relevant circumstances such as the prosecutor's questions and statements during voir dire. United States v. Collins, 551 F.3d at 921; Williams v. Runnels, 432 F.3d at 1107. In the prima facie inquiry, it is also relevant for the court to consider the differing treatment of similarly situated potential jurors, *i.e.*, to conduct a comparative analysis. United States v. Collins, 551 F.3d at 921-23; United States v. Esparza-Gonzalez, 422 F.3d 897, 905 (9th Cir. 2005).

FOOTNOTES

16 The Supreme Court, since Batson, has determined that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race. Powers v. Ohio, 499 U.S. 400, 402, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

At step two of the analysis, the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge — reasons that must be related to the particular case being tried. Purkett v. Elem, 514 U.S. at 768-69 (citations and internal quotation marks omitted). A "legitimate reason" need not be a reason that makes sense, is persuasive, or is even plausible. **[*26]** Id. It must, however, be a reason that does not deny equal protection. Id. at 769. The issue is the facial validity of the explanation. Id. (citation omitted). At this second step, the reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the prosecutor's explanation. Id. (citation omitted); see also Rice v. Collins, 546 U.S. 333, 339, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (so long as reason offered is not inherently discriminatory, it suffices at step two of the analysis). Any determination about the credibility of the explanation is reserved for the third step of the analysis. Purkett v. Elem, 514 U.S. at 768. Steps two and three are independent inquiries that may not be collapsed into one. Id.

Step three of the Batson analysis, involves an evaluation of the prosecutor's credibility. Snyder v. Louisiana, 552 U.S. at 477 (citation omitted). The decisive question will be whether counsel's

race-neutral explanation for a peremptory challenge should be believed. Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion). [17] The trial court must not simply accept the proffered reasons at face value; it has a duty meaningfully to evaluate the persuasiveness of the prosecutor's **[*27]** race-neutral explanation to discern whether it is a mere pretext for discrimination. Williams v. Rhoades, 354 F.3d 1101, 1108 (9th Cir.) (citations, internal quotation marks, and internal brackets omitted), cert. denied, 543 U.S. 926, 125 S. Ct. 345, 160 L. Ed. 2d 225 (2004). The trial court must evaluate the record and consider each explanation within the context of the trial as a whole. Kesser v. Cambra, 465 F.3d 351, 359 (9th Cir. 2006) (en banc); see also Thaler v. Haynes, 130 S. Ct. 1171, 1174, 175 L. Ed. 2d 1003 (2010) (judge ruling on objection to peremptory challenge needs to take into account all possible explanatory factors in particular case) (citation and quotations omitted); Miller-El v. Dretke, 545 U.S. 231, 251-52, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Batson requires judge to assess plausibility of prosecutor's stated reason for striking juror in light of all evidence with a bearing on it) (citation omitted); Batson, 476 U.S. at 93 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (citation and internal quotations omitted). The court may consider factors such as the prosecutor's demeanor, the reasonableness of the **[*28]** explanation, and the nexus between the explanation and accepted trial strategies. Miller-El v. Cockrell, 537 U.S. 322, 339-40, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); see also Snyder v. Louisiana, 552 U.S. at 477 (demeanor of attorney who exercises challenge often will be best evidence of discriminatory intent) (citation and quotations omitted); Mitleider v. Hall, 391 F.3d 1039, 1047 (9th Cir. 2004) (trial court must evaluate prosecutor's proffered reasons and credibility under totality of relevant facts using all available tools including its own observations and the assistance of counsel), cert. denied, 545 U.S. 1143, 125 S. Ct. 2968, 162 L. Ed. 2d 895 (2005). [18] The court may also be required to conduct a comparative juror analysis to determine whether the basis upon which a prosecutor challenged a juror is a pretext. Kesser v. Cambra, 465 F.3d at 360-61. [19] "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El v. Dretke, 545 U.S. at 241. The fact that a prosecutor accepts other jurors of the same race as the challenged jurors is indicative, albeit **[*29]** not dispositive, of a nondiscriminatory motive. Turner v. Marshall, 121 F.3d 1248, 1254 (9th Cir. 1997), cert. denied, 522 U.S. 1153, 118 S. Ct. 1178, 140 L. Ed. 2d 186 (1998).

FOOTNOTES

17 Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot. Hernandez v. New York, 500 U.S. at 359.

18 In a situation in which the prosecutor's race-neutral reason for a peremptory challenge is a juror's demeanor, the trial court must evaluate whether the prosecutor's demeanor belies a discriminatory intent, and whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. Snyder v. Louisiana, 552 U.S. at 477. However, no Supreme Court case clearly establishes that a judge, in ruling on an objection to a peremptory challenge, must reject a demeanor-based explanation unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. Thaler v. Haynes, 130 S. Ct. at 1174-75.

19 Comparative analysis may be probative **[*30]** of a discriminatory intent even where a non-stricken juror does not share all of the characteristics identified by a prosecutor as bases for striking the challenged juror. See Miller-el v. Dretke, 545 U.S. at 247 n.6 ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects and there is no reason to accept one. . . . A *per se* rule that a defendant cannot win a Batson claim unless there is an identical white

juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters.").

A court need not find all nonracial reasons pretextual in order to find racial discrimination. Ali v. Hickman, 584 F.3d 1174, 1192 (9th Cir. 2009), cert. denied, 130 S. Ct. 2065, 176 L. Ed. 2d 429, 2010 WL 303963 (2010); Kesser v. Cambra, 465 F.3d at 360. If review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination. Kesser v. Cambra, 465 F.3d at 360 (citations omitted). Where it is determined that a prosecutor had mixed-motives in challenging a prospective juror, *i.e.*, where both race-based and race-neutral reasons **[*31]** motivated a challenged decision, the Ninth Circuit has limited the inquiry to "whether the prosecutor was motivated in substantial part by the discriminatory intent." Cook v. Lamarque, 593 F.3d 810, 815 (9th Cir. 2010) (quoting Snyder v. Louisiana, 552 U.S. at 485). [20]

FOOTNOTES

20 While the trial court need not make specific findings on all the evidence, beyond ruling on the objection to the challenge (United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir.), cert. denied, 528 U.S. 900, 120 S. Ct. 235, 145 L. Ed. 2d 197 (1999)), where the record does not reflect that a court undertook a sensitive inquiry into the available circumstantial and direct evidence of intent, the Supreme Court has presumed that such court did not undertake such an analysis. Green v. Lamarque, 532 F.3d 1028, 1030 n.2 (9th Cir. 2008) (as amended, 2008 U.S. App. LEXIS 16482, 2008 WL 2952801 (9th Cir. 2008)) (citing Miller-El v. Dretke, 545 U.S. at 241).

On federal habeas review, a trial court's factual determinations at step three of the Batson analysis are entitled to deference. Cook v. Lamarque, 593 F.3d at 815 (citing Batson, 476 U.S. at 98 n.21). Where a federal habeas court's review of the state court's factual determinations is based entirely on information that was contained in **[*32]** the state court record, federal habeas courts must defer to a California trial court's conclusion that there was no discrimination unless that finding was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Cook, 593 F.3d at 815-16 & n.3 (Section 2254(d)(2), instead of Section 2254(e)(1) applies because review of state court's factual determination based entirely on information contained in state court record) (citation omitted); Ali v. Hickman, 584 F.3d at 1180-81 & n.4 (same).

3. Analysis

Here, the preliminary issue of whether petitioner made a prima facie showing of discrimination is moot because, as noted above, the prosecutor offered race-neutral explanations for the peremptory challenges in issue and the trial court ruled on the ultimate question of intentional discrimination. See Hernandez v. New York, 500 U.S. at 359. Accordingly, the issue before this court is whether the California Court of Appeal's decision affirming the trial court's determination that the prosecutor's challenges of Juror Nos. 2[8836], 5[6108] and 7[3741] were not racially motivated was contrary to, or involved an unreasonable application **[*33]** of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented. Based upon a review of the record and the applicable law, this court concludes that petitioner is not entitled to habeas relief on his Wheeler/Batson claim. [21]

FOOTNOTES

21 This court recognizes that the trial court was not as clear as it could have been in separating steps two and step three of the Batson analysis. However, after an independent review of the record, and based upon the trial court's express recognition that it was to

determine whether the peremptory challenges were used systematically to exclude any cognizable group of jurors, the trial court's characterization of the prosecutor's stated reasons as "sufficient" to withstand a Wheeler/Batson, and the trial court's expressed belief that after listening to the prosecutor explain her reasoning, the trial court believed the reasons to be "justifiable," this court is satisfied that the trial court did not improperly conflate steps two and three of the Batson analysis.

a. Juror No. 5[6108]

The Court of Appeal initially addressed Juror No. 5[6108]. The prosecutor assertedly challenged Juror No. 5[6108] because **[*34]** (1) the juror's cousin had been accused of a shooting, and the juror spoke at a related, extra-judicial proceeding on behalf of the cousin; and (2) the prosecutor had observed the juror making eye contact with petitioner's attorney. (RT 241). The Court of Appeal concluded that the trial court's finding that the prosecutor did not challenge the juror for an impermissible reason was adequately supported by the record. (Lodged Doc. F at 7, 8). This court finds no basis to conclude that the state courts' determination relative to the prosecutor's non-discriminatory motive in excusing Juror No. 5 was objectively unreasonable. [22]

FOOTNOTES

22 To the extent the state courts did not conduct a comparative juror analysis when evaluating petitioner's Batson claim at step three, this court has done so de novo, to the extent the record permits. Green, 532 F.3d at 1031.

Petitioner has not demonstrated that the prosecutor's reasons for striking Juror No. 5[6108] were a pretext for racial discrimination. See Purkett, 514 U.S. at 768 ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

First, the fact that a prospective juror has a relative **[*35]** who was arrested and incarcerated has been recognized as a plausible, race-neutral basis for exercising a peremptory challenge. See, e.g., United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987) ("reasonable" to challenge black juror whose brother was in prison for armed robbery), overruled on other grounds by Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988); United States v. Hendrix, 509 F.3d 362, 371 (7th Cir. 2007) ("legitimate and race-neutral" for prosecutor to strike prospective African-American jurors who had relatives in prison); Messiah v. Duncan, 435 F.3d 186, 201 (2d Cir. 2006) (prosecutor could reasonably have believed that juror who had been prosecuted by his office and who had relatives in prison would be unduly sympathetic to defendant and hostile to the prosecutor); Devoil-El v. Groose, 160 F.3d 1184, 1186 (8th Cir. 1998) (race-neutral reasons include "having a relative in jail, dissatisfaction with the police, . . . and having been a crime victim"), cert. denied, 525 U.S. 1163, 119 S. Ct. 1077, 143 L. Ed. 2d 79 (1999); United States v. Wiggins, 104 F.3d 174, 176 (8th Cir. 1997) ("the incarceration of a close family member is a legitimate race-neutral reason justifying the use of a peremptory strike"); **[*36]** United States v. Mathis, 96 F.3d 1577, 1582 (11th Cir. 1996) ("The record shows that [the potential juror], who is Hispanic, was removed because a close family member of hers had had a cocaine conviction. There was no clear error in allowing the strike in this case."), cert. denied, 520 U.S. 1213, 117 S. Ct. 1699, 137 L. Ed. 2d 825 (1997).

Second, a juror's conduct during trial — such as making eye contact with the defendant's attorney — can also serve as a race-neutral basis for exercising a peremptory challenge. See, e.g., Brown v. Terhune, 158 F. Supp. 2d 1050, 1083 (N.D. Cal. 2001) (peremptory challenges are often based on "experienced hunches and educated guesses, derived from . . . a juror's 'bare looks and gestures") (quoting J.E.B. v. Alabama, 511 U.S. 127, 148, 114 S. Ct. 1419, 128

L. Ed. 2d 89 (1994) (O'Connor, J., concurring)). Although the trial court did not see Juror No. 5 [6108] make eye contact with petitioner's counsel (RT 243), the Supreme Court recently clarified that a trial judge need not have personally observed or recall the aspect of a juror's demeanor on which a prosecutor's explanation is based in order to assess whether a prosecutor's challenge was racially motivated. See Thaler v. Haynes, 130 S. Ct. at 1174-75. As nothing in **[*37]** the record suggests that the prosecutor fabricated the observations in issue or that other jurors behaved similarly and were not excused by the prosecutor, this court cannot find that the rejection of petitioner's claim relating to this basis of the prosecutor's challenge to Juror No. 5[6108] was objectively unreasonable.

Third, contrary to petitioner's suggestion, a comparative analysis does not yield a conclusion that the prosecutor exercised a challenge against Juror No. 5[6108] on a discriminatory basis. More specifically, petitioner argues that the prosecutor's first reason for striking Juror No. 5 [6108] was pretextual because former Juror No. 8[4478 or 4479] [23] and former Juror 13[0399] "also had negative involvement with the criminal justice system, yet they were not African Americans and [were] allowed to sit as jurors by the prosecutor in [petitioner's] case." (Traverse at 5).

FOOTNOTES

23 Although the former Juror No. 8 to whom petitioner refers, was originally called as Juror No. 4478, such juror identified himself as Juror No. 4479. (RT 99, 110).

Former Juror No. 8[4478/4479] was one of the original prospective jurors called into the jury box. (RT 99). Although petitioner asserts that **[*38]** this juror was not African-American, the jury selection transcript contains no indication of this prospective juror's race or ethnicity. During voir dire, this prospective juror stated: He had been arrested 20 years earlier on a drug charge which was dismissed, had received a jaywalking ticket when he was a young teenager, and had a brother-in-law who had been arrested for driving under the influence. (RT 141, 169-71). He had been the victim of a robbery during which he was held at knife point and had also been a victim of various and miscellaneous non-violent crimes. (RT 140). As the individual who held him at knife point was captured by the police and convicted, he was satisfied with the way he had been treated. (RT 141). Former Juror No. 8[4478/4479] was the subject of a peremptory challenge exercised by petitioner's co-defendant, and thus did not serve on petitioner's jury. (RT 244). [24]

FOOTNOTES

24 The prosecutor initially accepted the panel as constituted after exercising a single peremptory challenge against former Juror No. 5[6108]. (RT 239). At that point in time, the panel included Juror No. 7[3741], a subject of the Wheeler/Batson motions, as well as former Juror No. 8[4478/4479], as **[*39]** to whom petitioner's co-defendant's counsel subsequently exercised a peremptory challenge. (RT 244). The prosecutor ultimately used 7 of her 30 peremptory challenges, and one of her two peremptory challenges to the alternate jurors. (RT 5, 239, 240, 279, 280, 330, 331, 405, 422).

Former Juror No. 13[0399] was also one of the original prospective jurors called into the jury box. (RT 99). Such juror ultimately became Juror No. 5[0399] and served on petitioner's jury. (RT 115, 239). Although petitioner asserts that this juror was not African-American, the jury selection transcript contains no indication of this prospective juror's race or ethnicity. During voir dire, this juror stated: His brother had been imprisoned for threatening someone with a gun. (RT 172). The juror had not gone to court during the matter. (RT 172). Although his brother complained to him about the police, once his brother told the juror that he was guilty, the juror told him "well then, you have nothing to say." (RT 172-73). The juror's house had

been broken into twice in the last two years. (RT 143). He reported the matters to the police and was "especially" satisfied with the way the police treated him in connection **[*40]** with the second burglary because the police gave him advice and explained how living off an alley made him a vulnerable target. (RT 144).

Although the record does not reflect the race of these two jurors, this court assumes for purposes of analysis, that they were African-American as petitioner asserts. However, even accepting that premise, a comparative analysis does not support an inference of purposeful discrimination. Unlike the African-American Juror No. 5[6108], as to whom the prosecutor exercised a peremptory challenge, Juror Nos. 8[4478/4479] and 13[0399] had not spoken on behalf of their relative in connection with their relatives' criminal prosecutions -- a fact the prosecutor said partially motivated her peremptory challenge of Juror No. 5[6108]. (RT 241).

Moreover, based upon its own review of the record, the court notes that the prosecutor *did* exercise multiple peremptory challenges against other non-disputed presumably non-African-American prospective jurors who had been in trouble with the law or whose family members had been in trouble with the law, suggesting that her exercise of a challenge as to Juror No. 5[6108] on such basis was not pretextual. (RT 264, 273-74, 279 **[*41]** [Juror No. 8[7234] (juror falsely accused of crime)]; RT 283, 295, 330 [Juror No. 14/2[7796] (juror's sister convicted/juror attended child custody hearing for sister)]; RT 396-80, 422 [Juror No. 13[4776] (juror's sister arrested)]. [25]

FOOTNOTES

25 Although not addressed by petitioner, this court notes, based upon its own review of the record, that another juror, who was originally seated as Juror No. 13[3502], and ultimately served as Juror No. 2[3502] during petitioner's trial, also had family members who had been in trouble with the law. (RT 362, 377, 404). The race/ethnicity of this juror is not discernible from the record, though the fact that petitioner does not now, and did not on direct appeal (when petitioner was represented by counsel) point to this juror as a non-African-American juror who was similarly situated to Juror No. 5[6108] and was not the subject of a prosecution peremptory challenge, suggests that this juror may well have been African-American.

After a careful review of the record, this court concludes that the California courts' rejection of petitioner's Wheeler/Batson motion relative to Juror No. 5[6108] was not contrary to, and did not involve an unreasonable application **[*42]** of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this portion of his Wheeler/Batson claim.

b. Juror No. 7[3741]

The prosecutor assertedly challenged Juror No. 7[3741] because she was unemployed, and thus "[did] not have the stability in the community to be able to sit as a juror. . . ." (RT 242). The Court of Appeal concluded that the trial court's finding that the prosecutor did not challenge the juror for an impermissible reason was adequately supported by the record. (Lodged Doc. F at 7, 8). This court finds no basis to conclude that the state courts' determination relative to the prosecutor's non-discriminatory motive in excusing Juror No. 7[3741] was objectively unreasonable.

The fact that Juror No. 7[3741] was unemployed is a credible, race-neutral basis for exercising a peremptory challenge. See, e.g., United State v. Cruz-Escoto, 476 F.3d 1081, 1089-90 (9th Cir. 2007) (juror's unemployment held to be a race-neutral reason for peremptory challenge); United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir.1998) (fact that juror had been **[*43]** unemployed for a year was race-neutral reason for striking Hispanic juror); see also

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 n. 14, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (peremptory challenges based on occupation do not raise same level of concern as those based on race or gender); United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987) (excluding jurors based on profession wholly within prosecutor's prerogative) (citation omitted); Hall v. Luebbers, 341 F.3d 706, 713 (8th Cir. 2003) (occupation is a permissible reason to defend against a Batson challenge) (citation omitted). Since petitioner does not identify any other non-African-American jurors similarly unemployed who were not excused by the prosecutor, this court cannot find that the rejection of petitioner's claim relating to the prosecutor's reason for challenging Juror No. 7[3741] was objectively unreasonable. [26]

FOOTNOTES

[26] This court's *de novo* comparative analysis reveals only one other juror/prospective — Juror No. 2[3502] — who said that she was not working (as opposed to being retired). (RT 362). Petitioner fails to argue, let alone demonstrate that the prosecutor's failure to excuse this unemployed juror is indicative of a discriminatory motive **[*44]** in excusing Juror No. 7 [3741]. The court notes that the race of Juror No.2[3502] is not apparent from the record. Petitioner's failure to raise the non-excusal of such juror (and his counsel's failure to do so on direct appeal) may be due to the fact that such juror is African-American. However, even assuming that such juror is not African-American, she is distinct from Juror No. 7[3741] because she qualified her statement by indicating that she was not working because she was disabled, an additional fact which weakens any inference of instability arising from unemployment. (RT 362).

Petitioner argues that the prosecutor's stated rationale is pretextual because the prosecutor failed to explore the duration of, and reasons for Juror No. 7[3741]'s unemployment before striking the prospective juror. (Traverse at 5). While a prosecutor's statements and questions during voir dire can shed light on the prosecutor's motivations, this court notes, from its review of the record, that the prosecutor in this case did not ask many questions during the entirety of the voir dire, and that those questions she did ask were largely of a general nature. (RT 233-37, 279, 328-29, 396-400). On this record, **[*45]** the court will not ascribe a discriminatory motive to the prosecutor based upon a failure to ask follow-up questions of Juror No. 7[3741]. Petitioner has simply not met his burden to establish that the prosecutor exercised a peremptory challenge against Juror No. 7[3741] based upon a discriminatory motive. [27]

FOOTNOTES

[27] To the extent petitioner intends to suggest as he did on direct appeal that *retired* jurors are essentially equivalent to an unemployed juror, and that the court should thus consider the prosecutor's failure to strike non-African-American retired jurors in assessing the prosecutor's motivations, this court disagrees, as an inference of lack of stability can more readily be made from unemployment than retirement.

After a careful review of the record, this court concludes that the California courts' rejection of petitioner's Wheeler/Batson motion relative to Juror No. 7[3741] was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this portion of his Wheeler/Batson claim.

c. [*46] Juror No. 2[8836][28]

FOOTNOTES

28 Juror No. 2[8836] was initially seated as Juror No. 15. (RT 284, 330).

The prosecutor assertedly challenged Juror No. 2[8836] based on (1) the numerous contacts she had had with the criminal justice system through family members (son pleaded guilty to discharge of firearm; husband accused of theft, nephew shot in Hawthorne); and (2) the juror's statement that she felt that petitioner and his co-defendant were on trial because something was missing. (RT 334-35). The Court of Appeal concluded that the trial court's finding that the prosecutor did not challenge the juror for an impermissible reason was adequately supported by the record. (Lodged Doc. F at 7, 8). This court finds no basis to conclude that the state courts' determination relative to the prosecutor's non-discriminatory motive in excusing Juror No. 2 [8836] was objectively unreasonable.

First, as discussed above, the fact that a prospective juror has a relative with a criminal record constitutes a plausible, race-neutral reason for exercising a peremptory challenge. Here, Juror No. 2[8836] stated that her son had been incarcerated for discharging a firearm, and her ex-husband had been imprisoned approximately **[*47]** 25 years earlier for credit card fraud. (RT 296-99). For the same reasons discussed above in connection with Juror No. 5[6108], petitioner fails to demonstrate that the prosecutor's exercise of a peremptory challenge against Juror No. 2 [8836] on this basis was pretextual.

Second, when asked about the fact that petitioner chose to go to trial, while her son had pleaded guilty, Juror No. 2[8836] said "I have no problem with that. My son said he did it. So [petitioner and his co-defendant are] . . . on a trial simply because of the fact there's some information that is missing or —. " (RT 297). There is nothing inherently pretextual about the prosecutor's conclusion that Juror No. 2[8836] could not be fair because she thought something was "missing" in petitioner's prosecution. Cf. United States v. Power, 881 F.2d 733, 740 (9th Cir. 1989) ("It is not improper for a prosecutor to rely on his instincts with respect to the voir dire process.") (quoting United States v. Chinchilla, 874 F.2d 695, 699 (9th Cir. 1989)). As nothing in the record suggests that other jurors expressed similar beliefs and were not excused by the prosecutor, this court cannot find that the rejection of petitioner's **[*48]** claim relating to this basis of the prosecutor's challenge to Juror No. 2[8836] was objectively unreasonable.

After a careful review of the record, this court concludes that the California courts' rejection of petitioner's Wheeler/Batson motion relative to Juror No. 2[8836] was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this portion of his Wheeler/Batson claim either.

B. The Trial Court's Decision to Permit Amendment of the Charging Information Does Not Merit Relief

Petitioner claims that the trial court denied him due process and a fair trial when it granted the prosecution's motion to amend the charges to add a new count in the middle of trial. (Petition at 6D-6O; Traverse at 8-10). The LASC, the last state court to render a reasoned decision on the issue, rejected this claim on its merits. **29** (RT 339-45, 438, 449, 1416-17). Petitioner is not entitled to federal habeas relief on this claim.

FOOTNOTES

29 As the California Court of Appeal and California Supreme Court rejected this **[*49]** claim without comment on habeas review — determinations which are deemed to be on the merits — this court looks through to the trial court's original ruling on the issue as such ruling constitutes the last reasoned state court decision for purposes of federal habeas review. See Medley v. Runnels, 506 F.3d 857, 863 (9th Cir. 2007) (en banc) (where, on federal habeas review, neither California Court of Appeal nor California Supreme Court issued reasoned decision, reviewing court looked through to trial court's oral pretrial ruling which constituted

last reasoned decision under Ylst v. Nunnemaker, 501 U.S. 797, 804-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)), cert. denied, 552 U.S. 1316, 128 S. Ct. 1878, 170 L. Ed. 2d 754 (2008); see also Edwards v. Lamarque, 475 F.3d 1121, 1135 (9th Cir. 2007) (Fisher, J., dissenting) ("When a state trial court reaches a reasoned conclusion that the appellate court subsequently does not address, traditionally we have treated the trial court's determination as the last reasoned decision.") (citing Hirschfield v. Payne, 420 F.3d 922, 928 (9th Cir. 2005) (applying deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA) to oral ruling of state trial court which constituted last reason decision)). **[*50]** In any event, because it is not clear to this court that petitioner raised the *federal* basis of this claim in the trial court, as opposed to in the California Supreme Court where such federal basis was clearly presented (Lodged Doc. M at 3), this court has conducted an independent review of the record and concludes, based upon such a review, that the California courts' rejection of this claim was not objectively unreasonable.

1. Pertinent Facts

a. Preliminary Hearing

On March 14, 2001, a preliminary hearing was held in this matter in connection with an amended complaint which charged petitioner with multiple offenses, including driving in willful or wanton disregard for safety of persons or property while fleeing from pursuing police officers ("felony evasion" or "felony evading") in violation of California Vehicle Code section 2800.2(a). (CT 1-123). The prosecution called a total of five witnesses, including Sergeant Contreras. (CT 1-123).

Sergeant Contreras testified about his involvement in the initial stop and subsequent pursuit and apprehension of petitioner in the early morning hours of January 24, 2001. (CT 68-99). As pertinent to the felony evading charge, Sergeant Contreras testified:

On **[*51]** January 24, 2001, Sergeant Contreras was in a marked black and white patrol vehicle. (CT 72). After Sergeant Contreras stopped petitioner, he called for a backup unit. (CT 72, 74). He and both of the backup officers were wearing police uniforms. (CT 73, 75). One of the backup officers ordered petitioner to step out of his vehicle. (CT 74). Petitioner did not comply, but instead started his car and "sped away." (CT 74-75). The two police patrol cars activated their sirens and lights (which included at least one lighted red lamp) and gave chase. (CT 75-76, 77). As he fled police, petitioner twice drove on the wrong side of the road, and exceeded the speed limit on both the Pacific Coast Highway and residential streets. (CT 74-78; see RT 344-45).

At the end of the preliminary hearing, petitioner's counsel moved to dismiss all counts based upon insufficiency of the evidence. (CT 118). The court granted petitioner's motion to dismiss only as to the felony evasion charge, finding that the evidence was sufficient to believe that the remaining charges had been committed and that petitioner was guilty thereof. (CT 120). The court then ordered that petitioner be held to answer the remaining charges. **[*52]** (CT 120, 121).

b. Pertinent Subsequent Proceedings

On March 28, 2001, the state court arraigned petitioner on an Information that did not include a felony evasion charge. (CT 124-32, 153-54). On April 20, 2001, petitioner waived arraignment on an Amended Information that also did not include a felony evasion charge. (CT 133-41, 155-56).

Jury selection for petitioner's trial commenced on October 23, 2001. (CT 166; RT 1, 21).

On October 26, 2001, the prosecutor moved to amend the Amended Information to add as count

10 the same felony evasion charge that had been dismissed at the preliminary hearing. (CT 171; RT 339-40). Petitioner's counsel objected, arguing that the proposed amendment was late, that he had not prepared a defense with respect to a felony evasion charge, and consequently, that petitioenr would be prejudiced if the court authorized the amendment . (RT 340-42). The trial court reserved ruling on the prosecutor's motion until jury selection had been completed and the prosecutor had presented her opening statement that morning. (CT 171-72; RT 344, 438).

That afternoon, the trial court granted the motion to amend, stating:

> It seems to me that with respect to the People's motion **[*53]** to amend a count 10 [felony evading], I'm going to grant the motion. It seems to me whether or not the People have sufficient evidence for the jury to decide the issue can be the subject to [sic] an 1118.1 [motion for acquittal]. It's without prejudice to [petitioner's] rights in that regard. But it also seems to me it's not the kind of thing that would lead to undue surprise, additional witnesses. I think it's fairly before people in this case, the litigants, and I just don't see that it's unduly prejudicial to grant that motion.

(RT 438). Petitioner's counsel later reiterated his objections to the trial court's ruling, stressing the significant prejudice petitioner would arguably suffer if the Amended Information was further amended at such a late stage of the proceedings. [30] (RT 448-49). The trial court repeated the reasons for its ruling:

> I'll state to you the way I saw it. The matter was addressed at the preliminary hearing. It seems to me without count 10 [felony evasion], without that allegation, the same facts are going to be placed before the jury; and rather than hear the People's motion at the close of People's evidence, she [sic] chose to amend at the front end.
>
> I think they **[*54]** should be permitted to do this because I really don't see there's any new facts put before this jury in this case. And I just don't see there's substantial undue prejudice to the defendants. If I were in your shoes, I would be making the same arguments; But I do think it's a fair order. That's my order as to Count 10.

(RT 449).

FOOTNOTES

30 Petitioner's counsel stated:

> I am definitely stunned by the court's decision to allow an amendment after the trial has started on the new classification of crime, namely, the 2800.2 felony evading.
>
> I would also indicate to the court, in terms of prejudice, that I did not voir dire this jury as to that issue. And the prosecutor has provided zero reason as to why she chose to amend the complaint [sic] [now] as opposed to any other day in the last six months. And, additionally, I am simply unprepared to defend and litigate that issue. Having said that, I'll do my best.

> I just want the record to be very clear on that. I see no justification for the permission — to allow this prosecutor to amend at this outrageously late date when there's been no reason offered as to why they took so long to do that.
>
> Additionally, let me add one additional fact, and that is, had the **[*55]** People chosen to amend at the appropriate time, namely, with the filing of the Information, and I might additionally add this Information has been amended on a couple of occasions, so they've had ample opportunity to consider and think about this issue, then I certainly would have brought a 995 [motion to set aside information] to address the issue of felony evading based upon the preliminary hearing transcript, and now I'm being deprived of that opportunity as well. Because certainly I, unfortunately, now that we're in trial, simply don't have the time to sit and research those issues and start to prepare a 995. We're in trial. I respectfully disagree with the court's decision on that issue. I just don't think there's any showing whatsoever to permit that, Your Honor.

(RT 448-49).

On October 31, 2001, the prosecution filed a Second Amended Information which included the felony evasion charge (count 10). (CT 142-52). The trial court arraigned petitioner on the Second Amended Information, and entered a plea of not guilty on petitioner's behalf. (RT 450-51).

On November 1, 2001, petitioner's counsel renewed his objection to the addition of the felony evasion charge in the context of a motion **[*56]** to dismiss, and the trial court again addressed the issue, reaffirming its original ruling. [31] (RT 1116-24).

FOOTNOTES

31 The trial court stated:

> I'm not going to change my decision. . . . [P] . . . First of all, at the preliminary hearing, the [petitioner] was on notice as to the charge and as to evidence that would support the claim. So, in a technical fashion, the charge was before — . . . [P] . . .There was the charge and I believe sufficient evidence for the defense to be on notice as to what the people were pursuing and indeed to hold the [petitioner] to answer, if you will. [P] Further, the evidence in this case in the ordinary progression, I felt from the beginning, although I didn't know what your case was all about when I made the ruling, it seemed to me there was going to be that evidence put before the trier of fact in the People's case in chief when they were presenting the evidence as to what happened from the time of the alleged offense — from the beginning of the transaction, from the beginning of the police involvement, to the time of the apprehension. I felt this evidence was going to come out in this case in any event, and on that basis — on those bases, I permitted the People **[*57]** to add count 10, and I'm going to stand by my ruling.

(RT 1123-24).

As noted above, on November 5, 2001, the jury convicted petitioner of the felony evasion

charge. (CT 298, 302-303, 366; RT 1300).

On July 2, 2002, petitioner's counsel filed a motion for new trial and argued, in support thereof, that he should receive a new trial on count 10 based upon the amendment which added the felony evasion charge because petitioner was not afforded adequate notice of such charge or an adequate opportunity to defend against it. (CT 330-47; RT 1407-11). The trial court denied petitioner's motion for a new trial, stating in pertinent part:

> I'm going to tell you how I'm going to rule as to count 10, felony evading. I previously allowed the People to amend because I thought it was a fair thing to do under the circumstances. I believe there was fair notice to the defense as to what the underlying elements were. On that basis, I thought it was fair to permit the amendment during trial, and I'm going to stand by my prior ruling, and I'm not going to grant a new trial as to count 10. I thought that, as I'm repeating myself, it was the fair thing to do under the circumstances.

(RT 1416-17).

2. Pertinent Law

"The **[*58]** Sixth Amendment guarantees a criminal defendant the fundamental right to be informed of the nature and cause of the charges made against him so as to permit adequate preparation of a defense." Gautt v. Lewis, 489 F.3d 993, 1002 (9th Cir. 2007) (citations omitted), cert. denied, 552 U.S. 1245, 128 S. Ct. 1477, 170 L. Ed. 2d 300 (2008); see also In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948) ("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 guarantee is applicable to the states through the due process clause of the Fourteenth Amendment. Gautt, 489 F.3d at 1003 (citing Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.")).

Under California law, a trial court has discretion to permit the amendment of an Information to allege offenses established at the preliminary hearing, even during trial, **[*59]** as long as the defendant's substantial rights are not compromised. Cal. Penal Code § 1009; People v. Graff, 170 Cal. App. 4th 345, 361-62, 87 Cal. Rptr. 3d 827 (2009); People v. Jones, 164 Cal. App. 3d 1173, 1178, 211 Cal. Rptr. 167 (1985). A defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based. People v. Burnett, 71 Cal. App. 4th 151, 165-66, 83 Cal. Rptr. 2d 629 (1999).

Evidence is sufficient to prove that a defendant committed felony evasion if it establishes: (1) the defendant was operating a motor vehicle and willfully fled or otherwise attempted to elude a pursuing police officer; (2) he did so with the specific intent to evade such officer; (3) the officer's vehicle exhibited at least one lighted red lamp visible from the front; (4) the defendant saw or reasonably should have seen the red lamp; (5) the officer's vehicle sounded a siren, as reasonably necessary; (6) the officer's motor vehicle was distinctively marked; (7) the officer was wearing a distinctive uniform; and (8) the driver of the pursued vehicle drove in a willful or wanton disregard for the safety of persons or property. See CALJIC 12.85; People v. Sewell, 80 Cal. App. 4th 690, 694-695, 95 Cal. Rptr. 2d 600 (2000) **[*60]** (The offense of evading a police officer is committed by one who, "while fleeing or attempting to elude a pursuing peace officer," drives his pursued vehicle in "a willful or wanton disregard for the safety of persons or property.") (citation omitted), overruled on another ground by People v. Howard, 34 Cal. 4th

1129, 1139, 23 Cal. Rptr. 3d 306, 104 P.3d 107 (2005). A "willful or wanton disregard for the safety of persons or property" can be established by showing that while evading the police a defendant violated three or more traffic laws. Cal. Vehicle Code § 2800.2(b).

3. Analysis

Petitioner contends that the trial court denied him due process and a fair trial when it granted the prosecution's motion to amend the Amended Information. (Petition at 6D-6O; Traverse at 8-10). More specifically, petitioner argues that the amendment was improper because evidence presented at the preliminary hearing did not support a charge of felony evading and the late amendment prejudiced petitioner's defense (*i.e.* he was unable adequately to prepare and to file a motion to dismiss the added charge; he was unable to voir dire jurors on the issue; and he had insufficient time to prepare a defense to the charge). (Petition at 6F-6N; Traverse **[*61]** 9-11). Petitioner is not entitled to federal habeas relief on this claim.

First, to the extent petitioner argues that the trial court violated California Penal Code section 1009 when it allowed the prosecutor to amend the Amended Information during trial, such a state law claim is not cognizable in this federal habeas proceeding. See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); see also Langford v. Day, 110 F.3d 1380, 1389 (9th Cir.) ("[A petitioner] may not transform a state-law issue into a federal one merely by asserting a violation of due process."), cert. denied, 522 U.S. 881, 118 S. Ct. 208, 139 L. Ed. 2d 144 (1997).

Second, to the extent petitioner contends that the trial court's ruling violated his rights to due process and a fair trial, such a claim is without merit. Preliminarily, petitioner does not argue that the Second Amended Information failed clearly to inform him of the nature and the cause of all charges against him, nor could he. On October 26, 2001, the trial court expressly allowed the prosecutor to amend the Amended Information to add count 10 charging felony evading under California Vehicle Code section 2800.2 ("Section 2800.2"). (CT 171; RT 339-40, 438). Petitioner stated that **[*62]** he understood the charge — specifically felony evading under Section 2800.2. (CT 171; RT 449-50). In addition, on October 31, 2001, the prosecutor filed the Second Amended Information which included, as count 10, the charge of felony evasion, a violation of Section 2800.2. (CT 142-52, 171). Nor could petitioner credibly argue that California Penal Code section 1009 itself contravenes any clearly established Supreme Court authority. See, e.g., Franklin v. Lewis, 2002 U.S. Dist. LEXIS 6371, 2002 WL 552333, at *12 (N.D. Cal. April 9, 2002) (California Penal Code section 1009 "not contrary to Supreme Court authority."). The gravamen of petitioner's claim, therefore, is that by allowing amendment of the Amended Information when it did — *i.e.*, immediately after the prosecution gave its opening statement — the trial court afforded petitioner a constitutionally inadequate amount of time to prepare a defense against the additional charge. Such a claim does not merit habeas relief.

The trial court concluded that permitting amendment did not prejudice petitioner, particularly because no additional witnesses or other evidence would need to be presented to prove the felony evading charge. (RT 438, 448-49). Moreover, considering **[*63]** that the trial court granted the prosecution's motion to amend on October 26, 2001, and the prosecution rested on November 1, 2001, petitioner had six days (out of a trial that lasted less than two weeks) to prepare a defense to the added charge. (RT 438, 449-50, 1060, 1115, 1181). Under such circumstances, this court cannot conclude that petitioner received constitutionally inadequate notice. See, e.g., Stephens v. Borg, 59 F.3d 932, 936 (9th Cir. 1995) (five days of actual notice of the prosecution's intention to rely on a felony-murder theory sufficient to prepare and raise a defense); Morrison v. Estelle, 981 F.2d 425, 428 (9th Cir. 1992) (two days to prepare closing argument defending new felony-murder theory constitutionally sufficient); Douglas v. Cambra, 2007 U.S. Dist. LEXIS 81005, 2007 WL 3231778, at *8 (E.D. Cal. Nov. 1, 2007) (petitioner not deprived of due process where defense counsel had four days to revise closing argument to address amended charge) (citation omitted), report and recommendation adopted, 2008 U.S. Dist. LEXIS 13817, 2008 WL 539807 (E.D. Cal. Feb. 25, 2008); Kenny v. Newland, 2001 U.S. Dist. LEXIS 20768, 2001 WL 1602698, at **7-8 (N.D. Cal. Dec. 5, 2001) (Petitioner received fair notice of amended charges against him where "prosecution **[*64]** amended the

information while petitioner was still putting on defense witnesses.").

The state courts' rejection of petitioner's claim that the amendment of the Amended Information denied him due process and a fair trial was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this claim.

C. Petitioner's Fourth Amendment Claim Relating to the Admission of Evidence Derived from an Allegedly Unconstitutional Traffic Stop Does Not Merit Relief

Petitioner contends that he is entitled to habeas relief because the introduction of evidence derived from an allegedly unconstitutional traffic stop — namely evidence of petitioner's flight from the police and the ammunition discovered during his subsequent arrest — violated his Fourth Amendment right to be free from unreasonable searches and seizures. (Petition at 6P-6X; Traverse at 10-11). Petitioner's Fourth Amendment claim is not cognizable on federal habeas review.

Where the state has provided an opportunity for full and fair litigation of **[*65]** a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. See Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). California affords such an opportunity to criminal defendants under state law. See Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990).

In this case, petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court by virtue of California Penal Code § 1538.5. [32] The fact that petitioner and/or his counsel did not avail themselves of such an opportunity is immaterial. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996) (relevant inquiry is whether petitioner had opportunity to litigate his claim, not whether he did in fact do so or even whether claim was correctly decided) (citations omitted). Accordingly, petitioner is not entitled to federal habeas relief on his Fourth Amendment Claim.

FOOTNOTES

32 California Penal Code Section 1538.5 authorizes criminal defendants to seek the suppression of evidence obtained as a result of an unreasonable search or seizure. Cal. Penal Code § 1538.5.

D. The Trial Court's Refusal to Strike Multiple [*66] Strike Convictions Does Not Merit Relief

Petitioner claims that the trial court abused its discretion and violated due process by refusing to strike four of his five strike priors. (Petition at 6A-6B; Traverse at 6-7). The California Court of Appeal, the last state court to issue a reasoned decision on the issue of whether the trial court abused its discretion, rejected this claim on its merits. [33] (Lodged Doc. F at 8-11). Petitioner is not entitled to federal habeas relief on this claim.

FOOTNOTES

33 Because it does not appear to this court that petitioner raised the *federal* basis of this claim in the Court of Appeal, as opposed to in the California Supreme Court where such federal basis was fairly presented (Lodged Doc. L at 6), this court has conducted an independent review of the record and concludes, based upon such a review, that the California courts' rejection of this claim was not objectively unreasonable.

In California, trial courts have the discretion to dismiss prior strikes in the interest of justice under California Penal Code section 1385(a). People v. Superior Court (Romero), 13 Cal. 4th 497, 529-30, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). In ruling on a motion to dismiss a strike, "the court in question must consider **[*67]** whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the . . . spirit [of California's Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." People v. Williams, 17 Cal. 4th 148, 161, 69 Cal. Rptr. 2d 917, 948 P.2d 429 (1998).

In petitioner's case, the trial court denied petitioner's motion to strike the strike priors, and sentenced petitioner to concurrent terms of 25 years to life on the two counts of conviction in accordance with the Three Strikes law. (CT 330-52; RT 1417-29). The California Court of Appeal upheld the trial court's decision, finding that it was not an abuse of discretion, particularly in light of the nature of the current crimes and petitioner's criminal history. (Lodged Doc. F at 10-11).

The Ninth Circuit has held that a challenge to the denial of a motion to dismiss a strike constitutes a state law claim that cannot be considered in a federal habeas petition. Brown v. Mayle, 283 F.3d 1019, 1040 (9th Cir. 2002), vacated **[*68]** on other grounds, Mayle v. Brown, 538 U.S. 901, 123 S. Ct. 1509, 155 L. Ed. 2d 220 (2003). Accordingly, petitioner's claim that the trial court improperly denied his motion to strike four of his strike priors is not subject to federal habeas review. See 28 U.S.C. § 2254(a) (Federal habeas corpus relief may be granted "only on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States."); Estelle, 502 U.S. at 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

To the extent petitioner's claim is reviewable based upon a potential denial of due process, it lacks merit, as petitioner has not shown that his sentencing was fundamentally unfair. See Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief."). In concluding that the trial court had not abused its discretion, the Court of Appeal reasoned **[*69]** as follows:

> Initially, we note that [petitioner] is correct that his current convictions do not constitute violent or serious crimes to the extent those crimes are defined [in California Penal Code §§ 667.5(c), 1192.7(c)]. Nonetheless, they are not offenses which may be considered insignificant. Felony evasion is a crime of moral turpitude [citation] which "carries with it as a likely consequence the possibility of massive physical harm" [citation]. Also, possession of ammunition by a felon gives rise to the inference of potential for great bodily injury, even death, from the improper use of firearms. [citation].
>
> Moreover, when [petitioner's] current convictions are considered with his prior criminal conduct, which is not minimal, it is clear that it cannot be said that he falls outside the spirit of the three strikes law. In 1991, a juvenile petition for robbery was sustained, and based thereon he was placed in a youth home for nine months. In 1993, he sustained four convictions underlying the challenged strikes, i.e., for which he was sentenced to prison for eight years. [Petitioner] and an accomplice threatened the victim's life and "to burn him out of the neighborhood." They threw **[*70]** a burning Christmas tree through the window of the victim's home. In 1998, while on parole therefor, [petitioner] was convicted of battery on a peace officer [citation] and sentenced to prison for 32 months. On March 14, 2000, he was

paroled therefrom, and on January 24, 2001, he committed the current crimes.

(Lodged Doc. F at 10-11) (internal citations omitted).

In light of the facts in this case, the California Court of Appeal's determination that petitioner's sentence fell within the spirit of the "Three Strikes" statute and its determination that the trial court did not abuse its discretion were not objectively unreasonable. Nor, based on the foregoing facts and law, does this court disagree with the California Supreme Court's implicit determination that the sentence imposed upon petitioner was not fundamentally unfair or a violation of due process.

In sum, the California courts' rejection of petitioner's instant claim was not contrary to, and did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this **[*71]** claim.

E. The Trial Court's Refusal to Reduce Convictions from Felonies to Misdemeanors Does Not Merit Relief

Petitioner claims that the trial court abused its discretion and violated due process when it denied his motion to reduce his two felony convictions to misdemeanors. (Petition at 6B-6C; Traverse at 7-8). The California Court of Appeal, the last state court to issue a reasoned decision on the issue of whether the trial court abused its discretion, rejected this claim on its merits. [34] (Lodged Doc. F at 11-12). Petitioner is not entitled to federal habeas relief on this claim.

FOOTNOTES

34 Because it does not appear to this court that petitioner raised the *federal* basis of this claim in the Court of Appeal, as opposed to in the California Supreme Court where such federal basis was fairly presented (Lodged Doc. L at 7), this court has conducted an independent review of the record and concludes, based upon such a review, that the California courts' rejection of this claim was not objectively unreasonable.

California Penal Code section 17(b) grants sentencing courts the discretion to reduce "wobbler" offenses — crimes punishable by either a prison sentence or a fine/incarceration in the county **[*72]** jail — from felonies to misdemeanors. [35] See People v. Superior Court (Alvarez), 14 Cal. 4th 968, 977-79, 60 Cal. Rptr. 2d 93, 928 P.2d 1171 (1997); see also Ewing v. California, 538 U.S. 11, 16, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (California offenses which may be classified as either felonies or misdemeanors are known as "wobblers"); United States v. Denton, 598 F.3d 1206, 1213 (9th Cir. 2010) ("Under California law, trial courts have longstanding authority to reduce an offense from a felony to a misdemeanor for a wobbler. . . ."). In ruling on a motion to reduce a wobbler from a felony to a misdemeanor, sentencing courts consider "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial . . . [as well as] the general objectives of sentencing." [36] People v. Superior Court (Alvarez), 14 Cal. 4th at 978 (citations omitted).

FOOTNOTES

35 Both of petitioner's offenses of conviction are wobblers. See Cal. Penal Code §§ 17(b); 12316(b)(3) (unlawful possession of ammunition is punishable by imprisonment in county jail or state prison and/or imposition of a fine); Cal. Vehicle Code § 2800.2 (evading a police

officer); People v. Statum, 28 Cal. 4th 682, 685, 122 Cal. Rptr. 2d 572, 50 P.3d 355 (2002) **[*73]** (violating California Vehicle Code section 2800.2(a) is "wobbler" offense).

36 Pursuant to Rule 4.410(a) (formerly Rule 410) of the California Rules of Court, general objectives of sentencing include: (1) protecting society; (2) punishing the defendant; (3) encouraging the defendant to lead a law-abiding life in the future and deterring him from future offenses; (4) deterring others from criminal conduct by demonstrating its consequences; (5) preventing the defendant from committing new crimes by isolating him for the period of incarceration; (6) securing restitution for the victims of crime; and (7) achieving uniformity in sentencing.

Here, the trial court denied petitioner's motion to reduce his felony convictions to misdemeanors, and, as noted above, sentenced petitioner in accordance with California's Three Strikes law. The California Court of Appeal upheld the trial court's denial of petitioner's motion, finding that it was not an abuse of discretion, in light of petitioner's criminal history and the fact that petitioner committed the instant crimes while he was on parole. (Lodged Doc. F at 11-12).

First, to the extent petitioner contends that the trial court improperly exercised **[*74]** its discretion under state sentencing law, his claim is not cognizable on federal habeas corpus review. See Estelle, 502 U.S. at 67-68 (mere errors in application of state law not cognizable on federal habeas corpus review); Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (declining to address contention that involved a question of state sentencing law); Ely v. Terhune, 125 F. Supp. 2d 403, 411 (C.D. Cal. 2000) (claim that state trial court abused its discretion by refusing to reduce petitioner's second degree burglary conviction to a misdemeanor not cognizable in federal habeas proceeding).

Second, to the extent petitioner's claim is reviewable based upon a potential denial of due process, it lacks merit, as petitioner has not shown that his sentencing was fundamentally unfair. See Christian v. Rhode, 41 F.3d at 469. In concluding that the trial court had not abused its discretion, the Court of Appeal reasoned:

> The record contains abundant support for the trial court's implied finding that reduction of the two felonies to misdemeanors would be inappropriate. Although [petitioner] is young, he has a substantial criminal history, as recounted above. Also, his prior convictions **[*75]** involved violence or the potential for violence, i.e., robbery, terrorist threats, arson, attempted arson, and battery on a peace officer. Moreover, he was on parole when he committed the current crimes.

(Lodged Doc. F at 11-12).

In light of the facts of this case and the above-referenced analysis of the Court of Appeal, with which this court agrees, this court cannot say that the trial court's denial of petitioner's motion to reduce his felony convictions to misdemeanors was fundamentally unfair or otherwise deprived petitioner of due process.

The California courts' rejection of petitioner's instant claim was not contrary to, and did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to habeas relief on this claim.

F. Petitioner's Claim That the Use of 1993 Prior Convictions to Enhance His Sentence Breached a 1993 Plea Agreement Does Merit Relief

Petitioner contends that the use of his 1993 convictions as strikes to enhance his sentence to 25

years to life in the instant case constituted a breach of his 1993 plea agreement **[*76]** with prosecutors, and violated petitioner's right to due process. (Petition at 6B7-6B8; Traverse at 12). See supra note 6. As the California Supreme Court rejected this claim without comment on habeas review — a determination which is deemed to be on the merits — and as there is no reasoned state court decision to look to, this court has conducted an independent review of the record to determine whether the California Supreme Court's decision was objectively unreasonable. Petitioner is not entitled to federal habeas relief on this claim.

In May 1993, petitioner agreed to plead guilty to criminal charges pending against him in exchange for a three year prison term ("1993 Plea Agreement"). (Petition at 6B7; Traverse at 12). Petitioner claims that he entered the 1993 Plea Agreement with the understanding that California law at the time limited the enhancement of future sentences based on such prior convictions to one or five additional years. (Petition at 6B7; Traverse at 12). Petitioner also claims that he was never told that subsequent changes in California sentencing laws could expose him to greater enhancements. (Traverse at 12). Thus, petitioner essentially argues that any enhancement **[*77]** based on his 1993 convictions above what California sentencing law provided in 1993 (*i.e.* one or five additional years) constitutes a breach of the 1993 Plea Agreement and a violation of due process. (Petition at 6B7-6B8; Traverse at 12). This court disagrees.

A criminal defendant has a due process right to enforce the terms of his plea agreement. Santobello v. New York, 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Buckley v. Terhune, 441 F.3d 688, 694-95 (9th Cir. 2006) (en banc), cert. denied, 550 U.S. 913, 127 S. Ct. 2094, 167 L. Ed. 2d 831 (2007). The party asserting the breach bears the burden of proving the underlying facts establishing a breach. See United States v. Laday, 56 F.3d 24, 26 (5th Cir. 1995); United States v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988).

To determine if a plea agreement has been breached, courts look to state contract law and consider what was reasonably understood by the defendant when he entered his plea of guilty. See Davis v. Woodford, 446 F.3d 957, 962 (9th Cir. 2006); Gunn v. Ignacio, 263 F.3d 965, 970 (9th Cir. 2001); Ricketts v. Adamson, 483 U.S. 1, 6 n.3, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987). In California, contracts (including plea bargains) are deemed to incorporate and contemplate not only the existing law but the reserve **[*78]** power of the state to amend the law or enact additional laws. Davis, 446 F.3d at 962 (citing People v. Gipson (In re Gipson), 117 Cal. App. 4th 1065, 12 Cal. Rptr. 3d 478 (2004)).

Here, petitioner fails to establish a breach of the 1993 Plea Agreement. Petitioner does not allege or demonstrate that the 1993 Plea Agreement contained terms that petitioner would not be subject to future California sentencing laws as amended, or that such laws would not be changed. Nor does petitioner allege that the prosecutor failed to abide by any express term in that agreement which effectively provided either of the same protections. Petitioner's unexpressed belief that only 1993 sentencing provisions would govern future enhancements based on his prior convictions does not constitute a term of the 1993 Plea Agreement, and thus the use of his 1993 convictions as strikes to enhance his sentence in the instant case, does not constitute a breach of the 1993 Plea Agreement. See, e.g., Sanchez v. Hedgpeth, 706 F. Supp. 2d 963, 2010 U.S. Dist. LEXIS 18218, 2010 WL 787924, at **20-22 (C.D. Cal. Feb. 28, 2010) (rejecting petitioner's contention that use of prior conviction to enhance his sentence under Three Strikes law in later case constituted breach of plea agreement in prior **[*79]** conviction case); Cabales v. Ayers, 2007 U.S. Dist. LEXIS 43037, 2007 WL 1593869, at *10 (N.D. Cal. Jun. 1, 2007) (Habeas petitioner's unexpressed subjective belief that he "would be paroled either by a specific date or under [] specified conditions" was not "term" in plea agreement that could be breached.). In this case, petitioner fails to demonstrate that the use of his 1993 convictions as a strike to enhance his sentence in the instant case constituted a breach of the 1993 Plea Agreement or otherwise deprived him of due process. [37]

FOOTNOTES

37 To the extent petitioner suggests that he was entitled in 1993 to be affirmatively advised of the potential collateral consequence that his 1993 conviction could be used to enhance a sentence in the manner in which it has been used in the present case, such a contention lacks merit. There is no obligation to advise a criminal defendant that his plea and conviction may constitute a strike under the Three Strikes law or that it may otherwise be used to enhance a future sentence. People v. Sipe, 36 Cal. App. 4th 468, 479, 42 Cal. Rptr. 2d 266 (1995), cert. denied, 516 U.S. 1131, 116 S. Ct. 951, 133 L. Ed. 2d 875 (1986); see also United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) (possibility that defendant will be convicted of **[*80]** another offense in the future and will receive an enhanced sentence based on an instant conviction is collateral, not direct consequence of a guilty plea); Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988) (courts must inform defendants of only direct, rather than all possible collateral consequences of pleading guilty); United States v. Garrett, 680 F.2d 64, 65-66 (9th Cir. 1982) (federal court has no obligation to advise defendant pleading guilty of collateral consequence that conviction could result in sentence enhancement in another case); cf. Padilla v. Kentucky, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010) (holding that counsel must inform client whether guilty plea carries risk of collateral consequence of deportation). Accordingly, even if petitioner was not advised in 1993 that his conviction in such case could be used to enhance his sentence in a future case, this fact, in and of itself, does not establish a breach of a plea agreement.

The California Supreme Court's rejection of this claim was not contrary to, and did not involve an unreasonable application of clearly established federal law, and was not based upon an unreasonable determination of the facts in light of the evidence presented. **[*81]** Accordingly, petitioner is not entitled to habeas relief on this claim.

G. Petitioner's Ineffective Assistance of Trial Counsel Claim Does Not Merit Relief

Petitioner argues that his trial counsel rendered ineffective assistance because counsel failed to seek suppression of the evidence derived from Sergeant Contreras' allegedly unconstitutional traffic stop. (Petition at 6B1-6B3; Traverse at 11-12). As the California Supreme Court rejected this claim without comment on habeas review ? a determination which is deemed to be on the merits — and as there is no reasoned state court decision to look to, this court has conducted an independent review of the record to determine whether the California Supreme Court's decision was objectively unreasonable. Petitioner is not entitled to federal habeas relief on this claim.

1. Pertinent Law

a. Ineffective Assistance of Counsel

The Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment guarantees a state criminal defendant the right to effective assistance of counsel at trial. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). To warrant habeas relief due to ineffective assistance of counsel, a petitioner must **[*82]** demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-93, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also Yarborough v. Gentry, 540 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (per curiam) (Sixth Amendment right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense) (citations omitted). As both prongs of the Strickland test must be satisfied in order to establish a constitutional violation, failure to satisfy either prong requires that a petitioner's ineffective assistance of counsel claim be denied. Strickland, 466 U.S. at 687, 697 (no need to address deficiency of performance if lack of prejudice is obvious); Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) (failure to satisfy either prong of Strickland test obviates need to consider the other).

The first prong of the Strickland test — deficient performance — requires a showing that

counsel's performance was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The relevant inquiry under Strickland is not what defense counsel could have done, but whether counsel's **[*83]** choices were reasonable. See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance "must be highly deferential," and the court must guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. Strickland, 466 U.S. at 689; see also see Yarborough v. Gentry, 540 U.S. at 8 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted); Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (the first Strickland prong is a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'") (citation omitted); Karis v. Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002) (court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight"), cert. denied, 539 U.S. 958, 123 S. Ct. 2637, 156 L. Ed. 2d 655 (2003) (citation and quotations omitted). A petitioner bears the heavy burden of demonstrating that counsel's assistance was neither reasonable nor the result of sound strategy. Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001), cert. denied, 535 U.S. 935, 122 S. Ct. 1313, 152 L. Ed. 2d 222 (2002); **[*84]** see also Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir.) (en banc) ("Because this case involves a claim of ineffective assistance of counsel, there is an additional layer of deference to the choices of trial counsel."), cert. denied, 552 U.S. 1009, 128 S. Ct. 532, 169 L. Ed. 2d 371 (2007).

Due to the difficulties inherent in making the above-described evaluation, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004) (there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment), cert. denied, 546 U.S. 934, 126 S. Ct. 419, 163 L. Ed. 2d 319 (2005) (citation omitted); Morris v. California, 966 F.2d 448, 456-57 (9th Cir.), cert. denied, 506 U.S. 831, 113 S. Ct. 96, 121 L. Ed. 2d 57 (1992) (if court can conceive of reasonable tactical purpose for counsel's action or inaction, court need not determine actual explanation). A habeas petitioner bears the burden to overcome the presumption that, under the circumstances, the challenged action constituted competent representation. Strickland, 466 U.S. at 689.

The second prong of the Strickland test — prejudice — requires a showing of "reasonable **[*85]** probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694-95. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. at 694-95.

To prevail on a Sixth Amendment claim rooted in defense counsel's failure to litigate a Fourth Amendment issue, a petitioner must establish that (1) the motion to suppress would have been meritorious; and (2) there is a reasonable probability that the jury would have reached a different verdict absent the introduction of the unlawful evidence. Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1170 (9th Cir. 2003) (citing Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

b. Fourth Amendment

The Fourth Amendment requires law enforcement officers to have at least a reasonable suspicion of criminal activity before making an investigatory traffic stop. See United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) (citing Terry v. Ohio, 392 U.S. 1, 9, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)); United States v. Choudhry, 461 F.3d 1097, 1100 (9th Cir. 2006) ("[A] police officer may conduct **[*86]** an investigatory traffic stop if the officer has 'reasonable suspicion' that a particular person 'has committed, is committing, or is about to commit a crime.'") (citation omitted).

Reasonable suspicion is a particularized and objective basis for suspecting the particular person

stopped of criminal activity. United States v. Morales, 252 F.3d 1070, 1073 (9th Cir. 2001) (citation and internal quotations omitted). Officers have reasonable suspicion when specific, articulable facts, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity. Choudhry, 461 F.3d at 1100 (citation and internal quotations omitted). The reasonable suspicion analysis takes into account the totality of the circumstances. United States v. Montero-Camargo, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc), cert. denied, 531 U.S. 889, 121 S. Ct. 211, 148 L. Ed. 2d 148 (2000). "It is not a matter of hard certainties, but of probabilities." United States v. Mattarolo, 209 F.3d 1153, 1157 (9th Cir.) (citation omitted), cert. denied, 531 U.S. 888, 121 S. Ct. 208, 148 L. Ed. 2d 146 (2000). Officers may draw on their own experience and specialized training to make inferences from and deductions about the **[*87]** cumulative information available to them that might well elude an untrained person. Arvizu, 534 U.S. at 273-74 (citing Cortez, 449 U.S. at 418).

Evidence obtained as a direct or indirect result of a traffic stop that violates the Fourth Amendment generally cannot be used at trial against a defendant. Morales, 252 F.3d at 1073 ("If the initial stop was unconstitutional, then all evidence seized as a result of the stop must be suppressed as the fruit of the poisonous tree.") (citing Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). In determining whether to suppress evidence as "fruit" of a Fourth Amendment violation through police activity, the appropriate inquiry is whether, granting establishment of the primary illegality, evidence to which an instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of primary taint. United States v. Foppe, 993 F.2d 1444, 1449 (9th Cir.) (citing and quoting Wong Sun, 371 U.S. at 488) (internal quotations omitted), cert. denied, 510 U.S. 1017, 114 S. Ct. 615, 126 L. Ed. 2d 579 (1993). Although there must be some causal connection between the Fourth Amendment violation and the evidence to be suppressed, **[*88]** that alone is not enough to require suppression. Id. (citation omitted). Courts must further ask "whether the illegal activity tends to significantly direct the investigation to the evidence in question." Id. (citation omitted); see Wong Sun, 371 U.S. at 487-88 ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") (citation omitted).

2. Discussion

Petitioner fails to demonstrate that his trial counsel was ineffective based upon such counsel's failure to move to suppress evidence of petitioner's flight from police and ammunition found when police arrested him.

In this case, the record establishes that irrespective of whether or not Sergeant Contreras had reasonable suspicion to stop petitioner's vehicle in the first instance, petitioner's flight from the allegedly illegal stop constituted a new **[*89]** crime for which petitioner could constitutionally be stopped and arrested, and any evidence obtained as a result thereof was admissible at trial. See, e.g., United States v. Garcia, 516 F.2d 318, 319 (9th Cir. 1975) (assuming U.S. Border Patrol illegally stopped defendant at fixed Border Patrol checkpoint, defendant's flight after being ordered to stop and ensuing high-speed chase "supplied probable cause to arrest [defendant] and [] to search his car[,]" therefore, district court did not err in denying motion to suppress evidence of 55 pounds of marijuana found in defendant's trunk); United States v. Dawdy, 46 F.3d 1427,1430-31 (8th Cir. 1995) (even if initial stop/arrest was constitutionally invalid, defendant's resistance provided independent grounds for arrest, and evidence discovered in subsequent searches of his person and his automobile admissible) (citations omitted); United States v. Sheppard, 901 F.2d 1230, 1235-36 (5th Cir. 1990) (collecting cases in which defendant's illegal flight broke nexus between stop/arrest and subsequent arrest/seizure of evidence). Therefore, any motion to suppress evidence of petitioner's flight from police and the ammunition found during his arrest **[*90]** would have been futile. Indeed,

the California Supreme Court, on habeas review, considered and rejected on the merits petitioner's claim that the evidence in issue was obtained in violation of the Fourth Amendment. (Lodged Doc. M at 4-4N; Lodged Doc. N). Consequently, petitioner's trial counsel cannot be deemed deficient for failing to file a meritless motion to suppress and petitioner cannot have been prejudiced by his counsel's failure to do so.

In short, the California Supreme Court's rejection of petitioner's ineffective assistance of trial counsel claim was not contrary to, and did not involve an unreasonable application of clearly established law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on his ineffective assistance of trial counsel claim.

H. Petitioner's Ineffective Assistance of Appellate Counsel Claim Does Not Merit Relief

Petitioner contends that his appellate counsel was ineffective in failing to raise on appeal the trial court's alleged error in granting the prosecution's motion to amend the Amended Information. (Petition at 6B3-6B6; Traverse at 12). **[*91]** As the California Supreme Court rejected this claim without comment on habeas review — a determination which is deemed to be on the merits — and as there is no reasoned state court decision to look to, this court has conducted an independent review of the record to determine whether the California Supreme Court's decision was objectively unreasonable. Petitioner is not entitled to federal habeas relief on this claim.

The standards set forth in Strickland also govern claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001), cert. denied, 535 U.S. 995, 122 S. Ct. 1556, 152 L. Ed. 2d 479 (2002). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. See Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997) (citation omitted). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." Id. (citation omitted). Appellate counsel's failure to raise an issue on direct appeal cannot constitute ineffective assistance when **[*92]** the "appeal would not have provided grounds for reversal." Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (citation omitted).

As noted above, the trial court had discretion to permit the amendment in issue at any stage of the proceeding if the felony evasion was established at the preliminary hearing and/or arose out of the transaction on which petitioner was held to answer, and so long as the defendant's substantial rights were not compromised. Cal. Penal Code § 1009; People v. Graff, 170 Cal. App. 4th at 361-62; People v. Burnett, 71 Cal. App. 4th at 165-66; People v. Jones, 164 Cal. App. 3d at 1178 (1985). The California Supreme Court, by its silent rejection on habeas review of petitioner's claim of trial error based upon the amendment, implicitly determined that the trial court acted within its discretion. This court, based upon an independent review of the record, including the transcript of the preliminary hearing, and in light of the applicable law, likewise concludes: (i) the evidence presented at the preliminary hearing was sufficient to establish the elements of felony evasion and that the felony evasion arose out of the transaction on which petitioner was held to **[*93]** answer; and (ii) petitioner's substantial rights were not compromised by the amendment.

As this court agrees with the California Supreme Court's implicit determination that an appeal of the trial court's decision permitting the amendment to add the felony evasion charge would not have provided grounds for reversal, petitioner's appellate counsel cannot be deemed deficient for failing to raise such a non-meritorious claim. See Pollard, 119 F.3d at 1437 (9th Cir. 1997) (appellate counsel not deficient for failing to present claims with no likelihood of success); Baumann v. United States, 692 F.2d 565, 572 (9th Cir. 1982) (failure to raise meritless legal argument does not constitute ineffective assistance of counsel).

In short, the California Supreme Court's rejection of petitioner's ineffective assistance of

appellate counsel claim was not contrary to, and did not involve an unreasonable application of clearly established law, and was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on his ineffective assistance of appellate counsel claim.

VI. RECOMMENDATION

IT THEREFORE IS RECOMMENDED **[*94]** that the District Judge issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: May 28, 2010

/s/

Jacqueline Chooljian

Honorable Jacqueline Chooljian

UNITED STATES MAGISTRATE JUDGE

*2010 U.S. Dist. LEXIS 73201, **

RENEE DEAN FELTON, Petitioner, v. ROBERT AYERS, Warden, Respondent.

NO. CV 07-01113 AHS (FFM)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

2010 U.S. Dist. LEXIS 73201

April 27, 2010, Decided
April 27, 2010, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus dismissed, Judgment entered by Felton v. Ayers, 2010 U.S. Dist. LEXIS 73196 (C.D. Cal., July 20, 2010)

PRIOR HISTORY: Felton (Renee Dean) on H.C., 2006 Cal. LEXIS 10523 (Cal., Aug. 30, 2006)

CORE TERMS: sentence, plea agreements, voluntary intoxication, prior convictions, robbery, sentencing, apartment, Strikes Law, federal habeas, consciousness of guilt, felony, attempted robbery, specific intent, convicted, years to life, jury instruction, prior felony, citations omitted, enhancement, deficient, sentencing laws, federal law, residential, intoxicated, prosecutor, telephone, defense counsel's failure, robbery conviction, defense of diminished capacity, counsel's performance

COUNSEL: [*1] Renee Dean Felton, Petitioner, Pro se, San Quentin, CA.

For Warden Robert Ayers, Respondent: Corey J Robins, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: FREDERICK F. MUMM, United States Magistrate Judge.

OPINION BY: FREDERICK F. MUMM

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Alicemarie H. Stotler, United

States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the present Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be dismissed in its entirety with prejudice.

I. PROCEDURAL HISTORY

Petitioner challenges his 2004 conviction and sentence for attempting residential burglary. On January 14, 2004, in the first phase of a bifurcated court trial, a jury convicted Petitioner Renee Dean Felton in the Los Angeles County Superior Court on two counts of attempted residential robbery, in violation of California Penal Code §§ 664 / 211. (Pet. at 2; Clerk's Transcript ["CT"] at 138.) In the second phase of the **[*2]** bifurcated trial, the trial judge found true, for purposes of California's Three Strikes Law, two prior convictions and four prior prison term allegations. (*See* CT at 42, Reporter's Transcript, Volume 3 of 3 ["RT3"] at 1805.) Petitioner was sentenced on April 14, 2004, pursuant to California's Three Strikes Law, to a total sentence of 32 years to life with the possibility of parole. (CT at 138.)

Petitioner filed a direct appeal from his conviction in the California Court of Appeal. (Pet. at 3; Lodged Document ["LD"] 4.) That appeal was denied on April 19, 2005 in a reasoned, unpublished opinion affirming the conviction but modifying the trial court's award of presentence custody credit. (*See* Pet. at 3, LD 7.) [1] Petitioner then filed a petition for review with the California Supreme Court. (Pet. at 3; LD 8.) That petition was denied on June 22, 2005. (Pet. at 3; LD 9.) [2] Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court, and that petition was denied on August 30, 2006 without comment or citation to authority. (Pet. at 4; LD 11.)

FOOTNOTES

1 This Court notes that the state courts refer to Petitioner as "Dean Renee Felton" (*see* LD 7), whereas the captions in **[*3]** the instant Petition and Petitioner's Traverse list Petitioner as "Renee Dean Felton," and some of Petitioner's other filings refer to Petitioner as "Dean R. Felton." This Court is not aware of any explanation for these discrepancies.

2 Respondent asserts that the petition for review to the California Supreme Court was denied without comment or citation to authority. (*See* Answer at 1.) However, Respondent has not lodged that opinion with this Court, but instead has lodged a printout from the California Appellate Courts website confirming the denial of that petition on June 22, 2005. (*See* LD 9.) This Court notes that Petitioner does not dispute that his petition for review to the California Supreme Court was denied without comment or citation to authority.

On February 20, 2007, Petitioner filed a form "Petition for Writ of Habeas Corpus by a Person in State Custody 28 U.S.C. § 2254" ("Petition" or "Pet."). Attached to the Petition are pages labeled "Inserts," consisting of "Insert A" through "Insert E," which contain Petitioner's grounds for relief, and which this Court construes together as a Memorandum of Points and Authorities in support of the Petition (hereinafter cited as "Memo").

Respondent **[*4]** filed an Answer ("Answer") to the Petition on May 7, 2007. Petitioner filed a Traverse to Respondent's Answer ("Traverse") on June 1, 2007. On November 19, 2009, this Court ordered Respondent to file a Supplemental Answer and to lodge relevant papers pertaining to plea agreements entered into regarding Petitioner's prior convictions. On March 10, 2010, Respondent filed a Supplemental Answer and lodged copies of the relevant plea agreements.

On April 12, 2010, Petitioner constructively filed a Supplemental Traverse to Respondent's Supplemental Answer.

This matter is now under submission and ready for decision.

II. FACTUAL BACKGROUND

On direct review, the California Court of Appeal summarized the factual background pertaining to Petitioner's conviction as follows: [3]

> Dean Renee Felton (Petitioner) was charged by information with attempted robbery of Arnulfo Aldana ["Aldana"]<FN2> and Florentino Moreno ["Moreno"]. It was also alleged Petitioner had suffered two prior strike felony convictions and had served four separate prison terms for a felony.<FN3>
>
> <FN2.> At the preliminary hearing, Arnulfo Aldana gave his name as Arnulfo Aldana Salinas.
>
> <FN3.> Penal Code [§] 211, 664; 667, subdivisions (b)-(i); **[*5]** 1170, subdivisions (a)-(d); 667.5, subdivision (b).
>
> *Prosecution Evidence*
>
> Arnulfo Aldana and Florentino Moreno apparently spoke and understood little English.<FN4> One evening, they were walking home with roommates when they saw Petitioner, a stranger, some distance away. As the men reached their apartment, Petitioner began shouting and running towards them. Frightened, Aldana urged his roommates to enter the apartment quickly, but Petitioner pushed in behind them and locked the front door from inside. After saying something in English, Petitioner struck [the] two roommates, and then said "25" while rubbing his index finger across his neck. Aldana believed Petitioner was expressing he had a weapon and intended to harm them. Aldana and Moreno understood Petitioner when he demanded "money" in English and patted his own pants' pockets. Petitioner then searched around the television. Aldana picked up the telephone to show Petitioner he would call [the] police and Petitioner attempted to grab it. Aldana handed the telephone to Moreno who called [the] police from another room.
>
> <FN4.> Both used Spanish language interpreters for their testimony.
>
> Officers responded to the apartment and yelled for **[*6]** the occupants to come outside. As Moreno opened the front door, Petitioner said there was "no problem" and he would "return" or "come back." Aldana understood these comments "a little;" Moreno did not know what they meant. Petitioner left the apartment and was taken into custody. The arresting officer's report noted Petitioner was staggering and could barely stand when he was arrested. [4]
>
> *Defense Evidence*
>
> Petitioner neither testified nor presented evidence in his defense.
>
> The jury returned verdicts of guilty of two counts of attempted first degree robbery of Arnulfo Aldana and Florentino Moreno.
>
> During the bifurcated proceedings on the prior felony strike convictions, the prosecutor proved Petitioner had a 1987 attempted robbery conviction and a 1989

robbery conviction and had served four separate prison terms for a felony.

(*See* LD 7 at 2-3; italics and footnotes in original; bracketed material, including bracketed footnote, added.)

FOOTNOTES

3 This Court has substituted the term "Petitioner" where appropriate throughout the Court of Appeal's opinion for the term "appellant" or for other references to Petitioner.

4 This Court notes that the arresting officer testified at trial. (*See* Reporter's Transcript, **[*7]** Volume 2 of 3 ["RT2"] at 917-931.)

III. PETITIONER'S CLAIMS

The instant Petition presents five grounds for relief:

1. Two prior felonies to which Petitioner had previously pled guilty, *i.e.,* the 1987 attempted robbery and the 1989 robbery, were improperly used to enhance Petitioner's sentence for the instant attempted residential robbery conviction under California's Three Strikes Law since, at the time Petitioner pled guilty to those prior felonies, the plea agreements stipulated that each felony could only be used to add up to five (5) years to a sentence for a subsequent crime. (*See* Memo at 1-2.)

2. Petitioner's trial counsel was ineffective: (a) for failing to present "an adequate defense" at trial or at sentencing; (b) for failing to object to the use of two of Petitioner's prior felonies at sentencing; and (c) for failing to raise either a "diminished capacity" or a "voluntary intoxication" defense. (*See* Memo at 3-5.)

3. The trial judge showed bias in improperly refusing to give a jury instruction on the theory of a "diminished capacity" defense. (*See* Memo at 6.)

4. The trial judge improperly gave CALJIC No. 2.06 jury instruction regarding "consciousness of guilt," since the evidence **[*8]** was insufficient to support that instruction. (*See* Memo at 7-14.)

5. The trial judge erred and abused his discretion when he refused to dismiss one of Petitioner's prior offenses and used that prior offense in calculating Petitioner's sentence under California's Three Strikes Law. (*See* Memo at 15-20.)

IV. STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims herein is set forth in 28 U.S.C. § 2254 (d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214 (1996)). *See* 28 U.S.C. § 2254(d); *see also Lindh v. Murphy,* 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Under the AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "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); *see Williams v. Taylor,* 529 U.S. 362, 402, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The **[*9]** phrase "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade,* 538 U.S. 63, 71-72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Under the AEDPA, the only definitive source of clearly established federal law is set forth in a holding (as

opposed to dicta) of the Supreme Court. *See Williams,* 529 U.S. at 412; *see also Yarborough v. Alvarado,* 541 U.S. 652, 660-61, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (citing *Williams,* 529 U.S. at 412). Thus, while circuit law may be "persuasive authority" in analyzing whether a state court decision was an unreasonable application of Supreme Court law, "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v. Murphy,* 331 F.3d 1062, 1069 (9th Cir. 2003), *cert. denied,* 540 U.S. 968, 124 S.Ct. 446, 157 L.Ed.2d 313 (2003), *overruled in part on other grounds by Lockyer v. Andrade,* 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144. However, a state court need not cite the controlling Supreme Court cases in its own decision, "so long as neither the reasoning nor the result of the state-court decision **[*10]** contradicts" relevant Supreme Court precedent which may pertain to a particular claim for relief. *Early v. Packer,* 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. *Williams,* 529 U.S. at 405-06. A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413. A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of governing law was incorrect, erroneous, or even "clear error." *Lockyer,* 538 U.S. at 75. Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." *Id.*

In applying these standards, a federal habeas court looks to the last reasoned **[*11]** state court decision. *See Davis v. Grigas,* 443 F.3d 1155, 1158 (9th Cir. 2006). "Where there has been one reasoned state judgment rejecting a federal claim, [federal habeas courts should presume that] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker,* 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) (federal court "looks through" unexplained orders to last reasoned state court decision); *Medley v. Runnels,* 506 F.3d 857, 862 (9th Cir. 2007) (en banc). With respect to those claims for which there is no reasoned state court decision, *e.g.,* when the state court does not supply reasoning for its decision, a Federal habeas court will conduct an "independent review" of the record to determine whether the state court decision was contrary to, or an unreasonable application of, controlling United States Supreme Court precedent. *See Allen v. Ornoski,* 435 F.3d 946, 954-955 (9th Cir. 2006) (citing, *inter alia, Delgado v. Lewis,* 223 F.3d 976, 982 (9th Cir. 2000)). "Independent review" is not the equivalent of *de novo* review, "but rather is a style of review which views the state court decision "through the **[*12]** 'objectively reasonable' lens ground by *Williams.*" *Allen v. Ornoski,* 435 F.3d at 955 (citations omitted). Although the federal habeas court independently reviews the record, it must "still defer to the state court's ultimate decision." *Id.* (citation omitted).

V. DISCUSSION

A. Ground One: Improper Use of Prior Felonies in Sentencing.

This Court construes Petitioner first ground to argue, essentially, that Petitioner is entitled to specific performance of his prior plea bargains, based on the law as it stood in California in 1987 and 1989, which law provided that, if a defendant committed a subsequent "serious" felony, his punishment would only be increased by five years. *See* former California Penal Code § 667. Petitioner complains that California's Three Strikes Law, which now allows for imposition of a 25 years to life sentence for a defendant with two prior strikes, violates his prior plea agreements; and Petitioner argues that "[b]ecause [the] prior guilty pleas are binding, the instant conviction / sentence must be adjusted to the required sentence." (Memo at 2.)

Respondent argues that these plea agreements were entered into before the California Three Strikes Law was enacted in 1994. **[*13]** (*See* Answer at 4.) Respondent argues that the Three Strikes Law permissibly revised state law on the use of prior convictions for sentencing

purposes; and therefore the fact that Petitioner's sentence for the instant attempted robberies was enhanced by more than 5 years due to his prior convictions does not violate the prior plea agreements. (*See id.*)

Petitioner presented this claim in his habeas petition to the California Supreme Court (LD 10), and that court denied that petition without comment or citation to authority. (LD 11.) Accordingly, since the state courts did not issue a reasoned opinion denying this claim, this Court conducts its own independent review to determine if the state courts' denial of this claim was contrary to clearly established federal law. *See Allen v. Ornoski,* 435 F.3d at 954-955 (*citing, inter alia, Delgado v. Lewis,* 223 F.3d at 982).

1. Legal standards regarding prior plea agreements.

Due process requires that "when a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so it can be said to be part of the inducement or consideration, the promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). **[*14]** Claims that a plea agreement was breached are analyzed under state contract law. *Ricketts v. Adamson,* 483 U.S. 1, 6 n.3, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987). *See also United States v. De la Fuente,* 8 F.3d 1333, 1337 (9th Cir. 1993) ("Plea agreements are contractual in nature and are measured by contract law standards."). In construing a plea agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty. *United States v. De la Fuente,* 8 F.3d at 1337-38.

Under California law, a plea bargain is "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." *People v. Gipson,* 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004) (citation omitted). Absent an express promise that a conviction resulting from a petitioner's plea agreement would not be used to enhance a petitioner's sentences for future convictions in a way other than proscribed by the then-existing version of California's Penal Code, a plea agreement vests no rights other than those which relate to the immediate disposition **[*15]** of the case. *See Gipson,* 117 Cal. App. 4th at 1070 (citation omitted); *see also Buckley v. Terhune,* 441 F.3d 688, 698 (9th Cir. 2006) (affording relief where court's express statements created ambiguity as to the terms of the plea agreement); *Davis v. Woodford,* 446 F.3d 957, 960-61 (9th Cir. 2006) (distinguishing *Gipson,* and stating that when California plea agreement includes specific agreement as to how facts can be used, such as where conviction pursuant to plea is deemed as one prior conviction rather than two, agreement is enforceable, and breach of agreement is due process violation). "The possibility that a defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea"; and a defendant's plea is voluntary even if he is not advised of such collateral consequences. *United States v. Brownlie,* 915 F.2d 527, 528 (9th Cir. 1990); *see also People v. Crosby,* 3 Cal. App. 4th 1352, 1354-55, 5 Cal. Rptr. 2d 159, 160 (1992) (possibility of enhanced punishment in case of a future conviction is a collateral consequence).

2. Analysis.

Review of the plea documents lodged by Respondent **[*16]** reveals that no promise was made to Petitioner that he would not receive a sentencing enhancement for subsequent crimes. *See* Supplemental Lodgments Documents ["SLD"], Documents I and J ["SLD I, SLD J"]. The documents reflect that on January 6, 1987, Petitioner pled guilty to a violation of California Penal Code § 664/211, attempted robbery. (SLD I at 4.) At the plea hearing, Petitioner stated that no other promises, apart from the conditions noted by the court, had been made to him concerning sentencing. (SLD I at 11.) Petitioner stated that he fully understood the consequences of pleading guilty. (SLD I at 17.) The record does not reflect that there was any discussion of the collateral consequences of a future conviction; and the record also does not reflect that any promise was made that Petitioner would not receive a sentencing enhancement for subsequent crimes.

The record also reflects that on August 7, 1989, Petitioner pled guilty to charges of second degree robbery, in violation of California Penal Code § 211, and that he used a knife during the commission of the crime within the meaning of Penal Code § 12022(d). Petitioner received a three-year sentence for that conviction. (*See* **[*17]** SLD I at 3, 7-8, 14.) The prosecutor at the plea hearing stated to Petitioner "Sir, if are [sic] released in the future, if you suffer any other conditions [sic], your conviction in this particular case would add an extra five years to your sentence." (SLD I at 13.) Petitioner then stated that no one had promised him anything other than what was indicated at the plea hearing to get him to plead guilty. (*Id.*) The record does not reflect that there was any other discussion of the collateral consequences of a future conviction. Significantly, the record does not reflect that *any* promise was made to Petitioner regarding future enhancements. The statement that upon future conviction Petitioner would receive a five year enhancement was merely a statement of existing law as to collateral consequences of Petitioner's plea. [5] The statement was not phrased in a limiting manner, *i.e.*, Petitioner was not advised that he would only receive a five year enhancement if he suffered a future conviction or that any future enhancements would otherwise be limited to five years.

FOOTNOTES

[5] Then-existing California Penal Code § 667(a)(1) provided for a five-year enhancement for any person convicted of a serious felony **[*18]** who had previously been convicted of a serious felony.

In light of the record, Petitioner's interpretation of the meaning of his prior plea agreements is not reasonable. Neither the prosecutor nor the sentencing court was required to advise Petitioner that California's sentencing laws could change, and that Petitioner's prior conviction could be used to enhance a future sentence beyond the five years authorized by California law as it existed in 1989. *See, e.g., Clark v. Marshall,* No. CV 04-481 DDP (MAN), 2009 U.S. Dist. LEXIS 93938, 2009 WL 3270923, at *7 (C.D. Cal. 2009) (habeas petitioner could not reasonably interpret his prior California state plea agreement as representing that petitioner was forever insulated from future changes in California sentencing laws). *Cf. Davis v. Woodford,* 446 F.3d at 962 (distinguishing *Gipson* where plea agreement did not merely incorporate existing law by reference but also included specific promise about how many prior convictions would be placed in Petitioner's record as result of guilty plea). Furthermore, both *Gipson* and *Davis* establish that there is no implied incorporation of the law as it exists at the time of plea bargain; and California contract law incorporates the **[*19]** state's reserve power to amend the law. *See Oberg v. Carey,* No. C 04-5446 PJH (PR), 2007 U.S. Dist. LEXIS 21347, 2007 WL 3225442, at *4-6 (N.D. Cal. 2007) (petitioner not entitled to specific performance of 1980 plea agreement, and no due process violation, where subsequent sentence enhanced pursuant to California's Three Strikes law). For these reasons, habeas relief is not warranted on this claim.

B. Ground Two: Ineffective Assistance of Counsel.

Petitioner's second ground for relief argues that Petitioner's trial counsel was ineffective: (1) for failing to present "an adequate defense" at trial or at sentencing; (2) failing to object to the use of two of Petitioner's prior felonies at sentencing; and (3) failing to raise either a "diminished capacity" or a "voluntary intoxication" defense. (*See* Memo at 3-5.) Petitioner apparently argues that his counsel's decision not to present any defense case after the People rested was deficient performance. (*See* Pet. at 3.) Petitioner also argues that he "implored" his trial counsel to raise a "diminished capacity" defense. (Memo at 3.) While Petitioner concedes that his counsel "briefly" referred to "voluntary intoxication" while cross-examining the arresting officer, Petitioner **[*20]** complains that his counsel failed to follow up on this line of questioning or develop a "voluntary intoxication" defense any further. (Memo at 4-5.) Petitioner also argues that trial counsel should have "contested" Petitioner's prior 1987 plea agreement for attempted robbery and his 1989 plea agreement for robbery. (Memo at 5.)

Petitioner presented this claim in his habeas petition to the California Supreme Court (LD 10), and that court denied that petition without comment or citation to authority. (LD 11.) Accordingly, since the state courts did not issue a reasoned opinion denying this claim, this Court conducts its own independent review to determine if the California Supreme Court's denial of this claim was contrary to clearly established federal law. *See Allen v. Ornoski,* 435 F.3d at 954-955 (*citing, inter alia, Delgado v. Lewis,* 223 F.3d at 982).

1. Legal standards

For a petitioner to prevail on an ineffective assistance of counsel claim, he must satisfy a two-pronged test: (1) he must show that counsel's performance was deficient *and* (2) he must show that he was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). **[*21]** A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them. *Id.* at 697; *see also Thomas v. Borg,* 159 F.3d 1147, 1151-52 (9th Cir. 1998). Thus, the prejudice suffered by a petitioner can be evaluated before examining counsel's performance. *See Strickland,* 466 U.S. at 697.

To prove deficient performance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 687-88. Because of the difficulty in evaluating counsel's performance, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland,* 466 U.S. at 689. Only if counsel's acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance, will the petitioner prove deficient performance. *Id.* at 690; *United States v. Quintero-Barraza,* 78 F.3d 1344, 1348 (9th Cir. 1995). **[*22]** "At all points, '[j]udicial scrutiny of counsel's performance must be highly deferential.'" *Wong v. Belmontes,* U.S. , 130 S.Ct. 383, 384-85, 175 L. Ed. 2d 328 (2009) (quoting *Strickland,* 466 U.S. at 689).

At the time of Petitioner's trial, which began on December 22, 2003, the defense of "diminished capacity" had long been abolished in California. *See, e.g., People v. Mejia-Lenares,* 135 Cal. App. 4th 1437, 1450, 38 Cal. Rptr. 3d 404 (2006) (defense of "diminished capacity" abolished by the California Legislature in 1981 and by voter initiative in 1982) (citations omitted); California Penal Code § 25. [6] However, evidence of voluntary intoxication, while not an affirmative defense, remains relevant "to the extent it bears upon the question whether the defendant actually had the requisite specific mental state required for commission of the crimes at issue." *People v. Horton,* 11 Cal. 4th 1068, 1119, 47 Cal. Rptr. 2d 516, 906 P.2d 478 (1995). *See also People v. Saille,* 54 Cal. 3d 1103, 1119, 2 Cal. Rptr. 2d 364, 820 P.2d 588 (1991) (voluntary intoxication is not an affirmative defense; but it may be considered in deciding whether defendant possessed required specific intent). A defendant is entitled to a voluntary **[*23]** intoxication instruction "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's actual formation of specific intent." *People v. Williams,* 16 Cal. 4th 635, 677, 66 Cal. Rptr. 2d 573, 941 P.2d 752 (1997) (citation and internal quotation marks omitted). A voluntary intoxication instruction is not required unless there is evidence to show that the defendant "became intoxicated to the point he failed to form the requisite intent [ ]." *People v. Ivans,* 2 Cal. App. 4th 1654, 1661, 4 Cal. Rptr. 2d 66 (1992) (citation omitted).

FOOTNOTES

6 California Penal Code § 25 states, in pertinent part, that "[t]he defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the

commission of the crime charged."

2. Discussion

This Court does not find any deficient performance in defense counsel's failure to present a defense case, or, in particular, **[*24]** argue that "voluntary intoxication" negated Petitioner's ability to form the requisite intent for robbery or challenge the use of Petitioner's prior convictions to enhance his sentence under California's Three Strikes Law. Petitioner's vague argument that counsel should have presented a defense is, for the most part, conclusory; Petitioner does not point to any evidence, other than his claim that he was "voluntarily intoxicated," that would have constituted such a defense. Petitioner was the only defense witness with relevant personal knowledge of the incident; and Petitioner does not argue that he would have testified.

As noted above, Petitioner's argument that defense counsel should have presented a defense of "diminished capacity" was precluded by California law at the time of Petitioner's trial. *See People v. Mejia-Lenares,* 135 Cal. App. 4th at 1450; California Penal Code § 25.

Likewise, Petitioner's complaint that defense counsel should have argued that Petitioner was "voluntarily intoxicated" is not well-taken. Defense counsel argued, in her opening statement, that Petitioner "was intoxicated at the time he was detained by the police officers." (RT2 at 613.) Defense counsel also **[*25]** argued that Petitioner "has always maintained that he did not attempt to rob anybody and that was never his intent on that particular evening." (RT2 at 613.) In support of those opening arguments, defense counsel elicited testimony from the arresting officer that his report reflected that Petitioner was "staggering" and "could barely stand up" at the time he was arrested. (RT2 at 929.) However, in her closing arguments, defense counsel did not argue that Petitioner was intoxicated, but instead elected to highlight, among other things, the following facts: the alleged victims did not speak English and likely misunderstood Petitioner; there was "mass confusion" at the scene; Petitioner allowed Moreno to remain in the bedroom on the telephone with the door closed for at least a few minutes; Petitioner allowed other alleged victims to move freely throughout the apartment; the length of time that Petitioner remained at the apartment during the alleged attempted robbery, including the time that Petitioner apparently knew that Moreno was in the bedroom with the telephone, showed that Petitioner's motives were innocent; and Petitioner did not attempt to run after police arrived. (*See* RT3 at **[*26]** 1241-48.) These facts supported the theory that Petitioner had no intention to rob the victims [7] and was not, in fact, attempting to rob the victims. The voluntary intoxication argument would have inconsistently contended that although Petitioner was attempting to rob the victims, he was essentially too drunk to know what he was doing. Given the state of the evidence, counsel's choice to focus her arguments as she did did not fall outside the wide range of professionally competent assistance.

FOOTNOTES

[7] The trial court instructed the jury that for the crime of attempted residential robbery "there must exist . . . a specific intent in the mind of the perpetrator." (RT3 at 1229.) The trial court instructed on the elements of the crime as follows:

> One, a person had possession of some property, however slight; two, the property was attempted to have been taken from that person or from his or her immediate presence; three, the property was attempted to have been taken against the will of that person; four, the attempted taking was accomplished either by force or fear; and, five, the attempted taking of the property was done with the specific intent permanently to deprive that person of the property.

(RT3 **[*27]** at 1231.)

In any event, defense counsel's failure to argue a "voluntary intoxication" defense was not prejudicial to Petitioner. There was ample evidence Petitioner acted with specific intent, intoxicated or not. Petitioner first approached the victims from behind, yelling at them in the alley; and he pushed them into the apartment and forced his way in with them. Inside the apartment, Petitioner was talking "strongly" to the victims. (*See* RT2 at 617-21, 658-59, 672-73.) Once inside the apartment, Petitioner forcefully punched and poked the victims as he spoke to them, and pointed at them, and he struck victim Jose Ambrosio in the face with his fist. (RT2 at 621-22, 642-43, 678-69.) Petitioner also made a "slicing" motion across his throat; and he had his hand in his pocket at times. (*See* RT2 at 622-23, 629-30, 666-67, 674-75.) When victim Aldana showed Petitioner that he was going to use the telephone, Petitioner tried to grab the telephone from Aldana. (RT at 623.) These actions speak for themselves and belie innocent intent. Furthermore, at least some of Petitioner's statements were also understood despite any language barrier. For example, Petitioner said "money" and "pistol" to **[*28]** the victims, again belying innocent intent. (*See* RT2 at 626-27, 647, 674-75.) Taken together, it must be found that many of Petitioner's actions and words evidenced the specific intent to attempt to rob the victims. In light of this evidence, defense counsel's apparent decision to abandon her voluntary intoxication arguments at closing were reasonable; and, since a voluntary intoxication argument would have been unavailing in any event, Petitioner suffered no prejudice from defense counsel's failure to make such argument.

Likewise, Petitioner's argument that defense counsel failed to adequately challenge the use of his two prior convictions at sentencing is unavailing. As discussed above, Petitioner's rights or the terms of Petitioner's prior plea agreements were not violated by the use of those prior convictions to enhance Petitioner's sentence under California's Three Strikes Law. Furthermore, to the extent that Petitioner may be challenging his defense counsel's performance during the second phase of the bifurcated trial, where the trial court found that those prior convictions were adequately proved, the record reflects that there is no evidence that would call the trial court's **[*29]** findings into doubt. (*See* RT3 at 1801-07.) Thus, counsel's performance cannot be deficient for failing to object to the trial court's findings.

C. Ground Three: Improper Refusal to Give Jury Instruction.

Petitioner's third ground for relief argues that the trial judge showed "bias" in improperly refusing to give a jury instruction on the theory of a "diminished capacity" defense. (*See* Memo at 6.) Petitioner argues that "it was clear from the testimony of [the arresting officer] that Petitioner was drunk and staggering during and possibly before the incident of September 4, 2003." (Memo at 6.)

Petitioner presented this claim in his habeas petition to the California Supreme Court (LD 10), and that court denied that petition without comment or citation to authority. (LD 11.) Accordingly, since the state courts did not issue a reasoned opinion denying this claim, this Court conducts its own independent review to determine if the California Supreme Court's denial of this claim was contrary to clearly established federal law. *See Allen v. Ornoski,* 435 F.3d at 954-955 (9th Cir. 2006) (*citing, inter alia, Delgado v. Lewis,* 223 F.3d at 982).

1. Legal standards.

Jury instruction issues are generally **[*30]** matters of state law for which federal habeas relief is not available. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). To obtain relief based on an instruction given to the jury, a petitioner must establish not merely that the instruction was undesirable, erroneous, or even universally condemned, but that it violated some constitutional right. *See, e.g., Cupp v. Naughten,* 414 U.S. 141, 146, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973); *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Where the claim is that an instruction was erroneously omitted, the petitioner's burden is "especially heavy," because an omission of an instruction is less likely to be prejudicial than an affirmative misstatement of the law. *See Henderson,* 431

U.S. at 155.

Furthermore, under California law, an instruction that intoxication can negate specific intent is considered a "pinpoint" instruction. *See People v. Saille,* 54 Cal. 3d at 1119. A pinpoint instruction "pinpoints" the crux of a defendant's case, usually by relating a legal issue in the case to particular evidence from which a reasonable doubt as to the defendant's guilt could arise. *See People v. Sears,* 2 Cal.3d 180, 190, 84 Cal. Rptr. 711, 465 P.2d 847 (1970). **[*31]** Pinpoint instructions are fact-specific; and where evidence is minimal or insubstantial, a trial court need not give a pinpoint instruction on its effect. *See People v. Flannel,* 25 Cal.3d 668, 684, 160 Cal. Rptr. 84, 603 P.2d 1 (1979), *superseded by statute on other grounds as stated in In re Christian S.,* 7 Cal. 4th 768, 774-75, 30 Cal. Rptr. 2d 33, 872 P.2d 574 (1994).

Even if an instructional error has occurred, such error is subject to review for harmlessness, *i.e.,* whether a petitioner suffered "actual prejudice" with respect to the verdict in his case. *See Fry v. Pliler,* 551 U.S. 112, 121-22, 127 S. Ct. 2321, 2328, 168 L. Ed. 2d 16 (2007) (holding that "in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* [ ], whether or not the state appellate court recognized the error and reviewed it for harmlessness [ ]") (citing *Brecht v. Abrahamson,* 507 U.S. 619, 637-38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (on federal habeas review, alleged instructional error is subject to review for harmlessness, *i.e.,* whether the alleged error had a "substantial and injurious effect or influence in determining **[*32]** the jury's verdict").

2. Discussion.

As discussed above, the defense of diminished capacity had been abolished in California at the time of Petitioner's trial. To the extent that Petitioner seeks to argue that the trial court should have given an instruction on voluntary intoxication, that claim is also foreclosed. As also discussed above, there was ample evidence to show that Petitioner harbored the requisite specific intent for the crime; consequently, an instruction on voluntary intoxication, which would have required a showing that there was "substantial evidence" of Petitioner's voluntary intoxication *and* that such intoxication affected Petitioner's "actual formation of specific intent," was not warranted. *See People v. Williams,* 16 Cal.4th at 677. Since the evidence that Petitioner had the requisite intent was overwhelming, the omission of an instruction on voluntary intoxication was not prejudicial. *See Fry v. Pliler,* 551 U.S. at 121-22 (citing *Brecht*).

D. Ground Four: Improper Giving of Jury Instruction.

In Ground Four, Petitioner argues that the trial judge improperly instructed the jury, over defense objection, with CALJIC No. 2.06, entitled "Efforts to Suppress Evidence." (*See* **[*33]** Memo at 7-14; CT at 75.) Petitioner argues that the evidence was insufficient to warrant the instruction. (*See id.*)

This Court notes that, as the parties were discussing jury instructions with the trial court outside the presence of the jury, a lengthy hearing was held on the issue of whether Petitioner improperly attempted to intimidate or dissuade the victims after the police arrived at the scene, and whether Petitioner's actions evidenced a "consciousness of guilt" that justified a jury instruction on the issue. (*See* RT3 at 1204-16.) The prosecutor argued at that hearing that "when the people inside of the apartment realized that the police were outside, [Petitioner] made statements to them indicating that he wanted them to act like everything was okay." (RT3 at 1204.) Petitioner's counsel argued that Petitioner merely said "Come back. No problem," and there was no explanation of what those remarks meant, and therefore an instruction on "consciousness of guilt" was not warranted. (RT3 at 1204.) Defense counsel argued that "[t] here is nothing to indicate that [Petitioner] intimidated a particular witness." (RT3 at 1207.) The trial court had testimony read back (*see* RT3 at 1210); and **[*34]** the trial court ultimately found that the interpretation of what Petitioner's remarks meant was properly an issue for the jury; and so the trial court denied the defense motion to bar the instruction. (*See* RT3 at 1216, 1225.) The trial court instructed the jury that:

> If you find that a defendant attempted to suppress evidence against himself in any manner such as by intimidation of a witness, this attempt may be considered by you as a circumstance tending to show consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

(RT3 at 1225.) The prosecutor made no mention of the instruction and offered no argument regarding Petitioner's "consciousness of guilt" in her closing or rebuttal remarks. (*See* RT3 at 1232-41, 1248-52.) Defense counsel also did not mention the instruction or discuss Petitioner's "consciousness of guilt" in her closing remarks. (*See* RT3 at 1241-48.)

This Court's own review of the record reveals that Arnulfo Aldana testified that when the police came, Petitioner said that there was "no problem" to the people inside the apartment, and he said to them "come back, come back," apparently **[*35]** as they went to leave the apartment after the police arrived. (*See* RT2 at 628-29.) Florentino Moreno also testified that, after the police arrived and the people in the apartment went outside, Petitioner "said there was no problem, that he would return, that there was no problem." (RT2 at 678.) Moreno admitted, however, that when Petitioner said "no problem" and that he "would return," Moreno did not know what that meant. (*Id.*)

Petitioner presented this claim in his direct appeals to the California Court of Appeal (LD 7) and the California Supreme Court (LD 8.) Since the California Supreme Court's denial of this claim was without comment, this Court "looks through" that denial to the reasoned opinion of the California Court of Appeal. *See Ylst,* 501 U.S. at 803; *Medley,* 506 F.3d at 862.

1. California Court of Appeal's opinion.

The California Court of Appeal interpreted this claim to argue that the giving of CALJIC No. 2.06 was error because it was not supported by "substantial evidence." (*See* LD 7 at 3.) The Court of Appeal noted that Petitioner argued that, as a result of the erroneous instruction, any doubt the defense may have been able to establish on the question of guilt was dashed **[*36]** because the jury could easily have inferred a consciousness of guilt that simply did not exist. (LD 7 at 4.) However, the Court of Appeal found that the jury was not likely misled by the instruction; and that, even if the trial court erred by giving the instruction, the error was harmless. (LD 7 at 4.) The Court of Appeal noted that the trial court also gave CALJIC No. 17.31, which instructed that:

> The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts.

(*See* LD 7 at 4; *see also* RT3 at 1252, CT at 91.) The Court of Appeal stated that "[b]ecause jurors are presumed to understand and follow instructions given to them, [] we conclude any error in instructing the jury with CALJIC No. 2.06 was harmless." (LD 7 at 4 [footnotes omitted].)

2. Discussion.

This Court's own review confirms that the Court of Appeal's opinion is entitled to deference. The Court of **[*37]** Appeal correctly applied the harmlessness standard of *Brecht,* 507 U.S. at 637-38. The California Court of Appeal found, even if the trial court erred in giving the instruction, the error was harmless. The second part of the instruction on CALJIC No. 2.06 explicitly instructed that even if Petitioner's conduct evidenced a "consciousness of guilt," that conduct was not sufficient by itself to prove guilt, and its weight and significance, if any, were for the jury to decide. As noted, the trial court also instructed that the jury should disregard any

instruction which applies to facts that the jury determined did not exist. Neither the "consciousness of guilt" instruction, nor the facts of Petitioner's alleged suppression of evidence and "consciousness of guilt," were highlighted for the jury by either the prosecution or the defense in closing. Lastly, apart from Petitioner's statements and any consciousness of guilt that Petitioner may have harbored, there was ample evidence, as discussed above, to convict Petitioner in any event. For all of these reasons, the instruction did not have a substantial and injurious effect or influence in determining the jury's verdict, and therefore habeas **[*38]** relief is not warranted on this claim. *See Brecht,* 507 U.S. at 638.

E. Ground Five: Trial Court's Refusal to Dismiss Prior Felony.

Petitioner's fifth ground for relief argues that the trial judge erred and abused his discretion when he refused to dismiss at least one of Petitioner's prior offenses, for robbery or attempted robbery in 1989 and 1987, respectively, and instead used those offenses in calculating Petitioner's sentence under California's Three Strikes Law. (*See* Memo at 15-20.) Petitioner argues that no one was injured in each of those prior crimes, and therefore the trial judge should have exercised his discretion to strike at least one conviction and thereby reduce Petitioner's sentence for the instant attempted residential robbery. (*See id.*) Petitioner also argues, *inter alia,* that the trial court's failure to strike this prior conviction violated his rights against "disproportionate punishment" under the Eighth Amendment. (Memo at 15.)

Respondent argues that this Ground Five is unexhausted because Petitioner only presented the California state law grounds for this claim to the California state courts, and never alleged any violation of his federal rights. (*See* Answer at **[*39]** 15-16.) Without deciding this exhaustion issue, this Court notes that Petitioner presented at least a similar, relevant claim in his direct appeals to the California Court of Appeal (LD 7) and the California Supreme Court (LD 8.) Since the California Supreme Court's denial of that claim was without comment, this Court again "looks through" that denial to the reasoned opinion of the California Court of Appeal. *See Ylst,* 501 U.S. at 803; *Medley,* 506 F.3d at 862.

As noted, Petitioner was convicted on two counts of attempted residential robbery. (*See* CT at 138.) Respondent notes that the trial court dismissed Petitioner's strike-priors as to Count I and sentenced Petitioner to 7 years for that conviction; but the trial court declined to strike Petitioner's strike-priors as to Count II, and sentenced Petitioner to 25 years to life on that count, for a total sentence of 32 years to life. (Answer at 14, citing CT at 135, RT3 at 1813-16.)

1. California Court of Appeal opinion.

The Court of Appeal noted that Petitioner brought a *Romero* motion in the trial court which prompted a lengthy discussion of Petitioner's criminal history. [8] (*See* LD 7 at 5-7; *see also* CT at 105-07.) The Court of Appeal **[*40]** stated that it was shown that, among other crimes, in 1987 Petitioner was convicted of attempted robbery, for which he received three years probation, and in 1989 Petitioner was convicted of robbery, and was sentenced to three years in prison. (LD 7 at 5.) The Court of Appeal noted that defense counsel's *Romero* motion urged the trial court to sentence Petitioner as only a "second strike offender," since no one was harmed during Petitioner's 1987 or 1989 crimes, and since Petitioner had a history of substance abuse and had never been afforded drug treatment. (*See* LD 7 at 5.) The Court of Appeal found, however, that the trial court had shown some leniency in striking prior convictions as to some of the prior strike allegations pertaining to Count I; and the Court of Appeal found that the trial court did not abuse its discretion under California law in sentencing Petitioner "in light of [Petitioner's] recidivism, the nature of his current offenses, and the likelihood he would commit future robberies if not imprisoned as a third strike offender." (LD 7 at 7.)

FOOTNOTES

[8] A "*Romero* motion" is a motion to dismiss a prior "strike" conviction in the interest of justice under California Penal Code § 1385. **[*41]** *See People v. Superior Court (Romero),*

13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996).

2. Legal standards.

A state court's misapplication of its own sentencing laws does not justify federal habeas relief unless the petitioner demonstrates fundamental unfairness amounting to a due process violation. *Christian v. Rhode,* 41 F.3d 461, 469 (9th Cir. 1994); *see also Estelle v. McGuire,* 502 U.S. at 67, 69. A petitioner's contention that a state trial court improperly exercised its discretion under state sentencing law does not allege any cognizable claim for federal habeas relief. *See Brown v. Mayle,* 283 F.3d 1019, 1040 (9th Cir. 2002), *vacated on other grounds,* 538 U.S. 901, 123 S. Ct. 1509, 155 L. Ed. 2d 220 (2003) (claim that trial court abused its discretion by failing to strike prior conviction alleged under Three Strikes Law not cognizable on federal habeas review); *Lathan v. Felker,* No. CV 09-8589 CAS (E), 2010 U.S. Dist. LEXIS 24459, 2010 WL 958947, at *11 (C.D. Cal. 2010) (denying federal habeas claim that state trial court abused its discretion by refusing to reduce petitioner's prior convictions to misdemeanors). However, under certain narrow circumstances, the misapplication of state sentencing law may violate due process. *See Richmond v. Lewis,* 506 U.S. 40, 50, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992). **[*42]** "[T]he federal, constitutional question is whether [the error] is so arbitrary or capricious as to constitute an independent due process" violation. *Id.* (internal quotation and citation omitted); *see also Christian,* 41 F.3d at 469 ("[a]bsent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief."). [9]

FOOTNOTES

[9] This Court also notes that the Eighth Amendment to the Constitution, applicable to the states through the Fourteenth Amendment, proscribes the infliction of "cruel and unusual punishments." U.S. Const. Amend. VIII; *Kennedy v. Louisiana,* 554 U.S. 407, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525 (2008). The United States Supreme Court has upheld the application of California's "Three Strikes" law, finding that, where properly applied, it does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See Ewing v. California,* 538 U.S. 11, 30-31, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (upholding a 25 years to life sentence for theft of three golf clubs); *Lockyer,* 538 U.S. at 77 (upholding two 25 years to life sentences for two counts of petty theft).

3. Discussion.

At the threshold, this **[*43]** Court notes that, although Respondent contends this claim is unexhausted, this Court may dismiss an unexhausted claim on the merits where it is perfectly clear that the claim does raise even a colorable federal claim. *See Cassett v. Stewart,* 406 F.3d 614, 623-24 (9th Cir. 2005); 28 U.S.C. § 2254(b)(2). As discussed below, this claim is not colorable and dismissal is appropriate even if this claim is unexhausted.

This Court finds no fundamental unfairness in the exercise of the trial court's discretion refusing to eliminate at least one more of Petitioner's prior two strikes, as there was ultimately no misapplication of California's sentencing laws. Under California Penal Code § 667, a defendant is subject to an increased term of punishment for the present offense for a prior conviction which includes all of the elements of a crime listed as a "serious" or "violent" felony in California Penal Code § 1192.7(c). *See, e.g., People v. Johnson,* 114 Cal. App. 4th 284, 302-03, 7 Cal. Rptr. 3d 492 (2003); *see also Moore v. Chrones,* 687 F. Supp. 2d 1005, 2010 WL 291774, at *28-29 (C.D. Cal. 2010). Where a defendant has previously been convicted of two or more "serious" **[*44]** or "violent" felonies, California's Three Strikes Law imposes a 25 years to life sentence. *See* California Penal Code §§ 667(e)(2)(A) and 1170.12(c)(2)(A); *accord Riggs v. Fairman,* 399 F.3d 1179, 1181 (9th Cir. 2005) ("California's [Three Strikes Law] imposes a 25 year to life sentence on defendants previously convicted of two or more 'serious' or 'violent' felonies."). The

plea agreement transcripts, which Respondent has lodged in support of its argument against Ground One in the Petition, reflect that the 1987 attempted robbery and the 1989 robbery were both "serious felonies" potentially punishable by over a year in state prison. (*See* SLD J at 9, 14-15 (1987 attempted robbery conviction); SLD I at 7 (1989 robbery conviction); *see also* California Penal Code § 1192.7(c)(1)(19)(robbery).) Accordingly, the trial court's decision not to exercise its discretion under state law and strike one of Petitioner's prior convictions does not present a cognizable federal habeas claim. *See Brown v. Mayle,* 283 F.3d at 1040; *Lathan v. Felker,* 2010 U.S. Dist. LEXIS 24459, 2010 WL 958947, at *11.

VI. RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; **[*45]** and (2) directing that judgment be entered denying the Petition on the merits with prejudice.

DATED: April 27, 2010

/s/ FREDERICK F. MUMM

FREDERICK F. MUMM

United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

*2010 U.S. Dist. LEXIS 66714, **

MICHAEL WAYNE ANDERSON, Petitioner, v. T. FELKER, Warden, Respondent.

No. CV 07-4938-DDP (RCF)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

2010 U.S. Dist. LEXIS 66714

March 10, 2010, Decided
March 30, 2010, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus denied, Judgment entered by Anderson v. Felker, 2010 U.S. Dist. LEXIS 66706 (C.D. Cal., June 25, 2010)

PRIOR HISTORY: People v. Anderson (Michael W.), 2006 Cal. LEXIS 14920 (Cal., Dec. 13, 2006)

CORE TERMS: sentence, flight, shot, Strikes Law, plea agreement, federal law, years to life, guilt, alcohol, enhance, corpus, front door, patrons, bullet, prior conviction, federal habeas, consciousness, instructing, impairment, sentencing, shooting, prison, scene, medication, brick, rifle, hit, prior felony convictions, flight instruction, unusual punishment

COUNSEL: [*1] Michael Wayne Anderson, Petitioner, Pro se, Soledad, CA.

For T Felker, Warden, Respondent: Carl N Henry, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: RITA COYNE FEDERMAN, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: RITA COYNE FEDERMAN

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dean D. Pregerson, United

States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

Petitioner, a state prisoner proceeding pro se, filed a Petition For Writ Of Habeas Corpus on July 31, 2007. Respondent filed an Answer on November 19, 2007. Petitioner filed a Traverse on February 29, 2008. For the reasons stated below, the Petition should be denied with prejudice.

Procedural History

On July 1, 2005, Petitioner was convicted in Los Angeles County Superior Court of one count of shooting at an occupied building. [1 Clerk's Transcript ("CT") 173.] In a bifurcated proceeding, Petitioner admitted that he had sustained two prior felony convictions within the meaning of California's Three Strikes Law. [2 Reporter's **[*2]** Transcript ("RT") 1012-15.] The trial court sentenced him to a total of thirty years to life in state prison. [2 CT 346-47.]

On October 5, 2006, the California Court of Appeal affirmed Petitioner's conviction. [Lodged Doc. 4.] The California Supreme Court denied his petition for review on December 13, 2006. [Lodged Doc. 5.] Petitioner did not seek state habeas corpus relief.

Factual Background

On March 22, 2005, Linda Wheeler and her husband were working at the Rude Dug Bar in Covina. [1 RT 303.] Petitioner entered the bar at 2:00 that afternoon. He stayed for about two hours, consuming three beers. [1 RT 304-05.] Wheeler noticed that Petitioner was acting "different" and talking to himself. [1 RT 305.] Wheeler advised Petitioner she would not serve him any more alcohol and he got a "little bit" angry. [1 RT 306.] Wheeler asked Petitioner to leave, but he refused. [1 RT 310, 405-06.] Wheeler's husband and two bar patrons grabbed Petitioner by the arms and physically removed him from the bar. [1 RT 310-11, 33.] Petitioner struggled as he was escorted from the premises. As the men exited the bar, they all slipped and fell to the ground. [1 RT 333-37, 407-08.]

Steven Sandoval and Derek Rubio **[*3]** were also at the bar that afternoon. [1 RT 353, 375.] They were standing outside making a phone call when Petitioner was ejected. [1 RT 355, 378.] Petitioner approached them and asked why they had not stood up for him. Petitioner warned that they were "going to pay" and they were "all going to hell." [1 RT 356, 378-79.] Petitioner then walked to his white Ford Mustang and did something in the trunk area for one to two minutes. He got into the car and drove away. [1 RT 358-60, 380-81.]

Several minutes later, Wheeler and her patrons heard a noise that some recognized as a gunshot. Everyone hit the floor. [1 RT 312-13, 338, 360, 383-85.] Sandoval and Rubio were sitting near the front door and estimated that a bullet came within twelve to fifteen inches from hitting them. Wood fragments hit Sandoval in the neck. [1 RT 360-61, 383-84.] After the gunshot, one of the patrons ran to the back door and saw a white Mustang driving away. [1 RT 339-40.] Wheeler and police officers later inspected the building and discovered that a bullet had entered the bar through the front door, penetrated the wall between the dance floor and the kitchen, ricocheted off the hood above the stove, and entered the **[*4]** ceiling, where the bullet was lost in the attic. [1 RT 314-16, 633-37.]

When Petitioner arrived home that evening, his wife and children noticed injuries to his face. [1 RT 423-24, 438, 829-30.] He told his family that he got into a fight at the bar and had been beaten up by several men. He explained that he fired a shot into the bar because he was mad, but nobody had been hurt. [1 RT 423-24, 438-39.]

That evening, Petitioner told Detective Michael Robison that he had not intended to shoot at anyone, but rather was aiming for the brick work above the bar's front door. [1 RT 609.] A search of Petitioner revealed three .44 caliber bullets in his shirt pocket. [1 RT 610-11.] Officers found a .44 Magnum rifle, several boxes of ammunition, and gun cleaning supplies in the trunk of Petitioner's Mustang. [1 RT 624.]

Petitioner later told Detective Thomas Tardif that as he was being escorted from the bar, four or five people started punching him. [1 RT 660.] Petitioner left the area, loaded his rifle with one bullet, and drove back to the bar. [1 RT 661-62.] Petitioner slowed his vehicle as he approached the bar and shot into the brick area above the bar's front door. He had intended only to **[*5]** scare the people inside. [1 RT 662-63.]

At trial, Petitioner presented the testimony of psychiatrist Gregory Cohen. Dr. Cohen testified that Petitioner was taking a number of medications for a heart condition, in addition to Tranxene for anxiety and acetaminophen with codeine. [2 RT 777-80.] Dr. Cohen explained that when Tranxene and codeine are combined with alcohol it will result in increased sedation and intoxication, and ultimately could lead to increased impairment, unconsciousness, coma, or death. [2 RT 781-82.] Specifically, the combination of alcohol, tranxene, and codeine could result in slurred speech, motor deficits, sleepiness, difficulty reasoning, impaired judgment and concentration, faulty memory, and mood swings. [2 RT 783-84.] Depending on the dosage, a person taking this combination could lose consciousness, or go in and out of consciousness. [2 RT 784.]

Based on evidence indicating Petitioner had suffered head injuries at the time of his arrest, Dr. Cohen testified that the injuries could have resulted in brain trauma. [2 RT 785-86.] Petitioner's blood thinning medication could have exacerbated the injury to his brain. [2 RT 787.] In addition, the combination of Petitioner's **[*6]** medications, head trauma, and alcohol could have resulted in impairment, affecting memory, concentration, and reasoning. Dr. Cohen opined that an individual under those circumstances might not have been able to distinguish right from wrong or appreciate the consequences of his actions. [2 RT 788-89.]

Petitioner's Claims

Petitioner asserts the following grounds for federal habeas corpus relief.

1. The trial court violated Petitioner's Fourteenth Amendment rights by using his 1991 convictions to enhance his current sentence in violation of the terms of his plea agreement in the prior case.

2. The trial court violated Petitioner's Sixth Amendment right to trial by jury and his Fourteenth Amendment right to due process by instructing the jury on the flight of an accused.

3. The trial court violated the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment by sentencing Petitioner to thirty years to life.

4. The trial court violated the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment by denying Petitioner's motion to dismiss one of his prior felony convictions pursuant to California Penal Code § 1385.

Standard of Review

Review of the Petition **[*7]** is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Woodford v. Garceau,* 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Under AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

"Clearly established federal law" within the meaning of 28 U.S.C. § 2254(d)(1), "refers to the holdings, as opposed to the dicta," of the Supreme Court's decisions as of the time of the

relevant state court decision. *Williams v. Taylor,* 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Under this clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case **[*8]** differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.* at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Application of AEDPA to Petitioner's Claims

Petitioner raised his claims on direct appeal to the California Court of Appeal. [Lodged Doc. 1.] The court of appeal reached the merits of the claims in a reasoned, written decision. [Lodged Doc. 4.] Petitioner also raised his claims in his petition for review, which the California Supreme Court denied without comment. [Lodged Doc. 5.] This "silent denial" is considered a denial on the merits. *See Hunter v. Aispuro,* 982 F.2d 344, 347-48 (9th Cir. 1992), *cert. denied,* 510 U.S. 887, 114 S. Ct. 240, 126 L. Ed. 2d 194 (1993). The Court will "look through" the supreme court's summary denial to the court of appeal's decision to determine whether the state court's ruling on the claim was contrary to, or involved an unreasonable application of, federal law. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); **[*9]** *Shackleford v. Hubbard,* 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied,* 534 U.S. 944, 122 S. Ct. 324, 151 L. Ed. 2d 242 (2001).

Discussion

A. Violation of Plea Agreement

In his first claim, Petitioner contends the use of his 1991 convictions to enhance his current sentence under the Three Strikes Law violated his federal due process rights by breaching the terms of his 1991 plea agreement. He contends that in 1991, the prosecution was limited to seeking only a five year enhancement for a prior conviction, and therefore it could not seek additional penalties under the Three Strikes Law by using the 1991 convictions to enhance the current offense.

The California Court of Appeal denied Petitioner's claim, finding that the subsequent enactment of California's Three Strikes Law did not alter the terms of Petitioner's 1991 plea agreement, and Petitioner did not show the prosecution had failed to abide by those terms. [Lodged Doc. 4 at 9-10.]

A criminal defendant has a due process right to enforce the terms of his plea agreement. *Buckley v. Terhune,* 441 F.3d 688, 694 (9th Cir. 2006), *cert. denied,* 550 U.S. 913, 127 S. Ct. 2094, 167 L. Ed. 2d 831 (2007) (citing *Santobello v. New York,* 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). [1] In evaluating Petitioner's claim of violation **[*10]** of the plea agreement, the Court must determine whether the prosecutor in the prior case made a promise to Petitioner concerning the use of his conviction to enhance future sentences, and, if so, whether Petitioner's guilty plea was induced by that promise. *See Davis v. Woodford,* 446 F.3d 957, 960-61 (9th Cir. 2006).

FOOTNOTES

1 Because the claim relies on the principles established in *Santobello,* Respondent's argument that the claim is barred by the doctrine of retroactivity under *Teague v. Lane,* 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), lacks merit.

Petitioner does not show that his 1991 plea agreement contained any provision regarding the use of his 1991 convictions to enhance a future sentence, let alone a provision limiting such use or

the length of any enhancement that could be imposed. [2 CT 218-19.] Because Petitioner fails to prove the plea agreement contained such a provision, he fails to meet his burden on federal habeas review to demonstrate a violation of his federal rights. *See* 28 U.S.C. § 2254(d). Therefore, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

B. Instructional Error

In his second ground for relief, **[*11]** Petitioner argues the trial court erred in instructing the jury on the flight of an accused because the instruction inferred a consciousness of guilt and thereby reduced the prosecution's burden of proof.

At trial, defense counsel objected to the use of CALJIC No. 2.52 regarding the flight of a suspect from the scene of the crime, arguing that Petitioner was leaving the bar when the shooting occurred and thus his departure from the scene could not be considered flight. [2 RT 912.] The trial court overruled the objection and instructed the jury pursuant to CALJIC No. 2.52 as follows:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but it is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

[2 RT 935; 1 CT 130.]

The California Court of Appeal held that the trial court erred by instructing the jury pursuant to CALJIC 2.52 because there was nothing in the evidence to suggest that Petitioner's act of driving away **[*12]** from the bar "was anything more than a mere departure from the scene of the crime," and did not infer that he was motivated by a consciousness of guilt. [Lodged Doc. 4 at 5-6.] The state court, however, found the error was harmless because Petitioner did not deny firing the shot, but rather presented a mental impairment defense. [*Id.* at 6.] The court concluded that "the instruction that appellant's flight, if proved, might be considered in deciding the question of his guilt added little to the jury's determination of whether he had the requisite mental state." [*Id.* at 6-7.]

To merit relief on a claim of error in a jury instruction, Petitioner must show the instructional error so infected the entire trial that the resulting conviction violated due process. *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). The allegedly erroneous instruction must be considered in the context of the trial record and the instructions as a whole. *Estelle,* 502 U.S. at 72; *Henderson,* 431 U.S. at 156.

At trial, Petitioner did not deny shooting at the building. His defense was that he had been beaten up at the bar and reacted irrationally as a result of the combination **[*13]** of physical trauma and the alcohol and prescription medication he had ingested. In closing, defense counsel argued that due to voluntary intoxication, Petitioner could not have acted with malice or an understanding that his behavior was wrong. [2 RT 968-85.]

To counter this defense, the prosecution presented evidence to show that prior to the shooting, Petitioner threatened patrons outside the bar that they "going to pay." He spent several minutes at his trunk, which was later found to hold a rifle and several boxes of ammunition. Upon arriving home, Petitioner was able to relate to his family the events that had taken place, and even explained to his daughter that he shot at the bar because he was mad about having been beaten up. He told Detective Robinson he did not mean to shoot anyone, but rather was aiming at the brick work above the bar's front door. Later, he told Detective Tardif that he loaded his rifle, drove back to the bar, and shot at the brick area above the door, intending to scare the people inside.

Petitioner's behavior and statements were not consistent with a man who did not know his actions were wrong. In light of the strength of the evidence undermining Petitioner's **[*14]** mental impairment defense, the flight instruction did not contribute significantly to the jury's evaluation of guilt.

Moreover, the flight instruction itself stated that the jury had to determine if flight had been proved, and even then, it instructed that flight was not sufficient to establish guilt, but should be considered in light of all the other evidence. The jury also was instructed to consider the instructions as a whole, and that not all the instructions were necessarily applicable. [1 CT 116, 147.] In the context of the instructions that were given, and the evidence as a whole, the use of CALJIC 2.52 did not rise to the level of a due process violation. *See Estelle,* 502 U.S. at 73-74 (instruction concerning prior acts did not violate due process because it instructed the jury first to determine whether the defendant committed the prior acts); *McMillan v. Gomez,* 19 F.3d 465, 469 (9th Cir.), *cert. denied,* 513 U.S. 860, 115 S. Ct. 170, 130 L. Ed. 2d 107 (1994)(flight instruction did not violate due process because it instructed the jury first to determine whether flight had been proved).

Furthermore, on federal habeas review of a state court instructional error, the Court applies the harmless error standard announced **[*15]** in *Brecht v. Abrahamson,* 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). *Hedgpeth v. Pulido,* 555 U.S. 57, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388 (2008) (per curiam). Petitioner does not show that any error in instructing the jury pursuant to CALJIC 2.52 had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 637. Accordingly, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

C. Cruel and Unusual Punishment

The trial court sentenced Petitioner under the Three Strikes Law to thirty years to life in state prison. Petitioner contends the sentence is grossly disproportionate to the crime, in violation of the Eighth Amendment.

The California Court of Appeal denied relief, noting that Petitioner was not an immature youth at the time of his crime, his current offense was similar in nature to his prior offense, he failed to rehabilitate despite a prior grant of probation, and he had not sought help for his alcohol abuse and panic disorder. [Lodged Doc. 4 at 11-12.]

In determining whether the sentence violates the Cruel and Unusual Punishment Clause, the Court considers "the governing legal principle or principles **[*16]** set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade,* 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). In *Lockyer,* the Supreme Court acknowledged that its Eighth Amendment jurisprudence had "not been a model of clarity." *Id.* at 72. For purposes of review under § 2254(d)(1), the Court determined only that it is "clearly established" that the Eighth Amendment contains a "gross disproportionality principle," which is "applicable to sentences for terms of years." *Id.* Although the precise contours of this principle are unclear, it is applicable only in the "exceedingly rare" and "extreme" case. *Id.* at 73 (citing *Rummel v. Estelle,* 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), *Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), and *Harmelin v. Michigan,* 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)).

Here, in response to being thrown out of a bar, Petitioner took the extreme measure of retrieving his firearm, loading it, and firing in the direction of the bar where he knew innocent patrons were present. This was not the first time Petitioner left the scene of an altercation, armed himself with a firearm, and shot in the direction of another human being. Petitioner's prior convictions relate to an incident in 1990 during which Petitioner **[*17]** was involved in a confrontation with his neighbor, Santiago Rios. [2 CT 228-32.] Petitioner ultimately stabbed Rios in the chest with a knife. [2 CT 232-34.] After the stabbing, Petitioner fired four shots at Rios as Rios ran down the street. [2 CT 238-40.] One of the shots hit Rios's father in the hand. [2 CT 242, 275-76.] After the elder Rios was hit, Petitioner fired two or three more shots. [2 CT 243.] Petitioner admitted

he had been convicted of two counts of assault with a deadly weapon in connection with this incident. [2 RT 1012-15.]

The current crime and Petitioner's past history of violence establish a pattern of dangerousness. Petitioner's sentence of thirty years to life for a serious felony involving the personal use of a firearm does not present an "exceedingly rare" case amounting to a violation of the gross disproportionality principle, particularly in view of his prior convictions. *See, e.g., Lockyer,* 538 U.S. at 73-77 (upholding consecutive sentences of twenty-five years to life under California's Three Strikes Law for conviction of two counts of felony petty theft with a prior theft conviction where the petitioner had an extensive prior criminal history and had been **[*18]** in and out of prison for many years); *Taylor v. Lewis,* 460 F.3d 1093, 1101-02 (9th Cir. 2006) (upholding sentence of twenty-five years to life under California's Three Strikes Law for possession of 0.036 grams of cocaine, where the petitioner's prior offenses involved violence and crimes against a person, and he had served multiple prior prison terms). Therefore, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

D. Failure to Strike a Prior Strike Conviction

In his final claim for relief, Petitioner contends the trial court violated the Due Process Clause and the Eighth Amendment by refusing to exercise its discretion under California Penal Code § 1385 to strike one of Petitioner's prior convictions.

The California Supreme Court has recognized the trial courts retain the discretion under the Three Strikes Law to strike prior felony conviction allegations in the furtherance of justice. *People v. Superior Court (Romero),* 13 Cal. 4th 497, 530, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). Petitioner's claim alleges only an abuse of trial court discretion based on state statutory principles, and as such, is not cognizable on federal habeas **[*19]** corpus review. *See Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Langford v. Day,* 110 F.3d 1380, 1389 (9th Cir. 1996), *cert. denied,* 522 U.S. 881, 118 S. Ct. 208, 139 L. Ed. 2d 144 (1997) (a state law claim cannot be transformed "into a federal one merely by asserting a violation of due process").

To the extent Petitioner alleges the trial court violated the federal Constitution by failing to consider mitigating factors, his claim is not supported by the record. During sentencing, the trial court acknowledged defense counsel's arguments in mitigation, which centered on the facts of the offense, Petitioner's physical and mental health, and the facts of the prior offense. [2 RT 1037, 1041-48, 1057-59.]

A state sentencing error may violate federal due process principles where it is arbitrary or capricious, or is otherwise fundamentally unfair. *See Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); *Christian v. Rhode,* 41 F.3d 461, 469 (9th Cir. 1994). In sentencing Petitioner, the trial court considered the mitigation evidence and ultimately concluded it was not sufficient to justify striking one of Petitioner's prior strikes. Petitioner does not show the trial court's decision was arbitrary or capricious, or fundamentally unfair. **[*20]** Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

Recommendation

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition with prejudice.

DATED: March 10, 2010

/s/ Rita Coyne Federman

RITA COYNE FEDERMAN

UNITED STATES MAGISTRATE JUDGE

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In

*2010 U.S. Dist. LEXIS 61198, **

REGINALD OWENS, Petitioner, v. A. A. LAMARQUE (Warden), Respondent.

No. CV 02-9421-JHN(CW)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 61198

May 14, 2010, Decided
May 14, 2010, Filed

SUBSEQUENT HISTORY: Accepted by, Writ of habeas corpus denied, Dismissed by Owens v. Lamarque, 2010 U.S. Dist. LEXIS 61368 (C.D. Cal., June 17, 2010)

PRIOR HISTORY: In re Owens, 2002 Cal. LEXIS 6872 (Cal., Sept. 11, 2002)

CORE TERMS: sentence, burglary, porch, apartment, federal habeas, harmless, door, plea agreement, enhancement, stolen, prior conviction, caution, theft, unusual punishment, stereo, felony, cruel, jurors, guilt, burglary conviction, stolen property, years to life, oral admissions, contraband, bicycle, stuff, testimony relating, proportionality, exculpatory, recidivist

COUNSEL: [*1] Reginald Owens, Petitioner, Pro se, San Luis Obispo, CA.

For A A Lamarque, Respondent: Timothy M Weiner, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: CARLA M. WOEHRLE, United States Magistrate Judge.

OPINION BY: CARLA M. WOEHRLE

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Jacqueline H. Nguyen, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For reasons stated below, the petition for

habeas corpus relief should be denied and this action dismissed with prejudice.

I. *PROCEDURAL HISTORY*

The pro se petitioner is a prisoner in state custody pursuant to a conviction in California Superior Court, Los Angeles County, Case No. BA202193. On August 4, 2000, a jury found Petitioner guilty of burglary (Cal. Penal Code § 459) and receiving stolen property (Penal Code § 496(a)). [Reporter's Transcript ("RT") at 172-74; Clerk's Transcript ("CT") at 96-99.] The trial court then found "true" several prior conviction allegations (Penal Code §§ 667(a)(1), (b)-(i), 667.5(b), 1170.12(a)-(d)), struck some of **[*2]** the priors, and imposed a total sentence of eighteen years imprisonment. [CT at 190-93.]

On appeal, the California Court of Appeal modified Petitioner's sentence (staying a concurrent term imposed on the receiving count), but otherwise affirmed the judgment in an unpublished opinion filed December 13, 2001. [No. B148206, Return ("Ret."), Exhibit ("Ex.") Ex. C.] [1] The California Supreme Court summarily denied review, without comment or citation, in an order filed February 20, 2002. [No. S103658, Ret. Ex. E.] [2] The California Supreme Court summarily denied a subsequent habeas petition, without comment or citation, in an order filed September 11, 2002. [No. S106866, Ret. Ex. G.] [3]

FOOTNOTES

1 Petitioner raised five issues on appeal: (1) whether the court gave a proper instruction when the jury asked if a porch qualified as a structure; (2) whether there was sufficient evidence of receiving stolen goods; (3) whether the receiving conviction should be reversed if the burglary conviction were reversed; (4) whether the court should have instructed the jury with CALJIC 2.71; and (5) whether the court properly sentenced Petitioner for both burglary and receiving stolen property. [Ret. Ex. B at 34.]

2 Petitioner **[*3]** raised two issues in his petition for review: (1) whether he could be convicted of burglary for entering a porch; and (2) whether the court properly instructed the jury with CALJIC 2.71. [Ret. Ex. D at 78-82.]

3 Petitioner raised two issues in this petition: (1) whether his sentence was cruel and unusual punishment under the Eighth Amendment; and (2) whether the state breached a plea agreement by using a prior conviction as a "strike." [Ret. Ex. F at 125-26.]

The present petition for writ of habeas corpus (28 U.S.C. § 2254) ("Pet.") was filed on December 11, 2002. Respondent's return ("Ret.") was filed on February 14, 2003. Petitioner's traverse ("Tra.") was filed on May 7, 2003. The matter has been taken under submission.

II. *FACTUAL BACKGROUND*

On direct review, the California Court of Appeal summarized the factual background to Petitioner's case as follows:

> [T]he evidence, the sufficiency of which as to the burglary conviction is undisputed, established that on January 17, 2000, Christopher Allphin lived with Robert Hestand and Brandon Hill in a two-story apartment on 29th Street in Los Angeles. Allphin, Hestand, and Hill were roommates. At about 10:45 p.m., Hestand left the apartment **[*4]** to go to the store, leaving Allphin alone in the apartment. Hill was not at the apartment that night.
>
> Perhaps five or ten minutes after Hestand left, Allphin, who was upstairs, heard the door open, but not shut, downstairs. Allphin heard no one. Allphin called out to see if Hestand had returned, but no one responded. Allphin then heard "rattling around

downstairs" and, about 45 seconds later, walked downstairs. Allphin assumed a person could hear Allphin coming downstairs. Allphin saw that the front door was ajar and went to it. From the time Allphin was upstairs and heard the noise to the time he first went to the door, 45 seconds elapsed. Allphin opened the door and looked outside. Allphin saw "a person and a bike in front on the porch halfway between the porch and the sidewalk there." Allphin observed no one else. The person was getting on and straddling a bicycle and was loading something onto it. Allphin saw two objects in the person's hands. [Footnote omitted.]

Allphin shut the door, went towards his entertainment center, and noticed that Hestand's stereo and Hill's Playstation were missing. Allphin had seen both items on the entertainment center 30 minutes before, and Hestand **[*5]** had seen the stereo there minutes before he left. Allphin ran back to the porch area. No more than 20 seconds passed from the time Allphin first opened the door to the time he returned, running, to the door. Allphin opened the door and observed [Petitioner] riding the bicycle out of the apartment gates, one hand holding a duffel bag on the handle of the bicycle, the other holding an item tucked under his arm. When Allphin opened the door, he did not hear footsteps or voices, did not observe anyone on the porch area or walkway, and observed no one but [Petitioner]. The front door, porch, and street were lit.

Allphin began chasing [Petitioner] when Hestand drove up in his car. Allphin entered the car, told Hestand they had just been "robbed," pointed to [Petitioner], and told Hestand to follow him. Allphin testified that Hestand did not really know what was going on except that "we got burglarized." At some point during the ensuing pursuit, Hestand observed that [Petitioner] was carrying Hestand's stereo.

Hestand and Allphin drove into a driveway on 30th Street, Allphin exited the car, and Allphin tried to speak with [Petitioner]. Allphin pretended he needed directions and asked [Petitioner] **[*6]** where Figueroa Street was. [Petitioner] did not slow down, but continued on his way, "said it's over there[,]" and pointed away. Allphin then saw the Playstation, including its cord and controllers, protruding from the duffel bag which was hanging on the handle bars. [Petitioner] was holding the stereo with his other hand.

Allphin jogged after [Petitioner] and told him, "'Give me back my stuff.'" [Petitioner] first pedaled faster, then stopped, faced Allphin, and replied, "'I found this stuff.'" Allphin responded, "[Y]ou found it in my apartment." Allphin testified that he did not remember what [Petitioner] then said, but a "heated argument" ensued for about a minute, during which Allphin used profanity but Allphin did not think [Petitioner] did. Allphin also testified that, during the argument, [Petitioner] was telling Allphin "'It's all right, I'll give it back. I didn't know it was your stuff.'" [Petitioner] also stated, "'Don't tell the police . . . .'" Allphin replied that if [Petitioner] returned Allphin's belongings without further argument, Allphin would not call the police. [Footnote omitted.]

Allphin returned to Hestand's car with the stereo and Playstation, and Allphin and **[*7]** Hestand returned to their apartment and called police. About five to ten minutes passed from the time Allphin first heard a noise in the apartment to the time he returned to it with Hestand. [Footnote omitted.] [Petitioner] presented no defense evidence. [See footnote below. [4]]

[Ret. Ex. C at 60-65.]

FOOTNOTES

4 "During jury argument, [Petitioner] conceded a burglary of the apartment and theft of the

items had occurred, but urged that [Petitioner] did not commit the crimes. [Petitioner] urged someone else committed the burglary, heard Allphin, and dropped the stolen items outside, and [Petitioner] found them there, but did not steal them." [Ret. Ex. C. at 65 n.4.]

III. *PETITIONER'S CLAIMS*

Petitioner asserts four claims for federal habeas relief [Pet. at 6-7]:

Ground One. In violation of due process, the trial court improperly instructed the jury in responding to the jury's question whether the porch is considered part of the building or structure?

Ground Two. The trial court improperly instructed the jury using CALJIC No. 2.71 on the evaluation of evidence of oral admissions by a defendant not made in court.

Ground Three. Petitioner's sentence amounted to cruel and unusual punishment under the Eighth Amendment.

Ground **[*8]** *Four:* The plea agreement in Petitioner's 1982 burglary conviction was breached by use of that conviction as a "strike" to double Petitioner's term on his current burglary charge.

Petitioner raised present grounds one and two on direct appeal, and exhausted them in his petition for review; he raised and exhausted present grounds three and four in his state habeas petition. [*See above* nn. 2 & 3.]

IV. *STANDARD OF REVIEW*

Review of the petition in this case is governed by provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "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).

"Clearly established Federal law" means "the **[*9]** governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade,* 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). "Habeas relief is unavailable if the Supreme Court has not 'broken sufficient legal ground' on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue." *Pinholster v. Ayers,* 590 F.3d 651, 662 (9th Cir. 2009)(en banc)(*quoting Williams v. Taylor,* 529 U.S. 362, 381, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)), *petition for cert. filed,* 78 U.S.L.W. 3728 (U.S. Mar. 9, 2010) (No. 09-1088) [cert. denied, 130 S. Ct. 3410, 177 L. Ed. 2d 323 (2010)]. Although "only Supreme Court authority is binding, circuit court precedent may be 'persuasive' in determining what law is clearly established and whether a state court applied that law unreasonably." *Pinholster,* 590 F.3d at 662 (*citing Clark v. Murphy,* 331 F.3d 1062, 1069 (9th Cir. 2003)).

A state court decision is "contrary to" clearly established Supreme Court law if it "'applies a rule that contradicts the governing law set forth in [Supreme Court] cases'" or if it reaches a result different from Supreme Court precedent on "materially indistinguishable" **[*10]** facts. *Price v. Vincent,* 538 U.S. 634, 640, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003)(*quoting Williams,* 529 U.S. at 405-06); *see also Frantz v. Hazey,* 533 F.3d 724, 734 (9th Cir. 2008) (en banc)(state court decision using "the wrong legal rule or framework" constitutes error under "contrary to" prong of § 2254(d)(1)).

A decision involves an "unreasonable application" of Supreme Court law "'if the state court

identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Chia v. Cambra,* 360 F.3d 997, 1002 (9th Cir. 2004)(*quoting Andrade,* 538 U.S. at 75). "To show that a state court's application of Supreme Court precedent was 'unreasonable,' the petitioner must establish that the state court's decision was not merely incorrect or erroneous, but 'objectively unreasonable.'" *Pinholster,* 590 F.3d at 662 (*citing Williams,* 529 U.S. at 409-10). Similarly, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen,* U.S. , 130 S. Ct. 841, 849, 175 L. Ed. 2d 738 (2010)(*citing* **[*11]** *Williams,* 529 U.S. at 411); *see also Taylor v. Maddox,* 366 F.3d 992, 999 (9th Cir. 2004)("objectively unreasonable" standard applies to state court factual determinations).

The phrase "adjudicated on the merits" means that the state court's "grant or denial rest[ed] on substantive, rather than procedural, grounds." *Pinholster,* 590 F.3d at 662 (*citing Lambert v. Blodgett,* 393 F.3d 943, 966 (9th Cir.2004)). [5] In reviewing a state court adjudication, a federal habeas court looks to the last reasoned state decision on a claim as the basis for the state court's final judgment on that claim. *Pinholster,* 590 F.3d at 662. When there is no state court decision articulating a rationale for judgment on the merits of a claim, a federal habeas court independently reviews the record to determine whether the state court's decision was contrary to, or an unreasonable application of, controlling law. *Pinholster,* 590 F.3d at 663 and n.4; *Delgado v. Lewis,* 223 F.3d 976, 981-82 (9th Cir. 2000). "Such '[i]ndependent **[*12]** review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable.'" *Pinholster,* 590 F.3d at 663 (*quoting Himes v. Thompson,* 336 F.3d 848, 853 (9th Cir.2003)).

FOOTNOTES

[5] When a claim was rejected by the state court on procedural rather than substantive grounds, de novo review is required. *See Pirtle v. Morgan,* 313 F.3d 1160, 1167 (9th Cir. 2002)(citations omitted). De novo review is also required if it is clear that the state court has not decided an issue. *Reynoso v. Giurbino,* 462 F.3d 1099, 1109 (9th Cir. 2006)(*citing Rompilla v. Beard,* 545 U.S. 374, [390], 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)).

V. *DISCUSSION*

In reviewing present grounds one and two, this court may look through the state supreme court's summary denial to the reasoned opinion by the court of appeal. In reviewing present grounds three and four, this court must make an independent review of the record to determine whether the state court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law.

A. GROUNDS ONE AND TWO: INSTRUCTIONAL ERROR

Petitioner asserts claims **[*13]** of instructional error in grounds one and two. Claims of error in state court jury instructions are generally a matter of state law, and thus do not raise a federal constitutional question. *See Gilmore v. Taylor,* 508 U.S. 333, 343, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993); *Estelle v. McGuire,* 502 U.S. 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Federal habeas review is limited to a determination of whether alleged instructional error "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire,* 502 U.S. at 71 (*citing Cupp v. Naughten,* 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)). When this determination is made, a challenged instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp,* 414 U.S. at 146-147; *see also Middleton v. McNeil,* 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004)(per curiam)("If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (citations and internal quotation marks omitted)).

Moreover, **[*14]** even if the court finds constitutional error in the use of a jury instruction, a federal habeas petitioner must still show that the error had a substantial and injurious effect or influence in determining the jury's verdict resulting in actual prejudice to the petitioner. *See Fry v. Pliler,* 551 U.S. 112, 121, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007)(federal habeas court must assess prejudicial impact of constitutional error in state-court criminal proceeding under "substantial and injurious effect" standard of *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)); *Calderon v. Coleman,* 525 U.S. 141, 147, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998)(same); *Beardslee v. Woodford,* 358 F.3d 560, 577-78 (9th Cir. 2004) (finding instructional error harmless).

Under these standards, Petitioner's claims in grounds one and two do not merit federal habeas relief.

1. *Ground One: Court's Response to Jury Question*

Petitioner's jury was instructed that the prosecution was required to prove the following elements of burglary:

> 1. A person entered a building; and
>
> 2. At the time of the entry, that person had the specific intent to steal and take away someone else's property, and intended **[*15]** to deprive the owner permanently of that property.

[CT at 79.] The jury was further instructed that "[a] building is a structure." [CT at 79.]

In ground one, Petitioner does not contend that the instructions given to the jury before deliberations were incorrect or misleading as to the elements of burglary. [Pet. at 6; Petition Memorandum ("Pet. Mem.") at 6-15.] Rather, he contends that the judge erred in how he answered the deliberating jury's subsequent question, "Is the porch considered to be part of the building/structure[?]" [Pet. at 6; Pet. Mem. at 6-15; jury question, CT at 95.]

The court of appeal described the circumstances as follows:

> After the presentation of evidence, the court gave standard instructions to the jury concerning the present offenses. [Footnote omitted.] At 2:00 p.m. on August 3, 2000, the jury retired to deliberate. . . . At 4:00 p.m., the jury sent the court a note asking, "[i]s the porch considered to be a part of the building/structure[.]" The court recessed for the day.
>
> At 9:00 a.m. on August 4, 2000, the jury resumed deliberations and, at 9:30 a.m., out of their presence, the court and parties discussed the jury's second note. The prosecutor urged the second **[*16]** note raised an issue of fact and the jury should resolve it after being instructed on the definition of a building. [Petitioner] urged the porch lacked a roof and was not enclosed or locked, the issue was one of law, and the court should simply reply in the negative to the second note.
>
> At 9:40 a.m., the jury returned to the courtroom to hear the trial court's response. . . . [See below.] At 9:42 a.m., the jury resumed deliberations and, at 9:55 a.m., the jury announced it had reached a verdict.

[Ret. Ex. C at 66-67; *see also* RT at 156-70; CT at 29, 95.]

The judge answered the jury's question with the following supplemental instruction:

> Yesterday afternoon the jurors provided us with another question. And the question was is the porch considered to be a part of the building/structure.
>
> Let me respond to your question in this way: that the determination of whether or not the porch is considered part of a building or structure is based upon whether a reasonable person would have an expectation of protection from unauthorized intrusion into the area and therefore it's based upon that definition and it's a matter for the jury to determine.

[RT at 170.]

Petitioner did not testify at trial, but in **[*17]** closing argument the defense proposed the theory that Petitioner did not enter the victims' apartment, but found the stolen items on the porch, where they had been abandoned moments before by the unidentified actual burglar. [RT at 140 et seq.] Petitioner contends that, if the jurors had accepted this theory, they should have been able to find that, even if Petitioner entered the porch, he did not enter a "structure," thereby negating the entry element of burglary. Petitioner contends that the judge's supplemental instruction wrongly allowed the jury to conclude that the porch was part of the structure, and to find that Petitioner committed burglary even if he only entered the porch. [Pet. at 6; Pet. Mem. at 6-15.]

In analyzing this claim, the court of appeal first stated that the supplemental instruction may well not have been supported by the state law cited by the trial court. [Ret. Ex. C at 68.] However, the court of appeal found "no need to decide whether the giving of the instruction at issue was error." [*Id.*] Instead, the court of appeal simply found that any possible error was harmless:

> However, there is no need to decide whether the giving of the instruction at issue was error. **[*18]** [Petitioner] does not dispute the sufficiency of the evidence as to the burglary conviction. Indeed, there was overwhelming evidence, and [Petitioner] conceded below, that *someone* burglarized Allphin's apartment and stole the Playstation and stereo from inside the apartment. [Footnote omitted.]
>
> Thus, the issue was identity. A short time after Allphin heard a noise downstairs, he caught [Petitioner] red-handed on the bicycle with the stolen goods outside the apartment. No one else was in the vicinity. The jury reasonably could have concluded that [Petitioner] brought the bicycle and duffel bag to the apartment to burglarize it, make a quick getaway, and transport stolen items; that when Allphin observed [Petitioner], [Petitioner] was preparing his getaway; and [Petitioner's] subsequent flight evidenced consciousness of guilt concerning the burglary.
>
> Moreover, when Allphin jogged to [Petitioner] and demanded the contraband, [Petitioner] first responded by pedaling faster, evidencing consciousness of guilt. The jury reasonably could have concluded that [Petitioner] stopped only because he believed he could not pedal faster and maintain control of the bicycle while holding the contraband. **[*19]** Further, [Petitioner] repeatedly begged Hestand not to call the police; this too evidenced consciousness of guilt concerning the burglary.
>
> Further still, during Allphin's direct examination, he testified that he demanded the contraband; [Petitioner] replied, "'I found this stuff[;]'" and Allphin responded, "'[y]ou found it in my apartment.'" An argument ensued, but at no time did Allphin, *during direct examination,* testify that, during that argument, [Petitioner] denied that he had "found" the contraband *in the apartment.* As our Supreme Court recently has observed, "'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation

> may be considered as a tacit *admission* of the statements made in his presence.'" (*People v. Riel* (2000) 22 Cal. 4th 1153, 1189, 96 Cal. Rptr. 2d 1, 998 P.2d 969, quoting *Estate of Neilson* (1962) 57 Cal. 2d 733, 746, 22 Cal. Rptr. 1, 371 P.2d 745, italics added.) Thus, [Petitioner] admitted he obtained the contraband in the apartment, that is, he committed the burglary. [Footnote omitted.] **[*20]** Similarly, Allphin testified that Hestand threatened to call the police if [Petitioner] did not give the items to Allphin; [Petitioner] failed to deny then that he had done the wrongdoing implicit in Hestand's threat.
>
> Beyond that, Hestand testified [Petitioner] admitted "stealing." Moreover, it is settled that evidence of conscious possession of recently stolen property, coupled with only slight corroborating evidence tending to prove guilt, is sufficient to permit a burglary conviction (see *People v. Johnson* (1993) 6 Cal. 4th 1, 35-38, 23 Cal. Rptr. 2d 593, 859 P.2d 673), and we believe such corroboration is present here. Further, we note there is no dispute that the trial court properly rejected instructions on accomplice liability for burglary, and on receiving stolen property with innocent intent; accordingly, it is undisputed that there was no substantial evidence that [Petitioner] was an accomplice or possessed the contraband with innocent intent. The jury, instructed that burglary required intent to steal, convicted [Petitioner] of burglary and thereby rejected his defense argument that he "found" the property. In sum, we conclude there was overwhelming evidence that [Petitioner] was the person who burglarized **[*21]** Allphin's apartment.[[6]] Therefore, any error in the giving of the challenged instruction was harmless under any conceivable standard. [Footnote omitted.] (Cf. *People v. Watson* (1956) 46 Cal. 2d 818, 836, 299 P.2d 243; *Chapman v. California* (1967) 386 U.S. 18, 24[, 87 S.Ct. 824, 17 L.Ed.2d 705].)

[Ret. Ex. C at 68-71.] [7]

FOOTNOTES

6 "The fact that one or more jurors may have considered the issue of whether the items were removed by [Petitioner] merely from the porch does not alter our conclusion." Ret. Ex. C at 71 n.8.]

7 In *Chapman,* a case on direct review of a state-court criminal judgment, the Supreme Court "held that a federal constitutional error can be considered harmless only if a court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Fry,* 551 U.S. at 116 (*quoting Chapman,* 386 U.S. at 24).

As noted above, in *Fry v. Pliler* the Supreme Court reiterated that the harmless error standard to be applied on federal habeas review of state criminal judgments is the standard of *Brecht v. Abrahamson,* under which "an error is harmless unless it had substantial and injurious effect or influence in determining the jury's verdict." *Fry,* 551 U.S. at 116 (internal quotations marks omitted)(*citing* **[*22]** *Brecht,* 507 U.S. at 631; *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). In *Fry,* the Court made clear that the *Brecht* harmless error standard applies on federal habeas review whether or not a state court applied the *Chapman* standard. *Fry,* 551 U.S. at 116 and n.1. Moreover, the federal habeas court does not need to first determine whether the state court unreasonably applied the *Chapman* standard, but may simply apply the *Brecht* standard. *Id.* at 120.

Here, following the example of the state court of appeal, this court may decline to decide whether the trial court's supplemental instruction regarding the porch amounted to constitutional error, and, instead, may simply conclude that any such error was harmless. As quoted above, the court of appeal reasonably determined that there was overwhelming evidence that Petitioner was the actual burglar who entered the victims' apartment, and that there was

nothing in the record to suggest that the jurors believed the defense suggestion (that Petitioner only went as far as the porch). Under these circumstances there is also no reason to conclude that a jury instruction on whether the porch was part of the structure **[*23]** had any substantial and injurious effect or influence in determining the jury's verdict that Petitioner was guilty of burglary.

Accordingly, because any error in the challenged instruction was harmless under *Brecht,* Petitioner does not merit federal habeas relief on this claim.

2. *Ground Two: CALJIC No. 2.71*

In Ground Two, Petitioner contends that the trial court improperly instructed the jury using CALJIC No. 2.71, which pertains to the evaluation of evidence of oral admissions by a defendant not made in court. [Pet. at 6; Pet. Mem. at 18-23.]

As given at trial, CALJIC No. 2.71 provided as follows:

> An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crime for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> Evidence of an oral admission of a defendant not made in court should be viewed with caution.

[RT at 115-116; *see also* CT at 70.]

As he did on direct review before the state courts, Petitioner argues that CALJIC No. 2.71 should **[*24]** not be given when, as Petitioner contends to be the case here, extrajudicial statements attributed to a defendant are exculpatory and support the defendant's sole defense, as the instruction allegedly directs the jury to discredit such exculpatory statements and view them "with caution." [Pet. at 6; Pet. Mem. at 18-23.]

Specifically, Petitioner refers to victim Allphin's testimony recounting certain statements by Petitioner when Allphin demanded that Petitioner return the stolen property and Petitioner said, among other things, "'I found this stuff,'" "'It's all right, I'll give it back. I didn't know it was your stuff [just] don't call the police,'" and "'Look, there is no reason to get upset about it. You don't have to call the cops. We can just be friends. My name is Reggie. Reggie Owens. Reggie.'" [Pet. Mem. at 18 (citing RT at 52-54).]

According to Petitioner, his entire defense at trial was that the foregoing "extrajudicial statements proved that [Petitioner] had found, and had not stolen the items," but CALJIC No. 2.71 "created a high probability that the jury would discredit the only evidence supporting [Petitioner's] sole defense." [Pet. Mem. at 19-23.] According to Petitioner, **[*25]** this result followed from the part of CALJIC No. 2.71 that states that "[e]vidence of an oral admission of a defendant not made in court should be viewed with caution." [*Id.*]

While Petitioner appears to acknowledge that the targeted phrase refers to viewing "*[e]vidence* of an oral admission" with caution as opposed to viewing the admission itself with caution, Petitioner argues that "[j]urors could easily be confused as to whether 'evidence of the admission' is the same as the admission itself, as opposed to the manner in which it was relayed or the trustworthiness of the source." [*Id.*] Thus, "[h]ad the jury [under CALJIC No. 2.71] not viewed skeptically [Petitioner's] statements that he had found and not stolen the goods, it could not have convicted him of burglary nor of receiving stolen property." [*Id.* at 22-23.]

In its opinion, the court of appeal rejected this claim as follows:

> The court, using CALJIC 2.71, instructed the jury on the definition of an admission. [Footnote omitted.] [Petitioner] claims the instruction should not be given "when a defendant does not himself testify at trial, when extrajudicial statements made by the defendant are admitted into evidence through the testimony **[*26]** of a prosecution witness without objection by the defense, and when the statements support the defendant's sole defense."
>
> However, CALJIC No. 2.71 did not instruct the jury that *any* statements, or exculpatory statements, by a defendant were admissions. That instruction informed the jury, inter alia, that an admission was a statement by a defendant which "tends to prove [his] guilt when considered with the rest of the evidence." The instruction also informed the jurors that they were the exclusive judges as to whether the defendant made an admission.
>
> Moreover, there was substantial evidence to support the giving of the instruction, including (1) Allphin's testimony relating [Petitioner's] adoptive admission . . . that he found the items in the apartment, (2) Allphin's testimony relating [Petitioner's] statement that he would "give it back" to Allphin; (3) the testimony of Allphin and Hestand relating [Petitioner's] demand that the police not be called; (4) Allphin's testimony relating [Petitioner's] argument to Allphin "that [the Playstation] wasn't with it," implying that the Playstation was not with the stereo, and that Allphin was not entitled to the Playstation; (5) Allphin's testimony **[*27]** relating [Petitioner's] adoptive admission of wrongdoing resulting from his failure to deny wrongdoing when Hestand threatened to call the police if [Petitioner] did not give the items to Allphin; and (6) Hestand's testimony relating [Petitioner's] admission of "stealing." The trial court's giving of the instruction was proper. [Citations of state cases omitted.] None of the cases cited by [Petitioner], or his argument, compels a contrary conclusion.

[Ret. Ex. C at 72-73.]

Here, the court of appeal concluded that the trial court properly gave CALJIC No. 2.71 because substantial evidence supported giving the instruction and because, by its terms, the instruction expressly applied to inculpatory statements (*i.e.*, an "admission," as defined in the instruction), not to exculpatory statements, and that it was for the jury to decide whether or not Petitioner made any "admissions." [Ret. Ex. C at 72-73.] This court should defer to the California Court of Appeal's conclusion that the instruction was properly given under California law. *Wainwright v. Goode,* 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Bains v. Cambra,* 204 F.3d 964, 977 (9th Cir. 2000).

Furthermore, applying the federal **[*28]** standard discussed above, and considering the challenged portion of the instruction -- "Evidence of an oral admission of a defendant not made in court should be viewed with caution" -- in the context of the overall charge, there is no indication that this challenged part of the instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire,* 502 U.S. at 71; *see Cupp,* 414 U.S. at 146-147; *Middleton,* 541 U.S. at 437. In Petitioner's case, there is no basis for concluding that, upon hearing an instruction clearly defining "admissions" and urging "caution" in regard to such inculpatory evidence, the jurors misunderstood it as urging caution with respect to allegedly exculpatory out of court statements. Furthermore, there is no basis for concluding that this single sentence in a jury instruction is what caused the jurors not to believe Petitioner's suggestion that he merely carried off items previously stolen by an unknown person.

The state court decision on this claim is neither contrary to nor an unreasonable application of clearly established Supreme Court law, and relief should be denied on ground two.

B. GROUND THREE: CRUEL [*29] AND UNUSUAL PUNISHMENT

In Ground Three, Petitioner contends that his sentence amounted to cruel and unusual punishment under the Eighth Amendment. [Pet. at 7.] This contention is without merit.

1. *Background*

Prior to imposing sentence in this case, the trial court found "true" that Petitioner suffered two prior convictions for first degree burglary which qualified as "strikes," making Petitioner eligible for at least one term of twenty-five years to life, as well as prior "serious felony" enhancements, making Petitioner eligible for two five-year enhancement terms, under California Penal Code sections 667(a)(1), (b)-(i), 1170.12(a)-(d). [CT at 15-18, 190-93.] The court also found "true" that Petitioner had served prior prison terms on other convictions for second degree burglary and fleeing or evading a pursuing police officer, making Petitioner eligible for two one-year enhancement terms under Penal Code section 667.5(b). [CT at 15-18, 190-93.]

After making these findings, the trial court struck one of the "strike" allegations, along with both prison term priors. [CT at 190-93.] The court then sentenced Petitioner to state prison for a total term of eighteen years, comprising the following **[*30]** components: (1) a mid-term of four years on the burglary count, doubled to eight years based on the remaining "strike" allegation; [8] (2) both five-year prior "serious felony" enhancements for consecutive terms totaling ten years; and (3) a two-year concurrent term on the receiving stolen property count. [CT at 190-93.] The court of appeal later ordered the sentence on the receiving count stayed under Penal Code section 654. [Ret. Ex. C at 74.] Thus, Petitioner's total sentence is eighteen years, largely reflecting his status as a recidivist. [*Id.*; CT at 190-93.]

FOOTNOTES

8 As a result of the trial court's decision to strike one prior "strike," Petitioner was no longer eligible for a term of twenty-five years to life but, but, because of the one remaining "strike," was eligible for a doubling of the term on the principal count. *See* Cal. Penal Code §§ 654, 667(b)-(i), 1170.12(a)-(d).

2. *Petitioner's Sentence Did Not Violate the Eighth Amendment*

"The Eighth Amendment, which forbids cruel and unusual punishment, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California,* 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (plurality opinion) (quoting **[*31]** *Harmelin v. Michigan,* 501 U.S. 957, 996-97, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)). The Eighth Amendment does not require strict proportionality between a sentence and the crime on which it is based. *See Harmelin,* 501 U.S. at 1001. Rather, in non-capital cases, the Eighth Amendment "forbids only extreme sentences that are grossly disproportionate to the crime," with this "gross disproportionality principle" applicable only in the "exceedingly rare" and "extreme" case. *Harmelin,* 501 U.S. at 1001, 1005; *see also Lockyer v. Andrade,* 538 U.S. at 72 ("A gross disproportionality principle is applicable to sentences for terms of years" and applies, if at all, only in the "exceedingly rare" and "extreme" case (*citing Ewing,* 538 U.S. at 20-27)); *Rummel v. Estelle,* 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare.").

When, as here, a defendant is sentenced under recidivism legislation, such as California's Three Strikes and other habitual offender laws, the Eighth Amendment's "gross disproportionality principle" calls for an evaluation which "place[s] **[*32]** on the scales not only [a defendant's] current felony, but also his . . . history of felony recidivism." *Ewing,* 538 U.S. at 27-30.

> Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of

> conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by their repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." [*Citing Rummel,* 445 U.S. at 276; *Solem v. Helm,* 463 U.S. 277, 296, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).] To give full effect to the State's choice of this legitimate penological goal, . . . proportionality review of [a prisoner's] sentence must take that goal into account.

Id. at 29.

Applying these considerations, the Supreme Court held in *Ewing,* on direct review, that the challenged Three Strikes recidivist sentence (of twenty-five years to life for a felony theft of golf clubs, worth about $ 1200, by a defendant with multiple prior convictions **[*33]** for theft, burglary and robbery) did not amount to cruel and unusual punishment under the Eighth Amendment's narrow proportionality principle for noncapital sentences. *Id.* at 17-20, 29-31 (*quoting Harmelin,* 501 U.S. at 996-97); *see also Lockyer v. Andrade,* 538 U.S. at 66-70, 73-77 (on AEDPA review, finding that a California decision rejecting an Eighth Amendment challenge to a Three Strikes sentence of fifty years to life for two counts of petty theft with a prior, was neither contrary to nor an unreasonable application of clearly established Supreme Court law, and noting that the defendant's criminal history included a series of theft, burglary, and drug convictions); *Rummel,* 445 U.S. at 264 *et seq.* (upholding a Texas recidivist sentence of twenty-five years to life with possibility of parole for obtaining $ 120.75 by false pretenses when the defendant had prior convictions and prison terms for fraudulent use of a credit card (for $ 80) and passing a forged check (for $ 28.36)); *but see Solem,* 463 U.S. at 279, 282, 284-303 (finding Eighth Amendment violation where, under a South Dakota recidivist statute, a trial court imposed a life sentence without possibility of parole for uttering **[*34]** a $ 100 "no account" check when the defendant had six prior convictions for nonviolent felonies).

Given the Supreme Court precedent as discussed above, Petitioner's total sentence of eighteen years is not grossly disproportionate, either with respect to the "doubled" term of eight years on the burglary count or the two five-year prior "serious felony" enhancement terms. Petitioner's current burglary offense cannot be considered less serious, or otherwise reasonably distinguished, from the theft offenses in *Ewing* and *Lockyer,* nor can Petitioner's lengthy adult criminal history (extending over twenty-five years and including the prior "strike" convictions, other enhancement allegations in this case, and other convictions for battery, carrying a loaded firearm in public, and grand theft auto [CT at 15-18, 122-93, 204-05]) be considered less significant than the *Ewing* and *Lockyer* defendants' records of theft, burglary, and drug-related convictions over a similarly extended period of time. *See Lockyer,* 123 S. Ct. at 1170; *Ewing,* 538 U.S. at 17-20, 27-31. In *Lockyer* and *Ewing* each Three Strikes count resulted in a term of twenty-five years to life, and this was found not to be disproportionate **[*35]** or cruel and unusual punishment in violation of the Eighth Amendment. It follows that Petitioner's less stringent sentence of eighteen years for burglary and enhancements is not constitutionally defective, especially in light of the trial court's decision to strike one of Petitioner's prior "strikes" and two additional one-year enhancements.

Here, Petitioner's criminal record supports a finding that he is a recidivist who, consistent with Supreme Court precedent, may be punished more severely than first-time offenders. Accordingly, the state courts' denial of Petitioner's Eighth Amendment claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law, and ground three does not merit federal habeas relief and should be denied.

C. GROUND FOUR: PRIOR "STRIKE" CONVICTION ALLEGATION

Finally, in ground four, Petitioner contends that the plea agreement underlying his 1982 burglary conviction was breached when that conviction was used, under the Three Strikes law passed in 1994, to double the term on his current burglary charge. [Pet. at 7; *see also* CT at 15-18, 183, 190-93.]

Insofar as Petitioner may be seeking to directly challenge the validity of his **[*36]** 1982 conviction, he is precluded from doing so because he was no longer in custody on that conviction, on which the sentence had fully expired, before his the present conviction or the filing of the present petition. *See Lackawanna v. Coss,* 532 U.S. 394, 401, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001)(*citing Maleng v. Cook,* 490 U.S. 488, 489-94, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989)(per curiam)). Insofar as Petitioner seeks to challenge the use of the allegedly invalid 1982 conviction as a strike enhancing his present sentence, his claim is barred by the holding in *Lackawanna,* 532 U.S. at 403-04 (if a prior conviction, which "is no longer open to direct or collateral attack in its own right," "is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained."). *See also Clark v. Marshall,* No. CV 04-481-DDP(MAN), 2009 U.S. Dist. LEXIS 93938, 2009 WL 3270923 at *7 (C.D. Cal. Oct. 8, 2009) (applying *Lackawanna*).

The *Lackawanna* Court allowed an exception to this rule if a "petitioner can demonstrate that his current sentence was enhanced on the basis of a prior conviction **[*37]** that was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment . . ." *Lackawanna,* 532 U.S. at 404. That exception does not apply in Petitioner's case. Here, Petitioner has not claimed that he was denied counsel in the 1982 case, and, on the contrary, the record indicates that Petitioner was represented by counsel when he pled guilty in 1982 (under the name Reginald Toombs). [RT at 188; CT at 187.]

Moreover, although Petitioner claims that the state breached his 1982 plea agreement, he does not claim that the 1982 agreement included a provision that the conviction would not be used to enhance a future conviction. *Cf. Davis v. Woodford,* 446 F.3d 957, 961-62 (9th Cir. 2006)(when prosecutor expressly promised that only one prior conviction would be placed in defendant's criminal record, the later use of eight counts as eight strikes violated the plea agreement). Instead, Petitioner is claiming that the state violated the 1982 plea agreement because it used the 1982 conviction to enhance his present sentence under the Three Strikes law, rather than under enhancement statutes in force in 1982. [Pet at 7.] However, under California law, "contracts (including **[*38]** plea bargains) are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws.'" *Davis,* 446 F.3d at 962 (*quoting People v. Gipson (In re Gipson),* 117 Cal. App. 4th 1065, 12 Cal. Rptr. 3d 478, 481 (2004)(internal quotation marks omitted)); *see also Clark,* 2009 U.S. Dist. LEXIS 93938, 2009 WL 3270923 at *7 (petitioner could not reasonably have understood plea agreement "as a representation that Petitioner was insulated forever from future changes in California's sentencing laws"); *Zaragoza v. Marshall,* No. CV 08-1029-GW(RC), 2009 U.S. Dist. LEXIS 75157, 2009 WL 2488060 at *5 (C.D. Cal. Aug. 12, 2009)(finding no breach of plea agreement when petitioner was not specifically promised that conviction would not be considered a future strike); *Oberg v. Carey,* No. C 04-5446-PJH(PR), 2007 U.S. Dist. LEXIS 21347, 2007 WL 3225442 at *4-6 (N.D. Cal. Oct. 30, 2007)(no implied incorporation of the law as it was at the time of the plea bargain).

Accordingly, Petitioner's claim that the state violated his plea agreement in the 1982 case by using it as a strike in calculating his present sentence is without merit, and the state court decision denying this claim was neither contrary to, nor an unreasonable **[*39]** application of, clearly established Supreme Court law.

VI. *RECOMMENDATION*

It is therefore recommended that the court issue an order: (1) accepting this Report and Recommendation; and (2) denying the petition and dismissing this action with prejudice.

DATED: May 14, 2010

/s/ Carla M. Woehrle

CARLA M. WOEHRLE

United States Magistrate Judge

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In

*2010 U.S. Dist. LEXIS 94415, **

DARRELL CASTLEBERRY, Petitioner, v. GAIL LEWIS, Warden, Respondent.

No. EDCV 03-624 JHN (CW)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

2010 U.S. Dist. LEXIS 94415

May 7, 2010, Decided
May 7, 2010, Filed

SUBSEQUENT HISTORY: Accepted by, Habeas corpus proceeding at, Judgment entered by Castleberry v. Lewis, 2010 U.S. Dist. LEXIS 94414 (C.D. Cal., Sept. 9, 2010)

CORE TERMS: juror's, prosecutor's, nephew's, teacher, peremptory challenges, race-neutral, comparative, pretextual, federal habeas, criminal histories, plea agreement, prosecutor stated, evidence presented, family members, discriminatory, implausible, questioning, questioned, responded, convicted, spoken, facing, struck, federal law, prosecutor used, prospective jurors, purposeful discrimination, objectively, peremptory, empaneled

COUNSEL: [*1] Darrell Castleberry, Petitioner, Pro se, Vacaville, CA.

For Gail Lewis, Warden, Respondent: Gary W Brozio, Kevin R Vienna, Kyle Niki Cox Shaffer, Matthew C Mulford, LEAD ATTORNEYS, CAAG Office of Attorney General of California, San Diego, CA.

JUDGES: CARLA M. WOEHRLE, United States Magistrate Judge.

OPINION BY: CARLA M. WOEHRLE

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Jacqueline H. Nguyen, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For reasons stated below, the Petition for

habeas corpus relief should be conditionally granted.

I.PROCEDURAL HISTORY

Pro se Petitioner, a prisoner in the custody of the California Department of Corrections, challenges a conviction in California Superior Court, San Bernardino County (Case No. FSB 16264). On August 31, 1999, a jury found Petitioner guilty of one count of second-degree commercial burglary and one count of petty theft with a prior. [Clerk's Transcript ("CT") 203-204.] The trial court found true allegations that Petitioner had two prior strike convictions under the Three Strikes **[*2]** Law (Penal Code Sections 667(b)-(i) and 1170.12(a)-(d)) and had served one prior state prison term (Cal. Penal Code Section 667.5(b)). [CT 206.] Petitioner received a total sentence of twenty-six years to life in state prison. [CT 210-11.]

Petitioner appealed. In an unpublished decision filed on January 10, 2001, the California Court of Appeal affirmed the judgment in full. [Lodged Document ("Lodg.") Item 7, hereinafter "Opinion".] The California Supreme Court summarily denied review on March 28, 2001. [Lodg. Item 9.] Petitioner then filed three habeas petitions in the state courts, and each of the petitions was denied. [Lodg. Items 10-14.]

Petitioner filed the present Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) on June 4, 2003. Responded filed a Return on February 11, 2004. Petitioner filed a Traverse on June 21, 2004.

On March 4, 2010, Petitioner filed a Motion for Leave to File a Second Amended Petition, proposing the following additional claims: (1) Petitioner's restitution fine violates the Eighth Amendment; (2) use of Petitioner's prior offense for application of the Three Strikes Law violates the prohibition against ex post facto laws; and (3) breach of Petitioner's plea **[*3]** agreement for the prior offense. [1]

FOOTNOTES

1 Petitioner's motion should be denied because amendment would be futile based on the nature of Petitioner's three proposed claims. First, Petitioner's challenge to his restitution fine is not cognizable on federal habeas review because it is not a challenge to Petitioner's custody. See Bailey v. Hill, 599 F.3d 976, 982 (9th Cir. 2010); Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998); Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987). Second, the Supreme Court has rejected the proposition that application of recidivist statutes to convictions sustained before the law was enacted violates ex post facto and other principles. See Parke v. Raley, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). Finally, Petitioner's assertion of breach of his prior plea agreement, premised on changes in state sentencing law since the plea was entered, does not warrant federal habeas relief; there is no legal authority to support Petitioner's apparent assertion that because the law did not provide for a Three Strikes sentence at the time of his plea, he is not subject to this particular enhancement. See Clark v. Marshall, No. CV 04-481-DDP (MAN), 2008 U.S. Dist. LEXIS 110445, 2009 WL 3270923, at *7 (C.D. Cal. Oct. 8, 2009)(rejecting **[*4]** petitioner's claim that prior plea agreement "somehow locked in the sentencing law in effect at the time the agreement was made" in light of state provision reserving power to amend or enact additional laws for purposes of plea agreements); Zaragoza v. Marshall, No. CV 08-1029 GW (RC), 2009 U.S. Dist. LEXIS 75160, 2009 WL 2488060 at *5 (C.D. Cal. Aug. 12, 2009) (finding no breach of plea agreement where petitioner was not specifically promised that conviction would not be considered a future strike and prosecutor simply explained consequences of plea under current state of the law); Oberg v. Carey, No. C 04-5446 PJH (PR), 2007 U.S. Dist. LEXIS 21347, 2007 WL 3225442 at *4-6 (N.D. Cal. Oct. 30, 2007) (noting that "there is no implied incorporation of the law as it was at the time of the plea bargain" and that California expressly reserves power to amend or add laws with respect to sentencing enhancements (citing People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004)); cf. Davis v. Woodford, 446 F.3d 957, 963 (9th Cir. 2006)(enforcing

plea agreement that contained specific agreement as to how the facts of prior conviction would be used, as opposed to an attempt to "freeze" the applicable law).

II. FACTUAL BACKGROUND

On direct **[*5]** review, the California Court Appeal summarized the factual background of the case against Petitioner ("Castleberry") as follows:

> On October 13, 1997, security personnel employed by the J.C. Penney department store at the Carousel Mall in San Bernardino observed Castleberry remove two shirts from a rack of clothing, roll them up and put them into his pants. When Castleberry left the store, he was apprehended and escorted to the store's loss prevention office. San Bernardino Police Officer Currie arrived, retrieved the shirts from Castleberry's pants and transported him to the police station . . . Castleberry was tried, convicted and sentenced for commercial burglary and petty theft.
>
> [Op. 2-3.]

III. PETITIONER'S CLAIM

Petitioner, who is African-American, states the following claim for federal habeas relief: the prosecutor used her peremptory challenges to systematically exclude seven African-American people from the jury. [Petition ("Pet.") at 6.] Under clearly-established federal law, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the **[*6]** State's case against a black defendant." Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Petitioner's racial discrimination claim pursuant to People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), California's precursor to Batson, was rejected by the California Court of Appeal in its last reasoned decision.

IV. STANDARD OF REVIEW

Review of the Petition in this case is governed by provisions of the AEDPA. Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "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).

"Clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). "Habeas relief is unavailable **[*7]** if the Supreme Court has not 'broken sufficient legal ground' on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue." Pinholster v. Ayers, 590 F.3d 651, 662 (9th Cir. 2009)(en banc)(quoting Williams v. Taylor, 529 U.S. 362, 381, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)), petition for cert. filed, 78 USLW 3549 (Mar. 9, 2010)(No. 09-1088) [cert. granted 130 S. Ct. 3410, 177 L. Ed. 2d 323 (2010)] Although "only Supreme Court authority is binding, circuit court precedent may be 'persuasive' in determining what law is clearly established and whether a state court applied that law unreasonably." Pinholster, 590 F.3d at 662 (citing Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003)).

A state court decision is "contrary to" clearly established Supreme Court law if it "'applies a rule that contradicts the governing law set forth in [Supreme Court] cases'" or if it reaches a result

different from Supreme Court precedent on "materially indistinguishable" facts. Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003)(quoting Williams, 529 U.S. at 405-06); see also Frantz v. Hazey, 533 F.3d 724, 734 (9th Cir. 2008) (en banc)(state court decision using "the wrong legal rule **[*8]** or framework" constitutes error under "contrary to" prong of § 2254(d)(1)). A decision involves an "unreasonable application" of Supreme Court law "'if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir. 2004)(quoting Andrade, 538 U.S. at 75). "To show that a state court's application of Supreme Court precedent was 'unreasonable,' the petitioner must establish that the state court's decision was not merely incorrect or erroneous, but 'objectively unreasonable.'" Pinholster, 590 F.3d at 662 (citing Williams, 529 U.S. at 409-10). Similarly, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, U.S. , 130 S. Ct. 841, 849, 175 L. Ed. 2d 738 (2010)(citing Williams, 529 U.S. at 411); see also Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004)("objectively unreasonable" standard applies to state court factual determinations).

The phrase "adjudicated on the merits" means that the state court's **[*9]** "grant or denial rest [ed] on substantive, rather than procedural, grounds." Pinholster, 590 F.3d at 662 (citing Lambert v. Blodgett, 393 F.3d 943, 966 (9th Cir.2004)). [2] In reviewing a state court adjudication, a federal habeas court looks to the last reasoned state decision on a claim as the basis for the state court's final judgment on that claim. Pinholster, 590 F.3d at 662. Here, the California Court of Appeal rejected Petitioner's claim in the last reasoned opinion on direct review. Accordingly, the court reviews the court of appeal's opinion for purposes of AEDPA review. Pinholster, 590 F.3d at 662; see also Shackleford v. Hubbard, 234 F.3d 1072, 1079 n. 2 (9th Cir. 2000)(citing Ylst v. Nunnemaker, 501 U.S. 797, 803-804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)).

FOOTNOTES

2 When a claim was rejected by the state court on procedural rather than substantive grounds, de novo review is required. See Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)(citations omitted). De novo review is also required if it is clear that the state court has not decided an issue. Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006)(citing Rompilla v. Beard, 545 U.S. 374, [390], 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)).

V.DISCUSSION

Background

In **[*10]** this case, the pool of prospective jurors included nine black people, two of whom were excused by the defense through peremptory challenges. [Petition for Review, 6.] The prosecutor used her peremptories to dismiss the remaining seven, leaving no black people on the empaneled jury. [3] [Id.] The defense twice brought Wheeler motions, which were both denied by the trial court. [RT 163, 219.] Facts regarding the prosecutor's dismissal of three of the black jurors are determinative of Petitioner's Batson claim.

FOOTNOTES

3 Respondent contends that only six black jurors were excused, noting that one of the seven cited jurors had a Hispanic last name. [Answer, at p. 4.] This issue is not dispositive of Petitioner's entitlement to federal habeas relief.

Juror No. 49, Gwendolyn Williams, was a widow (her late husband was a college psychology

instructor) and a retired teacher's aide. When asked whether she had any friends or relatives who were ever charged with a criminal offense, Ms. Williams responded that she had nephews who, "I guess they were charged," but that, "I don't know too much about it because I really wasn't in contact with them." [Reporter's Transcript ("RT") 23-25.] When asked whether her **[*11]** nephews' case would affect her at all during the trial, Ms. Williams responded, "No." [RT 24.] Ms. Williams pointed out that, aside from her nephews, "None of our relatives, we haven't been charged with any kind of crime." [RT 24.] After being challenged for using one of her peremptory strikes on Ms. Williams, the prosecutor initially cited Ms. Williams' occupation as a teacher and her husband's as a teacher of psychology. [RT 158-59.] Later, the prosecutor added that in light of Ms. Williams' relationship with her nephews, the prosecutor's experience indicated that jurors with such background "certainly take that back into the deliberation room" and are "very sympathetic with regards to others sitting in similar shoes to their family members and have a very difficult time convicting and calling it like it is without having their family members come into mind." [RT 212.]

Juror No. 23, David Jenkins, was an irrigation specialist for the San Bernardino airport authority and separated from his wife. [RT 114.] Mr. Jenkins had a nephew who was "serving some time" for a drug conviction. [RT 114, 121.] He then stated that his nephew was serving the sentence at the West Valley jail but that **[*12]** they had not spoken. [Id.] With regard to striking Mr. Jenkins, the prosecutor later explained that, "At one time he says they were serving time and at another point, he said that they were in jail. I found his answers to be a little inconsistent in that regard. I am not exactly sure that people serve time when they are at West Valley." [RT 211.] The prosecutor also expressed concern that the nephew was a "convicted felon," which "is exactly what [Mr. Jenkins] is going to be hearing about with regards to the defendant in this case." [Id.]

Juror No. 27, Betty Little, was married (her husband worked for the Rialto Police Department) and worked in "teacher preparation" for California State University, which involved administering the placement of newly-credentialed teachers in jobs; Ms. Little was not a teacher herself. [RT 175, 177, 178.] Ms. Little had a "host of relatives" that had pending criminal charges in Tennessee, including a brother, son and cousin facing drug-related charges. [RT 175, 178, 179.] When asked whether she had to travel to Tennessee to help her relatives, Ms. Little replied, "Oh, no, no," but she did keep in touch with them. [RT 179.] Ms. Little stated that she was **[*13]** close to her relatives because "they are my family" but when asked whether she felt bad for them, she said, "Not really because, you know, they shouldn't be out there to begin with, you know, to do that crime." [RT 177, 178.] Ms. Little opined that her relatives had been treated fairly by "the system" and that she would try to keep her relatives' cases "separate from the situation here. I would just try." [RT 180.] After striking Ms. Little from the jury and being asked to justify the strike, the prosecutor stated that it was "very likely" that Ms. Little's closeness to her family would cause her a problem in "listening to the case and coming to a resolution." [RT 209.] The prosecutor further expressed concern over Ms. Little's "level of teaching, being at the university level. I don't think there is ever anybody at the university level that I have ever kept on a jury. Her level of experience at Cal State and the surroundings of the faculty there at that level is far different than you have at the lower level of teaching." [RT 210.]

The trial court found that each of the prosecutor's peremptory challenges "had at least one, if not more, legitimate reasons" and that the "People have **[*14]** met the burden to show that it was not, though it may appear to have been, it is not the attempt to exclude a cognizable group from the panel." [RT 218.] The California Court of Appeal agreed, finding that adequate race-neutral grounds had been provided, and that "substantial evidence supports at least one legitimate race-neutral reason for each questioned peremptory challenge." [Opinion, 8.]

Batson Standard

Analysis of a Batson claim involves a three-step process. Batson, 476 U.S. at 93-94. The first is whether the defendant made a prima facie showing that the prosecution challenged prospective jurors on the basis of an impermissible ground such as race. Batson, 476 U.S. at 96; see also Green v. LaMarque, 532 F.3d 1028, 1029 (9th Cir. 2008)(Step One "is a burden of production,

not a burden of persuasion" (citing Johnson v. California, 545 U.S. 162, 170-71, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005)). The second step is whether the prosecution has articulated a facially race-neutral explanation for his or her action. Batson, 476 U.S. at 97.

The third step is whether the defendant has carried his or her ultimate burden of proving purposeful discrimination. Batson, 476 U.S. at 98; see also **[*15]** Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008); Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed 2d 196 (2005); Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S. Ct. 1029, 154 L. Ed 2d 931)(2003); Johnson v. California, 545 U.S. at 168; Cook v. LaMarque, 593 F.3d 810, 814 (9th Cir. 2010); Gonzalez v. Brown, 585 F.3d 1202, 1206 (9th Cir. 2009); Ali v. Hickman, 584 F.3d 1174, 1180 (9th Cir. 2009); Green v. LaMarque, 532 F.3d at 1029-30; Kesser v. Cambra, 465 F.3d 351, 359 (9th Cir. 2006)(en banc); Yee v. Duncan, 463 F.3d 893, 898 (9th Cir. 2006); Williams v. Runnels, 432 F.3d 1102, 1105-06 (9th Cir. 2006). "Although the burden remains with the defendant to show purposeful discrimination, the third step of Batson primarily involves the trier of fact. After the prosecution puts forward a race-neutral reason, the court is required to evaluate the 'persuasiveness of the justification.'" Kesser, 465 F.3d at 359 (quoting Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)). "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge **[*16]** should be believed." Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). Step three of the Batson inquiry "involves an evaluation of the prosecutor's credibility," as well as the "juror's demeanor." Snyder, 552 U.S. at 477; see also Thaler v. Haynes, U.S. , 130 S. Ct. 1171, 1174-75, 175 L. Ed. 2d 1003 (2010)(clarifying that Snyder does not hold that trial court's evaluation of prosecutor's demeanor-based explanation for peremptory strike requires court to observe and recall the juror personally).

"These determinations of credibility and demeanor lie 'peculiarly within the trial judge's province,'" and are owed deference "in the absence of exceptional circumstances." Id. (quoting Hernandez, 500 U.S. at 365). A state court's decision on the ultimate question of discriminatory intent constitutes a finding of fact which is entitled to a presumption of correctness on federal habeas review, and this finding can be rebutted only by a showing that the court's finding was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); Cook v. LaMarque, 593 F.3d at 816 and n. 3; Ali v. Hickman, 584 F.3d at 1180-81 **[*17]** (citing Kesser v. Cambra, 465 F.3d at 358 and n. 1); [4] see also Miller-El v. Dretke, 545 U.S. at 240.

FOOTNOTES

4 The Ninth Circuit has explained that "we apply § 2254(d)(2) to 'intrinsic review of a state court's processes, or situations where petitioner challenges the state court's findings based entirely on the state record.'" Kesser, 465 F.3d at 358 n. 1 (quoting Taylor v. Maddox, 366 F.3d at 1000; citing Lambert v. Blodgett, 393 F.3d 943, 972 n. 19 (9th Cir. 2004)). In contrast, the standard of 28 U.S.C. § 2254 (e)(1), which also applies a presumption of correctness to a determination of fact made by a state court, but which requires rebuttal by clear and convincing evidence, applies to challenges based on extrinsic evidence or "evidence presented for the first time in federal court." Id. (noting that Miller-El v. Dretke, 545 U.S. at 240, recites, but does not distinguish between, § 2254(d)(2) and § 2254(e)(1)). In Kesser, because the evidence of prosecutorial bias was found in the record presented to the state appellate court, the court found that petitioner's Batson claim was governed by § 2254(d)(2) rather than § 2254(e)(1), but that in any event, the record would satisfy either standard. **[*18]** Id. For the same reasons, the instant claim is governed by § 2254(d)(2), but the application of that provision rather than § 2254(e)(1) is not dispositive of the claim in light of the record. See also Ali v. Hickman, 584 F.3d at 1180-81 and n. 4; Green v. LaMarque, 532 F.3d at 1031 n. 5.

Analysis

Here, the trial court found that Petitioner made a prima facie showing that the prosecutor used peremptory challenges on the basis of race. [RT 209.] The prosecutor then presented facially race-neutral reasons for each of her peremptory challenges. [RT 209-13.] At step three, the trial court found that Petitioner had not proven purposeful discrimination, and that finding was upheld by the California Court of Appeal in the last reasoned state court decision. For purposes of this court's review, there is no apparent dispute as to the first two steps of the Batson framework; the sole issue is whether the state court erred in concluding that Petitioner failed to meet his ultimate burden of establishing that the prosecutor's challenges were motivated by purposeful racial discrimination. As discussed below, the state court's findings at step three involved an unreasonable determination of the facts **[*19]** in light of the evidence.

1. Gwendolyn Williams

As noted above, the prosecutor explained that she dismissed Ms. Williams because she and her late husband were teachers, because she had relatives with criminal histories, and that in the prosecutor's experience, such jurors would "certainly take back" to the jury room such experiences and have a "very difficult time" to vote for conviction. The state appellate court agreed with the trial court that these were permissible race-neutral reasons, stating that, "It is not unreasonable to think that [Ms. Williams] might be more apt to feel sorry for the defendant than another juror might be." [Opinion 6.] The appellate court also cited a new reason to dismiss Ms. Williams not raised by the prosecutor, noting that "[s]he was soft spoken and less than unequivocal when asked if she could withstand pressure from other jurors." [Id.]

Review of the voir dire transcript refutes all of these identified non-racial grounds for dismissal of the juror. The prosecutor's initial stated reason to challenge Ms. Williams - her occupation as a teacher - was factually incorrect; Ms. Williams was in fact a retired teacher's aide. [RT 23.] The prosecutor subsequently **[*20]** corrected herself, stating that it was Ms. Williams's occupation as a teacher's aide that formed the basis of the challenge, but the dismissal of Ms. Williams for either reason is implausible when the prosecutor's actions are analyzed in comparison with empaneled non-black jurors: Juror No. Twelve was a teacher in language arts and social studies and was married to an English teacher. [RT 30.] Moreover, the prosecutor's apparent concern over Ms. Williams' late husband's involvement in psychology was not plausible, given that empaneled Juror No. Four was a psychiatric counselor. [RT 117, 120.] Such a comparison is properly a part of the "totality of relevant facts" that may reveal an invidious discriminatory purpose. Kesser, 465 F.3d at 360 (citing Hernandez v. New York, 500 U.S. at 363). [5] [RT 117.]

FOOTNOTES

5 Under clearly established federal law, comparative juror analysis is an important tool for evaluating Batson claims on federal habeas review. See Miller-El v. Dretke, 545 U.S. at 241 (noting that comparative analysis may be used to show purposeful discrimination at Batson's third step if the proffered reason for striking a black juror "applies just as well to an otherwise similar nonblack **[*21]** who is permitted to serve."); Kesser, 465 F.3d at 361 ("[I]n Miller-El, the Court made clear that comparative analysis is required even when it was not requested or attempted in the state court."). The record here is sufficient to allow for this court's consideration of such an analysis in assessing the reasonableness of the state court adjudication of petitioner's claim. Cf. Boyd, 467 F.3d at 1151 (granting habeas relief where indigent California petitioner had been denied transcript of voir dire proceedings necessary to evaluate facts and circumstances relevant to establishing Batson claim).

In this case, the California Court of Appeal expressly declined to engage in a comparative juror analysis, citing the California Supreme Court's decision in People v. Jackson, 13 Cal.4th 1164, 1197, 56 Cal. Rptr. 2d 49, 920 P. 2d 1254 (1996), and other state law cases, for the proposition that it was not required to do so. [Opinion 9.] In Kesser, the Ninth Circuit considered the California courts' then-routine failure to conduct a comparative analysis

because state law did not require it, noting that federal law recommended such analysis "[l]ong before Miller-El [v. Dretke]" was decided, and suggesting **[*22]** that "the California courts may wish to revisit this position in light of Miller-El [v. Dretke]." Kesser, 465 F.3d at 360 nn. 2 and 3 (citing Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997)(additional citations omitted)); see also Green v. LaMarque, 532 F.3d at 1030 (suggesting that state court's failure to conduct a comparative juror analysis violates Batson's mandate to conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (quoting Batson, 476 U.S. at 93)). More recently, the California Supreme Court noted that "our former practice of declining to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." People v. Lenix, 44 Cal. 4th 602, 622, 80 Cal. Rptr. 3d 98, 187 P.3d 946 (2008). Accordingly, the state supreme court held that despite the perceived "inherent limitations" of making such an analysis on a "cold appellate record," "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." Id.

The prosecutor's second reason to challenge **[*23]** Ms. Williams - her stated belief that Ms. Williams would sympathize with the defendant because she had close family members with criminal histories - is contradicted by the record. Ms. Williams stated that aside from her nephews, "None of our relatives [has] been charged with any kind of crime"; she also indicated that she did not know very much about her nephews' case because she was not in contact with them, and unequivocally indicated that the cases would not affect her during the trial. Under these circumstances, the prosecutor's stated concern that Ms. Williams would be incapable of keeping her nephews out of her deliberations depended on an unfounded characterization of Ms. Williams' testimony. See Miller-El v. Dretke, 545 U.S. at 244 (mischaracterization of juror testimony is evidence of discriminatory pretext); see also Ali v. Hickman, 584 F.3d at 1190 (declining to credit offered reason where juror's statement was opposite of prosecutor's representation). The prosecutor's justification is even more suspect when compared with the prosecutor's lack of concern over other jurors with similar or more serious circumstances. Seven empaneled jurors (Nos. Four, Five, Seven, Eight, **[*24]** Nine, Eleven, and alternate No. Two) had family members with criminal convictions or who were facing criminal charges [RT 117, 206, 71, 88, 48, 143, 236]; and one jury member (No. Six) was personally convicted of drunk driving thirty years earlier. [RT 185.] In particular, Juror No. Four, like Ms. Williams, had a nephew facing a criminal charge and spoke "on occasion" with her nephew, whereas Ms. Williams did not speak to her nephews at all. [RT 121.] Under these circumstances, it is "difficult to believe that [Ms. Williams'] family background provided a real reason for striking her because the prosecutor accepted other jurors with family problems." Kesser, 465 F.3d at 366-67 (finding prosecutor's use of dismissed juror's family background was "almost certainly pretextual" because, in part, the "prosecutor did not excuse other jurors whose relatives, like [the dismissed juror's], had committed crimes."); see also Ali v. Hickman, 584 F.3d at 1189 (invalidating prosecutor's stated concern that struck juror had negative experience with criminal justice system that might bias her against prosecution because record indicated juror "felt comfortable" with the system, and other jurors with **[*25]** experiences in criminal justice system, including negative ones, were not struck); Green, 532 F.3d at 1032 (finding pretextual prosecutor's rationale that dismissed black juror had an imprisoned stepfather when six white jurors had relatives and friends who had also been arrested, indicted or convicted of crimes); Miller-El v. Dretke, 545 U.S. at 250 n. 8 (finding that a "pretextual indication" was not mitigated because the criminal history of the brother of a dismissed black juror, as cited by the prosecutor, "was comparable to those of relatives of other panel members not struck by prosecutors"). Accordingly, both of the reasons offered by the prosecutor with respect to Ms. Williams - regarding her profession and her relatives' criminal history - are implausible.

As for the state appellate court's raising, upon its review of the transcript, an additional reason to dismiss Ms. Williams, i.e., that she was soft spoken and somewhat equivocal when asked if she could withstand pressure from other jurors, it is implausible that such a reason was a legitimate basis for the prosecutor to dismiss Ms. Williams when it was not raised by the

prosecutor herself. In Miller-El v. Dretke, the Supreme **[*26]** Court disapproved the state court's attempt to substitute its own reasons in the Batson inquiry in this manner:

> [A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's . . . substitution of a reason for eliminating [the juror] does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Miller-El v. Dretke, 545 U.S. at 252; see also Gonzalez v. Brown, 585 F.3d at 1207 and 1209 n. 6 (noting that "we will consider both the prosecutor's stated reasons and circumstantial evidence" to evaluate a Batson claim, but finding that where the prosecutor offers no reasons, Miller-El v. Dretke likely would preclude the state appellate court from offering "a hypothetical justification" for the prosecution's strike (citing Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004)("[I]t **[*27]** does not matter that the prosecutor might have had good reasons to strike prospective jurors. What matters is the real reason they were stricken.")(emphasis in original)); Green, 532 F.3d at 1030 ("[T]he prosecutor is responsible for articulating his own reasons for the challenges exercised . . . [C]ourts must be careful not to substitute their own speculation as to reasons why a juror might have been struck for the prosecutor's stated reasons."); Williams v. Runnels, 432 F.3d 1102, 1109 (9th Cir. 2006) (reviewing courts' determination that "the record contained evidence for each juror that would support peremptory challenges on non-objectionable grounds . . . [did] not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges."), citing Johnson, 545 U.S. at 172; Miller-El v. Dretke, 545 U.S. at 252)).

The reasons expressed for the first time by the state appellate court were not objectively sound in light of the record. After defense counsel made the observation during voir dire that Ms. Williams was soft spoken, he asked her whether she could "stand up **[*28]** for your beliefs" in the fact of "pressure" from other jurors. [RT 35.] Ms. Williams initially responded that "I wish I could," but when subsequently asked whether, "If you thought you were right, you could stick with it," she clearly responded "Yes." [Id.] The record does not indicate that she was particularly susceptible to being strong-armed into voting with the majority. Because the record strongly indicates that the previously stated reasons for striking Ms. Williams were pretextual, this "raises an inference that this final rationale is also a make-weight." Ali v. Hickman, 584 F.3d at 1192.

On the basis of this record, the state appellate court's conclusion that "substantial evidence supports at least one legitimate race-neutral reason for each questioned peremptory challenge" [6] [Opinion 8] was not merely wrong as to Ms. Williams, but an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Although this is sufficient to establish Batson error, see Snyder, 552 U.S. at 472 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose" (quoting United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)), **[*29]** there was also evidence of pretextual explanations for striking two other jurors, as discussed below. These instances are not as "clear-cut" as Ms. Williams's, but they make it "even harder to believe that [the] reasons for striking [Ms. Williams] were race-neutral." Kesser, 465 F.3d at 368-69 (discussing apparent pretextual reasons to strike two Native American jurors, without deciding "whether there was any genuine nonracial reason for striking each of these jurors," as evidence which "undercut" prosecutor's credibility); see also Ali v. Hickman, 584 F.3d at 1193 (finding that because removal of one juror was racially motivated, "we need not evaluate the validity of the prosecutor's" strikes against other black jurors, but "[w]e do so

briefly," because it "lends further support to our conclusion" that [the removed juror's] strike was racially motivated).

FOOTNOTES

6 The state courts' apparent reasoning that the prosecutor's decision to dismiss the challenged jurors is valid if "at least one" out of multiple reasons was legitimate may be further inconsistent with clearly established federal law, which requires consideration of the "totality of the relevant facts" before deciding the validity **[*30]** of a Batson challenge. See Hernandez, 500 U.S. at 363. "'[T]he prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent,' even where other, potentially valid explanations are offered." Ali v. Hickman, 584 F.3d at 1192 (quoting Snyder, 552 U.S. at 485); Kesser, 465 F.3d at 360 ("A court need not find all nonracial reasons pretextual in order to find racial discrimination," and finding precedent persuasive "'the fact that two of the four proferred reasons do not hold up under judicial scrutiny militates against their sufficiency.'")(quoting United States v. Chinchilla, 874 F.2d 695, 699 (9th Cir. 1998)).

2. David Jenkins

The prosecutor's first reason to strike Mr. Jenkins, his apparent inconsistency regarding the location of his nephew's incarceration, is called into question given that Mr. Jenkins had not spoken to his nephew about the crime; thus, it was not unreasonable that Ms. Jenkins would be uncertain about where his nephew was incarcerated, whether it was state prison or the West Valley jail. The prosecutor's second reason to strike Mr. Jenkins, his relationship with a "convicted felon," was based on the unverified assumption **[*31]** that Mr. Jenkins's nephew's drug crime was a felony. The prosecutor's concern that Mr. Jenkins could not keep his nephew's case separate from the trial is implausible when compared to the prosecutor's treatment of other jurors, particularly Juror No. Four, who also had a nephew facing a drug-related charge, as noted above. Moreover, the prosecutor's purported concern that Mr. Jenkins's nephew's crime was "exactly what he was going to be hearing about with regards to the defendant in this case" was false, given that Mr. Jenkins' nephew had a drug-related crime, whereas petitioner was on trial for burglary and petty theft; on the other hand, Juror No. Five had a cousin with a burglary conviction but was not challenged. [RT 203, 206.] Accordingly, the only possibly legitimate reason to strike Mr. Jenkins would have been what the state appellate court characterized as Mr. Jenkins being a "little inconsistent" regarding his nephew's criminal status. [Opinion 7.] "[I]f that was all the prosecutor had, it sounds pretty hollow." Kesser, 465 F.3d at 370 (finding the existence of only one legitimate reason out of five to strike a Native American juror - the length of her commute to the courthouse **[*32]** - weak).

3. Betty Little

The prosecutor's initial reason for challenging Ms. Little - she was a university teacher - was factually incorrect. Ms. Little was an administrator for a state university with a teaching credential program and explicitly stated that she was not a teacher. [RT 177.] See McClain v. Prunty, 217 F.3d 1209, 1221 (9th Cir. 2000)("Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised."), citation omitted)); Johnson v. Vasquez, 3 F.3d 1327, 1331 (9th Cir. 1993)("When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.").

The second reason for challenging Ms. Little, concern over the fact that she had a "host of relatives" facing criminal charges, is undermined upon comparison to the other jurors; as discussed above with regard to Ms. Williams and Mr. Jenkins, several of the accepted jurors had family members with criminal histories that should have **[*33]** raised similar concerns for the prosecutor but apparently did not. Moreover, the prosecutor's prediction that it was "very likely"

that Ms. Little's judgment would be clouded by her relatives' criminal past was unfounded, given that Ms. Little explained that she did not feel badly for her relatives, that she believed they were treated fairly by the criminal justice system, and she would "just try" to keep their cases separate from the current case. [RT 179.] See Kesser, 465 F.3d at 363 (finding the prosecutor's reasons incredible when they "not only fail a comparative analysis, [but were] inconsistent with [the juror's] own testimony").

Moreover, the prosecutor used a peremptory challenge on Ms. Little after an unusually detailed questioning about how close Ms. Little's relatives were to her and the nature of their crimes. [RT 178-180.] In contrast, two unchallenged jurors who had relatives with criminal histories were not questioned about this at all: Juror No. Seven stated that she had a relative who pled guilty to a criminal offense, and Juror No. Eleven had a relative who was charged with a criminal offense [RT 71, 143-44]. The nature of these offenses and whether Jurors Seven and **[*34]** Eleven had as close a relationship with their relatives as did Ms. Little with hers remained unknown because the prosecutor did not ask them to elaborate on these cases. If the prosecutor was as concerned as she claimed about jurors being improperly affected by their relatives' criminal histories, she would have made at least a preliminary inquiry to Jurors Seven and Eleven; the fact that she did not indicates that her stated concerns about Ms. Little were not genuine.

These circumstances are similar to those considered by the Ninth Circuit in Green, where there was a disparity between the prosecutor's expression of concern regarding a black juror with an incarcerated stepfather and the depth of questioning of white jurors with similar experiences. Green, 532 F.3d at 1032. According to the Ninth Circuit, "That the prosecutor did not question these similarly situated venire members about their incarcerated acquaintances and relatives undermines the prosecutor's . . . asserted rationale for striking [the black juror]." Id. at 1033; see also Miller-El v. Dretke, 545 U.S. at 244 (finding implausible prosecutor's explanation that a black juror was struck for having reservations about the **[*35]** death penalty when non-black jurors who turned out to have stronger reservations were not questioned as probingly and accepted "with no evident reservations"). More generally, the Supreme Court has suggested that a disparate level of questioning of black and non-black jurors by the prosecutor over a purported area of concern that is subsequently used to justify the strike can be indicative of pretext. See Snyder, 552 U.S. at 484 (questioning sincerity of prosecutor's concern over black juror's scheduling conflict when prosecution attempted to elicit assurances that white juror could serve despite having "substantially more pressing" conflicts than black juror, who was not questioned deeply about available accommodation); see also Ali v. Hickman, 584 F.3d at 1192 (questioning prosecutor's concern over juror's religious beliefs, finding that "when the prosecutor was concerned about a juror's religious views, he specially asked about them" and that his "failure to do so in [the black juror's] interview indicated that he did not think the issue was a significant one in her case").

Under these circumstances, the state appellate court's decision that the prosecutor's use of peremptory challenges **[*36]** was legitimate 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)(2). Accordingly, habeas corpus relief should be granted.

VI. RECOMMENDATION

For the reasons discussed above, it is recommended that the court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's Motion for Leave to file a Second Amended Petitioner (docket no. 44, filed March 4, 2010); (3) granting habeas relief on Petitioner's claim of Batson error; and (4) directing that judgment be entered conditionally granting habeas relief, requiring that Petitioner be released from custody unless the State of California grants a new trial within sixty days.

DATED: May 7, 2010

/s/ Carla M. Woehrle

CARLA M. WOEHRLE

United States Magistrate Judge

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In

*2010 U.S. Dist. LEXIS 32387, **

MICHAEL SCOTT FRIZE, Petitioner, v. ROBERT J. HERNANDEZ, Warden, Respondent.

NO. EDCV 06-1269-MMM (MAN)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 32387

February 9, 2010, Decided
February 9, 2010, Filed

SUBSEQUENT HISTORY: Accepted by, Adopted by, Writ of habeas corpus denied, Dismissed by, Judgment entered by Frize v. Hernandez, 2010 U.S. Dist. LEXIS 31314 (C.D. Cal., Mar. 26, 2010)

PRIOR HISTORY: People v. Frize, 2004 Cal. LEXIS 3276 (Cal., Apr. 14, 2004)

CORE TERMS: serious felony, sentence, prior conviction, upper term, assault, sentencing, plea agreement, deadly weapon, traverse, juror, trial counsel, ineffective, enhancement, federal habeas, statutory maximum, parole, federal law, bodily injury, prosecutor, habeas petition, critical stages, aggravating, felony, reasonable doubt, criminal proceeding, probation, burglary, bailiff, prong, admit

COUNSEL: [*1] Michael Scott Frize, Petitioner, Pro se, Chino, CA.

For Robert Hernandez, Respondent: David Delgado-Rucci, LEAD ATTORNEY, CAAG Office of Attorney General of California, San Diego, CA.

JUDGES: MARGARET A. NAGLE, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: MARGARET A. NAGLE

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United

States District Court for the Central District of California.

INTRODUCTION

Petitioner filed a habeas petition pursuant to 28 U.S.C. § 2254 on November 16, 2006. On April 3, 2007, Petitioner filed a First Amended Petition ("Amended Petition"). Respondent filed a motion to dismiss on the grounds that the Amended Petition was untimely and the claims alleged in it were either unexhausted or procedurally barred, and lodged the state record ("Lodg."). Pursuant to a Report and Recommendation issued by the Court on October 31, 2007 ("October 31, 2007 Report and Recommendation"), District Judge Morrow denied the motion to dismiss on January 24, 2008. Respondent then filed an Answer, and Petitioner filed a Traverse **[*2]** and a Notice of Supplemental Authorities.

The matter is ready for decision.

PRIOR PROCEEDINGS

On August 21, 2001, a San Bernardino County Superior Court jury found Petitioner guilty of: manufacturing methamphetamine, in violation of California Health & Safety Code § 11379.6(a) (Count One); possession of ephedrine/pseudoephedrine with intent to manufacture methamphetamine, in violation of California Health & Safety Code § 11383(c)(1) (Count Two); making available a place for manufacturing of methamphetamine, in violation of California Health & Safety Code § 11366.5 (Count Three); and possession of hydriodic acid with intent to manufacture methamphetamine, in violation of California Health & Safety Code § 11383(c)(2) (Count Four). (Lodg. No. 1, 1 Clerk's Transcript ("CT") 137-40, 146.)

In a bifurcated proceeding, the trial court found true allegations that Petitioner had sustained two "strike" convictions within the meaning of California's Three Strikes law and had served three prior prison terms within the meaning of California Penal Code § 667.5. (1 CT 55, 156-57.) On October 31, 2002, the trial court partially granted a motion to dismiss Petitioner's "strike" convictions, leaving one "strike" **[*3]** conviction for purposes of sentencing. (2 CT 540-41.) The trial court sentenced Petitioner to a total term of 15 years, consisting of an upper term of seven years, doubled under the Three Strikes law, plus a one year enhancement under California Penal Code § 667.5.

Petitioner appealed to the California Court of Appeal. (Lodg. No. 2.) On January 28, 2004, the California Court of Appeal issued an unpublished decision affirming Petitioner's conviction and sentence. (Lodg. No. 5.) Petitioner sought review in the California Supreme Court. (Lodg. No. 6.) On April 14, 2004, the California Supreme Court denied review without comment or citation to authority. (Lodg. No. 7.)

Petitioner filed a habeas petition in the San Bernardino County Superior Court. (Lodg. No. 8.) On January 6, 2005, the trial court denied the petition without prejudice, stating that only the ineffective assistance of counsel claims were cognizable because the other claims were, or should have been, raised on direct appeal, and the court would not consider the ineffective assistance claims unless Petitioner re-pleaded them in a concise and plainly written manner. (Lodg. No. 9.) On February 14, 2005, Petitioner filed a petition **[*4]** for writ of mandate in the California Court of Appeal, seeking an order directing the trial court to rule upon the merits of his habeas petition. (Lodg. No. 10.) On February 25, 2005, the California Court of Appeal summarily denied the petition. (Lodg. No. 11.)

Petitioner then filed a "First Amended Petition" in the San Bernardino County Superior Court, raising, among other claims, the claim alleged in the Amended Petition in this action as Ground Five. (Lodg. No. 12.) On April 18, 2005, the Superior Court denied the petition. (Lodg. No. 13.) The Superior Court stated that Petitioner's ineffective assistance claims lacked merit and that his remaining claims were improperly raised because they were either properly the subject of direct appeal or were without legal or factual merit. (*Id.*)

Petitioner filed a habeas petition in the California Court of Appeal, again raising Ground Five. (Lodg. No. 14.) On June 13, 2005, the California Court of Appeal denied the petition without comment or citation to authority. (Lodg. No. 15.) Petitioner filed a habeas petition in the California Supreme Court, raising Ground Five. (Lodg. No. 16.) On May 10, 2006, the California Supreme Court denied the petition **[*5]** without comment or citation to authority. (Lodg. No. 18.)

Petitioner filed a third habeas petition in the San Bernardino County Superior Court, raising the claims alleged in this Amended Petition as Grounds One and Two. (Lodg. No. 17.) On May 11, 2006, the trial court denied the petition on the ground that Petitioner's contentions lacked evidentiary and legal support. (Lodg. No. 19.)

Petitioner filed a habeas petition in the California Court of Appeal, raising Grounds One and Two. (Lodg. No. 20.) On June 7, 2006, the California Court of Appeal denied relief without comment or citation to authority. (Lodg. No. 21.) Petitioner filed a habeas petition in the California Supreme Court, raising Grounds One and Two; he later submitted a "First Amended Petition" adding the claims alleged in the Amended Petition as Grounds Three and Four. (Lodg. Nos. 22 and 25.) On January 17, 2007, the California Supreme Court denied relief on procedural grounds, citing In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), and In re Robbins, 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998). (Amended Petition, Ex. L.)

SUMMARY OF THE EVIDENCE AT TRIAL

As determined by the California Court of Appeal on direct review, the facts underlying Petitioner's **[*6]** conviction and sentence, briefly stated, are as follows: [1]

> On August 29, 1999, a sheriff's deputy, searching for [Petitioner] in order to serve him with an arrest warrant, noticed that the windows at the home [Petitioner] and his girlfriend had been renting had been recently covered with blankets and cardboard, thus preventing people from looking into the residence from outside. Although the patio door to the third-floor master bedroom was open, there was a light on inside and voices could be heard coming from the house; no one responded to knocking at the front door. Officers entered through the open patio door and found the television inside on and a can of beer cold to the touch nearby, but no persons. They also found a small- to medium-sized methamphetamine lab throughout several rooms of the house, and items used to manufacture the drug and waste from the manufacturing process in a trailer parked in the garage. Plastic sheeting had been placed on some of the interior walls of the house to protect them from damage due to splashing during the manufacturing process. Two of the rooms had additional venting systems. In one room there was a television monitor hooked up to cameras positioned **[*7]** to show anyone approaching the garage or front door. Men's and women's clothing was found in two bedrooms. A checkbook bearing the names of [Petitioner] and his girlfriend at that address, a box of blank checkbooks and bank statements, both of their birth certificates, an application filled out by [Petitioner], a receipt for a purchase he had made, a photo identification belonging to his girlfriend, their W-2's, and address books were in the house. [Petitioner]'s fingerprints were found on a soda bottle containing methamphetamine.

(Lodg. No. 5 at 1-2.)

FOOTNOTES

1 In its decision affirming Petitioner's conviction, the California Court of Appeal discussed the evidence presented at trial in a summary entitled "Facts." (Lodgment No. 5 at 2-3.) On federal habeas review, "a determination of a factual issue made by a State court shall be

presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *See also* Schriro v. Landrigan, 550 U.S. 465, 473-74, 127 S. Ct. 1933, 1939-40, 167 L. Ed. 2d 836 (2007) ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing **[*8]** evidence.'") (*citing* Section 2254(e)(1)); Pollard v. Galaza, 290 F.3d 1030, 1033, 1035 (9th Cir. 2002) (statutory presumption of correctness applies to findings by both trial courts and appellate courts); Dubria v. Smith, 224 F.3d 995, 1000 (9th Cir. 2000) (*en banc*).

The Section 2254(e)(1) presumption has not been shown to be inapplicable to the state appellate court's description of the evidence presented at Petitioner's trial. Accordingly, in the above summary, the Court has quoted the pertinent portions of the state court's decision. *See* Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009)(relying on and presuming the correctness of the state appellate court's summary of the evidence at trial, when such findings had not been shown to be erroneous under Section 2254(e)(1)); Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009)(same).

PETITIONER'S CLAIMS

1. The trial court's determination that one of Petitioner's 1992 convictions for assault with a deadly weapon constituted a "serious felony" for purposes of enhancing his current sentence violated Petitioner's plea agreement in the 1992 proceeding.

2. Trial counsel rendered ineffective assistance, in violation of the Sixth Amendment, **[*9]** by failing to investigate Petitioner's 1992 plea agreement and rebut the allegation that his prior conviction for assault with a deadly weapon constituted a serious felony.

3. Petitioner was deprived of his constitutional rights to due process, a fair trial, a fair and impartial jury, and the effective assistance of counsel when the trial court held a telephonic conference with the bailiff and the prosecutor in the absence of trial counsel.

4. Appellate counsel rendered ineffective assistance, in violation of the Sixth Amendment, by failing to argue on direct appeal that Petitioner's constitutional rights were violated by trial counsel's absence from a telephonic conference between the trial court, the bailiff, and the prosecutor.

5. Petitioner's sentence violates the Sixth Amendment, because the trial court imposed an upper term sentence based on factors not found beyond a reasonable doubt by the jury.

(Amended Petition, Attach. at 1-3.)

STANDARD OF REVIEW

The Petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under Section 2254(d), a federal court may not grant a writ of habeas corpus on behalf of a person in state **[*10]** custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *see also* Brown v. Payton, 544 U.S. 133, 141, 125 S. Ct. 1432, 1438, 161 L. Ed. 2d 334 (2005). In this case, review of Petitioner's claims is governed by Section 2254(d)(1). [2]

FOOTNOTES

2 *See* Lambert v. Blodgett, 393 F.3d 943, 966-69 (9th Cir. 2004) (Section 2254(d) applies when the state court has denied a claim based on its substance, rather than on the basis of a procedural or other rule precluding state court review of the merits). Petitioner has not raised any Section 2254(d)(2) challenge to the state court's rejection of his claims, and the record does not reveal any basis for such a challenge.

"Clearly established Federal law," for purposes of Section 2254(d)(1) review, "refers to the holdings, as opposed to the dicta, of **[*11]** [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000); *see also* Carey v. Musladin, 549 U.S. 70, 74, 127 S. Ct. 649, 653, 166 L. Ed. 2d 482 (2006); Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003); Stokes v. Schriro, 465 F.3d 397, 401-02 (9th Cir. 2006)(this statutory language "refers to Supreme Court precedent at the time of the last-reasoned state court decision"). Section 2254(d)(1) "plainly restricts the source of clearly established law to the Supreme Court's jurisprudence." Lambert, 393 F.3d at 974; *see also* Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir. 2008) (*en banc*) ("What matters are the holdings of the Supreme Court, not the holdings of lower federal courts."), *cert. denied,* 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008). However, although "[o]nly Supreme Court precedents are binding on state courts under AEDPA," Ninth Circuit "precedents may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents." Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005) (*en banc*).

Under the first prong of Section 2254(d)(1), a state court decision is "contrary to" federal **[*12]** law if the state court applies a rule that contradicts the governing law as stated by the Supreme Court or reaches a different conclusion than that reached by the high court on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 1853, 155 L. Ed. 2d 877 (2003). This includes "use of the wrong legal rule or framework." Frantz v. Hazey, 533 F.3d 724, 734 (9th Cir. 2008) (*en banc*).

The second prong of Section 2254(d)(1) is met when a state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies it to the facts of the petitioner's case. Williams, 529 U.S. at 412-13, 120 S. Ct. at 1523. The "unreasonable application" inquiry is an objective one, and the standard is not satisfied simply by showing error or incorrect application of the governing federal law. Andrade, 538 U.S. at 75, 123 S. Ct. at 1174; Woodford v. Visciotti, 537 U.S. 19, 25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279 (2002) (*per curiam*); Williams, 529 U.S. at 409, 120 S. Ct. at 1521. "The **[*13]** question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." Landrigan, 550 U.S. at 473, 127 S. Ct. at 1939.

Petitioner presented Grounds One through Four to the California Supreme Court by habeas petition. (Lodg. Nos. 22, 25.) The California Supreme Court denied relief on procedural grounds. (Amended Petition, Ex. L.) When the state court has not reached the merits of a claim, the federal court must review that claim *de novo. See* Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005)(applying *de novo* standard of review to a claim in a habeas petition that was not adjudicated on the merits by the state court); Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (same); *see also* Pirtle v. Morgan, 313 F.3d 1160, 1167-68 (9th Cir. 2002) ("[W]hen it is clear that a state court has not reached the merits of a properly raised issue, we must review it *de novo.*"). Because the California Supreme Court did not reach the merits of Grounds One through Four, the Court must review these claims *de novo.*

Petitioner presented Ground Five to the state courts by habeas petition. **[*14]** (Lodg. Nos. 12, 14, 16.) The California Supreme Court and the lower courts denied the claim on the merits but no court explained the reasons for the denial. (Lodg. Nos. 13, 15, 18.) Because this claim was not addressed by any state court in a reasoned opinion, "a review of the record is the only means of deciding whether the state court's decision was objectively unreasonable." Greene v.

Lambert, 288 F.3d 1081, 1088 (9th Cir. 2002); *see also* Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003)(same); Pirtle, 313 F.3d at 1167 ("although we independently review the record, we still defer to the state court's ultimate decision").

DISCUSSION [3]

FOOTNOTES

3 Respondent renews his argument, made previously in his motion to dismiss, that Petitioner's claims are untimely and procedurally barred. (Answer at 10-15.) The Court addressed and rejected Respondent's timeliness and procedural default arguments in its October 31, 2007 Report and Recommendation, which was adopted by the District Judge. The Court declines to revisit these resolved issues.

I. PETITIONER'S SENTENCING CLAIM IN GROUND ONE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

Petitioner challenges the trial court's finding that his 1992 conviction for **[*15]** assault with a deadly weapon constituted a "serious felony" and thus a "strike" under the Three Strikes law. (Amended Petition, Attach. at 1.) Specifically, Petitioner contends that the trial court's treatment of the prior conviction as a "serious felony" violates due process, because his 1992 plea agreement contained an implicit understanding that he would not suffer any future adverse sentencing consequences as a result of the conviction. (*Id.*; Traverse at 10.)

A. Background

1. Petitioner's Prior Convictions

On June 22, 1992, in Case No. WEW232789 in the Orange County Superior Court, Petitioner pleaded guilty to two counts of assault with a deadly weapon, in violation of California Penal Code § 245(a)(1), and one count of residential burglary, in violation of California Penal Code § 459. (2 CT 587-93, 603-05, 608.). The deadly weapon was a club and the two assault counts involved different victims. (2 CT 596-98.) As part of the plea agreement, Petitioner admitted inflicting great bodily injury, within the meaning of California Penal Code § 12022.7, as to one of the assault counts. (2 CT 603, 605.) The felony complaint did not charge Petitioner with causing great bodily injury as to **[*16]** the other assault count. (2 CT 596-97.) Although the felony complaint included an aggravated mayhem count and a serious felony allegation as to the burglary count, Petitioner did not admit, or plead guilty to, these additional allegations. (2 CT 596-98, 603-05.) As part of the plea agreement, the prosecution moved to dismiss "the remaining counts," and Petitioner was sentenced to 90 days in jail and probation. (2 CT 588, 591.)

In 1995, as part of a plea bargain in another criminal proceeding, Petitioner admitted that he had violated the terms of his probation for his 1992 convictions, and he was sentenced to three years in prison to be served concurrently with his sentence for the 1995 conviction. (2 CT 524-28, 611-16.)

2. Trial Court Proceedings

The Second Amended Information in the criminal proceeding in issue here alleged that two of Petitioner's 1992 convictions -- the burglary conviction and one of the assault with a deadly weapon convictions -- constituted serious felonies within the meaning of the Three Strikes law. (1 CT 55.) On August 31, 2002, after a court trial on the prior conviction allegations, the trial court found these allegations to be true. (Lodg. No. 27, 4 Reporter's **[*17]** Transcript ("RT") 771-72.) On October 31, 2002, the trial court partially granted Petitioner's motion, pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996),

to dismiss one or more of the "strike" convictions, leaving only one remaining "strike" conviction, namely, Petitioner's conviction for assault with a deadly weapon as to which he had admitted great bodily injury. [4] (4 RT 889.) The trial court sentenced Petitioner to the upper term of seven years, doubled the term to 14 years under the Three Strikes law, and added one year under Section 667.5. (4 RT 889-90.)

FOOTNOTES

4 The trial court stated that it was striking *two* of Petitioner's *three* "strike" convictions, namely, the burglary count and the other assault with a deadly weapon count. (4 RT 888-89.) However, the operative Information alleged only two "strike" convictions, *i.e.*, the 1992 burglary count and one of the two 1992 assault with a deadly weapon counts. (1 CT 55.) The prosecution never alleged that the other 1992 assault with a deadly weapon count -- as to which the 1992 case felony complaint did not allege (and Petitioner did not admit) personal infliction of great bodily injury -- was a "serious **[*18]** felony." It appears, thus, that the trial court misspoke. Regardless, Petitioner was sentenced based on a single "strike" conviction, the 1992 assault with a deadly weapon count as to which he had admitted personal infliction of great bodily injury.

3. Post-Conviction State Court Proceedings

On November 21, 2005, Petitioner petitioned the Los Angeles County Superior Court for a writ of coram nobis, seeking to vacate his guilty plea in the 1992 criminal proceeding or, alternatively, to bar the use of the 1992 convictions as "serious felonies" and "strikes" for the purpose of enhancement in other cases. (Lodg. No. 28.) Petitioner contended that: his guilty plea was obtained by misrepresentations on the part of the trial court and counsel regarding the nature of the conviction offenses; he never admitted that the prior convictions were "serious felonies"; he pleaded guilty under the belief that he was pleading guilty to "non-serious" felonies; and the dismissal of the "remaining counts" under the plea bargain included a dismissal of the "serious felony" enhancement. (Lodg. Nos. 28, 31.)

On December 21, 2005, the Los Angeles County Superior Court denied the petition for a writ of coram nobis. **[*19]** (Lodg. No. 29.) The Superior Court acknowledged that Petitioner was not asked to admit, and never admitted, that his conviction offenses were serious felonies, as is required by California Penal Code § 969f(a), [5] but it nevertheless found no reversible error. The Superior Court stated:

> Failure to ask the defendant to admit the counts he pled to were serious felonies, and the People "dismissing" the remaining counts, is not, however, a basis to set aside the plea and vacate the judgment. Although the serious felony allegation was in essence dismissed when no admission was taken and the court made no finding, the prosecution is not precluded from proving the serious felony conviction if defendant is convicted of a subsequent felony.

(Lodg. No. 29 at 2, *citing* People v. Leslie, 47 Cal. App. 4th 198, 54 Cal. Rptr. 2d 545 (1996); emphasis in original.)

FOOTNOTES

5 California Penal Code § 969f(a) provides, in pertinent part (emphasis added):

> Whenever a defendant has committed a serious felony as defined in subdivision (c) of Section 1192.7, the facts that make the crime constitute a serious felony may be charged in the accusatory pleading. However, the crime shall not be referred to as a serious felony **[*20]** nor shall the jury be informed that the

> crime is defined as a serious felony. This charge, if made, shall be added to and be a part of the count or each of the counts of the accusatory pleading which charged the offense. If the defendant pleads not guilty to the offense charged in any count which alleges that the defendant committed a serious felony, the question whether or not the defendant committed a serious felony as alleged shall be tried by the court or jury which tries the issue upon the plea of not guilty. *If the defendant pleads guilty of the offense charged, the question whether or not the defendant committed a serious felony as alleged shall be separately admitted or denied by the defendant.*

Petitioner appealed to the California Court of Appeal, which affirmed the Superior Court's decision. People v. Frize, 2006 Cal. App. Unpub. LEXIS 8465, 2006 WL 2724057 (2006) (unpublished). The California Court of Appeal found that Petitioner's 1992 plea agreement did not contain an express or implicit promise that the 1992 convictions could not later be used as serious felonies. 2006 Cal. App. Unpub. LEXIS 8465, [WL] at *4-*5. It pointed out that the parties expressly agreed that Petitioner would admit the great bodily injury allegation as to one of the **[*21]** assault counts, an admission which automatically converted that crime from a non-serious to a serious felony. 2006 Cal. App. Unpub. LEXIS 8465, [WL] at *5; see California Penal Code § 1192.7(c)(8) ("serious felony" includes "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice"). Even if Petitioner did not understand at the time that some of the convictions could later be used as serious felonies, this belief was a mistake of law that did not warrant relief. Frize, 2006 Cal. App. Unpub. LEXIS 8465, 2006 WL 2724057, at *4, *5. Moreover, even though Petitioner did not expressly admit that the prior convictions were serious felonies, a defendant's failure to admit serious felony allegations "does not preclude the prosecution from later alleging that the conviction constitutes a serious felony where, as here, the plea bargain did not include an agreement to dismiss the serious felony allegation." 2006 Cal. App. Unpub. LEXIS 8465, [WL] at *4 (*citing* Leslie, 47 Cal. App. 4th at 203-05, 54 Cal. Rptr. 2d at 547-48.)

Petitioner subsequently challenged the treatment of the 1992 assault conviction as a "strike" in state habeas petitions attacking his current conviction and sentence. (Lodg. Nos. 20, 22, 25.) As previously discussed, the **[*22]** California Supreme Court dismissed his claim on procedural grounds. (Amended Petition, Ex. L.)

B. Analysis

Petitioner contends that the trial court violated his 1992 plea agreement, and violated clearly established federal law as set forth in Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), when it treated his 1992 conviction for assault with a deadly weapon, as to which he had admitted personal infliction of great bodily injury, as a serious felony and a "strike." (Amended Petition, Attach. at 1; Traverse at 12.) In Santobello, the Supreme Court held: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262, 92 S. Ct. at 499; *accord* Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 2547, 81 L. Ed. 2d 437 (1983)("when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand"). This rule has been regularly and consistently applied in the Ninth Circuit. *See, e.g.,* Davis v. Woodford, 446 F.3d 957, 960 (9th Cir. 2006); Buckley v. Terhune, 441 F.3d 688, 694-95 (9th Cir. 2006); **[*23]** Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003); Gunn v. Ignacio, 263 F.3d 965, 969 (9th Cir. 2001).

In determining whether a plea agreement has been breached, contract law principles apply. *See* Brown, 337 F.3d at 1159. "In construing an agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty."

United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993); Gunn, 263 F.3d at 970; *see also* United States v. Clark, 218 F.3d 1092, 1095 (9th Cir. 2000) (if "a term of a plea agreement is not clear on its face, we look to the facts of the case to determine what the parties reasonably understood to be the terms of the agreement"). Thus, if the terms of a plea agreement are disputed, the defendant's contention regarding his subjective understanding is not dispositive; rather, any dispute over the terms of the agreement must be determined by objective standards.

Here, Petitioner does not contend that the prosecution in the 1992 proceeding expressly promised that none of the conviction counts would ever be treated as "serious felonies" for the purpose of sentence enhancement in future criminal proceedings. Rather, **[*24]** Petitioner contends that his plea agreement included an *implicit* promise that the convictions would not carry any adverse consequences in the future. (Amended Petition, Attach. at 1.) Petitioner points out that he was never asked to admit that the conviction counts were serious felonies, and argues that the "serious felony" allegation with respect to the burglary count -- the only count that was expressly alleged in the felony complaint to constitute a "serious felony" -- was dismissed. (Traverse at 11-15.) Petitioner contends that he believed he was pleading guilty to "non-serious" felonies, and he would not have pleaded guilty had he known the prior convictions could be used to enhance his sentence in the future. (*Id.*)

"[T]he construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." Ricketts v. Adamson, 483 U.S. 1, 5 n.3, 107 S. Ct. 2680, 2683 n.3, 97 L. Ed. 2d 1 (1987). Here, when Petitioner attempted to invalidate the 1992 plea agreement, the state courts expressly rejected the construction of the agreement that Petitioner urges upon this Court. (*See* Lodg. No. 29; Frize, 2006 Cal. App. Unpub. LEXIS 8465, 2006 WL 2724057, at *4-*5.) The **[*25]** Court has reviewed the plea agreement and related documents and concurs in the state courts' interpretation. Neither the plea agreement nor the plea colloquy contain any reference to the treatment of the convictions in *future* criminal proceedings.

Nor can the plea agreement reasonably be interpreted to include an implied provision precluding the use of the convictions for subsequent enhancement purposes. As part of the plea agreement, Petitioner was required to admit the allegation in the felony complaint that he personally inflicted great bodily injury with respect to the assault count at issue here. Absent that admission, Petitioner's assault with a deadly weapon conviction would not necessarily be a serious felony and a "strike." *See* People v. Solis, 90 Cal. App. 4th 1002, 1018, 109 Cal. Rptr. 2d 464, 477 (2001) (before 2000, assault with a deadly weapon was not designated as a serious felony, and it qualified as a "strike" under the Three Strikes law only if the defendant personally inflicted great bodily injury or used a dangerous or deadly weapon). Because of his admission, however, Petitioner's assault with a deadly weapon conviction is a serious felony as a matter of law. California Penal Code § 1192.7(c)(8). **[*26]** This provision of Petitioner's plea bargain, and its attendant consequences, cannot be reconciled with an implicit promise that his convictions would not be treated as serious felonies.

Petitioner argues that the prosecution's failure to require him to admit that his prior convictions were serious felonies, together with the dismissal of the serious felony allegation with respect to the burglary count, compels a different result. (Traverse at 10-14, 16.) To the extent Petitioner is asserting a violation of Penal Code § 653f(a), as the Supreme Court has observed repeatedly "'federal habeas corpus relief does not lie for errors of state law.'" Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991)(*quoting* Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102, 111 L. Ed. 2d 606 (1990)). A federal habeas court decides only whether a conviction violated the Constitution, laws, or treaties of the United States. Estelle, 502 U.S. at 67, 112 S. Ct. at 480.

Moreover, under California law, a prosecution's failure to obtain a defendant's admission that a conviction pursuant to a guilty plea is a serious felony does not preclude the prosecution from proving its status as a serious felony in a future **[*27]** criminal proceeding and using it to enhance the defendant's sentence. Leslie, 47 Cal. App. 4th at 204-05, 54 Cal. Rptr. 2d at 548.

In Leslie, as in Petitioner's 1992 proceeding, the prosecution made a "serious felony" allegation that was never addressed during the entry of the guilty plea. *Id.* at 204, 54 Cal. Rptr. 2d at 548. The California Court of Appeal agreed that, in essence, the serious felony allegation was dismissed, but it held that the prosecution was not precluded from raising the issue if the defendant suffered future felony convictions. *Id.* at 205, 54 Cal. Rptr. 2d at 548 (pointing out that Section 969f was introduced to benefit the prosecution by sparing it the trouble of proving that a prior conviction is a serious felony in subsequent cases); *see also* People v. Blackburn, 72 Cal. App. 4th 1520, 1528-31, 86 Cal. Rptr. 2d 134, 139-42 (1999) (the fact that a personal use of a firearm allegation was stricken as part of a plea agreement did not preclude the prosecution in a future proceeding from proving personal use for purposes of treating the prior conviction as a serious felony and a "strike"). In any event, as discussed above, Petitioner's admission of the great bodily **[*28]** injury enhancement as to the 1992 assault conviction at issue established that conviction as a "serious felony" as a matter of law, and no further admissions were needed. Frize, 2006 Cal. App. Unpub. LEXIS 8465, 2006 WL 2724057, at *4 & n.4.

Petitioner contends that, at the time of his 1992 guilty plea, he did not know, and was never informed, that any of the ensuing convictions could later be deemed serious felonies and used to enhance a future sentence. (Traverse at 10, 12-13; *see* Lodg. No. 31 [Declaration of Michael Scott Frize, dated March 8, 2006] at 2-3.) Due process requires that a criminal defendant be informed of all the direct consequences of a guilty plea. Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988); *see* Brady v. United States, 397 U.S. 742, 755, 90 S. Ct. 1463, 1472, 25 L. Ed. 2d 747 (1970). There is no due process violation when a trial court fails to inform the defendant of collateral consequences, such as the possibility of future sentence enhancement. United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) ("[t]he **[*29]** possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea"); United States v. Garrett, 680 F.2d 64, 65-66 (9th Cir. 1982). Petitioner's erroneous belief that none of his 1992 convictions would constitute serious felonies for purposes of a future enhancement does not give rise to a due process violation.

The Court, therefore, finds no basis for finding or concluding that the enhancement of Petitioner's current sentence under the Three Strikes law constituted a breach of his 1992 plea agreement. Due process was not offended by the use of Petitioner's 1992 prior conviction for assault with a deadly weapon, as to which he had admitted personal infliction of great bodily injury, as a serious felony and a "strike" in connection with his current conviction and sentence. Accordingly, Ground One does not warrant federal habeas relief.

II. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN GROUND TWO DOES NOT WARRANT FEDERAL HABEAS RELIEF.

Petitioner contends that trial counsel was ineffective, because he failed to investigate Petitioner's 1992 plea agreement **[*30]** and did not argue to the trial court that the 1992 convictions could not be deemed "serious felonies" and used as "strikes" under the Three Strikes law. (Amended Petition, Attach. at 1-2; Traverse at 16-19.)

A. Applicable Law

The Sixth Amendment to the United States Constitution guarantees the *effective* assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984). To prevail on a claim that his counsel rendered ineffective assistance, Petitioner must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Id.* at 688-93, 104 S. Ct. at 2064-68; *see also* Knowles v. Mirzayance, U.S. , 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009) ("*Strickland* requires a defendant to establish deficient performance and prejudice"); Yarborough v. Gentry, 540 U.S. 1, 5, 124 S. Ct. 1, 4, 157 L. Ed. 2d 1 (2003) (*per curiam*) (the Sixth Amendment right "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense"). As both prongs of the Strickland test must be satisfied to establish a constitutional violation, failure to satisfy either prong requires that an ineffective

[*31] assistance claim be denied. *See* Strickland, 466 U.S. at 697, 104 S. Ct. at 2069 (no need to address deficiency of performance if prejudice is examined first and found lacking); Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other"); Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998) (no need to address prejudice when petitioner cannot establish deficient performance).

The first prong of the Strickland test -- deficient performance -- requires a showing that, in view of all the circumstances, counsel's performance was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The relevant inquiry under Strickland is not what defense counsel could have done, but whether counsel's choices were reasonable. *See* Mirzayance, 129 S. Ct. at 1420 ("'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms'"; *quoting* Strickland); Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998).

Judicial scrutiny of counsel's performance "must be highly deferential," and this Court must guard against **[*32]** the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (observing that "it is all too easy" for a court examining a defense after it has proved unsuccessful to find a particular act or omission to be unreasonable); *see also* Gentry, 540 U.S. at 8, 124 S. Ct. at 6 (noting that even inadvertent, as opposed to tactical, attorney omissions do not automatically guarantee habeas relief, because "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"); Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003) (the first Strickland prong is a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'"). A habeas reviewing court can neither second-guess counsel's decisions nor "apply the fabled twenty-twenty vision of hindsight" but, "rather, will defer to counsel's sound strategy." Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001). "The defendant bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial **[*33]** strategy." *Id.*

Due to the difficulties inherent in making this evaluation, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A habeas petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (*internal quotation marks and citation omitted*); *see also see also* Bell v. Cone, 535 U.S. 685, 698, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002); Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009) (the petitioner "bears the burden of proving that [counsel's] trial strategy was deficient"), *cert. denied* 130 S. Ct. 1154, 175 L. Ed. 2d 984 (U.S. Jan. 19, 2010) (No. 09-7617); Murtishaw, 255 F.3d at 939 (the petitioner "bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy").

The second prong of the Strickland test -- prejudice -- requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability **[*34]** is a probability "sufficient to undermine confidence in the outcome." *Id.; see also* Visciotti, 537 U.S. at 22, 123 S. Ct. at 359. "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial." Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S. Ct. 2574, 2586-87, 91 L. Ed. 2d 305, (1986).

B. Analysis

Petitioner contends that trial counsel did not provide the trial court with the transcript of the 1992 plea colloquy and failed to familiarize himself with the nature of Petitioner's 1992 plea bargain. (Amended Petition, Attach. at 1-2; Traverse at 17.) As a result, Petitioner argues, trial counsel made frivolous arguments regarding the prior convictions instead of making the arguments set forth by Petitioner in Ground One. (Traverse at 17.)

As an initial matter, the record does not support Petitioner's contention that the trial court lacked the 1992 plea transcript. The 1992 plea transcript is part of the state record in Petitioner's case: a copy is included in the "priors packet" in the Clerk's Transcript; and at the time the trial court found the 1992 conviction allegations **[*35]** to be true, it stated that "[t]here's not only a plea form, there's a transcript of the entry of the plea." (2 CT 587-94; 4 RT 771, 772.) Although the record contains a colloquy between Petitioner's counsel and the trial court suggesting that neither of them had the 1992 plea transcript before them at the time of Petitioner's Romero motion, [6] the trial court clearly had the transcript before it when it determined that the 1992 burglary conviction and one of the 1992 assault with a deadly weapon convictions were serious felonies.

FOOTNOTES

6 Petitioner refers to the following exchange between his counsel and the trial court during counsel's Romero argument:

> The Court: I don't have a copy of a transcript for that plea.
>
> [Trial counsel]: And I don't know if I do either.
>
> Trial court: No. I have a copy of a transcript from a subsequent plea in 1995.
>
> [Trial counsel]: And so I was kind of relying in part and predominantly on the information that was presented by [the prosecutor] and also the . . . what I attached was that plea form, that handwritten plea form.

(4 RT 858-60.)

Moreover, even assuming, *arguendo,* that trial counsel did not adequately review the plea transcript, or did not review it at all, Petitioner **[*36]** did not suffer any prejudice. The state courts have rejected Petitioner's argument that his 1992 plea agreement included a promise that his 1992 convictions would not be treated as "serious felonies" in future criminal proceedings. (*See* Lodg. No. 29; Frize, 2006 Cal. App. Unpub. LEXIS 8465, 2006 WL 2724057). Absent such an express or implied promise, the dismissal of "serious felony" allegations in the 1992 proceedings did not preclude the trial court in Petitioner's subsequent criminal case from finding that the 1992 convictions were "serious felonies" for purposes of sentencing Petitioner under the Three Strikes law. *See* Leslie, 47 Cal. App. 4th at 204-05, 54 Cal. Rptr. 2d at 548. Moreover, the plea agreement required Petitioner to admit personally inflicting great bodily injury as to one of the assault with a deadly weapon counts, an admission that rendered that 1992 conviction a "serious felony" and a "strike" as a matter of law. It is not ineffective to fail to make futile arguments. James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."). There is no reasonable likelihood that trial counsel could have persuaded the trial **[*37]** court that Petitioner's 1992 conviction for assault with a deadly weapon, as to which he had admitted personally inflicting great bodily injury, could not be used as a "strike," and thus, no prejudice can be found.

To the extent Petitioner argues that trial counsel was ineffective for failing to challenge the trial court's consideration of the 1992 convictions for purposes of imposing an upper term sentence (Traverse at 18), he identifies no viable basis for such a challenge. Under California law, the trial court was entitled to consider Petitioner's prior convictions for purposes of selecting an upper term sentence regardless of whether or not they constituted "serious felonies." [7] California Rules of Court, Rule 4.421. Once again, counsel was not ineffective for failing to make a meritless argument. *See* James, 24 F.3d at 27.

FOOTNOTES

7 The trial court could not use the same prior conviction to impose both an enhancement and an upper term sentence. *See* California Penal Code § 1170(b); California Rules of Court Rule 4.420(c). However, there is no indication that the trial court did so, and Petitioner does not rest his ineffective assistance claim on any such contention.

Petitioner asks the Court **[*38]** to take judicial notice of California State Bar records showing that his trial counsel was disciplined by the State Bar, both before Petitioner's trial and several years later, and has since resigned from the State Bar with charges pending. (Traverse at 19, Ex. B.) Petitioner's request is granted. Fed. R. Evid. 201. Nevertheless, the sole issue before the Court is the adequacy of trial counsel's representation in *this* case. As discussed above, the arguments Petitioner contends his trial counsel should have made were meritless. Petitioner's trial counsel was not ineffective for failing to make them, and Petitioner suffered no prejudice as a result of that failure. Moreover, despite Petitioner's dismissive characterization of his trial counsel's arguments at sentencing, his counsel was able to persuade the trial court to reduce the "third strike" sentence sought by the prosecution to a "second strike" sentence.

Accordingly, Petitioner has shown neither deficient performance on the part of his trial counsel nor resulting prejudice. Strickland, 466 U.S. at 689, 694, 104 S. Ct. at 2065, 2068. Ground Two, therefore, does not warrant federal habeas relief.

III. GROUND THREE DOES NOT WARRANT [*39] FEDERAL HABEAS RELIEF.

Petitioner contends that he was denied due process, his right to an impartial jury, and his Sixth Amendment right to counsel when the trial court conducted proceedings in the case in the presence of the prosecutor but outside the presence of Petitioner's trial counsel. (Amended Petition, Attach. at 2; Traverse at 20-23.)

According to the record, on August 16, 2001, while the jury was listening to a readback of testimony as part of its deliberations, the court bailiff contacted the trial judge on the telephone, with the court reporter present. 8 (3 RT 715, 716 [Traverse, Ex. C].) The trial court stated that the conversation would be on the record to document a communication between the bailiff and a juror. (3 RT 715.) The bailiff stated that, the previous night, two jurors had informed him that another juror had made a comment about having used methamphetamine in the past. (3 RT 715.) The jurors wanted to convey this information to the trial court. (3 RT 715.) The trial court inquired whether the bailiff had told the jurors that, if they wished to communicate with the trial court, they needed to put their concerns in writing. (3 RT 715-16.) The bailiff responded **[*40]** in the affirmative, but stated that he had not received any written communication from the jurors. (3 RT 715-16.) The trial court stated that Petitioner's counsel and the prosecutor should be made aware of the contact, but there was no need for any action until the trial court received a written communication from the jurors. (3 RT 716.)

FOOTNOTES

8 The trial judge had previously advised counsel she would not be in court that morning because of a death in the family, but she would be available on the telephone for consultation regarding jury questions or other matters of substance. (3 RT 713.) The trial judge also noted that Petitioner's trial counsel would be available by telephone that morning. (3 RT 713.) The prosecutor and Petitioner's counsel both stipulated to this procedure. (3 RT 713.)

At that point, the prosecutor entered the courtroom, and the bailiff advised the trial court of his

presence. (3 RT 716.) The prosecutor had apparently heard at least some of these proceedings, because he stated that he had a concern regarding whether the jurors were "truly forthcoming" in responding to the jury questionnaires. (3 RT 716-17.) Notwithstanding this concern, the prosecutor agreed with the trial **[*41]** court that no action was necessary as yet. (3 RT 717.) The trial judge commented that she had not realized the prosecutor was present. (3 RT 717.) The trial judge directed the prosecutor to advise Petitioner's counsel of the conversation and check whether Petitioner's counsel had a different viewpoint, stating that "the clerk can read back exactly what they had to say so there's no confusion since he's not present." (3 RT 717.) The trial judge then reiterated that, until the jurors submitted a written communication, there was no need for any action. (3 RT 717.)

Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings. Montejo v. Louisiana, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009) (*citing* United States v. Wade, 388 U.S. 218, 227-28, 87 S. Ct. 1926, 1932, 18 L. Ed. 2d 1149 (1966); Powell v. Alabama, 287 U.S. 45, 57, 53 S. Ct. 55, 60, 77 L. Ed. 158 (1932)). When a defendant is denied counsel at a critical stage, prejudice is presumed, and automatic reversal is required. United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984); Musladin v. Lamarque, 555 F.3d 830, 837-38 (9th Cir. 2009).

"A critical **[*42]** stage is 'any stage of a criminal proceeding where substantial rights of a criminal accused may be affected.'" Hovey v. Ayers, 458 F.3d 892, 902 (9th Cir. 2006) (quoting Mempa v. Rhay, 389 U.S. 128, 134, 88 S. Ct. 254, 257, 19 L. Ed. 2d 336 (1967)); *see also* Bell, 535 U.S. at 695-96, 122 S. Ct. at 1851 (a critical stage of criminal proceeding denotes a step that holds significant consequences for the accused). The Ninth Circuit has formulated a three-factor test for determining what constitutes a critical stage. Hovey, 458 F.3d at 901. The federal court must consider: whether failure to pursue strategies or remedies would result in a loss of significant rights; whether counsel would be useful in helping the accused understand the legal confrontation; and whether the proceeding tests the merits of the accused's case. *Id.;* Menefield v. Borg, 881 F.2d 696, 698-99 (9th Cir. 1989). In a recent case, the Ninth Circuit applied these factors to find that a pretrial status conference during which the pre-existing trial date was confirmed was not a critical stage, and the petitioner's Sixth Amendment rights were not violated by counsel's absence from the conference. United States v. Benford, 574 F.3d 1228, 1232-33 (9th Cir. 2009).

Applying **[*43]** these factors, the proceedings at issue here did not constitute a critical stage of the proceedings. The trial court did not make any ruling and did not communicate with the jury. Rather, the trial court took the position that it would not take any action regarding the matter until the jurors submitted a written communication. Thus, the proceeding did not test the merits of the case, and the presence of Petitioner's counsel was not necessary. *See* Hovey, 458 F.3d at 901.

Petitioner argues that if present, his trial counsel could have expressed his views regarding the need for the trial court to take some action. (Traverse at 21.) "The defendant's or attorney's presence may also be an important opportunity 'to try and persuade the judge to respond.'" Frantz, 533 F.3d at 743 (citation omitted). However, the trial judge ordered the prosecutor to discuss the matter with Petitioner's counsel to ascertain whether he had a different view regarding how to handle the issue, and the judge ordered the clerk to read back the proceedings to Petitioner's counsel. (3 RT 717.) Thus, Petitioner's counsel was not deprived of an opportunity to express his views. Moreover, there is no indication that Petitioner's **[*44]** counsel would have urged a different course of action if he had been present. Significantly, counsel never mentioned the matter during the next conference between the trial court and counsel, although the jury was still deliberating. [9] (4 RT 718.)

FOOTNOTES

9 Petitioner complains that the trial court should have ascertained whether his counsel had,

in fact, been advised of the matter, suggesting that he may not have been. (Traverse at 21-22.) Absent some evidence to support this speculation, the Court will not assume that the trial court's clerk and the prosecutor disregarded the trial court's directives.

"[D]efendants or their attorneys have a due process right to be present in conferences when jurors' notes are discussed." Frantz, 533 F.3d at 743 (directing evidentiary hearing regarding circumstances leading to exclusion of self-represented defendant from conference regarding response to jury note). However, here there was no juror note in Petitioner's case; rather, the trial court decided to wait for a note before taking any action concerning the concerns expressed by two jurors to the bailiff.

Nor was this a situation in which the jury was seeking guidance regarding the law or the evidence. **[*45]** In such a situation, "[c]ounsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response -- or the decision whether to respond substantively or not -- that is crucial." Musladin, 555 F.3d at 843 (state court's decision, which found the trial court's failure to consult defense counsel before responding to a jury note by referring the jury to its instructions to be harmless, was not contrary to federal law; opining that if review were *de novo,* the panel would have found the proceeding to implicate a critical stage, and the error to be structural); *but see* United States v. Mohsen, 587 F.3d 1028, 1032 (9th Cir. 2009) (trial court erred in failing to consult counsel before refusing the jury's request to see the indictment, but the error was harmless; noting that, "[u]nlike the communication in Musladin, the jury note here was not a question about the law governing the jury's deliberations").

Here, there was no question pertinent directly to the jury's deliberations; the jurors merely advised the bailiff that another juror may have used methamphetamine in the past. Indeed, the trial court expressed doubt as to whether the **[*46]** jurors had been questioned regarding their use of illegal drugs, stating that the court would not have permitted questioning along those lines. (3 RT 717.)

Thus, the proceeding in issue here did not constitute a critical stage of Petitioner's trial, and his counsel's absence did not violate due process or Petitioner's Sixth Amendment right to counsel. [10]

FOOTNOTES

10 Petitioner's claim in the Amended Petition concerns only his trial counsel's absence from the proceedings. (Amended Petition, Attach. at 2.) In his Traverse, Petitioner also complains that *he* was not personally present. (Traverse at 20.) Petitioner may not raise a claim for the first time in his Traverse. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) ("A traverse is not the proper pleading to raise additional grounds for relief."). In any event, the Court's conclusion that the proceeding did not implicate a critical stage of the trial is dispositive of any claim that Petitioner was not personally present. *See* Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L. Ed. 2d 631 (1987) (defendant has a due process right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute **[*47]** to the fairness of the procedure" but has no right to be present "when presence would be useless, or the benefit but a shadow.") (*internal quotation marks and citations omitted*); La Crosse v. Kernan, 244 F.3d 702, 707-08 (9th Cir. 2001) ("By the [Supreme] Court's limitation of [the constitutional] right to 'critical stages of the trial,' clearly, a criminal defendant does not have a fundamental right to be present at *all* stages of the trial.") (*italics in original*).

In the Amended Petition, Petitioner also refers to a purported violation of his right to an impartial jury. (Amended Petition, Attach. at 2.) He does not, however, set forth the basis for

this claim. "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." James, 24 F.3d at 26. There is nothing before the Court suggesting any violation of Petitioner's constitutional right to an impartial jury. *See* Hamilton v. Ayers, 583 F.3d 1100, 1106 (9th Cir. 2009) (on pre-AEDPA review, stating that "[t]o justify a new trial based on a claim of juror bias, [petitioner] must demonstrate that a dishonest answer was given on voir dire to a material question and that the correct response **[*48]** would have provided a valid basis for a challenge for cause, or that his right to an impartial jury . . . was otherwise violated by actual or implied juror bias") (*internal citations omitted*).

Accordingly, Ground Three does not warrant federal habeas relief.

IV. GROUND FOUR DOES NOT WARRANT FEDERAL HABEAS RELIEF.

Petitioner contends that appellate counsel was ineffective, because he failed to argue on direct appeal that Petitioner was deprived of due process and his Sixth Amendment right to counsel when the trial court conducted the above-described proceeding in the case outside the presence of his trial counsel. (Amended Petition, Attach. at 2; Traverse at 23-24.)

The Sixth Amendment right to the effective assistance of counsel encompasses the right to the effective assistance of appellate counsel as well. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821 (1985). However, appellate counsel need not raise every nonfrivolous issue requested by defendant. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983). The analytical framework of Strickland governs ineffective assistance of appellate counsel claims. Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). **[*49]** As the Ninth Circuit has explained, in the appellate context the two prongs will often overlap:

> In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . For these reasons, a lawyer who throws in every arguable point -- "just in case" -- is likely to serve her client less effectively than one who concentrates solely on the strong arguments. Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason -- because she declined to raise a weak issue.

Miller, 882 F.2d at 1434 (*footnote omitted*). Thus, the appropriate inquiry is whether a specific claim would have resulted in a "reasonable probability of reversal." *Id.; see also* Wildman v. Johnson, 261 F.3d 832, 840-42 (9th Cir. 2001) (appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when the appeal would not have provided grounds for reversal); Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000)(same).

As **[*50]** discussed above, the proceeding concerning the jurors' comment to the bailiff did not constitute a critical stage under federal law. Nor did the trial court's handling of the matter violate California law or federal law, including as such federal law has been interpreted by California courts. *See* People v. Mickle, 54 Cal. 3d 140, 174, 284 Cal. Rptr. 511, 528, 814 P.2d 290 (1991) ("A statutory or constitutional violation occurs only where the court actually provides the jury with instructions or evidence during deliberations without first consulting counsel."). The jury "made no inquiry about the law or the facts of the case, the court did not give any directions to the jury." People v. Avila, 38 Cal. 4th 491, 613, 43 Cal. Rptr. 3d 1, 100, 133 P.3d 1076 (2006)(trial court did not violate federal Constitution when it communicated with the jury regarding being excused for a three day weekend without soliciting counsel's views).

Thus, there is no reasonable likelihood that a challenge to the trial court's handling of the juror inquiry on direct appeal would have resulted in a different result at trial. Appellate counsel, therefore, did not perform deficiently by failing to make such a challenge, and Petitioner

suffered **[*51]** no prejudice as a result. *See* Wildman, 261 F.3d at 840-42; Miller, 882 F.2d at 1434.

Accordingly, Ground Four does not warrant federal habeas relief.

V. GROUND FIVE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

Petitioner contends that his Sixth Amendment rights were violated, because the trial court sentenced him to the upper term based on factors not found beyond a reasonable doubt by a jury. (Amended Petition, Attach. at 3.)

A. Background - Sentencing

The jury found Petitioner guilty of four counts related to the manufacture of methamphetamine. (1 CT 137-40, 146.) The count selected by the trial court as the principal count, manufacturing methamphetamine, is punishable by imprisonment in state prison for three, five, or seven years. California Health & Safety Code § 11379.6(a). Under California's determinate sentencing law in effect at the time Petitioner was sentenced, [11] when a statute specified three possible terms, the sentencing court was required to select the middle term unless imposition of the upper or lower terms was justified by circumstances in aggravation or mitigation. California Penal Code § 1170; California Rules of Court, Rule 4.420(a); *see also* California Rules of Court, Rules 4.408, **[*52]** 4.421, 4.423 (setting forth a non-exhaustive list of aggravating and mitigating factors). Circumstances in aggravation and mitigation were required to be established by preponderance of the evidence, and selection of the upper term was justified only if the circumstances in aggravation outweighed the circumstances in mitigation. California Rules of Court, Rule 4.420(b).

FOOTNOTES

11 Since Petitioner's sentencing, California's determinate sentencing law has been modified as a result of United States Supreme Court and California Supreme Court precedent, which is discussed infra. The Court's discussion is premised on the cited California statutes and rules as they existed when Petitioner was sentenced, not as they exist now.

On October 31, 2002, Petitioner appeared before the trial court for sentencing. (4 RT 857.) The Court initially heard Petitioner's Romero motion and struck one of Petitioner's "strikes," leaving one "strike" conviction. [12] (4 RT 889.) The trial court then selected an upper term of seven years for the principal count, stating that, based on the factors in the probation report and the fact that Petitioner was on parole at the time of the offense, it found that the factors in aggravation **[*53]** outweighed the factors in mitigation. (4 RT 889-90, 892.) The trial court doubled the seven-year term under the Three Strikes law based on the remaining "strike" and added one year under Section 667.5. (4 RT 889-90, 892.) The trial court imposed concurrent terms for the other three counts. (4 RT 892.) The total term imposed, thus, was 15 years. (4 RT 890, 892.)

FOOTNOTES

12 As previously explained, the trial court erroneously stated that it was striking two of Petitioner's three strikes, instead of one of Petitioner's two strikes. (4 RT 888-89.)

B. Applicable Clearly Established Federal Law

In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Supreme Court overturned a New Jersey sentencing scheme that allowed the sentencing court to enhance a criminal defendant's sentence beyond the prescribed statutory maximum after it

found, by a preponderance of the evidence, that his crime was motivated by racial bias. *Id.* at 468-71, 497, 120 S. Ct. at 2351-53, 2366-67. The Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. at 2362-63.

In **[*54]** Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Supreme Court explained that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id.* at 303, 124 S. Ct. at 2537 (*emphasis in original*). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04, 124 S. Ct. at 2537 (*emphasis in original*).

In People v. Black, 35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005) ("Black I"), the California Supreme Court applied these principles to California's determinate sentencing law. The California Supreme Court held that the "statutory maximum" for Apprendi purposes was the upper term of California's three-tier sentencing system, and concluded that the judicial fact-finding that occurs when a judge exercises his or her discretion to impose an upper term sentence does not violate a defendant's Sixth Amendment right to a jury trial. *Id.* at 1254, 1257-61, 29 Cal. Rptr. 3d at 750, 753-56.

Thereafter, the Supreme Court decided **[*55]** Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), which disapproved of Black I. The Supreme Court concluded that the middle term, not the upper term, of California's three-tier sentencing system constitutes the "statutory maximum" under Apprendi and Blakely. *Id.* at 293, 127 S. Ct. at 871. The Supreme Court held that California's sentencing scheme violated the Sixth Amendment, because it allowed the sentencing judge to impose an upper term sentence based on factual findings that were not made beyond a reasonable doubt by a jury. *Id.* at 293-94, 127 S. Ct. at 871.

The Supreme Court subsequently vacated Black I and remanded it for reconsideration in light of Cunningham. Black v. California, 549 U.S. 1190, 127 S. Ct. 1210, 167 L. Ed. 2d 36 (2007). On July 19, 2007, the California Supreme Court issued its decision on remand in People v. Black, 41 Cal. 4th 799, 62 Cal. Rptr. 3d 569, 161 P.3d 1130 (2007) ("Black II"), *cert. denied,* 552 U.S. 1144, 128 S. Ct. 1063, 169 L. Ed. 2d 813 (2008). The California Supreme Court held that "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number **[*56]** of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." Black II, 41 Cal. 4th at 813, 62 Cal. Rptr. 3d at 579 (*emphasis in original*). In other words, as long as one aggravating circumstance has been established in a constitutional manner, a defendant's upper term sentence withstands Sixth Amendment challenge. *See* Butler v. Curry, 528 F.3d 624, 643 (9th Cir.)("[I]f at least one of the aggravating factors on which the judge relied in sentencing Butler was established in a manner consistent with the Sixth Amendment, Butler's sentence does not violate the Constitution. Any additional factfinding was relevant only to selection of a sentence within the statutory range."), *cert. denied,* 129 S. Ct. 767, 172 L. Ed. 2d 763 (2008).

Even if a Sixth Amendment sentencing violation is found, the habeas petitioner is entitled to relief only if the error was not harmless. *See* Washington v. Recuenco, 548 U.S. 212, 221-22, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006) (sentencing errors subject to harmless error analysis); *see also* Butler, 528 F.3d at 648 **[*57]** (a petitioner "is entitled to relief only if the sentencing error in his case is not harmless"). Applying the harmlessness standard set forth by the Supreme Court in Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), a federal reviewing court must determine whether "the error had a substantial and injurious effect on [a petitioner's] sentence." Butler, 528 F.3d at 648 (*quoting* Hoffman v. Arave,

236 F.3d 523, 540 (9th Cir. 2001)); *see* Brecht, 507 U.S. at 637, 113 S. Ct. at 1722.

C. *Teague* Does Not Bar The Application Of *Cunningham* To Petitioner's Sixth Amendment Claim.

Respondent argues that, because Petitioner's conviction became final before the Supreme Court decided Cunningham, his claim is barred by the anti-retroactivity principles of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). (Answer at 26-31). Petitioner's conviction became final for Teague purposes on July 14, 2004, at the expiration of his 90-day period for filing a petition for a writ of certiorari to the Supreme Court. Bowen v. Roe, 188 F.3d 1157, 1159-60 (9th Cir. 1999). The Supreme Court decided Blakely on June 24, 2004, but did not decide Cunningham until 2007.

When a respondent raises the issue of retroactivity, **[*58]** federal courts must apply Teague before considering the merits of a claim. Butler, 528 F.3d at 633. The Ninth Circuit, however, has held that: "Cunningham . . . did not announce a new rule of constitutional law and may be applied retroactively on collateral review." Butler, 528 F.3d at 639; *see also* Chioino v. Kernan, 581 F.3d 1182, 1184 n.1 (9th Cir. 2009)("[w]e have since held that where a federal habeas petitioner's conviction became final between Blakely and Cunningham, the rule in Cunningham should be retroactively applied under [Teague]"). Petitioner's case falls squarely within this rule. Thus, Teague does not bar the retroactive application of Cunningham to Petitioner's Sixth Amendment claim.

D. Petitioner's Claim Fails On The Merits.

The trial court stated that it selected the upper term based on the factors in Petitioner's probation report and the fact that Petitioner was on parole at the time he committed the offense. (4 RT 892.) The probation report listed the following circumstances in aggravation under Rule 4.421: the manner in which the crime was carried out indicated planning, sophistication, or professionalism; Petitioner's prior convictions as an adult were numerous and **[*59]** of increasing seriousness; Petitioner had served a prior prison term; Petitioner was on parole when the crime was committed; and Petitioner's prior performance on probation and parole was unsatisfactory. (Lodg. No. 32 at 4.)

In Almendarez-Torres v. United States, 523 U.S. 224, 247, 118 S. Ct. 1219, 1232, 140 L. Ed. 2d 350 (1998), the Supreme Court held that, unlike other facts that increase the penalty for a crime, the fact of a prior conviction need not be pleaded in an indictment or proved to a jury beyond a reasonable doubt. In Apprendi, the Supreme Court retained the Almendarez-Torres prior conviction exception, and held that any fact, "other than the fact of a prior conviction," that increases the penalty for a crime beyond a statutory maximum must be found beyond a reasonable doubt by a jury. Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63. The Supreme Court thereafter reaffirmed the prior conviction exception in both Blakely and Cunningham. *See* Cunningham, 549 U.S. at 274, 127 S. Ct. at 860 ("the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found **[*60]** by a jury or admitted by the defendant"); Blakely, 542 U.S. at 301, 124 S. Ct. at 2536 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). Thus, under clearly established Supreme Court precedent, prior convictions constitute an exception to the requirement that facts used to increase a sentence beyond a statutory maximum must be found beyond a reasonable doubt by a jury. *See* Butler, 528 F.3d at 643-44.

Here, the trial court cited Petitioner's parole status at the time of the instant offense as a reason for imposing an upper term sentence. (4 RT 892.) The Supreme Court has not addressed whether a finding that a defendant was on probation or parole falls within the scope of the *Apprendi* "prior conviction" exception. In Butler, the Ninth Circuit held that a defendant's probationary status does not fall within the *Apprendi* "prior conviction" exception and, thus, must be submitted to the jury and proved beyond a reasonable doubt. Butler, 528 F.3d at 647.

In Butler, however, the Ninth Circuit was applying *de novo* review. *Id.* at 641. Since **[*61]** then, the Ninth Circuit has held that its holding in Butler does not constitute clearly established federal law for purposes of AEDPA and review of a habeas claim under Section 2254 (d). Kessee v. Mendoza-Powers, 574 F.3d 675, 679 (9th Cir. 2009). The Ninth Circuit acknowledged that it reached its conclusion in Butler primarily by examining its own caselaw, and other courts have interpreted the *Apprendi* prior conviction exception more broadly. *Id.* The Ninth Circuit reasoned that, because the Supreme Court has not spoken regarding this issue and other courts have reached conclusions different from that reached in Butler, a state court's finding that a defendant's probationary status falls under the *Apprendi* prior conviction exception cannot be contrary to, or an unreasonable application of, Supreme Court precedent. *Id.; see also* Mirzayance, 129 S. Ct. at 1419 (noting that, under Supreme Court precedent, it is not an unreasonable application of clearly established federal law "for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court); Musladin, 549 U.S. at 77, 127 S. Ct. at 654 (where holdings of the Supreme Court regarding **[*62]** the issue presented on habeas review are lacking, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law'"); Holley v. Yarborough, 568 F.3d 1091, 1097-98 (9th Cir. 2009) ("[c]ircuit precedent may not serve to create established federal law on an issue the Supreme Court has not yet addressed," and "[w]hen there is no clearly established federal law on an issue, a state court cannot be said to have unreasonably applied the law as to that issue").

Here, although the state courts did not articulate a reason for denying Petitioner's Sixth Amendment claim and the Court is applying independent review, the Court must still review Petitioner's claim under the deferential AEDPA standard of Section 2254(d), which governs Ground Five. *See* Himes, 336 F.3d at 853; Greene, 288 F.3d at 1088. The Court concludes that, because the Supreme Court has not specifically addressed whether a finding that, at the time of the crime, the petitioner was on probation or parole falls within Apprendi's prior conviction exception, and in light of the Ninth Circuit's holding in Kessee, the trial court's reliance on Petitioner's parole status as an aggravating factor to impose **[*63]** an upper term sentence cannot constitute a basis for federal habeas relief. *See* Rankins v. Adams, 349 Fed. Appx. 127, 2009 WL 3157780, *1 (9th Cir. 2009) (unpublished) (affirming denial of habeas relief when trial court cited as an aggravating factor the fact that defendant was on parole at the time of the instant offense) (case citable under Fed. R. App. P. 32.1(a) and Ninth Circuit Rule 36-3).

Under California law, one aggravating circumstance is legally sufficient to make the defendant eligible for an upper term sentence. Black II, 41 Cal. 4th at 813, 62 Cal. Rptr. 3d at 579. Thus, as long as one aggravating circumstance has been established in a constitutional manner, a defendant's upper term sentence is the "statutory maximum" and withstands Sixth Amendment challenge. *Id.;* Butler, 528 F.3d at 643. Here, the Court has concluded that there is no clearly established federal law, as set forth by the Supreme Court, that requires the sole factor expressly cited by the trial court to impose an upper term sentence -- Petitioner's parole status -- to be found beyond a reasonable doubt by a jury. Thus, Petitioner was eligible for an upper term sentence by virtue of a fact established in a manner consistent **[*64]** with the Sixth Amendment. [13] His upper term sentence is constitutional even if the trial court impermissibly relied on additional aggravating factors not found by a jury.

FOOTNOTES

13 Moreover, Petitioner's 15-year sentence did not exceed the "statutory maximum" under Blakely. The maximum sentence to which Petitioner was exposed by his present conviction was a three strikes sentence of 25 years to life plus one year, or 26 years to life. (*See* Lodg. No. 32 at 8.) The trial court's decision to strike Petitioner's other "strike" conviction did not wipe it out for purposes of computing his "statutory maximum" sentence. *See* In re Varnell, 30 Cal. 4th 1132, 1138, 135 Cal. Rptr. 2d 619, 623, 70 P.3d 1037 (2003) (explaining that dismissal of a strike allegation does not prevent the prior conviction from being considered for other purposes in the same proceeding); People v. Garcia, 20 Cal.4th 490, 496, 85 Cal. Rptr. 2d 280, 283, 976 P.2d 831 (1999)("[A] court might strike a prior conviction allegation

in one context, but use it in another."). Thus, the "statutory maximum" was the "third strike" sentence that Petitioner would have faced had the trial court not exercised its discretion to dismiss his other "strike." It follows that **[*65]** Petitioner's upper term "second strike" sentence did not exceed the "statutory maximum" and, therefore, could not transgress the constitutional limits on sentencing set forth in Apprendi, Blakely, and Cunningham. *See* Diaz v. Castalan, 625 F. Supp. 2d 903, 927-28 (C.D. Cal. 2008) (concluding that upper term "second strike" sentence imposed after trial court struck a "strike" did not violate Apprendi and its progeny, because it was below the statutory maximum of 25 years to life).

Furthermore, even assuming, *arguendo,* that the trial court's reliance on Petitioner's parole status violated Cunningham, the error was harmless for two reasons. First, the record contains evidence of Petitioner's parole status at the time of the commission of the offense. The probation report states that Petitioner was on parole when he committed the present offense. (Lodg. No. 32 at 5.) Deputy Roger Loftis, who discovered the crime scene, attempted to testify that "[t]here was a parolee that lived at that address that had a warrant for his arrest," but the trial court sustained an objection to this testimony, and the deputy subsequently testified only that he was attempting to serve an arrest warrant on Petitioner. **[*66]** (1 RT 74-75.) If permitted to do so, Deputy Loftis could have testified to Petitioner's parole status. The Court has no doubt that, if presented with such evidence, the jury would have found beyond a reasonable doubt that Petitioner was on parole at the time of the crime. *Contrast* Butler, 528 F.3d at 651-52 (Ninth Circuit could not determine that the error was harmless, because the record did not contain a probation report or other document reflecting Butler's probationary status and did not show what evidence regarding the probation issue was presented to the trial court).

Second, although the record does not reflect whether the trial court relied on Petitioner's prior convictions in selecting an upper term sentence, it *could* have legally imposed an upper term sentence on that basis. *See* Butler, 528 F.3d at 648-49 ("With regard to a Sixth Amendment sentencing violation, however, the relevant question is not what the trial court *would* have done, but what it legally *could* have done. After one aggravating factor was validly found, the trial court legally *could* have imposed the upper term sentence.")(*emphasis in original*). The record shows that Petitioner suffered several prior convictions, **[*67]** including: a 1992 conviction for residential burglary; two 1992 convictions for assault with a deadly weapon; a 1995 conviction for vehicle theft; and 1995 convictions for receiving stolen property and unlawful possession of a firearm by a convict. (Lodg. No. 32 at 1, 4, 5; *see also* 1 CT 55; 4 RT 771-72.) California law prohibited the trial court from imposing an upper term sentence based on Petitioner's 1992 "strike" conviction for assault with a deadly weapon and the prior conviction based upon which the trial court imposed a one-year Section 667.5 enhancement. [14] *See* California Penal Code § 1170(b) (prohibiting dual use of facts to enhance sentence and to impose upper term); California Rules of Court Rule 4.420(c) (fact found as an enhancement may be used to impose the upper term only if the court strikes the punishment for the enhancement). However, the trial court could properly rely on Petitioner's *other* prior convictions. *See* Boultinghouse v. Hall, 583 F. Supp. 2d 1145, 1165 (C.D. Cal. 2008) ("the mere fact of Petitioner's prior convictions constituted an aggravating circumstance warranting imposition of an upper term sentence without a jury finding").

FOOTNOTES

14 The prosecution alleged **[*68]** prior conviction enhancements under Section 667.5 for Petitioner's 1992 conviction for burglary, 1995 conviction for unlawful possession of a firearm, and 1995 conviction for vehicle theft. (1 CT 55.) The trial court imposed a single enhancement pursuant to Section 667.5. (4 RT 892.) It did not specify on which prior convictions the Section 667.5 enhancement was based, although its reference to "the first enhancement" suggests that it was the burglary conviction, which was the first one listed. (2 CT 55; 4 RT 892.)

For both these reasons, assuming there was sentencing error, it did not have a substantial or injurious effect on Petitioner's sentence and, thus, was harmless. *See* Brecht, 507 U.S. at 637, 113 S. Ct. at 1722.

For all of the foregoing reasons, the state courts' rejection of Petitioner's Sixth Amendment claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the Supreme Court. Ground Five, therefore, cannot support federal habeas relief.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying the Petition; and **[*69]** (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: February 9, 2010

/s/ Margaret A. Nagle

MARGARET A. NAGLE

UNITED STATES MAGISTRATE JUDGE

*2010 U.S. Dist. LEXIS 22601, **

ANTHONY WATKIN, Petitioner, v. DERRAL G. ADAMS, et. al, Respondents.

1:07-CV-01282-OWW-JMD-HC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 22601

March 11, 2010, Decided
March 11, 2010, Filed

PRIOR HISTORY: Watkin (Anthony) on H.C., 2007 Cal. LEXIS 8000 (Cal., July 25, 2007)

CORE TERMS: sentencing, plea agreements, objectively unreasonable, hat, ineffective assistance of counsel, entitled to relief, robbery, prosecutor's, line-up, felony, habeas corpus, trial counsel, prior convictions, deficient performance, ineffective, sentence, arrest, clerk, knives, plea bargain, bias, reasonable probability, enhancement, biased, juror, state law, habeas petition, summarily denied, federal habeas, factual basis

COUNSEL: **[*1]** Anthony Watkin, Petitioner, Pro se, CORCORAN, CA.

For Derral G. Adams, Warden, Respondent: Jesse Noel Witt, LEAD ATTORNEY, California Department of Justice Attorney General, Sacramento, CA.

JUDGES: John M. Dixon, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: John M. Dixon

OPINION

FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

OBJECTIONS DUE WITHIN THIRTY DAYS

Petitioner Anthony Watkin ("Petitioner") is proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Procedural History

In 2004, a jury convicted Petitioner of three counts of second degree robbery. (Lod. Doc. 3 at 3). With respect to one of the robbery counts, the jury found Petitioner personally used a knife in the commission of the robbery. (Id.) Petitioner waived his right to a jury trial with respect to the People's allegation that Petitioner had suffered two prior serious felony convictions, and the Superior Court found the allegation to be true. (Id.).

On June 16, 2005 Petitioner filed a direct appeal of his conviction in the California Court of Appeal. (Id. at 1). The California Court of Appeal affirmed Petitioner's conviction in a reasoned decision issued on February 8, 2006. (Lod. Doc. 6). Petitioner filed **[*2]** a petition for review before the California Supreme Court on February 11, 2006. (Lod. Doc. 4). The California Supreme Court summarily denied the petition for review on April 19, 2006.

On March 8, 2007, Petition filed a petition for writ of habeas corpus before the California Supreme Court. (Answer at 2). The California Supreme Court summarily denied the petition on July 25, 2007.

Petitioner filed the instant petition for writ of habeas corpus in the United States District Court for the Eastern District of California on August 27, 2007. (Pet. at 1). It appears that Petitioner filed a second state habeas petition in an attempt to exhaust certain claims after filing his federal petition. (*See* Doc. 23). The California Supreme Court summarily denied Petitioner's second state habeas with citation to two California cases concerning denial of untimely petitions. *See In re Watkin,* 2009 Cal. LEXIS 2799 (Cal. 2009) (citing *In re Clark,* 5 Cal.4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993); *In re Robbins,* 18 Cal.4th 770, 780, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (Cal. 1998).

The Court ordered Respondent to file responsive pleading on November 30, 2007. Respondent filed an answer to the petition on February 29, 2008. Petitioner filed a traverse on October 2, 2008. [1]

FOOTNOTES

1 The **[*3]** pleading Petitioner filed on October 2 is titled "Motion to Respondent's Motion to Dismiss." Respondent has not filed a motion to dismiss; rather, Respondent asserts in its answer to the petition that the petition may be dismissed for lack of exhaustion. Because Petitioner's October 2 pleading addresses the merits of Respondent's answer (including arguments unrelated to the exhaustion issue), the Court construes the pleading as a traverse.

Factual Background [2]

Anthony Watkin [was convicted by a jury] of three counts of second degree robbery, one including the personal use of a knife. (Pen. Code, §§ 211; 12022, subd. (b)(1).) The court found true that appellant had suffered prior serious felony convictions. (§ 667, subds. (b)-(i); 1170.12, subds. (a) - (d).) The trial court sentenced appellant to prison for twenty-five years to life for each robbery conviction, a consecutive one year term for the use of a knife, another consecutive one year term for the prior prison enhancement and five consecutive years each for the prior serious felonies for a total term of 75 years to life plus 12 years....

In June of 2001 appellant entered an Arco Mini-Mart gas station, got a bottle of soda and told **[*4]** the two clerks to give him money from the cash register. The clerks did not take him seriously which apparently upset him, and he threatened to shoot them (though no weapon was visible.) The clerks gave him approximately $ 300 and he left, telling them not to call the police or he would come back and kill them.

Four days later, appellant robbed Romero's Pizza in Fresno. He entered the store and demanded money from the clerk. He had his hand in his shirt as if he had a gun. He then directed the employees to the back of the store and threatened to "blow up" the store if they did not comply.

A few days later, appellant again entered Romero's Pizza. The clerk recognized him as the robber from a few days before and started to walk to the back of the store. Appellant told her it was the last time he would rob her because he was going to Mexico and "I've got a gun, so put the money in the bag." The clerk gave appellant the money from the store and saw a knife in appellant's hand. The police stopped appellant shortly thereafter....

[Appellant claims] that the trial court erred in denying his belated Code of Civil Procedure section 170.6 request. Subdivision (d) of section 170.3 of the Code of Civil **[*5]** Procedure specifies: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding." This expedited procedure is the exclusive means for appellate review. (People v. Hull (1991) 1 Cal.4th 266, 269-275, 2 Cal. Rptr. 2d 526, 820 P.2d 1036.)

When his case became ready for trial assignment it was assigned from the master calendar to Department 60. Appellant did not file a challenge to the Department 60 assignment until he had already been assigned to Department 60. Section 170.6, subdivision (a)(2) provides that, "If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial." It is undisputed appellant failed to make his motion in a timely manner under the statute...

Appellant next contends the prosecutor committed misconduct in closing argument when he pointed out appellant's failure to present any evidence that a hat alleged to have been worn during the robberies and recovered **[*6]** by the police in his impounded car was not his. The prosecutor stated: "What about the test for hair samples? People presented evidence from Ms. Campise, Ms. Sepulveda and a security still photo that shows a hat was worn. We then presented the hat. If DNA evidence -strike that. But the defense felt there wasn't any evidence -logical material evidence to show that wasn't his hat.

Defense counsel objected and the objection was overruled. Appellant now contends this argument constituted improper comment on his failure to testify in violation of Griffin v. California (1965) 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (Griffin). Appellant claims the above argument "directly called into question appellant's failure to testify and explain about the hat found in the impounded car." We disagree. While appellant is correct that he had no duty to testify and "explain about the hat," appellant's argument ignores the obvious intent of the prosecutor's comment. The prosecutor continued, "If that DNA sample could have ruled it out, why not do it?"...

[A]ppellant contends the trial court abused its discretion when it refused to strike one of his priors... trial court has discretion under the three strikes law to dismiss **[*7]** or vacate prior conviction allegations or findings in the furtherance of justice....Before ruling on appellant's Romero motion, the trial court heard argument in the motion and commented that while appellant "doesn't appear to be the type of person who would do anything violent at the time of the robbery," that he "still has a deadly weapon and he still committed the robberies." The court went on to note that "As much as I think he seems to be a nice individual he commits robberies. And this is what the law was designed to do, to put away people who commit robberies." The court declined to exercise its discretion to strike a strike.

FOOTNOTES

2 The Court adopts the factual summary of the California Court of Appeal's unpublished decision denying Petitioner's direct appeal of his conviction. (Lod. Doc. 6).

Petitioner raises several additional claims not addressed by the California Court of Appeal. As discussed above, the trial court enhanced Petitioner's sentence pursuant to California's three strikes law based on Petitioner's prior convictions. Petitioner contends that when he plead guilty to his prior offenses, he did so based on the State's representations that the convictions could be used to enhance **[*8]** future sentences pursuant to the then-existing California Penal Code sections, not the three strikes sentencing scheme passed after Petitioner plead guilty to the prior offense. Thus, Petitioner claims that the trial court's imposition of the three strikes sentencing enhancements violated the terms of Petitioner's prior plea agreements. In a separate but related claim, Petitioner contends that the trial court improperly imposed three strikes sentencing enhancements without submitting the question of whether Petitioner had suffered two prior serious felonies to the jury.

Petitioner also raises several ineffective assistance of counsel claims. Petitioner asserts that his trial counsel was ineffective for failing to bring a motion to exclude evidence obtained through an illegal arrest and unconstitutional line-up procedure; failing to call a key witness for Petitioner; failing to bring a motion to exclude knives entered as evidence against Petitioner; failing to request a continuance in order to permit a black female juror to continue service on the jury; failing to attack the credibility of certain witnesses; and failing to produce documents that supported Petitioner's defense.

Finally, **[*9]** Petitioner contends that the trial court prejudiced Petitioner by informing the jury that Petitioner had previously been convicted of a felony.

I. Venue and Jurisdiction

A person in custody pursuant to the judgment of a state court may file a petition for a writ of habeas corpus in the United States district courts if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); [3] 28 U.S.C. § 2241(c)(3); *Williams v. Taylor,* 529 U.S. 362, 375, n.7, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Venue for a habeas corpus petition is proper in the judicial district where the prisoner's trial was held. *See* 28 U.S.C. § 2241(d).

FOOTNOTES

3 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all petitions for writ of habeas corpus filed after its enactment. *Lindh v. Murphy,* 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481, (1997); *Jeffries v. Wood,* 114 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied,* 522 U.S. 1008, 118 S. Ct. 586, 139 L. Ed. 2d 423 (1997) (quoting *Drinkard v. Johnson,* 97 F.3d 751, 769 (5th Cir.1996), *cert. denied,* 520 U.S. 1107, 117 S. Ct. 1114, 137 L. Ed. 2d 315 (1997), *overruled on other grounds by Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L. Ed. 2d 481 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The **[*10]** instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

Petitioner's trial was conducted in Fresno County, California. As Petitioner asserts that he is being held in violation of his right to due process under the United States Constitution, and because Fresno County is within the Eastern District of California, the Court has jurisdiction to entertain Petitioner's petition and venue is proper in the Eastern District. 28 U.S.C. § 84; 28 U.S.C. § 2241

(c)(3).

II. Standard of Review

Section 2254 "is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment." *Sass v. California Board of Prison Terms,* 461 F.3d 1123, 1126 (9th Cir. 2006) (quoting *White v. Lambert,* 370 F.3d 1002, 1009-10 (9th Cir. 2004)). Under section 2254, a petition for habeas corpus may not be granted unless the state court decision denying Petitioner's state habeas petition "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the **[*11]** State court proceeding." 28 U.S.C. § 2254(d). "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly... rather, that application must be objectively unreasonable." *Lockyer v. Andrade,* 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (citations omitted).

III. Petitioner's Claims

A. Petitioner's Claims Concerning California Code of Civil Procedure 170.6

1. Trial Court Error

Petitioner contends that the trial court committed error in denying Petitioner's motion under California Code of Civil Procedure section 170.6, which prohibits California judges from trying matters in which the judge is prejudiced against a party to the action. The California Court of Appeal rejected Petitioner's claim of trial court error in the only reasoned decision issued by the State on Petitioner's section 170.6 claim. The Court of Appeal held that Petitioner failed to bring a timely motion under section 170.6. (Lod. Doc. 6).

Petitioner's allegation of trial court error fails to state a claim for federal habeas relief. Federal habeas corpus relief is generally unavailable for alleged **[*12]** error in the interpretation or application of state law. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). [4] To the extent Petitioner's claim regarding section 170.6 asserts a due process violation on the basis of judicial bias, Petitioner has failed to meet his burden of establishing that the trial judge was actually biased against Petitioner.

FOOTNOTES

4 The Supreme Court has noted the possibility that in some instances, an error of state law may be sufficiently egregious to amount to a denial of due process or equal protection. *See, e.g., Pulley v. Harris,* 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). Petitioner's claim of error regarding section 170.6 does not implicate the type of state law error contemplated by the High Court in *Pulley.* Petitioner does not allege an equal protection violation, and the Supreme Court has defined the category of infractions that violate the fundamental fairness doctrine of due process "very narrowly." *E.g. Dowling v. United States,* 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). No clearly established federal law holds that the fundamental fairness doctrine of the due process clause is violated by a state court's erroneous denial of a defendant's motion to disqualify a judge absent a showing **[*13]** that the judge was actually biased against the defendant.

The Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge. *Larson v. Palmateer,* 515 F.3d 1057, 1067 (9th Cir. 2008). To succeed on a judicial bias claim, however, the petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Id.* (quoting *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). Absent evidence of some extrajudicial source of bias or partiality, neither adverse

rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are critical or disapproving of, or even hostile to, counsel, the parties, or their cases. *Id.* (quoting *Liteky v. United States,* 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

Petitioner offers no evidence to support his conclusory allegation of judicial bias. Petitioner merely states, "Petitioner feels that [sic] trial judge was bias [sic] toward him, because of the 170.6 challenge." (Pet. at 17). Petitioner's unsupported, circular contention fails to rebut the presumption that his trial judge was not biased. Accordingly, the State court decisions rejecting Petitioner's claim of judicial **[*14]** bias were not objectively unreasonable, and therefore Petitioner is not entitled to relief on his section 170.6 claim.

2. Ineffective Assistance of Counsel

Petitioner asserts that his trial counsel was ineffective for failing to bring a timely motion under section 170.6 to disqualify the trial court judge. The California Court of Appeal issued the last reasoned decision denying Petitioner's ineffective assistance of counsel claim. The Court of Appeal held that Petitioner failed to demonstrate that he suffered prejudice as a result of his counsel's failure to bring a timely motion under section 170.6. (Lod. Doc. 6).

For Petitioner to prevail on his ineffective assistance of counsel claims, he must show: (1) that counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance. *E.g., Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them. *Id.* at 697; *Thomas v. Borg,* 159 F.3d 1147, 1151-52 (9th Cir. 1998). Establishing counsel's deficient performance does not warrant setting aside the judgment **[*15]** if the error had no effect on the judgment. *Seidel v. Merkle,* 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must show prejudice such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694.

As the California Court of Appeal noted, Petitioner fails to establish that he suffered any prejudice as a result of his counsel's failure to bring a timely motion under section 170.6. Petitioner has not demonstrated that the trial judge was actually biased against him, and Petitioner presented no evidence before the state courts to establish a reasonable probability that had his counsel brought a timely motion under section 170.6, the result of Petitioner's trial would have been different. Accordingly, the State court decisions rejecting Petitioner's ineffective assistance of counsel claim were not objectively unreasonable, and Petitioner is not entitled to relief on this claim.

B. Petitioner's Plea Bargain Claim

Petitioner contends that the trial court's imposition of three strikes sentencing enhancements based on Petitioner's prior convictions violated the terms of the plea bargain **[*16]** agreements underlying the prior convictions. Petitioner's contention is based on his assertion that the versions of the penal code in place at the time Petitioner entered his plea were "an intrinsic part" of his plea agreement. (Pet. at 23). In the only State court adjudication of Petitioner's plea bargain claim, the California Supreme Court summarily denied Petitioner relief with citation to *In re Robbins,* 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (Cal.1998) and *In re Clark,* 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (Cal. 1993). Where state courts fail to provide a reasoned decision for denial of a habeas petition, federal habeas courts must independently review the record to determine whether the denial was objectively unreasonable. *E.g., Musladin v. Lamarque,* 555 F.3d 830, 835 (9th Cir. 2009).

A criminal defendant's right to due process entitles her to enforce the terms of a plea agreement. *Santobello v. New York,* 404 U.S. 257, 261-262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). "Plea agreements are contractual in nature and are measured by contract law standards." *United States v. De La Fuente,* 8 F.3d 1333, 1337 (9th Cir. 1993). In construing an agreement, the

court must determine what the defendant reasonably understood to be the terms of the agreement when he **[*17]** pleaded guilty. *Id.* The construction and interpretation of state court plea agreements and the concomitant obligations flowing therefrom are matters of state law. *Buckley v. Terhune,* 441 F.3d 688, 694 (9th Cir. 2006) (quoting *Ricketts v. Adamson,* 483 U.S. 1, 6 n.3, 107 S. Ct. 2680, 97 L. Ed. 2d 1). As the Ninth Circuit explained in *Buckley:*

> In California, "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles," *People v. Shelton,* 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d 354, 125 P.3d 290 (2006), and "according to the same rules as other contracts," *People v. Toscano,* 124 Cal. App. 4th 340, 344, 20 Cal. Rptr. 3d 923 (2004) (cited with approval in Shelton along with other California cases to same effect dating back to 1982). Thus, under Adamson, California courts are required to construe and interpret plea agreements in accordance with state contract law.

441 F.3d at 694. Accordingly, the Court turns to California law to determine whether Petitioner has established a breach of his plea agreement.

Under California law, a plea bargain is "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public **[*18]** policy." *People v. Gipson,* 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (Cal. Ct. App. 2004) (citing *In re Marriage of Walton,* supra, 28 Cal. App. 3d at p. 108). Thus, absent an express promise that the convictions resulting from Petitioner's plea agreements would not be used to enhance Petitioner's sentences for future convictions in a way other than proscribed by the then-existing version of California's Penal Code, the plea agreements vested no rights other than those which related to the immediate disposition of the case. *See id.* (citing *Way v. Superior Court of San Diego County,* 74 Cal. App. 3d 165, 180, 141 Cal. Rptr. 383 (Cal. Ct. App. 1977); *see also Buckley,* 441 F.3d at 698 (affording relief where court's express statements created ambiguity as to the terms of the plea agreement).

Here, Petitioner fails to provide sufficient evidence to carry his burden of establishing that the California Supreme Court's rejection of his claim was objectively unreasonable. *See, e.g., Baylor v. Estelle,* 94 F.3d 1321, 1325 (9th Cir. 1996) (a petitioner bears the burden of establishing entitlement to relief under section 2254). Petitioner has not produced any writings evincing the terms of his plea agreements. Further, Petitioner **[*19]** does not allege that he was promised or even told during plea negotiations that his convictions would only be used to enhance possible future sentences in accordance with the then-existing sentencing regime. Petitioner's conclusory allegation that the prosecution "established" that he would only be subject to the enhancements entailed by former versions of the California Penal Code is insufficient to develop the factual basis for his breach of plea bargain claim. Because the Court finds that Petitioner did not exercise reasonable diligence in presenting the factual basis for his breach of plea agreement claim in State court, Petitioner is precluded from presenting additional evidence in this proceeding. *See* 28 U.S.C. § 2254(e). Accordingly, Petitioner is not entitled to relief on his plea bargain claim.

C. Prosecutorial Misconduct Claim

Petitioner contends that the prosecutor made an inappropriate comment on Petitioner's refusal to testify during the people's closing argument. At trial, one piece of evidence that was used to link Petitioner to the crime was a hat found in Petitioner's vehicle. (Pet. at 28). During closing argument, the prosecutor stated:

> What about the test for hair samples? **[*20]** People presented evidence from Ms. Campise, Ms. Sepulveda and a security still photo that shows a hat was worn. We then presented the hat. If DNA- strike that. But the defense felt there wasn't any evidence- logical material evidence to show that wasn't his hat...If a DNA sample could have ruled it out, why not do it?

(Lod. Doc. 6 at 5). The California Court of Appeal applied the appropriate legal standard and denied Petitioner's claim. (Lod. Doc. 6 at 7-8) (citing *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)).

The Fifth Amendment of the United States Constitution forbids comment by the prosecution on the accused's refusal to testify. *E.g., Griffin,* 380 U.S. at 615. However, a prosecutor may comment on the failure of the defense to produce evidence other than the defendant's testimony. *See, e.g., Cook v. Schriro,* 538 F.3d 1000, 1020 (9th Cir. 2008). Directing the jury's attention to the lack of evidence in support of a defense theory is constitutionally permissible. *Id.*

The record demonstrates that the prosecution made no express reference to Petitioner's decision not to testify; rather, the prosecution simply pointed out that Petitioner did not offer DNA evidence which could have potentially **[*21]** established that he never wore the hat in question. The Court of Appeal noted, correctly, that "the unexplained failure to produce evidence can be the subject of appropriate comment by a prosecutor." (Lod. Doc. 6 at 6). The Court of Appeal also concluded that "given that the prosecutor immediately referred to the absence of DNA evidence and made no comment or implication regarding appellant's failure to testify after mentioning the hat, there is no reasonable likelihood the jury interpreted the prosecutor's closing arguments as indirectly commenting on appellant's failure to testify at trial." (Id.). The Court cannot say that the Court of Appeal's determination was objectively unreasonable. Accordingly, Petitioner is not entitled to relief on his claim of *Griffin* error.

D. Petitioner's Romero [5] Claim

FOOTNOTES

5 In *People v. Superior Court (Romero),* 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (Cal. 1996), the California Supreme Court held that a trial court may, in the interest of justice, strike an allegation that a defendant committed prior serious felonies pursuant to its authority under California Penal Code section 1385.

Petitioner contends that the sentencing court "abused its discretion" in denying Petitioner's request **[*22]** to strike one of Petitioner's prior felony convictions for the purposes of sentencing. (Pet. at 32). The California Court of Appeal rejected Petitioner's contention, noting that the trial court considered all relevant factors and exercise its discretion appropriately. (Lod. Doc. 6 at 8-9).

Alleged error in the application of state sentencing laws is not cognizable in a federal habeas action unless the error implicates a constitutional right. *See Fetterly v. Paskett,* 997 F.2d 1295, 1300 (9th Cir. 1993) (state sentencing error cognizable in habeas action only to the extent error implicated prisoner's right to due process) *cert. denied,* 513 U.S. 914, 115 S. Ct. 290, 130 L. Ed. 2d 205 (1994). In some instances, a sentencing court's error of law may implicate a defendant's due process rights. *See Ballard v. Estelle,* 937 F.2d 453, 456-57 (9th Cir. 1991) (noting that sentencing defendant under a statute that does not apply to the defendant's crime could violate due process); *see also Fetterly* 997 F.2d at 1300 (noting the possibility that failure to consider mitigation criteria, as required by statute, could render imposition of death penalty unconstitutional). [6] Here, however, Petitioner does not allege that the sentencing **[*23]** court sentenced him under an inapplicable statute or that the sentencing court failed to consider the relevant criteria in denying Petitioner's *Romero* motion. Petitioner contends merely that the sentencing court abused its discretion. This Court may not disturb the California Court of Appeal's finding that the sentencing court's denial of Petitioner's Romero motion was not an abuse of discretion. *E.g. Estelle,* 502 U.S. at 68.

FOOTNOTES

6 Petitioner's allegations do not implicate the type of liberty interest discussed in *Ballard* and

Fetterly. Petitioner's interest in having a prior conviction stricken under California Penal Code § 1385(a) pales in comparison to the liberty interests at stake in *Ballard* and *Fetterly.* In *Ballard,* the liberty interest implicated by the petitioner's allegation was the right to not be sentenced under a statute which the legislature did not intend to apply to petitioner's crime; in other words, the right to be free from unauthorized punishment. 937 F.2d at 456-57 In *Fetterly,* the petitioner alleged that the sentencing court failed to follow its statutory commands in sentencing petitioner to death for his crimes. 997 F.2d at 1300. Petitioner points to no authority which **[*24]** supports the proposition that a prisoner has a protected liberty interest in having a prior conviction stricken under a discretionary statute such as section 1385.

E. Petitioner's Cunningham Claim

Petitioner contends that his sentence violates his rights under the Sixth Amendment to the United States Constitution because the sentencing court enhanced Petitioner's sentence based on facts not found true beyond a reasonable doubt by the jury; specifically, the fact of Petitioner's prior convictions. (Pet. at 37) (citing *Cunningham v. California,* 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) for the proposition that Sixth Amendment requires a jury to make findings of fact before such facts may be used to expose defendant to a sentence beyond statutory maximum). Petitioner's claim lacks merit. The rule espoused in *Cunningham* does not apply to the fact of a prior conviction. *E.g., Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Petitioner was thus was not entitled to a jury finding on the issue of his prior convictions. Petitioner has no colorable sentencing error claim under the Sixth Amendment. Accordingly, the State court's rejection of Petitioner's sentencing claim was not objectively unreasonable and Petitioner **[*25]** is not entitled to relief on this claim. *Lockyer,* 538 U.S. at 75.

F. Petitioner's Ineffective Assistance of Counsel Claims

Petitioner contends his trial counsel was ineffective because counsel 1) failed to bring a motion to "have [Petitioner's] illegal arrest and unconstitutional line-up dismissed;" 2) failed to call a key witness for Petitioner and failed to bring a motion to have certain knives excluded from evidence; 3) failed to present Petitioner's bank statements to the jury; 4) failed to allow a one-day continuance in order to keep an African American juror on the jury; and 5) failed to attack the credibility of certain witnesses.

In order for Petitioner to prevail on his ineffective assistance of counsel claims, he must show: (1) that counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance. *E.g., Strickland,* 466 U.S. at 687. A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them. *Id.* at 697; *Thomas v. Borg,* 159 F.3d 1147, 1151-52 (9th Cir. 1998). Establishing counsel's deficient performance does not warrant setting aside the **[*26]** judgment if the error had no effect on the judgment. *Seidel v. Merkle,* 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must show prejudice such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694. As discussed below, Petitioner cannot establish prejudice resulting from any of his allegations of deficient performance.

1. Petitioner's Illegal Arrest and Line-up Claim

Petitioner's factual allegations are insufficient to establish a claim for relief, as Petitioner has not alleged sufficient facts for the Court to conclude that either his arrest or in-field line-up were unconstitutional. Because Petitioner failed to develop the factual basis for this claim before the State courts, Petitioner is precluded from doing so in this action. *See* 28 U.S.C. § 2254(e)(2).

Petitioner alleges merely that there were inconsistencies between two witness' descriptions of the assailant they saw and Petitioner's appearance *on the day he was arrested.* (Pet. at 41). Although Petitioner does allege that the police officer responsible for the in-field line-up failed to follow

procedure, Petitioner **[*27]** does not allege facts sufficient to establish that, under all the circumstances, the in-field line-up created "a very substantial likelihood of irreparable misidentification" and therefore was unconstitutionally suggestive. *E.g. Manson v. Brathwaite,* 432 U.S. 98, 115, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1976).

Petitioner cannot satisfy the prejudice prong of the *Strickland* test without establishing that either his arrest or line-up was unconstitutional, because absent such a showing, the Court cannot determine whether there is a reasonable probability that Petitioner would have receive a more favorable outcome had his counsel moved to suppress the evidence at issue. Even assuming a motion to exclude evidence of the witnesses' prior identification would have been granted, the witnesses both identified Petitioner during trial. (Pet. at 41-42). Thus, in order for Petitioner to demonstrate prejudice resulting from his counsel's omissions, Petitioner would have to establish not only that his line-up was unconstitutional, but that the witnesses' subsequent identification at trial was so tainted by the line-up that their live testimony would have been excluded. *See, e.g., United States v. Wade,* 388 U.S. 218, 241, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). Petitioner **[*28]** has failed to even allege facts sufficient to demonstrate prejudice. Accordingly, the State court's rejection of Petitioner's claim was not objectively unreasonable, and Petitioner is not entitled to relief on this claim. [7]

FOOTNOTES

7 At the end of each ineffective assistance of counsel claim, Petitioner makes the conclusory allegation that counsel's deficient performance was based in part on a conflict of interest; however, Petitioner fails to identify any such conflict.

2. Counsel's Failure to Call a Witness

Petitioner contends his trial counsel was ineffective for failing to call a witness in Petitioner's defense, Clarence Summerfield. In a related claim, Petitioner contends that his trial counsel was ineffective for failing to bring a motion to exclude the knives found in Mr. Summerfield's car during Petitioner's arrest. (Id. at 46-47). With respect to Petitioner's claims regarding the knives found in Mr. Summerfield's car, Petitioner's allegations are insufficient to state a claim for relief, as they do not reveal any colorable basis for exclusion of the knives from evidence.

With respect to counsel's decision not to call Mr. Summerfield as a witness, the record demonstrates that counsel's **[*29]** decision was reasonable and that Petitioner suffered no prejudice as a result of the decision. The only indication on the record of what Mr. Summerfield might have testified to is found in Exhibit A to the petition. (Pet. at 44). According to a report prepared by defense counsel's investigator, Mr. Summerfield stated that he picked Petitioner up at an intersection with the intention of giving Petitioner a ride to a friend's house. (Pet. at 44). Mr. Summerfield's statement to the defense investigator is inconsistent with Petitioner's version of the facts, as Petitioner contends that Mr. Summerfield was driving Petitioner to check on a damaged vehicle at a tow yard near the scene of the crime. (Pet. at 46). This inconsistency provided a reasonable strategic basis for counsel's decision not to call Mr. Summerfield. Further, a review of Mr. Summerfield's statement reveals that there is no reasonable probability that, had counsel called him to testify, the result of Petitioner's trial would have been different. The only testimony Mr. Summerfield could have provided to support Petitioner's defense was that Mr. Summerfield did not see Petitioner carrying knives when he entered Mr. Summerfield's **[*30]** car. (Pet. at 44). Mr. Summerfield also might have testified that the previous owners of the car could have left the knives in the car, as it was purchased only a few days before Petitioner's arrest. (Id.). Such testimony would have been of very little probative value, especially in light of the eye-witnesses testimony and other evidence offered against Petitioner. It is extremely unlikely that Mr. Summerfield's testimony would have changed the outcome of Petitioner's trial. Accordingly, the State court's rejection of Petitioner's claim was not objectively unreasonable, and Petitioner is not entitled to relief.

3. Failure to Produce Petitioner's Bank Statements

Petitioner contends that his trial counsel should have presented evidence of Petitioner's finances to the jury. (Pet. at 50-51). Specifically, Petitioner contends that his attorney should have presented evidence that Petitioner was receiving unemployment insurance and had one-hundred dollars in his bank account at the time of the crime; Petitioner avers this evidence would have undercut the prosecutions theory regarding Petitioner's motive for the robberies. (Id.). In light of the evidence on the record, it is extremely unlikely **[*31]** that evidence of Petitioner's financial status would have had *any* positive effect on Petitioner's defense at all, let alone changed the outcome of Petitioner's trial. Accordingly, the State court's rejection of Petitioner's claim was not objectively unreasonable, and Petitioner is not entitled to relief.

4. Juror Claim

Petitioner contends his trial counsel was ineffective for failing to obtain a one-day continuance in order to retain an African American juror on the jury. [8] (Pet. at 52). Petitioner cannot possibly establish that, had the juror remained on his jury, the result of his trial would have been different. Accordingly, the State court's rejection of Petitioner's claim was not objectively unreasonable, and Petitioner is not entitled to relief.

FOOTNOTES

8 A Random citation to *Batson v. Kentucky,* 471 U.S. 1052, 105 S. Ct. 2111, 85 L. Ed. 2d 476 (1986) appears amidst Petitioner's various ineffective assistance of counsel claims. To the extent Petitioner is attempting to assert a *Batson* violation, the Court notes that such a claim is unexhausted, does not relate to any conduct on the part of the prosecution, and fails to allege sufficient facts to state a prima facie *Batson* claim.

5. Impeachment Claim

Petitioner contends his trial **[*32]** counsel was ineffective for failing to impeach the credibility of two witnesses called by the prosecution. (Pet. at 55). Petitioner fails to identify the witnesses, fails to provide a factual basis for his assertion that they where biased against him, and fails to indicate any basis for impeachment. Petitioner cannot establish deficient performance or prejudice with respect to this claim. Accordingly, the State court's rejection of Petitioner's claim was not objectively unreasonable, and Petitioner is not entitled to relief.

G. Petitioner's Claim of Judicial Misconduct

Petitioner contends that the trial court improperly told the jury that Petitioner had suffered previous felony convictions. A review of the record reveals that Petitioner's claim lacks merit.

The jury was instructed that Petitioner had been convicted of a prior felony based on the a stipulation between defense counsel and the prosecution. (Lod. Doc. 7 at 1490). The sole purpose of the trial court's instruction was to establish a necessary element of the offense of felon in possession of a firearm; the trial court instructed the jury not to consider the evidence for any other purpose, and this Court must presume the jury **[*33]** followed the trial court's command. *E.g. Weeks v. Angelone,* 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000). Accordingly, the State court's rejection of Petitioner's claim was not objectively unreasonable, and Petitioner is not entitled to relief on this claim.

RECOMMENDATION

Based on the reasons stated above, the Court RECOMMENDS that the petition for writ of habeas corpus be DENIED WITH PREJUDICE and the Clerk of Court be DIRECTED to enter judgment for Respondent.

This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). **[*34]** The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Ylst,* 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: March 11, 2010

/s/ John M. Dixon

UNITED STATES MAGISTRATE JUDGE

*2009 U.S. Dist. LEXIS 75160, **

STEPHAN ZARAGOZA, Petitioner, vs. JOHN MARSHALL, Warden, Respondent.

Case No. CV 08-1029-GW(RC)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 75160

April 28, 2009, Decided
April 28, 2009, Filed

SUBSEQUENT HISTORY: Adopted by, Approved by, Writ of habeas corpus denied, Dismissed by, Judgment entered by Zaragoza v. Marshall, 2009 U.S. Dist. LEXIS 71354 (C.D. Cal., Apr. 28, 2009)
Approved by, Adopted by, Writ of habeas corpus denied, Dismissed by Zaragoza v. Marshall, 2009 U.S. Dist. LEXIS 75157 (C.D. Cal., Aug. 12, 2009)

PRIOR HISTORY: Zaragoza (Stephen) on H.C., 2008 Cal. LEXIS 889 (Cal., Jan. 23, 2008)

CORE TERMS: plea agreement, deadly weapon, assault, petitioner's claim, prosecutor, convicted, felony, habeas corpus, petitioner filed, nolo contendere, citations omitted, new state, enhancement, promised, district attorney, en banc, violent felony, sentencing, sentenced, violent, deputy, federal law, state prison, prison sentence, violating, fulfilled, responded, promisee, breached, sentence

COUNSEL: **[*1]** Stephan Zaragoza, Petitioner, Pro se, San Luis Obispo, CA.

For John Marhsall, Warden, Respondent: Chung L Mar, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: ROSALYN M. CHAPMAN

OPINION

REPORT AND RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE

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

BACKGROUND

I

On May 16, 1995, in Los Angeles County Superior Court case no. KA024070, petitioner Stephen Zaragoza pleaded nolo contendere to, and was convicted of, one count of assault with a deadly weapon in violation of California Penal Code ("P.C.") § 245(a)(1), and the court placed petitioner on 36 months formal probation. Lodgment no. 1.

On July 27, 2006, in Los Angeles County Superior Court case no. KA075676, petitioner pleaded nolo contendere to, and was convicted of, one count of possession of analogs with intent to manufacture methamphetamine in violation of California Health & Safety Code ("H.S.C.") § 11383(c)(1), **[*2]** and petitioner admitted he had previously been convicted of assault with a deadly weapon in violation of P.C. § 245(a)(1). Lodgment nos. 2-3. The petitioner was sentenced to four years in state prison, consisting of the low term of two years for violating H.S.C. § 11383(c)(1), doubled to four years as a second strike under California's Three Strikes law, P.C. §§ 667(b)-(i) and 1170.12(a)-(d). Id. The petitioner did not appeal the judgment. Petition at 2-3.

On or about April 13, 2007, petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court, which denied the petition on June 8, 2007. Lodgment nos. 3-4. On July 9, 2007, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, which denied the petition on July 17, 2007. Lodgment no. 5. On August 6, 2007, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which denied the petition on January 23, 2008. Lodgment no. 6.

II

On February 14, 2008, petitioner, proceeding pro se, filed the pending petition for writ of habeas corpus under 28 U.S.C. § 2254, raising the sole claim that "[w]here petitioner's **[*3]** plea bargain is significantly based on [a] promise that later becomes unavailable, due process requires that promise be fulfilled." Petition at 5. On June 23, 2008, respondent filed an answer, and on July 11, 2008, petitioner filed a reply.

DISCUSSION

III

The petitioner's claim must be considered in light of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), which "circumscribes a federal habeas court's review of a state court decision." Lockyer v. Andrade, 538 U.S. 63, 70, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003); Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 2534, 156 L. Ed. 2d 471 (2003). As amended by the AEDPA, 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- [P] (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 [P] (2) resulted in a decision that was based on an unreasonable **[*4]** determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Further, under the AEDPA, a federal court shall presume the state court's determination of factual issues is correct, and petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The California Supreme Court addressed petitioner's claim when it denied his petition for habeas corpus relief without comment. Gaston v. Palmer, 417 F.3d 1030, 1038 (9th Cir. 2005), amended by, 447 F.3d 1165 (9th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S. Ct. 979, 166 L. Ed. 2d 742 (2007); Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887, 114 S. Ct. 240, 126 L. Ed. 2d 194 (1993). However, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991); Medley v. Runnels, 506 F.3d 857, 862 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1878, 170 L. Ed. 2d 754 (2008). Thus, this Court will consider the reasoned decision of the Los Angeles County Superior Court denying petitioner's claim **[*5]** on the merits. Stenson v. Lambert, 504 F.3d 873, 884 (9th Cir. 2007), cert. denied, 129 S. Ct. 247, 172 L. Ed. 2d 188 (2008); Bonner v. Carey, 425 F.3d 1145, 1148 n.13 (9th Cir. 2005), amended by, 439 F.3d 993 (9th Cir.), cert. denied, 549 U.S. 856, 127 S. Ct. 132, 166 L. Ed. 2d 97 (2006).

IV

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 2547, 81 L. Ed. 2d 437 (1984); Davis v. Woodford, 446 F.3d 957, 961 (9th Cir. 2006). The State's breach of a plea agreement implicates the constitutional guarantee of due process. Johnson, 467 U.S. at 509, 104 S. Ct. at 2547; Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003).

"Plea agreements are contractual in nature and measured by contract law standards." In re Ellis, 356 F.3d 1198, 1207 (9th Cir. 2004) (en banc); Buckley v. Terhune, 441 F.3d 688, 695 (9th Cir. 2006) (en banc), cert. denied, 550 U.S. 913, 127 S. Ct. 2094, 167 L. Ed. 2d 831 (2007); Brown, 337 F.3d at 1159. Under "clearly established federal law[,] . . . the construction and interpretation **[*6]** of state court plea agreements 'and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law.'" Buckley, 441 F.3d at 694-95 (quoting Ricketts v. Adamson, 483 U.S. 1, 6 n.3, 107 S. Ct. 2680, 2684 n.3, 97 L. Ed. 2d 1 (1987)). "Under California law, a contract must be interpreted so as 'to give effect to the mutual intention of the parties as it existed at the time of contracting.'" Davis, 446 F.3d at 962 (quoting Cal. Civ. Code § 1636). In so doing, "[a] court must first look to the plain meaning of the agreement's language." Buckley, 441 F.3d at 695 (citing Cal. Civ. Code §§ 1638, 1644). "If the language in the contract is ambiguous, 'it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it[,]'" which means looking to the "'objectively reasonable' expectation of the promisee." Buckley, 441 F.3d at 695 (citations omitted). "If after this second inquiry the ambiguity remains, 'the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.'" Id. at 695-96 (citations omitted).

The petitioner contends that since he **[*7]** had previously been promised his 1995 assault with a deadly weapon conviction could not be used as a "strike" against him, the Superior Court erred in sentencing him as a second strike offender in 2006. In other words, petitioner claims that, under *Davis,* his 1995 plea agreement was breached when his 1995 conviction was used as a "strike" to double his 2006 sentence. [1] The petitioner supports his claim by reference to the written plea agreement he (but apparently not the prosecutor) signed in 1995, which included the statement that "this is not a violent feloney [sic] for future enhancement nor is it considered a strike under the new state 3 strikes law." Petition, Exh. 3; see also Lodgment no. 1 at 7:13-22 (petitioner's defense attorney states he has promised petitioner "[t]hat this would be placed on the record that this is not a violent felony for future enhancement nor is it going to be deemed a strike under the new state three-strikes law").

FOOTNOTES

1 This allegedly unconstitutional error has caused petitioner to "serve 80 percent of his . . . prison sentence[,]" People v. McCain, 36 Cal. App. 4th 817, 819, 42 Cal. Rptr. 2d 779 (1995); see also In re Martinez, 30 Cal. 4th 29, 34, 131 Cal. Rptr. 2d 921, 924, 65 P.3d 411 (2003) **[*8]** ("[A] recidivist with a prior strike may earn postsentence credits up to 20 percent of the total prison sentence."), since California's "Three Strikes" law, at the time petitioner was convicted and sentenced, provided:

> Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more [serious or violent] prior felony convictions . . . [t]he total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

P.C. §§ 667(c)(5) (1995), 1170.12(a)(5) (2006).

The Superior Court, in denying petitioner's claim, made the following factual findings underlying petitioner's 1995 nolo contendere plea:

> Petitioner executed a written Tahl form prior to entering his plea [in case no. KA024070]. One of the conditions of the plea noted on the Tahl form at box 14 was "the understanding that this is not a violent feloney [sic] for future enhancement nor is it considered a strike under the new state 3 strike law." During the oral **[*9]** waivers taken prior to the plea, petitioner's counsel noted that he had "promised" petitioner that "this is not a violent felony for future enhancement nor is it going to be deemed a strike under the new state three-strikes law." [P] During the oral waivers, the deputy district attorney further stated the terms of the negotiated disposition: "I also need to advise you, sir, this charge you are pleading to today *under the current state of the law* is not a serious or violent felony under [P.C. §§] 1192.7 or 667.5. And, *under the law today,* this charge here is not considered a strike." The deputy district attorney then asked petitioner if he understood this, to which petitioner answered "Yes."

Lodgment no. 4 at 3 (citations omitted; emphasis in original); see also Lodgment no. 1 at 7:13-19, 8:12-16; Petition, Exh. 3.

The Superior Court then rejected petitioner's claim, stating:

> When the Three Strikes law was enacted, assault with a deadly weapon, absent personal use of a dangerous or deadly weapon or the personal infliction of great bodily injury, was not considered a serious or "strike" felony. In March 2000, however, the electorate enacted Proposition 21 which, among other things, added **[*10]** assault with a deadly weapon to the list of felonies which qualify as a serious or "strike" felony. [P] Thus, although petitioner's conviction for assault with a deadly weapon was not a "strike" at the time of his plea in the earlier [1995] case, a subsequent change in the law made it so at the time of his plea in the immediate [2006] case. The clear terms of the plea agreement in the earlier [1995] case, as stated by the deputy district attorney during the plea admonition, simply described the state of the law at the time of the plea. **Significantly, the plea agreement did not purport to protect petitioner from future changes in the law.** Thus, the subsequent change in the law in March 2000 did not violate the terms of [petitioner's] original [1995] plea agreement. Consequently, the use of the

> earlier conviction as a strike in the immediate [2006] case, based as it was on a change in the law, did not violate the terms of [petitioner's] plea agreement in the earlier [1995] case. On this ground, therefore, his petition is denied.

Lodgment no. 4 at 4 (citations omitted; emphasis added).

Initially, petitioner's claim is without merit since he **admitted** his 1995 conviction was a strike under **[*11]** the Three Strikes law during his 2006 plea colloquy. [2] In fact, petitioner's 2006 plea agreement afforded petitioner a low-term sentence in exchange for his guilty plea to violating H.S.C. § 11383(c)(1) **and** his admission of the prior 1995 conviction as a "strike." Lodgment no. 2 at 8:14-22. Since petitioner voluntarily agreed his 1995 conviction was a "strike" for sentencing purposes on his 2006 conviction, he cannot now complain he was sentenced in accordance with that agreement. Cf. Blakely v. Washington, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

FOOTNOTES

2 Specifically, as part of the 2006 plea colloquy, the prosecutor asked petitioner:

> Also, **it was alleged that you have a prior serious felony, more commonly referred to as a strike conviction.** This was alleged under Penal Code Section 1170.12 and Penal Code Section 667(b) through (i), and that is you were convicted in Los Angeles County Superior Court, May 16 of 1995, case number KA024070 of Penal Code Section 245(a)(1), and that was an assault with a deadly weapon. [P] **Is it true that you sustained that conviction?**

Lodgment no. 2 at 8:14-21 (emphasis added). Petitioner responded **"[y]es."** Id. at 8:22 (emphasis added). The **[*12]** prosecutor also informed petitioner:

> I have to point out that if you earn any credits while in custody, that's up to the Department of Corrections. It could be you have to serve 100 percent of your four years; **however, you have to serve at least 80%, because by law, the Department of Corrections cannot give you more than 20% credits. [P] Do you understand that?**

Id. at 2:24-3:2, 7:22-27 (emphasis added). Petitioner responded **"[y]es."** Id. at 3:3, 7:28 (emphasis added).

In any event, even if petitioner had not agreed that his 1995 conviction was a strike under the Three Strikes law, petitioner's reliance on *Davis* is misplaced in showing a breach of his 1995 plea agreement. In *Davis,* the defendant entered a plea in 1986 to eight robbery counts with the understanding "there would be only one conviction on his record" -- as the prosecutor specifically promised. Davis, 446 F.3d at 959. In 2000, a jury convicted Davis of a new felony, and the trial court mistakenly determined he "had eight prior 'strikes' due to the 1986 robbery conviction. . . ." Id. at 958-59. The Ninth Circuit concluded the use of Davis's 1986 conviction as eight separate "strikes" breached his 1986 plea agreement, and granted **[*13]** Davis's habeas petition and remanded the matter for resentencing. Id. at 962-63.

Here, unlike *Davis,* the prosecutor made no specific promise that petitioner's assault with a deadly weapon conviction would **not** be considered a "strike" in any future sentencing. Rather, as the Superior Court noted, the prosecutor simply explained to petitioner that his nolo contendere plea did not constitute a strike ***"under the current state of the law[,]"*** and petitioner acknowledged he understood. Lodgment no. 1 at 8:12-18 (emphasis added). Thus, *Davis* does not benefit petitioner, and his claim of breach of plea agreement is without merit.

For all these reasons, the California Supreme Court's denial of petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) adopting the Report and Recommendation as the findings of fact and conclusions of law herein; and (3) directing that Judgment be entered denying the petition and dismissing the action with prejudice.

DATE: April 28, 2009

/s/ ROSALYN M. CHAPMAN

ROSALYN M. CHAPMAN

UNITED STATES **[*14]** MAGISTRATE JUDGE

*2009 U.S. Dist. LEXIS 25601, **

MIGUEL ANGEL ESCALERA, Petitioner, vs. VICTOR ALMAGER, Respondent.

CASE NO. CV F 07-01644 LJO WMW HC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 25601

March 18, 2009, Decided
March 19, 2009, Filed

PRIOR HISTORY: Escalera (Miguel Angel) on H.C., 2007 Cal. LEXIS 7911 (Cal., July 25, 2007)

CORE TERMS: prior conviction, sentence, federal law, jury trial, plea agreements, enhance, arrest, deficient, contest, summarily denied, quotation marks, methamphetamine, enhancement, sentencing, convicted, nolo, habeas petition, possession of cocaine, federal habeas, trial counsel, appealability, certificate, ineffective, firearm, seizure, corpus, armed, habeas corpus relief, direct consequences, counsel failed

COUNSEL: **[*1]** Miguel Angel Escalera, Petitioner, Pro se, AVENAL, CA.

For Almager, Respondent: Barton Elwell Bowers, LEAD ATTORNEY, Attorney General's Office for the State of California, Sacramento, CA.

JUDGES: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

OPINION BY: Lawrence J. O'Neill

OPINION

ORDER DENYING FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS WITH PREJUDICE; DIRECTING CLERK OF COURT TO ENTER JUDGMENT FOR RESPONDENT; DECLINING ISSUANCE OF CERTIFICATE OF APPEALABILITY

On August 31, 2007, Miguel Angel Escalera ("Petitioner"), a *pro se* California prisoner, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition") in the United States District Court for the Central District of California ("Central

District"). (Pet. 1.) [1] On October 10, 2007, the Central District transferred the Petition to the United States District Court for the Eastern District of California ("Eastern District") pursuant to 28 U.S.C. § 2241(d), finding Petitioner's state conviction arose from the Kern County Superior Court, located within the jurisdictional boundaries of the Eastern District, and that the Eastern District was the more convenient forum. *See* 28 U.S.C. §§ 84(b), 2241(d). On November **[*2]** 14, 2007, the Eastern District received the Petition.

FOOTNOTES

1 Although petitions for habeas corpus relief are routinely referred to a Magistrate Judge, *see* L.R. 72-302, the Court exercises its discretion to address the Petition pursuant to Local Rule 72-302(d).

On December 11, 2007, Petitioner filed a First Amended Petition ("FAP"). On September 3, 2008, Victor Almager ("Respondent") filed an Answer to the FAP. As of the date of this Order, Petitioner has not filed a Traverse or a request for an extension of time to do so. Thus, this matter is ready for decision.

PROCEDURAL HISTORY

On May 4, 2005, Petitioner pled no contest in the Kern County Superior Court to possession of cocaine for sale (Cal. Health & Safety Code § 11351), and admitted being personally armed with a firearm (Cal. Penal Code § 12022(c)) and having a prior strike conviction within the meaning of California's Three Strikes Law (*id.* §§ 667(b)-(i), 1170.12). (Clerk's Tr. ("CT") 49, 105.) On July 21, 2005, the superior court sentenced Petitioner to ten years in state prison: the middle term of three years on Petitioner's possession offense, doubled to six years because of his prior strike conviction, and a four-year arming enhancement. **[*3]** (*Id.* 105.)

On July 21, 2005, Petitioner appealed his conviction and sentence to the California Court of Appeal. (CT 102.) On March 24, 2006, the court of appeal modified the judgment to award additional presentence custody credit and to impose a mandatory fine, surcharge, and penalty assessment, but otherwise affirmed the conviction and sentence. (Lodged Doc. ("LD") 5 at 3.) Petitioner did not file a petition for review in the California Supreme Court. (*See* FAP 2.) [2]

FOOTNOTES

2 For ease of reference, the Court utilizes the CM/ECF pagination for the FAP.

On December 29, 2006, Petitioner filed a habeas petition in the Kern County Superior Court, which denied the petition in a reasoned decision on February 20, 2007. (LD 6; FAP 29-31.) On March 12, 2007, Petitioner filed a habeas petition in the California Supreme Court and a supplemental habeas petition therein on May 18, 2007. (LD 7-8.) On July 25, 2007, the supreme court summarily denied the habeas petition. (FAP 27.)

On August 31, 2007, Petitioner filed his federal Petition in the Central District, and this Court received the Petition on November 14, 2007.

FACTUAL BACKGROUND

[3]

FOOTNOTES

3 Because the California courts did not recite the factual background, the **[*4]** Court adopts

the factual background from Petitioner's Opening Brief on direct appeal as a fair and accurate summary of the evidence presented at trial.

The following information has been taken from the presentence report.

> On November 18, 2004, officers with the Bakersfield Police Department conducted a surveillance of a residence in an attempt to contact and arrest [Petitioner]. [Petitioner] was the subject of a warrant out of West Covina, Los Angeles County that had been issued for attempted homicide and kidnaping. [Petitioner] was arrested after he was observed exiting the residence and entering a vehicle with a female subject. [4] Following the arrest, the subject informed the officers that she had resided at the residence with [Petitioner] for the past nine months and had observed him in possession of cocaine on numerous occasions. A search warrant was then obtained and the residence was searched. Two safes were located in the master bedroom that contained a quantity of packaged cocaine, methamphetamine, a loaded revolver, and a digital scale. More methamphetamine and a large amount of currency was discovered hidden in the kitchen. While being transported to Los Angeles after his arrest, **[*5]** [Petitioner] made statements admitting possession of the cocaine and methamphetamine. (Probation Report p. 6-7.)

(LD 4 at 3.)

FOOTNOTES

4 [Petitioner's Opening Brief footnote 2:] According to the reporter's transcript, [Petitioner] was arrested only on the warrant. A complaint as to the instant Kern County case was filed on January 6, 2005, at which time a warrant was issued for his arrest. At the time, [Petitioner] was in custody in Los Angeles County jail. Los Angeles County ultimately did not pursue the matter that was the subject of the arrest warrant. (Probation Report, p.2; RT, vol. 1, 19-22.)

PETITIONER'S CLAIMS

1. Ineffective assistance of trial counsel (FAP 4, 16);

2. Use of Petitioner's prior conviction to enhance his sentence violates the Double Jeopardy Clause (*id.* 4, 13, 20);

3. Use of Petitioner's prior conviction to enhance his sentence violates his right to a jury trial (*id.* 5, 17, 21);

4. Use of Petitioner's prior conviction to enhance his sentence violates the terms of two prior plea agreements (*id.* 5, 19); and

5. Petitioner was subject to an unreasonable search and seizure (*id.* 8, 24).

STANDARD OF REVIEW

The current Petition was filed after the Antiterrorism and Effective Death Penalty **[*6]** Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), was signed into law and is thus subject to its provisions. *See Lindh v. Murphy,* 521 U.S. 320, 326-327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The standard of review applicable to Petitioner's claims is set forth in 28 U.S.C. § 2254 (d), as amended by the AEDPA:

> (d) An application for a writ of habeas corpus on behalf of a person in custody

> pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). **[*7]** To determine what, if any, "clearly established" United States Supreme Court law exists, the court may examine decisions other than those of the United States Supreme Court. *LaJoie v. Thompson,* 217 F.3d 663, 669 n.6 (9th Cir. 2000). Ninth Circuit cases "may be persuasive." *Duhaime v. Ducharme,* 200 F.3d 597, 598 (9th Cir. 2000) (as amended). On the other hand, a state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law if no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court. *Brewer v. Hall,* 378 F.3d 952, 955 (9th Cir. 2004); *see also Carey v. Musladin,* 549 U.S. 70, 76-77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

A state court decision is "contrary to" clearly established federal law if the decision 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. *Early v. Packer,* 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam); *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 **[*8]** habeas court is "unconstrained by § 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,* 537 U.S. at 8.

State court decisions which 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 are based on 'an *unreasonable* determination of the facts.'" *Early,* 537 U.S. at 11 (*quoting* 28 U.S.C. § 2254(d)). Consequently, 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. *Williams,* 529 U.S. at 406-10, 413; *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (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." *Woodford,* 537 U.S. at 24-25, 27. An "unreasonable application" is different from an "erroneous" or "incorrect" **[*9]** one. *Williams,* 529 U.S. at 409-10; *see also Waddington v. Sarausad,* 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009); *Woodford,* 537 U.S. at 25.

A state court factual determination must be presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Furthermore, a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus. *Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005).

DISCUSSION

Claim One

In his first claim, Petitioner alleges several instances of ineffective assistance of trial counsel before and during the proceedings that resulted in Petitioner's plea of no contest. (FAP 4, 16-19.) The California Supreme Court summarily denied this claim. (FAP 27.) While a state court's summary denial is considered to be on the merits, *see Hunter v. Aispuro,* 982 F.2d 344, 347-48 (9th Cir. 1992), here there is no "reasoned" state court decision on this claim, and the Court accordingly conducts an "independent review of the record." *See Delgado v. Lewis,* 223 F.3d 976, 981-82 (9th Cir. 2000). "That is, although we independently review the record, we still defer to the state court's ultimate decision." **[*10]** *Pirtle v. Morgan,* 313 F.3d 1160, 1167 (9th Cir. 2002).

For a petitioner to prevail on an ineffective assistance of counsel claim, he must show: (1) that counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them. *Id.* at 697; *Thomas v. Borg,* 159 F.3d 1147, 1151-52 (9th Cir. 1998).

To prove deficient performance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 687-88. Because of the difficulty in evaluating counsel's performance, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Only if counsel's acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance will the petitioner prove deficient performance. *Id.* at 690; *United States v. Quintero-Barraza,* 78 F.3d 1344, 1348 (9th Cir. 1995). **[*11]** The petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland,* 466 U.S. at 689.

Establishing counsel's deficient performance does not warrant setting aside the judgment if the error had no effect on the judgment. *Id.* at 691; *Seidel v. Merkle,* 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must show prejudice such that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Strickland,* 466 U.S. at 694. The prejudice analysis equally applies in the plea context. *See Hill v. Lockhart,* 474 U.S. 52, 57, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). A petitioner will only prevail if he can prove that counsel's errors resulted in a "proceeding [that] was fundamentally unfair or unreliable." *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

First, Petitioner contends that he "never saw State counsel but for just minutes, just during each court appearance." **[*12]** (FAP 16.) However, at the time of Petitioner's plea, the trial court asked Petitioner "Have you had enough time to discuss the plea, the admission on the prior, as well as the armed clause with your attorney, Mr. Lukehart?", to which Petitioner responded "Yes, sir." (Rep.'s Tr. ("RT") 8-9.) In addition, Petitioner has not shown how, having had more contact with his trial counsel, he would not have pled no contest [5] and would have insisted on going to trial.

FOOTNOTES

5 Petitioner's plea of no contest, or "nolo contendere," is equivalent to a plea of guilty. *See* Cal. Penal Code § 1016 ("The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. . . .).

Second, Petitioner states that his counsel promised to file a suppression motion and a motion to dismiss, yet counsel did not do so. (FAP 16.) Petitioner must overcome the presumption that his counsel's decision not file a suppression motion and **[*13]** a motion to dismiss "might be considered sound trial strategy." *Strickland,* 466 U.S. at 689. In addition, trial counsel need not file a motion that he or she knows to be meritless on the facts and the law. *See Lowry v. Lewis,* 21 F.3d 344, 346 (9th Cir. 1994). Here, Petitioner provides no grounds for a suppression motion or a motion to dismiss. Furthermore, the prosecution had ample evidence to convict Petitioner of possession of cocaine for sale and being personally armed with a firearm. While being transported to Los Angeles after his arrest, Petitioner admitted to the possession of cocaine and methamphetamine found in a residence, which contained (1) two safes that housed a quantity of packaged cocaine, methamphetamine, a loaded revolver, and a digital scale, and (2) methamphetamine and a large amount of currency in the kitchen. (LD 4 at 3.)

Third, Petitioner claims his counsel failed to investigate and prepare for his case, and did not obtain a copy of Petitioner's 1993 plea agreement and hearing transcripts before advising Petitioner on how to "handle" his prior strike allegations. (FAP 17.) Petitioner's assertion is conclusory and unsupported, and Petitioner fails to show any prejudice **[*14]** from his allegation. *See Jones v. Gomez,* 66 F.3d 199, 204-05 (9th Cir. 1995) (finding a petitioner's conclusory allegations did not meet the specificity requirement); *James v. Borg,* 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

Fourth, Petitioner states that his counsel failed to protect him and inform him of a complete and correct set of facts and the consequences of a plea of no contest. (FAP 17.) Petitioner's allegation that his counsel failed to inform him of his case is conclusory and unsupported, and Petitioner's claim that his counsel failed to explain the consequences of his plea is belied by Petitioner's acknowledgment during plea proceedings that he "had enough time to discuss the plea, the admission on the prior, as well as the armed clause" with his attorney. (RT 8-9.) In addition, the trial court fully explained the consequences of Petitioner's plea. (*Id.* 2-8.)

Fifth, Petitioner alleges that his counsel "lied" to him by stating that if Petitioner "did not admit to the State's allegations in open court [Petitioner] was going to spend 51 years to the rest of his life in . . **[*15]** . prison . . . ." (FAP 17.) The transcript of plea proceedings provides the best evidence on the issue of coercion. *See, e.g., United States v. Jimenez-Dominguez,* 296 F.3d 863, 869 (9th Cir. 2002). Petitioner's claim fails because the trial court provided a complete and correct explanation of the consequences of Petitioner's plea (*see* RT 2-9), and Petitioner acknowledged that no other promises were made to induce him to enter his plea (*see id.* 6).

Finally, Petitioner contends his trial counsel filed a motion to strike his prior 1993 conviction only after Petitioner admitted in open court that he did in fact suffer that conviction. (FAP 17.) Petitioner fails to show prejudice from counsel's timing because it did not prevent the trial court from considering whether to strike the prior conviction for the purpose of sentencing. *See, e.g., People v. Carmony,* 33 Cal. 4th 367, 372-74, 14 Cal. Rptr. 3d 880, 92 P.3d 369 (2004) (acknowledging trial court's discretion to strike defendant's prior convictions); *see also People v. Lee,* 161 Cal. App. 4th 124, 126-29, 73 Cal. Rptr. 3d 811 (2008) (same).

Based on the foregoing, Petitioner fails to show trial counsel's performance was deficient. *Strickland,* 466 U.S. at 687-88. Moreover, even if trial counsel's **[*16]** performance was deficient, Petitioner fails to show the result of the trial would have been any different. *Id.* Accordingly, the Court finds that the California courts' rejection of Petitioner's ineffective assistance of trial counsel claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claim Two

In his second claim, Petitioner asserts that use of a prior conviction to enhance his current sentence violates the Double Jeopardy Clause. (FAP 4, 13, 20-21.) Because the California Supreme Court summarily denied this claim, the Court must "look through" to the last reasoned decision, that of the Kern County Superior Court on habeas review. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803-05, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). In rejecting Petitioner's claim, the superior court stated:

> [Petitioner] does not cite any authority, nor is the court aware of any authority which declares the three strikes law as applied here unconstitutional on the grounds [Petitioner] alleges. The criminal file notes that [Petitioner] was convicted of grossly negligently [sic] firing a firearm in 1993, and **[*17]** in 1998 convicted of Penal Code Section 245(a)(1) which is assault with a deadly weapon likely to cause great bodily injury. These prior convictions could be, and in fact were, taken into account to determine sentencing on his present crimes. Petitioner is not being refurnished for his previous convictions. The legislature gave the court authority to take previous convictions into account before imposing sentence on his present crimes.

(FAP 31.)

The Double Jeopardy Clause protects against successive prosecutions for the same offense after an acquittal or conviction, and against multiple punishments for the same offense. *Monge v. California,* 524 U.S. 721, 727-28, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998); *Witte v. United States,* 515 U.S. 389, 397, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995). However, "[e]nhancement statutes, [such as] recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction." *Witte,* 515 U.S. at 400 (internal quotation marks and citation omitted). "In repeatedly upholding such recidivism statutes," the Supreme Court has "rejected double jeopardy challenges because the enhanced punishment imposed for the later offense is not to be viewed as either a new jeopardy or additional **[*18]** penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* (internal quotation marks omitted).

Here, use of Petitioner's prior conviction to enhance his current sentence did not place Petitioner in double jeopardy. *Witte,* 515 U.S. at 400; *see, e.g., Simpson v. Thomas,* 528 F.3d 685, 689-90 (9th Cir. 2008) (stating California's Three Strikes Law does not violate the Double Jeopardy Clause); *Allen v. Stratton,* 428 F. Supp. 2d 1064, 1077-78 (C.D. Cal. 2006) (same).

Accordingly, the Court finds that the California courts' rejection of Petitioner's double jeopardy claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claim Three

In his third claim, Petitioner states that use of a prior conviction violates his right to a jury trial. (FAP 5, 17, 21-23.) Because the California Supreme Court summarily denied this claim, the Court must "look through" to the last reasoned decision, that of the Kern County Superior Court on habeas review. *See Ylst,* 501 U.S. at 803-05. **[*19]** In rejecting Petitioner's claim, the superior court stated:

> The court also notes [Petitioner's] arguments as to the nolo contender plea. Petitioner cites authority which requires that such a plea [be] know[ing], voluntary, and intelligent. Petitioner alleges that he was not aware of the consequences of this plea, and that he now wants a jury trial to revisit the case. The file indicates that there was an exhaustive explanation of the rights [Petitioner] would be giving up if he chose to plead guilty. This exhaustive list of his relinquished rights was done by the judge on May 4, 2005. It was noted in the file that [Petitioner] has requested a

> jury trial and pled not guilty. The jury trial set for May 4, 2005 was vacated due to his plea of nolo contender. The court did not take counsel's assertions of [Petitioner's] understanding of the consequences of such a plea alone but independently determined on its own that [Petitioner] desired to plea nolo contender. Further, the appeals court in its ruling independently review[ed] the entire record and found no reason to disturb the convictions. The conviction was affirmed in all respects on March 21, 2006 save for applying additional sentencing **[*20]** credits which were awarded [Petitioner].

(FAP 30-31.)

"Petitioner has no federal right to have a jury decide" the "existence of a prior conviction." *Davis v. Woodford,* 446 F.3d 957, 963 (9th Cir. 2006). The fact that Petitioner had a state statutory right to a jury trial on his prior convictions does not avail him. *See Dillard v. Roe,* 244 F.3d 758, 769 (9th Cir.2001) (discussing Cal. Penal Code § 1025). The Constitution permits prior convictions to be used to enhance a sentence, without being submitted to a jury, so long as the convictions were themselves obtained in proceedings that required the right to a jury trial and proof beyond a reasonable doubt. *Apprendi v. New Jersey,* 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). There is no suggestion that Petitioner's prior convictions were obtained without the requisite procedural safeguards. In any event, Petitioner admitted the fact of his prior convictions when he entered his plea of no contest. (RT 2-10.)

Accordingly, the Court finds that the California courts' rejection of Petitioner's jury trial claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas **[*21]** relief is not warranted on this claim.

Claim Four

In his fourth claim, Petitioner argues that use of his prior conviction to enhance his sentence violates the terms of a 1993 and 1998 plea agreement. (FAP 5, 19-20.) Because the California Supreme Court summarily denied this claim, the Court must "look through" to the last reasoned decision, that of the Kern County Superior Court on habeas review. *See Ylst,* 501 U.S. at 803-05. In rejecting Petitioner's claim, the superior court stated:

> [Petitioner] does not cite any authority, nor is the court aware of any authority which declares the three strikes law as applied here unconstitutional on the grounds [Petitioner] alleges. The criminal file notes that [Petitioner] was convicted of grossly negligently [sic] firing a firearm in 1993, and in 1998 convicted of Penal Code Section 245(a)(1) which is assault with a deadly weapon likely to cause great bodily injury. These prior convictions could be, and in fact were, taken into account to determine sentencing on his present crimes. Petitioner is not being refurnished for his previous convictions. The legislature gave the court authority to take previous convictions into account before imposing sentence **[*22]** on his present crimes.

(FAP 31.)

Due process guarantees under the Fifth Amendment require that a defendant's guilty plea be voluntary and intelligent. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Torrey v. Estelle,* 842 F.2d 234, 235 (9th Cir. 1988). A plea of guilty is voluntary only if it is "entered by one fully aware of the *direct* consequences" of his plea. *Torrey,* 842 F.2d at 235 (*quoting Brady v. United States,* 397 U.S. 742, 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)) (citation and internal quotation marks omitted). "[A]lthough a defendant is entitled to be informed of the direct consequences of the plea, the court need not advise him of all the possible collateral consequences." *Id.* (internal quotation marks omitted); *accord United States v. Amador-Leal,* 276 F.3d 511, 514 (9th Cir. 2002).

"The distinction between a direct and collateral consequence of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Torrey,* 842 F.2d at 236 (internal quotation marks omitted). "In many cases, the determination that a particular consequence is 'collateral' has rested on the fact that it was in the hands of another government agency or in **[*23]** the hands of the defendant himself." *Id.* "In determining the voluntariness of a plea and whether it has been made intelligently, the court cannot be required to foresee an accused's future conduct and to predict all possible alternative ramifications thereof." *Id.* "The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea." *United States v. Brownlie,* 915 F.2d 527, 528 (9th Cir. 1990).

In addition, under California law, plea bargains are interpreted according to contract law principles, *see Buckley v. Terhune,* 441 F.3d 688, 694-95 (9th Cir. 2006) (en banc), and a criminal defendant has a due process right to enforce the terms of his plea agreement, *id.* at 694 (*citing Santobello v. New York,* 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). Plea bargains are "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws." *Davis,* 446 F.3d at 962 (citation and internal quotation marks omitted).

Here, to the extent Petitioner alleges that imposition of a sentencing enhancement violates the terms **[*24]** his 1993 and 1998 plea agreement, his claim is without merit. First, use of Petitioner's prior 1993 conviction to enhance his sentence is not a "direct consequence" of any plea agreements. This is because use of the 1993 conviction as an enhancement was not a result that represented a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Torrey,* 842 F.2d at 236. The use of Petitioner's 1993 conviction is rather a "collateral consequence" in "the hands of the defendant himself," *id.;* "[t]he possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea," *Brownlie,* 915 F.2d at 528. Therefore, the trial courts were not required to advise Petitioner of the potential use of his convictions as enhancements under California law.

Second, Petitioner does not show an express term limiting the State's power to use his prior convictions for future sentencing enhancements. (*See* CT 66-81.) In addition, nothing in the record suggests that Petitioner, much less the State, understood any plea agreements to limit future enhancements **[*25]** based on Petitioner's prior convictions. Furthermore, the comments of the judge during Petitioner's 1993 plea proceeding neither explicitly nor implicitly altered the terms of Petitioner's plea agreement. (*See* CT 66-81.)

Accordingly, the Court finds that the California courts' rejection of Petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claim Five

In his fifth and final claim, Petitioner contends that he was subject to an unreasonable search and seizure. (FAP 8, 24.) Specifically, Petitioner claims that there was no probable cause for his arrest warrant. (*Id.* 24.) Because the California Supreme Court summarily denied this claim, the Court must "look through" to the last reasoned decision, that of the Kern County Superior Court on habeas review. *See Ylst,* 501 U.S. at 803-05. In rejecting Petitioner's claim, the superior court stated:

> Petitioner contends that as he was driving his vehicle, he was stopped by police, and forcibly with his girlfriend taken from the vehicle and driven to his house and coerced to open up a safe in **[*26]** which cocaine and a weapon were found.
>
> The facts in [Petitioner's] petition differ from those he raised on appeal. In his appellate brief, [Petitioner] states that there was a warrant for his arrest in Los Angeles County for attempted murder and kidnapping. Pursuant to also [sic] police

> surveillance, [Petitioner] was arrested pursuant to a warrant outside his home as he was getting into the automobile. His girlfriend at the time mentioned the possession of illegal drugs.
>
> Even if [Petitioner] still contends that his conviction was due to an illegal search and seizure, such matters are not cognizable in habeas corpus proceedings. *In re Harris,* (1993) 5 Cal.4th 813, 826. Likewise admissibility of evidence is also not a subject for habeas corpus petitions. *In re Harris,* (1993) 5 Cal.4th 813, 836, 21 Cal. Rptr. 2d 373, 855 P.2d 391.

(FAP 30.) Here, the Kern County Superior Court did not reach the merits of Petitioner's search and seizure claim. The Court accordingly conducts a de novo review of this claim. *See Pirtle,* 313 F.3d at 1167-68 ("[W]e hold that when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo. . . . Nonetheless, under AEDPA, factual determinations by **[*27]** the state court are presumed correct and can be rebutted only by clear and convincing evidence.").

If the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not pursue habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure should have been excluded from trial. *See Stone v. Powell,* 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). California law expressly provides a defendant with an opportunity to move to suppress evidence on the basis that it was obtained in violation of the Fourth Amendment. *See* Cal. Penal Code § 1538.5. "The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." *Ortiz-Sandoval v. Gomez,* 81 F.3d 891, 899 (9th Cir. 1996) (recognizing that California Penal Code section 1538.5 provides a defendant a full and fair opportunity to litigate his claim in state court within the meaning of *Stone*).

Here, although Petitioner had the opportunity to present a motion to suppress evidence, he did not do so. In addition, Petitioner pled no contest to possession of cocaine for sale and admitted **[*28]** being personally armed with a firearm. Accordingly, Petitioner's Fourth Amendment claim is not cognizable on federal habeas review.

Certificate of Appealability

An applicant seeking to appeal a district court's dismissal of a habeas petition under 28 U.S.C. § 2254 must first obtain a certificate of appealability ("COA") from a district judge or circuit judge. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A judge should either grant the COA or state reasons why it should not issue, and the COA request should be decided by a district court in the first instance. Fed. R. App. P. 22(b)(1); *United States v. Asrar,* 116 F.3d 1268, 1270 (9th Cir. 1997).

The applicant for a COA must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel,* 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). A "substantial showing" is defined as a demonstration (1) that the issues are debatable among jurists of reason; (2) that a court could resolve the issues differently; or (3) that issues are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); *see Slack,* 529 U.S. at 483-84 (stating **[*29]** that except for substituting the word "constitutional" for the word "federal," § 2253 codified the pre-AEDPA standard announced in *Barefoot v. Estelle*).

Where, as present here, a district court has rejected constitutional claims on their merits, the COA standard is straightforward. "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484. The Court has reviewed the record of this case and finds that reasonable jurists would not find the Court's assessment of the constitutional claims debatable or wrong. On the merits of this case, reasonable jurists would not debate the constitutionality of Petitioner's

conviction and sentence. Accordingly, the Court declines to issue a certificate of appealability.

CONCLUSION AND ORDER

For the reasons discussed above, the Court DENIES the First Amended Petition for Writ of Habeas Corpus with prejudice and DECLINES the issuance of a certificate of appealability. The Clerk of Court is ORDERED to enter Judgment for Respondent and to close Case No. CV F 07-01644 LJO WMW HC.

IT IS SO ORDERED.

Dated: March 18, 2009

/s/ Lawrence J. O'Neill

UNITED **[*30]** STATES DISTRICT JUDGE

*2009 U.S. Dist. LEXIS 19233, **

KIM LOBOU GAMBLE, Petitioner, vs. R. J. SUBIA, et al., Respondents.

CASE NO. CV F 07-01645 LJO WMW HC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 19233

March 11, 2009, Decided
March 12, 2009, Filed

PRIOR HISTORY: Gamble v. Subia, 2008 U.S. Dist. LEXIS 53904 (E.D. Cal., May 22, 2008)

CORE TERMS: sentence, felony, cruel, burglary, prior conviction, unusual punishment, offender, habeas petitions, habeas corpus, assault, years to life, misdemeanor, probation, theft, federal law, ineffective, prison, parole, plea agreement, summarily denied, jail, criminal history, grand theft, disproportionality, convicted, weapon, petty, guilty plea, degree burglary, serious felonies

COUNSEL: [*1] Kim Lobou Gamble, Petitioner, Pro se, Ione, CA.

For R J Subia, Warden, Respondent: Catherine Chatman, LEAD ATTORNEY, Attorney General's Office for the State of California, Department of Justice, Sacramento, CA.

JUDGES: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

OPINION BY: Lawrence J. O'Neill

OPINION

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS WITH PREJUDICE; DIRECTING CLERK OF COURT TO ENTER JUDGMENT FOR RESPONDENTS; DECLINING ISSUANCE OF CERTIFICATE OF APPEALABILITY

On October 25, 2007, Kim Lobou Gamble ("Petitioner"), a *pro se* California prisoner, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). [1] On September 10, 2008, R. J. Subia ("Respondent") filed an Answer to the Petition. On October 20, 2008, Petitioner filed a Traverse. Thus, this matter is ready for

decision.

FOOTNOTES

1 Although petitions for habeas corpus relief are routinely referred to a Magistrate Judge, *see* L.R. 72-302, the Court exercises its discretion to address the Petition pursuant to Local Rule 72-302(d).

PROCEDURAL HISTORY

On March 11, 2003, Petitioner pled guilty in the Stanislaus County Superior Court to second degree burglary (Cal. Penal Code § 459) and petty theft with a **[*2]** prior conviction (*id.* § 666). (2003 Clerk's Tr. ("CT") 98.) Petitioner also admitted that he sustained three prior felony convictions that were serious felony convictions within the meaning of California's Three Strikes law (Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(e)), and three prior prison terms (*id.* § 667.5 (b)). (2003 CT 56-63.) On July 17, 2003, the superior court sentenced Petitioner to twenty-eight years to life in state prison. (*Id.* 98.)

On July 23, 2003, Petitioner appealed his conviction and sentence to the California Court of Appeal. (2003 CT 100.) [2] On August 11, 2004, the court of appeal remanded the case for the purpose of allowing Petitioner a hearing on a motion to substitute counsel and a hearing on Petitioner's motion to withdraw his guilty plea. (Lodged Doc. ("LD") 4 at 3-4.) On remand, the superior court denied Petitioner's motions to substitute counsel and to withdraw his plea and reinstated Petitioner's conviction and sentence on June 28, 2005. (2004 CT 11, 98.)

FOOTNOTES

2 Petitioner filed several habeas petitions while his first direct appeal was pending. On January 22, 2004, and April 6, 2004, Petitioner filed habeas petitions in the Stanislaus County Superior Court, **[*3]** which denied the petitions in reasoned opinions on February 2, 2004, and April 6, 2004, respectively. (Pet. at CM/ECF p. 93, 161.) On April 16, 2004, Petitioner filed a habeas petition in the California Court of Appeal, which summarily denied the petition on April 22, 2004. (Lodged Docs. 7-8.) Petitioner then filed a habeas petition on May 20, 2004, in the California Supreme Court, which summarily denied the petition on August 31, 2005. (Lodged Docs. 13-14.)

In July 2005, Petitioner again appealed to the California Court of Appeal. (2004 CT 99.) [3] On December 14, 2006, the court of appeal affirmed Petitioner's conviction and sentence in a reasoned opinion. (LD 4.) On January 24, 2007, Petitioner filed a petition for review in the California Supreme Court, which summarily denied the petition on February 28, 2007. (LD 5-6.)

FOOTNOTES

3 While Petitioner's second direct appeal was pending, on October 4, 2005, Petitioner filed a federal habeas petition in the United States District Court for the Eastern District of California. *See Gamble v. Kernan,* No. CV F 05-01352 AWI DLB HC, 2006 U.S. Dist. LEXIS 34792 (E.D. Cal. Oct. 4, 2005, Doc. 1). On May 30, 2006, judgment was entered dismissing the federal habeas petition without prejudice **[*4]** due to Petitioner's then pending state court direct appeal. *Id.* (Docs. 17-18).

On May 27, 2007, Petitioner filed a habeas petition in the Stanislaus County Superior Court, which denied the petition in a reasoned opinion on June 1, 2007. (Pet. 89.) [4] On June 19, 2007,

Petitioner filed a habeas petition in the California Court of Appeal, which summarily denied the petition on June 21, 2007. (LD 9-10.) On July 6, 2007, Petitioner filed a habeas petition in the California Supreme Court. (LD 15.) On December 19, 2007, the supreme court denied the petition citing *In re Clark,* 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), *In re Dixon,* 41 Cal. 2d 756, 264 P.2d 513 (1953), *In re Miller,* 17 Cal. 2d 734, 112 P.2d 10 (1941), and *In re Lindley,* 29 Cal. 2d 709, 177 P.2d 918 (1947). (LD 16.) On August 16, 2007, Petitioner filed a habeas petition in the California Court of Appeal, which summarily denied the petition on August 23, 2007. (LD 11-12.)

FOOTNOTES

4 For ease of reference, the Court utilizes the CM/ECF pagination for the Petition.

On October 25, 2007, Petitioner filed the instant federal Petition.

FACTUAL BACKGROUND

5

FOOTNOTES

5 The Court adopts the factual background from the December 14, 2006, California Court of Appeal opinion on direct review as a fair and accurate summary **[*5]** of the evidence presented at trial. *See* 28 U.S.C. § 2254(e)(1); *Hernandez v. Small,* 282 F.3d 1132, 1135 n.1 (9th Cir. 2002).

The following facts are taken in pertinent part from the report of the probation officer filed April 4, 2003:

> "On October 14, 2002, at approximately 7:40 p.m., an officer from the Modesto Police Department responded to the Factory 2-U store located at 452 Paradise Road in Modesto, California, regarding a petty theft. Store employee, Sarey Ry, reported she had been working when she observed a black male, later identified as [Petitioner], enter the business through the exit doors. She noted a video camera records everyone entering the store through the entrance, however there is no video camera recording the exit doors. [Petitioner] walked to the men's clothing section and began selecting pants, shirts and jackets from the most expensive racks.... He then grabbed all of the items and walked out of the store without paying. The employee followed [Petitioner] out of the store and asked him if he was going to pay for the items, at which time, [Petitioner] entered a grayish-brown Plymouth Voyager van, license number 2MPC314, which was driven away on Paradise Road by a **[*6]** black female. The estimated value of the property taken from the store was over $ 400.
>
> [P] ... [P]
>
> "On October 15, 2002, at approximately 2:40 a.m., the officer was dispatched to 1019 Colorado Avenue in Modesto, California, regarding a subject banging on the door trying to get in. The residents at the Colorado Avenue address reported [Petitioner] had been trying to get into the residence. He had been yelling at the residents to let him in, claiming he had 'hot clothes' that he would have to throw out if they did not let him in.
>
> "On October 22, 2002, Sarey Ry positively identified [Petitioner] through a photo

> lineup as the person responsible for taking the clothing from Factory 2-U. On November 4, 2002, [Petitioner] was arrested at the Stanislaus County Jail, where he was in custody in another case."

(LD 4 at 5.)

PETITIONER'S CLAIMS

1. Petitioner's sentence of twenty-eight years to life constitutes cruel and unusual punishment under the federal and California Constitutions (Pet. 4);

2. Ineffective assistance of trial counsel (*id.*);

3. Insufficient evidence supported the 1981 assault and 1983 burglary convictions as "serious" felonies under California's Three Strikes law (*id.* 5);

4. [Duplicates **[*7]** Claim Three, *see id.* 5];

5. The use of Petitioner's prior convictions as strikes for his sentence under California's Three Strikes law violates the terms of a prior plea agreement (*id.* 6); and

6. The use of Petitioner's prior convictions for his sentence under California's Three Strikes law violates the California Constitution's ban on impairing existing contracts (*id.*).

STANDARD OF REVIEW

The current Petition was filed after the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), was signed into law and is thus subject to its provisions. *See Lindh v. Murphy,* 521 U.S. 320, 326-327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The standard of review applicable to Petitioner's claims is set forth in 28 U.S.C. § 2254 (d), as amended by the AEDPA:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United **[*8]** 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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To determine what, if any, "clearly established" United States Supreme Court law exists, the court may examine decisions other than those of the United States Supreme Court. *LaJoie v. Thompson,* 217 F.3d 663, 669 n.6 (9th Cir. 2000). Ninth Circuit cases "may be persuasive." *Duhaime v. Ducharme,* 200 F.3d 597, 598 (9th Cir. 2000) (as amended). On the other hand, a state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law if no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in

state court. *Brewer v. Hall,* 378 F.3d 952, 955 (9th Cir. 2004); *see also Carey v. Musladin,* 549 U.S. 70, 76-77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

A state **[*9]** court decision is "contrary to" clearly established federal law if the decision 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. *Early v. Packer,* 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam); *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 § 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,* 537 U.S. at 8.

State court decisions which 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 are based on 'an *unreasonable* determination of the facts.'" *Early,* 537 U.S. at 11 (*quoting* 28 U.S.C. § 2254(d)). Consequently, a state court decision that correctly identified the governing legal rule may be rejected if it **[*10]** unreasonably applied the rule to the facts of a particular case. *Williams,* 529 U.S. at 406-10, 413; *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (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." *Woodford,* 537 U.S. at 24-25, 27. An "unreasonable application" is different from an "erroneous" or "incorrect" one. *Williams,* 529 U.S. at 409-10; *see also Waddington v. Sarausad,* 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009); *Woodford,* 537 U.S. at 25.

A state court factual determination must be presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Furthermore, a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus. *Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005).

DISCUSSION

[6]

FOOTNOTES

6 Respondent argues that several of Petitioner's claims are procedurally defaulted. (*See generally* Answer.) When the claims raised in a habeas petition are easier to resolve on the merits, the interests of judicial economy counsel against deciding **[*11]** the more complex or uncertain procedural default issues. *See Franklin v. Johnson,* 290 F.3d 1223, 1232 (9th Cir. 2002) (*citing Lambrix v. Singletary,* 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)); *see also Batchelor v. Cupp,* 693 F.2d 859, 864 (9th Cir. 1982). Because such a situation exists here, the Court addresses Petitioner's claims on the merits.

Claim One

In his first claim, Petitioner contends that his sentence of twenty-eight years to life constitutes cruel and unusual punishment under the federal and California Constitutions . (Pet. 4, 41.) Because the California Supreme Court summarily denied this claim, the Court must "look through" to the last reasoned decision on this claim, that of the California Court of Appeal on direct review. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803-05, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). In denying Petitioner's claim, the court of appeal stated:

> The California Constitution forbids "'cruel *or* unusual punishment,'" whereas the

federal Constitution precludes "'cruel *and* unusual'" punishment. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196, fn. 5, 2 Cal. Rptr. 2d 714.) Thus, if we find [Petitioner]'s punishment does not violate California's Constitution, it cannot violate the Eighth Amendment. Under the California Constitution, **[*12]** the issue balances on whether the sentence "'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Gray* (1998) 66 Cal.App.4th 973, 992, 78 Cal. Rptr. 2d 191.) The case of *In re Lynch* (1972) 8 Cal.3d 410, 105 Cal. Rptr. 217, 503 P.2d 921 identified three techniques for courts to make this finding. "'First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions. [Citations.]'" (*People v. Gray, supra,* 66 Cal.App.4th at p. 992.) A punishment may be cruel and unusual if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d at p. 424; *People v. Dillon* (1983) 34 Cal.3d 441, 478, 194 Cal. Rptr. 390, 668 P.2d 697.) Especially relevant to this determination is an examination of "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch, supra,* 8 Cal.3d at p. 425.) **[*13]** In assessing the nature of the offense, a court should consider the circumstance of the particular offense such as the defendant's motive, the way the crime was committed, the extent of the defendant's involvement and the consequences of the defendant's acts. (*People v. Dillon, supra,* 34 Cal.3d at p. 479.) In analyzing the nature of the offender, a court should consider the defendant's "age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

"Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496, 90 Cal. Rptr. 2d 517.) We give great deference to the Legislature's power to set the punishment for a particular crime and to make judgments among various penological approaches. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214, 105 Cal. Rptr. 2d 187; *People v. Martinez, supra,* 76 Cal.App.4th at p. 494.) Moreover, it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality and necessitates an examination of the second and third criteria. **[*14]** (*People v. Meeks* (2004) 123 Cal.App.4th 695, 707, 20 Cal. Rptr. 3d 445.)

Under California law, it is well established that cruel and unusual arguments must first be presented to the trial court because they require fact-specific determinations about the offense and the offender. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229, 134 Cal. Rptr. 2d 652; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583, 60 Cal. Rptr. 2d 653.) [Petitioner] did not argue in the superior court that imposition of a 28-year-to-life sentence would constitute cruel and/or unusual punishment. Therefore, he has waived the right to raise this issue on appeal. While some courts have chosen to resolve the issue despite waiver, we decline to expend judicial resources in this manner.

Nonetheless, we mention that here, just as in *People v. Kelley, supra,* 52 Cal.App.4th 568, [Petitioner] would not have prevailed even if he had preserved the issue. [7] In *Lockyer v. Andrade* (2003) 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144, the United States Supreme Court held that a California Court's imposition of two consecutive 25 years to life sentences was neither contrary to nor an unreasonable application of federal law. (*Id.* at pp. 66, 77.) In *Ewing v. California* (2003) 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108, the Supreme Court held the Eighth Amendment **[*15]** did not prohibit the State of California from sentencing a repeat felon to a prison term of 25 years to life under the state's

"'Three Strikes and You're Out'" law. (*Id.* at p. 14.) A plurality of the Supreme Court specifically held:

> "... To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California 'was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.' [Citation.] Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' [Citation.]
>
> "We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments...." (*Ewing v. California, supra,* 538 U.S. at pp. 30-31.)

In the instant case, the nature **[*16]** of the offense and the offender warranted the prison sentence imposed by the trial court. As to the offense, [Petitioner] entered the Factory 2-U store exit door, went directly to the rack of the most expensive men's apparel, and grabbed numerous items. When a store employee confronted [Petitioner] about the need for payment, [Petitioner] simply left the store, placed the attire in a waiting van, and departed on Paradise Road. [Petitioner] never displayed regret for his criminal conduct or suggested the items were taken to ensure sustenance for himself or others. His blatant conduct clearly posed a serious risk to society.

As to the offender, respondent properly points out that [Petitioner] has an extensive criminal history dating back more than two decades. The probation officer summarized his numerous offenses in the following manner:

> "March 21, 1980, Alameda County Superior Court (# 163818), 459 PC, a felony, 2 years probation, 180 days jail.
>
> "October 22, 1980, Alameda County Superior Court (# 172575), 487 PC, a felony, 3 years probation, 6 months jail.
>
> "July 13, 1981, Alameda County Superior Court (# 72371), 245(a) PC, a felony, 4 years California Department of Corrections. October **[*17]** 19, 1982 paroled from CDC.
>
> "July 1, 1983, Alameda County Superior Court (# 76367), 459 PC, first degree, a felony, 6 years CDC. May 26, 1986, paroled from CDC. March 10, 1988, violation of parole, return to CDC. July 26, 1988, violation of parole, return to CDC. May 23, 1989, violation of parole, return to CDC.
>
> "January 20, 1989, Alameda County Superior Court (# 313885), 10852 VC, a misdemeanor, 2 years probation, 90 days jail.
>
> "May 15, 1989, Sacramento County Superior Court (# 89M07303), 594 (b)(3) PC, a misdemeanor, 3 years probation, 10 days jail.
>
> "March 7, 1990, Alameda County Superior Court (# 100982), 211 PC, a

> felony, 12 years CDC. March 6, 1998, violation of parole, return to CDC. October 1, 1998, violation of parole, return to CDC. August 5, 1999, violation of parole, return to CDC. January 21, 2000, violation of parole, return to CDC. Discharged from parole July 6, 2001.
>
> "December 31, 2001, Alameda County Superior Court (# 472649), 243 (e)(1) PC, a misdemeanor, 5 years court probation, 90 days jail.
>
> "October 24, 2002, Stanislaus County Superior Court (# 1048254) 243 (b) PC, a misdemeanor, 3 years probation, 60 days jail."

[Petitioner] acknowledges this rather extensive record but points **[*18]** out the strike offenses occurred in 1981, 1983, and 1990, the most recent being 12 years prior to the commission of the substantive offense charged in the instant case. He also contends the focus of the inquiry on appeal must be on the seriousness of the current offense because it is that offense which must bear the weight of the recidivist penalty. He goes on to argue that he was convicted of two "wobbler" offenses--second degree burglary and petty theft with a prior (Pen. Code, §§ 459, 666). He maintains the trial court could reduce such offenses either by imposing a misdemeanor sentence or by declaring the offenses misdemeanors upon a grant of probation.

The United States Supreme Court essentially rejected these types of arguments in *Ewing v. California, supra,* 538 U.S. at pages 28-29. As to the gravity of the offenses, [Petitioner] was not merely charged with burglary and petty theft with a prior in the instant case. Rather, he was charged with such offenses after having sustained prior serious felony convictions under Penal Code section 667, subdivision (d). As to the status of the offenses as "wobblers," the Supreme Court observed with respect to the grand theft charged in *Ewing v. California, supra,* 538 U.S. at pages 28-29:

> "That **[*19]** grand theft is a 'wobbler' under California law is of no moment. Though California courts have discretion to reduce a felony grand theft charge to a misdemeanor, it remains a felony for all purposes 'unless and until the trial court imposes a misdemeanor sentence.' [Citations.] 'The purpose of the trial judge's sentencing discretion' to downgrade certain felonies is to 'impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon.' [Citations.] Under California law, the reduction is not based on the notion that a 'wobbler' is 'conceptually a misdemeanor.' [Citation.] Rather, it is 'intended to extend misdemeanant treatment to a potential felon.' [Citation.] In Ewing's case, however, the trial judge justifiably exercised her discretion not to extend such lenient treatment given Ewing's long criminal history.
>
> "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find **[*20]** expression in the legislature's choice of sanctions...."

> The 28-year-to-life prison term is not disproportionate to the offense or the offender and does not offend fundamental notions of human dignity. Rather, it is [Petitioner]'s conduct that "offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d at p. 424.) "Fundamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the public safety and security." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, 48 Cal. Rptr. 2d 256, disapproved on another point in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8, 66 Cal. Rptr. 2d 423, 941 P.2d 56.) [Petitioner]'s sentence is not shocking or inhumane in light of the nature of the offense and offender and reversal of the judgment of sentence is not required.

(LD 4 at 6-11.)

FOOTNOTES

7 [California Court of Appeal footnote 2:] This conclusion obviates the need for a discussion of [Petitioner]'s contention that trial counsel was ineffective at sentencing by failing to assert a claim of cruel and/or unusual punishment. To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the **[*21]** judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624, 85 Cal. Rptr. 2d 132, 976 P.2d 683.) Generally speaking, where--as here--the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for writ of habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 426, 152 Cal. Rptr. 732, 590 P.2d 859.)

Increased punishment for recidivists imposed pursuant to state statutory schemes regularly has survived Eighth Amendment challenges. In *Lockyer v. Andrade,* 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), the Supreme Court made clear that, in the context of an Eighth Amendment habeas challenge to a prison sentence, the "only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer,* 538 U.S. at 73 (*citing Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); *Solem v. Helm,* 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); *Rummel v. Estelle,* 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). "Outside the context of capital **[*22]** punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare," *Rummel,* 445 U.S. at 272, and the Supreme Court has cautioned federal courts to be "reluctant to review legislatively mandated terms of imprisonment for crimes concededly classified and classifiable as felonies," *Hutto v. Davis,* 454 U.S. 370, 374, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982). *See Rummel,* 445 U.S. at 274. "Generally, so long as the sentence imposed does not exceed the statutory maximum, it will not be overturned on Eighth Amendment grounds." *United States v. McDougherty,* 920 F.2d 569, 576 (9th Cir. 1990).

In *Lockyer,* the Supreme Court concluded that two consecutive twenty-five years to life sentences with the possibility of parole, imposed under California's Three Strikes law following two petty theft convictions with priors, did not amount to cruel and unusual punishment. *See Lockyer,* 538 U.S. at 77. Similarly, in *Ewing v. California,* 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), the Supreme Court held that a sentence of twenty-five years to life imposed under California's Three Strikes law for felony grand theft of three golf clubs did not violate the Eighth Amendment, especially where the defendant had a long history of **[*23]** increasingly violent recidivism. *Cf. Reyes v. Brown,* 399 F.3d 964 (9th Cir. 2005) (remanding for examination of the "factual specifics" of each of Reyes' prior convictions in order to "determine whether the offense was a 'crime against a person' or involved violence"); *Rios v. Garcia,* 390 F.3d 1082, 1086 (9th Cir. 2004) (rejecting petitioner's claim that sentence of twenty-five years

to life constituted cruel and unusual punishment when current offense was shoplifting $ 79.98 worth of watches following a minor struggle with a loss prevention officer, and petitioner's lengthy criminal record included two prior robberies that "involved the threat of violence because his cohort used a knife"); *but see Ramirez v. Castro,* 365 F.3d 755, 768-70 (9th Cir. 2004) (finding sentence of twenty-five years to life was grossly disproportionate to the crime committed where the current offense was a "wobbler" felony for the nonviolent shoplifting of a $ 199 VCR, and the two prior strike convictions arose from one guilty plea relating to nonviolent crimes where no weapons were involved and for which defendant received a sentence of one year in county jail and three years probation).

In California's Three **[*24]** Strikes law context, the Ninth Circuit has applied the Supreme Court's framework in *Solem* to examine as an initial matter "whether [the petitioner's] extreme sentence is justified by the gravity of his most recent offense and criminal history." *Reyes,* 399 F.3d at 967 (*quoting Ramirez,* 365 F.3d at 768). In applying the test of disproportionality, the Ninth Circuit begins by looking at the "core conduct" of the offender's current conviction and then reviewing the offender's criminal history and the underlying facts of the predicate offenses. *Ramirez,* 365 F.3d at 768. If this analysis "raises an inference of gross disproportionality," *id.* at 770 (*quoting Harmelin,* 501 U.S. at 1005), the court then compares the sentence to those imposed for other crimes in the same jurisdiction, as well as those imposed for the same crime in other jurisdictions, *id.* at 764 (*citing Solem,* 463 U.S. at 292). *See generally Gonzalez v. Duncan,* 551 F.3d 875, 879-91 (9th Cir. 2008) (discussing and applying gross disproportionality principle).

Preliminarily, to the extent that Petitioner challenges his sentence as a violation of the California Constitution, that claim is not cognizable on federal habeas corpus. **[*25]** *See* 28 U.S.C. § 2254(a); *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Hinman v. McCarthy,* 676 F.2d 343, 349 (9th Cir. 1982).

In this case, as the court of appeal elaborated, Petitioner's conduct clearly posed a serious risk to society. As to the gravity of the offense, Petitioner entered the Factory 2-U store exit door, went directly to the rack of the most expensive men's apparel, and grabbed numerous items. When a store employee confronted Petitioner about the need for payment, Petitioner simply left the store, placed the attire in a waiting van, and departed. Petitioner's offense of burglary was a serious crime in which he deprived the rightful owner of property, caused a store employee to confront him, and created a potential for fear and violence. *See People v. McCormack,* 234 Cal. App. 3d 253, 257, 285 Cal. Rptr. 504 (1991) ("Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation--the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are **[*26]** primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety." (*quoting People v. Gauze,* 15 Cal. 3d 709, 715, 125 Cal. Rptr. 773, 542 P.2d 1365 (1975))). In addition, Petitioner's counts of burglary and theft of over $ 400 are more serious than the petitioner's offense in *Lockyer* (two petty theft convictions arising from theft of $ 153.54 of videotapes), wherein the Supreme Court upheld that petitioner's Three Strikes sentence. *See Lockyer,* 538 U.S. at 66, 77.

Furthermore, as stated by the court of appeal, Petitioner has an extensive criminal history dating back more than two decades. Petitioner's prior history includes first degree burglary, robbery, grand theft, assault with a deadly weapon, and battery convictions. (*See* 2003 CT 71-72.) Petitioner's current offenses are his tenth and eleventh convictions, and Petitioner has now amassed seven felonies. (*See id.*) The series of crimes leading to the current offenses were very serious and most involved a high degree of danger to the victims and the public in general. In addition, Petitioner's current offenses of burglary and petty theft **[*27]** bear a relation to his prior convictions, as he has already been convicted of burglary and grand theft and other more serious offenses against the person such as robbery, assault, and battery. (*See id.*) Furthermore, Petitioner's criminal history is more extensive and serious than the petitioner's in *Lockyer,* whose prior convictions included two counts of misdemeanor theft, at least three

counts of residential burglary, and two counts of transportation of marijuana. *See Lockyer,* 538 U.S. at 66-67, 77.

The trial court's imposition of a life term for Petitioner's current convictions does not raise an "inference of gross disproportionality," in light of the seriousness of Petitioner's triggering convictions and his lengthy criminal history. *Ramirez,* 365 F.3d at 768; *see Lockyer,* 538 U.S. at 77; *Ewing,* 538 U.S. at 11; *Joshua v. Adams,* 231 F. App'x 592, 593-94 (9th Cir. 2007) (upholding twenty-five years to life sentence of offender for stealing two bottles of alcohol with prior convictions of first and second degree robberies).

Accordingly, the Court finds that the California courts' rejection of Petitioner's cruel and unusual punishment claims was neither contrary to, nor an unreasonable **[*28]** application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claim Two

In his second claim, Petitioner asserts that his trial counsel was ineffective for failing to object to Petitioner's sentence as cruel and unusual punishment. (Pet. 4, 74.) Because the California Supreme Court summarily denied this claim, the Court must "look through" to the last reasoned decision, that of the California Court of Appeal on direct review. *Ylst,* 501 U.S. at 803-05. In rejecting Petitioner's claim, the court of appeal stated:

> Under California law, it is well established that cruel and unusual arguments must first be presented to the trial court because they require fact-specific determinations about the offense and the offender. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229, 134 Cal. Rptr. 2d 652; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583, 60 Cal. Rptr. 2d 653.) [Petitioner] did not argue in the superior court that imposition of a 28-year-to-life sentence would constitute cruel and/or unusual punishment. Therefore, he has waived the right to raise this issue on appeal. While some courts have chosen to resolve the issue despite waiver, we decline to **[*29]** expend judicial resources in this manner.
>
> Nonetheless, we mention that here, just as in *People v. Kelley, supra,* 52 Cal.App.4th 568, [Petitioner] would not have prevailed even if he had preserved the issue. [8]

(LD 4 at 8.)

FOOTNOTES

8 [California Court of Appeal footnote 2:] This conclusion obviates the need for a discussion of [Petitioner]'s contention that trial counsel was ineffective at sentencing by failing to assert a claim of cruel and/or unusual punishment. To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624, 85 Cal. Rptr. 2d 132, 976 P.2d 683.) Generally speaking, where--as here--the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for writ of habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 426, 152 Cal. Rptr. 732, 590 P.2d 859.)

For a petitioner to prevail on an ineffective assistance of counsel claim, he must show: (1) that counsel's performance was deficient, and (2) that he was prejudiced **[*30]** by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them. *Id.* at 697; *Thomas v. Borg,* 159 F.3d 1147, 1151-52 (9th Cir. 1998).

To prove deficient performance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 687-88. Because of the difficulty in evaluating counsel's performance, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Only if counsel's acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance will the petitioner prove deficient performance. *Id.* at 690; *United States v. Quintero-Barraza,* 78 F.3d 1344, 1348 (9th Cir. 1995). The petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland,* 466 U.S. at 689.

Establishing counsel's deficient performance does **[*31]** not warrant setting aside the judgment if the error had no effect on the judgment. *Id.* at 691; *Seidel v. Merkle,* 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must show prejudice such that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Strickland,* 466 U.S. at 694. Thus, the petitioner will only prevail if he can prove that counsel's errors resulted in a "proceeding [that] was fundamentally unfair or unreliable." *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

Here, defense counsel's failure to object to Petitioner's sentence as a violation of the Eighth Amendment did not constitute deficient performance because, as discussed in Claim One, *supra,* Petitioner's sentence does not constitute cruel or unusual punishment. In addition, defense counsel's failure to object did not prejudice Petitioner because there was no reasonable probability that the trial court would have reversed or lessened Petitioner's sentence, *see supra* **[*32]** Claim One; and in any event, the California Court of Appeal addressed Petitioner's claim on the merits and denied it notwithstanding the procedural bar due to defense counsel's failure to object.

Accordingly, the Court finds that the California courts' rejection of Petitioner's ineffective assistance of trial counsel claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claims Three & Four

In his third and fourth claims, Petitioner states that insufficient evidence supported the 1981 assault and 1983 burglary convictions as "serious" felonies under California's Three Strikes law. (Pet. 5, 76.) Because the California Supreme Court summarily denied this claim with citations indicating a procedural bar (*see* LD 16; *supra* note 6), the Court must "look through" to the last reasoned decision, that of the Stanislaus County Superior Court on habeas review. *See Ylst,* 501 U.S. at 803-05. In denying Petitioner's claim, the superior court stated:

> Petitioner filed a Writ of Habeas Corpus on May 27, 2007 challenging the sufficiency of the evidence that his **[*33]** strike priors were serious felonies. He also asserts that he as [sic] not informed that his priors were strike offenses.
>
> . . . .
>
> Petitioner further asserts that the Penal Code 969b packet was insufficient to prove that his priors were strikes. In this matter Petitioner admitted the strike priors when he entered a guilty plea admitting all priors on March 11, 2003. The court did not rely on the 969b packets. Further, the waiver of plea forms establishing the priors which were part of Petitioner's Writ filed 1/22/04 show that Petitioner pled to 245 P.C., Assault with Deadly Weapon with Use and 459 P.C., First Degree. Both

convictions are strikes under the Three Strikes Law.

Petitioners [sic] Writ is hereby DENIED.

(Pet. 89.)

Normally, the Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, the Supreme Court has "not extended *Winship's* protections to proof of prior convictions used to support recidivist enhancements." *Dretke v. Haley,* 541 U.S. 386, 395, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004) (*citing Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); **[*34]** *Apprendi v. New Jersey,* 530 U.S. 466, 488-490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Preliminarily, the Court notes that Petitioner admitted his prior convictions for the 1981 assault and the 1983 burglary, admitted that the 1983 burglary was of the first degree, and admitted that both convictions were "serious" felonies for the purpose of California's Three Strikes law. (*See* 2003 Rep.'s Tr. ("RT") 79-81.) [9]

FOOTNOTES

[9] In reciting Petitioner's prior 1983 burglary conviction, the trial court mistakenly stated "July 13th, 1981," as the date of conviction (*see* 2003 RT 80); Petitioner's actual date of conviction for that burglary was July 1, 1983 (*see* 2003 CT 72; Pet. 192-99, 202). Petitioner does not challenge this ministerial error, but instead challenges the evidence supporting whether his prior convictions were "serious." (*See* Pet. 76-79.)

Notwithstanding Petitioner's admission, sufficient evidence supported the finding that Petitioner's 1981 assault and 1983 burglary convictions were "serious" for the purposes of California's Three Strikes law. Attached to Petitioner's federal Petition are: (1) an Abstract of Judgment dated November 5, 1981, which shows Petitioner's conviction for assault with a deadly weapon on July 13, 1981 **[*35]** (Pet. 172); (2) a July 13, 1981, Reporter's Transcript in which Petitioner pled guilty to assault with a deadly weapon and admitted that he had personally used a firearm in that offense (*id.* 174-79); and (3) a plea form filed on July 13, 1981 (*id.* 185). As to the first degree burglary, attached to Petitioner's federal Petition are: (1) a July 1, 1983, Reporter's Transcript in which Petitioner pled guilty to first degree burglary (Pet. 192-99); and (2) a plea form filed on July 1, 1983 (*id.* 202). The 1981 assault with a deadly weapon conviction and the 1983 first degree burglary conviction are both "serious" crimes for purposes of California's Three Strikes law. *See* Cal. Penal Code §§ 1170.12(b)(1) (California's Three Strikes law), 1192.7(c)(18) (first degree burglary), (31) (assault with a deadly weapon); *Jackson v. Virginia,* 443 U.S. 307, 324 n.16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (stating a federal court must refer to the relevant state statutory provisions); *see also Wainwright v. Goode,* 464 U.S. 78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983) (stating a federal court in habeas proceedings must defer to the state courts' interpretation of state law).

Accordingly, the Court finds that the California courts' rejection of Petitioner's insufficient **[*36]** evidence claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claim Five

In his fifth claim, Petitioner argues that the use of his prior convictions as strikes for his sentence under California's Three Strikes law violates the terms of a prior plea agreement. (Pet.

6, 81, 100.) Because the California Supreme Court summarily denied this claim with citations indicating a procedural bar (*see* LD 16; *supra* note 6), the Court must "look through" to the last reasoned decision, that of the Stanislaus County Superior Court on habeas review. *See Ylst,* 501 U.S. at 803-05. In denying Petitioner's claim, the superior court stated:

> Petitioner filed a Writ of Habeas Corpus on May 27, 2007 challenging the sufficiency of the evidence that his strike priors were serious felonies. He also asserts that he as [sic] not informed that his priors were strike offenses.
>
> The pleas to the strike priors occurred on July 13, 1981 and July 1, 1983, prior to the enactment of the Three Strikes Law. (See Petitioner's Writ of Habeas Corpus filed in 1/22/04). The trial judge **[*37]** could not predict that the offenses would become strikes more than 10 years after the plea and was therefore under no obligation to inform Petitioner of future consequences under the Three Strikes Law.
>
> . . . .
>
> Petitioners [sic] Writ is hereby DENIED.

(Pet. 89.)

Due process guarantees under the Fifth Amendment require that a defendant's guilty plea be voluntary and intelligent. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Torrey v. Estelle,* 842 F.2d 234, 235 (9th Cir. 1988). A plea of guilty is voluntary only if it is "entered by one fully aware of the *direct* consequences" of his plea. *Torrey,* 842 F.2d at 235 (*quoting Brady v. United States,* 397 U.S. 742, 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)) (citation and internal quotation marks omitted). "[A]lthough a defendant is entitled to be informed of the direct consequences of the plea, the court need not advise him of all the possible collateral consequences." *Id.* (internal quotation marks omitted); *accord United States v. Amador-Leal,* 276 F.3d 511, 514 (9th Cir. 2002).

"The distinction between a direct and collateral consequence of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." **[*38]** *Torrey,* 842 F.2d at 236 (internal quotation marks omitted). "In many cases, the determination that a particular consequence is 'collateral' has rested on the fact that it was in the hands of another government agency or in the hands of the defendant himself." *Id.* "In determining the voluntariness of a plea and whether it has been made intelligently, the court cannot be required to foresee an accused's future conduct and to predict all possible alternative ramifications thereof." *Id.* "The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea." *United States v. Brownlie,* 915 F.2d 527, 528 (9th Cir. 1990).

In addition, under California law, plea bargains are interpreted according to contract law principles, *see Buckley v. Terhune,* 441 F.3d 688, 694-95 (9th Cir. 2006) (en banc), and a criminal defendant has a due process right to enforce the terms of his plea agreement, *id.* at 694 (*citing Santobello v. New York,* 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). Plea bargains are "deemed to incorporate and contemplate not only the existing law but the reserve power of **[*39]** the state to amend the law or enact additional laws." *Davis v. Woodford,* 446 F.3d 957, 962 (9th Cir. 2006) (citation and internal quotation marks omitted).

Here, to the extent Petitioner alleges that imposition of a life sentence under California's Three Strikes law violates the terms of his 1981 assault, 1983 burglary, or 1990 robbery convictions, his claim is without merit. First, use of Petitioner's prior convictions as strikes under California's Three Strikes law is not a "direct consequence" of his plea agreement. This is because the use of the convictions as strikes was not a result that represented a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Torrey,* 842 F.2d at 236. The use

of Petitioner's prior convictions as strikes is rather a "collateral consequence" in "the hands of the defendant himself," *id.;* "[t]he possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea," *Brownlie,* 915 F.2d at 528. Therefore, the trial courts were not required to advise Petitioner of the potential use of his convictions **[*40]** as enhancements under California's Three Strikes law; nor could they, as California's Three Strikes law was passed in 1994, after the prior convictions at issue. *See* 1994 Cal. Legis. Serv. Prop. 184 (West); 1994 Cal. Legis. Serv. Ch. 12 (A.B. 971) (West). [10]

FOOTNOTES

10 In his Petition, Petitioner explicitly states that he is not raising any Ex Post Facto claims in relation to California's Three Strikes law. (*See* Pet. 100.)

Second, none of Petitioner's plea agreements contains an express term limiting the State's power to use his convictions for future sentencing enhancements. (*See* Pet. 172-186, 192-203, 205-18.) In addition, nothing in the record suggests that Petitioner, much less the State, understood the plea agreements to limit future enhancements based on Petitioner's prior convictions. Furthermore, the comments of the judges during each of Petitioner's plea proceedings neither explicitly nor implicitly altered the terms of Petitioner's plea agreements. (*See id.* 174-82, 192-200, 207-18.) For example, the judge's statements at Petitioner's 1990 plea proceeding that (1) "if [Petitioner] happen[s] to get arrested and convicted in the future on a serious felony and the judge in this case decides **[*41]** to send you to prison, he is going to have to add five years to your sentence for this case today" (Pet. 210), and that (2) "because [Petitioner] already [has] two prior serious felonies . . . you're talking about 15 years in prior offenses" (*id.*), merely described the consequences of Petitioner's plea under then-existing law; the statements were not a promise to limit the State's future use of those convictions. Petitioner's plea agreements are "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws," *Davis,* 446 F.3d at 962, such as California's Three Strikes law.

Accordingly, the Court finds that the California courts' rejection of Petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Claim Six

In his sixth and final claim, Petitioner contends that the use of his prior convictions for his sentence under California's Three Strikes law violates the California Constitution's ban on impairing existing contracts. (Pet. 6, 81, 101.)

A petitioner may **[*42]** not obtain federal habeas relief by alleging the violation of a state constitution. *See* 28 U.S.C. § 2254(a); *Estelle,* 502 U.S. at 67-68; *Hinman,* 676 F.2d at 349. Thus, Petitioner's allegation of the violation of the California Constitution is not cognizable on federal habeas corpus.

Accordingly, the Court finds that the California courts' rejection of Petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

Certificate of Appealability

An applicant seeking to appeal a district court's dismissal of a habeas petition under 28 U.S.C. § 2254 must first obtain a certificate of appealability ("COA") from a district judge or circuit judge. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A judge should either grant the COA or state reasons why it should not issue, and the COA request should be decided by a district court in

the first instance. Fed. R. App. P. 22(b)(1); *United States v. Asrar,* 116 F.3d 1268, 1270 (9th Cir. 1997).

The applicant for a COA must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); **[*43]** *Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel,* 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). A "substantial showing" is defined as a demonstration (1) that the issues are debatable among jurists of reason; (2) that a court could resolve the issues differently; or (3) that issues are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); *see Slack,* 529 U.S. at 483-84 (stating that except for substituting the word "constitutional" for the word "federal," § 2253 codified the pre-AEDPA standard announced in *Barefoot v. Estelle*).

Where, as present here, a district court has rejected constitutional claims on their merits, the COA standard is straightforward. "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484. The Court has reviewed the record of this case and finds that reasonable jurists would not find the Court's assessment of the constitutional claims debatable or wrong. On the merits of this case, reasonable jurists would not debate the constitutionality of Petitioner's conviction and sentence. Accordingly, the Court **[*44]** declines to issue a certificate of appealability.

CONCLUSION AND ORDER

For the reasons discussed above, the Court DENIES the Petition for Writ of Habeas Corpus with prejudice and DECLINES the issuance of a certificate of appealability. The Clerk of Court is ORDERED to enter Judgment for Respondents and to close Case No. CV F 07-01645 LJO WMW HC.

IT IS SO ORDERED.

Dated: March 11, 2009

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

*2008 U.S. Dist. LEXIS 110445, **

CHESTER LEDZEPPLIN CLARK, Petitioner, v. JOHN MARSHALL, Warden, Respondent.

NO. CV 04-00481-DDP (MAN)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 110445

September 15, 2008, Decided
September 15, 2008, Filed

SUBSEQUENT HISTORY: Accepted by, Writ of habeas corpus denied, Dismissed by, Judgment entered by Clark v. Marshall, 2009 U.S. Dist. LEXIS 93938 (C.D. Cal., Oct. 8, 2009)

PRIOR HISTORY: Clark (Chester L.) on H.C., 2006 Cal. LEXIS 8168 (Cal., June 28, 2006)

CORE TERMS: juror, prosecutor, prospective jurors, lineup, prima facie case, trial counsel's, evidentiary hearing, robbery, federal habeas, peremptory challenges, sentence, peremptory challenges, ineffective assistance, venire, prong, federal law, prior convictions, basis of race, excused, refused to participate, strong likelihood, discriminatory, ineffective, peremptory, seated, used to enhance, plea agreement, assistance of counsel, identification, demeanor

COUNSEL: [*1] Chester LedZepplin Clark, Petitioner, Pro se, Imperial, CA.

For William Sullivan, Warden of the California Correctional Institution at Tehachapi, California, Substituted for John Marshall, Substituted for Cathy Prosper, Respondent: Kristofer Jorstad, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

JUDGES: MARGARET A. NAGLE, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: MARGARET A. NAGLE

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dean D. Pregerson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United

States District Court for the Central District of California.

INTRODUCTION

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 26, 2004 ("Petition"). On June 14, 2004, Respondent filed a motion to dismiss the Petition as untimely ("Motion to Dismiss"). Pursuant to a Report and Recommendation filed on October 19, 2004, District Judge Pregerson denied the Motion to Dismiss on February 17, 2005. Respondent then filed an Answer, and Petitioner filed a Reply.

The matter is submitted and ready for decision.

PRIOR PROCEEDINGS

On **[*2]** August 8, 2000, a Los Angeles County Superior Court jury found Petitioner guilty of two counts of second degree robbery in violation of California Penal Code § 211. (Clerk's Transcript ("CT") 137, 139.) The jury found true allegations that Petitioner personally used a firearm in the commission of the robbery within the meaning of California Penal Code § 12022.5 (a)(1). (CT 137, 139.) On October 26, 2000, the trial court found true allegations that Petitioner had sustained two prior convictions within the meaning of California's Three Strikes law (California Penal Code §§ 667(b)-(i) and 1170.12(a)-(d)). (CT 162.) On November 22, 2000, the trial court sentenced Petitioner to state prison for a term of 75 years to life. (CT 164-66.)

Petitioner appealed. On February 7, 2002, the California Court of Appeal issued an unpublished decision affirming Petitioner's conviction and sentence. (Motion to Dismiss, Ex. B.) Petitioner filed a petition for review in the California Supreme Court. On May 1, 2002, the California Supreme Court denied the petition for review without comment or citation to authority. (Motion to Dismiss, Ex. C.)

Petitioner subsequently filed a habeas petition in the Los Angeles **[*3]** Superior Court. (Motion to Dismiss, Ex. D, indicating that the petition was received on May 1, 2003.) After a hearing, the Superior Court denied the petition on July 2, 2003. (Motion to Dismiss, Ex. E.) Petitioner then filed a habeas petition in the California Court of Appeal. (Motion to Dismiss, Ex. F.) On August 8, 2003, the California Court of Appeal denied the petition without comment or citation to authority. (Motion to Dismiss, Ex. G.) Petitioner filed a petition for review in the California Supreme Court. (Motion to Dismiss, Ex. H.) On October 22, 2003, the California Supreme Court denied the petition without comment or citation to authority. (Motion to Dismiss, Ex. I.)

SUMMARY OF THE EVIDENCE AT TRIAL

On May 2, 1998, at about 1:30 p.m., two African-American men carrying guns walked though the back door of a parts store in Gardena. (3 Reporter's Transcript ("RT") 402, 405.) Store employee Antonia Farhat identified Petitioner as one of the men. (3 RT 402, 407.) The other man also carried a pipe. (3 RT 407.) There were four store employees behind the counter: Farhat, Michael Dunn, Carlos Perez, and Hugo Ballesteros. (3 RT 409; 4 RT 619.) There also were customers in the store. (3 **[*4]** RT 410.)

Petitioner and his accomplice shouted to everybody to get down. (3 RT 409, 410.) The men said they wanted the cash in the store. (3 RT 411.) Dunn was the closest employee to the cash register, and Petitioner's accomplice hit him on the back with the pipe, telling him to hurry and open the register. (*Id.*) Petitioner was standing close to Farhat, pointing his gun at her head. (3 RT 411-12, 414.) He was very agitated, saying, "Hurry up, give us all the cash. We'll kill her if you don't." (3 RT 412, 414.)

Dunn opened the cash register and Petitioner's accomplice took money, totaling about $ 2,000, from it. (3 RT 415; 4 RT 628, 629.) Petitioner's accomplice then demanded that Dunn give him cash from his wallet. (3 RT 418-19, 631.) Money was taken from the wallets of Perez and Ballesteros as well. (3 RT 418-19.) During this time, Petitioner kept his gun pointed at Farhat.

(3 RT 419-20.) Petitioner and his accomplice then fled through the back of the store. (3 RT 420-23.)

Raul Mendieta, who worked near the parts store, saw a dark-skinned man run out of the store and get into a gray car. (4 RT 736-38.) The car, driven by another dark-skinned man, left the parking lot in a hurry. (7 RT **[*5]** 738-39.)

The same day, Compton Police Officer Keith Bowen saw a gray 1983 Oldsmobile Cutlass speeding and pursued it. (4 RT 656-57.) He identified Petitioner in court as the driver. (4 RT 681.) Bowen recognized Petitioner as a member of the Nutty Block Crips gang, and because Petitioner was not alone, Bowen decided to request backup before confronting him. (4 RT 661-62.) During the car chase, Bowen saw an object fly out of Petitioner's car window. It was later recovered and identified as a revolver. (4 RT 664-65, 680.) Petitioner's car slowed down by the Longfellow Elementary School, and he and his companion jumped out while the car was still moving, leaving the car to crash into the wall. (4 RT 663-64.) Bowen chased Petitioner, who left behind him a trail of money. (4 RT 667-69.) Petitioner jumped over a fence, and Bowen did not follow. (4 RT 667.)

Fingerprints lifted from the passenger window and the driver's seatbelt and buckle of the Oldsmobile Cutlass matched Petitioner's fingerprints. (5 RT 950-52.) It was later determined that the Oldsmobile Cutlass was stolen in Gardena on May 1, 1998, the day before the robbery. (4 RT 903.) Two weeks after the robbery, Mendieta identified a **[*6]** photograph of the Oldsmobile Cutlass as the gray car he saw leaving the parking lot. (4 RT 739-40.)

Petitioner was apprehended more than a year later, on December 21, 1999, as a result of a traffic stop. (4 RT 606, 613.) He gave his name as Markees Tucker and attempted to flee. (4 RT 608-09.)

Dunn and Ballesteros were unable to make an in-court identification of Petitioner as one of the robbers. (4 RT 626; 5 RT 1053.) Dunn was also unable to make an identification from photographs shown to him by the police. (4 RT 634.) Ballesteros identified Petitioner in a photo lineup, stating that he was 40% certain of the identification. (5 RT 984-85, 1055, 1062.) Farhat also identified Petitioner in a photo lineup with 40% certainty. (5 RT 982.)

Petitioner presented an alibi defense. Three witnesses, including Petitioner's girlfriend Latoya Matthews, testified that Petitioner was at a birthday barbecue for Matthews during the afternoon of the robbery. (5 RT 1093-94; 6 RT 1254-57, 1288-94.) A neighbor of Matthews' sister testified that, during the party, Petitioner threw Matthews into the pool. (6 RT 1255.) Matthews also testified that she was with Petitioner at his grandmother's house earlier that **[*7]** day. (5 RT 1094-95.)

PETITIONER'S HABEAS CLAIMS

1. The Los Angeles County Superior Court denied Petitioner's requests for discovery during his post-conviction proceedings.

2. Petitioner's sentence violates the Constitution, because his prior convictions were used to enhance his current sentence under the Three Strikes law even though he was not advised of that possibility when he pleaded guilty in connection with the prior convictions.

3. The prosecutor violated the Equal Protection Clause by exercising peremptory challenges to remove African-American prospective jurors on the basis of race.

4. Defense counsel violated the Equal Protection Clause by exercising peremptory challenges to remove white prospective jurors on the basis of race.

5. Defense counsel was ineffective, because he failed to develop the record to show a prima facie case of discriminatory exclusion of African-American prospective jurors.

6. Appellate counsel was ineffective, because he failed to argue that: (a) the trial court erroneously admitted evidence that Petitioner refused to participate in a lineup and instructed the jury that it could consider this evidence as showing consciousness of guilt; and (b) the trial court **[*8]** erroneously admitted evidence of other crimes.

(Petition at 5-6, Attachment ("Attach.").)

STANDARD OF REVIEW

The Petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under Section 2254(d), a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *see also* Brown v. Payton, 544 U.S. 133, 141, 125 S. Ct. 1432, 1438, 161 L. Ed. 2d 334 (2005). In this case, with one exception, review of Petitioner's claims is governed by Section 2254(d)(1). [1]

FOOTNOTES

1 *See* Lambert v. Blodgett, 393 F.3d 943, 966-69 (9th Cir. 2004)(Section 2254(d) applies when the state court has denied a claim based on its substance, rather than on the basis of a procedural **[*9]** or other rule precluding state court review of the merits). While Petitioner has raised one claim that could implicate Section 2254(d)(2), as discussed below, de novo review of that claim is required, and hence, it is not governed by the Section 2254 review standard. Petitioner has not raised any Section 2254(d)(2) challenge to the state court's rejection of his other claims, and the record does not reveal any basis for such a challenge.

"Clearly established Federal law," for purposes of Section 2254(d)(1) review, "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000); *see also* Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 653, 166 L. Ed. 2d 482 (2006); Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003)(clearly established federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"); Stokes v. Schriro, 465 F.3d 397, 401-02 (9th Cir. 2006)(this statutory language "refers to Supreme Court precedent at the time of the last-reasoned state court decision"). Section 2254(d)(1) **[*10]** "plainly restricts the source of clearly established law to the Supreme Court's jurisprudence." Lambert, 393 F.3d at 974; *see also* Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir. 2008)(*en banc*)("What matters are the holdings of the Supreme Court, not the holdings of lower federal courts."). However, although "[o]nly Supreme Court precedents are binding on state courts under AEDPA," Ninth Circuit "precedents may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents." Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005)(*en banc*).

Under the first prong of Section 2254(d)(1), a state court decision is "contrary to" federal law if the state court applies a rule that contradicts the governing law as stated by the Supreme Court or reaches a different conclusion than that reached by the high court on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 1853, 155 L. Ed. 2d 877 (2003). This includes "mistakes in reasoning" or "use of the wrong legal rule or framework." Frantz v. Hazey, 513 F.3d 1002, 1012 (9th Cir. 2008)(*en banc*).

The second prong of Section 2254(d)(1) is met when a state court identifies the correct governing **[*11]** legal principle from the Supreme Court's decisions, but unreasonably applies it to the facts of the petitioner's case. Williams, 529 U.S. at 412-13, 120 S. Ct. at 1523. The "unreasonable application" inquiry is an objective one, and the standard is not satisfied simply by showing error or incorrect application of the governing federal law. Andrade, 538 U.S. at 75, 123 S. Ct. at 1174; Woodford v. Visciotti, 537 U.S. 19, 25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279 (2002)(*per curiam*); Williams, 529 U.S. at 409, 120 S. Ct. at 1521. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007).

DISCUSSION

I. GROUND ONE DOES NOT STATE A COGNIZABLE FEDERAL HABEAS CLAIM.

In Ground One, Petitioner contends that his equal protection rights were violated at the evidentiary hearing in his Superior Court habeas proceedings, because the state court refused to allow him discovery of certain police reports and to question Officer Bowen. (Petition at 5, Attach. at 1; Reply at 1-2.)

Ground One alleges errors in the post-conviction **[*12]** review process. Federal habeas relief is not available to redress errors in state post-conviction proceedings. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989)("[A] petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings."); *see also* Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998)("[F]ederal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings"); Gerlaugh v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997)(errors committed during state post-conviction proceedings are not cognizable in a federal habeas action); Villafuerte v. Stewart, 111 F.3d 616, 632 n.7 (9th Cir. 1997)(claim that petitioner "was denied due process in his state habeas corpus proceedings" was not cognizable on federal habeas review). This is because a habeas petitioner must allege that his or her detention violates the United States Constitution, a federal statute, or a treaty. Franzen, 877 F.2d at 26; 28 U.S.C. § 2254(a). An attack on the petitioner's state postconviction proceedings "is an attack on a proceeding collateral to the detention and not the detention itself." Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995). **[*13]** "Errors or defects in the state postconviction proceeding do not . . . render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." Williams v. Missouri, 640 F.2d 140, 143-44 (8th Cir. 1981).

Thus, the state habeas court's decisions regarding permissible discovery and the scope of evidence at the evidentiary hearing did not implicate Petitioner's constitutional rights, and Petitioner's complaints about them are not cognizable in this case. Accordingly, Ground One does not warrant federal habeas relief.

II. PETITIONER'S SENTENCING CLAIM IN GROUND TWO DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Two, Petitioner contends that his current Three Strikes sentence, enhanced by his 1993 "strike" convictions for robbery and assault with a deadly weapon, is unconstitutional. Specifically, Petitioner argues that when he entered the guilty pleas on which his 1993 convictions rest, the trial court did not advise him that his convictions could be used to enhance a future sentence under the Three Strikes law; it only advised him that the convictions could be used to enhance a future sentence under California Penal Code § 667. (Petition at 5, **[*14]** Attach. at 1; *see* Motion to Dismiss, Ex. F (Reporter's Transcript of Petitioner's guilty plea hearing on April 20, 1993).) Petitioner contends that he relied on the trial court's representation that it had advised him of all the consequences of his plea, and he would not have pleaded guilty had he known that his conviction could, in the future, subject him to a life sentence. (Petition, Attach. at 1.) He further contends that his Three Strikes sentence violates his 1993 plea agreement and, for that reason, violates his rights under Article 1 of the United

States Constitution. (*Id.;* Reply at 4.) Petitioner argues that he should be allowed to withdraw his 1993 plea or, at least, that his prior convictions should not be used to enhance his current sentence. (Reply at 4.)

To the extent Petitioner argues that his 1993 guilty plea is invalid because he was not advised his convictions could be used to enhance his sentence in subsequent criminal proceedings under the Three Strikes law, his claim is barred by Lackawanna v. Coss, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). In Lackawanna, the Supreme Court held that when, as here, a prior state court conviction is later used to enhance a criminal sentence, **[*15]** "the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Id.* at 403-04, 121 S. Ct. at 1574. The Supreme Court has allowed habeas petitioners to collaterally challenge their prior convictions in federal habeas proceedings only "where there was a failure to appoint counsel in violation of the Sixth Amendment." *Id.* at 404, 121 S. Ct. at 1574. Here, the record shows that Petitioner was represented by counsel when he pleaded guilty in 1993. (Motion to Dismiss, Ex. F at 88.) Thus, this exception does not apply, and Petitioner is precluded from collaterally attacking his prior convictions through this Petition.

Petitioner's contention that his plea agreement was breached by the use of his 1993 convictions as "strikes" in his present criminal case also is without merit. In general, considerations of fundamental fairness require that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427 (1971); **[*16]** *accord* Gunn v. Ignacio, 263 F.3d 965, 969 (9th Cir. 2001); United States v. Mondragon, 228 F.3d 978, 980 (9th Cir. 2000). To determine whether a plea agreement has been breached, courts consider what was "reasonably understood" by a defendant "when he entered his plea of guilty." Gunn, 263 F.3d at 970; United States v. Serrano, 938 F.2d 1058, 1061 (9th Cir. 1991). "[T]he construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." Ricketts v. Adamson, 483 U.S. 1, 5 n.3, 107 S. Ct. 2680, 2684 n.3, 97 L. Ed. 2d 1 (1987).

Additionally, "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985)(citation omitted). "[A]bsent misrepresentations or other impermissible conduct by state agents, . . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Brady v. United States, 397 U.S. 742, 757, 90 S. Ct. 1463, 1473, 25 L. Ed. 2d 747 (1970)(citations **[*17]** omitted).

Petitioner is not complaining that a plea bargain promise was breached. *Contrast* Davis v. Woodford, 446 F.3d 957, 961-62 (9th Cir. 2006)(because the prosecutor expressly promised that only one prior conviction would be placed in defendant's criminal record, use of the eight counts as eight strikes violated the plea agreement). Rather, Petitioner believes the plea agreement somehow locked in the sentencing law in effect at the time the agreement was made. Under California law, however, a plea agreement is "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws." People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478, 482 (2004). *See* Davis, 446 F.3d at 962 (explaining that its conclusion that the plea agreement was breached was consistent with Gipson, because the plea bargain "did not purport to freeze the law" but included a specific promise as to how many prior convictions would be placed in defendant's criminal record).

Petitioner interprets the trial court's advisement that, in the event of a future conviction, the guilty plea would render Petitioner subject to an enhancement **[*18]** under California Penal Code § 667, and the court's reference to "*all* the consequences," as an implicit assurance that the court had enumerated all possible consequences for all time, and Petitioner would not be

subject to any enhancement other than that contained in Section 667. (Reply at 4; Motion to Dismiss, Ex. F. at 98.) This is not a reasonable interpretation. The trial court advised Petitioner of a possible enhancement existing under the law at the time, *i.e.,* under Section 667. (Motion to Dismiss, Ex. F at 97-98.) Neither the prosecutor nor the trial court was in a position to promise that state sentencing law would not be amended in such a way that, should Petitioner commit additional crimes in the future, his guilty plea might subject him to a longer sentence enhancement than that set forth in Section 667. *See* Johnson v. Lumpkin, 769 F.2d 630, 633 (9th Cir. 1985)(in order for plea offer to be binding under Santobello, the agent offering it must have authority to make the offer). Petitioner could not have reasonably interpreted the trial court's advisements regarding the Section 667 enhancement as a representation that Petitioner was insulated forever from future changes in **[*19]** California's sentencing laws. *See* Gunn, 263 F.3d at 970.

Petitioner argues that the trial court should have advised him of the possibility that the law could change, and thus, his convictions could be used to enhance a future sentence under a not-yet-passed law. (Petition, Attach. at 1.) No such advisement was required. "The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea," and a defendant's plea is voluntary even if he is not advised of such collateral consequences. United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990); *see also* People v. Crosby, 3 Cal. App. 4th 1352, 1354-55, 5 Cal. Rptr. 2d 159, 160 (1992)(possibility of enhanced punishment in case of a future conviction is a collateral consequence).

For these reasons, Petitioner's current sentence does not violate his 1993 plea agreement, and due process was not offended by the use of his 1993 prior convictions as "strikes." Accordingly, Ground Two does not warrant federal habeas relief.

III. PETITIONER'S *BATSON* AND INEFFECTIVE ASSISTANCE CLAIMS IN GROUNDS THREE, FOUR, AND FIVE [*20] DO NOT WARRANT FEDERAL HABEAS RELIEF.

Petitioner asserts three claims stemming from the allegedly improper exercise of peremptory challenges on the basis of race by both the prosecutor and Petitioner's own counsel. In Ground Three, Petitioner contends that his right to equal protection was violated by the prosecutor's use of peremptory challenges to exclude African-American prospective jurors on the ground of race. (Petition at 6.) In a related claim in Ground Five, Petitioner contends that his trial counsel provided ineffective assistance, in violation of the Sixth Amendment, by failing to make an adequate record regarding the prosecution's exercise of peremptory challenges as to African-American members of the venire. (Petition, Attach. at 3.) In Ground Four, Petitioner contends again that his right to equal protection was violated, because the trial court failed to quash the venire after Petitioner's counsel used defense peremptory challenges to exclude white jurors on the basis of race. (Petition at 6, Attach. at 2-3.)

The Court's review and analysis of these three claims is hampered to some extent by the failure of Petitioner's attorneys -- not once, but twice -- to develop the **[*21]** factual bases for his claims. Petitioner's trial counsel failed to make an adequate record in support of the allegation that the prosecution improperly exercised peremptory challenges on the basis of race; indeed, this failure is the basis for Petitioner's fifth habeas claim. When afforded a state habeas evidentiary hearing and, thus, a chance to close this evidentiary gap, Petitioner's habeas counsel nonetheless failed to do so. As discussed below, Petitioner's failure to develop the facts underlying his claim cannot now be rectified.

Although the record is flawed, it nonetheless is plain that Petitioner's peremptory challenge-based claims fail. As explained below, there is no basis for finding, at the first step of the relevant inquiry, that there has been a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race. Petitioner's attendant ineffective assistance claim fails as well, because there is no basis for finding the requisite prejudice. Petitioner's assertion that his conviction should be set aside due to his own trial counsel's exercise of peremptory challenges also cannot warrant relief, as no clearly established federal law, within the

[*22] meaning of Section 2254(d)(1), supports it. In short, flaws in the record notwithstanding, Petitioner's allegations stemming from the exercise of peremptory challenges at his trial provide no basis for federal habeas relief.

A. Background

1. Trial

Near the conclusion of the second day of jury selection, the prosecutor had exercised 12 peremptory challenges, five of which were directed to African-American prospective jurors. Petitioner's counsel made a Wheeler motion, [2] initially complaining that four African-American jurors had been excused, but subsequently complaining that five of the 12 prospective jurors excused by the prosecutor's peremptory challenges were African-American. [3] Petitioner's counsel asserted that Petitioner, who is African-American, was being denied a "true cross-section of the population" as his jury. (3 RT 362-63.) Applying the "strong likelihood" standard, the trial court held that Petitioner had not made a prima facie case. The trial court declared that it had taken into account the answers and demeanor of the dismissed jurors and the ethnic composition of both the prospective jurors who had been seated and those remaining in the venire. (*Id.*)

FOOTNOTES

2 People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

3 Petitioner's **[*23]** counsel did not identify which peremptorily challenged and excused jurors were African-American, nor did he indicate how many of the remaining prospective jurors in the venire were African-American. (3 RT 362-63.)

Immediately after the trial court denied Petitioner's Wheeler motion, the prosecution made its own Wheeler motion based on the exercise by Petitioner's counsel of seven out of 12 peremptory challenges against white jurors. (3 RT 363-64.) The trial court denied the motion, finding that while the prosecutor had made a stronger showing than had Petitioner's counsel, he had failed nevertheless to meet the "strong likelihood" standard for establishing a prima facie case. (*Id.*) The prosecutor renewed his Wheeler motion after an eighth white juror was excused by Petitioner's counsel, but the trial court again denied it. (3 RT 368-69.)

2. The California Court Of Appeal's Decision

On direct appeal, the California Court of Appeal rejected Petitioner's claim that the prosecutor had exercised his peremptory challenges in a discriminatory manner. (Motion to Dismiss, Ex. B at 10-11.) Pointing out that the record did not disclose which of the dismissed jurors were African-American, the state **[*24]** appellate court declared: "For this reason (and because the record also shows that the prosecutor excused 'many people' because they had been arrested), there is no support for [Petitioner]'s claim of Wheeler error." (*Id.* at 10-11.)

The California Court of Appeal then turned to Petitioner's related claim that his trial counsel's failure to make an adequate record deprived Petitioner of his right to the effective assistance of counsel. It found that Petitioner had failed to make a showing that his attorney had no rational, tactical purpose for failing to pursue his Wheeler motion by describing the jurors for the record. (Motion to Dismiss, Ex. B at 11.) The state appellate court concluded: "Perhaps trial counsel made the motion knowing it lacked merit but needing a reason to interrupt the prosecutor's concentration on the jurors' answers. Whatever the reason, this record does not show prejudice." (*Id.*)

The California Court of Appeal also denied Petitioner's claim that his trial counsel had exercised the defense peremptory challenges in a discriminatory manner, stating that, just as the record

was inadequate to permit meaningful review of the defense Wheeler motion, it also was inadequate **[*25]** to permit review of the prosecutor's Wheeler motion. (Motion to Dismiss, Ex. B at 11-12.)

3. State Habeas Proceedings

After Petitioner filed a habeas petition in the Los Angeles County Superior Court, the trial court held an evidentiary hearing regarding Petitioner's ineffective assistance claim based on his trial counsel's failure to make a record in connection with Petitioner's Wheeler motion. [4] (Motion to Dismiss, Ex. E at 18-19.) Petitioner's trial counsel testified that he brought the Wheeler motion in good faith. He stated that his failure to make a record describing the dismissed jurors was not tactical but, rather, must have been an oversight on his part, because he believed he had made a "satisfactory" record should there be an appeal. (July 2, 2003 EHT at 24-25, 27, 40-41.) Trial counsel admitted he could not actually remember what he had been thinking in this respect. (*Id.* at 51.) Trial counsel recalled that, at the time he made the defense Wheeler motion, the prosecutor had excused two prospective jurors who were "minorities," one African-American and one Hispanic. (*Id.* at 26, 44-45.) He stated that one of the reasons he made the motion was to stop the prosecution from excusing **[*26]** any more African-American prospective jurors. (*Id.* at 43-44.)

FOOTNOTES

4 Petitioner's assertion (Reply at 8) that the trial court "ordered petitioner not to" attempt to develop additional factual information regarding his peremptory challenge-based claims at this hearing, including regarding the make-up of the venire, is disingenuous. At a hearing on June 2, 2003, the prosecutor vigorously disputed the trial court's authority to hold an evidentiary hearing with respect to Petitioner's pending state habeas petition, arguing that, because there had been no finding that a prima facie case had been stated and no order to show cause had issued, there was no jurisdiction to allow discovery or hold an evidentiary hearing. (Reporter's Transcript of Hearing on June 2, 2003, 7-13, 25-28, 35-36, 38.) Petitioner's habeas counsel made clear that trial counsel was being called as a witness *only* for the limited purpose of filling a "gap" in the record identified by the state appellate court on direct appeal, namely, regarding why trial counsel failed to make a clear record for purposes of the Wheeler motion. Petitioner's habeas counsel stated that a declaration from trial counsel on this specific issue would **[*27]** obviate the need for a hearing, if one could be obtained. (*Id.* at 5-6, 39-40.) The trial court decided to set a hearing date for July 2, 2003, subject to the possible obviation of that hearing should the desired declaration of trial counsel be filed instead. (*Id.* at 36-40.)

On July 2, 2003, Petitioner's habeas counsel advised that trial counsel had not provided a declaration, but would appear to testify. (Reporter's Transcript of Hearing on July 2, 2003 ("July 2, 2003 EHT") 2-3.) The prosecutor again stated her jurisdictional objection to holding an evidentiary hearing. (*Id.* at 3-10, 21.) Petitioner's habeas counsel reiterated that the only inquiry of trial counsel he wished to make was regarding trial counsel's failure to make a record for the Wheeler motion. (*Id.* at 11-13.) The trial court conceded it might lack the authority to proceed with an evidentiary hearing but decided that, because trial counsel was present, he could be questioned regarding the limited issue framed by Petitioner's habeas counsel. However, the trial court declined to allow Petitioner's counsel to call as an additional witness a police officer for the purpose of questioning the officer about the veracity of **[*28]** his trial testimony related to the crime in issue. (*Id.* at 17-19.)

The transcripts for both the June 2, 2003, and July 2, 2003 hearings plainly show that Petitioner did not attempt to elicit any information concerning his present peremptory challenge-related claims other than trial counsel's testimony about his failure to make an adequate record in support of the Wheeler motion. Petitioner's contention that the trial court precluded him from attempting to obtain other relevant information, such as about the make-up of the venire, is simply untrue.

By the time of the evidentiary hearing, Petitioner's trial counsel was suffering from congestive heart failure. (July 2, 2003 EHT 41.) He had limited use of his limbs due to edema and was in a wheelchair. (*Id.* at 41, 43.) He was on medication and found it difficult to concentrate. (*Id.* at 41-42.) The trial judge presiding over the evidentiary hearing, who also had presided over the trial, stated that he had serious doubts regarding trial counsel's memory and ability to reason during the evidentiary hearing, which were very different from what they had been during trial. (*Id.* at 53-55.) The trial court observed that it was apparent Petitioner's **[*29]** trial counsel did not remember much about the voir dire proceeding, given his testimony that Petitioner's Wheeler motion had been based on the exercise of peremptory challenges to one African-American prospective juror and one Hispanic prospective juror. (July 3, 2003 EHT at 53.) The trial court also noted the rather bizarre testimony of Petitioner's trial counsel that assessing whether or not the prosecutor had a legitimate reason for exercising a particular peremptory challenge would have required recessing the trial in order to allow a defense investigator to interview the prospective juror about her life experiences (*see id.* at 38-40), stating that this called into question trial counsel's "rational understanding of what's going on." (*Id.* at 53-54.)

The trial court conclude that "very little value" could be given to trial counsel's testimony due to the apparent effect of his impairments, and rejected it as untrustworthy. (July 3, 2003 EHT at 54-55.) The trial court then found that Petitioner had not shown prejudice and denied the habeas petition. (July 2, 2003 EHT at 55-56.)

B. Ground Two - *Batson* Violation By The Prosecution

1. The Applicable Clearly Established Federal Law And Standard [*30] Of Review

The Equal Protection Clause of the Fourteenth Amendment forbids the use of peremptory challenges to exclude potential jurors solely on the basis of race. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986). The Supreme Court has established a three-step procedure for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. First, the defendant must make a prima facie showing that the prosecution exercised a peremptory challenge on the basis of race. That is, the defendant bears the burden of demonstrating that the facts and circumstances of the case raise an inference that the prosecution excluded venire members from the petit jury solely on account of their race. *Id.* at 96, 106 S. Ct. at 1723. Second, if a defendant makes this prima facie showing, the burden then shifts to the prosecution to provide a neutral explanation for its challenge. *Id.* at 97, 106 S. Ct. at 1723. Third and finally, "[t]he trial court will then have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S. Ct. at 1724. At this third step, the court must evaluate the credibility of the **[*31]** prosecutor's proffered justifications to determine whether they are genuine. Purkett v. Elem, 514 U.S. 765, 769, 115 S. Ct. 1769, 1771-72, 131 L. Ed. 2d 834 (1995).

Here, the state courts found that Petitioner's equal protection claim failed at the first step. The trial court employed the Wheeler "strong likelihood" standard to determine that Petitioner had not established a prima facie case. (3 RT 362). The California Court of Appeal did not specify the standard it was using, but its citations to Wheeler and other California cases indicate that it was using the "strong likelihood" standard. (Motion to Dismiss, Ex. B at 11.) Under this standard, the defendant must show a strong likelihood that the prosecution is exercising its peremptory challenges based on group association. Wheeler, 22 Cal. 3d at 280, 148 Cal. Rptr. at 905.

In Wade v. Terhune, 202 F.3d 1190 (9th Cir. 2000), the Ninth Circuit held that when a California court determines that defendant has not established a prima facie case using the "strong likelihood" standard of Wheeler, its determination is not entitled to AEDPA deference, because the "strong likelihood" standard of Wheeler is more stringent than the Batson "raise an inference" standard. **[*32]** *Id.* at 1195-97. In People v. Box, 23 Cal. 4th 1153, 99 Cal. Rptr. 2d 69, 5 P.3d 130 (2000), however, the California Supreme Court held that, under Wheeler, a "strong likelihood" means a "reasonable inference" and, therefore, the Wheeler standard is

consistent with Batson. Box, 23 Cal. 4th at 1187 n.7, 99 Cal. Rptr. 2d at 94 n.7.

Subsequently, the California Supreme Court issued its decision in People v. Johnson, 30 Cal. 4th 1302, 1 Cal. Rptr. 3d 1, 71 P.3d 270 (2003), in which it held that the Wheeler "strong likelihood" standard requires the defendant to show that it is more likely than not that the prosecutor's challenge was made with discriminatory intent, and thus the Wheeler standard is consistent with the Batson "reasonable inference" standard. *Id.* at 1316, 1 Cal. Rptr. 3d at 12-13. The United States Supreme Court rejected this interpretation of Batson and reversed, holding that the "more likely than not" standard impermissibly places on the defendant a more onerous burden of proof than Batson requires. Johnson v. California, 545 U.S. 162, 168, 170, 125 S. Ct. 2410, 2416, 2417, 162 L. Ed. 2d 129 (2005). The Supreme Court explained that "a defendant satisfies the requirements of Batson's first step by producing evidence **[*33]** sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* at 170, 125 S. Ct. at 2417.

In the light of the Supreme Court's elucidation of Batson in Johnson, it is clear that the state courts applied an incorrect standard in determining that Petitioner had not established a prima facie case. When the state courts use the incorrect "strong likelihood" standard, this Court must review the prima facie determination *de novo* rather than under the deferential AEDPA standard. Williams v. Runnels, 432 F.3d 1102, 1105 (9th Cir. 2006)("Runnels"); Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004); Fernandez v. Roe, 286 F.3d 1073, 1077 (9th Cir. 2002); Cooperwood v. Cambra, 245 F.3d 1042, 1047 (9th Cir. 2001); Wade, 202 F.3d at 1197; *compare* Boyd v. Newland, 467 F.3d 1139 (9th Cir. 2006)(applying deferential AEDPA standard when the state courts had applied both the California and the federal standards), *cert. denied,* 550 U.S. 933, 127 S. Ct. 2249, 167 L. Ed. 2d 1089 (2007); *cf.* Frantz, 513 F.3d at 1012 (federal habeas court performs *de novo* review after the state court applies the wrong standard under Supreme Court precedent).

2. Petitioner Has Not Established A Prima Facie Case.

To make **[*34]** a prima facie case under the first prong of Batson, Petitioner was required to establish that: (1) the prospective jurors at issue were members of a cognizable group, in this case African-Americans; (2) the prosecution used peremptory challenges to remove them; and (3) the facts and relevant circumstances raise an inference that the challenges were motivated by race. Cooperwood, 245 F.3d at 1045-46; *see* Batson, 476 U.S. at 96, 106 S. Ct. at 1723. Only the third factor is at issue here.

"[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" Johnson, 545 U.S. at 169, 125 S. Ct. at 2416 (quoting Batson, 476 U.S. at 94, 106 S. Ct. at 1721). Thus, there are several ways in which a federal court can review a state court's determination with respect to the first Batson step in light of the "totality of the relevant facts." Boyd, 467 F.3d at 1147 (quoting Batson, 476 U.S. at 94, 106 S. Ct. at 1721).

A defendant "can make a prima facie showing based on a statistical disparity alone." Runnels, 432 F.3d at 1107. "Statistical facts like a high proportion of **[*35]** African-Americans struck and a disproportionate rate of strikes against African-Americans can establish a pattern of exclusion on the basis of race that gives rise to a prima facie Batson violation." Williams v. Woodford, 384 F.3d 567, 583 (9th Cir. 2004). However, "[t]here is no magic number of challenged jurors" that automatically establishes a prima facie case of discrimination. United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989). And, "[a]lthough a pattern of strikes against African-Americans provides support for an inference of discrimination," a defendant "must point to more facts than the number of African-Americans struck to establish such a pattern." Williams, 384 F.3d at 583. For example, in Williams, the petitioner failed to create an inference of discrimination when he alleged that the prosecutor used two of 19 challenges to remove the only two African-American females on the jury, and one of three challenges to remove a male African-American alternate juror. *Id.* at 583-84. "Because Williams failed to allege, and the record does not disclose, facts like how many African-Americans . . . sat on the

jury, how many African-Americans were in the venire, and how large **[*36]** the venire was, it is impossible to say whether any statistical disparity existed that might support an inference of discrimination." *Id.* at 584. *Contrast* Johnson, 545 U.S. at 164, 173, 125 S. Ct. at 2414, 2419 (finding a prima facie case when the prosecutor used three of 12 peremptory challenges against the only three African-Americans in the jury pool); Runnels, 432 F.3d at 1107 (finding a prima facie case when only four of the first 49 prospective jurors were African-American and the prosecutor used three of his first four challenges against African-Americans).

Here, the record indicates that, at the time of Petitioner's Wheeler motion, the prosecutor had exercised five out of 12 peremptory challenges against African-Americans. (3 RT 363.) The record also indicates that, subsequently, seven additional prospective jurors were called to the jury box, and while Petitioner's counsel exercised further peremptory challenges, the prosecutor did not. (3 RT 365-84.) The record is devoid of information regarding whether any of the additional jurors seated in the jury box were African-American. [5] Nor is there any evidence regarding the racial make-up of the venire from which the jurors were **[*37]** drawn, or of the jury that ultimately was seated. Thus, as in Williams, there is insufficient information to give rise to an inference of discrimination based on a finding of statistical disparity.

FOOTNOTES

5 Petitioner alleges that initially, there were six African-American prospective jurors in the jury box, and one remained when the Wheeler motion was made. (Petition at 6, Attach. at 2; Reply at 5-6, 8.) However, the record contains no evidence as to the racial/ethnic make-up of the prospective jurors seated in the jury box at the time of the Wheeler motion. Petitioner's counsel stated the basis for the motion to be: "The prosecution has excused one, two, three -- by my count it's four, four Afro-American jurors were left, with one on the panel at the moment, and we objected." (3 RT 362.) The trial court agreed with counsel's subsequent clarification that five of the prosecutor's peremptory challenges involved African-American prospective jurors, but made no comment about the racial/ethnic make-up of the remaining seated prospective jurors (3 RT 363), and there was no subsequent clarification of the record with respect to how many African-American prospective jurors remained, whether seated **[*38]** in the jury box or in the jury pool as a whole.

Petitioner effectively concedes that the record is insufficient to permit an inference of discrimination based on statistical disparity, but argues that he was precluded from developing such information at the trial court evidentiary hearing by reason of the limited nature of the questioning allowed by the trial court. (Reply at 8.) For the reasons set forth in Note 4, *supra,* this contention is not persuasive. As discussed above, the record shows that Petitioner's habeas counsel sought only to elicit evidence regarding why trial counsel had failed to make a record in support of the Wheeler motion for purposes of Petitioner's ineffective assistance of trial counsel claim, and he neither stated a desire nor made any attempt to elicit other evidence relevant to Petitioner's Batson-related claims. Petitioner's habeas counsel made no effort to expand the scope of the hearing or to seek discovery for the purposes of obtaining evidence about the racial and ethnic composition of the persons seated in the jury box and in the venire as a whole. Hence, Respondent's contention that Petitioner failed to utilize an opportunity available to him to develop **[*39]** the factual basis for his present Batson claims, for purposes of the 28 U.S.C. § 2254(e)(2) limitation on evidentiary hearings in federal habeas cases, is well-taken. [6]

FOOTNOTES

6 For this reason, even if Petitioner had requested an evidentiary hearing on this issue, one would not be available. *See* 28 U.S.C. § 2254(e)(2) ("[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing" absent certain exceptions not applicable here); Williams v. Taylor, 529 U.S. 420, 432, 120 S. Ct. 1479, 1488, 146 L. Ed. 2d 435 (2000)(failure to develop the

factual basis of a claim, for purposes of this statute, means "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel"). Moreover, there is no reason to believe that an evidentiary hearing would adduce information regarding the racial and ethnic composition of the venire, particularly given the deteriorating memory of Petitioner's trial counsel as of the time of the state evidentiary hearing. *Cf.* Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002)(the failure "to show what more an evidentiary hearing might reveal" precludes holding one).

In addition **[*40]** to this defect in the factual basis for Petitioner's claim, it also is impossible to engage in a comparison of the African-American jurors excused by the prosecutor and the non-African-American jurors he did not challenge. *See* Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325, 162 L. Ed. 2d 196 (2005); Boyd, 467 F.3d at 1149 (the reviewing court should perform comparative juror analysis at the prima facie stage). Petitioner's counsel did not make a record at trial of which five of the 12 jurors excused by the prosecutor were African-American, nor did the trial court do so. The record shows only that one of the dismissed jurors, who had a son just released from prison, expressed the view that too many African-Americans are incarcerated and identified her son as African-American, which gives rise to the inference that she too might be African-American. (2 RT 117, 139-45.) It also appears from the record that the juror dismissed immediately before the prosecutor made his Wheeler motion was African-American. (2 RT 111-12; 3 RT 361-62.) Otherwise, the record does not disclose which jurors were African-American or contain any evidence that would permit the Court to assume with confidence which **[*41]** prospective jurors were African-American and which were not, and thus, it does not permit the Court to perform a comparative analysis as described in Boyd. [7]

FOOTNOTES

[7] In a declaration submitted in support of his habeas petition in the California Court of Appeal, Petitioner identified three prospective jurors as African-Americans, including the juror who identified her son as African-American, and indicated that his identification was based on his personal observations and notes taken at trial. (Motion to Dismiss, Ex. F at 67 (Declaration of Chester L. Clark, dated July 27, 2003), P 4).) In his unsigned and unsworn Reply, Petitioner identifies three additional prospective jurors as African-Americans, but states no basis for his identification. (Reply at 5-6.) Even assuming, *arguendo,* that Petitioner's description of these jurors could be correct, the record does not reveal the race or ethnicity of the other prospective jurors.

Petitioner argues that, nonetheless, the Court should proceed past the first step of the Batson inquiry, because the prosecutor gave a reason for his dismissal of these jurors. (Reply at 9.) Petitioner relies on the prosecutor's less than eloquent comment that, "unlike **[*42]** many people that I have excused for reasons where they've had instances where they've been personally arrested or have -- at ever once that have been arrested," there appeared to be no reason other than race for defense counsel's peremptory challenges of white jurors. (3 RT 364.) Petitioner also contends that the California Court of Appeal's assertion that the prosecutor excused "many people" because they had been arrested is not supported by the record. (Motion to Dismiss, Ex. B at 10-11; Reply at 9.)

Petitioner's argument is not persuasive for several reasons. First, the prosecutor's comment was made in support of his own Wheeler motion and was made *after* the trial court already had ruled on and denied the Wheeler motion made by Petitioner's counsel. It was not proffered as a second step, neutral explanation for the peremptory challenges made by the prosecution (*i.e.,* following a step one finding of a prima facie showing that the challenges were exercised on the basis of race), and the prosecutor did not at any time purport to explain *his* peremptory challenges of African-American prospective jurors on this basis. Thus, this comment does not constitute a reason for proceeding past **[*43]** the first step of Batson.

Second, although the comment is garbled in pertinent part, the prosecutor appears to be referring to more than arrests of the jurors themselves, namely, to arrests of family members. Petitioner correctly points out that, contrary to the California Court of Appeal's comment, the record does not reflect that the prosecutor's challenges were directed to jurors who themselves had been arrested. However, a review of the record discloses that at least four of the five prosecution peremptory challenges about which Petitioner complains, *i.e.,* involving prospective jurors who Petitioner asserts are African-American (*see* Reply at 5-6), were directed at prospective jurors whose close relatives had been tried and/or convicted. Juror No. 9803 stated that her twin brother had been tried for embezzlement and acquitted, and the police did not treat him fairly. (2 RT 102, 126-28; 3 RT 323.) Juror No. 9542 stated that he had four uncles, two aunts, and three cousins who had been arrested, although he believed they had been treated fairly. (2 RT 109, 130-31; 3 RT 302.) Juror No. 0871, as previously discussed, had a son just released from prison and opined that her son had not **[*44]** been treated fairly in prison and too many African-Americans are incarcerated. [8] (2 RT 117, 139-45; 3 RT 322.) Juror No. 7672 stated that her husband had been arrested for possession of narcotics, tried, and convicted, although she believed he had been treated fairly. (3 RT 305, 316-18, 323, 336.)

FOOTNOTES

8 Petitioner asserts that he has satisfied the step three inquiry, because the jury as seated contained three alleged non-African-Americans with arrest records. (Reply at 9.) The record does show that, after both sides' Wheeler motions were denied, additional prospective jurors were called to the jury box to sit in seats 16 through 18. Two of them had DUI convictions, and another had received probation for a theft offense as a juvenile. Two of them stated that they had been treated fairly, and one expressed discontent with the handling of the case by the police and the public defender. After the defense exercised additional peremptory challenges, these three prospective jurors moved into seats three, six, and seven, and ended up on the jury as accepted by both sides. (3 RT 355, 357-58, 359-60, 362, 364-65, 382-83.) The record does not contain any evidence of the race or ethnicity of these three **[*45]** jurors. In any event, given that the Court has not found a step one prima facie case to be established, there is no reason to consider whether the fact of these three jurors' arrest records satisfies the step three inquiry.

Moreover, the prosecutor said nothing during the jury selection process that would support an inference that he was biased against African-American jurors. *See* Batson, 476 U.S. at 97, 106 S. Ct. at 1723 ("[T]he prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose."); Boyd, 467 F.3d at 1149 (the court "may have to review the questions that the prosecution asked of jurors at step one of the Batson analysis to determine whether a defendant has made a prima facie showing of unlawful discrimination").

Finally, the trial court specifically found and stated on the record that, based on its own observations of the jurors' demeanor, there was no prima facie case of discrimination. (3 RT 362-63.) Although this Court is conducting *de novo* review, it still must defer to the trial court's factual findings regarding the jurors' demeanor. *See* Wainwright v. Witt, 469 U.S. 412, 428, 105 S. Ct. 844, 854, 83 L. Ed. 2d 841 (1985) **[*46]** ("[D]eterminations of demeanor and credibility . . . are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; '[t]he respect paid such findings in a habeas proceeding certainly should be no less.'" (quoting Patton v. Yount, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 2892, 81 L. Ed. 2d 847 (1984))). As the Ninth Circuit has explained:

> [T]he trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. The trial judge personally witnesses the totality of circumstances that comprises the "factual inquiry," including the jurors' demeanor and tone of voice as they answer questions and

> counsel's demeanor and tone of voice in posing the questions. . . . The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason.

Tolbert v. Page, 182 F.3d 677, 683 (9th Cir. 1999)(*internal citation omitted).*

Although the trial court did not identify how the demeanor of the dismissed jurors led to its conclusion, the fact remains that the trial court was **[*47]** a percipient observer of the dismissed jurors, which this Court is not, and nothing in the record provides a basis for rejecting the trial court's factual findings.

Having reviewed the facts and relevant circumstances surrounding the prosecutor's exercise of five out of 12 peremptory challenges against African-American prospective jurors, the Court concludes that Petitioner failed to establish a prima facie case of discrimination under Batson. Accordingly, Petitioner's Batson claim in Ground Three does not warrant federal habeas relief.

C. Ground Five -- Ineffective Assistance Of Counsel

1. The Applicable Clearly Established Federal Law

The Sixth Amendment to the United States Constitution guarantees the *effective* assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984). When a petitioner claims a Sixth Amendment violation based on his counsel's performance, "[i]n addition to the deference granted to the state court's decision under AEDPA, [federal habeas courts] review ineffective assistance of counsel claims in the deferential light of" Strickland. Brown v. Ornoski, 503 F.3d 1006, 1011 (9th Cir. 2007).

To prevail on a claim that his counsel rendered **[*48]** ineffective assistance, Petitioner must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland, 466 U.S. at 688-93, 104 S. Ct. at 2064-68; *see also* Yarborough v. Gentry, 540 U.S. 1, 5, 124 S. Ct. 1, 4, 157 L. Ed. 2d 1 (2003)(*per curiam*)(the Sixth Amendment right "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense"). As both prongs of the Strickland test must be satisfied in order to establish a constitutional violation, failure to satisfy either prong requires that a petitioner's ineffective assistance claim be denied. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069 (no need to address deficiency of performance if lack of prejudice is obvious); Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998)(no need to address prejudice when petitioner cannot establish deficient performance).

The first prong of the Strickland test -- deficient performance -- requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Judicial scrutiny of counsel's performance **[*49]** "must be highly deferential," and this Court must guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; *see also* Gentry, 540 U.S. at 8, 124 S. Ct. at 6 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003)(the first Strickland prong is a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'").

Due to the difficulties inherent in making the above-described evaluation, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (*internal quotation marks and citation omitted); see also* Bell v. Cone, 535 U.S. 685, 698, 122 S. Ct. 1843, 1852, 152 L. Ed.

2d 914 (2002)(even if an ineffective assistance claim is **[*50]** not subject to Section 2254(d)(1) deference, the petitioner still must overcome the presumption that counsel's conduct might be considered sound trial strategy).

The second prong of the Strickland test -- prejudice -- requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.; see also* Visciotti, 537 U.S. at 22, 123 S. Ct. at 359.

Finally, for a petitioner to succeed on an ineffective assistance of counsel claim in a Section 2254 proceeding, it is not enough to persuade a federal court that the Strickland test would be satisfied if his claim "were being analyzed in the first instance." Bell, 535 U.S. at 698-99, 122 S. Ct. at 1852. It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Id.* Rather, the petitioner must show that the state courts" applied Strickland to the facts of his case in an objectively unreasonable manner." *Id.; see also* Gentry, 540 U.S. at 5, 124 S. Ct. at 4; **[*51]** Visciotti, 537 U.S. at 24-25, 123 S. Ct. at 360.

2. Petitioner's Ineffective Assistance Of Trial Counsel Claim Does Not Warrant Relief

It is undisputed that Petitioner's trial counsel failed to make a sufficient record with respect to his Wheeler motion. As discussed above, at the state habeas evidentiary hearing, Petitioner's trial counsel testified that he did not have any tactical reason for failing to make this showing, and it was an oversight. The trial court, however, found that trial counsel's memory of the jury selection process was impaired, and his testimony was untrustworthy. (July 2, 2003 EHT 24-25, 40, 54.) Nevertheless, the Court will assume that Petitioner's trial counsel performed deficiently by failing to make an adequate record and will proceed to the prejudice prong of the Strickland inquiry.

To show that his trial counsel's failure to make a complete record in connection with his Wheeler motion caused Petitioner prejudice, within the meaning of Strickland, Petitioner must establish a reasonable likelihood that Petitioner's Batson/Wheeler claim would have prevailed if counsel had made an adequate showing. Petitioner has not done so. Without demonstrating what the omitted **[*52]** information would have shown, Petitioner cannot demonstrate prejudice. There is nothing in the record from which this Court could conclude that there is a reasonable probability that the state trial, appellate, or high courts would have found a Batson/Wheeler violation if defense counsel had identified the African-American prospective jurors dismissed by the prosecution and noted the racial composition of the venire or of the jury. Indeed, as discussed in connection with Petitioner's Batson claim in Ground Three, even accepting as true Petitioner's unsupported allegations regarding which prospective jurors dismissed by the prosecutor were African-American, Petitioner still has not shown a prima facie case of a Batson violation.

Petitioner's ineffective assistance of counsel claim, therefore, fails under the second prong of Strickland. As a result, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, Ground Five does not warrant federal habeas relief.

D. Ground Four -- *Batson* Violation By The Defense

Petitioner also contends that he was deprived of equal protection, because his own counsel exercised **[*53]** peremptory challenges to exclude white jurors on the basis of race. (Petition at 6, Attach. at 2-3.)

The Supreme Court has held that the prosecution may assert a Batson challenge to the discriminatory use of peremptory challenges by the defense. McCollum v. Georgia, 505 U.S. 42, 55, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). This is because a criminal defendant exercising a

peremptory challenge is acting as a state actor to determine the composition of a governmental body, and a discriminatory challenge harms the individual juror who is the subject of the discrimination and also harms the community by undermining public confidence in the system of justice. *Id.* at 48-50, 54, 112 S. Ct. at 2353-54, 2356.

However, the Supreme Court has never addressed the potential remedy for a violation of Batson by the defense. The Ninth Circuit has also not addressed this issue. The Circuit Courts which have addressed it are split regarding whether a violation of Batson by a defendant's own counsel warrants reversal of the conviction. *Compare* United States v. Boyd, 86 F.3d 719, 724, 725 (7th Cir. 1996)(declaring that: "[g]iving a defendant a new trial because of his own violation of the Constitution would make a laughingstock **[*54]** of the judicial process"; and McCollum allows the judge to block the defense from violating important societal interests, but it "does not follow that by violating these important social interests a defendant can help himself to a new trial"), *with* United States v. Huey, 76 F.3d 638, 641 (5th Cir. 1996)(reversing defendant's conviction based on his counsel's discriminatory strikes, because "repudiating all results" from a trial tainted by Batson error is the only way to regain public confidence in the integrity of the judicial system).

Thus, there is no clearly established federal law, as explicated by the Supreme Court, that a criminal defendant's conviction cannot stand if defense counsel violated Batson. It follows that, regardless of whether the state courts correctly concluded that the prosecutor had not established a prima facie case, the state courts' rejection of Petitioner's Batson/Wheeler claim challenging discriminatory peremptory challenges by his own counsel could not be contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See* Carey, 127 S. Ct. at 654 (holding that the state court's rejection of a habeas claim was not contrary to **[*55]** or an unreasonable application of clearly established federal law, given the absence of a decision on the matter in issue by Supreme Court and a divergence of opinion on the issue among the lower courts); *see also* Wright v. Van Patten, 552 U.S. 120, 128 S. Ct. 743, 746-47, 169 L. Ed. 2d 583 (2008)(*per curiam*)(when no Supreme Court decision "squarely addresses" an issue and existing Supreme Court precedent "gives no clear answer to the question presented," Section 2254(d)(1) cannot be satisfied); Crater v. Galaza, 491 F.3d 1119, 1123 (9th Cir. 2007) (if habeas relief depends upon the resolution of an open question under Supreme Court decisions, "Section 2254(d)(1) precludes relief"); Clark v. Murphy, 331 F.3d 1062, 1071 (9th Cir. 2003)(when Circuit Courts applying Supreme Court precedent that is general, rather than specific, "have reached differing results on similar facts," the state court's decision cannot be said to be objectively unreasonable); Henderson v. La Marque, 2002 U.S. Dist. LEXIS 9412, 2002 WL 1034047, *11 n.3 (N.D. Cal. 2002)(finding claim premised on defense Batson violation to be without merit, because the prosecution withdrew its Wheeler motion before there was a ruling, but noting that even if the claim had merit, **[*56]** "petitioner would not be entitled to a new trial on this ground because no clearly established Supreme Court law requires a new trial for defense counsel's violation of Batson").

In view of the lack of clearly established federal law with respect to Petitioner's fourth claim, the state court's denial of this claim cannot warrant federal habeas relief under Section 2254(d)(1). Hence, Ground Four must be denied.

IV. PETITIONER'S INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM IN GROUND SIX DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Six, Petitioner contends that appellate counsel was ineffective, because he failed to argue that: (1) the trial court erred in admitting testimony that Petitioner refused to participate in a lineup; and (2) the trial court erred in admitting evidence of other crimes. (Petition, Attach. at 4.)

A. The Applicable Clearly Established Federal Law

The Sixth Amendment right to the effective assistance of counsel encompasses the right to the effective assistance of appellate counsel as well. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct.

830, 836, 83 L. Ed. 2d 821 (1985). However, appellate counsel need not raise every nonfrivolous issue requested by defendant. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983). **[*57]** The analytical framework of Strickland governs ineffective assistance of appellate counsel claims. Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). As the Ninth Circuit has explained, in the appellate context the two prongs will often overlap:

> In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . For these reasons, a lawyer who throws in every arguable point - "just in case" - is likely to serve her client less effectively than one who concentrates solely on the strong arguments. Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason -- because she declined to raise a weak issue.

Miller, 882 F.2d at 1434 (*footnote omitted*). Thus, the appropriate inquiry is whether a specific claim would have resulted in a "reasonable probability of reversal." *Id.; see also* Wildman v. Johnson, 261 F.3d 832, 840-42 (9th Cir. 2001)(appellate **[*58]** counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal); Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000)(same).

B. Failure To Argue Lineup Issues

During trial, the parties argued regarding the admissibility of evidence that Petitioner refused to participate in a lineup. (5 RT 913.) At a hearing out of the presence of the jury, Petitioner's counsel at the time of the lineup testified that he prepared a motion for a lineup at Petitioner's request, and it was granted. (5 RT 915, 923.) When counsel arrived at the scheduled time, jail personnel refused to allow him to see Petitioner prior to the lineup. (5 RT 916.) Later, he was told that Petitioner had refused to participate in the lineup. (5 RT 917.) Counsel asked to see Petitioner to persuade him to participate in the lineup, but jail personnel refused counsel's request. (5 RT 918.) Detective Zaitz testified that the deputy in charge of the lineup told him that Petitioner had refused to participate in the lineup, and Detective Zaitz asked the deputy to allow Petitioner's counsel to speak with Petitioner, but the deputy said that Petitioner **[*59]** did not want to speak with counsel. (5 RT 932.) Petitioner testified that he requested the lineup, but then refused to participate because he was much taller than some of the other participants. (5 RT 936.) He asked to speak with his counsel, but was not allowed to do so; he did not refuse to speak with counsel. (5 RT 936-37.)

The trial court overruled the defense objection to admission of evidence that Petitioner refused to participate in a lineup, stating that Petitioner's counsel would have been present and could have raised any appropriate objections to the conduct of the lineup. (5 RT 1025-38.) Detective Zaitz then testified that a lineup was scheduled, but Petitioner refused to participate. (5 RT 1044.) The trial court sustained the prosecution's objections to the attempt by Petitioner's trial counsel to elicit testimony that counsel at the time had tried to speak with Petitioner before the lineup. (5 RT 1045.) The jury subsequently was instructed that it could consider Petitioner's refusal to participate in a lineup as a circumstance tending to show consciousness of guilt. (CT 99.)

Petitioner contends that appellate counsel should have argued on appeal that the trial court erred **[*60]** when it admitted evidence that Petitioner refused to participate in a lineup while excluding evidence that Petitioner had not been allowed to speak with counsel prior to the lineup. Petitioner further contends that the trial court erred in instructing the jury that his refusal to participate in the lineup could be viewed as an effort to suppress evidence. (Petition, Attach. at 4; Reply at 18-20.)

Respondent has submitted to the Court a letter from appellate counsel to Petitioner, transmitting the opening brief on appeal and explaining why appellate counsel decided not to raise certain issues requested by Petitioner, including the lineup issue. (Answer, Ex. A.) Appellate counsel stated that, even if the California Court of Appeal found the trial court erred in instructing the jury it could consider evidence of Petitioner's refusal to participate in a lineup, counsel did not think the appellate court would find the error prejudicial, given the evidence of guilt, including fingerprint evidence, and the jury's evident rejection of Petitioner's alibi defense. (*Id.* at 23-24.)

Appellate counsel's decision not to present this issue cannot be regarded as ineffective. In People v. Johnson, 3 Cal. 4th 1183, 1213-14, 14 Cal. Rptr. 2d 702, 721, 842 P.2d 1 (1992), **[*61]** the California Supreme Court upheld the admission of evidence that the defendant refused to participate in a lineup, even though jail officials did not allow the attorney appointed to represent him for the lineup to speak with him. The California Supreme Court upheld the giving of the same instruction given here, *i.e.,* that the defendant's refusal could be considered as evidence of his consciousness of guilt. *Id.* at 1235, 12 Cal. Rptr. 2d at 730.

In view of the California Supreme Court's decision in Johnson, which the California Court of Appeal was bound to follow, it is highly unlikely the California Court of Appeal would have found that the trial court erred in admitting the challenged evidence and giving the challenged instruction. Thus, appellate counsel's decision to refrain from making the argument was not objectively unreasonable, nor was there any reasonable likelihood that the argument, if made, would have prevailed. *See* Miller, 882 F.2d at 1434.

Moreover, as appellate counsel pointed out in his letter, even if the California Court of Appeal found error, there was little chance that it would consider the error prejudicial. True, identification was an issue at trial; Petitioner's **[*62]** defense was that he was at a barbecue at the time of the robbery, and some of the store employees were unable to identify Petitioner at trial or were less than 50% certain of their identifications during a photographic lineup. (*See* 4 RT 626; 5 RT 982, 984-85, 1053, 1055, 1062.) However, one store employee positively identified Petitioner at trial as one of the robbers, Detective Bowen identified him as the driver of the stolen Oldsmobile Cutlass in which Petitioner fled the crime scene, and Petitioner's fingerprints were found on the car. (3 RT 402, 407; 4 RT 681, 739-40, 903; 5 RT 950-52.) Given this strong evidence tying Petitioner to the robbery, there was no reasonable likelihood that the state appellate court would have reversed Petitioner's conviction if appellate counsel had raised on appeal the above-discussed evidentiary and instructional error issues pertaining to Petitioner's lineup. Miller, 882 F.2d at 1434; *see* Wildman, 261 F.3d at 840-42; Jones, 231 F.3d at 1239 n.8.

C. Other Crimes Evidence

Over defense objection, the trial court permitted the jury to hear evidence that Petitioner participated in an armed robbery in 1992, while he was a juvenile. The trial court found **[*63]** the evidence admissible under California Evidence Code § 1101(b) as relevant to identity, stating that, in both cases, Petitioner and one or more companions robbed a store different from the usual robbery target and then fled in a stolen car to an area adjacent to the same elementary school, located close to Petitioner's residence. (6 RT 1333-34, 1349-50.)

Subsequently, the owner of a clothing store in Southgate testified regarding a robbery of his store at about three o'clock on October 28, 1992. (7 RT 1505-06.) Petitioner and two other young African-American men entered the store, Petitioner pointed a gun at the owner's head and asked for money from the cash register, the three men took the money and some clothes, and then they left. (7 RT 1505-09.) Two police officers testified that the police pursuit of Petitioner's car after the robbery ended at the Longfellow Elementary School. [9] (7 RT 1516-23, 1529-32.) Petitioner's counsel subsequently presented evidence from a police officer that driving to the Longfellow Elementary School yard after a robbery was common among Nutty Block Crip members. (7 RT 1550-51.)

FOOTNOTES

9 The officers did not remember the name of the school but one officer remembered **[*64]** the street. (7 RT 1521.)

Petitioner contends that appellate counsel should have argued on appeal that the trial court erred in admitting this evidence, because it only showed that the perpetrator of the robbery was a Nutty Block Crip member, not that Petitioner was the perpetrator. Petitioner also argues that the evidence was prejudicial, because it emphasized his gang ties. (Petition, Attach. at 4; Reply at 20-24.) In his letter explaining why he did not raise certain issues, appellate counsel stated that he concluded "there was no way the Court of Appeal or any appellate court was going to find that the admission of this evidence was prejudicial error." (Answer, Ex. A at 22.) Appellate counsel stated there was a reasonable basis for the admission of the evidence on the issue of identity, because the two robberies were very similar and, even if its admission was erroneous, the California Court of Appeal would not find it prejudicial given the fingerprint evidence and other evidence tying Petitioner to the robbery. (*Id.* at 22.)

Indeed, there is no reasonable likelihood that a challenge to the admission of the other crimes evidence would have succeeded on appeal. California Evidence Code § 1101(b) **[*65]** specifically permits the admission of evidence that a defendant committed a prior crime to show identity. Past crimes are probative of identity when the past crime and current offense share common features sufficiently distinctive to support the inference that the same person committed both acts. People v. Gray, 37 Cal. 4th 168, 203, 33 Cal. Rptr. 3d 451, 480, 118 P.3d 496 (2005). Here, the similarities between the two armed robberies are sufficient to render the past conviction admissible under Section 1101(b) on the issue of identity.

Moreover, even if the admission of evidence regarding Petitioner's prior conviction was erroneous, it was non-prejudicial for the reasons discussed above, *i.e.*, the existence of ample other evidence tying Petitioner to the robbery. As for the gang aspect, Officer Bowen previously testified that Petitioner was a Nutty Block Crip member. (4 RT 661-62.) In short, the jurors already were aware of this fact, independent of the prior crime evidence. Moreover, it was Petitioner's counsel who elicited testimony about the predilection of Nutty Block Crip members for committing armed robberies using stolen cars and subsequently fleeing to the vicinity of the Longfellow Elementary **[*66]** School. (7 RT 1549-51.) Appellate counsel's decision not to raise an issue on appeal does not constitute ineffective assistance when, as here, the issue would not have provided grounds for reversal. *See* Wildman, 261 F.3d at 840-42; Jones, 231 F.3d at 1239 n.8.

Accordingly, for the foregoing reasons, none of Petitioner's ineffective assistance of appellate counsel claims alleged in Ground Six warrant federal habeas relief.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: September 15, 2008

/s/

MARGARET A. NAGLE

UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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In

*2008 U.S. Dist. LEXIS 111829, **

ADEBOLA AIYEDOGBON, Petitioner, v. M. C. EVANS, Warden, and BILL LOCKYER, Attorney General, Respondents.

No. C 06-3822 WHA (PR)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 111829

April 21, 2008, Decided
April 22, 2008, Filed

PRIOR HISTORY: People v. Aiyedogbon, 2005 Cal. LEXIS 4726 (Cal., Apr. 27, 2005)

CORE TERMS: rape, sentence, sexual offenses, reasonable doubt, restaurant, prison, sex, retroactive, propensity, door, neck, evidence of prior, process rights, probative value, preponderance, bedroom, years to life, judicial construction, prejudicial, convicted, prisoner, theft, arrived, sexual assault, admission of evidence, criminal statutes, clearly-established, procedurally, enhancement, qualifying

COUNSEL: **[*1]** Adebola Aiyedogbon, Petitioner, Pro se, Soledad, CA.

For Acting Warden M.C. Evans, Attorney General Bill Lockyer, Respondents: Moona Nandi, LEAD ATTORNEY, CA Attorney General's Office, San Francisco, CA.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM ALSUP

OPINION

DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has responded with a traverse. For the reasons set forth below the

petition is **DENIED**.

STATEMENT

A San Mateo County jury convicted petitioner of attempted murder, *see* Cal. Penal Code §§ 664, 187(a)) (count 1); forcible rape, see *id*. § 261(a)(2)) (count 2); forcible oral copulation, *see id*. § 288a(c)(2)) (count 3); and corporal injury on a former spouse, *see id*. § 273.5(a)) (count 4). The jury found the allegations of premeditation and great bodily injury as to count one to be true. *See id*. §§ 189, 12022.7(a). The jury found not true allegations of great bodily injury as to counts two and **[*2]** three. In a bifurcated trial, the jury found true two prior conviction allegations, one of which was alleged as a qualifying prior under the "one strike" law, *see id*. § 667.61(d)(1)), and the "habitual sexual offender" law, *see id*. § 667.61(a)), both of which were alleged as qualifying priors under the "three strikes" law, *see id*. § 1170.12(c)(2)). The jury also found that appellant served two prior prison terms, *see id*. § 667.5(b). He was sentenced to a total of 175 years to life in prison.

His conviction was affirmed on direct appeal by the California Court of Appeal, and the California Supreme Court denied review.

The following facts are taken from the opinion of the California Court of Appeal:

> Appellant and the victim, Toyin B., were married in Nigeria in 1983 and had two sons, ages 12 and 13 at the time of trial. Appellant came to the United States in 1983, followed four years later by the victim. In 1993, appellant pled guilty to rape and was sent to prison. In 1994, the victim divorced appellant but remained in a "romantic relationship" with him through 2002. In 1996, she married Eric B. and then separated from him in 2002. In approximately November 2001, appellant moved back in **[*3]** with the victim and their children. The victim did not intend to reunite with or remarry appellant, but permitted him to move in with them for the sake of the children and until he could "get [back] on his feet." After moving back in, appellant beat the victim on a daily basis. She did not call the police because appellant was on parole and she did not want him to go to prison. Despite his abusive behavior, the victim continued to have consensual sex with him.
>
> On September 28, 2002, the victim met Dennis Cowen at a gas station near her house. He flirted with her and she told him she was looking for a job and thought he might help her find one. They agreed to meet that evening at a restaurant and she would bring her paperwork. Before going to meet Cowen, the victim told appellant she was going out and would return soon. When the victim arrived at the restaurant, she called Cowen and they agreed to meet at a different restaurant, the Peppermill.
>
> While Cowen and the victim were seated at the Peppermill and about to eat, the victim saw appellant and told Cowen of his presence. Appellant then approached the victim and in their Yoruba language, said, "Is this where you're coming to?" and she **[*4]** replied affirmatively. Appellant then said to Cowen, "You don't know who you're messing with. I'm F.B.I." The victim explained to Cowen that appellant was not her current, but her ex-husband. After appellant left the table, a waitress told Cowen and the victim that appellant offered to buy them a drink, which they refused. Appellant appeared to be very angry and a waitress walked him out of the restaurant. As the victim left the restaurant and entered her car, appellant drove up behind her. When she stopped, he exited his car and approached her with something in his hand. The victim then drove away and appellant reentered his car. Concerned about Cowen's safety, the victim drove to the back of the Peppermill and called him. She then saw appellant standing in front of Cowen's car and Cowen said appellant would not let him leave. Subsequently, Cowen left the parking lot and he and the victim went to a bar for a drink.
>
> When the victim arrived home at about 2:00 a.m., appellant was there. As she left

her sons' bedroom after looking in on them, appellant grabbed, kicked and dragged her to the master bedroom saying, "I'm killing you tonight. You die tonight." He then locked the bedroom door. **[*5]** Afraid for her safety, the victim ran into the bathroom and locked the door. As she was changing into her nightgown appellant demanded that she come out or he would knock down the door. When she opened the door he grabbed her by the throat and began beating her with his fists and pulling her hair. She scratched him in an attempt to defend herself. He continued threatening to kill her and said he would kill her if she opened the door. At one point he choked her and she passed out until he began kicking her in the ribs. At another point when appellant left the bedroom, the victim tried to use the phone to record a message about what was happening. However, appellant returned, continued to threaten to kill her and again rendered her unconscious. When the victim regained consciousness they continued struggling. He removed his clothes, pushed her onto the bed, removed her clothes and raped her while his elbow was on her throat. He forced her to orally copulate him and struck her when she tried to get up. He then used a necktie to tie them together while he slept.

Later that morning, the victim's pastor, James Eli, called as he usually did on Sunday mornings, and the victim asked to speak **[*6]** with Eli's wife, Kim West-Eli. Appellant ordered her not to say anything about what had happened. The victim told West-Eli that she was coming to see her, and appellant let her leave to avoid arousing West-Eli's suspicion. Appellant directed the victim to wear a turtleneck and makeup to cover the injuries he inflicted to her neck, eyes and forehead. She also suffered injuries to her hand and leg.

When the victim arrived at Eli's house, they immediately saw she was injured and persuaded her to call the police. She reported the incident to the police who transported her to the hospital for treatment. When the victim returned home from the hospital, appellant was not there. After that he wrote her many letters and called her several times. In one phone call, appellant told her in Yoruba not to cooperate with the prosecution. In another phone call which was recorded, transcribed, and translated for the jury, appellant admitted to the victim that he strangled her.

The victim admitted being convicted of possessing stolen property in 1991, pleading guilty to welfare fraud sometime between 1999 and 2002, and pleading guilty to theft in 2000. On cross-examination, she admitted that on one occasion **[*7]** she slapped appellant in front of Pastor Eli and on another occasion bit appellant on the back in self-defense.

Eli testified he had known appellant and the victim since 2001 and they had discussed their marital problems with him. On one occasion Eli went to their home after they called to report an argument. When Eli arrived, appellant angrily complained that the victim had "messed up" his life and he could not start a business. He began beating his chest and saying, "You're going down." Appellant told Eli that if the victim died, he would not care and would "just smoke a cigarette." Eli opined that appellant believed he was still married to the victim and was concerned about her spending time with other men. Eli said that when the victim arrived at his home on the morning after the charged offenses she was "hysterical" and had bruises on her eyes, neck and chest. She told Eli about what took place at the Peppermill and that, thereafter, appellant had choked her till she lost consciousness and raped her.

South San Francisco Police Officer Adam Plank interviewed the victim at Eli's home and transported her to the hospital. He described the victim as crying and shaking, with bruising **[*8]** around her eye and neck and a cut on her lower lip. The victim told him she had been raped and assaulted by appellant and that appellant threatened to kill her while choking her.

Nurse Sally Thresher performed a sexual assault examination on the victim following the incident. The victim appeared to be in a state of shock and had significant bruising around her neck and on her eyelids. The victim said that in the course of the assault and rape appellant hit her with a fist, struck her with a metal candle holder, body slammed her against the wall and choked her twice. The victim said she was also repeatedly forced to orally copulate appellant. Thresher's physical findings were consistent with the history given by the victim. The victim told Thresher that in the course of trying to fend off appellant's attack, she scratched him, breaking off two acrylic fingernails. A forensic examination of appellant following the assault revealed two small, fresh abrasions to his face consistent with being scratched by a fingernail.

Shortly after the incident, the victim gave consistent versions of the assault and rape, and the events leading up to it, to friends Moruf Oladapo and Wasiu Olowo. When Oladapo **[*9]** and Olowo visited appellant in jail to get his side of the story, appellant said he and the victim had argued but he denied doing anything to her. He suggested that the victim may have injured her neck with an iron.

Forensic pathologist Peter Benson testified it takes between four and six minutes for strangulation to result in death, but seconds to result in unconsciousness. Dr. Benson opined that the petechial hemorrhages to the victim's eyelids and the bruising of her neck were consistent with multiple efforts at strangulation. Her injuries were not consistent with self-infliction with an iron.

In 1992, L.M. applied for a job at a Daly City store owned or run by appellant. After submitting her application to appellant, he asked her to return for an interview. At the end of the interview she heard what sounded like the door being locked. Appellant returned to where she was seated and asked her to have sex with him. After she replied, "Hell no," he grabbed her forcibly from behind, pulled off her pants, removed his own clothes and raped her from behind. In the course of the assault he grabbed her around the neck to restrain her.

Finally, the prosecution introduced a recorded telephone **[*10]** conversation made by appellant to Toyin B. while he was in jail in which he admitted he had "offended" and "strangled" her. [FN3. The conversation, which was transcribed and translated into English, was admitted into evidence.]

The Defense

Testifying in his own defense, appellant denied raping L.M. Instead, he testified that after her third visit to his store they had consensual sex in the motel where she lived, after which she asked him for a pager, $ 400 or a job. However, appellant admitted that in August 1993 he pled guilty to raping L.M. Upon his release from prison in October 1994, he resumed living with Toyin B. Appellant testified that in 1996 he pled guilty to burglary and theft and was incarcerated until April 1999. He was then placed in immigration detention until August 2001 when he resumed living with Toyin B. Appellant said that while he was in custody he was unaware that the victim had divorced him and remarried.

Appellant denied ever hitting the victim. He said on one occasion in late 2001, when he tried to take her purse containing illegal drugs away from her, she bit him on his back. The next day she punched him with her fist and bit him on his lip.

According to appellant, **[*11]** on the night of the incident, the victim left the house shortly before 8:00 p.m. without telling him where she was going. He later went to the Peppermill for a drink. He noticed the victim's car in the parking lot and went inside the restaurant. As he later left the restaurant, he saw the victim and a man seated together. He approached them, said she was his wife, showed the man a picture of her and their children, and told the man not to believe her lies. After they

rejected his offer of a drink, appellant left the restaurant. When he saw the man leave the restaurant, appellant approached the man to introduce himself and they talked. Appellant denied threatening the man or blocking his car. Appellant then saw the victim drive by and he drove home.

Appellant said that when the victim got home she slammed the door and went into their bedroom. He denied dragging her into the bedroom. After changing into her nightgown she appeared to be very angry, shaking her arms and asking him why he had followed her. He took her arm in an effort to calm her down and she laid on his chest. He was scratched while trying to calm her down. The victim then told him she was depressed because she had been **[*12]** fired from her job and they had bills to pay. After she calmed down they had consensual intercourse and oral sex. He denied choking, striking or kicking her. When she left home early the next morning she had no injuries.

Appellant acknowledged writing a letter to the victim from prison in violation of the restraining order against him. He denied admitting in the recorded phone conversation that he strangled her, and said the translation from Yoruba was incorrect. Instead, he said he asked her in surprise, "Did I choke you?"

On rebuttal, Daly City Police Officer David Boffi testified that when he interviewed appellant about the rape of L.M., appellant denied knowing L.M. and having sex with her.

(Exh. 8 at 2-7.)

DISCUSSION

A. STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable **[*13]** determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falls under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in **[*14]** its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *See id.* at 409.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El*, 537 U.S. at 340. This presumption is not altered by the fact that the finding was made by a state court of appeals, rather than by a state trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981); *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must present

clear and convincing evidence to overcome § 2254(e)(1)'s presumption of correctness; conclusory assertions will not do. *Id.*

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

When there is no reasoned opinion from the highest state court to consider **[*15]** the petitioner's claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir.2000).

B. ISSUES PRESENTED

As grounds for federal habeas relief, petitioner asserts that: (1) his due process rights were violated by the trial court's admission of evidence of a prior rape to show propensity; (2) his due process rights were violated when the trial court gave CALJIC 2.50.1, relating to evidence of prior sexual offenses; (3) his due process and Ex Post Facto Clause rights were violated by treating his two 1993 felonies as two strikes; (4) treating the two 1993 felonies as two strikes violated the Eighth Amendment; and (5) retroactive application of the "three strikes" law violated the Contract Clause of the Constitution.

1. Admission of Evidence of Prior Rape

Petitioner first contends that admission of evidence of the of the Marzett rape under California Evidence Code section 1108 violated due process. Section 1108 is the exception to the general rule, codified in section 1101, that evidence of a defendant's character is inadmissible to prove his or her conduct on a specific occasion. Section 1108 **[*16]** allows the admission of evidence of prior sexual offenses, [1] subject to balancing the evidence's probative value against its prejudicial effect in accordance with Evidence Code section 352. [2]

FOOTNOTES

1 Section 1108 of the California Evidence Code provides: "[In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

2 Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusion of the issues, or of misleading the jury.

The California Court of Appeal held that admission of evidence pursuant to section 1108 does not violate federal due process, concluding that a binding decision of the California Supreme Court, *People v. Falsetta*, 21 Cal. 4th 903, 921-22, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999), had so held (Exh. at 7-8).

a. Lack of Clearly-Established Supreme Court Authority

Petitioner argues that the evidence of prior sexual assaults was **[*17]** admitted to show propensity and that this is a violation of due process. The United States Supreme Court has never held that admission of evidence of prior crimes to show propensity violates the right to due process. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (declining to rule on the constitutionality of propensity evidence); *Garceau v. Woodford*, 275 F.3d

769, 774 (9th Cir. 2001). Because habeas relief in this AEDPA case cannot be granted unless the state court's decision was contrary to, or an unreasonable application of, clearly-established Supreme Court authority, and there is no clearly-established Supreme Court authority, habeas relief could not be granted even if the court were to hold that petitioner's due process rights were violated -- which they were not, as discussed below.

b. Due Process

A state court's evidentiary ruling is not subject to federal habeas review unless the evidentiary ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). A federal court cannot disturb on due process **[*18]** grounds a state court's decision to admit evidence of prior bad acts unless the admission was arbitrary or so prejudicial that the trial was rendered fundamentally unfair. *See Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

As the California Supreme Court noted in *Falsetta*, the rule against propensity evidence is venerable. However, this rule was never absolute. *See Falsetta*, 21 Cal.4th at 913-16. Although every jurisdiction in the United States has a rule excluding propensity evidence, courts have routinely made exceptions in cases of prosecutions for sex offenses, either through carving out specific exceptions for sex offenses, through stretching the use of traditional exceptions, or through making exceptions for evidence of "lustful disposition." *Id.*; *see also United States v. LeMay*, 260 F.3d 1018, 1025-26 (9th Cir. 2001).

While the Ninth Circuit has not specifically ruled on the constitutionality of section 1108, several circuits have upheld the use of propensity evidence under Federal Rules of Evidence 413-414. [3] *See, eg., United States v. Castillo*, 140 F3d. 874, 881 (10th Cir. 1998); *United States v. Mound*, 149 F3d. 799 (8th Cir. 1992). In this jurisdiction, the Ninth Circuit **[*19]** affirmed the constitutionality of Rule 414 in *LeMay*. The court held in *LeMay* that Rule 414 is not unconstitutional because it is limited in its function by Rule 403. *LeMay*, 260 F.3d at 1026-27. Rule 403 directs judges to exclude any evidence submitted under Rule 414 that is more prejudicial than probative. *Id.* at 1027. The court reasoned that this balancing process eliminates any due process concerns from Rule 414, stating: "[a]s long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." *Id.* at 1026.

FOOTNOTES

3 The California Supreme Court noted that Evidence Code section 1108 was adopted after Federal Rule 413 and was modeled on it. Rule 413 provides in pertinent part: "(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." Fed. R. Evid. 413 (a).

The reasoning of *LeMay* applies equally to this case because the California rules are analogous **[*20]** to the federal rules. Evidence that is admissible under section 1108 is limited by section 352. Cal. Evid. Code § 1109(a)(1). Section 352 parallels Federal Rule of Evidence 403 because it permits a trial judge to exclude evidence when its probative value is substantially outweighed by its prejudicial effect. Cal. Evid. Code § 352. As the California Supreme Court held in *Falsetta*, 21 Cal.4th at 913, the requirement under section 352 to balance the prejudicial effect of the evidence against its probative value ensures that evidence admitted under section 1108 will not infringe on the right to a fair trial guaranteed by the Due Process Clause. The trial court here conducted a hearing on the prosecution motion to permit evidence of the Marzett rape and balanced the proposed testimony's probative value against the risk of undue prejudice (Exh. 8 at 8-9). Petitioner's due process rights were not violated.

c. Conclusion

For the above reasons, petitioner's claim that he is entitled to habeas relief because admission of evidence under Rule 1108 violated his due process rights is without merit.

2. Constitutionality of CALJIC 2.50.01

The trial court gave the 2002 version of CALJIC No. 2.50.01, which **[*21]** as given read:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case.
>
> "Sexual offense" means a crime under the laws of a state or of the United States that involves[:]
>
> Any conduct made criminal by Penal Code section 261(a)(2), rape. The elements of this crime are set forth elsewhere in these instructions.
>
> If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the rape of which he is accused in this case.
>
> However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime of rape. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable **[*22]** doubt of the charged crime. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(Exh. 1, vol. 2 at 240.)

Petitioner argues that the jury could have determined, by a preponderance of the evidence, that he was committed the Marzett rape, and then concluded that was guilty of the charged rape, without passing that inference through a proof-beyond-a-reasonable-doubt filter.

A challenge to a jury instruction solely as an error under state law does not state a claim cognizable in federal habeas corpus proceedings. *Estelle v. McGuire*, 502 U.S. 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Id.* at 72. The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Id.* In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977)); **[*23]** *Prantil v. California*, 843 F.2d 314, 317 (9th Cir.), *cert. denied*, 488 U.S. 861, 109 S. Ct. 158, 102 L. Ed. 2d 129 (1988). The court must inquire whether there is a "reasonable likelihood" that the jury erroneously applied the instruction in a way that violates the Constitution. *Estelle*, 502 U.S. at 72 & n.4.

Here, the court of appeal concluded that the instructions did not violate due process based on the California Supreme Court's holding that the 1999 revision of the instruction did not violate federal due process, and dictum in that case praising the 2002 revision, the one at issue here, as a further improvement on the 1999 revision (Exh. 8 at 13, discussing *People v. Reliford*, 29 Cal.

4th 1007, 1011-16, 130 Cal. Rptr. 2d 254, 62 P.3d 601 (2003)).

CALJIC No. 2.50.01 explicitly instructed the jury that "if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crime of rape of which he is accused in this case." [4] Given such a specific mandate, it is not reasonably likely that the jury might believe it could convict on a preponderance standard.

FOOTNOTES

4 This language from the 2002 revised instructions distinguishes this case from *Gibson v. Ortiz*, 387 F.3d 812 (9th Cir. 2004), **[*24]** in which the Ninth Circuit held that a petitioner's due process rights were violated when the trial court gave the 1996 version of the 2.50.01 instruction. *Id.* at 814. The 1996 version of 2.50.01 allowed a jury to consider evidence of prior uncharged sex offenses and to infer the defendant's guilt of the current offense from the prior uncharged offences. *Id.* 817-18. As the 1996 version of CALJIC 2.50.1 required only a preponderance of the evidence to prove the uncharged offenses, CALJIC 2.50.1 and 2.50.01 together allowed a jury to find a defendant guilty without requiring proof beyond a reasonable doubt. *Id.* at 822. The heart of the *Gibson* decision is the court's conclusion that the pre-revision instructions given in that case provided "two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." *Id.* at 823. When it is impossible to know whether a jury used the impermissible legal theory or the one which meets constitutional requirements, the unconstitutionality of one of the routes requires that the conviction be set aside. *Id.* at 825. In the revised version of the instruction, however, the constitutionally-deficient route **[*25]** was blocked off: The revised instruction tells the jury in unequivocal words that it cannot find petitioner guilty beyond a reasonable doubt just because it had found by a preponderance of the evidence that he committed prior bad acts. Indeed, *Gibson* suggested that the 1999 revised instruction would pass constitutional muster. 387 F.3d at 818-19.

Moreover, the other jury instructions bolster this conclusion. The trial court instructed the jury with CALJIC No. 2.90 that the prosecution had "the burden of proving [Petitioner] guilty beyond a reasonable doubt," and with CALJIC No. 2.01, which provides that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt" (Exh. 1 at 226, 253). Given that juries are presumed to follow their instructions, *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), there is no reasonable likelihood that the jury, in considering the instructions **[*26]** as a whole, erroneously applied CALJIC 2.50.01 in a way that violates the Constitution.

Giving the instruction did not violate due process

3. 1993 Felonies

Petitioner asserts that his due process and Ex Post Facto Clause rights were violated by the sentencing court's treatment of his two 1993 convictions as two separate strikes. Although the crimes, rape and committing a lewd and lascivious act with a child under fourteen, were committed on separate occasions against different victims, the cases were brought and tried together (Exh. 8 at 20). In 1997 the California Supreme Court decided *People v. Fuhrman*, 16 Cal.4th 930, 67 Cal. Rptr. 2d 1, 941 P.2d 1189 (1997), in which it held that "a prior qualifying conviction need not have been brought and tried separately from another qualifying conviction in order to be counted as a separate strike." *Id.* at 933.

Respondent contends that this claim is procedurally defaulted because it was not raised

contemporaneously in trial court. The court of appeals agreed, although it also went on to consider the merits (Exh. 8 at 20). The Ninth Circuit has recognized and applied the California contemporaneous objection rule in affirming denial of a federal petition on grounds of procedural default **[*27]** where counsel failed to object in trial court. *Inthavong v. Lamarque*, 420 F.3d 1055, 1058 (9th Cir. 2005); Paulino v. Castro, 371 F.3d 1083, 1092-93 (9th Cir. 2004); *Vansickel v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999). Respondent, therefore, is correct that these issues are procedurally defaulted, and because petitioner has not shown cause and prejudice or a miscarriage of justice, *see Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), this claim is barred. The claim alternatively will be considered on the merits, however.

Even though the Ex Post Facto Clause applies only to the legislative branch of government, there is a due process counterpart which prevents retroactive enlargement of the reach of criminal statutes by judicial interpretation. *Rogers v. Tennessee*, 532 U.S. 451, 455-56, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). "If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the construction must not be given retroactive effect." *Id.* at 457 (internal quotation marks and brackets omitted). This rule applies when a court construes a legislatively-enacted criminal statute, as well as when it develops the common **[*28]** law. *Id.* at 459-61.

Due process protects against judicial infringement of the right to fair warning that certain conduct will give rise to criminal penalties. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). *Bouie* is not violated unless judicial construction of a criminal statute represents a "radical and unforeseen" departure from former law. *Webster v. Woodford*, 369 F.3d 1062, 1069 (9th Cir. 2004).

Fuhrman was not a radical and unforseen departure from former law. The three-strikes law contains no "brought and tried separately" requirement, but another enhancement provision, section 667(a) of the Penal Code, does (Exh. 8 at 20-21). Petitioner's argument is that the California Supreme Court's holding that there is no such requirement in the three-strikes law was unforeseeable, but the fact is that the three-strikes law contained no such requirement and 667 (a) did; when there is an explicit clause in one statute that imposes a restriction, and another has no such explicit clause, it is not unforeseeable that the statute lacking the clause will be construed not to be subject to it.

In addition, although retroactive increases in the scope of criminal liability by judicial construction are **[*29]** barred by the Fourteenth Amendment Due Process Clause, retroactive sentence enhancements by judicial construction do not violate due process. *United States v. Newman*, 203 F.3d 700, 703 (9th Cir. 2000); *see also Holgerson v. Knowles*, 309 F.3d 1200, 1203 (9th Cir. 2002) (holding that the Supreme Court has not clearly established that retroactive sentence enhancements by judicial construction violate due process). Thus even if the *Fuhrman* decision did amount to a retroactive sentence enhancement, it could not be the basis for federal habeas relief because there is no clearly-established Supreme Court authority holding that due process prohibits such increases. *See Holgerson*, 309 F.3d at 1203. This claim is without merit.

4. Eighth Amendment

Partly as a result of the sentencing court's treating the 1993 convictions as two strikes, petitioner was sentenced to 175 years to life in prison. He contends that the sentence was cruel and unusual, a violation of the Eighth Amendment.

Respondent again contends that this claim is procedurally defaulted because it was not raised contemporaneously in trial court. The court of appeals agreed, although it also went on to consider the merits (Exh. 8 at 22 **[*30]** n.19). For the reasons discussed in section three above, this claim is procedurally barred, but also will be considered on the merits.

In *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), and *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), the United States Supreme

Court considered whether sentences imposed under California's "three-strikes" law violated the Eighth Amendment. In *Andrade*, a habeas case, the Court held that the "only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." *Id.* at 73 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)). The Court also made clear that the offense to which gross disproportionality review should be applied should not be defined in terms of just the offense of which petitioner was convicted, but that a prisoner's record of recidivism is to be considered. *Ewing*, 538 U.S. at 29.

A comparison of petitioner's case to both *Ewing* and *Andrade* reveals the inadequacy of his claim. In *Ewing*, the Supreme Court upheld a sentence of twenty-five years to life, pursuant to **[*31]** California's "three-strikes" law, against a recidivist prisoner convicted of grand theft. *Ewing*, 538 U.S. at 30-31. In *Andrade* the Supreme Court upheld a sentence of two consecutive terms of twenty-five years to life, pursuant to California's "three-strikes" law, where the defendant was convicted of two counts of petty theft. *Andrade*, 538 U.S. at 76. In both *Ewing* and *Andrade* the prisoners had lengthy criminal records and their triggering offenses were "wobblers", meaning the charges could have been classified as either felonies or misdemeanors at the discretion of the prosecutor or trial judge. *Andrade*, 538 U.S. at 66-67; *Ewing*, 538 U.S. at 16-19.

In the present case petitioner has a serious criminal record, including convictions for rape and lewd and lascivious conduct with a child under fourteen. Unlike the convictions in *Ewing* and *Andrade*, petitioner's triggering convictions, attempted murder, forcible rape, forcible oral copulation, and corporal injury on a former spouse are both violent and extremely serious. Thus, although the sentence here was more severe than those in *Ewing* and *Andrade*, both the prior offenses and the current one were dramatically more serious. The sentence **[*32]** here was not disproportionate to the offense.

Petitioner relies on the Ninth Circuit decision in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), where the court held that a sentence of twenty-five years to life on petty theft with a prior conviction was grossly disproportionate to the crime where the defendant's previous two strikes were the result of one negotiated plea resulting in a single county jail sentence. *Id.* at 768. The only similarity, however, is that petitioner's 1993 convictions were pursuant to one negotiated plea and he served a single prison sentence. The offenses in this case, both the triggering offenses and the priors, are dramatically more serious, as discussed above. The difference, when it is so striking and when the question is one of whether the sentence is disproportionate, is more than sufficient to distinguish *Ramirez*.

The sentence did not violate the Eighth Amendment.

5. Contract Clause Claim

Petitioner contends that the sentencing court's having treated his 1993 convictions as two strikes, even though they were not brought and tried separately, violated the Contract Clause of the Constitution. *See* U.S. Constitution, art. I, § 10 ("No State shall . . . pass **[*33]** any . . . Law impairing the Obligation of Contracts.").

Under California law, plea bargains are interpreted according to contract law principles, Cal. Civ. Code § 1635; *Buckley v. Terhune*, 441 F.3d 688, 695 (9th Cir. 2006) (en banc), and "are deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws," *People v. Gipson*, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004) (internal quotation marks omitted). That is, the 1993 plea bargain included an implied term allowing the State to change the law, such as by enacting the three-strikes law. There thus was no contractual violation to which the Contract Clause would apply. This claim is without merit.

CONCLUSION

The petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

IT IS SO ORDERED.

Dated: April 21, 2008.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

*2008 U.S. Dist. LEXIS 90701, **

ISAIAH THOMPSON-BONILLA, Petitioner, v. JOHN MARSHALL, Respondent.

No. C 05-1350 SI (pr)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 90701

October 30, 2008, Decided
October 30, 2008, Filed

PRIOR HISTORY: Bonilla v. Duncan, 2005 U.S. Dist. LEXIS 13305 (N.D. Cal., June 23, 2005)

CORE TERMS: sentence, identification, robbery, lineup, suggestive, gun, interrogation, confession, prior convictions, robber, robbed, promises of leniency, sentencing, police officer, recidivist, cocaine, station, disproportionate, involuntary, selective, parole, theft, shit, paper bag, federal habeas, disproportionality, incriminating, perpetrator, videotape, interview

COUNSEL: [*1] Isaiah Thompson-Bonilla, Petitioner, Pro se, San Luis Obispo, CA.

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For John Marshall, Respondent: Peggy S. Ruffra, LEAD ATTORNEY, CA State Attorney's Office, San Francisco, CA; Ross Charles Moody, LEAD ATTORNEY, Attorney General of the State of California, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER DENYING HABEAS PETITION

INTRODUCTION

This matter is now before the court for consideration of the merits of Isaiah Thompson-Bonilla's pro se petition for writ of habeas corpus. For the reasons discussed below, the petition will be denied.

BACKGROUND

A. The Crimes

Thompson-Bonilla's petition pertains to his conviction for three robberies and one attempted robbery. The particulars of the crimes are not relevant to the claims in the habeas petition, and therefore are only briefly summarized.

Thompson-Bonilla robbed Sabina Crocette at gunpoint as she **[*2]** walked home from the West Oakland BART station at about 9:25 p.m. on January 8, 2001. He threatened her with his gun, took her money, left her wallet on the ground, and departed on foot. He obtained about $ 70 in this robbery. She could not find her credit card holder and credit cards after the robbery.

He robbed Regina Bell at gunpoint as she walked home from the same BART station at about 11:45 p.m. on January 10, 2001. He threatened her with his gun and took her money. At her request, left the wallet with an identification she needed to register for school. He obtained about $ 30 in this robbery.

At about 1:00 p.m. on January 14, 2001, Thompson-Bonilla attempted to rob James Roth on the street near the West Oakland BART station. He threatened Roth with his gun which was partially concealed in a paper bag. Roth told him he did not have any money because he had just purchased groceries. Roth walked away, and called the police from his home.

A few minutes after the failed attempt to rob James Roth, Thompson-Bonilla robbed Maria Cahill in the same area. He pointed a gun which was partially concealed in a bag at her and threatened her, telling her that he needed money for drugs. Cahill **[*3]** told him she only had $ 10, retrieved that amount from her change purse, and handed it to Thompson-Bonilla. He then grabbed her change purse and obtained about $ 3 in coins. He gave the coin purse back to Cahill and walked away. Cahill went home, where her husband called the police.

Thompson-Bonilla was arrested minutes after the Cahill robbery. He "matched the suspect description of an African-American male in his 40's, wearing a green jacket, white pants, and black hat. The police spotted [him] five blocks from the Cahill robbery site, walking down the street counting change. The police stopped and pat-searched [Thompson-Bonilla], and found that he had a brown paper bag containing a gun. The gun was not loaded. The police conducted a full search and recovered a $ 10 bill and $ 2.70 in coins." Cal. Ct. App. Opinion, pp. 4-5.

After his arrest, Thompson-Bonilla made some incriminating statements at the scene and later confessed. He was identified by two victims in field show-ups and identified by two other victims in a lineup at the police station. The details of those are described later in the sections discussing claims arising from his statements and witness identifications.

B. Case **[*4]** History

Thompson-Bonilla was convicted following a bench trial in Alameda County Superior Court of three counts of robbery and one count of attempted robbery (all committed with personal use of a firearm), and one count of being a felon in possession of a firearm. See Cal. Penal Code, §§ 211, 664, 12021(a)(1). 12022.53(b). He was found to have suffered three prior robbery convictions that counted as strikes under California's Three Strikes law. See Cal. Penal Code § 1170.12(c)(2)(A). Thompson-Bonilla was sentenced to a total term of 45 years to life, comprised

of 25-to-life on one count of robbery, enhanced 10 years for the firearm use, plus 5 years for each of the two prior convictions.

He appealed. His conviction was affirmed by the California Court of Appeal and his petition for review was denied by the California Supreme Court. He also filed an unsuccessful state habeas petition, during the pendency of which this action was stayed.

In his second amended petition in this court, Thompson-Bonilla asserted seven claims for relief. Respondent filed his answer and supplemental answer. Thompson-Bonilla filed a traverse. The matter is now ready for decision on the merits.

JURISDICTION AND [*5] VENUE

This court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged conviction occurred in Alameda County, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that state court remedies were exhausted for the claims in the second amended petition.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was **[*6]** adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

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

DISCUSSION

A. Challenge To 1990 Conviction Used For Enhancement Purposes

Thompson-Bonilla contends that his right to due process was violated by the trial court's refusal

to strike the 1990 prior conviction. That conviction was used for purposes of enhancing his current sentence as a recidivist under California's Three Strikes law. He contends that the 1990 prior conviction should be vacated because he was not adequately advised of his constitutional rights before he pled guilty in that case.

It is too late for Thompson-Bonilla to challenge the 1990 conviction. "[O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively **[*8]** valid. . . . If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). Thompson-Bonilla may no longer challenge his 1990 conviction. The sentence on the 1990 conviction was finished and the conviction was no longer open to direct or collateral challenge long before his 2001 conviction occurred. See RT 1184 (received probation in 1990).

The only exception to the rule barring challenges to prior convictions used to enhance current sentences is that a petitioner may challenge a prior conviction on the ground that there was a failure to appoint counsel in that case in violation of the Sixth Amendment. Coss at 404. Thompson-Bonilla was not denied counsel in the 1990 proceedings, and therefore does not fit within the narrow exception to non-reviewability established by Coss. See RT 1185 (Thompson-Bonilla testifying that he consulted with his counsel before entering plea). Coss therefore precludes consideration of his claim in a federal habeas proceeding.

B. **[*9]** Eighth Amendment Challenge To Sentence

Thompson-Bonilla contends that his sentence of 45 years to life imprisonment violated his Eighth Amendment right to be free from cruel and unusual punishment. He urges that the court should note certain circumstances of the offenses committed: the gun was not loaded, the encounters were brief, no physical force was used, no one was injured, the property loss was minimal, the robberies were done to feed a drug addiction. He also argues that he showed empathy towards his victims by, for example, leaving a wallet behind in one case and allowing Roth to depart unhindered when Roth said he had no money. He also states that the court should consider the nature of the offender -- arguing that he was a productive member of the community before drugs ruined his life and predicting that he could once again become one.

A criminal sentence that is significantly disproportionate to the crime for which the defendant was convicted violates the Eighth Amendment's prohibition of cruel and unusual punishment. See Solem v. Helm, 463 U.S. 277, 303, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (sentence of life imprisonment without possibility of parole for seventh nonviolent felony violates Eighth Amendment). **[*10]** "[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." Id. at 289-90 (citation and quotation marks omitted). "'The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" Ewing v. California, 538 U.S. 11, 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring)). Under this proportionality principle, the threshold determination for the court is whether petitioner's sentence is one of the rare cases in which a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. Harmelin, 501 U.S. at 1005; Ewing, 538 U.S. at 30-31 (applying Harmelin standard). Only if such an inference arises does the court proceed to compare petitioner's sentence with sentences in the same and other jurisdictions. See Harmelin, 501 U.S. at 1005; cf. Ewing, 538 U.S. at 23. The threshold for an "inference of gross disproportionality" is quite high. See, e.g., Ewing, 538 U.S. at 30 (sentence of 25 years to life for conviction **[*11]** of grand theft with prior convictions was not grossly disproportionate); Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (upholding two consecutive 25-to-life terms for two convictions of theft of videotapes with prior convictions); Harmelin, 501 U.S. at 1008-09

(mandatory sentence of life without possibility of parole for first offense of possession of 672 grams of cocaine did not raise inference of gross disproportionality). Andrade and Ewing are the Supreme Court's most recent pronouncements on Eighth Amendment claims regarding prison sentences and both upheld California Three Strikes sentences for shoplifters with prior convictions. One of the important lessons from these two cases is that relief under the Eighth Amendment continues to be reserved for the extreme cases.

In determining whether the sentence is grossly disproportionate under a recidivist sentencing statute, the court looks to whether such an "extreme sentence is justified by the gravity of [an individual's] most recent offense and criminal history." Ramirez v. Castro, 365 F.3d 755, 768 (9th Cir. 2004); see Ewing, 538 U.S. at 28. In judging the appropriateness of a sentence under a recidivist statute, a court may take into account **[*12]** the government's interest not only in punishing the offense of conviction, but also its interest "'in dealing in a harsher manner with those who [are] repeat[] criminal[s].'" United States v. Bland, 961 F.2d 123, 129 (9th Cir.) (quoting Rummel v. Estelle, 445 U.S. 263, 276, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)), cert. denied, 506 U.S. 858, 113 S. Ct. 170, 121 L. Ed. 2d 117 (1992). The Eighth Amendment does not preclude a state from making a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime, as may occur in a sentencing scheme that imposes longer terms on recidivists. See, e.g., Ewing, 538 U.S. at 25 (upholding 25-to-life sentence for recidivist whose current conviction was for grand theft (for shoplifting three golf clubs)); Rummel, 445 U.S. at 284-85 (upholding life sentence with possibility of parole for recidivist convicted of fraudulent use of credit card for $ 80, passing forged check for $ 28.36 and obtaining $ 120.75 under false pretenses); Nunes v. Ramirez-Palmer, 485 F.3d 432, 439 (9th Cir.), cert. denied, 128 S. Ct. 404, 169 L. Ed. 2d 283 (2007) (upholding 25-to-life sentence for current conviction of petty theft with a prior theft-related conviction after **[*13]** finding that the petitioner's criminal history was longer, more prolific, and more violent than that in Andrade where a stiffer sentence was upheld); Taylor v. Lewis, 460 F.3d 1093, 1101-02 (9th Cir. 2006) (upholding 25-to-life sentence upon a conviction of possession of 0.036 grams of cocaine base with two prior felony convictions for voluntary manslaughter and robbery, and past violations of probation and parole); Rios v. Garcia, 390 F.3d 1082, 1082-83 (9th Cir. 2004), cert. denied, 546 U.S. 827, 126 S. Ct. 37, 163 L. Ed. 2d 74 (2005) (upholding 25-to-life sentence for current conviction of petty theft with a prior theft-related conviction and second degree burglary (for episode in which he shoplifted two watches having a combined value of $ 79.88, was chased by a loss prevention officer and was apprehended in the store parking lot after a minor struggle) and prior convictions were two robbery convictions in 1987); Bland, 961 F.2d at 128-29 (upholding life sentence without the possibility of parole for being a felon in possession of a firearm with thirteen prior violent felony convictions, including rape and assault); but see, e.g., Ramirez, 365 F.3d 755 (25-to-life sentence was grossly disproportionate for offender **[*14]** whose current crime was petty theft with a prior theft-related conviction and the two prior strike convictions were robbery convictions); Reyes v. Brown, 399 F.3d 964 (9th Cir. 2005), cert. denied, 547 U.S. 1218, 126 S. Ct. 2887, 165 L. Ed. 2d 938 (2006) (remanding for further proceedings to determine whether 26-to-life sentence was grossly disproportionate for current offense of perjury (for making misrepresentations on a DMV driver's license application when he impersonated a friend) and prior convictions were a 1981 residential burglary conviction committed as a juvenile and a 1987 armed robbery conviction).

The standard of review in § 2254(d) presents an additional problem for habeas petitioners asserting Eighth Amendment sentencing claims. In Lockyer v. Andrade, 538 U.S. at 72-73, the Court rejected the notion that its case law was clear or consistent enough to be clearly established federal law within the meaning of 28 U.S.C. § 2254(d), except that it was clearly established that a gross disproportionality principle did apply to sentences for terms of years (as well as to the death penalty). However, the precise contours of that principle "are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." **[*15]** Id. at 73 (quoting Harmelin, 501 U.S. at 1001).

The California Court of Appeal rejected Thompson-Bonilla's Eighth Amendment challenge to his sentence. The court correctly identified the controlling gross disproportionality rule, see Cal. Ct.

App. Opinion, p. 8 (citing Ewing), and reasonably applied it. Thompson-Bonilla had "a long history of recidivism, beginning with petty theft in 1989 and continuing through the next decade and beyond with multiple robberies and drug offenses. [He] did not reform himself despite lenient grants of probation, parole, and drug diversion. Instead, [he] continued to rob people with threats of violence. [Thompson-Bonilla's] prison sentence is not cruel and unusual punishment for his current offenses and history of recidivism." Id. at 8-9.

Thompson-Bonilla is not entitled to habeas relief on his Eighth Amendment claim. His is not that rare case where the sentence can be said to be grossly disproportionate. An armed robbery is considered extremely serious crimes, and certainly is far more serious than the shoplifting crimes at issue in Andrade and Ewing, in which the Supreme Court upheld 25-to-life and 50-to-life sentences for recidivist offenders. Even if **[*16]** it is proper to account the various circumstances that Thompson-Bonilla suggests should lessen his culpability, his conduct still amounted to an armed robbery (and attempted armed robbery) even if each was not the worst instance of that crime that ever occurred. In each robbery, he displayed the gun and indicated he was going to use it on the victim; although he now wants the court to consider that the gun was unloaded, he never told the victims that fact and at least one victim thought he was going to kill her when he threatened her with the gun. In each robbery, he took all the cash that the victim had, and his minimal monetary gain was not due to some kindness on his part but simply reflected he robbed from people who had no more cash for him to take. These may have been relatively minor crimes from his perspective but the victims almost certainly considered them to be much more serious. In any event, regardless of all the circumstances Thompson-Bonilla has identified to try to minimize the seriousness of the crimes, these armed robberies were more serious than the current crimes in every Supreme Court and Ninth Circuit case cited in this section of the order. Also, his criminal **[*17]** history was more serious than those in Andrade and Ewing and most of the cited Ninth Circuit cases. See Probation Officer's Report, unnumbered pages following CT 874.

The fact that he committed the robberies to feed a drug addiction does not help him. Even if his drug addiction was proven and was considered a mitigating factor, it would be constitutionally irrelevant. The Supreme Court has not held that a court must consider mitigating factors in determining whether a prison sentence is constitutionally permissible. Indeed, Supreme Court sentiment seems to be to the contrary. A majority of the Harmelin court rejected the contention that the Eighth Amendment requires a judge to consider mitigating factors before sentencing a convicted criminal to life imprisonment without the possibility of parole, thereby declining to extend the "individualized capital-sentencing doctrine" to non-capital cases. See Harmelin v. Michigan, 501 U.S. at 994-996; United States v. Gomez, 472 F.3d 671, 674 (9th Cir. 2006) (Harmelin does not apply to challenge to non-capital sentencing law); Alvarado v. Hill, 252 F.3d 1066, 1069 (9th Cir. 2001) (same).

Thompson-Bonilla's sentence of 45-to-life for an armed robbery **[*18]** with a gun by a recidivist is not that "rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Ewing, 538 U.S. at 30. His sentence did not violate the Eighth Amendment.

C. Miranda Claim

Thompson-Bonilla contends that the trial court should not have allowed into evidence a statement he made to a police officer before he was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The facts were these: "The police had not yet given Miranda advisements when [Thompson-Bonilla], handcuffed and being led to a patrol car, remarked: '[T]hat fucking rock got me pulling this shit.' A police officer asked [Thompson-Bonilla] what he meant and [Thompson-Bonilla] said, 'all this robbing shit.'" Cal. Ct. App. Opinion, p. 5.

The California Court of Appeal rejected the Miranda claim:

> [Thompson-Bonilla] concedes that his first statement ("that fucking rock got me

> pulling this shit") was a spontaneous admission that was not the product of any police interrogation. But [Thompson-Bonilla] maintains that the police officer wrongly questioned [Thompson-Bonilla] to elicit the second, incriminating response ("all **[*19]** this robbing shit"), in asking [Thompson-Bonilla] what he meant by his first remark. As the People point out, an officer's neutral inquiries to clarify a defendant's volunteered statement is not an interrogation under Miranda. (People v. Ray (1996) 13 Cal.4th 313, 338, 52 Cal. Rptr. 2d 296, 914 P.2d 846.) Even if we found that the officer's inquiry amounted to interrogation, any error in denying suppression of the second statement was harmless. The first statement is fully incriminating without the second, clarifying statement. Moreover, the challenged statement is insignificant when compared with the overwhelming evidence of guilt in this case, which includes a confession, eyewitness identification, and apprehension of [Thompson-Bonilla] blocks from the scene of a robbery in possession of a gun and the victim's stolen property.

Cal. Ct. App. Opinion, p. 11.

In Miranda, the Supreme Court held that certain warnings must be given before a suspect's statement made during custodial interrogation can be admitted in evidence. Miranda requires that a person subjected to custodial interrogation be advised that he has the right to remain silent, that statements made can be used against him, that he has the right to counsel, and **[*20]** that he has the right to have counsel appointed. See Miranda 384 U.S. at 444. These warnings must precede any custodial interrogation, which occurs whenever law enforcement officers question a person after taking that person into custody or otherwise significantly deprive a person of freedom of action. See id. at 444. General "on-the-scene questioning" concerning the facts and circumstances surrounding a crime or other general questioning of citizens during the fact-finding process do not trigger a duty to give Miranda warnings. See id. at 477-78. "[I] nterrogation means questioning or 'its functional equivalent,' including 'words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" Pope v. Zenon, 69 F.3d 1018, 1023 (9th Cir. 1995), overruled on other grounds, United States v. Orso, 266 F.3d 1030 (9th Cir. 2001) (quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). Habeas relief may be granted only if the admission of statements obtained in violation of Miranda "'had a substantial and injurious effect or influence in determining the **[*21]** jury's verdict.'" Pope, 69 F.3d at 1020 (quoting Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).

Assuming arguendo that the police officer's question amounted to interrogation, the admission of the second statement Thompson-Bonilla made was, at most, harmless error. Like the California Court of Appeal, this court sees the first statement he blurted out as fully incriminating. That he then clarified it to specify that it was the robberies to which he referred did not make matters much worse for him. No interrogation preceded Thompson-Bonilla's statement "that fucking rock got me pulling this shit," and that statement would be admissible in evidence with or without the second statement that clarified that "this shit" meant "all this robbing shit." Any ambiguity about the meaning of the first statement was minimal in light of the circumstances: he made the statement just after he was arrested for a robbery that had taken place moments earlier and, when arrested, he had a gun in a paper bag (like victim Maria Cahill reported the perpetrator pointed at her) and had about the same amount of money Cahill said had just been taken from her. The gun in a paper bag also matched the report of **[*22]** James Roth, who had just moments earlier had a gun in a paper bag pointed at him in an attempted robbery. Under the circumstances, that first statement did not need the clarifying statement to be extremely damaging to the defense. In addition to the very incriminating statement Thompson-Bonilla blurted out, there was substantial other evidence against him: the gun in the bag, the possession of a $ 10 bill and almost $ 3 in coins coinciding with the amount of money a recent robbery victim had reported was taken from her, the victims' strong identifications of him as the person who had robbed or tried rob them, and his confession at the police station. It can be said with complete certainty that the admission of evidence that Thompson-Bonilla told the officer that he was referring to robberies did not have a substantial and injurious effect on the decision of the

judge who sat as the trier of fact. The California Court of Appeal's rejection of the Miranda claim as harmless error was not contrary to or an unreasonable application of clearly established federal law as set forth by the Supreme Court.

D. Voluntariness Of Confession

Thompson-Bonilla contends that his confession at the police **[*23]** station was involuntary because it was induced by false promises of leniency and made while he was under the influence of cocaine. He claims that the trial court erred in refusing to exclude the confession. The California Court of Appeal found that he was not promised leniency and the confession was not made under the influence of cocaine.

Involuntary confessions in state criminal cases are inadmissible under the Fourteenth Amendment. See Blackburn v. Alabama, 361 U.S. 199, 205-07, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960). The voluntariness of a confession is evaluated by reviewing both the police conduct in extracting the statements and the effect of that conduct on the suspect. See Miller v. Fenton, 474 U.S. 104, 116, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). Absent police misconduct causally related to the confession, there is no basis for concluding that a confession was involuntary in violation of the Fourteenth Amendment. See Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The court must consider the effect that the totality of the circumstances had upon the will of the defendant. See Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). "The test is whether, considering the totality of the circumstances, the government obtained the statement by **[*24]** physical or psychological coercion or by improper inducement so that the suspect's will was overborne." United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988) (citing Haynes v. Washington, 373 U.S. 503, 513-14, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963)).

A statement is involuntary if extracted by any sort of threats or violence, or obtained by any direct or implied promise or by the exertion of any improper influence. See Hutto v. Ross, 429 U.S. 28, 30, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976). But this does not mean every statement made in response to a promise made by law enforcement personnel is inadmissible; rather, the "promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances." Leon Guerrero, 847 F.2d at 1366.; see, e.g., id. (promise to inform the prosecutor about a suspect's cooperation -- even if accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect -- does not render subsequent statements involuntary).

1. The Alleged Promise Of Leniency

Thompson-Bonilla does not contend that one will find an explicit promise of leniency in the record, but instead contends that a promise of leniency may be inferred from a statement he made in **[*25]** the recorded part of the interview that indicates that there was a promise of leniency made earlier in the unrecorded part of the interview. The California Court of Appeal disagreed.

> The record contains no evidence that [Thompson-Bonilla] was promised leniency. [Thompson-Bonilla's] interrogation began around 7:00 p.m. on January 14, 2001, the day of his arrest, and audio recordation began at 7:40 p.m. The police officer who interrogated [Thompson-Bonilla] testified that he never told [Thompson-Bonilla] that [Thompson-Bonilla] would receive any type of benefit by talking to the police. The recorded interrogation is devoid of any mention of leniency, as [Thompson-Bonilla] admits. However, [Thompson-Bonilla] claims that he was promised leniency during his initial interrogation, before audio recordation. His claim rests entirely upon one vague statement he made during his recorded confession. The statement was made as the officer was pressing [him] as to whether he committed any additional robberies in the days preceding his arrest. [Thompson-Bonilla] insisted that he had not committed other robberies, and that he was being "straightforward." [Thompson-Bonilla] explained: "You know, I ain't **[*26]** trying to shoot you to the left or trying

> to put no, no moons on you or anything like that because . . . [P] . . . [P] . . . you know, *basically the way I see it the fact of me getting caught up for robberies they're going to sink my ship anyway, the way I feel about it in the system. You think differently. I hope you're right*. Uh, so what I'm saying is that I'm just trying to, let's just, let's cut through the chase and all the bullcrap and give you guys what you need from me based on the way I see it. I mean, I mean how can I deny these things anyway. I got ID'd twice. You know, within a, I don't know, half-hour to forty minutes."
>
> [Thompson-Bonilla] argues that his recorded statement that his arrest for robbery and attempted robbery was "going to sink [his] ship" but that the officer "think[s] differently" implies that a promise of leniency must have been made during the initial interrogation. No such implication arises. The interrogating officer explicitly, and emphatically, denied that this statement referred to promised leniency. The officer testified that he "made it very clear" that he does "not speak for the district attorney. And I can't speak to sentencing and things like **[*27]** that." As the trial court found, [Thompson- Bonilla's] vague statement that the police officer "thinks differently" about whether [his] ship would sink may have been no more than a reference to the officer's disavowal of any knowledge of what punishment would be imposed.

Cal. Ct. App. Opinion, pp. 9-10 (quoting trial exhibit 3A (here, respondent's exhibit 2), p. 10) (italics in source).

The state court of appeal's finding that there was no promise of leniency -- in the recorded part of the interview or in the unrecorded part of the interview -- are findings of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(e). Thompson-Bonilla's brief -- which is a photocopy of his state appellate court brief -- comes nowhere near to providing the clear and convincing evidence necessary to rebut that presumption of correctness. [1] With the starting point of the legal analysis being a determination that there was no promise of leniency, the legal analysis quickly ends. There being no promise of leniency, it follows that the confession was not involuntary as a result of one.

FOOTNOTES

1 This court has reviewed the transcript of the taped interview as well as sergeant Figueroa's testimony about **[*28]** the interrogation on these points, see RT 136-162, and sees no error in the state appellate court's description of it -- and certainly not anything that would amount to clear and convincing evidence that the state appellate court's determination was wrong. The videotape of the interview was not provided to the court, but Thompson-Bonilla made no argument here or in state court that there is something to be seen on the videotape that would show the trial court or state appellate court's evaluation of it to be erroneous.

2. Effects Of Cocaine

The California Court of Appeal rejected the contention that the confession was the product of Thompson-Bonilla being under the influence of cocaine. The court explained that a confession by one under the influence of drugs is not involuntary unless "'his reasoning was in fact so impaired that he was incapable of free or rational choice.'" Cal. Ct. App. Opinion, p. 10 (quoting People v. Mayfield, 5 Cal.4th 142, 204, 19 Cal. Rptr. 2d 836, 852 P.2d 331 (Cal. 1993)). This was not such a case. The court explained that at least eight hours had passed since the alleged drug use before the interrogation took place and Thompson-Bonilla "admitted during the interrogation that the drug was 'beginning **[*29]** to wear off' around 1:00 p.m., six hours before he was interrogated. The interrogating officer testified that [Thompson-Bonilla] was not under the influence of drugs. We have also independently reviewed both the transcript and the audiotape of the interrogation, and neither provides any evidence that [he] suffered any mental impairment at the time of his confession." Id. at 10-11.

The state court of appeal's finding that there was no evidence to support the assertion that Thompson-Bonilla suffered any mental impairment due to cocaine when he confessed is a finding of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(e). Thompson- Bonilla's brief -- which is a photocopy of his state appellate court brief -- comes nowhere near to providing the clear and convincing evidence necessary to rebut that presumption of correctness. With the starting point of the legal analysis being a determination that Thompson-Bonilla's mental processes were not impaired by cocaine at the time he confessed, the legal analysis quickly ends. There being no impairment stemming from drug use, it follows that the confession cannot be deemed coerced on that ground.

E. Allegedly Suggestive Identification **[*30]** Procedures

Thompson-Bonilla contends that the procedures used for the victims to identify him were unacceptably suggestive and the subsequent in-court identifications by them violated his right to due process. Two victims identified him in field show-ups where he was the only person displayed to them; two other victims identified him during police station lineups where he was one of six people displayed. The relevant facts are these:

> The police drove Cahill to the site of [Thompson-Bonilla]'s detention around 1:20 p.m., only 10 minutes after she was robbed. A police officer explained to Cahill that the person the police detained and were taking her to see for possible identification "may or may not be" the robber. Cahill sat in a patrol car 40 feet across the street from where [Thompson-Bonilla] stood facing her, and identified [Thompson-Bonilla] as the robber.
>
> Roth also made an in-field identification of [Thompson-Bonilla]. A police officer told Roth that the police had "picked somebody up" and wanted him to see if he could make an identification. The police drove Roth to Mandela and 7th Streets, where [Thompson-Bonilla] was brought out from a waiting patrol car. Roth arrived at the **[*31]** scene a half hour or less from the time of the attempted robbery. Roth immediately identified [Thompson-Bonilla] as the robber, and then asked if the man had a cap. [Thompson-Bonilla]'s cap was placed on his head, and Roth further confirmed his identification of [Thompson-Bonilla] as the robber, saying, "[t]hat's positive," and "everything now fits."
>
> Crocette and Bell were taken to a police station for a physical lineup a couple days later, on January 16, 2001, and identified [Thompson-Bonilla] as the man who robbed them. Crocette testified that she "had no doubt" that [Thompson-Bonilla], whom she identified from the lineup, was the man who robbed her eight days earlier. Bell was likewise certain of her lineup identification of [Thompson-Bonilla], made within a week of being robbed. Bell testified that she was "more than positive," that [Thompson-Bonilla] was the robber, and characterized her lineup identification as "110 percent sure."

Cal. Ct. App. Opinion, p. 5.

"A conviction which rests on a mistaken identification is a gross miscarriage of justice." Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). Procedures by which the defendant is identified as the perpetrator therefore must be examined **[*32]** to assess whether they are unduly suggestive. "It is the likelihood of misidentification which violates a defendant's right to due process." Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Due process protects against the admission of evidence derived from certain suggestive identification procedures. See id. at 196; cf. Manson v. Brathwaite, 432 U.S. 98, 106 n.9, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) (standards are not different for pretrial and in-trial identifications). Unnecessarily suggestive identification procedures alone do not require exclusion of in-court identification testimony, however; "reliability is the linchpin in determining the admissibility of identification testimony." See id. at 114. The factors to consider with regard to an

alleged misidentification include: (1) the witness' opportunity to view the defendant at the time of the incident; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the time of the identification procedure; and (5) the length of time between the incident and the identification. See id. at 114; Neil, 409 U.S. at 199-200. "To prevail on a habeas claim, the petitioner must show that **[*33]** the identification procedures used in the case were "'so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.'" Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir.), cert. denied, 516 U.S. 1017, 116 S. Ct. 582, 133 L. Ed. 2d 504 (1995) (quoting Stovall v. Denno, 388 U.S. at 301-02).

The California Court of Appeal found that the field identifications by Cahill and Roth were not impermissibly suggestive because the police had not signaled to either of them that the person being viewed was in fact the robber. Id. at 12. The court further found that even if the field identifications were unduly suggestive, they were reliable under the totality of the circumstances:

> Cahill and Roth both had ample opportunity to view the robber during daylight confrontations committed at arm's length. The victims were attentive and able to provide a description of the robber's clothes and physique, which accurately matched [Thompson-Bonilla]. Roth was certain of his in-field identification, and unhesitatingly identified [Thompson-Bonilla] as the robber. Cahill was also certain, although she based her identification on the distinctive clothes worn by the robber rather than facial features. **[*34]** The victims made their identifications within 30 minutes of the crimes.

Id. at 13.

This court disagrees that the field show-up procedure was not suggestive but agrees that it was reliable. Regardless of what the officers said to indicate it was an open question whether the man being displayed to the victims was the robber, Thompson-Bonilla was displayed to both victims in handcuffs and standing next to a patrol car and uniformed officer. Those circumstances were suggestive -- suggesting that he was the one police thought worth arresting and, in turn, suggesting he was the one they thought was the perpetrator. However, the reliability of the identification by these two witnesses was strong. As the state court of appeal explained, both victims saw the perpetrator up close and in the middle of the day; both had described his clothes (i.e., green or green and blue jacket and white pants (in January)) and physique in a way that generally matched him; both had stated he held a gun in a paper bag; both were certain in their identifications of him; and both made their identifications within an hour of the crimes. The two show-ups were done separately, so the identification by one victim did **[*35]** not contaminate the other's identification of him. Thompson-Bonilla argues that the suggestiveness of the show-ups made them unreliable; however, the Supreme Court has not made reliability and suggestiveness synonymous and requires that they be viewed separately. See generally Neil, 409 U.S. at 198-99. The admission of evidence that these two witnesses identified Thompson-Bonilla in a field show-up did not result in a due process violation.

The California Court of Appeal also rejected the challenge to the lineup at which Crocette and Bell identified Thompson-Bonilla as the man who had robbed them. The lineup (comprised of six African-American males) was not impermissibly suggestive just because two men were smaller and thinner than him and another one was much older than him -- the court explained that there was no requirement that the people in the lineup must be nearly identical. Cal. Ct. App. Opinion, p. 13. The state appellate court and the trial court viewed a videotape of the lineup and both concluded that there was nothing on the tape that led either to believe it was suggestive.

The videotape of the lineup has not been made available to this court, but that does not preclude **[*36]** this court from deciding the claim. The portion of Thompson-Bonilla's habeas brief addressing this claim is a photocopy of his state court appellate brief. In both he argued that the lineup was suggestive because "of the five African-American fillers eventually chosen, two were smaller and thinner than him, and one was a lot older. (RT 228.) Thus, only two of the individuals in the lineup fit his general description." Second Amended Petition, p. 39. [2] The

California Court of Appeal stated that it had examined the videotape and saw "no support" for Thompson-Bonilla's contention that it was impermissibly suggestive. Thompson-Bonilla's presentation of the exact same argument to this court is not enough to meet the requirement that he show that the state court's decision was based on an unreasonable determination of the facts in light of te evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d)(2).

FOOTNOTES

2 Thompson-Bonilla also states in his brief that he "he is African-American, yet not everyone in his pool of choices was of the same ethnicity." Second Amended Petition, p. 36. The pool from which the fillers for the lineup were chosen has no bearing on his federal constitutional **[*37]** claim. The suggestive identification claim is analyzed with reference to the people who were actually viewed by the witnesses and not with reference to people who were not viewed.

The California Court of Appeal's decision that the lineup was not impermissibly suggestive was not contrary to or an unreasonable application of clearly established federal law. The lineup took place within two weeks of the robberies, at a time when the crimes were fresh in the victims' memories. The six people in the lineup were all African American men. Thompson-Bonilla's argument that a couple of fillers were shorter and one filler was older than him does not show that he was presented so differently from the others in the lineup as to make the lineup unduly suggestive. See United States v. Burdeau, 168 F.3d 352, 357-58 (9th Cir.), cert. denied, 528 U.S. 958, 120 S. Ct. 388, 145 L. Ed. 2d 303 (1999) (differences in photos of perpetrator and fillers in a photo array "in no way implied that the witnesses should identify him as the perpetrator"). Due process does not require that the participants be identical or identically groomed for the lineup to be acceptable. The age and stature differences did not create an impermissible suggestion that **[*38]** Thompson-Bonilla was the offender. Thompson-Bonilla does not show that the identifications made at the non-suggestive lineup were unreliable. The record suggests no reliability problem, as both of these victims had seen the robber up-close (although at night-time) and had a good opportunity to view him; both made their identifications within eight days of the crimes; and both were extremely certain when they picked him out at the lineup.

Thompson-Bonilla also challenges the later identifications by these victims in court during the trial, claiming that they were tainted by the unreliable pre-trial identifications. This claim fails because the pretrial identifications were not unreliable. He is not entitled to the writ on his due process claim.

Finally, he argues that his right to effective assistance of counsel was denied at the lineup. This Sixth Amendment claim is a non-starter because he had no right to counsel at the lineup. Counsel is not required at pre-indictment lineups because the right to counsel does not attach until adversary judicial proceedings have been initiated against a defendant. See Kirby v. Illinois, 406 U.S. 682, 688-91, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

F. Selective Prosecution/Sentencing **[*39]** Under Three Strikes Law

Thompson-Bonilla urges that his right to equal protection was violated because he and other African-Americans have been singled out for punishment under the harsher sentencing scheme of California's Three Strikes law. See Petition, pp. 43-44. He contends that, in an effort to convince the Legislature and electorate that the Three Strikes law was a successful response to criminal recidivism, district attorneys statewide, including in Alameda County, singled out African-Americans and other minority defendants for sentence enhancements while their White criminal counterparts were offered plea bargains or had the prior convictions stricken. Id. at 44. He urges that the pattern of discrimination can be determined if "one closely examines the statistical data," id. at 45, but did not provide that data. He asks to do discovery to demonstrate the

disparate treatment. Id. at 48.

A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. See United States v. Armstrong, 517 U.S. 456, 463, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). Although the decision whether **[*40]** to prosecute and what charges to bring generally rests entirely in the prosecutor's discretion, this discretion is subject to constitutional constraints, such as that it may not violate equal protection by relying on race. See id. at 464. In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "'clear evidence to the contrary.'" Id. (citation omitted). Unsupported allegations of selective prosecution are not enough. See United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994), cert. denied, 513 U.S. 1171, 115 S. Ct. 1147, 130 L. Ed. 2d 1106 (1995); see also United States v. Buffington, 815 F.2d 1292, 1305 (9th Cir. 1987) (speculation of selectivity by black defendant previously acquitted of officer's murder, without additional proof, insufficient to establish selective prosecution).

To establish a prima facie case of selective prosecution, the claimant must show that the prosecutorial policy (1) had a discriminatory effect and (2) was motivated by a discriminatory purpose. See Armstrong, 517 U.S. at 465. "To **[*41]** establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." Id.

Thompson-Bonilla comes nowhere near to showing a prima facie case of selective prosecution. His assertion that an analysis of unidentified data will show the selectivity of enforcement of the Three Strikes law is insufficient, as it was up to him to make that showing rather than just guess that such a showing could be made if one looked at the unidentified data. Likewise, his argument about various unidentified national and regional studies does not make a prima facie case of selective prosecution. He has not shown that similarly situated individuals (e.g., robbers with multiple current offenses) were not prosecuted under the Three Strikes law.

The Alameda County Superior Court rejected this claim because Thompson-Bonilla "fail[ed] to offer any factual or substantive support for his claim that the application of the Three Strikes Law violated his rights to Due Process or Equal Protection." Second Amended Petition, unnumbered exhibit. That determination was not contrary to or an unreasonable application of Armstrong; the dearth of evidentiary **[*42]** support for his generic allegation that a group has been treated differently dooms the claim to failure. The claim is denied. [3]

FOOTNOTES

3 The justifications for a rigorous standard for the elements of a selective-prosecution claim require a correspondingly rigorous standard for discovery in aid of such a claim. See Armstrong, 517 U.S. at 468. To establish entitlement to do discovery the petitioner must present "a credible showing of different treatment of similarly situated persons," i.e., persons that could have been prosecuted but were not. Id. at 469-70. Thompson-Bonilla has not shown his entitlement to discovery to try to learn of statistical information that might support his theory. His petition is simply too short on details to meet the rigorous standard identified by Armstrong for relief or even to permit discovery.

G. Claim For Breach of Plea Agreement From Prior Conviction

Thompson urges that the use of his old convictions for sentencing under the Three Strikes law violated his right to due process and equal protection and "breached the terms and spirit of their contractual agreement." Second Amended Petition, p. 51. He contends that there was "no specific reference concerning future **[*43]** usage of the proceedings or plea for purposes of enhancing a subsequent conviction and sentence beyond that specifically mentioned" in the then-existing laws when he pled guilty. Petitioner, pp. 52-53.

The use of the old convictions did not violate any federal constitutional right Thompson-Bonilla possessed. Due process concerns of fundamental fairness require that a prosecutor keep the promises upon which a defendant relies in entering into a plea agreement. See Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Johnson v. Lumpkin, 769 F.2d 630, 633 (9th Cir. 1985). Claims of a breached plea agreement are analyzed according to contract law standards of interpretation, such that a court looks to what was reasonably understood by the parties to be the terms of the agreement and whether or not those terms were fulfilled. See United States v. Kamer, 781 F.2d 1380, 1387 (9th Cir.), cert. denied, 479 U.S. 819, 107 S. Ct. 80, 93 L. Ed. 2d 35 (1986). California contracts, including plea bargains, are "'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws.'" People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (Cal. Ct. App. 2004) (citation **[*44]** omitted). Thompson-Bonilla's arguments that rely on the contractual nature of the old plea agreements fail because he concedes that the possibility of future use of the convictions was not part of the plea agreements. Because of the absence of any agreement that the convictions could not be used, there is no contract term to enforce. The fact that the trial courts that accepted his guilty pleas in the earlier proceedings did not warn him of the possibility of future enhancements under a law that did not yet exist did not violate his constitutional rights. See United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) (defendant need not be informed of the possibility of a future sentence enhancement). There is no merit to Thompson-Bonilla's claim that the use of the old convictions violated any federal constitutional right he possessed.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is DENIED. The clerk shall close the file.

IT IS SO ORDERED.

DATED: October 30, 2008

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

*2008 U.S. Dist. LEXIS 54241, **

PAUL LEE GARREN, Petitioner, v. M. C. KRAMER, Warden, Respondent.

NO. CV 07-2401-R(E)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 54241

April 21, 2008, Decided
April 21, 2008, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus denied, Writ of habeas corpus dismissed Garren v. Kramer, 2008 U.S. Dist. LEXIS 54217 (C.D. Cal., July 10, 2008)

PRIOR HISTORY: People v. Garren, 2005 Cal. LEXIS 8874 (Cal., Aug. 10, 2005)

CORE TERMS: sentence, sentencing, felony, petty theft, robbery, prosecutor, probation report, assertedly, prior conviction, ineffective, quotations, sentenced, Strikes Law C.T, probation officer, stand trial, pled guilty, theft-related, misdemeanor, corpus, trial counsel, security guard, citations omitted, assault charge, competence, waived, incompetent, mitigating, psychologist, continuance, investigate

COUNSEL: **[*1]** Paul Lee Garren, Petitioner, Pro se, Folsom, CA.

For M. C. Kramer, Warden Folsom State Prison, Respondent: Michael A Katz, LEAD ATTORNEY, CAAG - Office of Attorney, Los Angeles, CA.

JUDGES: CHARLES F. EICK, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: CHARLES F. EICK

OPINION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on April 11, 2007 ("Pet."), accompanied by an attached Memorandum ("Pet. Mem.") and Exhibits, including a lengthy memorandum of points and authorities labeled Petitioner's Exhibit 1 ("Pet. Mem., Ex. 1"). On July 26, 2007, Respondent filed an Answer asserting that all of Petitioner's claims are procedurally defaulted. On August 24, 2007, Petitioner filed a Reply.

On September 7, 2007, the Court issued an Order ruling that Petitioner had met his interim burden under Bennett v. Mueller, 322 F.3d 573 (9th Cir.), cert. denied, 540 U.S. 938, 124 S. Ct. 105, 157 L. Ed. 2d 251 (2003), and ordering Respondent **[*2]** to file a Supplemental Answer either: (1) attempting to meet Respondent's burden under Bennett v. Mueller; or (2) expressly waiving the procedural default defense and addressing the merits of the Petition. On November 29, 2007, Respondent filed a Supplemental Answer expressly waiving the state procedural bar of untimeliness and addressing the merits of the Petition. On January 25, 2008, Petitioner filed a Supplemental Reply ("Supp. Reply"), accompanied by an attached Memorandum ("Supp. Reply Mem."), raising, inter alia, a claim that Petitioner's trial counsel allegedly rendered ineffective assistance by failing to present mitigating evidence at sentencing.

On January 30, 2008, the Court issued an "Order re Exhaustion," deeming Petitioner's claim that his trial counsel ineffectively failed to present mitigating evidence at sentencing to be unexhausted, and ordering Petitioner to file either: (1) a document stating Petitioner's intent to delete and abandon the claim of ineffective assistance of trial counsel for allegedly failing to present mitigating evidence for sentencing purposes; (2) a document requesting dismissal of the entire proceeding without prejudice; or (3) a motion for a **[*3]** stay pursuant to Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). On February 8, 2008, Petitioner filed a "Request to Delete and Abandon the claim of ineffective assistance of trial counsel for Allegedly failing to present mitigating evidence for [sentencing] purposes," expressly abandoning this claim.

BACKGROUND

On July 28, 1998, security officials at a Home Base store in Ventura County caught Petitioner stealing tools worth approximately $ 120 (Reporter's Transcript ("R.T.") 14-20). According to a motion filed by Petitioner's counsel, Petitioner received a citation but failed to appear (see Clerk's Transcript ("C.T.") 28). A warrant was not served on Petitioner until December 9, 1999 (see C.T. 28).

Meanwhile, Petitioner was involved in another incident involving the theft of tools from a Home Base store, this time in San Bernardino County (see C.T. 22-23, 28). The San Bernardino incident allegedly involved Plaintiff's use of a "box cutter" or "X-acta" knife to cut a store employee (see C.T. 29). On November 24, 1999, Petitioner was arraigned in the San Bernardino County Superior Court on one count of robbery and one count of assault with a deadly weapon or with force likely to cause great bodily **[*4]** injury (Respondent's Lodgment S, pp. 5-6). [1] On December 7, 1999, Petitioner pled guilty to the San Bernardino charges pursuant to a plea agreement and requested immediate sentencing (Respondent's Lodgment S, pp. 8-9). The court took Petitioner's "Vargas" waiver, [2] and sentenced Petitioner to a total term of eight years (id.). The court ordered Petitioner released on his own recognizance upon the filing of a signed agreement to appear, set a resentencing date of February 10, 2000 on the Vargas waiver, and referred the matter to the probation office for a presentence investigation and report (id.).

FOOTNOTES

1 Because Respondent's Lodgment S does not bear consecutive page numbers, the Court has supplied page numbers.

2 If a defendant enters into a plea bargain, but fails to appear at sentencing, the court may refuse to approve the plea bargain, and in that case the defendant may withdraw the plea pursuant to California Penal Code section 1192.5. See People v. Cruz, 44 Cal. 3d 1247, 1250-51, 246 Cal. Rptr. 1, 752 P.2d 439 (1988). Under People v. Vargas, 223 Cal. App. 3d 1107, 273 Cal. Rptr. 48 (1990), a defendant may waive the right to withdraw his or her plea upon failure to appear at sentencing **[*5]** and agree that a specified longer term may be imposed in the event of a failure to appear. See also Turner v. Castro, 2001 U.S. Dist. LEXIS 18214, 2001 WL 1382100, at *3 (N.D. Cal. Nov. 1, 2001), aff'd, 58 Fed. App'x 749 (9th Cir. 2003) ("a plea agreement validly can provide for a specified greater term to be imposed in the event the defendant fails to appear for sentencing, and to a specified lesser term if the defendant does appear") (citations omitted).

In the Ventura County proceedings, the court held a competency hearing and, on February 9, 2000 (the day before resentencing in the San Bernardino case), found Petitioner incompetent to stand trial and transferred him to Patton State Hospital (see C.T. 28). [3] On February 10, 2000, Petitioner did not appear in the San Bernardino Superior Court (Respondent's Lodgment S, p. 10). The docket states Petitioner was in custody in Ventura County (id.). The matter was continued to February 14, 2000 (id.). On February 14, 2000, Petitioner did not appear in the San Bernardino Superior Court (Respondent's Lodgment S, p. 11). The docket states Petitioner was not transported from Ventura County (id.). The matter was continued to February 15, 2000 (id.). On February 15, 2000, **[*6]** Petitioner did not appear in the San Bernardino Superior Court (Respondent's Lodgment S, p. 12). The docket states Petitioner was "still not transported" (id.). The matter was continued to February 28, 2000 (id.). On February 28, 2000, Petitioner did not appear in the San Bernardino Superior Court (Respondent's Lodgment S, p. 13). The docket states that the district attorney was checking whether Petitioner was in custody in another county (id.). The matter was continued to March 2, 2000 (id.). On March 2, 2000, Petitioner did not appear in the San Bernardino Superior Court (Respondent's Lodgment S, p. 14). The docket states Petitioner was "in Patton State Hospital on another case out of another county" (id.). The court issued a bench warrant for Petitioner's arrest (id.).

FOOTNOTES

3 The record does not contain any transcript of the competency proceedings. The Court derives its description of those proceedings from the motion to strike the prior convictions filed by Petitioner's counsel and the Patton State Hospital report lodged herein by Respondent. The fact that these proceedings occurred is undisputed. The lack of a transcript of these proceedings is immaterial to the present adjudication.

On **[*7]** June 23, 2000, Petitioner was returned to the Ventura County Superior Court after the Patton State Hospital Medical Director certified that Petitioner was competent to stand trial (see C.T. 28; Respondent's Lodgment T, pp. 4-7). [4] Following a second competency hearing, the Ventura County Superior Court found Petitioner competent to stand trial (see C.T. 28).

FOOTNOTES

4 Because Respondent's Lodgment T does not bear consecutive page numbers, the Court has supplied page numbers.

Following a preliminary hearing, the Ventura County Superior Court held Petitioner to answer on April 11, 2001 (C.T. 28-29). On April 25, 2001, the District Attorney for the County of Ventura filed an Information charging Petitioner with one count of petty theft with a prior in violation of California Penal Code sections 484(a) and 666, based on an alleged prior 1987 grand theft conviction (C.T. 1-2). The Information further alleged that Petitioner had suffered four prior

robbery convictions qualifying as "strikes" under California's "Three Strikes Law," California Penal Code sections 667(b) - (i), and 1170.12(a) - (d) (C.T. 1-2). [5]

FOOTNOTES

5 The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, **[*8]** enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (i) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). The prosecution charged Petitioner under both versions (C.T. 1-2).

On July 18, 2001, in the Ventura County proceedings, Petitioner waived a jury trial (R.T. 2; C.T. 34). Also on that date, Petitioner's counsel filed a motion to strike the prior conviction allegations pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996) (C.T. 27-32). The prosecution filed an opposition to the motion (C.T. 22-26). On July 19, 2001, the Ventura County Superior Court found Petitioner guilty, and found true the prior conviction grand theft and robbery allegations (C.T. 36-38).

On October 16, 2001, the Ventura County Superior Court ordered the preparation of a psychologist's report regarding Petitioner (C.T. 39-40). After several continuances, on November 21, 2001, the Ventura County Superior **[*9]** Court denied Petitioner's Romero motion and sentenced Petitioner to a term of 25 years to life under the Three Strikes Law (C.T. 48-51).

On June 27, 2002, Petitioner was arraigned in the San Bernardino Superior Court on the bench warrant (Respondent's Lodgment S, p. 16). The court discharged the bench warrant (id.). Petitioner denied a violation of the Vargas waiver, and the court set a resentencing "on Vargas waiver" for July 24, 2002 (id.). On July 24, 2002, pursuant to a plea bargain, the San Bernardino Superior Court allowed Petitioner to withdraw his plea to the aggravated assault count, and dismissed that count (Respondent's Lodgment S, pp. 18-19). The court imposed a two-year sentence on the robbery charge (id.).

The Court of Appeal affirmed the judgment in the Ventura County case on May 26, 2005 (Respondent's Lodgment F). The California Supreme Court denied Petitioner's petition for review on August 10, 2005 (Respondent's Lodgment J).

Petitioner filed a habeas corpus petition in the Ventura County Superior Court on March 23, 2006, which that court denied on May 17, 2006 (Respondent's Lodgments K, L). Petitioner filed a habeas corpus petition in the Ventura County Superior Court **[*10]** on June 6, 2006, which that court denied on July 6, 2006 (Respondent's Lodgments M, N). Petitioner filed a habeas corpus petition in the California Court of Appeal on July 17, 2006, which that court denied on July 20, 2006 (Respondent's Lodgments O, P). [6] Petitioner filed a habeas corpus petition in the California Supreme Court on August 2, 2006 (Respondent's Lodgment Q). On February 14, 2007, the California Supreme Court denied the petition with a citation to In re Robbins, 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998), signifying that the petition was untimely under California law. [7]

FOOTNOTES

6 The copy of Petitioner's habeas corpus petition filed in the Court of Appeal which was lodged by Respondent does not bear a filing date. However, the Court takes judicial notice of the docket in Garren v. People, Court of Appeal case number B192297, available on the California courts' website at www.courtinfo.ca.gov, which shows the petition was filed on July 17, 2006. See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988)

(court may take judicial notice of court records).

7 As previously indicated, Respondent has waived the procedural default defense.

PETITIONER'S [*11] CONTENTIONS

Petitioner contends:

1. Petitioner allegedly received an unlawful sentence, because the crime of petty theft with a prior theft-related conviction assertedly is not a felony triggering application of the Three Strikes Law (Pet., Ground One, p. 5; Pet. Mem., Ex. 1, pp. 1-17; Supp. Reply Mem., pp. 1-17);

2. The sentencing court allegedly used assertedly unconstitutional prior convictions to impose a Three Strikes sentence (Pet., Ground Two, p. 5; Pet. Mem., Ex. 1, pp. 18-31; Supp. Reply Mem., pp. 18-24);

3. The trial court allegedly abused its discretion by denying Petitioner's "Romero" motion (Pet., Ground Three, p. 6; Pet. Mem., Ex. 1, pp. 32-39; Supp. Reply Mem., pp. 25-31);

4. The prosecutor allegedly committed misconduct by assertedly presenting false evidence to the sentencing court (Pet., Ground Four, p. 6; Pet. Mem., Ex. 1, pp. 40-48; Supp. Reply Mem., pp. 32-35);

5. The prosecution allegedly suppressed evidence which assertedly was exculpatory because the evidence allegedly would have put Petitioner in a "different light" at sentencing. See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (Pet., Ground Five, p. 6; Pet. Mem., Ex. 1, pp. 49-53; Supp. Reply Mem., pp. 35-38);

6. The trial **[*12]** court allegedly compelled Petitioner to stand trial although Petitioner was assertedly incompetent to do so (Pet., Ground Six, p. 6; Pet. Mem., Ex. 1, pp. 54-61; Supp. Reply Mem., pp. 38-42);

7. Petitioner allegedly was subject to multiple prosecution and punishment for the same act, assertedly in violation of the Double Jeopardy Clause (Pet., Ground Seven, p. 6; Pet. Mem., Ex. 1, pp. 62-67; Supp. Reply Mem., pp. 42-48);

8. Petitioner's sentence allegedly violated the Ex Post Facto Clause and Petitioner's plea agreement in a previous case (Pet., Ground Eight, p. 6; Pet. Mem., Ex. 1, pp. 28-31, 68-82; Supp. Reply Mem., pp. 48-51);

9. Petitioner's trial counsel assertedly rendered ineffective assistance, by allegedly:

(a) Failing to investigate the law and to argue that Petitioner's conviction for petty theft with a prior theft-related conviction did not constitute a felony triggering a Three Strikes sentence;

(b) Failing to investigate Petitioner's prior convictions and to file a "Sumstine" motion challenging Petitioner's prior convictions on "Boykin/Tahl" grounds; [8]

(c) Failing to investigate, and to inform the sentencing court about, the facts in the San Bernardino case;

(d) Failing to move **[*13]** for a continuance to permit the preparation of a new psychological report;

(e) Failing to prepare Petitioner for an interview with a probation officer, to ask

Petitioner why Petitioner did not talk to the probation officer, and to review the probation report; and

(f) Assertedly tricking or coercing Petitioner into waiving his jury trial right

(Pet., Grounds One and Nine; Pet. Mem, Ex. 1, pp. 56-57, 83-89; Supp. Reply Mem., pp. 52-58); and

FOOTNOTES

8 See Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Tahl, 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969), cert. denied, 398 U.S. 911, 90 S. Ct. 1708, 26 L. Ed. 2d 72 (1970), overruled in part, People v. Howard, 1 Cal. 4th 1132, 5 Cal. Rptr. 2d 268, 824 P.2d 1315 (1992), cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992).

10. Petitioner's appellate counsel allegedly rendered ineffective assistance, assertedly by failing to raise on appeal the issues in the Petition (Pet., Ground Ten, p. 6; Pet. Mem., Ex. 1, pp. 90-91; Supp. Reply Mem., p. 59).

STANDARD OF REVIEW

A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted **[*14]** 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) (as amended); see also Woodford v. Visciotti, 537 U.S. 19, 24-26, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002); Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); Williams v. Taylor, 529 U.S. 362, 405-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas **[*15]** relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citation

omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see **[*16]** also Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir.), cert. denied, 540 U.S. 968, 124 S. Ct. 446, 157 L. Ed. 2d 313 (2003).

In applying these standards, this Court looks to the last reasoned state court decision. See Franklin v. Johnson, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002). Where no such reasoned opinion exists, as where a state court rejected a claim in an unreasoned order, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). If the state court declined to decide a federal constitutional claim on the merits, this Court must consider that claim under a de novo standard of review rather than the more deferential "independent review" of unexplained decisions on the merits authorized by Delgado v. Lewis. See Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (standard of de novo review applicable to claim state court did not reach on the merits).

DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed on the merits with prejudice. [9]

FOOTNOTES

[9] The Court has read, considered and rejected on the merits all of **[*17]** Petitioner's contentions. The Court discusses Petitioner's principal contentions herein.

I. Petitioner's Claim that His Conviction for Petty Theft with a Theft-Related Conviction Did Not Warrant a Three Strikes Sentence Does Not Merit Habeas Relief.

California law authorizes a Three Strikes sentence "if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more [serious or violent] prior felony convictions . . . ." Cal. Penal Code § 667(c)(1); see also § 1170.12(c)(1). "[A]ny felony triggers a longer sentence under the Three Strikes law as long as the defendant has sustained at least one strike." People v. Strong, 87 Cal. App. 4th 328, 344, 104 Cal. Rptr. 2d 490 (2001) (footnote omitted); see also Lockyer v. Andrade, 538 U.S. at 67 ("any felony can constitute the third strike, and thus can subject a defendant to a term of 25 years to life in prison") (citations omitted).

In California, the potential sentence for a given offense determines the status of that offense as felony or misdemeanor. See Cal. Penal Code §§ 17(a), (b); People v. Terry, 47 Cal. App. 4th 329, 331-32, 54 Cal. Rptr. 2d 769 (1996). A felony is a crime punishable by death **[*18]** or imprisonment in state prison. Cal. Penal Code § 17(a). Every other crime is either a misdemeanor or an infraction. Id. Certain offenses, known colloquially as "wobblers," are punishable either by a prison sentence or by fine or incarceration in the county jail. See Cal. Penal Code § 17(b); People v. Williams, 49 Cal. App. 4th 1632, 1639 n.2, 57 Cal. Rptr. 2d 448 (1996) ("A wobbler is a special class of crime which could be classified and punished as a felony or misdemeanor depending upon the severity of the facts surrounding its commission.") (citation, internal quotations and brackets omitted).

The crime of simple petty theft is punishable by a fine or imprisonment in the county jail for not more than six months, or both, and hence is a misdemeanor. See Cal. Penal Code §§ 484, 487f, 490. The crime of petty theft with a prior theft-related conviction is a "wobbler," punishable either by a county jail term or a state prison term. See Cal. Penal Code § 666; Ewing v. California, 538 U.S. at 16; Lockyer v. Andrade, 538 U.S. at 67; People v. Terry, 47 Cal. App. 4th at 331-32.

"Under California law, where the offense is alternatively a felony or a misdemeanor, it is

regarded as a felony for **[*19]** every purpose until judgment. [citation]." United States v. Robinson, 967 F.2d 287, 293 (9th Cir. 1992); see People v. Upsher, 155 Cal. App. 4th 1311, 1320, 66 Cal. Rptr. 3d 481 (2007). Here, because Petitioner had a prior theft-related conviction, Petitioner's petty theft was charged as a felony, tried as a felony, and sentenced as a felony.

Nevertheless, Petitioner contends his conviction for petty theft with a prior theft-related conviction constituted only a misdemeanor conviction, not a felony conviction triggering a Three Strikes sentence. The Ventura County Superior Court rejected this contention, ruling that, under California law, Petitioner was convicted of a felony, not a misdemeanor (see Respondent's Lodgment N, p. 3).

Petitioner's claim presents only a state law issue not cognizable on federal habeas review. Federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Mere errors in the application of state law are not cognizable on habeas corpus. Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Matters relating to sentencing and serving of a sentence **[*20]** generally are governed by state law and do not raise a federal constitutional question. See Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (holding that question of whether particular prior conviction qualifies for sentence enhancement under California law is not cognizable on federal habeas corpus); see also Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021, 106 S. Ct. 3336, 92 L. Ed. 2d 741 (1986) (federal habeas relief "unavailable for alleged error in the interpretation or application of state law"); Sturm v. California Adult Authority, 395 F.2d 446, 448 (9th Cir. 1967), cert. denied, 395 U.S. 947, 89 S. Ct. 2021, 23 L. Ed. 2d 466 (1969) ("a state court's interpretation of its [sentencing] statute does not raise a federal question"). "[S]tate courts are the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); see also Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), cert. denied, 493 U.S. 942, 110 S. Ct. 344, 107 L. Ed. 2d 332 (1989).

Moreover, the state court did not err in determining, as a matter of state law, that Petitioner's conviction for petty theft with a prior theft-related conviction was a felony conviction triggering a potential Three Strikes sentence. California courts repeatedly have rejected **[*21]** Petitioner's contrary argument. See People v. Nguyen, 54 Cal. App. 4th 705, 711, 63 Cal. Rptr. 2d 173 (1997) (rejecting assertion that petty theft with a prior was only a misdemeanor to which Three Strikes Law did not apply); People v. Bury, 50 Cal. App. 4th 1873, 1876, 58 Cal. Rptr. 2d 682 (1996) (Three Strikes sentence for current offense petty theft with prior theft-related conviction proper; petty theft 'with a prior was "not a misdemeanor that carried the potential for a longer sentence," but "was, simply, a felony"); People v. Stevens, 48 Cal. App. 4th 982, 985, 56 Cal. Rptr. 2d 13 (1996). [10] Therefore, Petitioner has not shown any due process violation.

FOOTNOTES

10 Petitioner's reliance on United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) (en banc), and similar federal cases, is unavailing. Corona-Sanchez involved the issue of whether a California conviction for petty theft with a prior theft-related conviction constituted an aggravated felony under the United States Sentencing Guidelines. Applying the "categorical approach" commanded by Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the Ninth Circuit held that, under the Guidelines, petty theft was not a "theft offense" for **[*22]** which the term of imprisonment was at least one year, because the "categorical approach" required the court to separate the recidivist enhancement of California Penal Code section 666 from the underlying theft. Id. at 1213. In contrast, the issue here is simply whether Petitioner's instant offense constituted a felony under California law, which it did.

For the foregoing reasons, the state courts' rejection of this claim was not contrary to, or an

objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground One of the Petition.

II. Petitioner's Challenge to the Constitutionality of His Prior Robbery Convictions Does Not Merit Habeas Relief.

As indicated above, the trial court found true the allegations that Petitioner had suffered four prior robbery convictions qualifying as "strikes." Petitioner alleges that these prior convictions were assertedly the result of Petitioner's plea of nolo contendere allegedly obtained in violation of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) ("Boykin") and In re Tahl, 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969), **[*23]** cert. denied, 398 U.S. 911, 90 S. Ct. 1708, 26 L. Ed. 2d 72 (1970), overruled in part, People v. Howard, 1 Cal. 4th 1132, 5 Cal. Rptr. 2d 268, 824 P.2d 1315 (1992), cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992) ("Tahl"). [11] Petitioner also alleges that his counsel in the robbery case ineffectively advised Petitioner of the nature of the charges and the consequences of the plea, and assertedly coerced Petitioner to plead nolo contendere. [12]

FOOTNOTES

11 Under Boykin and Tahl, a conviction may be constitutionally invalid if the defendant pled guilty without waiving: (1) the right to a jury trial; (2) the right to confront adverse witnesses; and (3) the privilege against self-incrimination. Boykin, 395 U.S. at 243; Tahl, 1 Cal. 3d at 132.

12 Petitioner contends, among other things, that he told his attorney that Petitioner did not commit all of the robberies or use a real gun in the robberies he did commit, but rather used a toy gun (Pet. Mem., Ex. 1, p. 22).

Under Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001), a habeas petitioner may challenge a prior conviction used to enhance the petitioner's current sentence only where: (1) there was a failure to appoint counsel in violation of the Sixth Amendment; or (2) the petitioner cannot **[*24]** be faulted for failing to obtain a timely review of a constitutional claim, either because a state court refused to rule on a constitutional claim properly presented to it, or because the petitioner uncovered "compelling evidence" of his innocence after the time for review had expired that could not have been timely discovered. Id. at 403-05. Petitioner's challenge to his prior convictions fails to satisfy either of these criteria. Petitioner does not assert a failure to appoint counsel. Nor is there any indication in the record that a state court ever refused to rule on Petitioner's properly presented challenge to his prior conviction, or that Petitioner has uncovered new "compelling evidence" of his innocence that could not have been timely discovered. Therefore, Petitioner's challenge to the constitutionality of his prior robbery convictions does not merit habeas relief. See Lackawanna County Dist. Attorney v. Coss, 532 U.S. at 403-04; Nunes v. Ramirez-Palmer, 485 F.3d 432, 443 (9th Cir.), cert. denied, 128 S. Ct. 404, 169 L. Ed. 2d 283 (2007) (claim that prior conviction was obtained in violation of Boykin/Tahl barred); Santos v. Maddock, 249 Fed. App'x 523 (9th Cir. 2007), cert. denied, 128 S. Ct. 919, 169 L. Ed. 2d 761 (2008) **[*25]** (claim that appellate counsel provided ineffective assistance with respect to prior conviction barred). [13] Petitioner is not entitled to habeas relief on Ground Two of the Petition.

FOOTNOTES

13 The Court may cite unpublished Ninth Circuit opinions issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

III. The Trial Court's Denial of Petitioner's Motion to Strike the Prior Conviction Allegations Does Not Merit Habeas Relief.

A. Background

Prior to trial, the court held a hearing on Petitioner's motion to strike the prior conviction allegations pursuant to People v. Romero, supra (R.T. 4-11). Petitioner's counsel argued that Petitioner had struggled with a drug problem, that the prior robberies were approximately 20 years old, and that Petitioner had mental problems (R.T. 5-7). Petitioner's counsel acknowledged that the San Bernardino case was a "problem," observing that the offense in that case was a shoplifting that "got worse" because it "turned into a 211, an Estes-type robbery," [14] and that a "worker there at the Home Base in that other county was cut" (R.T. 7). Counsel suggested that the court should let the San Bernardino authorities "deal with **[*26]** that" (R.T. 7).

FOOTNOTES

14 See Cal. Penal Code § 211 ("Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."); People v. Estes, 147 Cal. App. 3d 23, 27-28, 194 Cal. Rptr. 909 (1983) ("a robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property").

The prosecutor responded, arguing that, while Petitioner did have a "drug addiction problem and mental illness," his criminal history showed it was likely he would commit more crimes (R.T. 8-10). The court reserved its ruling on the motion (R.T. 11).

On July 18, 2001, the court referred Petitioner to the probation office for a presentence examination and report, and set a sentencing date of August 16, 2001 (R.T. 30). On August 16, 2001, the court indicated that it had the probation report, a letter from Petitioner's grandparents, and a report from a psychologist, Dr. Emerick, which the doctor had prepared about a year before in connection **[*27]** with the competency proceedings (R.T. 31). The court indicated that there was a "possibility that the Court could be better informed" if it had a more recent psychologist's report (R.T. 32). The court also noted that the probation report showed that Petitioner received a term of eight years in the San Bernardino proceedings (R.T. 32). The prosecutor indicated that she had spoken to the prosecutor in the San Bernardino case "awhile ago" (R.T. 32). The following occurred:

> [THE PROSECUTOR]: . . . I think what happened was it was a plea bargain, so it was agreed upon what the sentence would be, and then he didn't show up for sentencing, but that's because he was arrested in this case. So I don't think he was sentenced, but I think there was an agreement for sentence according to what I understood from the deputy D.A.
>
> THE CLERK: It shows that on 3/2 of 2000 he FTA'd, and there was a bench warrant issued.
>
> THE COURT: Right, yeah, the probation report says that, but it also says eight years CDC.
>
> [THE PROSECUTOR]: I think that's what was agreed upon, but I don't think they ever imposed it.

(R.T. 32).

The court reappointed Dr. Emerick to examine Petitioner and write a report "outlining her opinion **[*28]** as to what effect, if any, Mr. Garren's mental condition had on his prior criminal activity or it may [sic] mitigate his prior criminal activity including the offense in this case in San Bernardino and the priors that are mentioned in the police report." The court continued the sentencing date to September 6. Id. On September 6, 2001, the court continued the sentencing date to November 6, 2001, because the court did not yet have Dr. Emerick's report (R.T. 36-37). On November 6, 2001, the court said it still did not have the report, and continued the sentencing date to November 21, 2001 (R.T. 38-39).

On November 21, 2001, the court heard the Romero motion. Petitioner's counsel argued that Petitioner suffered from a serious mental condition, and that his serious prior convictions were remote in time (R.T. 42-43). Although the probation report indicated Petitioner had received an eight-year sentence in the San Bernardino case, Petitioner's counsel said Petitioner had not yet been sentenced in that case (R.T. 42-43). Petitioner's counsel argued that the court should let the San Bernardino authorities handle that case, and should not impose a life sentence in the Ventura case (R.T. 43-44). **[*29]** The prosecutor acknowledged that Petitioner was a paranoid schizophrenic, but argued that the record warranted a Three Strikes sentence (R.T. 44-45).

The court said:

> Frankly, if it weren't for the San Bernardino situation, I think I would bend in favor of striking at least three of -- well, probably three of the four strikes. But that's what stops me. It's that violent act that occurred after this offense occurred that I think indicates to the court, as the district attorney says, that he's still a danger, albeit he has a mental problem and a drug problem.

(R.T. 45). The court denied the Romero motion and imposed a Three Strikes sentence of 25 years to life (R.T. 45).

B. Discussion

Petitioner contends the trial court did not exercise its discretion adequately in denying Petitioner's motion to strike the prior conviction allegations. Petitioner alleges that the court based its decision on assertedly false evidence, failed to continue the hearing to obtain a new psychologist's report, and failed to exercise "informed discretion" (Pet. Mem., Ex. 1, pp. 32-39). Petitioner also asserts that the court improperly considered hearsay evidence in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

As **[*30]** previously indicated, matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. See Miller v. Vasquez, 868 F.2d at 1118-19 (9th Cir. 1989); Middleton v. Cupp, 768 F.2d at 1085; Sturm v. California Adult Authority, 395 F.2d at 448. Petitioner's contention that the trial court improperly exercised its discretion under state law does not allege any claim for federal habeas relief. See Brown v. Mayle, 283 F.3d 1019, 1040 (9th Cir. 2002), vacated on other grounds, 538 U.S. 901, 123 S. Ct. 1509, 155 L. Ed. 2d 220 (2003); Ely v. Terhune, 125 F. Supp. 2d 403, 411 (C.D. Cal. 2000).

State laws providing for a method regarding the exercise of discretion in sentencing may create a constitutionally protected liberty interest under the due process clause. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); Walker v. Deeds, 50 F.3d 670, 672-73 (9th Cir. 1995). However, even if any liberty interest were implicated here, Petitioner's claims would lack merit.

In People v. Williams, 17 Cal. 4th 148, 161, 69 Cal. Rptr. 2d 917, 948 P.2d 429 (1998), the California Supreme Court held that, in determining whether to exercise its discretion to strike a

prior conviction **[*31]** allegation under People v. Romero, "the court in question must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes Law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." "Extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very statutory scheme within which he squarely falls and whose continued criminal career the law was meant to attack." People v. Strong, 87 Cal. App. 4th at 332.

Here, the sentencing court evaluated Petitioner based on, inter alia, the probation report showing Petitioner's lengthy criminal history, the letter from Petitioner's grandparents, the psychological reports, and the arguments of counsel. Petitioner has not shown that the trial court exercised its discretion in a manner inconsistent with People v. Williams. See Bonilla v. Knowles, 2007 U.S. Dist. LEXIS 9992, 2007 WL 516393, at *13 (E.D. Cal. Feb. 12, 2007), **[*32]** adopted, 2007 U.S. Dist. LEXIS 17133, 2007 WL 776733 (E.D. Cal. Mar. 12, 2007) (trial court did not abuse discretion in denying Romero motion, where court considered petitioner's arguments and the information in probation report).

Petitioner also alleges that the court based its decision on the allegedly false information that Petitioner had received an eight-year prison term in the San Bernardino case. According to Petitioner, he received only a two-year term in that case pursuant to a plea agreement, and was released on his own recognizance after signing a "Vargas" waiver whereby Petitioner "agreed to be sentenced to all the charges if he did not return as promised" (Supp. Reply Mem., p. 28). Petitioner also contends that the court improperly relied on false information from the prosecutor concerning the facts underlying the San Bernardino charges, asserting that the prosecutor falsely told the court that Petitioner stole tools from the Home Base in San Bernardino and stabbed a security guard with a box cutter (Pet. Mem., Ex. 1, p. 32).

A court may not base a sentence on materially false information. See Townsend v. Burke, 334 U.S. 736, 740-41, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); United States v. Wilson, 900 F.2d 1350, 1353 (9th Cir. 1990). **[*33]** However, Petitioner has not shown the court relied on any assertedly false information. First, with respect to the sentence imposed in the San Bernardino case, the docket in that case indicates that the court imposed an eight-year sentence in December of 1999, and only imposed the two-year sentence at resentencing in 2002, well after the sentencing in the Ventura case at issue here. Additionally, both the prosecutor and Petitioner's counsel told the Ventura County Superior Court that they believed Petitioner had not yet been sentenced in the Sari Bernardino proceedings. The record does not show that the Ventura County Superior Court based its sentence, in whole or in part, on Petitioner's receipt of an eight-year term in the San Bernardino case.

With respect to the court's alleged use of assertedly false evidence concerning the San Bernardino incident, Petitioner's claim fares no better. In the San Bernardino case, Petitioner pled guilty to aggravated assault on December 7, 1999 (see Respondent's Lodgment S). In Petitioner's written Romero motion, Petitioner's counsel stated that it appeared from information obtained from the prosecution in discovery that, in the San Bernardino case, **[*34]** a store employee was injured "from being cut by a 'box cutter' or 'X-acta' knife, for which the employee was sutured and released that day" (C.T. 29). The probation report stated that, according to a police report, when the security officer attempted to grab Petitioner, Petitioner struggled with the officer and a second employee, who saw a "box cutting type tool" fly out of Petitioner's hands (Respondent's Lodgment T, p. 17). The probation report also stated that the officer reported Petitioner lunged at the officer with a box cutter, cutting the officer near the wrist, and that the officer suffered a wound which required 20 stitches to close (id.). Petitioner's counsel acknowledged at the hearing on July 18, 2001 that the store employee in the San Bernardino case had been "cut" (R.T. 7). Indeed, in the present Petition, Petitioner acknowledges the security guard received a "small cut on his arm" during an altercation following an alleged assault on Petitioner by the security guard and a co-worker (see Pet. Mem., Ex. 1, p. 3).

Petitioner remained silent when the San Bernardino incident and the eight-year sentence were discussed in the Ventura proceedings, making no attempt to correct **[*35]** any allegedly false information. Petitioner has not shown that the Ventura County Superior Court relied on any allegedly false information at sentencing.

Petitioner further asserts the court failed to exercise "informed discretion" because the court sentenced Petitioner without the benefit of allegedly mitigating evidence and failed to continue the sentencing hearing sua sponte in order to obtain a new psychological report.

A criminal defendant is entitled to a sentencing decision made in the exercise of the "informed discretion" of the sentencing court. See United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972); People v. Belmontes, 34 Cal. 3d 335, 348 n.8, 193 Cal. Rptr. 882, 667 P.2d 686 (1983). However, Petitioner's conclusory allegation that the court sentenced Petitioner without the benefit of allegedly mitigating evidence lacks merit. Petitioner has not shown what mitigating evidence existed that would have led the court to a different sentencing choice. See Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995), cert. denied, 517 U.S. 1143, 116 S. Ct. 1437, 134 L. Ed. 2d 559 (1996) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."). [15]

FOOTNOTES

15 As mentioned above, Petitioner **[*36]** has abandoned his claims that trial counsel assertedly failed to present certain mitigating evidence to the sentencing court.

Petitioner also faults the trial court for failing sua sponte to continue sentencing to obtain a new psychological report. The Court of Appeal rejected this assertion, ruling that the court did not abuse its discretion in failing to continue the sentencing hearing (see Respondent's Lodgment F, pp. 3-4).

While a trial court may not deny a defense motion for a continuance arbitrarily or unreasonably, see Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985), cert. denied, 475 U.S. 1099, 106 S. Ct. 1502, 89 L. Ed. 2d 902 (1986), to show a constitutional violation warranting habeas relief, Petitioner must show he suffered "actual prejudice" as a result of the denial of a continuance. See Gallego v. McDaniel, 124 F.3d 1065, 1072 (9th Cir. 1997), cert. denied, 524 U.S. 917, 118 S. Ct. 2299, 141 L. Ed. 2d 159 (1998) and 524 U.S. 922, 118 S. Ct. 2311, 141 L. Ed. 2d 169 (1998). Petitioner's general allegation that a continuance would have enabled Petitioner to make a more favorable presentation at sentencing is insufficient to show the court erred in denying a continuance. See United States v. Sarno, 73 F.3d 1470, 1492-93 (9th Cir. 1995), cert. denied, 518 U.S. 1020, 116 S. Ct. 2555, 135 L. Ed. 2d 1073 (1996), and **[*37]** 519 U.S. 859, 117 S. Ct. 161, 136 L. Ed. 2d 105 (1996) (general allegations that a continuance would have permitted defendant to prepare a better defense insufficient).

Furthermore, the record shows that the court ordered a report from Dr. Emerick and continued sentencing several times until it obtained the report. At the beginning of the sentencing hearing on November 21, 2001, the court stated: "I received a letter report from Dr. Emerick . . ." (R.T. 41). Although the court said that the new report did not provide "much enlightenment," the court nevertheless said it had "some insight" regarding Petitioner's mental condition based on a previous report (R.T. 41). [16] As the Court of Appeal recognized (see Respondent's Lodgment F, pp. 3-4), the court had three psychological reports and a probation report, and deemed that information sufficient to impose sentence. Moreover, Petitioner does not disclose what a further psychological report supposedly would have revealed that would have aided the court. In these circumstances, the sentencing court had sufficient information to impose sentence. See United States v. Rosales-Lopez, 617 F.2d 1349, 1357 (9th Cir. 1980), aff'd on other grounds, 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) (sentence reflected **[*38]** informed discretion where judge had presided over pretrial matters and had studied the presentence report). In these circumstances, the court's failure to continue the hearing again did not violate the

Constitution.

FOOTNOTES

16 Because Dr. Emerick apparently was unaware of the court's referral question, her November 2001 report addressed the issue of Petitioner's competency, rather than expressly addressing the issue of the possible mitigating effect of his mental illness (see Respondent's Lodgment T, p. 8). However, the report did relate that Dr. Emerick and Petitioner had discussed Petitioner's need to stay off drugs and on his medication in the future (Respondent's Lodgment T, p. 9).

Finally, in a separate but related contention, Petitioner contends that the court improperly relied on hearsay evidence in alleged violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("Crawford"), specifically: (1) the prosecutor's statements in her opposition to the Romero motion that, in the San Bernardino incident, Petitioner had stolen tools and stabbed a security guard with a box cutter; [17] and (2) the statement in the probation report that Petitioner received an eight-year sentence in the San Bernardino **[*39]** case (Pet. Mem., Ex. 1, pp. 32-34). In Crawford, the United States Supreme Court held that out-of-court testimonial statements are inadmissible at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. However, the Supreme Court has held that the use of hearsay at sentencing does not violate the Constitution. See Williams v. New York, 337 U.S. 241, 246-52, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). Although a defendant has a due process right not to be sentenced on the basis of materially incorrect information, a sentence may be based upon hearsay accompanied by "some minimal indicia of reliability." See United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir.), cert. denied, 127 S. Ct. 248, 166 L. Ed. 2d 149 (2006) (because Crawford did not expressly overrule Williams v. New York, "the law on hearsay at sentencing is still what it was before Crawford; hearsay is admissible at sentencing, so long as it is 'accompanied by some minimal indicia of reliability'") (footnote omitted).

FOOTNOTES

17 In the prosecutor's opposition to Petitioner's Romero motion, filed on July 17, 2001, the prosecutor stated:

> San Bernardino now has a warrant out for defendant on a 211 charge that occurred after the **[*40]** incident in our case. In that case, he was stealing tools from Home [B]ase on 11/1/99 and when the security guard tried to stop him, defendant stabbed the security guard with a box cutter. The security guard required 17 stitches to close the wound.

(C.T. 22-26).

The prosecutor's description of the San Bernardino incident bore sufficient indicia of reliability. As indicated above, at the time of sentencing in the Ventura case, Petitioner had pled guilty to aggravated assault in the San Bernardino case (see Respondent's Lodgment S). Petitioner's counsel acknowledged that a store employee was cut in the San Bernardino incident (R.T. 7; C.T. 29). Thus, to the extent the court relied on alleged hearsay statements concerning the San Bernardino incident, those statements bore sufficient indicia of reliability.

Petitioner also has failed to show that the statements in the probation report concerning an eight-year sentence lacked sufficient indicia of reliability. The probation report was prepared in August of 2001 and filed on November 21, 2001 (Respondent's Lodgment T, pp. 10-26). As of November 21, 2001, the docket in the San Bernardino proceedings showed that, on December

7, 1999, Petitioner **[*41]** had pled guilty to both the robbery and the aggravated assault and had received an eight-year term (Respondent's Lodgment S). Although the docket showed Petitioner had given a "Vargas waiver," the docket did not disclose the terms of that waiver. Moreover, at an August 16, 2001 hearing preceding sentencing, the prosecutor said she did not believe the San Bernardino court had imposed sentence yet, adding that she thought the parties in that case had agreed on an eight-year term, but she did "not think they ever imposed it" (R.T. 32). At sentencing on November 21, 2001, Petitioner's counsel said that the probation report showed an eight-year sentence, but that Petitioner had not yet been sentenced in the San Bernardino case (R.T. 42-43). Under these circumstances, the statement in the probation report concerning an eight-year sentence in the San Bernardino case did not lack "minimal indicia of reliability."

In sum, the state courts' rejection of Petitioner's challenge to the trial court's denial of his Romero motion was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). **[*42]** Petitioner is not entitled to habeas relief on Ground Three of the Petition.

IV. Petitioner's Claim that the Prosecutor Allegedly Presented False Evidence at Sentencing Does Not Merit Habeas Relief.

The prosecution's knowing presentation of false evidence can violate the Constitution if there is a reasonable likelihood that the false evidence could have affected the judgment of the decisionmaker. Morris v. Ylst, 447 F.3d 735, 743 (9th Cir. 2006); Hovey v. Ayers, 458 F.3d 892, 916 (9th Cir. 2006). Petitioner contends that the prosecutor falsely represented to the court that Petitioner had pled guilty to assaulting and stabbing a security guard in the San Bernardino case (Pet. Mem., Ex. 1, pp. 40-41). Petitioner contends he did not stab the security guard, and asserts that the assault charge was dismissed as part of a plea bargain (Pet. Mem., Ex. 1, pp. 41-42). Petitioner contends the police report (which is not in the record) stated that the security guard assaulted Petitioner first (Pet. Mem., Ex. 1, p. 41). Petitioner alleges that, at sentencing, the prosecutor knew, but did not disclose to the judge, that: (1) Petitioner allegedly had entered into a plea bargain in the San Bernardino **[*43]** case calling for a two-year sentence and dismissal of the assault charge; (2) Petitioner allegedly had pled guilty to the theft charge and the assault charge had been dismissed; and (3) the plea bargain allegedly included an agreement "not to persue [sic] a 3-strike case in this incident" (Pet. Mem., Ex. 1, p. 43).

As indicated above, Petitioner initially pled guilty to both charges in the San Bernardino case, including the aggravated assault charge. In the Ventura case, Petitioner's counsel acknowledged that the victim in the San Bernardino case was cut and received stitches, and Petitioner even admits that the victim in that case was cut during the altercation (although Petitioner does not explain how the injury occurred). [18] Prior to November 21, 2001, the date that the court heard the Romero motion and sentenced Petitioner, the docket of the San Bernardino Superior Court showed that court had imposed an eight-year prison term. It was not until 2002, after Petitioner was sentenced in the Ventura case, that the assault charge was dismissed in the San Bernardino case and the court in that case imposed a two-year sentence. Additionally, the prosecutor told the Ventura court that the **[*44]** prosecutor believed the San Bernardino Superior Court had not sentenced Petitioner yet, despite the statement in the probation report that Petitioner had received an eight-year term in that case. In sum, Petitioner has not shown the prosecutor presented false evidence to the court, or failed to correct any alleged false evidence.

FOOTNOTES

[18] Petitioner alleges that he "can not prove that he did not stab this security guard, as it would be impossible to prove that something did not happen, if it did not happen (Pet. Mem., Ex. 1, p. 47). Petitioner's alleged inability to show he did not stab the security guard does not render false the prosecutor's statement that Petitioner did so.

It follows that the state courts' rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground Four of the Petition.

V. Petitioner's Brady Claim Does Not Merit Habeas Relief.

The suppression by the prosecution of evidence favorable to an accused violates due process "where the evidence is material either to guilt or to punishment, **[*45]** irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ("Brady"). The three "essential elements" of a Brady claim are: "The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; [the] evidence must have been suppressed by the State, either wilfully or inadvertently; and prejudice must have ensued." Banks v. Dretke, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) (citation and internal quotations omitted).

Petitioner alleges that the prosecution failed to disclose the facts that Petitioner entered into a plea bargain in the San Bernardino case whereby Petitioner had pled guilty to a "two year mitigated sentence" in that case and the assault charges were dismissed (Pet. Mem., Ex. 1, p. 49). As discussed above, however, at the time of sentencing in the Ventura case, Petitioner had not yet received a two-year sentence or the dismissal of the assault charge. The prosecutor did not violate Brady by failing to disclose information about events that had not yet occurred.

Petitioner also alleges that the prosecutor suppressed purported evidence that, following his arrest in the instant case, Petitioner "made **[*46]** a deal" with the Oxnard police department whereby Petitioner would purchase drugs as part of a police sting operation on three occasions in return for dismissal of the Ventura charges (Pet. Mem., Ex. 1, pp. 51-52). [19] Petitioner contends this information would have produced a more favorable result at sentencing (Pet. Mem., Ex. 1, pp. 52-53). Because Petitioner had personal knowledge of these alleged events, however, Petitioner cannot claim a Brady violation. See United States v. Shaffer, 789 F.2d 682, 690 (9th Cir. 1986) (citation omitted) (no Brady violation where the defendant was "aware of the essential facts enabling him to take advantage of any exculpatory evidence."); see also United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (Brady "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense") (emphasis added); Allen v. Lee, 366 F.3d 319, 324-25 (4th Cir.), cert. denied, 543 U.S. 906, 125 S. Ct. 208, 160 L. Ed. 2d 182 (2004), and 543 U.S. 919, 125 S. Ct. 103, 160 L. Ed. 2d 203 (2004) (prosecution's alleged failure to disclose jail records concerning medications administered to petitioner did not violate Brady, where petitioner had personal knowledge of any medications he received). In any **[*47]** event, Petitioner has not shown that this alleged information was material within the meaning of Brady. As indicated above, the sentencing court denied the Romero motion largely because the San Bernardino incident, which occurred over a year after the Ventura incident, demonstrated Petitioner's violence (R.T. 45). Petitioner has not shown a reasonable likelihood that the court would have granted the Romero motion if defense counsel had informed the court of Petitioner's alleged cooperation with Oxnard authorities following his arrest for petty theft in Ventura in 1998.

FOOTNOTES

[19] In the Romero motion, Petitioner's counsel stated that, after Petitioner received a citation to appear in the Ventura County Superior Court on August 28, 1998 on the petty theft charge, Petitioner failed to appear (see C.T. 28). This statement appears inconsistent with Petitioner's claim that he cooperated in police drug stings.

For the foregoing reasons, the state courts' rejection of, this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas

relief **[*48]** on Ground Five of the Petition.

VI. Petitioner's Claim that He Was Incompetent to Stand Trial Does Not Merit Habeas Relief.

Petitioner alleges he was forced to stand trial although he assertedly still was incompetent to do so (Pet. Mem., Ex. 1, p. 54). Petitioner contends he was so heavily medicated that he assertedly was "semi-conscious," did not understand the proceedings, did not understand the "legal issues of a 3-strike case," did not understand who the probation officer was or why she came to see Petitioner, and was unable to assist his attorney in a rational manner (Pet. Mem., Ex. 1, pp. 55-59). However, Petitioner also asserts that he does not contest the petty theft charge, but rather seeks only the remedy of a new hearing on the Romero motion and a new sentencing hearing (Pet. Mem., Ex. 1, p. 61).

Principles of substantive due process prevent the trial of an incompetent person. Medina v. California, 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004), cert. denied, 546 U.S. 934, 126 S. Ct. 419, 163 L. Ed. 2d 319 (2005). Competency requires that the defendant have the "capacity to understand the nature and object of the proceedings against **[*49]** him, to consult with counsel, and to assist in preparing his defense." Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. at 387; Boyde v. Brown, 404 F.3d 1159, 1165 (9th Cir. 2005), amended on other grounds, 421 F.3d 1154 (9th Cir. 2005). The defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and must have "a rational as well as a factual understanding of the proceedings against him." Godinez v. Moran, 509 U.S. 389, 396, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (citation and quotations omitted); Dusky United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); Boyde v. Brown, 404 F.3d at 1165.

Where genuine doubt exists as to a criminal defendant's competence to stand trial, principles of procedural due process require that a trial court conduct a hearing on the defendant's competency. Drope v. Missouri, 420 U.S. 162, 174, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. at 385-86; Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand **[*50]** trial." Drope v. Missouri, 420 U.S. at 181.

Thus, competency issues can implicate both procedural and substantive due process. See Lounsbury v. Thompson, 374 F.3d 785, 788 (9th Cir. 2004); see Davis v. Woodford, 384 F.3d at 644, 646 (discussing types of claims). Petitioner appears to allege both a procedural incompetency claim and a substantive competency claim.

With respect to procedural incompetency, the Court must determine whether the evidence of incompetence was such that a reasonable judge would be expected to experience a bona fide doubt concerning the defendant's competence. See Davis v. Woodford, 384 F.3d at 644. Such a doubt arises only when there is "substantial evidence" of incompetence. Davis v. Woodford, 384 F.3d at 644 (citation and internal quotations omitted). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." Drope v. Missouri, 420 U.S. at 180; Williams v. Woodford, 384 F.3d at 604. However, there are "no fixed or immutable signs **[*51]** which invariably indicate the need for further inquiry to determine fitness to proceed . . . ." Drope v. Missouri, 420 U.S. at 180. "The emergence of genuine doubt in the mind of a trial judge necessarily is the consequence of his total experience and his evaluation of the testimony and events of the trial." De Kaplany v. Enomoto, 540 F.2d 975, 982-83 (9th Cir. 1976), cert. denied, 429 U.S. 1075, 97 S. Ct. 815, 50 L. Ed. 2d 793 (1977). A state court's, determination that the evidence did not require a competency hearing is a finding of fact to which a federal habeas court must defer unless such finding is unreasonable within the meaning of 28 U.S.C.

section 2254(d)(2). Davis v. Woodford, 384 F.3d at 644.

Petitioner has failed to demonstrate evidence that would have caused a reasonable court to doubt Petitioner's competence after the court previously found Petitioner to be competent. Prior to trial, at the initial hearing on Petitioner's Romero motion, Petitioner's counsel told the court that Petitioner suffered from a mental illness but "not to the extent that it's making him incompetent," and that counsel was satisfied that Petitioner understood what was going on (R.T. 6). On the date of the final Romero hearing and **[*52]** sentencing, November 21, 2001, the court had before it, among other things: (1) a psychologist's report authored by a Dr. Nightingale, filed on July 26, 2000, recording the results of an interview Dr. Nightingale conducted with Petitioner on July 13, 2000; and (2) Dr. Emerick's most recent report concerning her interview with Petitioner on November 18, 2001 (R.T. 41; Augmented Clerk's Transcript, pp. 1-8; Respondent's Lodgment T, pp. 8-9). Dr. Nightingale concluded, inter alia, that Petitioner was "well aware" of the charges, was aware of the penalties involved, understood the functions of court personnel and procedures, was motivated to help in the legal process, appreciated the likely outcome, and had a "reasonably good" ability to cooperate with his attorney (id.). Dr. Nightingale opined that Petitioner was competent to stand trial (id.). Dr. Emerick stated that, although Petitioner appeared "very sedated," Petitioner had just awakened at the time of the interview, and that Petitioner was able to describe his legal situation "lucidly" and understood that he possibly could go to prison for 25 years (id.).

Nothing in the record shows Petitioner exhibited in court proceedings any indications **[*53]** that he was incompetent. In pretrial proceedings on July 18, 2001, Petitioner waived his jury trial right, affirming that he had talked to his attorney concerning what a jury trial was and what was involved (R.T. 2). Following Petitioner's conviction, Petitioner agreed to waive time on several occasions, never indicating any inability to understand the proceedings (R.T. 34, 37, 39-40).

The trial court was entitled to credit the opinions of the two psychologists that Petitioner was competent. See Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999), cert. denied, 528 U.S. 1105, 120 S. Ct. 844, 145 L. Ed. 2d 713 (2000) (trial court entitled to rely upon court-appointed clinical psychologist's recommendation that petitioner was competent to stand trial). Furthermore, Petitioner's courtroom behavior gave no sign that Petitioner might be incompetent. Drope v. Missouri, 420 U.S. at 180 (court should consider courtroom behavior in determining competence); Davis v. Woodford, 384 F.3d at 646 (petitioner's demeanor and interaction with the court showed Petitioner was not incompetent). In sum, Petitioner has not shown the existence of any "substantial" evidence of incompetence warranting a hearing. See Williams v. Woodford, 384 F.3d at 605-06 **[*54]** (rejecting procedural incompetence claim, where: (1) one psychologist opined that petitioner was competent; (2) a second psychologist declined to draw a conclusion but recorded a "preliminary impression" that there was little support for an insanity or diminished capacity defense; (3) petitioner showed no bizarre or irrational behavior in court proceedings; and (4) petitioner's counsel did not raise issue of petitioner's competence to stand trial).

For the same reasons, Petitioner has not shown substantive, actual incompetence. The Patton State Hospital and two psychologists had deemed Petitioner competent, and Petitioner's courtroom behavior evidenced no inability to understand the proceedings or to assist his counsel. Petitioner's counsel expressly affirmed that Petitioner was competent, and the trial judge did not indicate any doubt as to Petitioner's competence. See Boyde v. Brown, 404 F.3d at 1167 ("perhaps the most telling evidence" of substantive competence was the fact that neither defense counsel or the trial court "even hinted that Boyde was incompetent"); Williams v. Woodford, 384 F.3d at 608-10 (rejecting substantive incompetence claim, finding it "especially relevant" that **[*55]** petitioner's counsel did not raise issue of petitioner's incompetence to stand trial).

In sum, the state courts' rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on

Ground Six of the Petition.

VII. Petitioner's Double Jeopardy Claim Does Not Merit Habeas Relief.

Petitioner contends his sentence violated the Double Jeopardy Clause because the court used Petitioner's prior convictions both to elevate the petty theft to a felony and to impose a Three Strikes sentence. This claim lacks merit.

First, the court did not use the same conviction to elevate Petitioner's petty theft to a felony and to impose a Three Strikes sentence. The prosecution pled, and proved, that prior to the commission of the instant petty theft Petitioner had suffered a 1987 grand theft conviction, and it was that conviction which elevated the petty theft to a felony (R.T. 27, 30; C.T. 2).

In any event, even if the court had used the same prior conviction both to elevate Petitioner's petty theft to a felony and to support a Three **[*56]** Strikes sentence, Petitioner's claim would fail. The Double Jeopardy Clause permits the imposition of multiple punishment for the same offense where the legislature has authorized such multiple punishment. See Missouri v. Hunter, 459 U.S. 359, 366-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."). California law authorizes the use of a prior serious felony conviction both to elevate a petty theft to a felony and to calculate a sentence under the Three Strikes Law. See People v. White Eagle, 48 Cal. App. 4th 1511, 56 Cal. Rptr. 2d 749 (1996).

Petitioner also appears to contend his Three Strikes sentence violated the Double Jeopardy Clause because the sentence allegedly punished Petitioner twice for his prior strikes (Pet. Mem., Ex. 1, pp. 65-66). This contention also lacks merit. See Witte v. United States, 515 U.S. 389, 400, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995) ("In repeatedly upholding . . . recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense is not to be viewed as either **[*57]** a new jeopardy or additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime.") (citations and internal quotations omitted); United States v. Kaluna, 192 F.3d 1188, 1198 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1056, 120 S. Ct. 1561, 146 L. Ed. 2d 465 (2000) (federal Three Strikes statute did not violate Double Jeopardy Clause); Ortiz v. Almager, 2008 U.S. Dist. LEXIS 76178, 2008 WL 789746, at *21 (C.D. Cal. Feb. 27, 2008) (California's Three Strikes Law does not violate Double Jeopardy Clause). [20]

FOOTNOTES

[20] Petitioner's reliance on Brown v. Mayle, 283 F.3d 1019 (9th Cir. 2002), vacated, 538 U.S. 901, 123 S. Ct. 1509, 155 L. Ed. 2d 220 (2003) ("Brown"), and its progeny is unavailing. In Brown, the Ninth Circuit followed its earlier decision in Andrade v. Attorney General for the State of California, 270 F.3d 743 (9th Cir. 2001), rev'd, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) ("Andrade"), in holding that Three Strikes sentences for the current offense of petty theft with a prior violated the Eighth Amendment. The Brown court rejected an attempt to distinguish Andrade on the ground that the Brown petitioners' prior strikes were violent, observing that punishing the petitioners for their past violence would violate the Double Jeopardy Clause. Brown, 283 F.3d at 1037. **[*58]** In Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), the Supreme Court held that the state courts did not unreasonably apply any clearly established Supreme Court law in imposing Three Strikes sentences for the current offenses of petty theft with a prior. The Supreme Court vacated the decision in Brown and remanded for further consideration in light of Lockyer v. Andrade. See Mayle v. Brown, 538 U.S. 901, 123 S. Ct. 1509, 155 L. Ed. 2d 220 (2003). In light of these circumstances, any dictum in Brown regarding possible application of the Double Jeopardy Clause in a Three Strikes case can have little or no force.

In sum, because the court did not impose a sentence greater than that permitted by California law, no Double Jeopardy violation occurred. [21] Therefore, the state courts' rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground Seven of the Petition.

FOOTNOTES

21 To the extent Petitioner restates, in his Double Jeopardy claim, his argument that his petty theft conviction was only a misdemeanor, the Court rejects this argument for the reasons **[*59]** set forth in Section I, above.

VIII. Petitioner's Ex Post Facto Claim Does Not Merit Habeas Relief.

The Ex Post Facto Clause prohibits retroactive punishment for acts which could not be punished at the time they were committed. Collins v. Youngblood, 497 U.S. 37, 41-46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Rise v. State of Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995), cert. denied, 517 U.S. 1160, 116 S. Ct. 1554, 134 L. Ed. 2d 656 (1996). The proper inquiry is whether the relevant change "'alters the definition of criminal conduct or increases the penalty by which a crime is punishable.'" Lynce v. Mathis, 519 U.S. 433, 443, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997) (citation omitted). Petitioner alleges his sentence violated the Ex Post Facto Clause because his robbery convictions predated the enactment of the Three Strikes Law (Pet. Mem., Ex. 1, pp. 69-74).

At the time of Petitioner's current offense, California law provided that robbery convictions predating the effective date of the Three Strikes Law could count as strikes. See People v. Hamilton, 40 Cal. App. 4th 1615, 1617, 47 Cal. Rptr. 2d 749 (1995) (Three Strikes Law applies to prior convictions predating its effective date); Gonzales v. Superior Court, 37 Cal. App. 4th 1302, 1304, 44 Cal. Rptr. 2d 144 (1995) (same); People v. Sipe, 36 Cal. App. 4th 468, 478-79, 42 Cal. Rptr. 2d 266 (1995), **[*60]** cert. denied, 516 U.S. 1131, 116 S. Ct. 951, 133 L. Ed. 2d 875 (1996) (same); Curtis v. Guirbino, 2005 U.S. Dist. LEXIS 25191, 2005 WL 2789071, at *11 (E.D. Cal. Oct. 25, 2005), aff'd, 248 Fed. App'x 773 (9th Cir.), cert. denied, 128 S. Ct. 662, 169 L. Ed. 2d 521 (2007) (same). The Three Strikes Law applies to a felony conviction that fits the definition of a "serious felony" on June 30, 1993. People v. Moenius, 60 Cal. App. 4th 820, 826-27, 70 Cal. Rptr. 2d 579 (1998); Gonzales v. Superior Court, 37 Cal. App. 4th at 1311 & n.7; Cal. Penal Code § 667(h); Statement of Intent preceding text of California Penal Code section 1170.12 in Proposition 184, set forth at Historical and Notes following California Penal Code section 1170.12. On that date, which predated Petitioner's instant offense, robbery was a serious felony. See People v. De Porceri, 106 Cal. App. 4th 60, 65, n.6, 130 Cal. Rptr. 2d 280 (2003).

"Enhancement statutes, whether in the nature of criminal history provisions such as those provided in the [federal] Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." Nichols v. United States, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). The Supreme Court "consistently has sustained repeat-offender **[*61]** laws as penalizing only the last offense committed by the defendant." Id. (citations and internal quotations omitted); see Parke v. Raley, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992); Spencer v. Texas, 385 U.S. 554, 560, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

> Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or an additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated

offense because a repetitive one.

Gryger v. Burke, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948); see United States v. Kaluna, 192 F.3d at 1199 (federal "Three Strikes Law," 18 U.S.C. section 3559(c), did not violate the Ex Post Facto Clause because it was "on the books" at time defendant committed instant offense; citations and internal quotations omitted).

It is irrelevant that, at the time Petitioner committed the robberies, he necessarily was ignorant of the fact that the legislature later would enact a recidivist statute **[*62]** under which Petitioner might receive an increased sentence for any subsequent felony conviction. The Three Strikes Law was "on the books" at the time Petitioner committed the instant offense. Petitioner's Ex Post Facto argument is without merit. See Travalini v. California, 2008 U.S. Dist. LEXIS 18081, 2008 WL 652118, at *5 (E.D. Cal. Mar. 10, 2008) (rejecting Ex Post Facto challenge to California's Three Strikes Law); see also People v. Brady, 34 Cal. App. 4th 65, 71, 40 Cal. Rptr. 2d 207 (1995) (use of convictions suffered prior to Three Strikes Law's effective date as strikes did not violate due process or Ex Post Facto Clause; statute gave defendant notice that he would be treated more severely if he committed a new felony).

Petitioner's Ex Post Facto claim contains a number of subsidiary claims, all of which are untenable. Petitioner contends his sentence violated the Ex Post Facto Clause because California law permitting the imposition of a Three Strikes sentence for the current offense of petty theft with a prior theft-related conviction allegedly was "unexpected and indefensible" (see Supp. Reply Mem., p. 50). Petitioner's contention lacks merit. California law plainly authorized such a sentence well prior **[*63]** to the date Petitioner committed the instant offense. See People v. Bury, 50 Cal. App. 4th at 1876.

To the extent Petitioner contends his sentence violated an alleged plea agreement in Petitioner's earlier robbery case (see Pet. Mem., Ex. 1, pp. 79-82), the contention lacks merit. When a guilty plea rests in any significant degree on an agreement with the government, the agreement must be fulfilled. Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Petitioner attaches to the Petition a "Felony Disposition Agreement," filed March 3, 1981 in People v. Garren, Ventura County Superior Court case number CR-16204. That document does not contain any provision limiting the use of the robbery convictions to enhance a sentence Petitioner might receive if he committed a future crime. Petitioner does not allege, and the record does not show, that the plea agreement in Petitioner's robbery case contained any term respecting future changes in the law. [22] See Walker v. Casey, 2007 U.S. Dist. LEXIS 37537, 2007 WL 1500823, at *5 (E.D. Cal. May 23, 2007), adopted, 2007 U.S. Dist. LEXIS 55300, 2007 WL 2221439 (E.D. Cal. July 31, 2007) (imposition of Three Strikes sentence did not violate plea agreements entered into with respect to prior convictions, where petitioner **[*64]** did not show "any promise by the prosecutor that the [prior] convictions would not be used later to enhance a future sentence under a law that did not exist" and did not show "that there was a promise that the law would not change"). [23] Therefore, Petitioner's current sentence did not violate his 1981 plea agreement.

FOOTNOTES

22 Petitioner's reliance on Davis v. Woodford, 446 F.3d 957 (9th Cir. 2006), is unavailing. In that case, unlike here, the petitioner's plea agreement provided that if the petitioner pled guilty, there would be only one conviction on his record. Id. at 959-63.

23 Petitioner had no constitutional right to be advised of the possibility of future enhancements prior to entering his plea. See United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) ("The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea.").

Also embedded in Petitioner's Ex Post Facto claim is the assertion that Petitioner's sentence allegedly violated Due Process because, under California Penal Code sections 667(a)(1) and 667.5, Petitioner assertedly had a liberty **[*65]** interest in receiving only one or three-year enhancements for his prior conviction (Pet. Mem., Ex. 1, p. 74). As discussed herein, however, California law permitted the imposition of a Three Strikes sentence in Petitioner's case. Therefore, no Due Process violation occurred.

For the foregoing reasons, the state courts' rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground Eight of the Petition.

IX. Petitioner's Claims of Ineffective Assistance of Trial Counsel Do Not Merit Habeas Relief.

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. **[*66]** The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted). For purposes of habeas review under 28 U.S.C. section 2254(d), Strickland sets forth clearly established Federal law as determined by the United States Supreme Court. See Williams v. Taylor, 529 U.S. at 391 (citation and quotations omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934, 126 S. Ct. 419, 163 L. Ed. 2d 319 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." Karis v. Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002), **[*67]** cert. denied, 539 U.S. 958 (2003) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). The test is "only whether some reasonable lawyer . . . could have acted, in the circumstances, as defense counsel acted." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.) (citations and quotations omitted), rev'd on other grounds, 525 U.S. 141, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998); see also Babbitt v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998), cert. denied, 525 U.S. 1159, 119 S. Ct. 1068, 143 L. Ed. 2d 72 (1999) (relevant inquiry under Strickland is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable) (citation and quotations omitted); Morris v. California, 966 F.2d 448, 456-57 (9th Cir.), cert. denied, 506 U.S. 831, 113 S. Ct. 96, 121 L. Ed. 2d 57 (1992) (if the court can conceive of a reasonable tactical reason for counsel's action or inaction, the court need not determine the actual explanation). Petitioner bears the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 **[*68]** (citation and quotations omitted).

B. Discussion

1. Alleged Failure-to Investigate the Law and to Argue that Petitioner's Petty Theft with a Prior Theft-Related Conviction Assertedly Did Not Constitute a Felony

Triggering a Three Strikes Sentence

Petitioner's contention that his attorney failed to investigate the law and to argue that Petitioner's conviction for petty theft with a prior theft-related conviction assertedly did not constitute a felony is without merit. For the reasons stated previously, Petitioner's conviction for petty theft with a prior was a felony conviction, not a misdemeanor, and warranted imposition of a Three Strikes sentence in light of Petitioner's prior robbery convictions. Counsel reasonably could have determined that the court would rebuff any argument to the contrary. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997) ("the failure to take a futile action can never be deficient performance"); Shah v. United States, 878 F.2d 1156, 1162 (9th Cir.), cert. denied, 493 U.S. 869, 110 S. Ct. 195, 107 L. Ed. 2d 149 (1989) ("[T]he failure to raise a meritless legal argument does not constitute ineffective assistance of counsel"; citation and internal quotations **[*69]** omitted). For the same reasons, Petitioner has not shown a reasonable probability of a different result had counsel performed the investigation and made the argument suggested by Petitioner.

2. Alleged Failure to Investigate Petitioner's Prior Convictions and to File a "Sumstine" Motion Challenging Petitioner's Prior Convictions on "Boykin/Tahl" Grounds

Petitioner contends his counsel failed to obtain the record of Petitioner's prior robbery convictions to determine the validity of those convictions, failed to research the law, and failed to file a "Sumstine" motion to strike the robbery convictions on "Boykin-Tahl" grounds (Pet. Mem., Ex. 1, pp. 83-84). According to Petitioner, his counsel had "never even heard of a 'Sumstine' motion" (Pet. Mem., Ex. 1, p. 83).

People v. Sumstine, 36 Cal. 3d 909, 206 Cal. Rptr. 707, 687 P.2d 904 (1984) ("Sumstine"), authorizes a criminal defendant to bring a motion to strike a prior conviction on Boykin-Tahl grounds. Here, however, Petitioner has not shown a reasonable probability that, had counsel brought a "Sumstine" motion, the court would have granted the motion.

As indicated above, under Boykin and Tahl, a conviction may be constitutionally invalid **[*70]** if the defendant pled guilty without waiving: (1) the right to a jury trial; (2) the right to confront adverse witnesses; and (3) the privilege against self-incrimination. Boykin, 395 U.S. at 243; Tahl, 1 Cal. 3d at 132. On a "Sumstine" motion, the validity of the prior conviction is presumed, and the defendant bears the burden to show, by a preponderance of the evidence, the constitutional invalidity of the prior conviction. Curl v. Superior Court, 51 Cal. 3d 1292, 1303-07, 276 Cal. Rptr. 49, 801 P.2d 292 (1990); see also Parke v. Raley, 506 U.S. at 30 (it "defies logic" to presume from mere unavailability of transcript that defendant was not advised of his Boykin rights; "Boykin does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained"). The defendant must "affirmatively allege that at the time of his prior conviction he did not know of, or did not intelligently waive, [the defendant's Boykin/Tahl] rights." People v. Allen, 21 Cal. 4th 424, 439, 87 Cal. Rptr. 2d 682, 981 P.2d 525 (1999) (citation, quotations and italics omitted; quoting Sumstine, 36 Cal. 3d at 914).

Petitioner **[*71]** attaches to the Petition an Abstract of Judgment in People v. Garren, Ventura County Superior Court case number CR-16204, dated March 31, 1981, reflecting Petitioner's plea to four counts of robbery (Counts I, II, III and IV) in that case (Petition, Ex. E). The Abstract of Judgment also reflects the imposition of four enhancements pursuant to California Penal Code section 12022.5 for the personal use of a firearm in each robbery (id.). The "Felony Disposition Agreement," filed on March 3, 1981 in People v. Garren, Ventura County Superior Court case number CR-16204, signed by Petitioner, reflects Petitioner's plea of nolo contendere to "Counts I, II, III and IV" in that case, and Petitioner's admission of "use of firearm allegation" (Pet., Ex. A). The Agreement contains a check mark and Petitioner's initials next to the statement that Petitioner's counsel had advised Petitioner that Petitioner was waiving his constitutional rights to a jury trial and to confront and cross-examine the prosecution's witnesses and his privilege against self-incrimination. Petitioner also attaches to the Petition a minute order, signed by the Deputy County Clerk, reflecting Petitioner's plea of nolo

[*72] contendere to Counts I, II, III and IV in People v. Garren, Ventura County Superior Court case number CR-16204, and Petitioner's admission that "he used a firearm in the commission of said offense(s) as alleged in the Information" (Petition, Ex. C). This minute order states, among other things, that the court found that Petitioner had been advised of and understood his constitutional rights and that he knowingly had waived his constitutional right to remain silent, to a trial by court or jury, and to confront witnesses (Petition, Ex. C).

Petitioner has not shown a reasonable probability of a different result had counsel made the investigation and "Sumstine" motion as Petitioner suggests. In light of the documentary evidence showing that Petitioner waived his Boykin/Tahl rights before entering his plea to the robbery charges, it is not reasonably probable that the court would have granted any such motion, had such a motion been made. See People v. Pride, 3 Cal. 4th 195, 255-56, 10 Cal. Rptr. 2d 636, 833 P.2d 643 (1992), cert. denied, 507 U.S. 935, 113 S. Ct. 1323, 122 L. Ed. 2d 709 (1993) (where judge who accepted prior plea was dead, no reporter's transcript of plea proceedings existed, neither prosecutor nor defense **[*73]** counsel recalled plea proceedings, minute order said defendant "waived trial/jury" but did not refer to any other advisements or waivers, and defendant, testified he "did not remember" anyone advising him of his constitutional rights before he pled guilty, evidence that trial judge never deviated from procedure of advising defendants fully prior to accepting guilty pleas sufficed to show validity of plea); People v. Anderson, 1 Cal. App. 4th 318, 322-24, 1 Cal. Rptr. 2d 676 (1991) (docket sheet which contained clerk's contemporaneous notations and initials, and which stated that defendant had waived his rights to trial by jury and to confront and cross-examine witnesses and had waived his privilege against self-incrimination, sufficient to show validity of plea, even without waiver form signed by defendant or reporter's transcript); Worsley v. Municipal Court, 122 Cal. App. 3d 409, 415, 176 Cal. Rptr. 324 (1981) (docket entry, signed by judge, recording defendant's waiver of rights sufficient to show validity of plea; observing that "Tahl Waiver Form" requiring defendant to acknowledge waiver of rights by initialing form would suffice); Nelson v. Ukiah Justice Court, 86 Cal. App. 3d 64, 67, 150 Cal. Rptr. 39 (1978) **[*74]** (minutes prepared and certified by clerk sufficient to show validity of plea, in the absence of any evidence to the contrary). [24] Therefore, Petitioner has not shown Strickland prejudice. [25]

FOOTNOTES

24 Petitioner's allegation that asserted irregularities in the documents show the invalidity of his plea is without merit. Although Petitioner alleges that the minute order does not state expressly that Petitioner waived his privilege against self-incrimination (see Pet. Mem., Ex. 1, pp. 19-20), the minute order does expressly state that Petitioner waived his right to remain silent (Pet. Mem., Ex. A). Also, and contrary to Petitioner's assertion, the minute orders attached to the Petition as Exhibits B and C do not show that Petitioner was in two different courtrooms at the same time; the first order reflects that the master calendar judge transferred the case to the judge in Department 17 "forthwith," and the second order reflects Petitioner's entry of the plea in Department 17 (Petition, Exs. B, C). Although, as Petitioner contends, the "Felony Disposition Agreement" does not bear the date of Petitioner's signature, the signature of Petitioner's counsel or the judge's signature, and does not identify **[*75]** the charges other than by reference to the counts in the Information, that agreement, together with the abstract of judgment and minute order recording Petitioner's plea, suffice to show that there was no "Boykin/Tahl" violation.

25 The Court rejects Petitioner's contention that the "presumed prejudice" rule of United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), applies to this claim (see Pet. Mem., Ex. 1, p. 85). See Bell v. Cone, 535 U.S. 685, 697-98, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (Cronic applies only where counsel completely fails to subject the prosecution's case to meaningful adversarial testing, not where counsel's alleged failure to do so occurs only at specific points during trial; claims that counsel failed to submit mitigating evidence and waived closing argument analyzed under Strickland standard); Richter v. Hickman, 521 F.3d 1222, 2008 WL 943584, at *9-10 (9th Cir. 2008) (Cronic inapplicable to claim that counsel failed to investigate and prepare for trial, where record

showed counsel engaged in adversarial testing during trial, including making motions and cross-examining witnesses); Hovey v. Ayers, 458 F.3d 892, 906-07 (9th Cir. 2006) ("Cronic requires wholesale failure by counsel to defend **[*76]** the client"; Strickland standard applied to claim that counsel made prejudicial concessions in closing argument).

3. Alleged Failure to Investigate, and Inform the Sentencing Court About, the Facts in the San Bernardino Case

Petitioner also faults counsel for allegedly failing to investigate the San Bernardino case, and failing to determine that Petitioner pled guilty to a "two year mitigated sentence" and that the assault charge was dismissed (Pet. Mem., Ex. 1, p. 86). Petitioner asserts that counsel should have objected to the prosecution's allegedly false evidence regarding the San Bernardino case (id.). However, as discussed above, the San Bernardino Superior Court imposed the two-year sentence, and dismissed the assault charge, after Petitioner was sentenced in the Ventura case. Counsel could not have discovered events which had not yet occurred. Additionally, even assuming, arguendo, counsel could have discovered an alleged plea agreement in the San Bernardino case calling for a two-year sentence and dismissal of the assault charge, any investigation also would have led counsel to the San Bernardino Superior Court's order of December 7, 1999 describing Petitioner's plea of guilty **[*77]** to the assault charge and imposing an eight-year sentence. Moreover, the probation report indicated that Petitioner had failed to appear in the San Bernardino case on March 2, 2001 and that a bench warrant had issued (see Respondent's Lodgment S, p. 17). Counsel reasonably could have determined that it would be futile to base a sentencing argument on the then-speculative possibility that future events in the San Bernardino case could reduce Petitioner's sentence or result in a dismissal of the assault charge. For the same reasons, Petitioner has not shown a reasonable probability of a different result had counsel acted in the fashion suggested by Petitioner. It is not reasonably probable that the Ventura County Superior Court would have declined to impose a Three Strike sentence if it had known of the alleged future possibility of a reduced sentence or dismissal of the assault charge pursuant to a plea agreement in the San Bernardino case. Neither a reduction of the sentence nor a dismissal of the charge changed the violent nature of what occurred at the San Bernardino Home Base store.

4. Alleged Failure to Move for a Continuance to Permit the Preparation of a New Psychological Report

Petitioner **[*78]** faults counsel for failing to seek a continuance to permit the preparation of a new psychological report. The Court of Appeal rejected this assertion, ruling that the "presumed prejudice" rule of United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), did not apply, and that Petitioner had not shown Strickland prejudice (Respondent's Lodgment F, pp. 4-5).

The Court of Appeal's decision was not unreasonable. Under the applicable prejudice standard set forth in Strickland, [26] Petitioner has not shown prejudice from counsel's failure to request a continuance. Petitioner has not shown what an additional psychological report would have revealed, or how any revelation would have aided Petitioner.

FOOTNOTES

26 Although it is unclear whether Petitioner asserts in the present proceeding that the "presumed prejudice" rule of United States v. Cronic should apply to this claim, for the reasons stated previously the presumed prejudice rule does not apply. See fn. 27, ante.

5. Alleged Failure to Prepare Petitioner for an Interview with a Probation Officer, to Ask Petitioner Why Petitioner Did Not Talk to the Probation Office, and to Review the

Probation Report

Petitioner contends his attorney failed to prepare Petitioner **[*79]** for the interview with the probation officer, to ask Petitioner why Petitioner did not speak to the probation officer, and to review the probation report (Pet. Mem., Ex. 1, pp. 87-88). [27] Petitioner references Ground Six of the Petition, in which Petitioner contends that his mental problems allegedly prevented him from understanding who the probation officer was or why she came to see him, so that Petitioner allegedly lost the opportunity to present his side of the San Bernardino incident and to provide allegedly mitigating evidence (see Pet. Mem, Ex. 1, pp. 59, 88).

FOOTNOTES

27 Oddly, the Supplemental Reply alleges that counsel failed "to ensure the petitioner did or did not talk to the probation officer" (Supp. Reply Mem., p. 57). According to the probation report, Petitioner declined to give a statement to the probation officer (Respondent's Lodgment T, p. 19).

Petitioner does not allege how his attorney could have prepared Petitioner for an interview with the probation officer, or describe what specific information Petitioner could have given to the probation officer had such preparation occurred. Petitioner's conclusory allegations do not warrant habeas relief. See Jones v. Gomez, 66 F.3d 199, 204-205 (9th Cir. 1995), **[*80]** cert. denied, 517 U.S. 1143, 116 S. Ct. 1437, 134 L. Ed. 2d 559 (1996) (conclusory allegations unsupported by a statement of specific facts do not warrant habeas relief). Moreover, Petitioner has not shown a reasonable probability of a different result if counsel had prepared Petitioner for the interview.

To the extent Petitioner contends his counsel should have asked Petitioner why Petitioner did not speak with the probation officer, Petitioner does not allege what such an inquiry would have uncovered that could have aided Petitioner. To the extent Petitioner implies that Petitioner's alleged failure to speak with the probation officer should have alerted counsel to Petitioner's alleged incompetence, any such claim fails. Petitioner does not allege how his failure to speak with the probation officer would have caused counsel to doubt Petitioner's competence, and, for the reasons set forth above, the record does not show any other basis on which counsel should have doubted Petitioner's competence. Petitioner's claim that counsel failed to review the probation report lacks merit, because the record shows counsel was familiar with that report (see R.T. 42-43).

6. Alleged Use of Trickery or Coercion to Compel Petitioner to [*81] Waive His Jury Trial Right

Petitioner alleges his counsel coerced or tricked Petitioner into waiving his jury trial right. Petitioner alleges counsel told Petitioner that counsel had talked to the judge, that the judge was fair and lenient, and that if Petitioner waived his jury trial right, the judge would conclude that the case was a "mickey mouse" case and "just a simple shoplifting" and grant the Romero motion (Pet. Mem., Ex. 1, p. 56; Supp. Reply Mem., p. 58). Elsewhere in the Petition, however, Petitioner contends that he does not deny the petty theft, and that "there is no need for a new trial on this charge" (see Pet. Mem., Ex. 1, p. 61).

Petitioner has failed to demonstrate that counsel's advice was unreasonable. Furthermore, Petitioner has failed to demonstrate a reasonable probability of a different result but for counsel's alleged "trickery or coercion." Petitioner has not shown a reasonable probability that a jury would have failed to convict Petitioner; indeed Petitioner does not deny that he committed the petty theft or that he had a prior theft-related conviction. A failure to waive jury would not have impacted sentencing. Therefore, Petitioner has not shown Strickland **[*82]** prejudice. See Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995) (counsel's advice to waive jury trial and submit case to judge on stipulated facts did not prejudice petitioner, where evidence was so

strong that "more likely than not Hensley would have been convicted had he gone to trial").

C. Conclusion

For the foregoing reasons, the state courts' rejection of Petitioner's claims of ineffective assistance of trial counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground Nine of the Petition.

X. Petitioner's Claims of Ineffective Assistance of Appellate Counsel Do Not Merit Habeas Relief.

Petitioner asserts appellate counsel ineffectively failed to raise on appeal the other issues alleged in the Petition (Pet. Mem., Ex. 1, p. 90). In particular, Petitioner challenges appellate counsel's alleged failure to investigate and challenge the use of Petitioner's prior convictions, to raise a Crawford claim, to argue that Petitioner's petty theft with a prior was only a misdemeanor, to assert claims of prosecutorial **[*83]** misconduct and a Brady violation, and to challenge trial counsel's effectiveness (Pet. Mem., Ex. 1, pp. 90-91; Supp. Reply Mem., p. 59).

The standards set forth in Strickland govern claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001), cert. denied, 535 U.S. 995, 122 S. Ct. 1556, 152 L. Ed. 2d 479 (2002). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. See Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." Id. (citation omitted). Moreover, "[a] failure to raise untenable issues on appeal does not fall below the Strickland standard." Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002). Appellate counsel's failure to raise an issue on direct appeal cannot constitute ineffective assistance when "appeal would not have provided grounds for reversal." Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001).

For the reasons discussed previously, **[*84]** appellate counsel reasonably could have determined it would be futile to present on appeal Petitioner's claims that: (1) Petitioner's conviction for petty theft with a prior allegedly was only a misdemeanor; (2) Petitioner's prior convictions allegedly were unconstitutional under Boykin and Tahl; (3) the trial court allegedly abused its discretion in denying Petitioner's Romero motion; (4) Petitioner allegedly was incompetent to stand trial; and (5) Petitioner's sentence allegedly violated the Double Jeopardy and Ex Post Facto clauses. Strickland did not require appellate counsel to advance meritless arguments. See Rupe v. Wood, 93 F.3d at 1445; Shah v. United States, 878 F.2d at 1162. To the extent Petitioner contends appellate counsel should have challenged on appeal trial counsel's alleged failure to raise any of these issues at trial, Petitioner's claim fails for the same reasons. See Featherstone v. Estelle, 948 F.2d 1497, 1507 (9th Cir. 1991) (where trial counsel's performance did not fall below the Strickland standard, "petitioner was not prejudiced by appellate counsel's decision not to raise issues that had no merit") (footnote omitted).

Furthermore, where analysis of a claim **[*85]** of ineffective assistance of trial counsel requires recourse to matters outside the appellate record, California law requires that the claim be asserted in a petition for writ of habeas corpus, not on direct appeal. See, e.g., People v. Mendoza Tello, 15 Cal. 4th 264, 267-68, 62 Cal. Rptr. 2d 437, 933 P.2d 1134 (1997); People v. Pope, 23 Cal. 3d 412, 426-28, 152 Cal. Rptr. 732, 590 P.2d 859 (1979). "[B]ecause, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct." People v. Wilson, 3 Cal. 4th 926, 936, 13 Cal. Rptr. 2d 259, 838 P.2d 1212 (1992), cert. denied, 507 U.S. 1006, 113 S. Ct. 1648, 123 L. Ed. 2d 269 (1993); see also People v. Frye, 18 Cal. 4th 894, 979-80, 77 Cal. Rptr. 2d 25,

959 P.2d 183 (1998), cert. denied, 526 U.S. 1023, 119 S. Ct. 1262, 143 L. Ed. 2d 358 (1999) (citations and internal quotations omitted) ("a reviewing court will reverse a conviction **[*86]** on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission") (citations and internal quotations omitted). Here, appellate counsel reasonably could have determined that Petitioner's claims of ineffective assistance of trial counsel encompassed matters outside the appellate record, and hence could not be brought on direct appeal.

Similarly, appellate counsel reasonably could have determined that Petitioner's Brady and prosecutorial misconduct claims were based on matters outside the appellate record, and therefore could not be brought on direct appeal. See People v. Prince, 40 Cal. 4th 1179, 1234, 57 Cal. Rptr. 3d 543, 156 P.3d 1015 (2007); People v. Jenkins, 22 Cal. 4th 900, 952, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000), cert. denied, 531 U.S. 1155, 121 S. Ct. 1104, 148 L. Ed. 2d 975 (2001).

Petitioner cannot claim ineffective assistance of appellate counsel in failing to raise issues in a habeas corpus petition, for Petitioner enjoyed no right to counsel in collateral post-conviction proceedings. See Murray v. Giarratano, 492 U.S. 1, 7-10, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989); Pennsylvania v. Finley, 481 U.S. 551, 556, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); Wainwright v. Torna, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982); **[*87]** Cook v. Schriro, 516 F.3d 802, 2008 WL 441825, at *18 (9th Cir. Feb. 20, 2008).

For the foregoing reasons, the state courts' rejection of Petitioner's claims of ineffective assistance of appellate counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground Ten of the Petition.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: April 21, 2008.

/s/

CHARLES F. EICK

UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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In

*2008 U.S. Dist. LEXIS 51043, **

CARL L. CALLEGARI, Plaintiff, vs. COUNTY OF SAN JOAQUIN, et al., Defendants.

No. CIV S-08-214 JAM KJM P

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 51043

June 3, 2008, Decided
June 4, 2008, Filed

SUBSEQUENT HISTORY: Adopted by, Dismissed by Callegari v. County of San Joaquin, 2008 U.S. Dist. LEXIS 79362 (E.D. Cal., Oct. 6, 2008)

CORE TERMS: frivolous, robbery, plea agreements, recommendations, sentence, serious felonies, leave to proceed, qualifying, pauperis, narcotics, baseless, arguable, colloquy, enhance, bargain, felony, forma

COUNSEL: **[*1]** Carl Lee Callegari, Plaintiff, Pro se, Soledad, CA.

JUDGES: Kimberly J. Mueller, U.S. MAGISTRATE JUDGE.

OPINION BY: Kimberly J. Mueller

OPINION

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff alleges that San Joaquin County and the city of Stockton breached a contract with him, which restricted use of his 1990 robbery conviction to enhance subsequent sentences stemming only from other serious felonies. This breach occurred, he alleges, in 1996, when his prior robbery was used as a strike in sentencing him for a narcotics conviction.

A court may deny leave to proceed in forma pauperis if it appears from the face of the proposed

complaint that the action is frivolous. *Minetti v. Port of Seattle,* 152 F.3d 1113 (9th Cir. 1998). In determining whether an action is frivolous, the court may "pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). **[*2]** A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Franklin v. Murphy,* 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke,* 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona,* 885 F.2d 639, 640 (9th Cir. 1989); *Franklin,* 745 F.2d at 1227.

Plaintiff's complaint is frivolous. Between the time of petitioner's plea to robbery in 1990 and his narcotics conviction in 1996, California law changed to permit prior serious felonies to be used as strikes, qualifying a defendant for a term of twenty-five years to life for a felony conviction preceded by two convictions for qualifying felonies. *See People v. Helms,* 15 Cal.4th 608, 612, 63 Cal. Rptr. 2d 620, 936 P.2d 1230 (1997). In California, plea agreements are "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws." *Davis v. Woodford,* 446 F.3d 957, 962 (9th Cir. 2006), **[*3]** *quoting People v. Gipson (In re Gipson),* 117 Cal.App.4th 1065, 12 Cal. Rptr. 3d 478 (2004).

Moreover, plaintiff's claim has no basis in fact. It is true that plea agreements are evaluated under contract principles, as plaintiff suggests. *See, e.g., United States v. Coleman,* 208 F.3d 786, 791 (9th Cir. 2000). However, the plea agreement does not consist of everything said during the plea colloquy; rather, a plea bargain is what the prosecution offers, perhaps a specific sentence or the dismissal of other charges, in exchange for certain concessions from a defendant. *See Santobello v. New York,* 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). In the 1990 plea transcript attached to the complaint, the court outlined the plea agreement: "Mr. Callegari, my understanding is if you plead to Count 1, you're charged with robbery to the second degree, that I will sentence you to five years in state prison. The DA will dismiss the priors that are charged. The five years will run concurrently or along with the ten years you got in your other case." When asked if anything else had been promised, plaintiff said, "Not that I know of" Complaint, Ex. A at 2. Later, during the colloquy, the court informed plaintiff that the robbery could be used **[*4]** to enhance future sentences for serious felonies. *Id.,* Ex. A at 4. This statement was not part of any plea bargain, and also undermines plaintiff's argument that there was an agreement to the contrary.

Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed as frivolous.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, plaintiff may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: June 3, 2008.

/s/ Kimberly J. Mueller

Kimberly J. Mueller

U.S. MAGISTRATE JUDGE

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In

*2008 U.S. Dist. LEXIS 39536, **

CURTIS BARNETTE JOSHUA, Petitioner, v. DEBRA DEXTER, Respondent.

No. ED CV 07-00978-VAP (VBK)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

2008 U.S. Dist. LEXIS 39536

May 13, 2008, Decided
May 13, 2008, Filed

SUBSEQUENT HISTORY: Writ of habeas corpus dismissed Joshua v. Dexter, 2009 U.S. Dist. LEXIS 55631 (C.D. Cal., June 23, 2009)

CORE TERMS: amend, sentencing, habeas corpus, Strikes Law, sentence, federal habeas, futility, state law, insufficient evidence, leave to amend, new claim, plea bargain, enhancement, cognizable, convicted, evading, felony, appointment, ordering, habeas petition, robbery conviction, prior prison, prior convictions, prior proceeding, assistance of counsel, original petition, concurrently, commenting, recidivist, qualifying

COUNSEL: **[*1]** Curtis Barnette Joshua, Petitioner, Pro se, Blythe, CA.

For Debra Dexter, Warden, Respondent: Theodore M Cropley, LEAD ATTORNEY, CAAG, San Diego, CA.

JUDGES: VICTOR B. KENTON, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: VICTOR B. KENTON

OPINION

MEMORANDUM AND ORDER DENYING PETITIONER'S MOTION TO AMEND

INTRODUCTION

On August 3, 2007, Curtis Barnette Joshua (hereinafter referred to as "Petitioner") filed a "Petition for Writ of Habeas Corpus by a Person in State Custody," pursuant to 28 U.S.C. §2254

("Petition"). On September 7, 2007, Respondent filed a "Motion to Dismiss Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities in Support of Motion to Dismiss Petition for Writ of Habeas Corpus" and "Notice of Lodging," contending that the Petition should be dismissed on the grounds that the claims are unexhausted.

On September 11, 2007, the Court issued a Minute Order ordering Petitioner to file an Opposition or Statement of Non-Opposition to the Motion to Dismiss.

On September 24, 2007, Petitioner filed a document entitled "Petitioner's Objections to Motion to Dismiss and Request for Appointment of Counsel."

On February 4, 2008, the Court issued a Memorandum and Order Deeming Respondent's Motion to Dismiss **[*2]** Moot and ordering Respondent to file an Answer addressing the merits of the Petition.

On February 13, 2008, Petitioner filed a "Multi-Motion to: (1) Set Aside Abeyance; (2) Maintain Status of *In Forma Pauperis* Status or Court Fees and Costs; and (3) Request for Appointment of Counsel."

On February 19, 2008, the Court issued a Minute Order denying Petitioner's request for appointment of counsel and request to proceed *In Forma Pauperis.*

On March 5, 2008, Respondent filed an "Answer to Petition for Writ of Habeas Corpus (28 U.S.C. §2254) and Memorandum of Points and Authorities in Support Thereof."

On March 25, 2008, Petitioner filed a "Motion to Amend Writ of Habeas Corpus." Petitioner requests the Court allow him to add two additional claims.

On March 31, 2008, the Court issued a Minute Order ordering Respondent to file an Opposition or Statement of Non-Opposition to the Motion to Amend.

On April 9, 2008, Petitioner filed a "Multi-Motion to (1) Extension of Time to File Reply to the Answer by the Respondent(s) and/or (2) Stay the Reply Until Respondent Complies with Request on 2 Additional Claims on First Amended Writ; (3) appoint counsel."

On April 24, 2008, Respondent filed a document entitled **[*3]** "Respondent's Opposition to Petitioner's Motion to Amend Petition and Supporting Memorandum of Points and Authorities.

On May 7, 2008, Petitioner filed an "Acknowledgment."

Having reviewed the allegations in the Petition, Respondent's Answer, Petitioner's Motion to Amend, Respondent's Opposition and all of the records in this matter, the Court **HEREBY DENIES** Petitioner's Motion to Amend the Petition.

BACKGROUND

Petitioner was convicted by a jury in San Bernardino County Superior Court of second degree robbery in violation of California Penal Code ("PC") §211, criminal threats in violation of PC §422, and evading an officer in violation of Vehicle Code §2800.2 subd. (a). The court further found that Petitioner committed the following prior convictions: two prior strike convictions within the meaning of PC §§667(b) through (i); two prior serious felony convictions under PC §667(a)(1); in Count 1, a prior prison conviction under PC §667.5(a); and in Counts 2 and 3, two prior prison convictions under PC §667.5(b). The court sentenced petitioner to a total prison term of 30 years to life. (Respondent's Lodgment 1.)

On January 17, 2006, Petitioner filed an appeal in the California Court of Appeal. **[*4]** Petitioner raised the following claims: (1) there was insufficient evidence to establish that the "fear" experienced by one of the victims was sufficient to establish the criminal threat

conviction; (2) the trial court erred in not including on a lesser included offense of attempted criminal threats; (3) there was insufficient evidence to establish the robbery conviction; (4) the evidence was insufficient to support a finding of evading; (5) the trial court erred in sentencing Petitioner concurrently for the evading conviction as this was an escape that was a continuation of the robbery; (6) the People committed error by commenting that he lacked credibility for failing to take the stand and deny his guilt under oath; and (7) Petitioner was denied effective assistance of counsel during his trial and prior to sentencing. (Respondent's Lodgment 4.)

On August 17, 2006, the California Court of Appeal affirmed the judgment. (Respondent's Lodgment 6.)

Petitioner did not file a Petition for Review with the California Supreme Court.

On July 29, 2007, Petitioner filed a "Petition for Writ of Habeas Corpus" in the California Supreme Court wherein he raised the same claims as those raised in the **[*5]** California Court of Appeal.

On August 3, 2007, Petitioner filed the within Petition.

On January 16, 2008, the California Supreme Court denied Petitioner's state habeas petition.

PETITIONER'S CONTENTIONS

Petitioner contends the following, *inter alia:*

1. There was insufficient evidence to establish fear in violation of the Fourteenth Amendment;

2. Petitioner was denied a lesser included offense instruction in violation of the Sixth and Fourteenth Amendments;

3. There was insufficient evidence to establish a robbery conviction in violation of the Sixth, Eighth and Fourteenth Amendments;

4. There was reversible error by the prosecutor commenting on the Petitioner's failure to testify in his own defense in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments; and

5. Petitioner was denied the effective assistance of counsel on priors sentence in violation of the Fifth, Sixth and Fourteenth Amendments.

(*See* Petition at 5-6.)

DISCUSSION

For all of the following reasons, Petitioner's Motion to Amend is Denied.

A. *Applicable Law Regarding Motions To Amend.*

Federal Rule of Civil Procedure 15(a) allows a party to amend his petition by leave of court at any time, and such leave shall be freely given **[*6]** when justice so requires. In determining whether to grant a motion for leave to amend, a court considers the following factors, which are not given equal weight: futility of the amendment, bad faith, undue delay, prejudice to the opposing party, and whether the party has previously amended. *Bonin v. Calderon,* 59 F.3d 815, 845 (9th Cir. 1995). The Ninth Circuit has stated that "futility of an amendment can, by itself, justify the denial of a motion for leave to amend because the preferred amendments would be nothing more than an exercise in futility;" *see Scott v. Baldwin,* 225 F.3d 1020, 1023

(9th Cir. 2000) (petitioner's motion to remand denied because it would be futile to amend the habeas petition to allege a claim under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000)).

B. PETITIONER'S MOTION TO AMEND IS DENIED

Petitioner seeks leave to amend to add the following two claims to his Petition: "(6) [t]he trial court error [sic] in dismissing jury before hearing strike pre-(1994). Sixth, Eighth, Thirteenth, Fourteenth (U.S.C.A.) United States Constitution, and California [sic]" and "(7) [t]he trial court erred in the use of one prior per [sic] -1994, making two strikes out **[*7]** of one prior per [sic] -1994. Fifth, Sixth, Eighth, Thirteenth, Fourteenth (U.S.C.A.) and California Constitution [sic]." (Petitioner's "Proposed First Amended Petition" at pp. 8-13.)

In support of Petitioner's first new claim (Proposed Ground 6), Petitioner contends that because California's Three Strikes Law "was not in existence at the time of his 1990 plea bargain," the trial court cannot use his 1990 conviction to "retroactively" impose the penalty under the Three Strikes Law for his 2005 conviction. (Petitioner's "Proposed First Amended Petition" at pp. 9-10.) Petitioner therefore argues that the trial court's imposition of such a penalty violated the "pre-Three Strikes Law" "legal contract" he agreed to in 1990. (Petitioner's "Proposed First Amended Petition" at pp. 10-11.)

In *People v. Gipson,* 117 Cal.App.4th 1065, 12 Cal.Rptr.3d 478 (2004), the defendant claimed that his sentence under the Three Strikes Law for his crime committed in 2001, violated the plea bargain contract he made with the state in 1992. *Id.* at 1068-1069. Specifically, the defendant in *Gipson* argued that his 1992 plea agreement incorporated by reference California Penal Code's sentencing provisions as they **[*8]** existed in 1992, which provided a recidivist penalty of five years for each prior serious felony and a one-year enhancement for each prior prison term served. Therefore, the defendant in *Gipson* claimed the trial court violated this "contract" when it imposed a sentencing enhancement that was enacted after 1992. *Id.* In finding that the defendant was properly sentenced, the California Court of Appeal held that, "contracts are deemed to incorporate not only the existing law, but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy..." *Id.* at 1070; cf. *Davis v. Woodford,* 446 F.3d 957, 958, 961-963 (9th Cir. 2006)(where the state has "expressly agreed" to treat two or more convictions as a single "prior" for later recidivist sentencing under "whatever law might then be in effect," and where this agreement played a role in the defendant's decision to plead guilty, the state "must live with the particular bargain that it made.")

Here, Petitioner has made no allegation that the prosecution or trial court agreed to limit in any way the future consequences of Petitioner's 1990 guilty plea. Therefore, as Petitioner's claim **[*9]** in his Proposed Ground 6 appears to be identical to the claim in *Gipson,* it is meritless.

In support of Petitioner's second new claim (Proposed Ground 7), Petitioner appears to argue that, because he was convicted of both of his prior "strike" offenses on the same date and under the same court case number, the trial court violated his constitutional rights (as well as his 1990 plea bargain) when it used these two convictions as two separate prior strikes under the Three Strikes Law.

However, in *People v. Fuhrman,* 16 Cal.4th 930, 941 P.2d 1189, 67 Cal.Rptr.2d 1 (1997), the California Supreme Court held that under California's Three Strikes Law, "a prior qualifying conviction need not have been brought and tried separately from another qualifying conviction in order to be counted as a separate strike." *Id.* at 933. In other words, "when a defendant has been convicted of more than one violent or serious felony offense in a single prior proceeding, each conviction may be counted as a strike under the Three Strikes Law." *Id.* at 930. Therefore, Petitioner's claim in his proposed Ground 7 appears to be identical to the claim in *Fuhrman,* and is meritless.

Here, as noted above, Petitioner seeks **[*10]** to amend his Petition in include proposed

Grounds 6 and 7 which involve state sentencing claims and under state law are not meritorious. [1]

FOOTNOTES

1 Generally, matters relating to state sentencing are not cognizable under federal habeas review. *Miller v. Vasquez,* 868 F.2d 1116, 1118-19 (9th Cir. 1989)(holding that a question of whether a prior conviction qualifies for sentence enhancement under California law is not a cognizable federal habeas corpus claim). "Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief." *Christian v. Rhode,* 41 F.3d 461, 469 (9th Cir. 1994). A habeas petitioner must show that an alleged state sentencing error was "so arbitrary or capricious as to constitute an independent due process" violation." *Richmond v. Lewis,* 506 U.S. 40, 50, 113 S.Ct. 528, 536, 121 L. Ed. 2d 411 (1992). *See e.g., Cacoperdo v. Demosthenes,* 37 F.3d 504, 507 (9th Cir. 1994)("The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus."). *Peltier v. Wright,* 15 F.3d 860, 862 (9th Cir. 1994)(state supreme court's interpretation **[*11]** of whether state judge's order, placing defendant on probation and directing defendant to spend 60 days in county jail, constituted a withholding of judgment or sentence was a question of state law); *Hendricks v. Zenon,* 993 F.2d 664, 674 (9th Cir. 1993)(claim that state court violated state law when it failed to merge convictions for sentencing purposes held not to state due process violation are not cognizable in federal habeas). *See generally, Walker v. Endell,* 850 F.2d 470, 476 (9th Cir. 1987), *cert. denied,* 488 U.S. 981, 109 S. Ct. 530, 102 L. Ed. 2d 562 (1988)("Generally, a federal appellate court may not review a state sentence that is within statutory limits"). *See Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)(stating that it is not the province of a federal court to reexamine state court determinations on state law questions).

Furthermore, Petitioner alleges no new facts and there is nothing in the nature of these claims to suggest that Petitioner was unaware of the underlying factual allegations at the time he filed his original petition in Federal Court. Indeed, Petitioner had included these two proposed claims in a state petition filed in the California Supreme Court a mere two days before he filed his federal **[*12]** petition. (*See* Lodgment 7.) Additionally, Petitioner did not see fit to present these two claims in his "Amended" Petition filed on February 13, 2008. Petitioner waited until Respondent filed both the Motion to Dismiss and an Answer to his original federal Petition before making his eleventh hour attempt to present these two new claims to this Court. Petitioner had ample time to address these issues in prior proceedings and has not justification for not doing so. Accordingly, Petitioner's motion should be denied. (*See Bonin v. Calderon,* 59 F.3d at 845-846; *see also Briddle v. Scott,* 63 F.3d 364, 375 (5th Cir. 1995), *cert. denied,* 516 U.S. 1033, 116 S.Ct. 687, 133 L.Ed.2d 531 (1995) (denying federal habeas petitioner right to amend petition to add certain issues which could have been included in original petition, to avoid having to raise such issues in subsequent federal habeas proceeding that would be subject to dismissal for abuse of the writ).

Finally, Petitioner should not be permitted to amend the Petition to include the additional claims as it would be an exercise in futility. Thus, Petitioner's Motion to Amend the Petition is denied.

ORDER

For all the foregoing reasons, **IT IS HEREBY [*13] ORDERED** that Petitioner's Motion for Leave to Amend the Petition is Denied. Petitioner is **ORDERED** to file a Reply to Respondent's Answer within 30 days of the date of this Order. The matter will then stand submitted.

DATED: May 13, 2008

/s/

VICTOR B. KENTON

UNITED STATES MAGISTRATE JUDGE

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In

*2008 U.S. Dist. LEXIS 18081, **

FRANK ALLEN TRAVALINI, Petitioner, v. THE PEOPLE OF CALIFORNIA, Respondents.

1:04-CV-06588 OWW JMD (HC)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 18081

March 10, 2008, Decided
March 10, 2008, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus denied, Certificate of appealability denied Travalini v. California, 2008 U.S. Dist. LEXIS 44770 (E.D. Cal., May 24, 2008)

PRIOR HISTORY: Travalini v. California, 2006 U.S. Dist. LEXIS 18720 (E.D. Cal., Mar. 24, 2006)

CORE TERMS: sentence, habeas corpus, unusual punishment, felony, cruel, disproportionality, sentencing, recidivist, proportionality review, proportionality, imprisonment, convicted, custody, watch, van, ex post facto laws, years to life, equal protection, possibility of parole, threshold, burglary, prison, parole, federal law, procedural default, sentences imposed, federal habeas, legal principle, plea bargains, degree burglary

COUNSEL: [*1] Frank Allen Travalini, Petitioner, Pro se, Atascadero, Ca.

For People of California State of California, Respondent: David Andrew Eldridge, LEAD ATTORNEY, Office Of The Attorney General Of The State Of California, Sacramento, CA.

JUDGES: John M. Dixon, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: John M. Dixon

OPINION

FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action has been referred to this court pursuant to 28 U.S.C. § 636(b)

(1) and Local Rule 72-302.

PROCEDURAL HISTORY

Petitioner is confined by the State of California, pursuant to a judgment of the Superior Court of California, County of Kings. On September 12, 2001, Petitioner was sentenced to three consecutive terms of twenty-five years to life, following his convictions for escape from custody by means of force (Cal. Penal Code § 4532(a)), carjacking (Cal. Pen. Code § 215), and evasion of police by means of reckless driving (Cal. Veh. Code § 2800.2).

On October 14, 2003, the California Court of Appeal affirmed the judgment of the trial court with modifications not affecting the length of sentence. People v. Travalini, 2003 Cal. App. Unpub. LEXIS 9715 (Oct. 14, 2003). On January **[*2]** 28, 2004, the California Supreme Court denied review. People v. Travalini, 2004 Cal. LEXIS 143 (Jan. 14, 2004).

On October 12, 2003, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. The petition was denied on October 30, 2003. On November 12, 2003, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal. The appellate court denied the petition on November 26, 2003. On December 19, 2003, Petitioner filed a petition in the California Supreme Court. The California Supreme Court denied the petition on October 27, 2004. In re Travalini on H.C., 2004 Cal. LEXIS 10316 (Oct. 27, 2004).

Petitioner filed the instant Petition for Writ of Habeas Corpus on November 22, 2004. Petitioner subsequently amended his petition on March 13, 2007. Respondent filed its Answer on June 1, 2007.

FACTUAL BACKGROUND

1

FOOTNOTES

1 The Court adopts the facts as summarized by the California Court of Appeal.

> On July 3, 1995, Zainab Mohammed returned home at approximately 11:00 p.m. to find the apartment she shared with her husband, Abdulhameed Kamaluddin, in disarray. A gold watch, other jewelry, $ 3,000, and a set of car keys were missing from the apartment. Clothes and toiletries were strewn on top of the bed; included in these items was a wallet with defendant's identification. **[*3]** (Count I, burglary).
>
> Christina Dempsey was working at the Texaco Star Mart on July 3, 1995. At approximately 10:30 p.m. defendant came in the store. He got a drink and brought it to the counter. He asked Dempsey if she would hold on to his gold watch until he got some money. Dempsey said no. Defendant returned later that evening, picked up several items, and placed the items on the counter. Defendant started to take off his watch. Dempsey told defendant she could not accept the watch as payment for the goods. Defendant picked up the items and left. (Count II, theft with a prior theft-related conviction).
>
> Defendant was arrested shortly thereafter. He had Kamaluddin's watch on when he was arrested. He said he did not enter Kamaluddin's residence. He also told the officers he hid car keys (belonging to Kamaluddin) in the patrol car.
>
> On August 29, 1995, Sheriff's Deputy Lemos was taking defendant and other inmates to the transportation van after defendant's preliminary hearing on the

above charges. While Lemos was putting defendant in the van, defendant shifted and his belly chains dropped to the ground. Defendant ran and started to climb the fence. Lemos gave chase and attempted to pull **[*4]** defendant off the fence. Defendant threatened to hit Lemos in the head with his handcuffs. Defendant scaled the fence, took off his jail clothes, and ran. (Count III, escape by force.) Lemos found a metal shank at the crime scene. (Count IV, possession of a sharp instrument by a prisoner [this count was reversed in defendant's original appeal].)

Defendant entered the home of Evelyn Pereira and told her he needed a ride to Hanford. Pereira grabbed her car keys and walked out to the garage. (Count VII, burglary; defendant was acquitted of this charge). Pereira told her husband that defendant needed a ride. Jerry Pereira unlocked the doors to the van. Defendant got in the passenger door. Defendant said, "let's go." Jerry noticed that defendant had his hands in his lap and asked what defendant was carrying. Defendant said he had a knife. Jerry backtracked and defendant demanded Jerry's keys. Jerry gave defendant the keys, and defendant left with the Pereira van. (Count V, carjacking and count VI, robbery; defendant was acquitted of the alternate charge of robbery).

An officer recognized defendant as he drove the van. After realizing the officer recognized him, defendant led officers on a **[*5]** high-speed chase exceeding 100 miles per hour. Defendant eventually bailed out of the car and ran. He was apprehended. (Count VIII, evading a police officer).

Defendant does not challenge any portion of the sanity phase; we need not set forth those facts in detail. We note, for purposes of discussion of the sentencing issues, that defendant's family members testified that he was developmentally slow and had other disabilities. He could not function on his own. He used drugs heavily and experienced mental problems as a result. Some experts believed that defendant was a malingerer.

DISCUSSION

I. Jurisdiction

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 fn. 7, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. In addition, the conviction challenged arises out of the Fresno County Superior Court, which is located within the jurisdiction of this Court. 28 U.S.C.§ 2254(a); 2241(d). **[*6]** Accordingly the Court has jurisdiction over this action.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586, 139 L. Ed. 2d 423 (1997) (*quoting* Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996) *cert. denied,* 520 U.S. 1107, 117 S. Ct. 1114, 137 L. Ed. 2d 315 (1997)) (holding AEDPA only applicable to cases filed after its enactment). The instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

II. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody

pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The instant petition is reviewed under the provisions of the AEDPA. Lockyer v. Andrade, 538 U.S. 63, 70, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Under the AEDPA, a petition for habeas corpus will not be granted unless the **[*7]** adjudication in question "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 "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); see Lockyer, 538 U.S. at 70-71; Williams, 529 U.S. at 413.

As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71, *quoting* 28 U.S.C. § 2254(d)(1). In ascertaining "clearly established Federal law," the Court looks to the "holdings, as opposed to the dicta, of [Supreme Court] decisions as of the time of the relevant state-court decision." Id., *quoting* Williams, 529 U.S. at 412. "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id.

Finally, this Court must consider whether the state court's decision was "contrary to, or involved an unreasonable **[*8]** application of, clearly established Federal law." Lockyer, 538 U.S. at 72, *quoting* 28 U.S.C. § 2254(d)(1). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413; see also Lockyer, 538 U.S. at 72. "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413.

This Court may not issue the writ simply because in its independent judgment the state court decision applied clearly established federal law erroneously or incorrectly; for a writ to issue, 'that application must also be unreasonable." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was 'objectively unreasonable." Id. at 409.

Petitioner **[*9]** has the burden of establishing that the decision of the state court is contrary to or involved an unreasonable application of United States Supreme Court precedent. Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states, ninth circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. See Duhaime v. DuCharme, 200 F.3d 597, 600-01 (9th cir. 1999).

AEDPA requires that this court give considerable deference to state court decisions. The state court's factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). Moreover, we are bound by a state's interpretation of its own laws. Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir. 2002), *cert. denied,* 537 U.S. 859, 123 S. Ct. 231, 154 L. Ed. 2d 98 (2002), *rehearing denied,* 537 U.S. 1149, 123 S. Ct. 955, 154 L. Ed. 2d 854 (2003).

III. Review of Petitioner's Claims

A. Claims One and Two: Equal Protection/Ex Post Facto/Due Process

In his first and second claims for relief, Petitioner asserts his sentence under the California Three Strikes Law violated his equal protection and due process rights. Specifically, Petitioner claims that the prior convictions used to enhance his sentence were in **[*10]** part the result of plea bargains, and that he would not have pled guilty if he knew these convictions could be used

in the future to enhance his sentence. He claims his sentencing under the Three Strikes law violates the constitutional ban on ex post facto laws.

1. State Court Review

Petitioner's claims were first presented in the California Superior Court, which denied said claims on October 24, 2004. The court's order states: "The petition raises issues which petitioner admits are either still on appeal or could have been appealed. In re Ali (1965) 236 Cal.App.2d 679, 680-681, 46 Cal. Rptr. 170." This appears to be the only finding by the Superior Court with respect to Petitioner's equal protection and due process claims..

The California Court of Appeal and California Supreme Court subsequently denied Petitioner's claims on November 26, 2003 and October 27, 2004, respectively. We presume the higher courts relied on the Superior Court's finding in denying Petitioner's claims. See Ylst v. Nunnemaker, 501 U.S. 797, 802-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

2. Review of Petitioner's Claims

Procedural Default

A federal court will not review claims in a petition for writ of habeas corpus if the state court has denied relief on those claims **[*11]** on a state law ground that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). This doctrine of procedural default is based on the concerns of comity and federalism. Id., at 730-32.

There are limitations as to when a federal court should invoke procedural default and refuse to evaluate the merits of a claim because the petitioner violated a state's procedural rules. Procedural default can only block a claim in federal court if the state court "clearly and expressly states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989).

Although it appears likely the state courts denied Petitioner's equal protection and due process claims on procedural grounds for failing to raise them on direct appeal, We do not find the court's statement "clearly and expressly states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). Consequently, we reach the merits of Petitioner's claims.

Merits

The Ex Post Facto Clause prohibits a state from enacting a law that imposes additional punishment for a crime than the punishment was when the defendant committed the crime. Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 964, 67 L. Ed. 2d 17 (1981). **[*12]** A law violates the Ex Post Facto clause under four circumstances: (1) when it punishes a act which was not a crime when it was committed; (2) when it makes a crime's punishment greater than when the crime was committed; (3) when it deprives a person of a defense available at the time the crime was committed; or (4) when it alters the rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990); Carmell v. Texas, 529 U.S. 513, 522, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

The application of a sentencing enhancement due to a prior conviction does not violate the Ex Post Facto Clause as long as the statute was in effect before the triggering offense was committed. Brown v. Mayle, 283 F.3d 1019 (9th Cir. 2002), vacated 538 U.S. 901, 123 S. Ct. 1509, 155 L. Ed. 2d 220, on remand 66 Fed. Appx. 136, 2003 WL 21349784; United States v. Sorenson, 914 F.2d 173, 174 (9th Cir. 1990); United States v. Ahumada-Avalos, 875 F.2d 681, 683-84 (9th Cir. 1984). The California Three Strikes Law took effect in March of 1994, before

Petitioner committed the triggering offenses. Consequently, Petitioner's sentence does not violate **[*13]** the Constitution's prohibition against ex post facto laws.

Nor does Petitioner's argument that his contract rights have been violated have merit. Under California law, plea bargains are interpreted according to contract law principles. Cal. Civ. Code § 1635; Buckley v. Terhune, 441 F.3d 688, 695 (9th Cir. 2006) (en banc). Plea bargains "are deemed to incorporate and incorporate not only the existing law but the reserve power of the state to amend the law or enact additional laws." Gardner v. Yarborough, 176 Fed.Appx. 882 (9th Cir. 2006), *quoting* People v. Gipson, 117 Cal.App.4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004). None of Petitioner's plea agreements contains an express term limiting the State's power to use his convictions for future sentencing enhancements. Nor does anything in the record suggest that Petitioner or the state understood the plea agreements to limit any future sentences. Petitioner notes that in his prior plea bargains he "was advised that he would receive an additional one to five years in criminal enhancements were he ever convicted of another felony." Pet. at 8. This merely described the consequences of Petitioner's plea under then-existing law; it was not a promise to limit the **[*14]** State's future use of those convictions. Gardner, 176 Fed.Appx. 882.

Because Petitioner's sentence did not violate either his contract rights or the prohibition against ex post facto laws, Petitioner's claims should be denied.

B. Claim Three: Cruel and Unusual Punishment

In his third claim for relief, Petitioner asserts that his sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment.

1. State Court Review

Petitioner's claim was first presented on direct appeal to the California Court of Appeal. The Appellate Court denied Petitioner's claim, stating:

> Defendant committed the current offenses when he was 35 years old. His first offense, a burglary conviction, occurred in 1978 when he was 18 years old. In 1981, he was again convicted of burglary. While on probation in 1983, he was sent to prison after committing a residential first degree burglary. In less than a year following his parole, he committed another residential first degree burglary. He was paroled and then violated parole. In 1992, again less than a year after he was paroled, he was arrested for transportation of methamphetamine, he was convicted and sent to prison in 1992. Following his release he **[*15]** committed the current offenses.
>
> Defendant has demonstrated a clear propensity to victimize society and has done so almost his entire life. While defendant had an admitted drug problem, defendant shows little or no motivation to change his lifestyle and it appears the substance abuse is a substantial factor in committing the crimes. In such a situation, a defendant's drug abuse is not a mitigating factor...
>
> Although defendant may suffer some mental impairment, his escape attempt demonstrates that he is capable of planning and carrying out sophisticated behavior. Defendant's individual characteristics demonstrate a clear threat to public safety....
>
> Finally, in Lockyer v. Andrade, (2003) 538 U.S. [63, 123 S. Ct. 1166, 155 L. Ed. 2d 144], and Ewing v. California, (2003) 538 U.S. [11, 123 S. Ct. 1179, 155 L. Ed. 2d 108], the United States Supreme Court rejected the claim that life sentences imposed under California's three strikes law constitute cruel and unusual punishment for even relatively minor offenses.

California Court of Appeals Op. At 6-7. 2003 Cal. App. Unpub. LEXIS 9715.

2. Review of Petitioner's Claim

A criminal sentence that is not proportionate to the crime for which a defendant is convicted may indeed violate the Eighth Amendment. The Supreme Court recently decided two cases which discuss **[*16]** the clearly established federal law applicable to California Three Strikes cases. See Ewing v. California, 538 U.S. 11, 123 S. Ct.1179, 155 L. Ed. 2d 108 (2003); Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct.1166, 155 L. Ed. 2d 144 (2003).

In Andrade, the Supreme Court discussed the current state of Eighth Amendment proportionality review and held that the only clearly established governing legal principle is that a "gross disproportionality" review applies to criminal sentences for a term of years. Id. at 1173. Citing extensively to its past cases dealing with criminal sentencing and proportionality under the Eighth Amendment, the Court acknowledged that it has "not established a clear and consistent path for courts to follow." Id.

The Supreme Court held that "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' frame work is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." Id. The Court analyzed Andrade's sentence under Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) and Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), and held that the state court "did not confron[t] a set of facts **[*17]** that are materially indistinguishable from a decision of this Court and nevertheless arrive at a result different from our precedent." Id. at 1173-1174. Using section 2254(d)(1)'s "unreasonable application" clause, the Court also held that it was not objectively unreasonable for the California Court of Appeal to conclude that the contours of the gross disproportionality principle permitted an affirmance of Andrade's Three Strikes sentence. Id. at 1175.

In Ewing, the Supreme Court again reviewed the constitutionality of a Three Strikes sentence of 25 years to life for stealing three golf clubs. After reviewing the Court's Eighth Amendment jurisprudence, the Court chose to adopt Justice Kennedy's view [2] that:

> [There are] four principles of proportionality review-- the primacy of the legislature; the variety of legitimate penological schemes; the nature of our federal system; and, the requirement that proportionality be guided by objective factors--that inform the final one: The Eighth Amendment does not require strict proportionality between the crime and the sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.

Ewing, at 1186-1187.

FOOTNOTES

[2] As expressed **[*18]** in his concurring opinion in Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)(*citing* Solem v. Helm, 463 U.S. 277, 288, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).

Recognizing that state legislatures have a right to formulate penological schemes consistent with the state's policy goals and free from federal intrusion, the Court validated the California Three Strikes law, stating "[s]electing the sentencing rationales is generally a policy choice to be made by the state legislatures, not the federal courts." Id. at 1187. The Court deferred to the California Legislature's policy judgment to enact a tough recidivism statute and held that states have "a valid interest in deterring and segregating habitual criminals." Id. (*citing* Parke v. Raley,

506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992)).

In conducting a proportionality review of Ewing's sentence, the Court stated, "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." Id. at 1189-1190. The Court noted that "any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." Id. at 1190. In imposing a Three Strikes sentence **[*19]** on a recidivist criminal, the Court recognized the state's interest in dealing "in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." Id. (*citing* Rummel v. Estelle, 445 U.S. 263, 276, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). Accordingly, proportionality review must take this interest into account. Id. The Court held that Ewing's sentence of 25 years to life was justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by Ewing's long, serious criminal record. Id.

In reviewing Petitioner's claim, this Court will begin with a brief overview of the Eighth Amendment jurisprudence and the proportionality standard. In Rummel, the Court upheld a life sentence imposed under a Texas recidivist statute for a defendant convicted of obtaining $ 120.75 by false pretenses, an offense normally punishable by imprisonment for two to ten years. Rummel, 445 U.S. at 266, 100 S.Ct. at 1135. However, because he had two prior felony convictions (for fraudulent use of a credit card and passing a forged check), and had served two prior prison terms, the prosecution **[*20]** chose to proceed under the state's recidivist statute, which carried a life sentence. Id. The Supreme Court held that Rummel's sentence of life imprisonment *with* the possibility of parole did not violate the Eighth Amendment. Id. at 265-266 (emphasis added). The Court noted that Rummel had suffered two separate convictions and terms of imprisonment for each prior, that he would be eligible for parole in twelve years, and that under the Texas recidivist statute, prosecutors retained the discretion not to invoke the statute for "petty" offenders. Id. at 278-81.

Three years later, the Supreme Court set forth the criteria for finding a sentence to be cruel and unusual punishment under the federal Constitution and affirmed a decision of the Eighth Circuit holding unconstitutional a sentence of life imprisonment without the possibility of parole for a seven-time nonviolent felony recidivist. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L. Ed. 2d 637 (1983). Defining a three-part proportionality criteria, the Court concluded that Solem's sentence was grossly disproportionate to his crime of uttering a "no account" check for $ 100.00, even in light of his prior six nonviolent felony convictions: three for **[*21]** third degree burglary, one for obtaining money under false pretenses, one for grand larceny, and one for driving while intoxicated. Id. at 279-81. The Court emphasized that Solem's life sentence was far more severe than the sentence it had considered in Rummel, because Rummel was likely to be eligible for parole in twelve years, while Solem was given no possibility of parole at all. Id.

In Harmelin, the defendant received a mandatory sentence of life in prison *without* the possibility of parole for possession of more than 650 grams of cocaine, his first felony offense. 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)(emphasis added). The Supreme Court upheld the sentence, with five justices agreeing, for varying reasons, that the sentence did not violate the Eighth Amendment. Although the Court did not produce a majority opinion, seven justices favored some manner of proportionality review. Justice Kennedy, joined by Justices O'Connor and Souter, stated that a noncapital sentence could violate the Eighth Amendment if it was "grossly disproportionate" to the crime, but concluded that courts need not examine the second and third factors of intrajurisdictional and interjurisdictional reviews discussed in Solem, unless **[*22]** "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Id. at 1005.

The majority of the justices in the Harmelin Court agreed that outside capital punishment, deeming a sentence cruel and unusual punishment is "exceedingly rare" due to the lack of objective guidelines for terms of imprisonment. 501 U.S. at 964. The threshold for such an inference of disproportionality is high. See id. at 1001 (Kennedy, J. concurring). Generally, so long as the sentence imposed by the state court does not exceed statutory maximums, the

sentence will not be considered cruel and unusual punishment under the Eighth Amendment. United States v. McDougherty, 920 F.2d 569, 576 (9th Cir. 1990).

The Harmelin Court concluded that the defendant's sentence did not meet the threshold factor of "gross disproportionality." Justice Kennedy stressed the serious nature of Harmelin's offense, stating that the offense "threatened to cause grave harm to society" unlike "the relatively minor, nonviolent crime at issue in Solem." Harmelin, 501 U.S. at 1002. Justice Kennedy further noted that the "possession, use, and distribution of illegal drugs represent **[*23]** 'one of the greatest problems affecting the health and welfare of our population.'" and that the quantity of cocaine possessed by Harmelin had a potential yield of between 32,500, and 65,000 doses. Id.

In light of the Supreme Court's holdings in Andrade and Ewing, We find the decision of the state court is not an unreasonable application of clearly established Supreme Court precedent. Petitioner fails to cite any Supreme Court authority supporting his position that a seventy-five years to life sentence under these circumstances violates the constitutional prohibition against cruel and unusual punishment. Given Petitioner's extensive prior criminal history as well as the nature of the commitment offenses, Petitioner's is not the "exceedingly rare" case of a disproportionally high sentence. Accordingly, Petitioner's claim should be denied.

RECOMMENDATION

The Court HEREBY RECOMMENDS that the petition for writ of habeas corpus be DENIED and the Clerk of the Court be DIRECTED to enter judgment.

These Findings and Recommendations are submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. **[*24]**

Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: March 10, 2008

/s/ John M. Dixon

UNITED STATES MAGISTRATE JUDGE

- Citation information available

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In

*2007 U.S. Dist. LEXIS 86964, **

GAYLIN LYNN BURLESON, Petitioner, v. SCOTT KERNAN, Respondent.

No. C 05-1263 SI (pr)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 86964

November 15, 2007, Decided
November 15, 2007, Filed

SUBSEQUENT HISTORY: Stay denied by Burleson v. Kernan, 2007 U.S. Dist. LEXIS 86979 (N.D. Cal., Nov. 15, 2007)

Judge Profile
View a summary by nature of suit of the civil cases heard by this judge, excerpted from the CourtLink Judicial Strategic Profile.

CORE TERMS: standby counsel, tape, reasonable doubt, recording, kill, legal advice, domestic violence, lesser, knife, investigator, appointed, conversation, prison, state law, restitution, federal habeas, telephone, recorded, preponderance, prosecutor, discovery, telephone calls, box, assistance of counsel, district attorney, divorce, commit, phone, advisory, convict

COUNSEL: [*1] Gaylin L. Burleson, Petitioner, Pro se, Ione, CA.

For Scott Kernan, Warden, Respondent: Catherine A. McBrien, LEAD ATTORNEY, CA Attorney General's Office, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER DENYING HABEAS PETITION

INTRODUCTION

This matter is now before the court for consideration of the merits of Gaylin Lynn Burleson's pro se petition for writ of habeas corpus. For the reasons discussed below, the petition will be denied.

BACKGROUND

A. The Crimes

The evidence of the crimes was described in the California Court of Appeal's opinion.

> From 1989 until the time of trial, Jane Burleson worked as a Deputy Public Defender in Solano County. Before she joined the Solano County Public Defender's Office, she practiced law in Contra Costa County. Jane met Burleson in October 1985, when he was incarcerated in state prison. They developed a relationship and were married in April 1987.

I. Uncharged Domestic Violence Incidents

> Jane was permitted to have unsupervised conjugal visits with Burleson in the prisons. During one such visit in 1990 or 1991, as they were beginning to have sexual Burleson became angry. He jumped up, told Jane she was the "worst lay he ever **[*2]** had," and complained she did not do what he wanted or care how he felt. Burleson then made Jane "turn over on the bed, " and he beat her on the buttocks, back and thigh with one of her shoes. Later, still angry with Jane, Burleson took a serrated bread knife from the visiting room's kitchen and held it to her throat. Jane screamed but stopped when Burleson told her to "shut the fuck up." Jane did not report the incident because she did not want Burleson to be disciplined by prison authorities or prosecuted, and she feared he would retaliate. He also apologized afterward, telling Jane "he wouldn't have to do those things" if she would listen, pay attention, be "a good wife," and obey him.
>
> Burleson was released from prison in July 1993 and came to live at Jane's house. He did not work, and the couple lived on Jane's salary. Around this time, Jane's friends and colleagues noticed a change in her physical appearance and personality. Whereas she had been outgoing and effective as an attorney, she became progressively more withdrawn and distracted. She sometimes came to work with bruises, or wearing excessive makeup and dark sunglasses, or walking very gingerly, as if she were in pain. Although **[*3]** she denied it at the time, Jane's coworkers believed Burleson had been beating her.
>
> At trial, Jane testified violent episodes occurred "very regularly" after Burleson moved in with her. Once, when they were having a conversation, he said, "get off me" and pushed Jane into a wall. He then dragged her into the bedroom and slapped her face. In September 1993, shortly after Burleson's release from prison, Jane came to an office birthday party displaying signs of serious injuries. She had very obvious bruising on her face and had difficulty walking, sitting and standing. Her breathing was labored and she appeared to be in great pain, especially in her rib area. Upon seeing her condition, Jane's colleague Peter Foor, now a judge of the Solano County Superior Court, insisted on taking her to a hospital. Jane confided to Foor that her husband had beaten her severely, but she told hospital personnel she had fallen down and hit her side. Jane testified she did not tell the doctor the truth because she feared Burleson would be sent back to prison or would be angrier with her.

On October 9, 1993, Jane and Burleson drove to a cabin near the town of Chester, in Plumas County, to begin a planned three-week **[*4]** vacation together. Burleson had been complaining of pain in his shoulder. He "self-medicated" with methamphetamine and marijuana and frequently asked Jane to massage the area. The morning after they arrived at the cabin, while they were having coffee in bed, Burleson asked Jane for a massage. She agreed, but took a couple sips of coffee before she began massaging him. Burleson "became furious." He said, "When I want you to do something, I want you to do it now," and he hit Jane repeatedly in her shoulder, chest and head. After Burleson ordered her to put ice on her swelling face, Jane did so and then resumed massaging his shoulder. Later that night, Burleson asked for oral sex but became displeased at how Jane performed it. He grabbed her by the hair, pulled her head back, and hit her so hard she saw stars. Jane recalled saying, "Gaylin, you broke my face." The blow re-chipped a tooth that had previously been repaired. Burleson continued to punch Jane in her head and upper body, causing severe facial swelling, black eyes, and drainage from one of Jane's ears. Later, Burleson alternated between telling Jane he was sorry and saying she "had it coming."

Jane's injuries were too noticeable **[*5]** for them to leave the cabin the next day (a Monday). On Tuesday, Jane complained of pain and began vomiting, but Burleson insisted she stop because there was "nothing wrong" with her. He continued to use methamphetamine and grew angry with Jane again, saying she "wasn't a good wife, . . . wasn't listening to him, . . . wasn't cooking the way he wanted . . . [and] . . . wasn't showing him that [she] loved him." While yelling at her, Burleson punched, slapped, poked and kicked Jane. He eventually picked up a kitchen utility knife with an eight-to-ten-inch blade. While standing in front of Jane, Burleson tossed the knife from one hand to the other and said that while he was in prison he had fantasized about killing her. He held the knife to Jane's neck but did not actually cut her. Jane testified she felt she could not run away or otherwise protect herself in that situation.

The week in Plumas County continued with more violent incidents. One morning, as they drove down a muddy trail, Burleson told Jane "he could kill [her] and throw [her] anywhere in that county and nobody would ever find [her]." During a drive on Thursday, Burleson pulled off the road and began ranting at Jane, saying **[*6]** he was trying to save their marriage and insisting they "wouldn't have these problems" if she would listen and pay attention and "be a good wife to him . . . . " While they sat in the truck, Burleson punched Jane several times in the arm. He then told her to get out of the truck and walk with him into the woods. Jane did not want to go, thinking Burleson would kill her, but she followed him because she was afraid to disobey. Burleson eventually ordered her to sit on a log when they were in a secluded area in the woods. He paced in front of Jane and asked if she understood what it felt like to be "totally alone." He said, "That is how you make me feel." Then, he knelt in front of Jane, looked in her eyes and said, "This is finality." Jane thought Burleson was about to kill her, but he eventually rose and asked, "Do you want to save this marriage?" When Jane said she did, they returned to the truck. As they drove back to the cabin, Burleson reminded Jane, "I could kill you and drop you anywhere. Nobody would find you."

On Friday, Burleson again complained of pain in his shoulder and continued using methamphetamine. He told Jane he would want oral sex that night and warned her he would **[*7]** kill her if he did not like the way she performed it. He beat Jane severely that day. At one point, Burleson forced Jane to kneel before him while he tossed the kitchen knife back and forth. He then presented the knife to Jane, ordering her to take it and telling her, "You could kill me." Fearing Burleson was trying to trick her, and would disarm her and kill her if she obeyed, Jane refused to take the knife. After this incident, Burleson grew withdrawn. Calling Jane a "hostage," he refused to take her home. That night, he told her he would kill her if

she did not perform oral sex to his liking. Jane believed he truly intended to kill her, so she ran away from the cabin, wearing only a T-shirt, underwear and moccasins, while Burleson waited for her in the bedroom. She got lost in the dark and rain, but eventually reached a motor home. The occupants let her in, gave her some pants, and drove her to a hotel in town.

Jane did not call the police because she feared Burleson would be arrested for a parole violation, which she knew could send him back to prison for only one year, and she feared what he might do to her when he was released. Part of her also did not want Burleson to have to **[*8]** go back to prison at all. Instead, she called some friends. Jane's friend Vicki Cordova and her husband drove up to the hotel to pick up Jane. Jane was wet, muddy and badly bruised, with messy hair and two black eyes. After determining Burleson had left the cabin, Jane retrieved her belongings and rode with the Cordovas back to the Bay Area. Upon their return, Vicki Cordova photographed Jane's injuries. Jane later called Burleson to tell him she was safe and had not reported the incident to police or parole authorities. He expressed remorse and begged Jane to come back, crying and promising he would never hit her again. Jane believed him and persuaded Abe Cordova to drive her back to her home in Martinez. When Jane returned home and talked with Burleson, he said he "[had] to take that promise back" about not hitting her, but she could avoid future beatings by listening and "being a good wife."

The couple then drove to Monterey County to continue their vacation. One night, Burleson's back hurt, and he asked Jane to jump on his back. She hesitated, afraid of hurting him, and Burleson became angry because she did not obey him. He pushed Jane, punched her in the arm and chest, and dragged **[*9]** her out of bed by her hair. Holding her bruised face up to a mirror, Burleson forced her to look at herself and asked, "Would you want to fuck that?" After a stop in Carmel, the couple took a public tour of Hearst Castle in San Simeon. When they were surrounded by people, Jane told Burleson she had decided to leave him. However, Burleson convinced her to get into the truck with him to drive back home together.

When Jane returned to work, she confided in coworker Harry ("Ike") Isnor. In Isnor's presence, she tape-recorded a long narrative describing the "nightmare" events in Plumas and Monterey Counties. Jane testified she had become increasingly afraid Burleson would kill her, and she wanted people to know what had happened if she died. Later in November, when Burleson became angry about Jane's plan to have her parents visit on Thanksgiving, Jane contacted his parole officer, Joseph Kimmel, who arrested Burleson. Jane had not wanted Burleson to be arrested, and she feared he would become violent when he was released from custody. She therefore told Kimmel she was not afraid of Burleson and nothing had happened between them in Plumas County. Jane repeated this story at Burleson's parole **[*10]** revocation hearing. At the hearing, Jane testified her injuries resulted from a car accident. At trial, Jane described the accident in which Burleson backed his truck into her car, but she said she was nowhere near the car when it happened.

After Burleson was released from custody, the abuse continued. He punched Jane in the face when he misunderstood her reaction to his Valentine's Day present. He then began hitting Jane on a regular basis, about once every two weeks. Finally, one night in September 1994 when Burleson appeared in an especially dangerous mood, Jane fled the house, taking nothing but her purse and car. Jane moved into an apartment. She did not tell Burleson where she was living at first, but did give him her phone number. Eventually, Jane revealed her new address to Burleson and agreed to spend weekends at home with him. Their relationship proceeded well at first, but shortly before Christmas Burleson hit Jane, giving her a black eye. Later that month, when Jane was in the middle of defending a client in a murder trial, Burleson beat her "very, very severely," causing black eyes, bruised and swollen arms and a bruised chest. Her injuries were so severe that she had to **[*11]** seek

medical attention and could not return to the trial for a week. Jane told the doctor she had slipped while walking on a dock to a houseboat. Slowly, at Burleson's insistence, Jane moved back into the house with him.

II. Facts Relating to Charged Offenses

One Saturday in late January 1995, Jane spent the day at a continuing education seminar in Sacramento. When she returned that evening, Burleson was in a sullen mood. Burleson had a long telephone conversation with his friend Butch Wright and, afterward, became very angry with Jane, accusing her of patronizing Wright and his wife. During this rant, Burleson approached Jane and slapped her so hard she rolled backwards in her chair and hit her head against the wall. He then held a paring knife under Jane's eye and said, "I want you to tell me who you been fucking." If she did not, Burleson threatened to run the knife into her brain. Although she was very frightened, Jane responded he would have to do it because she had nothing to tell him. Burleson eventually put the knife down but remained angry. He ordered Jane to finish her drink and then drink two more glasses full of straight vodka. After she did so, he ordered her to call Wright **[*12]** and apologize for treating him with disrespect. He then made Jane call her parents and tell them she had lied to them and been irresponsible with money and that Burleson had been "a big assistance to [her] financially while he was in prison." After the phone calls, Burleson forced her to take a walk, have a cold shower and go to bed.

About 15 minutes later, Burleson came into the bedroom yelling that Jane's father did not treat him with appropriate respect. He left again, but soon returned holding a butcher knife. He leaned across the bed and grabbed Jane by the throat, pressing the tip of the knife against the right side of her chest. Inches from Jane's face, Burleson looked into her eyes and said, "'I'm going to kill you.' " Jane was convinced she was about to die. Burleson then raised the knife high and brought it down three inches away from her thigh, embedding it deep in the mattress. He removed the knife and said, "I could have killed you," then got into bed and went to sleep.

The next morning, although Jane had bruises on her neck where Burleson had choked her, they went to a friend's Super Bowl party. To hide the bruises, Jane wore heavy makeup and a high-necked blouse. While **[*13]** driving to the party, Jane and Burleson talked about the previous night. Burleson apologized and said he loved her. Jane said she loved Burleson too, but secretly planned to leave him once the weekend was over. On Monday morning, Jane called Burleson from the office and told him she was leaving him. She could hear him breaking things in the house. The next day, after she learned Burleson had left, Jane returned to the house with a police escort. The house was clean, but most of Burleson's clothes were gone, as was the mattress. Jane hired a locksmith to change the locks on the house and later moved back in. At Jane's request, private investigator Paul Fait moved into the house as well, to "make sure [she] was safe."

Burleson first called Jane to discuss money. He told her he had obtained approximately $ 18,000 in cash advances from their credit cards. He planned to move away and "start over," and he promised to help pay back the money after he "got himself established." In Burleson's next phone call, he told Jane he would cooperate in filing for divorce. Although these initial calls were businesslike, they grew progressively more threatening. Now living in South Dakota, Burleson began **[*14]** phoning Jane at all hours of the day and night. He threatened to kill Jane in extremely gruesome ways and sometimes threatened to kill and dismember her parents. Knowing Burleson had a prior murder conviction and a history of violence,

Jane believed he intended to carry out his threats, and she feared for her life. However, she did not immediately report the threatening phone calls to the police. Instead, at a coworker's suggestion, Jane began tape-recording the calls. Based on the frequency of the calls and the violence of Burleson's threats, Jane believed he would return and kill her. The tapes were made, she explained at trial, so people would know what had happened if she died. Sometimes Jane recorded the entire telephone conversation; other times she recorded only the threatening portions. She gave each completed tape to Paul Fait for safekeeping and to avoid any claim she had "doctored" the recording. [1] After one particularly threatening call, Jane became convinced "it was only a matter of time" before he killed her or paid someone to kill her. She therefore typed a letter stating that, if she were killed, she did not want her killer to receive the death penalty. She kept this **[*15]** letter in her desk at work and eventually gave it to her divorce lawyer. Finally, Jane contacted Burleson's parole officer and the police. They immediate) obtained a "'no bail'" arrest warrant and eventually located Burleson (in South Dakota by tracing his telephone calls to Jane.

Based on the events in January through March of 1995, Burleson was charged with inflicting corporal injury on a spouse (Pen. Code, § 273.5), two counts of assault with a deadly weapon or by force likely to produce reat bodily injury (Pen. Code, § 245, subd. (a)(1)), stalking (Pen. Code, § 646.9, subd. (a)), and making terrorist threats (Pen. Code, § 422). The information reats on also alleged enhancements for personal use of a knife and three prior serious felony convictions (for a murder and two robberies).

FOOTNOTES

1

The record on appeal includes transcripts of 12 tapes, recorded March 7, 1995 through March 16, 1995. . . . Suffice it to say these pages are filled with vulgar insults, obscenities and gruesome threats uttered by Burleson--primarily against Jane.

III. Defense Case

Burleson represented himself at trial. He called the emergency room physician who examined Jane in 1993, when Peter Foor took her to the hospital. **[*16]** The doctor diagnosed a rib cage contusion based on Jane's report that she had fallen against an object, but there were no rib fractures and he did not observe swelling or bruising. Burleson also called an accident reconstruction expert, who reenacted the collision that occurred when Burleson backed his truck into Jane's parked car. He testified that the injuries depicted in Vicki Cordova's photographs of Jane could have been caused by this accident if Jane were sitting in or exiting her car when it was struck. A forensic pathologist drew the same conclusion, based on her review of the accident reconstruction expert's report and Cordova's photographs. She also testified the bruises photographed appeared to be older than Jane had reported. Another witness, the brother of Burleson's friend, testified that Jane told him she was injured when Burleson backed his truck into her car. Burleson also called three witnesses from the Super Bowl party in January 1995. Each said they had observed no sign that Jane was injured or had been assaulted by Burleson the previous night.

> With regard to the tape-recorded phone calls, audiotape expert Fausto Poza testified that magnetic markers on some of the **[*17]** tapes indicated they were not produced by Jane's machine. Poza also believed some portions of the tapes had been recorded over, and he noted interruptions in the taping process. Defense expert Samuel Benson, M.D., also testified about the tape-recorded phone calls. A psychiatrist with experience treating prison inmates, Dr. Benson explained prison inmates often use vulgar, hostile language to communicate with each other. Their threats are usually not meant to be taken seriously; rather, inmates often use threats and intimidation as a coping mechanism to avoid true confrontation. According to Dr. Benson, Burleson exhibits borderline narcissistic, depressive and antisocial personality traits, which are exacerbated when he is intoxicated. He believed the threatening phone calls were not a prelude to violence, but expressions of Burleson's feelings of anger and fear of abandonment, especially given Burleson's belief that Jane was sleeping with the investigator who was staying in the house. Dr. Benson also testified Jane did not fit the profile of a typical battered woman. On the contrary, she struck Dr. Benson as the one who was "in charge" of the relationship. Dr. Benson thought the tape-recorded **[*18]** conversations showed evidence that Jane could "manipulate" Burleson.
>
> In its rebuttal case, the prosecution called the original district attorney assigned to the case and Jane's divorce attorney. Each testified that, contrary to insinuations made by the defense, Jane had never expressed a desire to use Burleson's criminal prosecution as leverage to obtain a more favorable divorce settlement.
>
> The jury acquitted Burleson of count one (inflicting corporal injury on a spouse), but found him guilty of the lesser included offense of battery. The jury found Burleson guilty of all other crimes charged and found true the allegations of knife use and prior serious felony convictions. The court sentenced him to a term of 40 years to life in prison, imposed a restitution fine of $ 18,000, and ordered him to pay restitution to Jane in an amount to be determined.

Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *3-18.

B. Case History

On February 10, 2000, Burleson was convicted in a jury trial in Contra Costa County Superior Court of battery, two counts of assault with a deadly weapon and by means likely to cause great bodily injury, one count of making terrorist threats, and one count of stalking. The jury found true the allegations **[*19]** that Burleson had used a knife during the assaults and that he had prior serious convictions for murder and two robberies, see Cal. Penal Code §§ 667(a), 1170.12 (b). He was sentenced to a term of 40 years to life in state prison on April 26, 2000.

Burleson appealed. The California Court of Appeal affirmed the judgment and the California Supreme Court denied his petition for review. Burleson's state habeas petitions were denied.

Burleson then filed his federal petition for a federal writ of habeas corpus. His petition alleged twelve cognizable claims. The court ordered respondent to show cause why the petition should not be granted. Respondent filed an answer and Burleson filed a traverse. (About 18 months after he filed his traverse, Burleson requested a stay so that he could return to state court to exhaust state court remedies for a claim concerning his sentence. In a separate order, the court denies that request.) The matter is now ready for a decision on the merits.

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged conviction

occurred **[*20]** in Contra Costa County, California, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties dispute whether Burleson exhausted his state judicial remedies as to his claim that his sentence was illegal. The court may deny, but not grant, relief on a habeas petition that presents an unexhausted claim. See 28 U.S.C. § 2254(b)(1). The district court can deny an unexhausted claim "only when it is perfectly clear that the applicant does not raise even a colorable federal claim." Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172, 126 S. Ct. 1336, 164 L. Ed. 2d 52 (2006).

STANDARD OF REVIEW

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

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decision but unreasonably **[*22]** applies that principle to the facts of the prisoner's case." Id. at 413. "[A] federal habeas court may nor issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." Id. at 409.

DISCUSSION

Many of Burleson's legal claims relate to certain audiotapes made by his wife, Jane, of telephone conversations between them. The disputes about testing the tapes pertain to examination of the methods Jane used to make the recordings (e.g., starts and stops, over- recordings and erasures) and not whether Burleson actually made the statements on them. Burleson admitted that he made the abusive and threatening statements that were recorded, although he claimed that the tapes had been altered to show what had prompted the outbursts and that Jane was not actually fearful at hearing his lengthy diatribes, see RT 2795, notwithstanding **[*23]** his numerous threats to kill her, her mother and her father as well as his graphic descriptions of how he would kill each of them, see RT 2770-2789. The prosecutor did not contend that the tapes were a continuous recording of the telephone calls; he acknowledged that Jane had recorded only parts of some conversations, sometimes because of equipment problems and

sometimes when the conversations had nothing to do with Burleson's threats. RT 2766.

A. Claims Concerning Assistance of Counsel at Trial Court Level

Burleson contends that the denial of his two Marsden [2] motions against attorney Spencer Strellis violated his rights to due process and to assistance of counsel. Attorney Strellis was the fourth attorney appointed to represent Burleson during the criminal case which took five years to get to trial and eventually was tried with Burleson representing himself. Burleson had filed Marsden motions against his first attorney before Strellis and another attorney after Strellis, but the only Marsden rulings he challenges in his habeas petition are the rulings on his two Marsden motions against attorney Strellis.

FOOTNOTES

2 People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970), requires the California trial court **[*24]** to permit a criminal defendant requesting substitution of counsel to specify the reasons for his request and generally to hold a hearing.

The Sixth Amendment grants criminal defendants who can afford to retain counsel a qualified right to hire counsel of their choice. See Wheat v. United States, 486 U.S. 153, 159, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). A criminal defendant who cannot afford to retain counsel has no right to counsel of his own choosing. See id. Nor is he entitled to an attorney who likes and feels comfortable with him. The Sixth Amendment guarantees effective assistance of counsel, not a "meaningful relationship" between an accused and his counsel. See Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). The essential aim is "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat, 486 U.S. at 159.

Nonetheless, to compel a criminal defendant to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive the defendant of any counsel whatsoever. Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005). "[N]ot every conflict or disagreement **[*25]** between the defendant and counsel implicates Sixth Amendment rights." Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000) (en banc). The denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel and is properly considered in federal habeas. See generally Schell, 218 F.3d at 1024-25. The "ultimate constitutional question" on federal habeas review is whether the state trial court's denial of the Marsden motion "actually violated [the defendant's] constitutional rights in that the conflict between [the defendant] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Schell, 218 F.3d at 1026.

In accord with the dictates of the Sixth Amendment and Marsden, the trial court inquired into Burleson's concerns. See Hudson v. Rushen, 686 F.2d 826, 831 (9th Cir. 1982) (state court conducted adequate hearing when it invited defendant to make a statement and listened to defendant's reasons for wanting new counsel). The trial court made a thorough inquiry into both of Burleson's **[*26]** motions. RT 632-773, 807-844, 1317-1381; see also RT 1542-1573 (Burleson's Marsden presentation regarding Strellis continuing even after he is representing himself).

The first Marsden motion was heard on March 12, 1997. At that hearing, Burleson complained at length about Strellis' performance in the hearing on the motion to suppress the audiotapes Jane had recorded. He also complained, among other things, that Strellis had not done an adequate investigation of the tapes of the telephone conversations, had not arranged for a Battered Woman's Syndrome expert or a medical expert (to possibly testify that Jane's photographed

injuries could be consistent with a car accident) or a psychiatric expert (to possibly testify about Burleson's behavior and intoxication during telephone conversations), and had not investigated witness Paul Fait [3] and his relationship with Jane. Eventually, when Burleson launched into a diatribe about a conspiracy (comprised of his defense attorneys, his divorce attorney, the district attorney and the court) working to put him in prison and protect his ex-wife's career, RT 749-762, defense counsel expressed concern over Burleson's apparent paranoia and moved under **[*27]** Penal Code § 1368 to have his competency to stand trial evaluated. After allowing defense counsel and Burleson a moment to confer -- apparently to figure out whether Burleson had just been engaging in hyperbole -- and when counsel then reiterated his request for a § 1368 evaluation, the court vacated the trial date, suspended the proceedings, and referred Burleson for psychological testing.

FOOTNOTES

3 Although Burleson complained that the attorney did not pursue Paul Fait, the defense investigator had just testified that Fait refused to return telephone calls so they had subpoenaed him.

The Marsden hearing was reconvened on April 25, 1997, after the appointed psychologist found Burleson competent. Burleson again expressed his belief that Strellis was working with the district attorney and court to damage his defense and protect Jane from prosecution. The trial court denied the first Marsden motion on May 1, 1997. The trial court "observed Burleson appeared to view himself as the 'captain' of his defense team. He thus became frustrated when his attorneys and investigators, whom he viewed as 'subordinates,' did not carry out all his orders regarding how the defense should be conducted. The court **[*28]** believed the lack of trust emanated from Burleson's disposition, rather than from any failure by Strellis to provide adequate representation." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *24-25. The trial court postponed the trial date. Although Burleson objected, the trial court found good cause for the postponement based on Strellis' unavailability due to his obligation to try a death penalty case in another county until September 1997 and the court's inability to find another attorney prepared to try the case in the interim. The court set a new trial date of September 15, 1997. In late August 1997, Burleson filed (through specially appointed counsel) an unsuccessful motion to dismiss due to a denial of his speedy trial rights and filed a pro per motion to challenge the trial judge for cause under California Code of Civil Procedure § 170.1. The trial date was later moved to January 1998.

On December 18, 1997, Burleson filed his second Marsden motion against attorney Strellis. He complained that Strellis had not arranged for defense expert Poza to conduct full testing of the audiotapes to show that there were gaps and erasures and other problems with the recordings. Burleson said Strellis was not advocating **[*29]** aggressively enough with regard to certain motions, had not adequately prepared the defense, and was working in Jane's best interests instead of Burleson's. The trial court denied the motion and said that Strellis and his co-counsel Krech appeared prepared for trial that was then more than two weeks away. [4] The trial court determined that the "asserted breakdown in this attorney-client relationship was due solely to Burleson's mindset, i.e., his inability to be satisfied with work performed by anyone else, [and] the court found no grounds for granting Marsden relief." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *27.

FOOTNOTES

4 Strellis did not say that he was trial-ready that day; rather, he said he expected to be ready as of the January 5, 1998 trial date. RT 1353. As the trial court noted , it is commonplace for the majority of trial preparation to take place as the trial date is imminent. RT 1357.

The California Court of Appeal rejected Burleson's claims that the trial court had erred in denying his motions to substitute appointed counsel. The appellate court determined that Burleson's "complaints do not rise to the level of constitutionally inadequate representation, nor do they signal a fundamental breakdown **[*30]** in attorney-client relations." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *29. The court found that Strellis had not been ineffective in preparing for trial, that there was evidence at the first hearing that showed "the defense team had completed a great deal of work in preparing the case for trial," and that Burleson's complaints about the testing of the audiotapes "have questionable support and, at best, amount to a disagreement over trial strategy." 2003 Cal. App. Unpub. LEXIS 2613 at *30-31. The appellate court saw Strellis' decision not to further test the tapes at the time not inadequate in light of the record at the second Marsden hearing, where "Strellis told the court he had retained an expert to testify about the tapes' authenticity, and he admitted he hoped the expert would give him an 'astronomical' estimate for testing (presumably so the defense could rely on this estimate, in limine or on appeal, to argue that the tapes should be excluded). But Strellis explained the defense expert told him 'he would not do the work,' and the other expert who examined the tapes for the defense had reached conclusions that were unfavorable." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *31. [5]

FOOTNOTES

[5] Burleson disputed the attorney's statement that the expert did **[*31]** not want to do the work. As Burleson's own investigator stated at a later hearing, the expert had to be coaxed into doing further work. See RT 1566. The trial court reasonably observed that the investigator's comments demonstrated the expert was at least initially unwilling to do the work. RT 1571.

The state appellate court also rejected Burleson's argument that the Marsden motion should have been granted because Strellis had an existing commitment to represent another client in a death penalty trial. That court found unsupported Burleson's accusation that Strellis concealed this obligation; instead, Strellis advised Burleson and the trial court of the scheduling problem without undue delay once he learned of it. Also, the state court of appeal noted that a trial date in a death penalty case is not set in stone and frequently gets continued. Burleson was not abandoned during Strellis' death penalty case: co-counsel Krech was able to argue several pretrial motions and the defense investigators continued working on the case. [6] That was Strellis' plan, not happenstance.

FOOTNOTES

[6] Burleson asks this court to take judicial notice of the death penalty case file and another state court case file. Petition, **[*32]** pp. 158, 238 n.14. The requests are denied. Judicial notice is not a way to get a court to do evidence-gathering and photocopying for a litigant. This court does not have ready access to other courts files, and expects a party to place in the record for this case everything he wants this court to consider. (This court has, however, reviewed Burleson's Exhibits H-J that came with his petition and are copies of documents from the Harris case.) Also, a party asking this court to take judicial notice needs to explain what he wants this court to judicially notice and the purpose for doing so.

After rejecting the arguments that there were inadequacies in Strellis' performance, the appellate court turned to the real problem: Burleson's attitude. The state appellate court rejected the argument that there was an irreconcilable breakdown in the relationship between attorney and client requiring replacement counsel. The client's distrust alone is not sufficient to require substitute appointed counsel and a trial court is not required to conclude there is an irreconcilable conflict "if the defendant has not made a sustained good faith effort to work out

any disagreements with counsel and has not **[*33]** given counsel a fair opportunity to demonstrate trustworthiness." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *33 (citation omitted). "The trial court did not abuse its discretion in determining Burleson had not made a sustained good faith effort to work with Strellis. The record of Burleson's Marsden motions against Strellis and earlier counsel amply supports the court's finding that Burleson became dissatisfied with any attorney who disagreed with him on strategic matters." 2003 Cal. App. Unpub. LEXIS 2613 at *34. The court of appeal concluded that, "to the extent there was a breakdown in trust and communication between this attorney and client, the record suggests the breakdown emanated entirely from Burleson's truculent attitude." 2003 Cal. App. Unpub. LEXIS 2613 at *25.

This court reaches the same conclusion. Burleson was extremely demanding of attorneys, and refused to yield to any lawyer's judgment, even on matters of trial strategy, if he disagreed with it. Burleson's unwillingness to let the lawyer make tactical determinations was not a legitimate reason to compel appointment of new counsel, see Schell v. Witek, 218 F.3d at 1026 & n.8, especially when there was no reason at all to expect that the same problem would not arise again with new counsel. **[*34]** Burleson's desire to micro-manage his case and to override his attorney's strategic decisions was evident repeatedly at the Marsden hearings. One example illustrates the degree to which he wanted to maintain control of everything: he was annoyed that counsel refused to pursue perjury charges against Jane and did not intend to accuse her at trial of perjuring herself. Even calling her a liar apparently wouldn't have been enough for Burleson. RT 1348, 1361. [7]

FOOTNOTES

7 Burleson fails to appreciate that if there was a genuine perjury concern for Jane, his attorney's ability to develop that at trial was quite limited. A judge often takes action when a witness has a perjury concern. See, e.g., Webb v. Texas, 409 U.S. 95, 98, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972). Burleson was irritated about his attorney's failure to commit to push Jane on this point: "I asked him if he was going to admonish my wife whenever she gets ready to commit perjury on the stand. He said, No. [P] I'm not going to let him do it. I'm not going to let him take control of this case and flush me down the toilet." RT 1348. Many of Burleson's comments reflected his belief that his appointed counsel's job was not just to obtain an acquittal for Burleson but also **[*35]** to crush his ex-wife. Not only is the latter not a legitimate attorney task, it is an extremely risky ploy. There is a substantial downside potential in verbally pummeling a domestic violence complainant in the courtroom, especially in a case where there are literally hours of recorded conversations in which the defendant has verbally berated and humiliated that same woman.

Burleson also had filed a Marsden motion against his first attorney, William Egan, on December 4, 1995, and one of the reasons for that motion was his irritation that Egan wasn't developing a case for a perjury prosecution of Jane. See CT 280. Egan's explanation about the tactical considerations relevant to the perjury issue apparently did nothing to abate Burleson's irritation. See CT 297. Burleson also made clear at the Marsden hearing for Egan that he was double-checking Egan's legal reasoning. See CT 283.

The state court's determinations that counsel was performing adequately and that no irreconcilable conflict existed were not unreasonable. In light of the information provided at the hearings, it was not unreasonable for the trial court to think that Burleson's frustration with any appointed counsel's exercise **[*36]** of his professional judgment would continue with new counsel and therefore did not warrant appointing a fifth attorney to represent Burleson. Appointment of new counsel wouldn't end the frustration that was more a product of Burleson's truculent attitude and controlling demeanor rather than counsel's behavior. Burleson was on this fourth attorney and admitted he had started making a record for appeal in anticipation of a Marsden problem within a few months of Strellis' initial appointment, RT 742, indicating his predisposition to find fault with counsel. And Burleson was accusing the trial judge of

"intentionally trying to walk on me and prevent me from presenting the defense available to me." RT 761; see RT 742, 746, suggesting that he would see any attorney appointed by that judge to be part of a plot to prevent him from presenting a defense. Burleson also had made up his mind that an attorney from the state defender's office had to be appointed for him and was irritated at one superior court judge's refusal to bypass the conflicts panel list; indeed, that caused him to file a Faretta motion. See CT 338.

Bearing in mind that the "purpose of providing assistance of counsel 'is simply **[*37]** to ensure that criminal defendants receive a fair trial,'" Wheat, 486 U.S. at 159, this court sees no evidence that purpose went unfulfilled in this case or that a Sixth Amendment violation occurred. Burleson has not shown that counsel provided ineffective assistance on any particular matter. And he has not shown that there was an impediment that resulted in an attorney-client relationship that fell short of that required by the Sixth Amendment. The California Court of Appeal's rejection of Burleson's claim was neither contrary to nor an unreasonable application of clearly established federal law as set forth by the U.S. Supreme Court. Burleson is not entitled to the writ on this claim.

B. Claims Concerning Assistance of Appellate Counsel

Burleson contends that he received ineffective assistance of counsel on appeal in that counsel failed to raise five allegedly meritorious issues that Burleson has identified and failed to effectively argue several of the allegedly meritorious issues that he did include in the appellant's opening brief.

The California Court of Appeal rejected the argument that appellate counsel was deficient in his appellate work:

> As if to prove his inability to be satisfied **[*38]** with any attorney, Burleson has filed a motion in this court seeking substitution of his appointed appellate counsel. . . . Burleson claims his appellate counsel's performance is constitutionally deficient because the attorney (1) failed to raise all arguably meritorious issues on appeal, (2) failed to perfect the appeal, and (3) failed to communicate with him sufficiently. We deny the motion.
>
> With regard to the first complaint, although counsel raises 13 issues in his 115-page opening brief, Burleson insists he should have raised an additional 13 issues as grounds for reversal. First, we must correct Burleson's apparent misimpression of the role of appellate counsel. Appellate counsel has no duty to raise every nonfrivolous issue suggested by the client. (Jones v. Barnes (1983) 463 U.S. 745, 751-754, 103 S. Ct. 3308, 77 L. Ed. 2d 987; see also People v. Johnson (1981) 123 Cal. App. 3d 106, 176 Cal. Rptr. 390 [appellate counsel need not raise a potentially arguable" issue if, in counsels opinion, the issue is unmeritorious].) As the United States Supreme Court has observed, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, **[*39]** or at most on a few key issues." (Jones v. Barnes, supra, at pp. 751-52.) With these principles in mind, we have reviewed the alleged errors described in Burleson's Marsden motion and conclude none appears to be "arguably meritorious" in that it has a "reasonable potential for success" and, if successful, would result in a reversal or a modification of the judgment.

Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *36-38. The state court of appeal listed the thirteen issues that Burleson faulted appellate counsel for not raising and explained briefly why each failed. See 2003 Cal. App. Unpub. LEXIS 2613 at *38 n.8. The court also rejected as contrary to the evidence the arguments that counsel had failed to include parts of the record and had not communicated with Burleson. 2003 Cal. App. Unpub. LEXIS 2613 at *39.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 391-405, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Claims of ineffective assistance of appellate counsel are evaluated under the Strickland standard, i. e., a defendant must show that counsel's advice fell below an objective standard of reasonableness and that there is a reasonable probability that, but for **[*40]** counsel's unprofessional errors, he would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1433-34 & n.9 (9th Cir. 1989) (citing Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. See Jones v. Barnes, 463 U.S. 745, 751-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); Miller, 882 F.2d at 1434 n.10. "The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller, 882 F.2d at 1434. See also Jones, 463 U.S. at 751-52. As the court in Miller explained:

> Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point - "just in case" - is likely to serve her client less effectively than one who concentrates solely on the strong arguments.

882 F.2d at 1434.

The objective reasonableness of counsel's failure to pursue the claims on appeal depends upon the merits of the claims. As mentioned by **[*41]** the California Court of Appeal in its footnote, the various claims would have failed for the reasons discussed therein. Therefore, it was not objectively unreasonable for appellate counsel to not pursue them. See Miller, 882 F.2d at 1434. For similar reasons, there was no prejudice. There is not a reasonable probability that, but for counsel's failure to raise the claims, Burleson would have prevailed on appeal. See Miller, 882 F.2d at 1434, n.9 (citing Strickland, 466 U.S. at 688, 694).

Not only were the claims not meritorious, but the inclusion of them would have added dozens of pages to an appellate brief that was already about twice as long as normally permitted under California Rule of Court 8.360. In his federal habeas petition, Burleson has trimmed the number -- from 13 down to 5 -- of additional claims he alleges appellate counsel should have included in the opening brief but still spent 50+ pages arguing just those five claims. [8] Having already submitted a 115-page brief raising 13 issues, appellate counsel reasonably and wisely decided not to submit a 26- or even an 18-issue brief that probably would have been about 200 pages long. Although courts have much higher tolerance **[*42]** levels for briefs written by unrepresented litigants, an appellate court would be extremely dismayed to receive a 200-page brief from a lawyer in a case of this nature. Skilled attorneys prioritize issues, raising the strongest rather than all issues. Doing so does not amount to ineffective assistance of counsel.

FOOTNOTES

[8] This court was dismayed by the frequency and extent of the distortions of the record by Burleson. Examples: (1) the discussion at page 198:2-5 does not accurately reflect Judge Sepulveda's response to his letter in light of the letter he wrote, CT 359-360, 367; see also CT 343; (2) the assertion that "there was a constant barrage of pressure," Petition, p. 198, is wholly unsupported by the citation to RT 99-100; (3) the recitation at page 202:21-22 is fabricated; (4) the discussion at page 204:1-3 misleadingly suggests testimony regarding the audiotapes pertains to the videotape that is the subject of that part of the federal habeas petition. Successful advocates know that distortions/misrepresentations of the record have a spill-over effect, in that they diminish the overall persuasive power of the brief. While Burleson may believe a misstatement has no consequence other **[*43]** than that the reader does not accept that particular proposition, skilled appellate counsel know better. Appellate counsel did not fail to provide effective assistance in failing to include these kinds of

distortions in his appellate brief.

This court also finds no merit in Burleson's claim that appellate counsel did not "effectively argue" several meritorious issues that he did include in the appellant's opening brief. Petition, p. 217. Burleson's argument is made with the benefit of having read the California Court of Appeal's decision, but that decision obviously was not in existence when counsel filed the appellant's opening brief. Counsel's conduct must be evaluated for purposes of the performance standard of Strickland as of the time of counsel's conduct, Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994), not with the hindsight of knowing how the appellate court analyzed the claims that allegedly could have been better argued. Further, appellate counsel's decision how to structure an argument is within a trained appellate lawyer's expertise. Burleson has not shown that counsel made legally incorrect arguments, but only that he would have structured the arguments differently or **[*44]** argued additional authority. There was neither deficient performance nor prejudice resulting from counsel's failure to argue the points he did raise in the manner recommended by Burleson.

C. Restriction On Standby Counsel's Communication With Burleson

Burleson claims that the trial court improperly prohibited standby counsel "from discussing the case with him and giving him legal advice." Petition, p. 271. This allegedly denied him his rights to due process, assistance of counsel, effective self-representation and equal protection of the law.

After the court denied Burleson's second Marsden motion against attorney Strellis, Burleson exercised his right to represent himself. See Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Standby counsel was appointed so that counsel could step in and the trial could go forward if Burleson was unable to continue representing himself for any reason. The attorneys appointed as standby counsel, Messrs. Strellis and Krech, previously had been Burleson's defense attorneys and had been formally relieved of their obligation to represent him. The trial court explained to Burleson that standby counsel "'is not an advisory counsel. He doesn't give legal advice of **[*45]** any kind.'" Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *40. The trial court denied Burleson's request for appointment of advisory counsel.

Burleson's communications with standby counsel came to the trial court's attention when Burleson complained that the district attorney improperly admonished him and standby counsel to stop talking. Burleson told the court that his counsel was comforting him. "I wasn't seeking advice, nor was I receiving legal advice. He wasn't offering any legal opinion whatsoever." RT 4407. After Burleson received clarification that standby counsel had been ordered to decline to provide legal advice because he was no longer Burleson's attorney, Burleson told the court, "I understand your order. And I am telling you that was not occurring. I was not seeking legal advice, nor was he offering legal advice." RT 4409. Burleson asserted he was only seeking comfort and company from another human being: standby counsel "was trying to comfort me by not being a sore thumb in this courtroom, an isolated individual who has no one to talk to. It makes me feel guilty. I have no friends. Nobody." RT 4412. Burleson's claim on appeal also was based on his insistence that he was not seeking legal **[*46]** advice. In his federal petition, Burleson's argument is based on his alleged right to receive the legal advice he told the state courts he was not seeking.

The state court of appeal rejected Burleson's contention that the restrictions on standby counsel undermined his right to effective self-representation. The state appellate court ruled that Burleson had no constitutional right to the assistance of counsel once he chose to represent himself. Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *40 (citing McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). The court further determined that it was proper to appoint standby counsel for the sole purpose of having professional counsel prepared to assume the defense if Burleson became unable to continue representing himself. Id.

(citing Locks v. Sumner, 703 F.2d 403, 407 n.3). The state court of appeal's rejection of Burleson's claim was not contrary to or an unreasonable application of clearly established federal law as set forth by the Supreme Court. [9]

FOOTNOTES

[9] The court stated that Burleson had not identified an actual order prohibiting standby counsel from rendering legal advice. This was incorrect: the trial court had confirmed on the record that, while he did not think he could **[*47]** prevent Burleson from seeking legal advice from anybody, "I can give directions to an officer of the court, and I have to Mr. Krech on several occasions and Mr. Strellis on other occasions, that they are not to be giving you legal advice." RT 4415; see also Resp. Exh. 3 (Appellant's Opening Brief), p. 79. Although the state appellate court's finding there was no order prohibiting the giving of legal advice by standby counsel was an erroneous factual determination, that mistake did not affect the rest of its analysis because the rest of state court of appeal's legal analysis presumed that there was such an order and implicitly found that such an order would have been proper.

There is no federal constitutional right to advisory counsel or to standby counsel. [10] A criminal defendant can be represented by counsel or he can represent himself, but the law does not require that he be allowed to do both. Although the Supreme Court has noted that it may be wise to appoint standby counsel for a defendant who wishes to waive representation by counsel, a defendant has no constitutional right "to represent himself and have access to 'advisory' or 'consultative' counsel at trial." United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994). **[*48]** See generally Kane v. Garcia Espitia, 546 U.S. 9, 126 S. Ct. 407, 163 L. Ed. 2d 10 (2005) (Faretta does not clearly establish a right to law library access or any other specific legal aid that must be afforded to a criminal defendant who has chosen to represent himself). The court can appoint standby counsel without denying the right to self-representation. See McKaskle, 465 U.S. at 176; see also United States v. George, 85 F.3d 1433, 1439 (9th Cir. 1996) (appointment of co-counsel or advisory counsel). *McKaskle* concerns how much interference must be tolerated from standby counsel rather than the amount of help he must be allowed to provide and therefore provides no helpful support to Burleson's position The fact that a court may appoint standby or advisory counsel does not mean that it must do so.

FOOTNOTES

[10] Standby counsel and advisory counsel are not the same thing. Standby counsel typically is appointed, as here, so that there is an attorney ready and able to step in to continue presenting the defense if the Faretta defendant becomes unable to continue representing himself. Advisory counsel typically may be appointed to provide advice to a criminal defendant on legal or procedural matters. Neither is constitutionally required.

There **[*49]** was no violation of Burleson's Sixth or Fourteenth Amendment rights in the restriction on his communication with standby counsel. Because Burleson had no right to advisory counsel, the trial court's order prohibiting standby counsel from giving legal advice did not violate Burleson's constitutional rights. Despite Burleson's argument to the contrary, there was no ongoing attorney-client relationship when standby counsel was appointed and therefore no interference with it. The attorney-client relationship had ended when counsel earlier was relieved as defense counsel. Because standby counsel was Burleson's former attorney, counsel had certain continuing duties as he would to any former client, such as keeping confidential previously learned client confidences. The very nature of standby counsel is such that the attorney is unable to perform most of the basic attorney functions because doing so (e.g., acting as a zealous advocate for his client) is fundamentally inconsistent with a defendant's exercise of his Faretta right. There was no ongoing attorney-client relationship and there was no

representation by counsel under the Sixth Amendment during the time Burleson was representing himself. **[*50]** He cannot assert a claim based on any interference in the non-relationship. "[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Faretta, 422 U.S. at 835 n.46.

The appointment of standby counsel was for the benefit of the administration of justice, not to help Burleson. This was a reasonable decision, especially under the circumstances where the defendant had already gone through several defense attorneys and had changed course on the self-representation/representation by counsel issue. See Petition, pp. 16-25 (procedural history during a two-year period included four Marsden motions, as well as a Faretta motion, followed by a request for appointment of counsel, followed later by another Faretta motion). If Burleson became unable to continue to represent himself, the trial could go forward and the needless consumption of resources and delay that would result from a mistrial could be avoided.

Burleson's equal protection argument also has no merit. Burleson claims he was treated differently based on the exercise of his **[*51]** Faretta right but fails to show he was treated differently from anyone similarly situated. He has not shown that standby counsel even exists in represented cases, let alone that defense counsel or represented clients can obtain legal advice from such counsel. Burleson was not discriminated against based on the exercise of his Farett right. The court's order was only that the standby counsel not provide him legal advice and, as shown above, he did not have a right to legal advice from counsel while representing himself. If he was seeking companionship (as he represented in state court) he had other people to turn to and, in any event, has not shown that the deprivation of companionship he calls a First Amendment violation, would support habeas relief. On the other hand, if he was seeking legal advice, he had no right to it from these two particular persons who were only present by court order and as officers of the court. He was not precluded from consulting with attorneys other than the two standby counsel. Moreover, the court had not precluded all communications between Burleson and his former attorneys; the trial court indicated it would consider an exception to the ruling if Burleson **[*52]** had a particular need to talk to standby counsel based on counsel's former representation of Burleson. See RT 4409-4410. Burleson's ability to communicate with his former counsel qua former counsel was still potentially available, if he had only asked the trial court.

Finally, even if Burleson was correct on the law and had a right to receive legal advice from standby counsel, it is doubtful that he would be entitled to habeas relief on this claim. Whether viewed as a claim for which state court remedies have not been exhausted or, more appropriately, a litigant playing fast and loose with the facts, there is a problem here in that Burleson has changed his story. He explicitly denied to the trial court that he was seeking legal advice about the case from counsel while here he insists he needed just that legal advice.

D. Claim That Sentence Was Not Allowed Under State Law

Burleson argues that the trial court exceeded its jurisdiction by sentencing him under California Penal Code § 1170.12(c)(2)(A) and appellate counsel was ineffective for failing to raise the issue. Petition, p. 231. His sentence was enhanced based on prior convictions that had been obtained on plea agreements entered **[*53]** before the Three Strikes law existed. He argues that using these old convictions to enhance the current sentence was "an unlawful impairment/ violation/breach of contract and offends Due Process under the 14th Amendment to the Constitution of the United States by violating the Doctrine of Equitable Estopp[el]." Petition, p. 232. Respondent disputes that the claim is exhausted.

The use of the old convictions did not violate any federal constitutional right Burleson possessed. Due process concerns of fundamental fairness require that a prosecutor keep the promises upon which a defendant relies in entering into a plea agreement. See Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Johnson v. Lumpkin, 769 F.2d 630, 633 (9th Cir. 1985). Claims of a breached plea agreement are analyzed according to contract law standards of interpretation, such that a court looks to what was reasonably

understood by the parties to be the terms of the agreement and whether or not those terms were fulfilled. See United States v. Kamer, 781 F.2d 1380, 1387 (9th Cir. 1986). California contracts, including plea bargains, are "'deemed to incorporate and contemplate not only the existing law but the reserve power **[*54]** of the state to amend the law or enact additional laws.'" People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (Cal. Ct. App. 2004) (citation omitted). Burleson's arguments that rely on the contractual nature of the old plea agreements fail because he concedes that the possibility of future use of the convictions was not part of the plea agreements. Petition, p. 233. Because of the absence of any agreement that the convictions could not be used, there is no contract term to enforce. The fact that the trial courts that accepted petitioner's guilty pleas in the earlier proceedings did not warn him of the possibility of future enhancements under a law that did not yet exist did not violate his constitutional rights. See United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990). (defendant need not be informed of the possibility of a future sentence enhancement).

There is no merit to Burleson's claim that the use of the old convictions violated state law or any federal constitutional right he possessed. It follows, also, that appellate counsel's failure to present this unmeritorious argument on appeal did not amount to ineffective assistance of counsel. The claims are not even colorable and **[*55]** therefore may be rejected on the merits even if state court remedies were not exhausted for them.

E. Evidence Of Prior Acts Of Domestic Violence

Claims VI and VII in the petition concern the use of evidence of prior acts of domestic violence. Burleson contends that the admission of such evidence violated his right to due process and to be free from ex post facto laws. He further contends that the jury instructions concerning such evidence violated his right to due process by permitting conviction upon less than proof beyond a reasonable doubt of all elements of the crimes charged.

1. Evidentiary Rules Regarding Prior Acts Of Domestic Violence

California Evidence Code § 1101 provides, in relevant part: "(a) Except as provided in this section and Section[] . . . 1109, evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion. [P] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his or her disposition to commit such an act."

Section 1109 provides, in relevant part that "in **[*56]** a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Evidence Code § 352 permits the court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of under prejudice, of confusing the issues, or of misleading the jury."

To summarize, § 1109 permits a trial court to admit evidence a defendant committed prior acts of domestic violence in order to show his motive, intent and the lack of accidental causes, to commit acts of domestic violence without meeting the similarity or pattern requirements of § 1101(b), and to prove he committed an offense involving domestic violence as long as the evidence is not inadmissible under § 352.

The California Court of Appeal rejected Burleson's ex post facto challenge to § 1109, finding that it "allow[ed] juries in domestic violence trials to hear additional and different testimony than they did before the statute **[*57]** was enacted, [but] it in no way alters the amount or type of evidence required 'in order to convict the offender.'" Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *51 (distinguishing Carmell v. Texas, 529 U.S. 513, 530-31, 120 S. Ct.

1620, 146 L. Ed. 2d 577 (2000)) Section 1109 may have added to the evidence the jury could consider, but it did not lessen the burden to prove guilt beyond a reasonable doubt. Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *51.

2. Ex Post Facto Clause

The U.S. Constitution provides that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ." U.S. Const., Art. I, § 10. In Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798), Justice Chase gave the classic description of ex post facto laws:

> I will state what laws I consider ex post facto laws, within the words and intent of the prohibition. 1 st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d Every law that changes the punishment, and inflects a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the **[*58]** legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 Dall. at 390 (emphasis added).

The fourth Calder category is at issue in Burleson's case. Although some earlier case law could be read to suggest that Calder's fourth category of ex post facto laws had been abandoned, the Supreme Court made in clear in Carmell v. Texas, 529 U.S. at 537-39, that no such abandonment had occurred. The fourth Calder category prohibits both laws that lower the burden of proof and laws that reduce the quantum of evidence necessary to meet that burden, but that does not mean that a state may not change any evidence laws. For example, a change in a witness competency rule did not violate the Ex Post Facto Clause; the changed rule did not always run in favor of the state and did not necessarily affect, let alone subvert, the presumption of innocence. See Carmell, 529 U.S. at 533 n.23, 546. "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the **[*59]** general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained." Id. at 546; see also Hopt v. Territory of Utah, 110 U.S. 574, 589-90, 4 S. Ct. 202, 28 L. Ed. 262 (1883).

Even assuming § 1109 was enacted after Burleson committed his crimes, it did not lower the burden of proof for the prosecution and did not change the quantum of evidence necessary to convict him. The statute permitted the jury to consider additional relevant evidence that was not excluded under § 352 in determining whether the prosecution had met its burden of proof. Burleson has not shown that § 1109 on its face or as applied in his case altered the burden of proof or the amount of evidence necessary to convict. Cf. United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001) (similarly structured federal rule on admissibility of evidence of prior misconduct in child molestation cases did not violate due process because Rule 403 (the federal analog to California Evidence Code § 352) functioned as a filter, resulting in the exclusion of 26 evidence that is so prejudicial as to deprive the defendant of his right to a fair trial). Section 1109 changed evidence admissibility rules, but that was permissible under Carmell and did **[*60]** not run afoul of the Ex Post Facto Clause. The state court of appeal identified Carmell as the key Supreme Court authority on the point, and its decision was not contrary to or an unreasonable application of Carmell.

3. Alleged Instructional Error In CALJIC 2.50.02

a. Background

Burleson contends that his right to due process was violated because the jury instructions could have been understood by a jury to permit his conviction based solely upon the fact of his prior acts of domestic violence and without finding each fact necessary to support the conviction beyond a reasonable doubt.

The jury was given these instructions on the use of evidence of the prior domestic violence:

> Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence [on one or more occasions] other than that charged in the case. [P] "Domestic violence" means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the defendant has had a child or is having or has had a dating or engagement relationship. . . . [P] "Abuse" means intentionally or recklessly causing or attempting **[*61]** to cause bodily injury, or placing another person in reasonable apprehension or imminent serious bodily injury to himself or herself, or another.
>
> If you find that the defendant committed a prior offense involving domestic violence, you may, but are not re uired to, infer that the defendant had a disposition to commit [the same or similar type] offense[s]. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused.
>
> However, if you find by a [preponderance of the evidence] that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient b itself to prove [beyond a reasonable doubt] that [he] committed the charged offense[s]. The weight and significance, if any, are for you to decide.

CT 2858-2859 (CALJIC 2.50.02).

> Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [crime [s] other than [those] for which [he] is on trial. [P] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence **[*62]** that a defendant committed the other [crime[s]].

CT 2860 (CALJIC 2.50.1). The jury also was instructed on the preponderance of the evidence standard, CT 2863, and was given the following standard reasonable doubt jury instruction:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This resumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [P] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

CT 2873 (CALJIC 2.90).

The California Court of Appeal rejected Burleson's claim of instructional error, following the reasoning of People v. Reliford, 29 Cal. 4th 1007, 1009, 130 Cal. Rptr. 2d 254, 62 P.3d 601 (Cal. 2003), which had determined that the 1999 version of CALJIC No. 2.50.01 (the sex abuse **[*63]** instruction that paralleled the CALJIC 2.50.02 domestic violence instruction) correctly stated the law. Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *58. Reliford had

found no reasonable likelihood under the instructions given that the jury would conclude it could convict appellant of the current offense solely because it found that he had committed a similar prior sex offense. See Reliford, 29 Cal. 4th at 1015-16. Reliford also had determined that the 1999 version of CALJIC 2.50.01 did not permit jurors to convict based solely on propensity evidence; to the contrary, the instruction explicitly reminded the jury that finding by a preponderance of the evidence that the defendant committed the prior offense was not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *58. The California Court of Appeal rejected Burleson's contention that the final paragraph of the 1999 version CALJIC 2.50.02 -- i.e., the paragraph above-quoted that begins with the phrase, "However, if you find. . . " -- did not sufficiently dispel the danger of a conviction based on propensity evidence because jurors could misinterpret its meaning. The instruction did not **[*64]** imply by way of a negative pregnant that prior sex offenses proven beyond a reasonable doubt are sufficient to prove the present offense beyond a reasonable doubt, and it was not reasonably likely that a jury could interpret the instruction to authorize conviction on a lesser standard of proof. Cal. Ct. App. Opinion, pp. 29-30, 2003 Cal. App. Unpub. LEXIS 2613. Lastly, the court determined that, even if the instruction was constitutionally infirm, the error would be harmless beyond a reasonable doubt; the evidence of guilt on the charged crimes was very strong and the prosecutor had not argued that the jury could convict on an improper basis. From this, the court was "satisfied the jury did not simply infer Burleson's guilt from a propensity established by the prior offenses, without regard to whether the prosecution had carried its burden of proving the charged crimes beyond a reasonable doubt." 2003 Cal. App. Unpub. LEXIS 2613 at *60.

b. Due Process Analysis

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. See Estelle v. McGuire, 502 U.S. 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). It is beyond dispute that the Fourteenth Amendment's Due Process Clause **[*65]** requires that a defendant be presumed innocent until proven guilty, that he may only be convicted upon a showing of proof beyond a reasonable doubt, and that the jury be properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt. Gibson v. Ortiz, 387 F.3d 812, 820 (9th Cir. 2004). "Any jury instruction that 'reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence.'" Id. (quoting Cool v. United States, 409 U.S. 100, 104, 93 S. Ct. 354, 34 L. Ed. 2d 335 (1972)). So long as the trial court instructs the jury on the necessity that defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. See Gibson, 387 F.3d at 825.

In reviewing an ambiguous instruction, the court must inquire whether a reasonable likelihood exists that the jury has applied the challenged instruction in a way that violates the Constitution. See Estelle, 502 U.S. at 72 & n.4; Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). A determination that there is a reasonable likelihood **[*66]** that the jury has applied the challenged instruction unconstitutionally establishes only that an error has occurred, however. See Calderon v. Coleman, 525 U.S. 141, 146, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998). If an error is found, the court also must determine that the error had a substantial and injurious effect or influence in determining the jury's verdict before granting habeas relief. See Calderon, 525 U.S. at 146-47.

The jury instructions given at Burleson's trial did not incorrectly describe the burden of proof or permit conviction upon a standard less than proof beyond a reasonable doubt of every element of the charged crimes. The 1999 version of CALJIC 2.50.02 given at his trial included important cautionary language: "if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses." When viewed in light of the other instructions given by the court, the 1999 revised CALJIC 2.50.02 given at Burleson's trial made clear that even if the jury found that he committed a prior domestic

violence crime by a preponderance of the evidence and drew **[*67]** the inference that he was likely to commit and did commit the crimes of which he was accused, that alone was not sufficient to prove beyond a reasonable doubt that he committed the charged crimes. There is no reasonable likelihood that the jury applied the challenged instructions to convict Burleson based on a preponderance of the evidence or any standard below proof beyond a reasonable doubt.

The instructions used at Burleson's trial were not the same as, or parallel to, those determined to be constitutionally infirm in Gibson v. Ortiz, 387 F.3d 812. In Gibson, the jury was instructed with the pre-1999 version of CALJIC 2.50.01 which did not caution the jury that the inference it could draw from the prior offense was not enough to prove guilt on the charged crime beyond a reasonable doubt. The problem in Gibson was compounded by the use of a modified version of CALJIC 2.50.1 that stated the preponderance of the evidence standard as the burden of proof for prior offenses. The "interplay of the two instructions allowed the jury to find that Gibson committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the charged acts based **[*68]** upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." Id. at 822. The Gibson instructions, carefully followed by the jury, would allow Gibson's conviction based on a finding made on the unconstitutionally low preponderance of the evidence standard. By contrast, Burleson's jury instructions, carefully followed by the jury, would not permit Burleson's conviction based on anything less than proof beyond a reasonable doubt of all elements of the crimes charged. The California Court of Appeal's rejection of Burleson's claim was not contrary to or an unreasonable application of clearly established federal law.

F. Admission Of Tape Recordings Of Telephone Calls

Burleson next claims that admission of tape-recordings of telephone calls between him and Jane was improper under state law and under the federal wiretap law. Without Burleson's knowledge, Jane had recorded about 24 hours of their telephone calls after he left town. As Burleson describes it, the admission of the recordings allowed the jury to hear "hour upon hour of the most vile and obscene threatening words uttered in petitioner's own voice." Petition, p. 312; see CT 2525-2573 (Burleson's 48-page **[*69]** list of offensive words he uttered on the tapes).

The trial court held a hearing on Burleson's motion to exclude the evidence. Burleson claimed that the tapes should have been excluded because they were made for the wrongful purpose of obtaining leverage in divorce proceedings. Both Burleson and Jane testified at the hearing. Jane testified that her motive in making the tapes was to make a record of what had become of her if she was killed, and she believed Burleson was going to kill her. She denied that the recordings were made to obtain a favorable divorce settlement. There was some testimony that Jane was trying to obtain Burleson's signature on a quitclaim deed to a piece of property after he left town. The state court determined that Burleson had not met his burden to show that Jane taped the calls to obtain leverage for divorce proceedings. The court noted that Jane's testimony showed she made the tapes as evidence in anticipation of being killed by Burleson. The trial court specifically "was not satisfied" that obtaining leverage in the divorce proceeding "was her intent at the time she was taping." RT 554.

On appeal, the California Court of Appeal determined that the admission **[*70]** of the evidence did not violate state wiretapping law. The state appellate court also rejected Burleson's argument that the state wiretapping law was unconstitutional because it was not as protective as the federal wiretapping law. Although California Penal Code § 632 makes surreptitious recordings of confidential communications criminal and generally inadmissible as evidence, Penal Code § 633.5 creates an exception to the rule for "recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of . . . any felony involving violence against the person." Cal. Penal Code § 633.5. A recording made under that exception is not inadmissible in a prosecution for "any felony involving violence against the person." Id. The California Court of Appeal noted that Burleson had tried to exclude the evidence under state law, under the federal wiretapping law (i.e., Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510-

2520), and by arguing state law was unconstitutional in that it was preempted by federal law.

The part of Burleson's claim that asserts a state law error is beyond **[*71]** the scope of a federal habeas action because the writ can only be issued if there was a violation of the Constitution, laws or treaties of the United States. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

The state court correctly rejected the claim that the admission of the evidence violated the federal wiretap law. Although the admission into evidence in state and federal courts of illegally obtained telephone recordings is not allowed, see 18 U.S.C. § 2515, the evidence here was not illegally obtained. It is not unlawful for a person not acting under color of law to record a communication to which she is a party "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State." 18 U.S.C. § 2511(2)(d). In recognition of the fact that people often act with multiple purposes, section 2511(2)(d) has been interpreted to apply "when it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act." United States v. Vest, 639 F. Supp. 899, 904 (D. Mass. 1986). **[*72]** The state court's rejection of Burleson's motion to suppress implicitly rejected his argument that the recording was made for a criminal or tortious purpose. The state trial court, applying the standard in Vest, made the factual findings that the recording was made by Jane to provide evidence about the expected cause of her death and that obtaining leverage in the divorce proceeding was not the primary motivation or determinative factor. Burleson has not provided any evidence, let alone clear and convincing evidence, necessary to overcome the presumption of correctness of those factual determinations, see 28 U.S.C. § 2254(e). The state court's factual findings support its determination that the recording was not made for the purpose of committing a criminal or tortious act. Furthermore, this court accepts the state court's state law determination (also based on the same factual determination) that a recording made to provide evidence of the expected cause of the recording party's death did not violate state law. The state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal habeas court. See Bradshaw v. Richey, 546 U.S. 74, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005); **[*73]** Hicks v. Feiock, 485 U.S. 624, 629, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988). Thus, there was no federal law or state law violation in the recording or the admission of the evidence. The state court of appeal's rejection of the claim was not contrary to or an unreasonable application of clearly established federal law.

G. Failure To Instruct On Lesser Related Offenses

Burleson claims that the state court erred in failing to instruct on lesser related offenses. Specifically, he claims that the court should have instructed on brandishing as a lesser related offense to assault with a deadly weapon, and should have instructed on making harassing telephone calls as a lesser related offense to making terrorist threats. He further argues that the retroactive application of People v. Birks, 19 Cal. 4th 108, 77 Cal. Rptr. 2d 848, 960 P.2d 1073 (Cal. 1998) (holding there was no defense right to lesser related offense instructions in California), to his case violated due process "in a manner akin to violation of the prohibition against ex post facto legislation." Petition, p. 314. This kind of retroactivity claim is known as a Bouie claim. See Bouie v. City of Columbia, 378 U.S. 347, 352-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

The California Court of Appeal ruled that the trial court properly refused **[*74]** to give the lesser 33 related instructions requested only by the defense. Although an earlier case, People v. Geiger, 35 Cal. 3d 510, 199 Cal. Rptr. 45, 674 P.2d 1303 (1984), had required instruction on lesser related offenses upon a defendant's request, Birks had overruled Geiger. Birks "held that trial courts may not instruct the jury on lesser related offenses absent the consent of both the defendant and the prosecution." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *75. The state appellate court rejected the argument that the Birks decision could not be retroactively applied to Burleson's case. Birks had specifically declared its holding to be retroactive and stated that due process did not prohibit such retroactivity because the ruling did

not expand criminal liability or enhance punishment for conduct previously committed. Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *76 (quoting Birks, which in turn cited Bouie and a state court case). The court further observed that a criminal defendant does not acquire a reliance interest in avoiding conviction on the pleadings by the means set forth in Geiger, and that Burleson had not indicated his case would have been conducted differently absent the Geiger rule. "'With or without Geiger, a criminal defendant **[*75]** has the same incentive to establish, by whatever means, that the prosecution has failed to prove the elements of charged or necessarily included offenses beyond a reasonable doubt.'" Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *77 (quoting Birks, 19 Cal. 4th at 137).

The California Court of Appeal was clearly correct in its rejection of the claim. The Bouie rule is confined to changes in substantive criminal law and does not apply to procedural rulings. Bouie determined that if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect." Bouie, 378 U.S. at 354 (citation omitted). The rationale of Bouie and its progeny rests on the core due process concepts of notice, foreseeability, and the right to fair warning of criminal penalties. Rogers v. Tennessee, 532 U.S. 451, 459, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). The Bouie rule against judicial expansion of a statute is not an identical twin to the ex post facto rule against retroactive application of legislative changes expanding criminal laws. See Rogers, 532 U.S. at 458-61. Thus, the inquiry regarding a judicial decision focuses **[*76]** on whether it impeded fair warning of criminal liability rather than whether it would fall within one of the categories of laws prohibited by the Ex Post Facto Clause.

Here, the change in the law worked by Birks was to narrow the circumstances under which lesser related offense instructions had to be given at a jury trial, i.e., such instructions had to be given only if both the defendant and prosecutor requested them. Birks worked no change in the law of assault with a deadly weapon or brandishing a deadly weapon, and worked no change in the law of making harassing telephone calls or making terrorist threats. It simply cannot be said that Birks deprived Burleson of fair warning about the penalties for these crimes when he committed them and when he went to trial. The Bouie rule does not apply here and there was no due process violation.

Burleson also had no independent federal due process right to instructions on the lesser related offenses under the law as set forth by the U.S. Supreme Court. There is no clearly established rule that a trial court must instruct on all lesser included and lesser related offenses. Although instructions on lesser included offenses must be given in capital **[*77]** cases, Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), "[t]here is no settled rule of law on whether Beck applies noncapital cases such as the present one. In fact, this circuit, without specifically addressing the issue of extending Beck, has declined to find constitutional error arising from the failure to instruct on a lesser included offense in a noncapital case." Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995), overruled on other grounds, Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999). The law concerning the duty to give instructions on lesser related offenses is even more unsettled. "[A]ny finding of constitutional error would create a new rule, inapplicable to the present case under [Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).]" Turner, 63 F.3d at 819. Burleson therefore could not prevail under 28 U.S.C. § 2254(d) on a claim that he had a federal due process right to lesser related offense instructions.

H. Prosecutorial Misconduct

Burleson claims that the prosecutor engaged in misconduct in his handling of a box of defense files. The California Court of Appeal described the background of this claim.

> Early in the case, when Burleson first decided to represent himself, the judge who then presided **[*78]** over the matter appointed an investigator to receive a box of discovery materials and redact all victim-identifying information before delivering it to Burleson. However, for reasons that are unclear, apparently the box was

> forwarded to the district attorney's office. A defense investigator testified that when he called Patricia Farrell, an investigator in the district attorney's office, she told him her office was in possession of a box of defense discovery material and they were in the process of redacting certain reports. Farrell did not recall this conversation and denied redacting any defense materials. Based on evidence presented at a hearing on Burleson's motion, the trial court concluded that, although the district attorney's office had come into possession of the defense material, it had returned the box and had not used the material to gain an unfair advantage. The court stated it was 'satisfied that no attorney' in the district attorney's office had read the material and concluded the office's possession of the box did not rise to the level of egregious misconduct warranting dismissal. Nevertheless, to remove any suggestion of impropriety, the court ordered the prosecution **[*79]** to remove investigator Farrell from the case and to have no further communications with her about the case.

Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *78-79. The California Court of Appeal determined that the trial court did not make an express finding that the prosecutor engaged in misconduct and agreed with the trial court that there was no evidence of prejudice to Burleson's case. See id. at 39-40, 2003 Cal. App. Unpub. LEXIS 2613. The court also found no outrageous misconduct that would show a due process violation under state law. Id. at 40, 2003 Cal. App. Unpub. LEXIS 2613.

The appropriate standard of review for a prosecutorial misconduct claim in a federal habeas corpus action is the narrow one of due process and not the broad exercise of supervisory power. Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). A defendant's due process rights are violated when a prosecutor's acts render a trial fundamentally unfair. Id.; Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.")

Burleson has offered absolutely no evidence to show that the D.A. investigator's possession of the box of defense materials had any prejudicial effect **[*80]** on the trial. This is not an oversight by an unrepresented habeas petitioner; the judge at the hearing repeatedly pointed out the absence of evidence of prejudice and the defense did not respond with any proof of prejudice at the hearing in state court. The trial court accepted as true that the D.A. had received discovery materials but court was "not satisfied that the district attorney did anything with it," and "was not satisfied that [obtaining the materials] was an orchestrated event. I'm not satisfied that there was any unfair advantage gained." RT 1197; see also RT 1209-1210. Burleson has not provided any evidence, let alone clear and convincing evidence, necessary to overcome the presumption of correctness of those factual determinations, see 28 U.S.C. § 2254 (e). Although the trial court did not believe there was any malicious intent in the D.A.'s office obtaining the box, the court decided to remove the investigator from the case and to order the prosecutor to have no further communications with her about the case to avoid any potential taint. See RT 1235-1238. The court recognized that it had scant evidence of what was in the box and no evidence that the investigator remembered **[*81]** anything from the box but explained that it was the kind of situation where the investigator might realize during trial that she knew something to be a fact but not realize the source of her knowledge. See RT 1238. Taking the prophylactic step of removing the investigator from the case avoided that potential problem. See RT 123 8-1242.

Burleson basically invites this court to punish the prosecution by assuming that the prosecutor must have done something wrong when it had the box of defense materials. Such an approach would be contrary to the Supreme Court's clear directive in Smith v. Phillips 455 U.S. at 219, that the focus must be on the impact of the alleged conduct on the fairness of the trial. However, no evidence was ever presented that the possession of the file by the prosecutor's office had any effect on the fairness of the trial. The California Court of Appeal's rejection of the claim was not contrary to or an unreasonable application of clearly established federal law.

I. Denial Of Defense Discovery Requests

Burleson claims that the trial court erred in rejecting his discovery requests for Jane's psychiatric records, to let his expert inspect Jane's phone lines and home, and **[*82]** for a district attorney's notes regarding the tapes of the telephone conversations. The California Court of Appeal determined that the trial court did not err on any of the three items. See Cal. Ct. App. Opinion, pp. 43-45, 2003 Cal. App. Unpub. LEXIS 2613.

The constitutional basis for the claims asserted by Burleson is not well articulated but appears to be a blend of the constitutional rights of due process, compulsory process and confrontation. A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). There is no Brady material question as to at least the first two discovery items because the materials were not in the possession or control of the prosecution. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective **[*83]** of the good faith or bad faith of the prosecution").

The Sixth Amendment to the United States Constitution gives a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor" and to "be confronted with witnesses against him. " The right to compulsory process is not absolute. Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The Sixth Amendment right to present relevant testimony may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. Rock v. Arkansas, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); see Perry v. Rushen, 713 F.2d 1447, 1453-54 (9th Cir. 1983) (no violation of compulsory process to prohibit evidence of third party identity because evidence collateral and state interest in evidentiary rule overriding). With these standards in mind, the court considers each of the discovery problems.

1. Psychiatric Records

The trial court denied Burleson's motion to obtain Jane's psychiatric records after reviewing the subpoenaed records in camera. The motion was denied without prejudice to Burleson renewing the motion at trial. He didn't. The state court of appeal determined that the claim of error on appeal was waived because Burleson **[*84]** failed to renew the motion at trial. The state appellate court rejected Burleson's argument that pretrial access was necessary to vindicate his federal constitutional rights to confront and cross-examine the complaining witness or receive a fair trial, relying on a state court decision that trial courts are not required to afford criminal defendants pretrial access to privileged psychotherapy records. Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *88 (citing People v. Hammon, 15 Cal. 4th 1117, 1119, 65 Cal. Rptr. 2d 1, 938 P.2d 986 (Cal. 1997)).

The refusal to provide the materials to Burleson before trial did not result in a violation of his federal constitutional rights. When one reads the record and Burleson's petition, one of the impressions that comes through is that Burleson may have been using his criminal case to inflict further harm on Jane -- that he wasn't quite done with her yet. His request to see her psychiatric records exemplifies that problem. He states that Jane's mental state was in issue because she testified she earlier had testified favorably to him at his 1994 parole revocation hearing -- when she said that Burleson had not harmed her -- due to her history of psychiatric disorder. Burleson does not explain how **[*85]** Jane's psychiatric records would have aided him in any way relating to this point of testimony. Burleson doesn't explain how it would have helped him to show that Jane did not have a recorded mental health problem at the time as one can have an untreated problem. On the other hand, if his goal was to show that she did have a problem, she admitted that. He also does not explain how it would have aided him in examining

Dr. Samuel Benson during trial. His paltry showing of need is greatly outweighed by the extraordinarily intrusive nature of the request.

2. Home Visit

The trial court denied Burleson's request to permit his expert to inspect the phone lines in Jane's home and videotape the interior and exterior of the house. Jane objected and declared that she no longer owned the telephone she had used to make the tapes. The California Court of Appeal determined that the trial court acted within its discretion in denying the request, especially in light of the declaration that Jane no longer had the telephone and "given the vague justification for Burleson's videotaping request" Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *89. That is, he had not demonstrated a sufficient plausible justification and good cause **[*86]** for the intrusion into the victim's fundamental privacy right in her home. Id.

The state court did not err in rejecting the discovery request. As Burleson had described it, a lot of what his expert was going to be doing depended on access to the telephone that had been in use when the tapes were made. See RT 2144-2145. He even wanted the expert to be allowed to take the telephone for testing. But the telephone was gone. Burleson has not shown how the testing for electro-magnetic fields was going to be of any value without the telephone. Moreover, he has not shown how his proposed testing was going to be accomplished or was going to be of any value without any evidence as to the particular conditions in place at the time of any recording. That is, there is no showing that the tester could conduct any useful tests of signal interference if he did not know where electricity-using devices were and whether they were in use when telephone calls were being recorded.

Burleson also misrepresented the record in stating that the trial court granted access and later reversed itself. See Petition, p. 325:13-117, p. 326:1. The statement he quotes is taken out of context: the court made the statement **[*87]** as a preface to its comment that it needed to explore the extent of the intended intrusion and that it needed to hear from Jane on the issue. As Burleson well knows, courts don't make rulings before hearing evidence and before hearing argument. Burleson's argument that there was a Brady violation is meritless as the material was not sought from the government but from a private party.

Finally, as respondent notes, Burleson's repeated threats to harm and kill Jane provided further reason to disallow the videotaping of the home (and the detailed information that it could provide about layout) by someone working for Burleson. Like the request to obtain Jane's psychiatric records, the request to videotape the interior and exterior of the home has an element of harassment.

3. District Attorney's Notes About The Tapes

Burleson claimed he was denied access to the deputy district attorney's notes about the audiotapes, although he never actually filed a motion for the discovery. "[D]uring an evidentiary hearing on Burleson's motion to suppress the audiotapes, a deputy district attorney testified he had listened to the tapes and made notes to indicate where on the tapes certain statements were **[*88]** made. Burleson interrupted his questioning of the attorney to declare, 'I would like discovery on that.' The court acknowledged Burleson's 'desire to have' the notes but never ruled on whether such discovery would be permitted. Beyond stating he 'would like discovery,' it appears Burleson took no further steps to obtain the notes." Cal. Ct. App. Opinion, 2003 Cal. App. Unpub. LEXIS 2613 at *90. The appellate court deemed the issue waived on appeal because Burleson failed to obtain a ruling from the trial court for review. Id.

This court agrees with the state court that there was no actual request for the materials, and therefore no error in failing to grant an unmade request. See RT 2735. It was Burleson's lack of skill as an advocate, not the trial court's error, that prompted him to fail to make a motion for the materials, as opposed to merely making an observation during examination of a witness. Furthermore, the alleged reason for requesting the documents was wholly speculative. Burleson claims he wanted to show the tapes were altered and were not a continuous recording, but his

request to obtain the district attorney's notes is based on the wholly unsupported speculation that the district attorney's office fabricated **[*89]** evidence to prosecute him. Burleson admitted that he made the abusive and threatening statements that were recorded, although he claimed that the tapes had been altered to show what had prompted the outbursts and that Jane was not actually fearful at hearing his lengthy diatribes, see RT 2795, notwithstanding his numerous threats to kill her, her mother and her father as well as his graphic descriptions of how he would kill each of them. The prosecutor did not contend that the tapes were a continuous recording of the telephone calls; he acknowledged that Jane had recorded only parts of some conversations, sometimes because of equipment problems and sometimes when the conversations had nothing to do with Burleson's threats. Lastly, it appears that the notes would have been protected work product. See Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006). There was no constitutional error here.

J. Restitution Order

Burleson was ordered to pay restitution of about $ 6,236.92 to Jane for various security related expenses. Jane sought and received restitution for amounts she spent to "(1) purchase and install a home security system, (2) pay monthly maintenance fees for the security system, (3) **[*90]** change the locks on her home, (4) purchase a handgun, (5) attend a weapons safety course, (6) pay fees necessary to obtain a concealed weapons permit, (7) pay for food and lodging and the repainting of her car, after she learned Burleson 'had put a "contract" out on [her] life' and fled her home, (8) pay collect telephone calls from Burleson, and (9) purchase a new mattress to replace one damaged and later taken by Burleson." Resp. Ex. 6A (Cal. Ct. App. Opinion # 2, pp. 1-2. He claimed on appeal, as he does here, that the amounts were not allowed under the restitution statute, California Penal Code § 1202.4, and that hearsay was improperly considered by the trial court.

The California Court of Appeal rejected Burleson's argument that California Penal Code § 1202.4 did not allow restitution for items spent related to crimes for which he was never charged or convicted. See Resp. Ex. 6A, p. 3. "[B]ased on the plain language of subdivision (f), the court must order full restitution for all economic losses a victim has suffered 'as a result of the defendant's conduct (§ 1202.4, subd. (f), italics added) unless it has an unusually compelling reason not to do so. The statute does not limit **[*91]** the amount of restitution to losses caused by criminal conduct for which the defendant was convicted." Resp. Exh. 6A, p. 3. "These expenses were related to the crimes against Jane for which Burleson was convicted; indeed, they resulted from what the trial court reasonably concluded was a pattern of ongoing conduct by Burleson designed to keep Jane living in a state of fear." Id. at 4. [11] The state court's interpretation of state law is binding on this court in consideration of the habeas petition. Because it has been determined that the restitution amounts were allowed under state law, there was no order in excess of that allowed by state law and no federal due process violation. See Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987). Burleson's particular arguments about the award of the costs of a security system, a mattress and phone calls also are state law claims for which relief is not available in a federal habeas action.

FOOTNOTES

[11] At the restitution proceedings, the trial court observed that there was a reasonable basis for Jane's expenditures based on Burleson's conduct. "[T]he conduct of this particular Defendant was on an ongoing basis to put Ms. Elliot in a state of fear. Fear **[*92]** that he was either going to return or he was going to have people return to harm her. [P] The terrorist threats were an ongoing thing. They were an ongoing thing to the extent that there is always a -- you pardon the expression -- a barb out there. It doesn't make any difference where I am, how I am situated, you will always be in fear of me, of things that I can do." RT 6939.

The state appellate court also rejected Burleson's argument that he was denied due process by

the use of allegedly inadmissible hearsay to determine the restitution matter. The court doubted that the statements were even hearsay "since, in this restitution hearing, they were offered not for the truth of the matter asserted, but as proof of Jane's state of mind." Id. Even if the information was hearsay, Burleson had failed to make a hearsay objection in the trial court and the defense actually had elicited almost all the hearsay evidence. Id. Burleson has not disputed that the hearsay about which he complains was introduced by the defense. He has not shown that the admission of the evidence violated his right to due process, as he must to obtain federal habeas relief.

Burleson has not shown that the state court **[*93]** of appeal's rejection of his claims regarding the restitution order was contrary to or an unreasonable application of clearly established federal law, as set forth by the Supreme Court. He is not entitled to the writ on this claim.

K. Petitioner's Objections To State Habeas Proceedings

Lastly, Burleson complains about the reception his state habeas petition received in the Contra Costa County Superior Court. Errors in the state post-conviction review process are not addressable through federal habeas corpus proceedings. See Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998); Gerlaugh v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997).

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is DENIED. The clerk shall close the file.

One final administrative matter: Having read the 348-page petition (in which the legal claims did not appear until page 157), this court concludes that the length of Burleson's petition was grossly excessive for the legal issues and circumstances of this case. Although this court has endured the fat brief, the next court to entertain Burleson's claims may wish to consider this court's observation before permitting a lengthy brief.

IT IS **[*94]** SO ORDERED.

DATED: November 15, 2007

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

In

*2007 U.S. Dist. LEXIS 37537, **

THOMAS LEE WALKER, Petitioner, vs. TOM CAREY, Warden, Respondent.

No. CIV 04-0555 LKK JFM P

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 37537

May 23, 2007, Decided
May 23, 2007, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus denied Walker v. Carey, 2007 U.S. Dist. LEXIS 55300 (E.D. Cal., July 30, 2007)

Judge Profile
View a summary by nature of suit of the civil cases heard by this judge, excerpted from the CourtLink Judicial Strategic Profile.

CORE TERMS: sentence, driver, sentencing, street, prior convictions, petitioner's claims, rock cocaine, corpus, federal habeas, ineffective, guilty pleas, cocaine, enhance, felony, state law, habeas corpus, cocaine base, plea agreements, hearsay, prior convictions, direct appeal, federal habeas, deficient, cruel, sentencing laws, sentence enhancements, counsel's performance, enhancement, marijuana, probation

COUNSEL: [*1] Thomas Lee Walker, Petitioner, Pro se, Vacaville, CA.

For Tom L. Carey, Warden, Attorney General for the State of California, Respondents: Christopher Joseph Wei, LEAD ATTORNEY, California Department of Justice, Attorney General's Of, San Francisco, CA.

JUDGES: John F. Moulds, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: John F. Moulds

OPINION

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding in propria persona with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2001 conviction on charges of sale of marijuana, sale of cocaine base, possession for sale, and the sentence of sixteen years, four months, in prison imposed thereon. [1] In his petition filed March 19, 2004 petitioner raises 16 claims that his prison sentence violates the United States Constitution.

FOOTNOTES

1 Petitioner's sentence was enhanced by findings that (1) petitioner was released from custody on bail at the time the crimes charged in counts I and II occurred; and (2) petitioner suffered two prior convictions pursuant to Health and Safety Code §§ 11370.2 subdivision (a) and 11370, subdivisions (a) and (c).

[*2] FACTS [2]

FOOTNOTES

2 The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v. Walker, No. A094495, 2002 Cal. App. Unpub. LEXIS 1963 (June. 7, 2002), a copy of which is attached as Exhibit E to Respondent's Answer, filed October 6, 2004.

All the offenses occurred in the area in front of 201 Mark Street in Vallejo. This area and the immediately surrounding streets are associated with a high level of drug sales. The north substation of the Vallejo Police Department is located 75 yards from 201 Mark Street.

A. Count I: Sale of Marijuana

On May 2, 2000, [petitioner] sold a baggie containing 49 grams of marijuana to Reka Turner. The sale took place on the street in front of 201 Mark Street.

B. Count II: Sale of Cocaine Base

On May 29, 2000, Officer Michael Wheat of the Vallejo Police Department was observing the 100 and 200 blocks of Mark Street with the aid of his binoculars. A driver in a white Mustang pulled up in front of [petitioner]. The driver looked at [petitioner], **[*3]** made some hand gestures, then parked three houses down the block. The driver exited his car and approached [petitioner]. [Petitioner] spoke briefly with two individuals, then turned and faced the driver. The driver handed [petitioner] what appeared to be folded money. [Petitioner] took the folded piece of paper, reached into his mouth, abstracted a small object and handed it to the driver.

Testifying as an expert in hand-to-hand drug transactions, Officer Wheat stated that it was common for drug dealers to hide rock cocaine in their mouths. With the belief that the driver purchased a rock of cocaine from [petitioner], Officer Wheat and his partner made a quick vehicle stop within three or four blocks. Officer Wheat informed the driver of the Mustang that he had observed the drug transaction. The driver put his head down and pointed in between the seats, where Wheat found a piece of rock cocaine.

Arrested the next day, [petitioner] had $ 376 in cash and a pager. He denied selling cocaine and instead said he was involved in selling "weed." [Petitioner] identified his

address as 201 Mark Street.

C. Count III: Possession for Sale of Cocaine Base

In response to repeated **[*4]** reports of drug activity, on March 6, 1999, Officer Drew Ramsey and two other officers drove up and parked in front of 201 Mark Street. Two of three men standing in the driveway ran off. Officer Ramsay chased a suspect running along the side of the house. The suspect yelled out "Rollers" as he ran. "Rollers" is "street slang" for police.

During the chase, Officer Ramsay noticed [petitioner] crouching near the crawl space of the house, making shaking movements as if he were dumping things onto the ground. Officer Ramsay told Officer Horton, who was following him, to "watch" [petitioner]. No one else was in the yard.

Returning to the crawl space area, Officer Ramsay found a slightly torn baggie and 17 pieces of rock cocaine scattered about. He testified that [petitioner] did not appear to be under the influence of any drugs and did not possess any narcotics paraphernalia. The seized rocks contained 4.28 grams of cocaine base.

Officer Les Bottomley testified as an expert in possession of cocaine base for sale and street level hand-to-hand sales of narcotics. He believed [petitioner] possessed the rock cocaine for sale rather than for personal use. This belief was based on the **[*5]** "sheer number" of rocks that [petitioner] possessed, in a neighborhood with "probably the highest" incidence of drug sales in the city, coupled with the fact that [petitioner] had no paraphernalia and did not appear to be under the influence of narcotics.

(People v. Walker, slip op. at 2-3, 2002 Cal. App. Unpub. LEXIS 1963 at 2-5)

PROCEDURAL HISTORY

1. On June 7, 2002, petitioner's direct appeal was denied by the California Court of Appeal for the First Appellate District. (Resp.'s Ex. E.) Petitioner appealed on two grounds: denial of his motion to suppress evidence obtained from a warrantless search of his grandmother's backyard and prejudicial prosecutorial misconduct. (Id. at 1.)

2. On July 19, 2002, petitioner filed a petition for review in the California Supreme Court. (Resp.'s Ex. F.) Petitioner continued to challenge the warrantless search, but also alleged certain evidence should have been suppressed and raised other Fourth Amendment claims. (Id.) Petitioner also argued that the admission of hearsay testimony violated his right to due process and to confront witnesses against him. (Id.) On August 21, 2002, the California Supreme Court denied the petition for review without comment. (Resp. **[*6]** 's Ex. G.)

3. On October 22, 2002, petitioner filed a petition for writ of habeas corpus in the Solano County Superior Court. (Resp.'s Ex. H.) Petitioner raised 15 claims. On November 27, 2002, the Solano County Superior Court denied petitioner's claims. (Resp.'s Ex. I.) Appended to the order of denial is a document entitled "Comment" in which the Superior Court advised petitioner that claims that could have been raised on direct appeal but were not are not cognizable on habeas corpus review, citing In re Dixon (1953) 41 Cal.2d 756, 759, 264 P.2d 513. (Id. at 2.) The Superior Court found that petitioner's claims regarding sentencing, search and seizure and evidentiary claims did not fall under any of the exceptions noted in In re Harris (1993) 5 Cal.4th 813, 828, 21 Cal. Rptr. 2d 373, 855 P.2d 391, so those claims were not cognizable on habeas review. (Resp.'s Ex. I, at 2, 3.) The Superior Court found that petitioner's double jeopardy claim was required to be raised in his direct appeal, but was not, so it was also barred from consideration, citing People v. Blalock (1960) 53 Cal.2d 798, 801, 3 Cal. Rptr. 137, 349 P.2d 953. (Resp.'s Ex. I, at 2.) Finally, the Superior Court found that petitioner had failed to **[*7]**

make a prima facie showing that "his counsel's performance was constitutionally deficient and that such deficiency led to an unfair trial or unreliable result (*Strickland v. Washington* (1984) 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674)." (Resp.'s Ex. I, at 3.)

4. On March 19, 2004, petitioner filed the instant petition, raising 16 claims, but also appended a copy of his 2002 petition for writ of habeas corpus filed in the California Supreme Court.

ANALYSIS

I. Standards for a Writ of Habeas Corpus

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

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

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is "contrary to" clearly established United States Supreme Court precedents if **[*8]** it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537 U.S. 3, 7, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. Williams, 529 U.S. at 413. A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003) (it is "not enough that a federal habeas court, in its independent review of the legal question, is left **[*9]** with a 'firm conviction' that the state court was 'erroneous.'")

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

II. Petitioner's Claims

A. Sentencing Claims

Petitioner raises various claims concerning sentencing errors. (Pet., Grounds One, Two and Four.) Petitioner argues he was denied due process and equal protection when the trial court sentenced petitioner to consecutive terms; that there are pre-emptive laws in sentencing that the state court may not derogate; and that jurors were not allowed to consider facts in mitigation concerning the prior convictions.

Habeas corpus relief is unavailable for alleged errors in the interpretation or application of state sentencing laws by either a state trial court or a state appellate court. Hendricks v. Zenon, 993 F.2d 664, 674 (9th Cir. 1993). So long as a state sentence "is not based on any proscribed

federal grounds such as being cruel and unusual, racially or ethnically motivated, or enhanced by indigency, the penalties for violation of state statutes are matters of state concern. **[*10]** " Makal v. State of Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976). The Ninth Circuit has specifically refused to consider state law errors in the application of state sentencing law. See, e.g., Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989). In Miller, the court refused to examine the state court's determination that a defendant's prior conviction was for a "serious felony" within the meaning of the state statutes governing sentence enhancements. Id. at 1118-19. The court did not reach the merits of the Miller petitioner's claim, stating that federal habeas relief is not available for alleged errors in interpreting and applying state law. Id. (quoting Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985)).

In Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), the Supreme Court reiterated the standard of review for a federal habeas court. It held that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." Id. at 65. The court emphasized that "federal habeas corpus relief does not lie for error in state law." Id. (citing **[*11]** Lewis v. Jeffers, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) and Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)). The court further noted that the standard of review for a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States (citations omitted)." Estelle, 502 U.S. at 67.

Therefore, petitioner's claims of sentencing error do not state a federal claim. See also Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir.1994)("The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus.") A habeas petitioner may not transform a state law issue into a federal one merely by asserting a due process violation. See Langford v. Day, 110 F.3d 1380, 1389 (9th Cir.1996).

Finally, after a careful review of the record of the sentencing proceedings, this court finds no federal constitutional error in connection with petitioner's sentence. Accordingly, claims 1, 2 and 4 should be denied.

B. Sentence Enhancement

Petitioner contends that the use of priors to enhance **[*12]** the instant sentence violated his prior plea agreements, the use of his prior drug convictions to enhance his sentence constituted double jeopardy and violated due process, and that the failure of the trial court to strike his prior convictions was an abuse of discretion. (Pet., Claims Three and Five.)

Petitioner waived jury trial [3] and admitted two prior convictions for possession of cocaine base for sale, Cal. Health & Safety Code § 11351.5, and transportation of a controlled substance, Cal. Health & Safety Code § 11352, within the meaning of Cal. Health & Safety Code § 11370.2(a) and 11370(a) and (c). (Resp.'s Ex. L1 at 289-92.) Those provisions of the California Health and Safety Code prohibit probation and require a consecutive three year enhancement for each prior felony conviction. (Id.) The trial court denied probation and imposed the enhancement for the prior convictions. (RT 300-01.)

FOOTNOTES

3 A criminal defendant in California has a statutory right to have a jury determine the question whether he has suffered convictions for prior felony offenses. Dillard v. Roe, 244 F.3d 758, 769 & n.13 (9th Cir.2001) (citing California Penal Code § 1025(b)).

[*13] Respondent contends that the enhancement does not result in an additional penalty for the earlier crimes, but rather an aggravated sentence based on petitioner's recidivism. Respondent argues that petitioner may not challenge the validity of the prior convictions in

federal court. Lackawanna County District Attorney v. Coss, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001).

The state court did not reach the merits of this claim.

To the extent petitioner is arguing that his prior convictions are invalid because he was not informed they could be used in subsequent criminal proceedings to enhance his sentence, his claim is barred by Lackawanna v. Coss, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). In Lackawanna the Supreme Court held that where, as here, a petitioner's state court conviction was later used to enhance a criminal sentence, "the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." 532 U.S. at 403-04. The Supreme Court has allowed a petitioner to collaterally challenge a prior conviction only "where there was a failure to appoint counsel in violation of the Sixth Amendment." **[*14]** Id. at 404. Because there is no evidence that petitioner was proceeding without counsel in connection with his prior guilty pleas, the "failure to appoint counsel" exception does not apply and he is precluded from collaterally attacking those convictions through a § 2254 petition. See id. at 406.

In any event, petitioner has failed to establish that his prior guilty pleas were invalid. "Before a court may accept a defendant's guilty plea, the defendant must be advised of the 'range of allowable punishment' that will result from his plea." Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988). However, state courts are not required to advise criminal defendants of all collateral consequences of a plea or of all possible ancillary or consequential results which may flow from a plea of guilty. Id. at 235; see also United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000). Thus, a defendant's ignorance of collateral consequences does not deprive a guilty plea of its voluntary character. United States v. Brownlie, 915 F.2d 527, 528 (1990); Torrey, 842 F.2d at 235. **[*15]** The possibility of future sentence enhancement is a collateral, not a direct, consequence of a guilty plea. Brownlie, 915 F.2d at 528; United States v. Garrett, 680 F.2d 64, 66 (9th Cir. 1982). Accordingly, petitioner's guilty pleas were not rendered involuntary by his ignorance of the possibility of future sentence enhancement. See Wheeler v. Yarbrough, 352 F. Supp.2d 1085, 1094-95 (C.D. Cal. 2005). In short, petitioner's prior guilty pleas were not involuntary or unintelligent based on the fact that he was not advised that the law might change and that his conviction might result in a longer sentence enhancement than that in force when he pled guilty.

Petitioner also argues that his current sentence breached the plea agreements entered with respect to his prior convictions because he did not agree, in entering the agreements, that the conviction later could be used to enhance his sentence. Assuming arguendo that this claim is not barred by Lackawanna, it should be denied. A guilty plea is invalid if induced by a promise which renders the plea involuntary. Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962); **[*16]** Chizen v. Hunter, 809 F.2d 560, 561 (9th Cir. 1986). When a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. Santobello, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Johnson v. Lumpkin, 769 F.2d 630, 633 (9th Cir. 1985). Due process concerns of fundamental fairness require that a prosecutor keep the promises upon which a defendant relies in entering into a plea agreement. Claims of a breached plea agreement are analyzed according to contract law standards of interpretation, such that a court looks to what was reasonably understood by the parties to be the terms of the agreement and whether or not those terms were fulfilled. See United States v. Kamer, 781 F.2d 1380, 1387 (9th Cir. 1986).

Petitioner's claim fails because he does not allege that the prosecutor failed to abide by any particular term of the prior plea agreements. He has not shown any promise by the prosecutor that the convictions would not be used later to enhance a future sentence under a law that did not yet exist and he has **[*17]** not shown that there was a promise that the law would not change. In fact, petitioner concedes that this subject was not addressed in the earlier proceeding. Any contention that the trial court that imposed petitioner's current sentence breached his prior plea agreements does not compel a different conclusion. The sentencing

court was not a party to petitioner's earlier agreements and was not bound or restricted by them.

This court concludes that petitioner's equal protection claim should also be denied pursuant to 28 U.S.C. § 2254(b)(2). As noted above, petitioner's claim of sentencing error is not cognizable in this federal habeas corpus proceeding. Habeas corpus relief is unavailable for alleged errors in the interpretation or application of state sentencing laws by either a state trial court or appellate court. Cacoperdo, 37 F.3d at 507; Hendricks, 993 F.2d at 674.

In his state court petition, petitioner also alleged that it is unconstitutional to use a prior conviction to enhance a sentence. However, the Supreme Court has long upheld the use of prior convictions to enhance sentences for subsequent convictions. See **[*18]** Schiro v. Farley, 510 U.S. 222, 223, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994) (citing Spencer v. State of Texas, 385 U.S. 554, 559, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967)).

Petitioner has failed to show that the state courts committed an error resulting in a complete miscarriage of justice. See Parke v. Raley, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992) ("we have repeatedly upheld recidivism statutes against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities"); United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999) ("The Supreme Court and this court uniformly have held that recidivist statutes do not violate the Ex Post Facto Clause if they are "on the books at the time the [present] offense was committed.") (quoting United States v. Ahumada-Avalos, 875 F.2d 681, 683-84 (9th Cir. 1989) (per curiam); Witte v. United States, 515 U.S. 389, 399, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995) (recidivist statutes do not violate double jeopardy because the enhanced punishment imposed for the later offense is not viewed as either a new jeopardy or an additional penalty **[*19]** for the earlier crimes, but is instead a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repeat offense).

In Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), the United States Supreme Court made clear that, in the context of an Eighth Amendment challenge to a prison sentence, the "only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." Andrade, 538 U.S. at 72 (citing Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); Solem v. Helm, 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); and Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). The Andrade Court concluded that two consecutive 25-years-to- life sentences with the possibility of parole, imposed under California's three-strikes law following two petty theft convictions with priors, did not amount to cruel and unusual punishment. Id. at 77; see also Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (holding that a **[*20]** sentence of 25 years to life imposed for felony grand theft under California's three-strikes law did not violate the Eighth Amendment). "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." Rummel, 445 U.S. at 272.

The United States Supreme Court has cautioned federal courts to be "'reluctan[t] to review legislatively mandated terms of imprisonment.'" Hutto v. Davis, 454 U.S. 370, 374, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982) (quoting Rummel, 445 U.S. at 274). "Generally, as long as the sentence imposed upon the defendant does not exceed statutory limits, [a federal court] will not overturn it on eighth amendment grounds." United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988). See also Belgarde, 123 F.3d at 1215; United States v. McDougherty, 920 F.2d 569, 576 (9th Cir. 1990). "[A] sentence within the limits set by a valid statute may not be overturned on appeal as cruel and unusual punishment unless the sentence is so 'grossly out of proportion to the severity of the crime' as to shock our sense of justice." **[*21]** United States v. Cupa-Guillen, 34 F.3d 860, 864 (9th Cir. 1994) (quoting United States v. Vega-Mejia, 611 F.2d 751, 753 (9th Cir. 1979)) (citing United States v. Washington, 578 F.2d 256, 258-59 (9th

Cir. 1978)).

In Andrade, the Supreme Court upheld imposition of two consecutive twenty-five years to life sentences under California's three strikes law after Andrade was convicted of petty theft of $ 150.00 worth of videotapes, with several prior convictions for petty theft, burglary and drug offenses. 538 U.S. at 66-67. In Ewing, the Court upheld a sentence of twenty-five years to life imposed under the same law following a conviction for grand theft involving three golf clubs valued at $ 399.00 each with four prior felony convictions for burglary and robbery. 538 U.S. 16-17. See also Rummel, supra (upholding life sentence with the possibility of parole for recidivism based on three underlying felonies of fraudulent use of a credit card for $ 80.00, passing a forged check for $ 28.36, and obtaining $ 120.75 under false pretenses); Harmelin, supra (upholding sentence **[*22]** of life without the possibility of parole for a first offense of possession of more than 650 grams of cocaine); see also United States v. Carr, 56 F.3d 38, 39 (9th Cir.1995) (sentence of 22 years upon conviction for sale of 66.92 grams of cocaine base with enhancement for two previous convictions for minor drug sales did not raise inference of gross disproportionality).

Under the decisions announced in Andrade and Ewing, petitioner's case is not one of those "exceedingly rare" sentences fitting within the contours of the "gross disproportionality" principle, and thus does not constitute cruel and unusual punishment. In the instant action, petitioner was convicted of three felony counts: sale of marijuana, sale of cocaine base, and possession for sale. Petitioner was also found to have two prior felony convictions, and to have committed at least one of the prior offenses while on probation. Petitioner's record renders his sentence indistinguishable from those upheld in Andrade and Ewing. Petitioner's Eighth Amendment claim must therefore be denied.

Finally, petitioner claims that the trial court abused its discretion when it declined, at the time of **[*23]** sentencing, to strike his prior conviction in the furtherance of justice. [4] (State Court Petition at 22-30.) Petitioner argues that his past offenses did not involve any violence and were not serious and did not show a threat of violence. (Id. at 25.) Petitioner further argues that his present crimes were not violent or serious. (Id.) Petitioner did not use a weapon or inflict an injury in any of his crimes. (Id.) Petitioner argues that his "background, character and prospects" do not compel the conclusion that he falls within the "spirit of the Three Strikes Law." (Id. at 26.) Petitioner further argues these were victimless crimes and that he "did not actively solicit their business but they were willing partners in the drug sales transactions." (Id. at 27.) Petitioner argues that the "circumstances in mitigation outweigh those in aggravation, making the low term appropriate for the primary offense." (Id. at 30.) Finally, petitioner contends that the enhancements for his prior convictions were an overkill on the part of the trial court, especially where petitioner exercised caution to prevent harm to persons or damage to property, including the fact that petitioner **[*24]** was never armed in the commission of these crimes as is often the case in such street level transactions." (Id. at 30.)

FOOTNOTES

4 California Penal Code § 1385 provides, in relevant part, "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." The California Supreme Court has held that in cases charged under California's Three Strikes law, a court may exercise the power to dismiss prior convictions at the time of sentencing in the furtherance of justice. People v. Superior Court (Romero), 13 Cal.4th 497, 529-30, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996).

This claim essentially involves an interpretation of state sentencing law. As explained above, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." Estelle, 502 U.S. at 67. So long as a state sentence "is not based on any proscribed federal grounds such as being **[*25]** cruel and unusual, racially or ethnically

motivated, or enhanced by indigency, the penalties for violation of state statutes are matters of state concern." Makal, 544 F.2d at 1035. Thus, "[a]bsent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief." Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994).

The trial court's decision not to strike petitioner's prior convictions was not fundamentally unfair. The state court record reflects that prior to the sentencing proceedings petitioner's trial counsel filed a motion to strike petitioner's prior convictions in the interest of justice. (CT 206-14.) At the hearing on the motion, defense counsel argued for leniency. (RT 294-97.) The trial judge stated that "Everybody has characterized [petitioner's] conduct as being street-level drug dealer." (RT 297.) The judge acknowledged that no violence was involved and that petitioner was "a nice fellow." (Id.) However, the judge noted petitioner was not eligible for probation and had "been on probation in a couple cases." (RT 299.) The judge declined to strike either of the **[*26]** prior convictions, stating "I have got to consider the protection of the community." (RT 300.) These conclusions are not contrary to the facts in the trial record.

After a careful review of the sentencing proceedings, this court finds no federal constitutional violation in the state trial judge's exercise of his sentencing discretion. Accordingly, petitioner is not entitled to relief on this claim. [5]

FOOTNOTES

5 If petitioner's sentence had been imposed under an invalid statute and/or was in excess of that actually permitted under state law, a federal due process violation would be presented. See Marzano v. Kincheloe, 915 F.2d 549, 552 (9th Cir. 1990) (due process violation found where petitioner's sentence of life imprisonment without the possibility of parole could not be constitutionally imposed under the state statute upon which his conviction was based). However, petitioner has not made that showing here.

In light of the above, petitioner's claims three and five should be denied.

C. Sufficiency **[*27]** of Evidence

In petitioner's sixth claim, he contends that his conviction was based on the uncorroborated testimony of police officers and that there was insufficient evidence of his guilt.

No state court issued a reasoned opinion addressing this claim.

> A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds. In Jackson v. Virginia, the Supreme Court held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. [307] at 319, 99 S.Ct. 2781, 61 L. Ed. 2d 560 [(1979)].

Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). Habeas corpus relief is available only if the state court's rejection of petitioner's sufficiency of the evidence claim was "objectively unreasonable." Id. at 1274-75 & n.13.

This court has reviewed the record and finds that the state court fairly described the facts adduced at trial. Unfortunately for petitioner, he **[*28]** was under surveillance by the police during most of the events at issue here; petitioner's grandmother lived only about 75 yards from the police substation. (RT 42.) Both Officer Wheat and Officer Ramsay, who personally viewed petitioner's actions, testified at trial. (RT 40-80 & 81-118; 140-69.) Officer Bottomley

provided his expert opinion in support of the prosecution. (RT 179-89.) Although Derrick Shields had trouble remembering certain facts during his testimony at trial (RT 22-24, 26-28, 33), he confirmed that his car made no stops between the time it had stopped at 201 Mark Street and the time police officers stopped the vehicle in which he was a passenger. (RT 31.) Officer Wheat testified that at the station, where he had taken Shields for further interview (RT 58), Shields told the officers that his girlfriend handed money to petitioner, and gave a description of the person who sold them marijuana, referred to him as "Thomas," and later identified a photograph of petitioner as that person. (RT 58-61.)

With regard to the sale of cocaine, Officer Wheat testified that he viewed the driver of a white Mustang stop his car and speak with petitioner. (RT 83.) Officer Wheat testified **[*29]** that the driver then pulled up, parked and got out of his car, carrying something in his hand which Officer Wheat stated he was 70% sure it was folded up money because it was green. (RT 85-87.) Officer Wheat testified that petitioner took it from the driver, then took something light-colored out of his mouth and handed it to the driver of the white Mustang. (RT 89-90.) Officer Darden testified he had also been surveilling petitioner through binoculars. (RT 137.) He testified that he stopped the white Mustang in which Mr. Brown was later discovered to have a rock of cocaine between the seats. (RT 138.) Officer Darden testified that he stopped the white Mustang about three blocks from where he last saw the car and that only about a minute elapsed from the time he observed the substation until he made the stop. (RT 138.)

After viewing the evidence in the light most favorable to the prosecution, this court finds that any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. Petitioner's sixth claim for relief should be denied.

D. Fourth Amendment Claims

In claims 7, 8, 9, 10, 11, 12 and 13, plaintiff raises allegations that various trial **[*30]** court rulings violated his Fourth Amendment right to be free from unreasonable searches and seizures. (Id.) These claims are not cognizable in a federal habeas corpus proceeding.

The United States Supreme Court has held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). Thus, a Fourth Amendment claim can only be litigated on federal habeas where petitioner demonstrates that the state did not provide an opportunity for full and fair litigation of the claim; it is immaterial whether the petitioner actually litigated the Fourth Amendment claim. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996); Gordan v. Duran, 895 F.2d 610, 613 (9th Cir. 1990).

The only issue before this court is whether petitioner had a full and fair opportunity in the state courts to litigate his Fourth Amendment claim, not whether the state courts correctly disposed of the Fourth Amendment **[*31]** issues tendered to them or even whether the claim was correctly understood. See Siripongs v. Calderon, 35 F.3d 1308, 1321 (9th Cir. 1994). Here, petitioner concedes the trial court held a hearing on petitioner's motion to suppress pursuant to California Penal Code § 1538.5. (Traverse at 5.) However, petitioner attempts to argue that because the state court failed to correctly apply the Fourth Amendment demonstrates he was not provided a full and fair hearing. (Traverse at 5.) Petitioner may not circumvent binding authority in this way. The record reflects petitioner had a full and fair opportunity to litigate his Fourth Amendment claims in state court. Accordingly, claims 7, 8, 9, 10, 11, 12, and 13 are barred.

E. Use of Hearsay Testimony

In claim 14, petitioner argues that one of the witnesses at trial was allowed to state what a third party told him, improperly allowing hearsay testimony, and depriving petitioner of his right to confront witnesses against him. In his traverse, petitioner asks the court to take judicial notice

of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)(hearsay evidence can only be admitted at trial if **[*32]** the witness is unavailable and the defendant has had an opportunity to cross-examine the witness prior to trial).

As a general rule, evidentiary rulings by state courts do not raise federal constitutional issues. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Federal habeas corpus relief is only available for evidentiary rulings so egregious that they amount to a violation of the Fourteenth Amendment's Due Process Clause. See Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). In order to violate the Due Process Clause the error must render the trial fundamentally unfair. Estelle, 502 U.S. at 72-73.

However, recently the United States Supreme Court addressed the question of whether Crawford may be applied retroactively. Whorton v. Bockting, U.S. , 127 S.Ct. 1173, 167 L. Ed. 2d 1 (2007). The Whorton Court held that Crawford v. Washington does not apply retroactively to convictions final on direct appeal as of the date Crawford was decided, or March 8, 2004. Id. In the instant case, petitioner's direct appeal became final on August 21, 2002. (Resp.'s Ex. G.) Accordingly, this court cannot apply Crawford **[*33]** to the instant petition.

But even assuming the court could review the record under Crawford, petitioner's claim is without merit. The statement that Officer Wheat made was:

> Mr. Brown made a statement to me he was coming into the Crest to buy some cocaine, that he lived in Martinez, he went up Park Street specifically due to the fact that he had bought cocaine from [petitioner] in the past, that is where he was going to buy it.

(RT 113.) The prosecution asked one more question, which was answered. (RT 113-14.) Then defense counsel stated "In addition, your Honor, I would object to that last statement that the officer read as hearsay and ask it be stricken." (RT 114.) The court responded, "It was nonresponsive, so the last statement will be stricken." (RT 114.)

The record reflects that the trial judge struck Officer Wheat's statement, so the hearsay statement of Mr. Brown was not part of the record for the jury's consideration. (RT 114.) The jury was later admonished that it was not to consider for any purpose any offer of evidence that was stricken by the court. (RT 196.) Reviewing courts presume "that jurors, conscious of the gravity of their task, attend closely **[*34]** the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. 307, 324 n.9, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); see also Richardson v. Marsh, 481 U.S. 200, 206, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)(referring to "the almost invariable assumption of the law that jurors follow their instructions"); Aguilar v. Alexander, 125 F.3d 815, 820 (9th Cir.1997) (holding that juries are presumed to follow a court's instructions as they are written).

Moreover, even if the admission of this statement was error, petitioner has failed to demonstrate prejudice. Petitioner is required to demonstrate that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Officer Wheat personally observed petitioner's actions and testified that he believed petitioner was selling the driver of the white Mustang rock cocaine. (RT 83-90.) Officer Darden testified that he stopped the white Mustang only three blocks away within about a minute and the driver pointed to the rock cocaine between the seats **[*35]** when prompted by the officer. (RT 98.) Given this testimony as well as the evidence described in section (C) above, this court cannot find that any error in admitting the hearsay statement had a substantial and injurious effect on the jury's verdict. Petitioner's fourteenth claim should be denied.

F. Ineffective Assistance of Trial Counsel

In the petition, petitioner contends that trial counsel was ineffective because:

> The trial counsel failed to aggressively investigate the circumstances and failed to put forth a defense of the charges. In effect, the counsel failed the petitioner. By accepting persons as witnesses when such witnesses had no percipient knowledge of the facts. . .

(Pet. at 17.) [6]

FOOTNOTES

6 In his state court petition, petitioner argued that defense counsel failed to raise various Fourth Amendment challenges; failed to pursue a misidentification defense based on petitioner's view that Jabbar Brown looks similar to petitioner and was present at the time the white Mustang driver (a different Mr. Brown) was found in possession of rock cocaine; failed to pursue petitioner's position that he was not in the area at the time the rock cocaine sale was made and failed to pursue an alibi defense by obtaining a statement from petitioner's wife to that effect; failure to pursue a defense that African-Americans were being unfairly targeted based on race; failure to obtain evidence to discredit Officer Ramsay regarding the evidence retrieved from the crawl space; and failed to appropriately challenge Officer Ramsay or Officer Horton on cross-examination. (Id. at 75-115.)

[*36] Respondent argues that the summary statement contained in the petition is insufficient to make a prima facie case, but that review of the record reflects defense counsel thoroughly cross-examined the prosecution witnesses and presented his own defense witness to explain why petitioner was in possession of such a large amount of cash in small denominations. (Answer at 15.) Respondent also contends that petitioner has failed to demonstrate prejudice.

The state court found that petitioner failed to make a prima facie showing that defense counsel's performance was constitutionally deficient and that such deficiency led to an unfair trial or unreliable result, citing Strickland, 466 U.S. at 694. (Resp.'s Ex. 1, at 3.)

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. **[*37]** After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally, competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (quoting Strickland, 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689).

Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, **[*38]** the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result

of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

Petitioner has failed to demonstrate that the result of the proceedings would have been different had defense counsel taken those steps suggested in the state court petition. Petitioner did not present a declaration from his wife or declarations or photographs that demonstrate a resemblance existed between petitioner and Jabbar Brown such that petitioner had been mistaken for Jabbar Brown. But even if he had, petitioner would still **[*39]** have to demonstrate that evidence would have overcome the testimony from police officers who personally viewed petitioner's actions. Their testimony was corroborated, at least in part, by statements made by Shields during his police interview. And, petitioner concedes that "petitioner was arrested the next day because a Mr. Brown told police officers that he bought drugs from petitioner." (State Court Petition at 113.) Although Mr. Brown, the driver of the white Mustang, did not testify at trial, there were sufficient facts from which the jury could find petitioner had sold rock cocaine to Mr. Brown. [7] (RT 137-38.) In light of the evidence presented at trial, this court cannot find that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. After a review of the record, this court concludes that the state court determination with regard to petitioner's claim of ineffective assistance of trial counsel was not contrary to, or an unreasonable application of Strickland. Claim 15 should also be denied.

FOOTNOTES

[7] On direct appeal, the state court found that the "evidence of [petitioner's] guilt on [the sale of the rock cocaine] count was overwhelming." (People v. Walker, slip op. at 7, 2002 Cal. App. Unpub. LEXIS 1963 at 11.)

[*40] G. Ineffective Assistance of Appellate Counsel

Finally, petitioner claims appellate counsel was ineffective because counsel "failed to raise the issues that needed to be raised." (Pet. at 18.) Respondent contends this is insufficient to state a claim of ineffective assistance of counsel.

The Strickland standards apply to appellate counsel as well as trial counsel. Smith v. Murray, 477 U.S. 527, 535-36, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). However, an indigent defendant "does not have a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Counsel "must be allowed to decide what issues are to be pressed." Id. Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined." Id. See also Smith v. Stewart, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (counsel not required to file "kitchen-sink briefs" because it "is not necessary, and **[*41]** is not even particularly good appellate advocacy.") There is, of course, no obligation to raise meritless arguments on a client's behalf. See Strickland, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice). Thus, counsel is not deficient for failing to raise a weak issue. See Miller, 882 F.2d at 1434. In order to demonstrate prejudice in this context, petitioner must demonstrate that, but for counsel's errors, he probably would have prevailed on appeal. Miller, 882 F.2d at 1434, n.9.

Petitioner's appellate counsel apparently reviewed the trial transcripts and raised the two issues he believed had the most merit. This decision was "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Although petitioner faults counsel for not raising all the claims contained in this petition, this court has evaluated those claims and determined they lack merit. Accordingly,

petitioner is unable to demonstrate prejudice, and is not entitled to relief on this claim. Claim 16 should also be denied.

For the foregoing reason, IT IS HEREBY **[*42]** RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 23, 2007.

John F. Moulds

UNITED STATES MAGISTRATE JUDGE

*2007 U.S. Dist. LEXIS 21347, **

GERALD THOMAS OBERG, Petitioner, v. TOM L. CAREY, Warden, Respondent.

No. C 04-5446 PJH (PR)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 21347

March 6, 2007, Decided
March 6, 2007, Filed

NOTICE: [*1] NOT FOR CITATION

SUBSEQUENT HISTORY: As Amended October 30, 2007.

Judge Profile
View a summary by nature of suit of the civil cases heard by this judge, excerpted from the CourtLink Judicial Strategic Profile.

CORE TERMS: burglary, plea bargain, plea agreement, sentence, registration, degree burglary, admission of evidence, ineffective assistance, felony, process rights, assistance of counsel, enhancement, inhabited, deficient, license, prong, pouch, possession of methamphetamine, counsel's performance, methamphetamine, fundamentally, probability, prosecutor, sentencing, prejudiced, breached, counted, magnet, questions of law, petitioner's claims

COUNSEL: Gerald Thomas Oberg, Petitioner, Pro se, Vacaville, CA.

For Tom L. Carey, Respondent: Glenn R. Pruden, LEAD ATTORNEY, Attorney General's Office, San Francisco, CA.

JUDGES: PHYLLIS J. HAMILTON, United States District Judge.

OPINION BY: PHYLLIS J. HAMILTON

OPINION

AMENDED ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has chosen not to file a traverse. The matter is submitted. [1]

FOOTNOTES

1 This order amends the order filed on March 6, 2006 only by deleting the "NOT FOR CITATION" designation.

BACKGROUND

A jury convicted petitioner on five counts: possession of methamphetamine for sale (Cal. Health & Safety Code § 11378 (count one)); transportation of methamphetamine (Cal. Health & Safety Code § 11379(a) (count two)); being under the influence of methamphetamine (Cal. Health & Safety Code § 11550(a) (count three)); possession of controlled substances paraphernalia **[*2]** (Cal. Health & Safety Code § 11364 (count four)); and driving with a suspended license (Cal. Veh. Code § 14601(a) (count five)). Exh. 3 (Clerk's Transcript, Vol. 3) at 626. [2] In a bifurcated proceeding, the jury found that petitioner had suffered two prior strikes as defined in California's three-strikes law. See Cal. Pen. Code §§ 667(b)-(i), 1170.12. These were incurred when petitioner entered into a plea bargain in 1980 to reduce two acts of burglary of an inhabited dwelling from first degree burglary to second degree burglary. Exh. 3 at 627, 629. As a result of his two prior strikes, the court sentenced petitioner to twenty-five years to life on count one. It stayed the life term on count two and imposed concurrent ninety-day jail terms on counts three through five. *Id.* at 673-675.

FOOTNOTES

2 2 Citations to "exh." are to the record lodged with the court by the Attorney General.

The California Court of Appeal affirmed petitioner's convictions **[*3]** and sentence and the California Supreme Court denied petitioner's application for review. Petitioner filed two subsequent rounds of state habeas petitions; all of the state petitions were denied.

The following facts are distilled from the opinion of the California Court of Appeal. *See* exh. 11 (opinion of the California Court of Appeal) at 1-3.

Two San Jose police officers saw petitioner make an illegal left turn. A check of his car's license plate revealed that the registration had expired in March 1995, despite the 1998 registration tag on the rear license plate. Upon stopping the car and obtaining identification, the officers learned that petitioner's driver's license had been suspended. Petitioner was the sole occupant of the vehicle.

Petitioner told Officer Cary that he had purchased the vehicle two to three weeks earlier, had been doing work on it, and had recently finished painting the car. Officer Cary noticed that petitioner appeared to be under the influence of a stimulant and that petitioner had fresh puncture wounds on his left arm.

Officer Cary searched the car and found a small leather vinyl case attached to a magnet, which he recognized as a container used to **[*4]** conceal narcotics in or on an automobile. Although the pouch had been lying on top of some other items behind the driver's seat, petitioner denied knowledge of the pouch and contended that it must have been there when he bought the car. Meanwhile, Officer Lee found a plastic box wedged in the right front wheel well. The box

contained four syringes, a glass pipe, an electronic gram scale, several small unused plastic baggies, a baggie containing powder residue, and another baggie containing approximately half an ounce of methamphetamine.

The trial court admitted evidence regarding petitioner's 1987 conviction for the possession of methamphetamine, finding that the prior crime was sufficiently similar in nature as to indicate a common scheme in the way petitioner had concealed the drugs in his car. Like the present offense, the 1987 case arose from a traffic stop where petitioner was the sole occupant of the vehicle. The officer who stopped petitioner in 1987 noticed that the registration sticker had been altered to read "88" although the registration had actually expired in 1985. The officer in 1987 found a pouch attached to the engine compartment with a large magnet; it contained **[*5]** drug paraphernalia and a gram of methamphetamine. Petitioner pled guilty to possession of methamphetamine.

STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor,* 529 U.S. 362, 407-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2001), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell,* 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion **[*6]** opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry),* 529 U.S. at 412-13. A state court decision is an "unreasonable application of Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

The standard of review is somewhat different if the state court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim. In such a case, a review of the **[*7]** record is the only means of deciding whether the state court's decision was objectively reasonable. *Plascencia v. Alameida,* 467 F.3d 1190, 1197-98 (9th Cir. 2006). When confronted with such a decision, a federal court should conduct "an independent review of the record" to determine whether the state court's decision was an unreasonable application of clearly established federal law. *Id.*

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El,* 537 U.S. 322 at 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931; *see also Torres v. Prunty,* 223 F.3d 1103, 1107 (9th Cir. 2000).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker,* 501 U.S. 797, 801-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *Shackleford v. Hubbard,* 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

DISCUSSION

One of the four issues which petitioner raised in his petition was dismissed by the court **[*8]** on initial review for failure to state a constitutional issue. As his remaining grounds for habeas relief, petitioner asserts that: (1) the introduction of evidence at trial regarding his 1987 conviction for possession of methamphetamine to show a common scheme violated his due process rights; (2) the State breached the terms of petitioner's 1980 plea bargain by charging the resulting convictions as prior strikes in his current case; and (3) he was denied effective assistance of counsel because his appellate counsel did not raise issue two on appeal, nor did appellate counsel argue that the 1980 convictions were no longer strikes after an amendment to the statutory definition mandated by Proposition 21.1.

Admission of Evidence of Prior Offense

Petitioner contends that the trial court's admission of evidence regarding his 1987 conviction violated his due process rights.

a. Due process limit on admission of evidence

Except for the specific guarantees of the Bill of Rights, the Due Process Clause has "limited operation." *Dowling v. United States,* 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). The Supreme Court therefore has "defined the category of infractions that violate 'fundamental **[*9]** fairness' very narrowly." Id. Specifically, a state court's admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *Henry v. Kernan,* 197 F.3d 1021, 1031 (9th Cir. 1999). Thus the due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass,* 45 F.3d 1355, 1357 (9th Cir. 1995). Only if there is no permissible inference the jury could draw from the admitted evidence and the evidence is of "such quality as necessarily prevents a fair trial," can admission of evidence violate due process. *Jammal v. Van de Kamp,* 926 F.2d 918, 920 (9th Cir. 1991).

b. Analysis

The state appellate courts held that under section 1101(b) of the California Evidence Code, evidence of petitioner's prior crime was admissible to show the similarity ("common plan") between them, which in turn tends to show that it was petitioner who committed the present crime. **[*10]** *See* exh. 11 (opinion of the California Court of Appeal) at 3-6; *see People v. Bradford,* 15 Cal. 4th 1229, 1316, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997) (prior crime evidence admissible to demonstrate modus operandi when it disclosed common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes). This decision as to California law binds this court, *see Bradshaw v. Richey,* 546 U.S. 74, 126 S. Ct. 602, 604, 163 L. Ed. 2d 407 (2005), but while adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness, *Jammal,* 926 F.2d at 919, so the question remains one of whether admission of the evidence rendered the trial fundamentally unfair.

In both the cases, petitioner had been driving a vehicle with a suspended license. Exh. 11 at 5-6. He had altered the registration tags on the cars to look as if the registration was current, although both registrations had actually expired. In both cases, petitioner concealed the drugs outside the car. *Id.* Although in 1987 the pouch **[*11]** containing the drugs was attached the vehicle by a magnet (whereas here, a plastic box containing the drugs was wedged under the wheel of the vehicle), a pouch with a magnet attached was found in the vehicle here. *Id.* Furthermore, "the [trial] court's express findings indicate a careful weighing of probative value against the danger of prejudice." *Id.* at 6-7.

The two occurrences were sufficiently similar that the jury could have drawn the permissible inference from evidence of the first crime that it was petitioner who had concealed the drugs. *See Dowling,* 493 U.S. at 349 (admission of evidence of circumstances surrounding a prior crime for which the accused had been acquitted was permissible to prove the accused's identity, since his actions in commission of both crimes were sufficiently similar); *Jammal,* 926 F.2d at 920 (permissible inference that because defendant had $ 135,000 in cash in trunk of his car at the time of one stop, the $ 45,000 in cash in trunk of car at time of another stop was his). And the trial court here performed the "probative value versus prejudice" balancing required by Rule 352 of the California Rules of Evidence, **[*12]** thus "adequately addressing" the concern that the jury could convict a defendant based on inferences drawn from the prior conduct. *See Dowling,* 493 U.S. at 353. For these reasons, admission of the evidence did not render the trial fundamentally unfair, so its admission did not violate petitioner's due process rights.

Because there was no constitutional violation, the state appellate courts' rejection of this claim was not contrary to, nor an unreasonable application of, clearly established United States Supreme Court authority.

2. *Breach of Plea Bargain*

In 1980 petitioner pled guilty to two counts of second degree burglary pursuant to a plea bargain. He claims that his current sentence violates his due process rights because it is a breach of his 1980 plea agreement. Petitioner seeks to withdraw his plea to the 1980 burglaries or, in the alternative, he seeks specific performance of the plea bargain based on the law as it was in 1980.

a. Breach of plea bargain as due process violation

Due process requires that "when a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so it can be said to be part of the inducement **[*13]** or consideration, the promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Claims that a plea agreement was breached are analyzed under state contract law. *Ricketts v. Adamson,* 483 U.S. 1, 6 n.3, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987).

b. Analysis

Petitioner claims that the alleged breach of the plea bargain requires that "at the least petitioner ... be allowed to withdraw his plea to the 1980 burglaries." Pet. at 19. However, in *Lackawanna County Dist. Attorney v. Coss,* 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001), the Supreme Court held that with the exception of convictions obtained in violation of the right to counsel, once a state conviction itself is no longer open to direct or collateral attack, it is "conclusively valid." *Id.* at 404. If the conviction is later used to enhance a criminal sentence, a petitioner "may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Id.*

A state conviction is not open to direct or collateral attack if the defendant is no longer in custody under that conviction at the time his petition is filed. *Maleng v. Cook,* 490 U.S. 488, 490, 494, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) **[*14]** (per curiam). Petitioner was not in custody for his 1980 conviction when he filed this habeas challenge, so it was no longer open to appeal or direct collateral attack, and under *Lackawanna* he cannot challenge it indirectly via this petition. The remedy of allowing him to withdraw the 1980 plea is not available in this proceeding.

In the alternative, petitioner requests specific performance of the plea bargain based on the law as it stood in 1980. In essence, he contends that his 1980 plea agreements locked in California law as it was at that time. In 1980, section 667 of the California Penal Code provided that if petitioner committed a subsequent felony, his punishment would be increased by one year for a non-serious felony or five years for a serious felony. California's addition of the three-strikes law

in 1994, reflected in sections 667(b)-(i) and 1170.12(c) of the Penal Code, allowed for the imposition of a twenty-five years to life sentence for persons with two prior strikes.

Petitioner does, not allege that the prosecutor failed to honor any of the terms in his 1980 plea agreement. He does not allege that the prosecutor promised him that his plea agreement would never form **[*15]** the basis of a sentencing enhancement. Nor does he argue that the prosecutor promised him that the law would never change. In fact, a knowing and voluntary plea does not require that a defendant be informed of the possibility of a future enhancement. *United States v. Brownlie,* 915 F.2d 527, 528 (9th Cir. 1990). Petitioner simply argues that because the law did not provide for the three strikes sentencing enhancement at the time he entered into the plea bargain in 1980, he is immune from this particular enhancement.

In *People v. Gipson (In re Gipson),* 117 Cal. App. 4th 1065, 12 Cal. Rptr. 3d 478 (2004), the court held that California contracts, including plea bargains, are "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws." *Id.* at 1070 (internal quotation marks and citation omitted). The Ninth Circuit in *Davis v. Woodford,* 446 F.3d 957 (9th Cir. 2006), quoting *Gipson,* recognized this principle of California law. *Id.* at 962. [3]

FOOTNOTES

3 The *Davis* court distinguished *Gipson,* however, on the grounds that when a California plea agreement includes a specific agreement as to how the *facts* can be used, as opposed to an attempt to restrict the applicable law, the agreement is enforceable and breach of it is a due process violation. *Davis,* 446 F.3d at 963. In *Davis* the parties to the plea agreement had agreed that the defendant's conviction pursuant to the plea would be treated as one "prior" rather than two. *Davis,* 446 F.3d at 960-61.

[*16] In this case petitioner's complaint is that the law has changed, not, as in *Davis,* that a plea bargain promise as to a question of fact has been breached. The claim thus is exactly that rejected in *Gipson,* and recognized as unavailing in *Davis* that the plea bargain incorporated existing law and could not be varied by later changes in the law. No promise was made that he would not receive a sentencing enhancement for subsequent crimes and *Gipson* and *Davis* establish that there is no implied incorporation of the law as it was at the time of the plea bargain. Because plea bargains are interpreted according to the law of the state in which they are reached, *see Ricketts,* 483 U.S. at 6 n.3, and California contract law incorporates the state's reserve power to amend the law, petitioner's contention that application of current law to him at his sentencing violated his plea bargain is incorrect, and his due process rights were not violated.

The appellate court's rejection of the claim was not contrary to, nor an unreasonable application of, clearly established United States Supreme Court authority.

3. *Ineffective Assistance of Appellate Counsel*

[*17] Petitioner contends that his appellate counsel was ineffective because he (1) failed to claim that petitioner's plea agreement was breached; and (2) failed to argue that Proposition 21, which in March of 2000 changed the definition of a burglary strike in sections 667.5(c)(21) and 1192.7(c)(18) of the California Penal Code, prevents his second degree burglary convictions from being counted as strikes.

a. Sixth Amendment right to effective assistance of counsel on appeal

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey,* 469 U.S. 387, 391-405, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Claims of ineffective assistance of appellate

counsel are reviewed according to the standard set out in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Miller v. Keeney,* 882 F.2d 1428, 1433 (9th Cir. 1989); *United States v. Birtle,* 792 F.2d 846, 847 (9th Cir. 1986). In order to prevail on an ineffective assistance claim, petitioner must establish two things. First, petitioner must show that counsel's performance was deficient, i.e. that it fell below **[*18]** an "objective standard of reasonableness" under prevailing professional norms. *Strickland,* 466 U.S. at 687-88. Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. Second, petitioner must establish that he or she was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* If the petitioner cannot establish incompetence under the first prong of *Strickland,* then a federal court considering a habeas ineffective assistance claim does not have to analyze prejudice under the second prong. *Siripongs v. Calderon,* 133 F.3d 732, 737 (9th Cir. 1998). "Under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. **[*19]** " *Bell v. Cone,* 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), *rev'd,* 359 F.3d 785 (6th Cir. 2004), *rev'd,* 543 U.S. 447, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005).

Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. *Jones v. Barnes,* 463 U.S. 745, 751-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Gerlaugh v. Stewart,* 129 F.3d 1027, 1045 (9th Cir. 1997); *Miller,* 882 F.2d at 1434 n.10. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. *Id.* at 1434 (footnote and citations omitted). Appellate counsel therefore will frequently remain above an objective standard of competence and have caused his client no prejudice for the same reason--because he or she declined to raise a weak issue. *Id.*

If the substantive basis of an ineffective assistance claim lacks merit, petitioner has not been prejudiced. *James v. Borg,* 24 F.3d 20, 26 (9th Cir. 1994) (petitioner could not establish that appellate counsel had been incompetent when the underlying basis for that challenge was improper); *Butcher v. Marquez,* 758 F.2d 373, 378 (9th Cir. 1985) **[*20]** ("[petitioner] claims as well that appellate counsel's failure to argue the issues presented above constituted ineffective assistance of counsel. In view of the fact that those claims have been shown to be invalid [petitioner] would not have gained anything by raising them").

b. Analysis

1. Failure to raise breach of plea agreement claim

First, regarding petitioner's claim of ineffective assistance concerning the alleged breach of his 1980 plea agreement, the court has concluded above that the substantive basis of this claim is without merit. Because petitioner's plea agreement was not violated, he cannot establish that counsel was incompetent in failing to raise this issue nor can he show he was prejudiced, since he would not have gained anything had the issue been raised. *James,* 24 F.3d at 26.

2. Failure to raise Proposition 21 issue

Petitioner also claims that appellate counsel was ineffective in failing to challenge the use of his 1980 convictions as prior strikes. He asserts that they should not have 'counted as strikes because they were for second degree burglary of inhabited dwellings and Proposition 21, which took effect in March of 2000, **[*21]** amended the three-strikes law to read that only burglaries of the "first degree" are to be counted as strikes. Pet. at 15-16; *see* Cal. Penal Code § § 667.5 (c)(21), 1192.7(c)(18).

The original version of section 1192.7(c)(18) listed "burglary of a residence" as a serious felony and a "strike" under California's three-strikes law. *People v. Garrett*, 92 Cal. App. 4th 1417, 1421, 112 Cal. Rptr. 2d 643 (2001). When that version of section 1192.7(c)(18) was adopted, a

burglary was burglary in the first degree only if it (1) was in the nighttime and (2) was of an inhabited dwelling or trailer coach, or the inhabited portion of any building. *Id.* at 1423. All other burglaries were of the second degree. Remembering that at that time a burglary was a strike if it were of a residence - with no requirement that the act have been in the nighttime - it becomes clear that it would have been possible for an offense to be factually a burglary in the second degree and still properly be counted as a strike, if the burglary was of a residence and was committed in the daytime.

In 1982, two years after the second degree burglary convictions at issue here, the "nighttime" **[*22]** requirement was deleted from the definition of first degree burglary. *Id.* Subsequent amendments to the burglary statute do not affect the analysis here. *See id.* at 1423-24 (chart showing history of amendments).

Proposition 21, effective in March of 2000, changed the definition of a burglary that qualifies as a strike to "any burglary of the first degree." *Id.* At that time petitioner's direct appeal was pending; he filed his notice of appeal on April 7, 1999, and his opening brief was not filed until October 28, 1999. *See* CT at 676 (notice of appeal); exh. 8, cover. Petitioner contends that his appellate counsel should have argued on appeal that his 1980 convictions for second-degree burglary were not strikes as defined in the newly-adopted Proposition 21.

For purposes of this ruling the court will assume that counsel's performance was deficient, and proceed to consider the prejudice prong of the *Strickland* test. *See Strickland,* 466 U.S. at 697 (court need not determine whether counsel's performance was deficient before examining the prejudice); *Williams v. Calderon,* 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (applauding **[*23]** district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice).

Garrett, decided on October 23, 2001, just short of a year after petitioner's appeal was decided, rejected the same argument petitioner makes here. *Id.* at 1432. The potential strikes in *Garrett* were residential burglaries in the second degree, just as were petitioner's here, and had clearly been strikes until the passage of Proposition 21. The question was whether they still were strikes post-Proposition 21. Despite the actual language of Proposition 21, the *Garrett* court held that all residential burglaries, regardless of their degree, are "strikes" pursuant to section 1192.7(c)(18) of the California Penal Code. *Id.* at 1431-1432. In reaching its conclusion, the *Garrett* court considered the intent of the legislature and the voters in passing Proposition 21. *Id.* at 1426. Voters were informed that Proposition 21 "adds *crimes to the serious and violent felony lists, thereby making offenders subject to longer prison sentences." Id.* (emphasis in original). Because Proposition 21 was enacted to expand the number of **[*24]** crimes in the serious and violent felony lists, the court reasoned that the intent in approving Proposition 21 was to provide additional punishment for specific *conduct* (burglary of an inhabited building), rather than a specific crime (first degree burglary). *Id.* at 1432.

Two of the three justices who decided petitioner's appeal were on the panel that decided *Garrett.* This does not, of course, establish with certainty how they would have ruled had petitioner's counsel raised this issue a year before *Garrett,* but it is suggestive.

Given the outcome in *Garrett,* and the overlap of justices, the court concludes that petitioner has not shown "a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different," *id.* at 694, so has not established that he was prejudiced by counsel's failure to raise this issue. There was no violation of his Sixth Amendment right to effective assistance of counsel.

c. Conclusion

Because there was no constitutional violation, the state courts' rejection of this claim was not contrary to, nor an unreasonable application of, clearly established United States **[*25]** Supreme Court authority. Petitioner is not entitled to habeas relief on this claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED.** The clerk shall close the file.

IT IS SO ORDERED.

Dated: October 30, 2007.

/S/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON

United States District Judge

*2007 U.S. Dist. LEXIS 66412, **

PHILLIP J. SEILER, Petitioner, v. J. BROWN, Warden, Respondent.

No. C 04-2911 PJH (PR)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 66412

August 30, 2007, Decided
August 30, 2007, Filed

Judge Profile
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CORE TERMS: governor, parole, commitment offense, reversal, prisoner's, plea agreement, federal law, evidence' standard, suitability, parole board, social history, incarceration, unsuitability, sentence, unstable, inmate's, misconduct, new law, prison terms, district attorney, ex post facto, rehabilitation, prison, old law, habeas corpus, habeas petitions, liberty interest, evidence to support, process violation, significant risk

COUNSEL: [*1] Phillip J. Seiler, Petitioner, Pro se, San Quentin, CA.

For Warden J. Brown, Respondent: Jessica N. Blonien, LEAD ATTORNEY, Attorney General's Office for the State of California, Sacramento, CA.

JUDGES: PHYLLIS J. HAMILTON, United States District Judge.

OPINION BY: PHYLLIS J. HAMILTON

OPINION

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Phillip Seiler filed a petition in this court for a writ of habeas corpus, pursuant to 28

U.S.C. § 2254. The court ordered respondent J. Brown, Warden, to show cause why the writ should not be granted. Respondent filed an answer and a memorandum of points and authorities in support of it and lodged exhibits with the court. Respondent also filed a motion to dismiss, which this court denied. Petitioner filed a traverse. For the reasons discussed below, the court DENIES the petition.

BACKGROUND

Petitioner, who is currently in the custody of the California Department of Corrections and Rehabilitation at California State Prison, San Quentin, pled guilty in 1989 to a charge of second degree murder with special enhancements, a violation of California Penal Code sections 187 and 12022.5, for shooting and killing his wife's lover in 1988. *See* Memorandum of Points and **[*2]** Authorities in Support of Petition ("Pet. Mem.") at 1. The trial court sentenced him to fifteen years to life, with a two-year enhancement for use of a firearm. *Id.* In 2003, he was found suitable for parole and granted parole by the Board of Prison Terms ("BPT"), a decision the Governor of California reversed. *Id.* at 2. Petitioner challenged the validity of the reversal in state habeas petitions, later denied, that he filed with the Marin County Superior Court, the California Court of Appeal, and the Supreme Court of California. Petition at 6-7. Petitioner again challenges the validity of the Governor's decision in the present petition. Pet. Mem. at 3-4.

Petitioner asserts three claims: (a) the Governor's reversal violated his plea agreement; (b) the Governor's power to review the BPT's decision violates the ex post facto clause of the United States and California Constitutions; and (c) the Governor's reversal of the BPT's decision violated his constitutionally protected liberty interest in parole because it was not based on any evidence. *Id.* at 5.

STANDARD OF REVIEW

A federal court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment **[*3]** of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Section 2254(d) applies to a habeas petition from a state prisoner challenging the denial of parole. *See Sass v. California Board of Prison Terms,* 461 F.3d 1123, 1126-27 (9th Cir. 2006).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than **[*4]** [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor,* 529 U.S. 362, 412-413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision is an "unreasonable application" of Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *See Williams (Terry),* 529 U.S. at 413.

A reviewing federal court may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

The state court decision to which 2254(d) applies is the "last reasoned decision" of the state

court. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803-804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *Barker v. Fleming,* 423 F.3d 1085, 1091-1092 (9th Cir. 2005). When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion, in this case the superior court's **[*5]** denial of petitioner's state habeas petition. *See Ylst* at 801-806; *Shackleford v. Hubbard,* 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000).

On November 8, 1988 "California voters approved Proposition 89, which added Section 8(b) to Article V of the California Constitution to provide for review [of parole board decisions] by the governor." *Johnson v. Gomez,* 92 F.3d 964 (9th Cir. 1996).

DISCUSSION

A. The Governor's Decision Did Not Violate the Plea Agreement

1. Background

Petitioner contends that the Governor's reversal of the BPT's decision violates his plea agreement because it impairs "vested rights acquired under prevailing law existing at the time he committed his crime...attaching an unanticipated disability to his negotiated plea and subsequent sentence." Pet. Mem. at 9. [1]

FOOTNOTES

1 Petitioner raises two more contentions under this claim, specifically that there is an ex post facto violation and that his plea may not have been voluntary. *See* Pet. Mem. at 9, 10-11. The ex post facto claim is dealt with in the subsequent section of this order. As to the contention that his plea may not have been voluntary, the court finds that such a contention goes to the validity of petitioner's plea, which is not an **[*6]** issue appropriately raised in a petition attacking the denial of parole. Such a contention would have to be raised in a separate petition directed toward his conviction.

2. Applicable Federal Law

A defendant has a due process right to enforce the terms of his plea agreement. *See Buckley v. Terhune,* 441 F.3d 688, 694 (9th Cir. 2006) *(en banc).* When a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

However, the Ninth Circuit has held that California contracts, including plea agreements, are "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws." *Davis v. Woodford,* 446 F.3d 957, 962 (9th Cir. 2006) (quoting *People v. Gipson (In re Gipson),* 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478 (2004)).

3. Analysis

Davis controls. The Ninth Circuit has deemed that a California contract, such as petitioner's plea agreement, incorporates and contemplates the reserve power of the state to amend the law, such as when the voters added Article V, section 8(b) **[*7]** to the California Constitution. Inherent in the agreement is, therefore, a recognition of the state's power, to change the final decision-maker from the BPT to the Governor. (Whether the use of this power is otherwise constitutionally sound is addressed below.) Thus the State cannot be said to violate a plea agreement when it acts in accordance with a new law that is necessarily incorporated into the agreement. Moreover, petitioner has advanced no evidence or argument that either the

prosecutor or the trial court made any promises to him with respect to parole. In other words, there is no evidence that parole was even part of the plea agreement. Thus the court finds no merit in petitioner's contention that his plea agreement was breached. Accordingly, habeas relief is denied on this claim.

B. The Governor's Decision Does Not Violate the Ex Post Facto Clause

1. Background

Petitioner contends that at the time he pled guilty the BPT was the "sole entity authorized to determine when a convicted murder *[sic]* would be released." Pet. Mem. at 13. Petitioner contends that the Governor's "clearly retroactive application of that power against Petitioner has prolonged his incarceration" **[*8]** and therefore violates the "constitutional bar against ex post facto application of law." *Id.* at 12. The court notes that Article V, section 8(b) of the California Constitution, which grants the Governor power to review, modify and reverse decisions of the Board of Prison Terms, was adopted after petitioner committed his commitment offense.

2. Applicable Federal Law

Application of the ex post facto clause, according to the Supreme Court, is limited to criminal legislation that effects an increase in punishment, criminalizes conduct that was not previously criminal, or requires more proof for conviction of an offense than was previously required. *See Collins v. Youngblood,* 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), *citing Calder v. Bull,* 3 Dall. 386, 390, 3 U.S. 386, 1 L. Ed. 648 (1798). In *California Department of Corrections v. Morales,* 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), the Court stated that without evidence that the new law substantively changed the definition of criminal conduct or altered the standards of parole eligibility, it created "only the most speculative and attenuated risk of increasing the measure of punishment." *Id.* at 514.

The Ninth Circuit, in *Johnson v. Gomez,* 92 F.3d 964 (9th Cir. 1996), a case factually similar to the instant **[*9]** case, rejected the contention that the California Governor's reversal of a grant of parole by the BPT violated the ex post facto clause. The appellate panel ruled that by merely adding a stage of review the law remained "neutral" rather than invidious:

> In this case, Johnson is similarly unable to demonstrate that an increase in his punishment actually occurred, because, like the petitioner in *Morales,* he had not been granted parole under the old law. *Morales,* 514 U.S. at ----, 115 S.Ct. at 1600. Under the old law, the BPT's decision would have been subjected to no review. Johnson's case is like *Dobbert,* where the petitioner could only speculate whether the jury would have imposed a life sentence had it possessed the final power to decide. *Dobbert,* 432 U.S. at 294, 97 S.Ct. at 2299 & n. 7. Here, because the BPT's parole decision is not final until after the expiration of the thirty-day gubernatorial review period, it cannot be said with certainty that the BPT would have granted Johnson parole had it possessed the final review authority.
>
> Johnson argues that, unlike the administrative convenience purpose of the law in *Morales,* the purpose and effect of the law here is to lengthen **[*10]** prison terms by making it more difficult for convicted murderers with indeterminate sentences to be released on parole. However, the law itself is neutral inasmuch as it gives the governor power to either affirm or reverse a BPT's granting or denial of parole. Moreover, the governor must use the same criteria as the BPT. The law, therefore, simply removes final parole decisionmaking authority from the BPT and places it in the hands of the governor. We cannot materially distinguish this change in the law from that at issue in *Mallett v. North Carolina,* 181 U.S. at 590, 21 S.Ct. at 731. In *Mallett,* the Court found no ex post facto violation where the new law allowed for higher court review of intermediate court decisions, even though the petitioner would have been entitled to a final intermediate court decision at the time of his

> crime. *Id.* at 597, 21 S.Ct. at 733. We therefore conclude that the application of Proposition 89 to authorize the governor's review of Johnson's grant of parole did not violate the Ex Post Facto Clause.

Id. at 967.

In *Garner v. Jones,* 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000), decided after *Johnson,* the Supreme Court addressed an inmate's as-applied constitutional challenge to "the **[*11]** retroactive application of a Georgia law permitting the extension of intervals between parole considerations." *Id.* at 246. The Court declared that the "standard announced in *[California Department of Corrections v.] Morales* [514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)] requires a more rigorous analysis of the level of risk created by the change in the law," rather than mere speculation: "We do not accept the Court of Appeals' supposition that the [new law] 'seems certain' to result in some prisoners serving extended periods of incarceration." *Id.* at 255. The Supreme Court stated that the relevant inquiry is that "[w]hen the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Id.*

The statute at issue in *Garner* vested the Parole Board with discretion to set an inmate's parole reconsideration hearing date and the power to permit expedited parole reviews if the circumstances warrant. *See id.* at 254. "These qualifications," the Court found, "permit a more careful **[*12]** and accurate exercise of the discretion the Board has had from the outset." *Id.* at 254. In evaluating whether the Board's use of its discretion was constitutionally permissible, the Court criticized the Court of Appeals for not considering the Board's internal policy statements which can provide "important instruction as to how the Board interprets its enabling statute ... and therefore whether, as a matter of fact, the amendment to the ... [statute] created a significant risk of increased punishment." *Id.* at 256. "Absent a demonstration to the contrary, we presume the Board follows its statutory commands and internal policies in enforcing its obligations." *Id.* at 256.

3. Analysis

Petitioner's claim fails under *Johnson* and *Garner.* Petitioner's contentions mirror those rejected in *Johnson.* Because the Governor's review is based on the same criteria and record used by the BPT, the layer of review itself is neutral. Petitioner can only speculate whether the BPT, had it had the final decision-making power, would have granted parole. Like the inmate in *Johnson,* because he had not been granted parole under the old law, petitioner cannot demonstrate that an increase in punishment occurred.

Petitioner's **[*13]** claim also fails under *Garner's* as-applied test. *Garner* directs this court to first examine whether the change is facially unconstitutional. As discussed in the preceding paragraph, because it leaves untouched the standards by which parole eligibility is determined, the law at issue in the present petition does not violate the ex post facto clause.

Next, *Garner* directs this court to determine whether petitioner has shown that there is a significant risk that the rule's practical application will result in increasing the period of incarceration. Petitioner has not overcome the presumption that the Governor followed the "statutory commands and internal policies in fulfilling [his] obligations." *Garner,* 529 U.S. at 256. He has said that the "governor['s] ... tough on crime political stance ... [has] result[ed] in the reversal of all but eight (8) out of approximately three hundred and fifty (350) findings of parole suitability by the Board of Prison Terms." Pet. Mem. at 8. However startling this evidence may be, this high reversal rate does not show with specific facts and details that in petitioner's case the Governor did not follow the statutory commands and internal policies in fulfilling **[*14]** his obligation to review decisions of the BPT.

For the foregoing reasons, habeas relief for this claim is DENIED.

C. The Governor's Decision is Supported by Some Evidence

1. Background

Petitioner contends that "[a]bsent a tangible demonstration that he **currently** poses an unreasonable risk to public safety the Governor fails to meet the 'some evidence' standard." Pet. Mem. at 17.

2. Applicable Federal Law

The Supreme Court has clearly established that a parole board's decision deprives a prisoner of due process if the board's decision is not supported by "some evidence in the record," or is "otherwise arbitrary." *Irons v. Carey,* 479 F.3d 658, 662 (9th Cir. 2007) (applying "some evidence" standard used for disciplinary hearings as outlined in *Superintendent v. Hill,* 472 U.S. 445, 445-455, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985)); *McQuillion v. Duncan,* 306 F.3d 895, 904 (9th Cir. 2002). The evidence underlying the Board's decision must also have "some indicia of reliability." *McQuillion,* 306 F.3d at 904; *Biggs,* 334 F.3d at 915. The some evidence standard identified in *Hill* is clearly established federal law in the parole context for purposes of § 2254 (d). *See Sass,* 461 F.3d 1123, 1128-1129 (9th Cir. 2006).

Ascertaining whether the **[*15]** some evidence standard is met "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Hill,* 472 U.S. at 455; *Sass,* 461 F.3d at 1128. The some evidence standard is minimal, and assures that "the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." *Sass,* 461 F.3d at 1129 *(quoting Hill,* 472 U.S. at 457).

The Governor does not have unfettered discretion, but rather "may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider." California Constitution, Article V, section 8(b).

3. Analysis

The Governor, though he noted that petitioner had made significant positive progress in prison, reversed the parole grant, stating that, "Mr. Seiler would pose an unreasonable risk to public safety if released at this time." Pet. Mem., Ex. C at 4. The stated reasons for the reversal were the gravity of petitioner's **[*16]** commitment offense, which, demonstrates an "exceptional indifference to human suffering," petitioner's "unstable social history," which included early drug use, petitioner's misconduct reports, and the opposition of the district attorney and the police department to petitioner's release. Pet. Mem., Ex. C at 3. Petitioner disputes the significance and weight the Governor attached to these factors, including the number and importance of the misconduct reports. Pet. Mem. at 19, 27.

a. Commitment Offense

Petitioner contends that the "facts of the crime, in particular, its unplanned, spontaneous nature, do not support the Governor's unilateral finding that Petitioner's actions demonstrate exceptional indifference to human suffering." *Id.* at 22.

The Governor described the commitment offense thus: "Angry and jealous, Mr. Seiler flew into a rage when he saw his estranged wife with [the victim] Mr. Horner. He pursued them and ran his van into their car, thereby endangering their lives. When Mr. Seiler confronted Mr. Horner, he pointed a 12-gauge shotgun and fired at point blank range, killing him instantly." Pet. Mem., Ex. C at 3.

The Governor may consider the gravity of the commitment offense **[*17]** in assessing an inmate's suitability for parole. *See* Cal. Pen. Code § 3041(b). The commitment offense may be a circumstance indicating unsuitability for parole if the "prisoner committed the offense in an especially heinous, atrocious, or cruel manner." Cal. Code of Regs. tit. 15, § 2402(c)(1). In determining this, the Governor may consider whether "the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering," and "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." *Id.*

Recent Ninth Circuit cases reflect that a critical issue in parole denial cases is the Board's use of evidence from the commitment offense and prior offenses. In *Biggs v. Terhune,* the court explained that the some evidence standard may be considered in light of the Board's decisions over time. *See* 334 F.3d 910, 916-917 (9th Cir. 2003). The court reasoned that "[t]he Parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered ... A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the **[*18]** rehabilitative goals espoused by the prison system and could result in a due process violation." *Id.* Although the *Biggs* court upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, the court cautioned that "[o]ver time, however, should *Biggs* continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of his offense would raise serious questions involving his liberty interest." *Id.* at 916.

The court in *Sass v. California Board of Prison Terms,* 461 F.3d 1123 (9th Cir. 2006), however, criticized the decision in *Biggs:* "Under AEDPA it is not our function to speculate about how future parole hearings could proceed." *Sass,* 461 F.3d at 1129. *Sass* determined that it is not a due process violation per se if the Board determines parole suitability based solely on the unchanging factors of the commitment offense and prior offenses. *See id.* (prisoner's commitment offenses in combination with prior offenses amounted to some evidence to support the Board's denial of parole). However, *Sass* does not dispute the argument in *Biggs* that, over time, **[*19]** a commitment offense may be less probative of a prisoner's current threat to the public safety.

Moreover, in the recent *Irons* decision, the Ninth Circuit emphasized the continuing vitality of *Biggs. See Irons v. Carey,* 479 F.3d 658 (9th Cir. 2006). However, the court found that relief for Irons was precluded by *Sass. Id.* The Ninth Circuit explained that all of the cases in which it previously held that denying parole based solely on the commitment offense comported with due process were ones in which the prisoner had not yet served the minimum years required by the sentence. *Id.* at 665. Also, noting that the parole board in *Sass* and *Irons* appeared to give little or no weight to evidence of the prisoner's rehabilitation, the Ninth Circuit stressed its hope that "the Board will come to recognize that in some cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from relevant California statutes." *Id. (citing Biggs,* 334 F.3d at 917). Even so, the Ninth Circuit has not set a standard as to when a complete reliance on unchanging circumstances **[*20]** would amount to a due process violation.

The court, having reviewed the record, finds that there was some evidence in the record to support the Governor's decision based on the commitment offense. There is no evidence that petitioner's wife or Mr. Horner encouraged or deliberately caused petitioner's rage. Petitioner shot Mr. Horner even though he had time to consider his actions when he pursued the pair in his vehicle. From this, the court finds that there was some evidence to support the conclusion that the manner in which the offense was carried out with an exceptionally callous disregard for human life.

Even though petitioner asserts that the Governor ignored the fact that the Board did carefully consider the commitment offense, this is irrelevant to the constitutional issue. Even though the Governor must review the same evidence as the Board, Section 8(b) allows him to arrive at a different decision than the BPT. This same explanation applies to petitioner's contention that the

unplanned nature of the crime does not indicate an exceptional indifference to human life. Section 8(b) allows the Governor to arrive at his own decision based on the record.

b. Unstable Social History and **[*21]** *Other Parole Suitability Factors*

The Governor also relied on petitioner's unstable social history as a factor for unsuitability. Specifically, the Governor mentioned his use of marijuana starting at age fourteen - using it twice a month until the commitment offense - his dropping out of high school, and his trouble making friends owing to frequent changes of residences in his youth. Pet. Mem., Ex. C at 3. The Governor also listed petitioner's seven misconduct reports, including two "serious reports" in 1991, and the opposition of the Sacramento District Attorney and the Sacramento City Police Department to his release, citing petitioner's "lack of compassion and regard for the law." Pet. Mem., Ex. at 3.

Petitioner contends that the Governor's finding that he has an unstable social history "is without foundation." Pet. Mem. at 24. Petitioner asserts that he has maintained contact with his family and has received letters from former employers offering jobs to petitioner after his release. *Id.* Furthermore, petitioner contends that he participated in Narcotics Anonymous while in prison with favorable results. *Id.* at 25. Petitioner disputes the significance and weight the Governor attached **[*22]** to these factors, including the number and importance of the misconduct reports. *Id.* at 27. He also contends that the Governor's reliance on the opinions of the police department and district attorney does not "comport to statutorily defined determinations set forth" in the California Penal Code. *See id.* at 28.

An unstable social history is listed as a circumstance tending to indicate unsuitability. Cal. Code of Regs. tit. 15, 2402(c)(3). In addition, circumstances which taken alone that do not clearly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability: "[a]ll relevant, reliable information available to the panel shall be considered in determining suitability for parole." *Id.* at section 2402(b).

The court, having reviewed the record, finds that there was some evidence in the record to support the Governor's decision. While the major events of heavy drug use and inadequate socialization are long past events and while at some point they may cease to be entitled to much weight, they provide, at this point, some evidence supporting the Governor's reversal and the state court's decision not to overturn the reversal. Though petitioner **[*23]** disputes the significance and number of the misconduct reports, the court finds that even in the absence of such reports, there was sufficient evidence to support the Governor's reversal of parole.

Petitioner's contention that the Governor's use of the opinions of the district attorney and police department is also without merit because under section 2402(b) of Title 15 of the California Code of Regulations the parole decision-maker shall consider all relevant and reliable information available in determining suitability for parole. Information from the prosecutors and the arresting and investigating officers, persons who have familiarity with petitioner's criminal acts, qualifies as relevant and reliable information.

For the foregoing reasons, habeas relief is DENIED on this claim.

CONCLUSION

The court concludes that the state court's adjudication did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. The court also concludes that its adjudication did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state **[*24]** court proceeding. Therefore, for the foregoing reasons, the court DENIES the petition.

The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 30, 2007

PHYLLIS J. HAMILTON

United States District Judge

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In

DECLARATION OF SERVICE BY CERTIFIED MAIL

Case Name: **John Doe v. Kamala D. Harris**
No.: **S191948**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 15, 2011, I served the attached **REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope as certified mail with postage thereon fully prepaid and return receipt requested, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Dennis P. Riordan, Esq.
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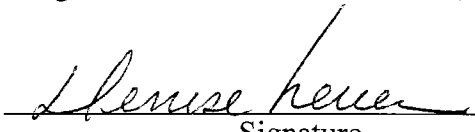
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Honorable Mark S. Boessenecker, Judge
Napa County Superior Court
825 Brown Street
Napa, CA 94559

I declare under penalty of perjury under the law of the State of California the foregoing is true and correct and that this declaration was executed on August 15, 2011, at San Francisco, California.

Denise Neves
Declarant


Signature