UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS L. ARNETT, Petitioner-Appellant, v. DANIEL PARAMO, Warden, Respondent-Appellee.	No. 17-56820 D.C. No. 5:16-cv-01169-FMO-JPR Central District of California, Riverside ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS L. ARNETT,[1] Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 16-1169-FMO (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

PROCEEDINGS

On June 3, 2016, Petitioner filed pro se a Petition for Writ of Habeas Corpus by a Person in State Custody, raising 19 claims challenging his 2012 forgery convictions and resulting three-strikes sentence of 25 years to life in state prison plus three years. On October 3, 2016, Respondent filed an Answer. On

[1] Petitioner's name is sometimes misstated as "James" in the Answer. (See Answer at 1 & Mem. at 1.)

November 3, 2016, Petitioner filed a Reply.

For the reasons discussed below, the Court recommends that judgment be entered denying the Petition and dismissing this action with prejudice.[2]

PETITIONER'S CLAIMS[3]

I. The trial court "should have . . . suppressed" Petitioner's "conversation[s]" with two officers who "illegally interrogated [him] on the way to jail." (Pet. at 5 (ground one).)[4]

II. Insufficient evidence supported Petitioner's convictions for forgery by possessing counterfeit currency because he did not "pass," but merely "held," counterfeit currency at the time of his arrest. (Id. at 5-6 (grounds two, four, and five).)

III. The evidence was similarly insufficient at the preliminary hearing to hold him over for trial. (Id. at 6

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[2] On March 13, 2014, the Court dismissed without prejudice Petitioner's first habeas petition because his direct appeal was still pending at the time. Arnett v. Sniff, No. 5:14-cv-00249-FMO-JPR (C.D. Cal. Feb. 7, 2014) (Mar. 13 order dismissing petition).

[3] Petitioner's 19 grounds for relief include duplicative claims and subclaims and, as Respondent puts it, "alternative ways of stating grounds already raised." (See Answer at 2.) The Court has reorganized those grounds and addresses them in an order different from that followed by the parties. Notably, grounds two, four, and five are grouped as raising the same sufficiency-of-evidence claim, and the ineffective-assistance claim in ground six is merged with duplicative claims from grounds seven, eight, nine, and 11, which, together with ground 10, comprise his overall ineffective-assistance "claim."

[4] Throughout, the Court uses the pagination provided by its Case Management/Electronic Case Filing system.

(ground three).)

IV. Defense counsel were ineffective "throughout" the proceedings – for failing to "investigate the facts to find out that Petitioner did not do the crime," failing to "interview any witnesses," appearing "more interested in getting another plea bargain," failing to file various motions, illegally waiving Petitioner's speedy-trial and -sentencing rights without consent, making a racist comment toward Petitioner, and failing to disqualify the trial judge, who was "evidently biased and prejudiced" for ruling against Petitioner and sentencing him to life in prison. (Id. at 11-15 (grounds six through 11).)

V. The trial court improperly denied Petitioner's Marsden motions.[5] (Id. at 16-17 (ground 12).)

VI. The trial court improperly allowed a shackled Petitioner in a wheelchair to be "paraded in front of jurors" in the courthouse hallway. (Id. at 17 (ground 13).)

VII. The trial court improperly denied Petitioner's motion for a new trial, which was based on prosecutorial and defense-counsel misconduct. (Id. at 17-18 (ground 14).)

VIII. Cumulative errors violated Petitioner's rights to due process and a fair trial. (Id. at 18 (ground 15).)

IX. The trial court violated Petitioner's speedy-trial rights by "repeatedly" continuing the trial date without his consent (id. (ground 16)), and his speedy-sentencing rights were violated by both the prosecutor and defense counsel, who delayed

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[5] People v. Marsden, 2 Cal. 3d 118, 123-24 (1970) (allowing defendant to request that court-appointed counsel be relieved for ineffectiveness or conflict).

his sentencing hearing without his consent for "more than a year" (id. at 18-19 (ground 17)).

X. Petitioner's 25-years-to-life sentence constituted cruel and unusual punishment (id. at 19 (ground 18)) and violated the Ex Post Facto Clause in that his sentence should have been reduced under propositions 36[6] and 47[7] (id. at 19-20 (ground 19)).

BACKGROUND

On May 29, 2012, Petitioner was convicted by a San Bernardino County Superior Court jury of forgery by possessing counterfeit currency, in violation of California Penal Code section 476, "Forgery; fictitious or altered bills, notes, or checks" (count one), and section 475(a), "Forgery; possession or receipt of items; intent to defraud" (count two). (Lodged Doc. 1, 1 Clerk's Tr. at 118-20, 125.) The trial court found in a bifurcated proceeding that Petitioner had sustained two prior convictions, in August 2000, for lewd contact with a child, in violation of section 288(a), each of which qualified as a strike under the three-strikes law.[8] (Id. at 127-28; Lodged Doc. 2, 1 Rep.'s Tr. at 182-83.) On March 21, 2013, the court denied

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[6] Proposition 36, the Three Strikes Reform Act of 2012, became effective on November 7, 2012, allowing certain qualified prisoners serving indeterminate life sentences under the three-strikes law to seek resentencing under California Penal Code section 1170.126 as second-strike offenders.

[7] Proposition 47 was enacted in November 2014 to allow resentencing or redesignation of certain enumerated felonies as misdemeanors through a petition under section 1170.18.

[8] The three-strikes law is codified in part at Penal Code sections 667, 667.5, and 1170.12.

Petitioner's motion to strike his section 288(a) convictions under People v. Superior Court (Romero), 13 Cal. 4th 497 (1996), and sentenced him to 25 years to life in state prison plus three years on count one; the court imposed but stayed the same sentence on count two. (Lodged Doc. 2, 1 Rep.'s Tr. at 187, 202, 223-26, 227-28.) The court also found that Petitioner was statutorily ineligible for resentencing under Proposition 36 based on his prior section 288(a) convictions. (Lodged Doc. 15 n.2; see also Lodged Doc. 2, 1 Rep.'s Tr. at 212-13 (defense counsel admitting at sentencing that it was "pretty clear" that Petitioner was ineligible for resentencing under Proposition 36 but requesting essentially same relief under Romero).)

Petitioner appealed, raising two claims not in the Petition. (See Lodged Doc. 15 at 2 (describing Petitioner's instructional-error and Romero claims on appeal).) On December 23, 2014, the court of appeal affirmed the judgment. (Id.) On February 3, 2015, Petitioner's appellate counsel filed a petition for review in the California Supreme Court, raising the same two claims. (See Appellant's Pet. for Review, People v. Arnett, 2015 WL 5779055 (Feb. 3, 2015).) Petitioner filed his own pro se petition for review, raising three additional claims, including sentencing claims corresponding in part to grounds 18 and 19 of the Petition. (Lodged Doc. 29.) On March 11, 2015, the state supreme court summarily denied both petitions.[9] (Lodged Doc.

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[9] Because Petitioner presented portions of ground 18 and 19 only in his discretionary petition for review and not to the court of appeal, the state supreme court's denial of review did not exhaust the claims. See Casey v. Moore, 386 F.3d 896, 916 (continued...)

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Meanwhile, before the conclusion of the superior-court proceedings, Petitioner began filing multiple rounds of habeas petitions in all levels of the state court. In relevant part, while waiting for his sentencing hearing, Petitioner filed in rapid succession a series of habeas petitions in January 2013, raising the speedy-sentencing claim in ground 17 of the Petition. (See Lodged Docs. 5 (Jan. 7, 2013 superior-court petition), 7 (Jan. 7, 2013 court-of-appeal petition), 9 (Jan. 28, 2013 supreme-court petition), 11 (Jan. 30, 2013 superior-court petition).) On January 15, 2013, the superior court denied the first petition, finding that Petitioner had expressly consented to the sentencing delays (Lodged Doc. 6); the court of appeal summarily denied its petition the same day (Lodged Doc. 8); and the state supreme court denied its petition on March 20, 2013, citing procedural bars (Lodged Doc. 10). On June 4, 2013, the superior court denied another speedy-sentencing petition as moot because Petitioner had by then already been sentenced. (Lodged Doc. 12.)

While his direct appeal was pending, Petitioner filed another two rounds of habeas petitions, raising all 19 claims of the Petition. (See, e.g., Lodged Docs. 16 (Nov. 27, 2013 petition in court of appeal), 18 (Dec. 23, 2013 petition in supreme court), 23 (July 24, 2014 petition in superior court), 25 (July 24, 2014 petition in court of appeal)); see also Cal. App.

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[9] (...continued)
(9th Cir. 2004) (exhaustion requires claim to be "raised throughout the state appeals process").

Cts. Case Info., http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2087054&doc_no=S221123 (last visited May 30, 2017) (state supreme court docket showing filing of habeas petition on Sept. 9, 2014, which was summarily denied on Oct. 15). His petition was summarily denied by the court of appeal on December 11, 2013 (Lodged Doc. 17),[10] and by the state supreme court on January 29, 2014 (Lodged Doc. 19). When he filed another petition raising the Petition's 19 claims in the superior court (Lodged Doc. 23), it denied ground one on procedural grounds in a reasoned decision on August 15, 2014 (see Lodged Doc. 24), but apparently overlooked and did not address the remaining claims, which were separately attached to the form used by Petitioner (see Lodged Doc. 23, Attach. 7 at 7-26 (listing in attachment claims corresponding to grounds two through 19 of Petition); Lodged Doc. 24 at 1 (superior-court order describing Petitioner's request for habeas relief as being premised on "two reasons": "conversations" with arresting officers should have been suppressed and search of him was illegal)). The petition was then summarily denied by the court of appeal on August 28, 2014 (Lodged Doc. 26), and the state supreme court on October 15, 2014, see Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2087054&doc_no=S221123 (last

[10] Petitioner sought review of this denial by filing a petition for writ of certiorari in the U.S. Supreme Court, which denied it on June 30, 2014. Arnett v. California, 134 S. Ct. 2880 (U.S. June 30, 2014).

visited May 30, 2017).[11]

In October 2014, Petitioner filed a petition in the superior court seeking resentencing under Penal Code section 1170.126; it was denied on November 3, 2014. (See Lodged Doc. 28.)[12] On appeal, his appointed counsel filed a brief under People v. Wende, 25 Cal. 3d 436 (1979), raising no issues but asking the court to conduct an independent review of the record; Petitioner did not file his own brief. See Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=43&doc_id=2094470&doc_no=G051101 (last visited May 30, 2017). On May 14, 2015, the court of appeal found that Petitioner was ineligible for resentencing and affirmed the judgment. (Lodged Doc. 28.) Petitioner did not seek review of the denial of resentencing in the state supreme court.

SUMMARY OF THE EVIDENCE

Because Petitioner challenges the sufficiency of the evidence to support his convictions, the Court has independently reviewed the state-court record. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). Based on that review, the Court finds that the following statement of facts from the California

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[11] Respondent did not lodge and apparently overlooked this disposition of Petitioner's habeas petition by the state supreme court. (Cf. Answer Mem. at 8 (incorrectly stating that Petitioner "did not file any further [habeas] pleadings with the California Supreme Court" after its January 29, 2014 denial of petition for review in Lodged Doc. 19).)

[12] Respondent claims to have lodged a copy of the clerk's transcripts of Petitioner's resentencing proceedings as lodgment number 27. But instead he apparently mistakenly lodged volume two of the clerk's transcripts of Petitioner's trial.

Court of Appeal opinion on direct appeal fairly and accurately summarizes the evidence.

> On January 11, 2012, a San Bernardino police officer arrested [Petitioner] in the lobby of the police station.[13] The officer searched [Petitioner] and found $810 in counterfeit currency and $25 in genuine bills folded together in [Petitioner]'s left front pants pocket. [Petitioner] initially told the officer he received the counterfeit money from a store that cashed his Social Security check, but admitted later the store gave him legitimate currency, which he gave to his wife. Still needing money to support his eight children, he paid a friend $200 for $1,000 in bogus currency, which he peddled on the streets. He provided an example of selling a counterfeit $100 bill for $40 of real currency, explaining "he just needed to hustle." Asked what he meant by "hustle," [Petitioner] "just smiled."
>
> A United States Secret Service agent confirmed the Federal Reserve notes [Petitioner] possessed were counterfeit, probably produced on "a typical home [ink jet] printer." Any person "familiar with handling money . . . would feel there [was] something wrong with [the] bills," although the notes might pass as genuine under certain circumstances, if mixed in with other currency or

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[13] Petitioner had apparently come to the police station to register as a sex offender, and he was arrested there on an outstanding warrant. (See Lodged Doc. 1, 1 Clerk's Tr. at 59-60 (defense's pretrial motion in limine seeking to sanitize circumstances of Petitioner's arrest).)

> if a person could not see the bills clearly. The person creating the notes made efforts to have the bills appear genuine by using special paper, and making sure the front and back of the bills lined up correctly. The agent explained counterfeit money is distributed to other people "to be spent or passed" commercially "[t]o gain some type of monetary instrument, such as paying for a meal or obtaining a gift card." The agent also explained there is a market for counterfeit money "on the streets."

(Lodged Doc. 15 at 2-3 (some alterations in original).)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> 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.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the

Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 135 S. Ct. 429, 431 (2014) (per curiam) (quoting § 2254(d)(1)).

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 412-13. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts 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 (2002) (per curiam) (citation omitted). A 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." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. Williams, 529 U.S. at 407-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409-10. In other words,

habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). "Even clear error will not suffice." Woods v. Donald, 575 U.S. ___, 135 S. Ct. 1372, 1376 (2015) (per curiam).

Petitioner did not exhaust any of his claims on direct appeal. He raised all 19 grounds for relief in various habeas petitions to all levels of the state court. His first such round culminated in the state supreme court's summary denial on January 29, 2014, which followed the court of appeal's summary denial on December 11, 2013. (See Lodged Docs. 17, 19.) He did not file a petition in the superior court during that round. Petitioner had, however, earlier raised ground 17, his speedy-sentencing claim, in a series of state habeas petitions. (See Lodged Docs. 6, 8, 10, 12.) Because the state supreme court denied that petition with citations to People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In re Swain, 34 Cal. 2d 300, 304 (1949),[14] however, the claim was not yet exhausted. (See Lodged Doc. 10); see also Seeboth v. Allenby, 789 F.3d 1099, 1104 n.3 (9th Cir. 2015) (citations to Swain and Duvall together "constitute[] dismissal without prejudice, with leave to amend to plead required facts with particularity"). Thus, all 19 of Petitioner's claims were exhausted only when the state supreme court summarily denied them

[14] These cases stand for the proposition that the claims were not alleged with sufficient particularity. See Cross v. Sisto, 676 F.3d 1172, 1176-77 (9th Cir. 2012).

on January 24, 2014. See Richter, 562 U.S. at 99 ("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."). Although Petitioner subsequently reraised them in other habeas petitions, because he was not required to do so, the state supreme court's denial on January 24, 2014, still provides the basis for review. See Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991) (holding that subsequent procedural bar imposed by habeas court was "irrelevant" because petitioner exhausted claim on direct appeal "and was not required to go to state habeas at all");[15] Nero v. Vazquez, CV 12-2111 FMO AS, 2014 WL 1289723, at *6 n.4 (C.D. Cal. Mar. 27, 2014) (citing Ylst). In any event, the only reasoned decisions in those later rounds rested on procedural grounds and thus do not count as "last reasoned decisions" for AEDPA-review purposes. See Ylst, 501 U.S. at 805; Nero, 2014 WL 1289723, at *6 n.4.

As to grounds 13 and 14, the trial court's rulings when Petitioner raised the claims in his motion for new trial are the last reasoned decisions on the merits and the basis for review. See Medley v. Runnels, 506 F.3d 857, 862-63 (9th Cir. 2007) (en banc) (looking through to last reasoned decision by trial court). Because there was no merits-based reasoned decision denying any

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[15] The Supreme Court recently granted certiorari in Wilson v. Sellers, No. 16-6855, 2017 WL 737820 (U.S. Feb. 27, 2017), to decide whether Richter implicitly abrogated Ylst's "look through" doctrine.

of the rest of Petitioner's claims, the Court conducts an independent review of the record to determine whether the state courts were objectively unreasonable in applying controlling federal law. See Haney v. Adams, 641 F.3d 1168, 1171 (9th Cir. 2011) (holding that independent review "is not de novo review of the constitutional issue, but only a means to determine whether the 'state court decision is objectively unreasonable'" (citation omitted)); see also Richter, 562 U.S. at 98, 102 (holding that petitioner still has burden of "showing there was no reasonable basis for the state court to deny relief," and reviewing court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision" and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" Supreme Court precedent).[16]

DISCUSSION

As a threshold matter, Petitioner's claims – in which he variously blames the judge, the prosecutor, and defense counsel for his imprisonment and three-strikes sentence – are simply too conclusory and speculative to warrant habeas relief.

Under 28 U.S.C. § 2254(a), a claim is cognizable in federal habeas corpus proceedings only if it alleges a violation of the Constitution, federal law, or treaties of the United States. See

[16] Even under de novo review, all of Petitioner's claims would fail. See Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in de novo review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review.").

also R. 1(a)(1), Rs. Governing § 2254 Cases in U.S. Dist. Cts. Although the Court should liberally construe pro se pleadings, "[a] petitioner is not entitled to the benefit of every conceivable doubt," and "the court is obligated to draw only reasonable factual inferences in the petitioner's favor." Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010) (as amended). Moreover, a "cursory and vague claim" does not warrant habeas relief. Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) (citing 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.")); see R. 2(c), Rs. Governing § 2254 Cases in U.S. Dist. Cts. (habeas petition must "specify all the grounds for relief" and "state the facts supporting each ground").

Here, Petitioner raises essentially the same 19 claims he raised in his pro se state habeas petitions, consisting almost entirely of conclusory and speculative allegations. (See, e.g., Pet. at 15 (asserting in ground 10 ineffective assistance based on defense counsel's failure to disqualify trial judge, who was "evidently biased and prejudiced" and "racist" based on Petitioner's adverse trial outcome and three-strikes sentence).) Indeed, each ground comprises essentially a few sentences at most, many of them identical to the statement of another claim, without any record citation or factual context or support.

Specifically, ground one seeks suppression of "conversations" between Petitioner and his arresting officers "on the way to jail," without specifying the content or context of those statements. (See id. at 5.) His sufficiency-of-the-

evidence challenge in grounds two through five is based on a two-sentence assertion of a legally frivolous theory. (Id. at 5-6; see also infra Section II(A).) In grounds six through 11 he claims that his assigned public defenders were ineffective "throughout the case," for failing to "investigate the facts to find out" that he was innocent and to file various motions, most of which, as explained below, were in fact filed. (See Pet. at 11-15; see also infra Section III.) Petitioner repeats the same ineffective-assistance allegations in support of his Marsden claim in ground 12. (Pet. at 16; see also infra Section III.) Ground 13 describes a single incident when the bailiffs "parade[d]" Petitioner, who was "shackled and in [a] wheelchair," "in front of jurors and spectators on [his] way to the Courtroom." (Pet. at 17; see also infra Section IV.) Ground 14 consists of a single sentence blaming the prosecutor and defense counsel for the denial of his motion for a new trial: "The People's and Public Defender's Patel's misconduct cumulatively destroyed Petitioner's due process rights that the Trial Court refused to grant a mistrial or the New Trial Motion." (Pet. at 17-18; see also infra Section IV.) Ground 15 refers to both "structural error[s]" and "cumulative errors stated above," which the Court liberally construes as a cumulative-error claim. (Pet. at 18; see also infra Section VI n.27.) Grounds 16 and 17 allege speedy-trial and -sentencing violations based on continuances requested by both parties, allegedly without Petitioner's consent even though he in fact consented to many of them. (Pet. at 18-19; see also infra Section V.) Ground 18 alleges in its entirety that his "punishment of 25 years to life for holding novelty

money is cruel and unusual" because it is "so hideous compared to murder or a sex crime." (Pet. at 19; see also infra Section VI.) Ground 19 alleges that he should have been resentenced under propositions 36 and 47 – which went into effect after his convictions – to essentially a misdemeanor-type sentence in county jail even though he is plainly statutorily ineligible. (Pet. at 19-20; see also infra Section VI.) Thus, the claims are too conclusory to warrant habeas relief. See Greenway, 653 F.3d at 804; Dows v. Wood, 211 F.3d 480, 486-87 (9th Cir. 2000) (factually unfounded argument provides no basis for federal habeas relief); Guest v. Miller, No. CV 13-8452 DMG (MRW), 2014 WL 5528396, at *3 (C.D. Cal. July 23, 2014) (dismissing habeas claim as "too conclusory, unsupported, and unintelligible to plausibly lead to habeas relief"), accepted by 2014 WL 5581394 (C.D. Cal. Oct. 31, 2014); Ward v. Beard, No. CV 11-8025 GAF (SS), 2013 WL 5913816, at *16-20 (C.D. Cal. Oct. 30, 2013) (denying "cursory and vague" allegations of ineffective assistance of counsel, such as counsel's failure to "search for . . . actual assailant").

Because Petitioner has not sufficiently alleged any habeas claims, he is not entitled to any relief. In any event, none of Petitioner's claims have merit, as further explained below.

I. Petitioner's Claim that His Postarrest Statements Were Involuntary Does Not Warrant Habeas Relief

In ground one, Petitioner argues that the trial court "should have . . . suppressed" certain postarrest "conversation[s]" between him and two officers, who "illegally interrogated" him "on the way to West Valley Detention Center."

(Pet. at 5.) Petitioner states that the interrogation was not recorded or supported by "signed statement[s]"; he "firmly believe[d]" that the officers "destroyed their notes"; the officers kept "badgering" him, and one of them "used excessive force" and kept him handcuffed in the backseat of a hot car; and he was "falsely charged" based on the police report. (Id.) Petitioner does not assert any Miranda[17] violations, however.

A. Relevant Background

On January 11, 2012, Petitioner was arrested when he went to the San Bernardino Police Department to register as a sex offender and an outstanding arrest warrant was discovered during the process. (See Lodged Doc. 1, 1 Clerk's Tr. at 59-60.) The arresting officer, Sochilt Martinez, was the case agent for the prosecution and testified at both the preliminary hearing and the trial. (See id. at 15-16; Lodged Doc. 2, 1 Rep.'s Tr. at 41-42.) At trial, Officer Martinez testified that after "mak[ing] contact" with Petitioner and arresting him in the station lobby, she noticed during a search incident to arrest that the stack of folded bills she had found in his pants pocket felt "different."[18] (Lodged Doc. 2, 1 Rep.'s Tr. at 43-45.) Petitioner became "agitated" during the search; he repeatedly questioned why Martinez was "checking his pockets" and got "pretty upset" when she discovered the money. (Id. at 47-48.) He refused to tell her the amount of the money and was generally uncommunicative

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[17] Miranda v. Arizona, 384 U.S. 436 (1966).

[18] The bills totaled $810, comprising eight $5s, one $10, eight $20s, and six $100s. (Lodged Doc. 2, 1 Rep.'s Tr. at 46.) Only $25, a $5 and a $20 bill, was "real money." (Id. at 46-47.)

except for mentioning that he "get[s] an SSI check." (Id. at 48.) He later sat on the ground and refused to move, forcing Martinez to have him physically escorted by other officers outside to her patrol car. (Id. at 47-48.)

After updating Detective Jerry Hanes, who took over the investigation, Martinez went outside to the parking lot to speak with both Petitioner and his wife, who had driven him to the station. (Id. at 48-49.) Although the record is not entirely clear as to the specific timing of events, Martinez testified that she read him his "new charge," "took his statement" "at some point," and drove him to jail. (Id. at 49-50.) She testified that before taking his statement, she "mirandized" him by reading a preprinted card. (Id.) She remembered that Petitioner was "still angry" and nonresponsive at first. (Id.) When he eventually indicated that he "wanted to talk," he provided a false story first, claiming that he had unknowingly received the fake money when he cashed his SSI check at Wal-Mart. (Id. at 51-52.) He subsequently admitted that he bought the fake money from his friend, "Steve" with a green Impala, by paying $200 real money for $1000 in fake currency. (Id.) He explained that he intended to sell the fake currency on the street for twice the amount he had paid. (Id.) Martinez noted that Petitioner was agitated for most of the interview but "calmed down" at the end and became "a lot more polite." (Id. at 52.)

On cross-examination, defense counsel elicited from Martinez that she had "discarded" her interview notes (id. at 55-56), and he impeached her direct testimony with her police report, showing that her testimony included certain details not in the report,

such as Steve's "green Impala" and Petitioner's statement that he didn't know where Steve was (id. at 61-62). Martinez also admitted that Petitioner's "statements" on her report were general summaries based on her recollection of the events, not his actual verbatim statements. (Id. at 65-66.)

Detective Hanes testified that he was involved in Petitioner's questioning, including asking for the source of the fake money. (Id. at 77-78.) Unlike Martinez, Hanes did not take notes or write a report (id. at 78) and apparently did not accompany Martinez when she drove Petitioner to jail (id. at 49 (Martinez testifying that after driving Petitioner to jail, she came back to station and "met back up with Detective Hanes")).

In an unsworn, unsigned, and undated "Citizen Complaint" attached to one of his state habeas petitions but not to his federal one, Petitioner's wife gave her version of the events surrounding his arrest. (See Lodged Doc. 16, Attach. Compl.) In relevant part, she alleged that while she was waiting in the parking lot, Martinez came out to inform her of Petitioner's impending arrest on an outstanding warrant, after which Petitioner was wheeled out in handcuffs and "placed" in a "waiting car parked in front of the station." (Id. at 1.) For the next two hours, Martinez, Hanes, and other officers questioned both her and Petitioner about the counterfeit currency, while Petitioner loudly protested about their treatment and demanded to be taken directly to West Valley Detention Center instead. (Id. at 1-2.) She alleged that Hanes "continued to use excessive force, by making my husband sit handcuffed in the back seat in 100 degree weather, questioning & accusing him of

criminal activity." (Id. at 2.) She noted that she was "very affended [sic]" and felt that they were "treated unfairly." (Id.)

This claim was denied summarily on the merits by the state habeas courts. (See Lodged Docs. 17, 19.) The superior court later denied the claim on procedural grounds. (See Lodged Doc. 24.)

B. Analysis

Petitioner seeks suppression of unspecified "conversations" he had with his arresting officers "on the way to jail," which apparently came after Martinez's questioning and interacting with him at the police station and in the parking lot. Thus, to the extent he already made incriminating statements to Martinez before his car ride and seeks to suppress additional statements, any error would likely be harmless. In any event, assuming he challenges all his postarrest statements to Martinez, the state courts' denial of the claim was not objectively unreasonable. The record clearly shows that he was given Miranda warnings and nonetheless chose to speak, after having some time to calm down. He does not dispute that fact or claim that the warning was defective in any way. Petitioner's postwarning decision to further engage Martinez – notably, by initially telling her a false story about where he got the counterfeit currency – constitutes an implied waiver of his right to remain silent. See Berghuis v. Thompkins, 560 U.S. 370, 388-89 (2010) ("In sum, a suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police.");

DeWeaver v. Runnels, 556 F.3d 995, 1002 (9th Cir. 2009) (holding that state court's denial of Miranda challenge was reasonable under AEDPA when suspect did not unambiguously invoke right to remain silent).[19]

Outside of the Miranda context, as long as the totality of circumstances shows that statements were made voluntarily, they are generally admissible. See Sturm v. Cate, 661 F. App'x 489, 491 (9th Cir. 2016) (when Miranda warnings adequate, state court's denial of involuntary-confession claim was not objectively unreasonable application of clearly established federal law or determination of facts), cert. denied, 137 S. Ct. 2137 (2017); see also Dickerson v. United States, 530 U.S. 428, 434 (2000) (general involuntary-confession claim must be decided by considering totality of circumstances, including "characteristics of the accused and the details of the interrogation" (citation omitted)).

Petitioner focuses on issues pertaining to the weight and credibility of Martinez's testimony concerning his statements, not its admissibility. (See Lodged Doc. 2, 1 Rep.'s Tr. at 110-

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[19] Petitioner's decision to break his silence by lying to Martinez about the source of the counterfeit currency further shows that he was not coerced and made a deliberate decision to speak. Indeed, when the prosecutor requested an inference-of-guilt instruction under CALCRIM 362 based on Petitioner's "false or misleading statement[s]," defense counsel opposed the request by noting that Petitioner freely "made the statement[s] when he didn't have to" and did not intend to mislead. (Lodged Doc. 2, 1 Rep.'s Tr. at 110-11.) Counsel also argued in closing that Petitioner was entirely forthcoming with officers and "didn't hide the fact that he's selling it on the streets," arguing that he did not intend to pass the counterfeit as "genuine" bills and therefore lacked the requisite intent. (Id. at 150-51.)

11 (defense counsel correctly noting that Martinez's failure to record interview and maintain notes related to her "credibility"), 143-45 (arguing in closing that Martinez's testimony required scrutiny because it was not written down or otherwise recorded).) The state courts could not have contravened clearly established law because the Supreme Court has never held that voluntary statements made after a proper Miranda advisement may be suppressed based on mere evidentiary weaknesses. See Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam) (holding that state court could not have unreasonably applied federal law if no clear Supreme Court precedent existed).[20] In any event, the jury was given various

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[20] Petitioner's "excessive force" allegations, which supposedly rendered his statements involuntary, seem to be based entirely on his wife's unsigned, undated, and unverified account of the arrest in her "complaint," which he did not even attach to his federal Petition. Even if the document constituted evidence, which it does not, the complaint merely portrays an active investigation by officers involving aggressive questioning and similar tactics, which is not unusual let alone excessive. Her cursory allegations concerning questioning by officers in "uncomfortable conditions, such as a hot patrol car, does not amount to a constitutional violation" or rise to the level of excessive force sufficient to render Petitioner's statements involuntary. See Dillman v. Vasquez, No. 1:13-CV-00404 LJO SKO, 2015 WL 881574, at *9 (E.D. Cal. Mar. 2, 2015) ("[T]he case law suggests that a brief (e.g., 30-minute-long) confinement in a hot patrol car does not violate the Fourth Amendment."). Further, the purported length of the interrogation was presumably related to Petitioner's noncompliance and physical escalation, which was why officers had to escort him to the parking lot in the first place. (See Lodged Doc. 2, 1 Rep.'s Tr. at 47-48.) Indeed, Petitioner's wife admitted that Petitioner was "yelling" and "curs[ing]" at the officers. (Lodged Doc. 16, Attach. Compl. at 2.) In any event, according to her account, he was apparently unaffected by any of the officers' conduct given that he allegedly steadfastly insisted on maintaining his Miranda rights

(continued...)

cautionary instructions on how to properly evaluate such inculpatory statements, including that Petitioner could not be convicted "based on his out-of-court statements alone," the jury must determine "whether [he] made any of these statements" and "how much importance to give to the[m]," and it should "[c]onsider with caution any statement made by [him] tending to show his guilt unless the statement was written or otherwise recorded." (See, e.g., Lodged Doc. 1, 1 Clerk's Tr. at 102-03.)

Finally, to the extent Petitioner seeks to challenge any search-and-seizure issues under the Fourth Amendment's exclusionary rule, such claims are not cognizable on federal habeas review. See Stone v. Powell, 428 U.S. 465, 481-82 (1976); Withrow v. Williams, 507 U.S. 680, 682 (1993) (holding that Stone's restriction on federal habeas jurisdiction of unconstitutional-search-and-seizure claim under Fourth Amendment does not extend to violation of Miranda under Fifth Amendment). Because Petitioner had a full opportunity to litigate any Fourth Amendment claims in state court, including in a pretrial suppression motion (see Lodged Doc. 1, 1 Clerk's Tr. at 40), he has no cognizable Fourth Amendment challenge on federal habeas review to the extent he seeks to raise any such claim here. See Stone, 428 U.S. 481-82; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996) (relevant inquiry under Stone is "whether

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[20] (...continued)
and never relented. (See id. at 1-2.) Even Petitioner seems to challenge only unidentified statements he made while being driven to the jail, not anything he may have said while he was waiting in the patrol car before then. Thus, Petitioner's wife's alleged statement provides no support for his claim.

petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided").

II. Petitioner's Sufficiency-of-Evidence Claims Do Not Warrant Habeas Relief

A. Trial

In grounds two, four, and five, Petitioner argues that the evidence was "insufficient" to convict him of forgery by possessing counterfeit currency with intent to defraud because he did not "pass," but merely "h[e]ld," the counterfeit currency at the time of his arrest. (Pet. at 5-6.)

In considering a sufficiency-of-the-evidence claim, a court must determine 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." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The reviewing court "must look to state law for 'the substantive elements of the criminal offense,'" although the "minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Coleman v. Johnson, 566 U.S. 650, ___, 132 S. Ct. 2060, 2064 (2012) (per curiam) (citation omitted). In determining whether the evidence was sufficient, a federal court must follow the state courts' interpretation of state law, including in the underlying case. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam); Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (per curiam).

In California, the crime of "forgery" may be committed in

multiple ways, including by possessing counterfeit currency with intent to defraud, which is punishable under several overlapping statutes. See Cal. Penal Code §§ 470-476. For possessing approximately $810 in counterfeit currency, Petitioner was convicted of violating section 476 (count one) and section 475(a) (count two). Section 475(a) targets "possession or receipt" of counterfeit notes or bills with intent to defraud. Id. § 475(a) ("Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items . . . with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery."). Section 476 punishes any making, passing, uttering, and publishing – as well as possessing with knowledge and intent to utter and defraud – a fictitious or altered bill, note, or check. Id. § 476 ("Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery.").

According to the trial court, Petitioner's two forgery convictions were merely "alternative theor[ies]" requiring "basically the same" elements and evidentiary proof. (See Lodged

Doc. 2, 1 Rep.'s Tr. at 38-39.)[21]

Petitioner is not entitled to habeas relief. He was convicted of forgery by "possession" with intent to defraud, meaning that whether he was merely holding the counterfeit currency when he was arrested is irrelevant because "holding" and "possessing" are essentially interchangeable words. Also, contrary to his assertion that it is not illegal to "hold" or possess counterfeit currency, possession of forged notes and bills is in and of itself "evidence of knowledge of their spurious nature" and of fraudulent intent. See People v. Norwood, 26 Cal. App. 3d 148, 159 (Ct. App. 1972) ("The necessary fraudulent intent may be inferred from defendant's unauthorized possession of [forged monetary instruments and documents].").

Further, unlike Petitioner's claim that he possessed only "novelty money," the fake bills closely resembled genuine

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[21] Petitioner was initially charged with only one count under section 476. (See Lodged Doc. 1, 1 Clerk's Tr. at 1, 11.) Apparently realizing that section 475(a) was "more applicable to [the] case than PC 476," the prosecutor filed an amended information on the first day of trial, seeking to add a second forgery-by-possession count under section 475(a). (See Lodged Doc. 2, 1 Rep.'s Tr. at 33-34; Lodged Doc. 1, 1 Clerk's Tr. at 75, 76-80.) According to the prosecutor, Petitioner would not be prejudiced by the additional charge because it would be "charged in the alternative, . . . not [as] an additional count," and was "nothing new," as both counts shared the same facts and elements. (Lodged Doc. 2, 1 Rep.'s Tr. at 35.) She further explained that her office "charge[s] things in the alternative all the time[;] [i]t's a 654 issue," meaning that the court could then stay the duplicate count's sentence under section 654. (Id. at 34.) Over the defense's objections, the court allowed count two to be added by amendment as an "alternative theory," with "basically the same" elements as count one. (Id. at 38-39.) The court then stayed the sentence on count two after Petitioner was convicted of both counts. Petitioner has not raised any challenge to these events.

currency; only upon close inspection would it become clear that it was fake, according to both Martinez and the U.S. Secret Service agent who testified at trial. (See Lodged Doc. 2, 1 Rep.'s Tr. at 43-45 (Martinez testifying that bills confiscated from Petitioner felt "different" only when she started counting them by hand), 104 (Secret Service agent testifying that "to the untrained eye" "these bills would appear genuine," in that someone would not be able to "immediately recognize [them] to be . . . counterfeit bill[s]"); see also id. at 159, 195-96 (prosecutor arguing in closing and court noting that evidence showed that "this is not novelty-type money," "children's money, play money," or "collector[']s item").) Petitioner's own admission that he bought it for $200 and planned to resell it for $400 shows that it was not just "play money."

In any event, Petitioner admitted to Martinez that he bought counterfeit currency from an acquaintance specifically to sell it to others for twice the purchase amount because he needed to "hustle." (Id. at 51-52.) In fact, he raised a different sufficiency challenge at trial, arguing that his plan to resell the counterfeit bills to others who knew them to be fake meant that he did not intend to defraud by attempting to pass them off as genuine bills; that claim was also meritless. See United States v. DeFilippis, 637 F.2d 1370, 1373 (9th Cir. 1981) (rejecting contention that defendants did not pass or utter counterfeit currency because their scheme did not require representing that altered bill was genuine or attempting to put it into circulation as money because "key element" is defendant's "specific intent to defraud"). Accordingly, based on the above,

there was more than sufficient evidence satisfying the "intent to defraud" requirement in support of Petitioner's forgery convictions.

B. Preliminary Hearing

Petitioner's argument in ground three challenging the sufficiency of the evidence at his preliminary hearing is not cognizable on federal habeas review. Federal habeas relief may be granted only on the ground that the 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 federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Although many states employ preliminary hearings to evaluate probable cause, it is well settled that there is no fundamental right to a preliminary hearing. See Howard v. Cupp, 747 F.2d 510, 510 (9th Cir. 1984) (per curiam); Ramirez v. Arizona, 437 F.2d 119, 119-20 (9th Cir. 1971) (per curiam). Thus, even the deprivation of a preliminary hearing would not require vacating a subsequent conviction, let alone some lack of evidentiary proof at the hearing. See Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."). Accordingly, Petitioner's claim concerning his preliminary hearing cannot provide a basis for habeas relief. See, e.g., Ortiz v. Figueroa, No. EDCV 14-1754-GW (KK), 2014 WL 8579622, at *4 (C.D. Cal. Dec. 5, 2014) (holding that any alleged

evidentiary insufficiency at preliminary hearing, or other alleged errors occurring in relation to such hearing, cannot provide basis for habeas relief with respect to petitioner's subsequent conviction or sentence), accepted by 2015 WL 1730370 (C.D. Cal. Apr. 8, 2015); see also Cabrera v. Yeats, 426 F. App'x 535, 536 (9th Cir. 2011) (finding petitioner's habeas challenge arising from trial court's dismissal of charge at preliminary hearing for lack of evidentiary support "relate[d] to . . . application of state law, and therefore is not cognizable").

In any event, as explained above, Petitioner's erroneous distinction between "passing" and "holding" counterfeit currency does not render the evidence against him insufficient, at trial or at the preliminary hearing. Accordingly, Petitioner's sufficiency-of-evidence claims do not entitle him to habeas relief.

III. Petitioner's Ineffective-Assistance-of-Counsel and *Marsden* Claims Do Not Warrant Federal Habeas Relief

A. General Background

Petitioner was represented at trial by two court-appointed deputy public defenders, David McClave and Alan Phou (see Lodged Doc. 1, 1 Clerk's Tr. at 5, 7, 8), both of whom he specifically names in the Petition as allegedly deficiently representing him (see Pet. at 11-15). McClave appeared with Petitioner at the initial "pre-preliminary hearing" on January 24, 2012, in which he obtained apparently the only plea offer from the prosecution on record; it was rejected by Petitioner. (Lodged Doc. 1, 1 Clerk's Tr. at 7.) Then Phou took over and remained as counsel of record from late January until early April, when he was

replaced by McClave again. (Id. at 8, 52.)

The relationship between Petitioner and defense counsel appears to have been challenging from the beginning. At the January 30, 2012 preliminary hearing – in Phou's second court appearance and merely two weeks since the public defender's office's appointment as counsel – Petitioner requested a Marsden hearing to replace him. (Id. at 9-10.) The court denied the request after holding an in camera hearing.[22] (Id.) According to Petitioner, he "asked for a Marsden hearing" for two reasons. (See Pet. at 11.) First, he claimed that Phou failed to comply with his pending "requests for a Penal Code §995 Motion, a Penal Code §17(b) Motion, a Romero Motion, and Discovery," and "[a]ll . . . Phoa [sic] produced in about February 2012 was some discovery." (Id.) Second, Petitioner apparently was displeased by counsel's involvement in plea discussions, claiming that counsel was ineffective for appearing "more interested in getting another plea bargain . . . [and] selling Petitioner out." (Id.) Petitioner's account is at least in part corroborated by the trial court's summary of the plea discussions immediately after denying the Marsden request, noting that it was a "typical . . . negotiation." (Lodged Doc. 1, 1 Clerk's Tr. at 18.)

At the preliminary hearing, Phou cross-examined Martinez and challenged the seized counterfeit bills on foundation and chain-of-custody grounds, as well as the prosecution's failure to prove that Petitioner's two section 288(a) priors were "separate

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[22] The Marsden-hearing transcripts were sealed and not included with the lodged documents. The Court ordered Respondent to lodge those transcripts, and he did so on July 31, 2017.

strikes." (Id. at 32-33.) The court disagreed, finding that Martinez's testimony alone showed probable cause to hold Petitioner for trial. (Id. at 34-35.) The court found the prior-strikes issue "premature" "at this point" but subject to renewal "for purposes of any future motions, 995 motions, . . . post preliminary hearing." (Id. at 35.)

On March 8, 2012, Phou filed two motions: a three-page suppression motion challenging Petitioner's "unlawful search and seizure" and a section 995 motion to set aside the information based on insufficiency of evidence presented at the preliminary hearing. (Id. at 40-50.) Phou apparently withdrew shortly after filing those motions.

On April 6, 2012, McClave appeared at the pretrial hearing, announcing that he would be "handling the case now" because "Phou [was] no longer on the case," and he had "spoke[n] with" Petitioner, who would be seeking another Marsden hearing to replace McClave. (Lodged Doc. 2, 1 Rep.'s Tr. at 2.) According to Petitioner, his Marsden request to replace McClave was prompted by the following: when he was "reassigned" to McClave in April 2012, he asked McClave about "the Penal Code §995 Motion, Motion to Suppress, and other requests" that Phou had purportedly promised to file but "were not done," and "McClave acted clueless and stupid because he claimed I did not know what I was talking about"; McClave also allegedly made a racist remark to him. (Pet. at 11-12.)[23] The court held an in camera hearing before

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[23] Petitioner complained at the Marsden hearing about not having been given discovery, but he acknowledged that he was (continued...)

denying the Marsden request. (Lodged Doc. 34, Marsden Tr. at 7; see Lodged Doc. 2, 1 Rep.'s Tr. at 2.)

McClave then filed a set of pretrial motions in limine on May 23, 2012, successfully convincing the court to sanitize Petitioner's prior convictions and the circumstances surrounding his arrest, namely, that he went to the police station to register as a sex offender and had an outstanding arrest warrant from Los Angeles County. (Lodged Doc. 1, 1 Clerk's Tr. at 58-68.) After trial, McClave filed two motions for a new trial and a lengthy sentencing memorandum raising both "statements in mitigation and Romero arguments." (See id., index at 2-4.) Petitioner submitted, but later withdrew, a third Marsden request to replace McClave, based in part on his unhappiness with McClave's decision to sanitize his arrest, which precluded the jury from knowing that he was "at the police station to register as a sex offender." (Lodged Doc. 2, 1 Rep.'s Tr. at 185-86; see also Lodged Doc. 1, 2 Clerk's Tr. at 201 (probation officer noting that Petitioner was "very upset" about counsel's performance because jury did not know "all of the evidence," including reason he went to police station, and jury "would have thought differently of him if they knew he was at the police station to register as a drug and sexual offender" and that "[h]e was trying to take care of his business . . . instead [of] . . . just loitering").)

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[23] (...continued)
allowed to read it on an "i-pad thing." (Lodged Doc. 34, Marsden Tr. at 2.)

B. Ineffective Assistance of Counsel

In grounds six through 11, Petitioner argues that defense counsel were ineffective "throughout" the proceedings, for failing to "investigate the facts to find out that Petitioner did not do the crime," failing to "interview any witnesses," appearing "more interested in getting another plea bargain," failing to file various motions, illegally waiving Petitioner's speedy-trial and -sentencing rights without consent, making a racist remark toward Petitioner, and failing to seek disqualification of the trial judge because he was "evidently biased and prejudiced" for not giving Petitioner a "fair trial" or sentence. (Pet. at 11-15.) As explained below, many of Petitioner's factually unsupported arguments are contradicted by the record and in any event do not amount to ineffective assistance.

1. Applicable law

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

Id. at 690. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Supreme Court has recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Accordingly, to overturn the strong presumption of adequate assistance, the petitioner must demonstrate that the challenged action could not reasonably be considered sound trial strategy under the circumstances of the case. Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively

> show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694; see also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective-assistance-of-counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court reiterated that AEDPA review requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim:

> The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. . . . Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

562 U.S. at 105 (citations omitted).

In Premo v. Moore, 562 U.S. 115, 127-28 (2011), the Supreme Court reversed the Ninth Circuit's grant of habeas relief on an ineffective-assistance-of-counsel claim based on Supreme Court precedent "that did not involve ineffective assistance of counsel" and "says nothing about the Strickland standard." "The lesson of Premo is that Strickland bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice." Walker v. Martel, 709 F.3d 925, 940 (9th Cir. 2013).

2. Analysis

Petitioner's ineffective-assistance allegations do not warrant habeas relief. First, he faults defense counsel for failing to carry out certain tasks that they actually did do. The record shows that the defense filed various motions that he

alleges were not filed, including a suppression motion, a section 995 motion, two motions for new trial, and a Romero sentencing motion. (See Lodged Doc. 1, 1 Clerk's Tr., index at 1-4.) Further, contrary to Petitioner's assertion, defense counsel apparently sought a reduction of the charged felony to a misdemeanor under section 17(b), which was denied. (See Lodged Doc. 2, 1 Rep.'s Tr. at 211.) Thus, most of Petitioner's arguments are simply not true.

Petitioner has not submitted any evidence or pointed to anything in the record to support his claims, despite first raising them in November 2013, more than three years ago. He failed to submit a declaration from trial counsel, or anyone, including himself, to corroborate his allegations regarding counsel's deficiency. On that basis alone his claims must be denied. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2013) (as amended) (holding that state court was not unreasonable in concluding that trial counsel's performance was not deficient as to particular ineffective-assistance claim when petitioner presented counsel's affidavit only to "support . . . other ineffective assistance claims" and "when [petitioner] had no evidence" to support claims); Vargas v. McEwen, No. EDCV 11-1181 VBF (FFM), 2012 WL 6676091, at *7 (C.D. Cal. July 25, 2012) (finding that claim that counsel was ineffective for failing to initiate plea negotiations failed for "lack of factual support" when petitioner did not submit or attempt to obtain declaration from trial counsel), accepted by 2012 WL 6677128 (C.D. Cal. Dec. 19, 2012). Similarly, Petitioner offers only conclusory assertions, unsupported by any competent evidence, to support his

claim that trial counsel failed to adequately investigate his defense; indeed, he does not name any witnesses he believes should have been called or point to any specific evidence he feels was overlooked by counsel. The record likewise does not indicate that trial counsel's investigation or preparation was inadequate in any way. See Ward, 2013 WL 5913816, at *18. Similarly, his conclusory assertions about counsel's alleged racist comment – which he conveyed to the trial judge at the Marsden hearing and which counsel denied (Lodged Doc. 34, Marsden Tr. at 2, 4) – and the trial judge's racial bias have no factual basis, and, without any corroboration, are insufficient to warrant habeas relief. Although Petitioner complains about counsel's failure to peremptorily challenge the trial judge under civil code section 170.6 (see Pet. at 15), he points to nothing the trial judge did during the statutory period for filing such a challenge that would have warranted it.

Second, defense counsel appear to have competently represented Petitioner throughout trial, despite the considerable strength of the prosecution's case – notably, Petitioner went to the police station on his own accord with a stack of counterfeit bills, was caught, and then quickly confessed and made additional incriminating statements – as well as the unique challenges posed by Petitioner.[24] Defense counsel obtained a plea offer from the

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[24] For instance, he unsuccessfully filed two Marsden motions almost immediately after each counsel's appearance. (Lodged Doc. 1, 1 Clerk's Tr. at 9 (first Marsden hearing conducted on January 30, 2012), 52 (second Marsden hearing on April 6, 2012).) He also calls counsel "clueless and stupid," apparently for telling (continued...)

prosecution on January 24, 2012, and apparently undertook considerable efforts to convince Petitioner to accept it, to no avail. (Lodged Doc. 1, 1 Clerk's Tr. at 7 (minute order showing "off the record, court and counsel confer in chambers," followed by notations, "OFFER/EXPOSURE PLACED ON THE RECORD," and "People's offer is rejected and withdrawn").)

Petitioner's remaining complaints about counsel also lack merit. To the extent he alleges that trial counsel displayed some personal animosity toward him, he has not shown any actual conflict of interest or irreconcilable differences actionable under the Sixth Amendment, which does not guarantee a "meaningful relationship between an accused and his counsel." See Ward, 2013 WL 5913816, at *16 (rejecting ineffective-assistance complaints concerning trial counsel's "[a]ttitude" and "personal dislike" of petitioner based on his "egregious crimes").

Thus, Petitioner's factually unsupported allegations of ineffective assistance are insufficient to entitle him to relief.

C. *Marsden* Denials

Petitioner argues in ground 12 that the trial court improperly denied his Marsden motions to relieve counsel, based on essentially the same arguments as in his ineffective-assistance-of-counsel claims. (See Pet. at 16-17.) As shown above, those arguments are either factually untrue or legally meritless.

To prevail upon a claim challenging a trial court's refusal

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[24] (...continued)
him that he "did not know what [he] was talking about." (Pet. at 11-12.)

to substitute counsel, a petitioner must demonstrate either that "an actual conflict of interest adversely affected his lawyer's performance," Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), or the disagreement "between [the petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment," creating "an attorney-client relationship that fell short of that required by the Sixth Amendment," Schell v. Witek, 218 F.3d 1017, 1026 (9th Cir. 2000) (en banc). "[N]ot every conflict or disagreement" in the attorney-client relationship implicates constitutional concerns. Id. at 1027; see Stenson v. Lambert, 504 F.3d 873, 886 (9th Cir. 2007) (contrasting "irreconcilable conflict" described in Schell, amounting to "constructive denial of the Sixth Amendment right to counsel," with other, lesser conflicts). Indeed, "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." Larson v. Palmateer, 515 F.3d 1057, 1066-67 (9th Cir. 2008) (citation omitted) (holding that state court's refusal to substitute counsel based on claims relating to counsel's "strategic decisions and lack of communication" with petitioner did not violate clearly established federal law).

Because Petitioner fails to demonstrate any irreconcilable conflict that significantly impeded his relationship with counsel, and the record reveals no such conflict, the trial court

properly denied his Marsden motions to relieve counsel.[25] Accordingly, Petitioner's claim does not warrant habeas relief.

IV. Petitioner's Claims Related to His Motion for New Trial Do Not Warrant Federal Habeas Relief

Petitioner argues in ground 14 that the trial court improperly denied his motion for new trial, which was based on several instructional-error claims and a shackling claim corresponding to ground 13. (Pet. at 17-18.) For the reasons discussed below, none of those claims warrant federal habeas relief.

In Petitioner's amended motion for new trial, dated April 22, 2013, he challenged the trial court's failure to (1) instruct the jury with section 648, "Making, issuing or circulating unauthorized money,"[26] as a lesser included offense of counts one and two; (2) give a "unanimity instruction" on counts one and two, as both statutes proscribe multiple acts in addition to possession; and (3) dismiss the jury panel when potential jurors allegedly witnessed Petitioner's shackling during voir dire. (Lodged Doc. 1, 2 Clerk's Tr. at 227-39.)

The trial court denied the amended motion for new trial,

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[25] Because Phou withdrew and was replaced by McClave shortly after Petitioner's unsuccessful Marsden request to relieve him, Petitioner's challenge as to the denial of his first Marsden motion is likely moot in any event.

[26] Section 648 provides that "[e]very person who makes, issues, or puts in circulation any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense, is guilty of a misdemeanor, and for each and every subsequent offense, is guilty of felony."

finding that (1) section 648 was "not a lesser included offense" of the charged offenses and no "substantial evidence . . . would warrant the giving of that instruction in any event"; (2) counts one and two as instructed "already clearly specifie[d]" the necessary prima facie elements for conviction, and "a separate unanimity instruction would [not] clarify anything for the jury [and] would have been duplicative"; and (3) due process was not violated based on the "minimal amount of time" that Petitioner was potentially seen in shackles by prospective jurors, "if in fact he was seen" at all. (Lodged Doc. 2, 1 Rep.'s Tr. at 187-202.)

A. Instructional Errors

The trial court's denial of Petitioner's motion for new trial raising instructional errors under state law fails to present any federal constitutional question warranting federal habeas relief. See, e.g., Schad v. Arizona, 501 U.S. 624, 634 n.5 (1991) (noting that state criminal defendant "has no federal right to a unanimous jury verdict" in noncapital case); Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam) (holding that state court's failure to instruct on lesser included offense in noncapital case does not present federal constitutional question or grounds for federal habeas relief (citing Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984)). As to the alleged lesser-included-offense instruction Petitioner wanted, his arguments seemingly rested on the language in the charging documents and the prosecutor's allegedly varying theories of the case, not his own. (See Lodged Doc. 1, 2 Clerk's Tr. at 227, 230-34.) Thus, the exception to noncognizability under Bashor,

730 F.2d at 1240 (noting that refusal to instruct on lesser included offenses consistent with defendant's theory of case may constitute cognizable habeas claim), does not apply.

B. Shackling

As to the shackling claim, the trial court noted the following outside the presence of prospective jurors:

> For the record, [Petitioner] is in a wheelchair and the way the court is configured, the only way to bring [Petitioner] up to this particular courtroom is to bring him up on the elevator. And the elevator comes out in the hallway [to] where basically the public is and the jury is. And there [sic] no other way to get him here. I can't take him down a back hallway . . . , so that they could not see that he is being escorted by the sheriff. But if we get him up here early enough, I can at least try to minimize that.
>
> And I'm not going to keep the jury down in the jury room. The jury room is in the basement [and] we're the 5th floor. We have two elevators that are notoriously bad and slow. And if I told jurors to gather in the jury room and then wait to have the deputy bring them all up, we'd invariably be delayed even longer than what [the] Court thinks is reasonable. So I'm going to [try] to do it the alternative way, which is if he gets here earlier [sic] enough, we have the jurors coming in later in the morning, we will try to get him up here before any of the jurors are present.

(Lodged Doc. 2, 1 Rep.'s Tr. at 17-18.) As such, the court

ordered the bailiff to "get [Petitioner] up here" as soon as possible, "closer to 8:30 to 9:45 so we can try to keep any contact with the jurors at a minimum." (Id. at 17.) The court also inquired as to where Petitioner would get "dress[ed]" for court upon arrival and was apparently satisfied by defense counsel's answer that he would get dressed "downstairs" before being brought up to the fifth floor. (Id. at 18.) When defense counsel noted that earlier that day one potential juror got in the elevator with Petitioner and was "standing over [him]" and likely saw Petitioner's waist chain, the court agreed to excuse that individual from the prospective juror pool. (Id. at 18-19.)

Petitioner's shackling claim fails because although clearly established law "prohibit[s] the use of physical restraints [on a defendant] visible to the jury absent a trial court determination . . . that they are justified by a state interest specific to a particular trial," Deck v. Missouri, 544 U.S. 622, 629 (2005), "[t]he jury's 'brief or inadvertent glimpse' of a shackled defendant is not inherently or presumptively prejudicial," Ghent v. Woodford, 279 F.3d 1121, 1133 (9th Cir. 2002) (as amended) (no prejudice from jury's brief glance of shackles outside of courtroom while petitioner was being transported); see also Williams v. Woodford, 384 F.3d 567, 593 (9th Cir. 2004) (as amended) (juror's viewing of defendant in handcuffs with a coat draped over his hands as he went to or from courtroom was not inherently or presumptively prejudicial). Petitioner has made no specific showing of actual prejudice, as he was required to do. See Williams, 384 F.3d at 593. Indeed, the court excused the only person, a prospective juror, who defense counsel said had

likely seen Petitioner's waist chain. (See Lodged Doc. 2, 1 Rep.'s Tr. at 18-19.) Thus, Petitioner is not entitled to habeas relief on his shackling claim.

V. Petitioner's Speedy-Trial and -Sentencing Claims Do Not Warrant Federal Habeas Relief

In ground 16, Petitioner argues that the trial court and defense counsel violated his right to a speedy trial by continuing the trial date without his consent. (Pet. at 18.) In ground 17, he argues that his "Speedy Sentencing Rights" were violated because the prosecutor and defense counsel repeatedly postponed his sentencing hearing without his consent, causing him to wait "forever to be sentenced" when the statutory deadline was 90 days. (Id. at 18-19.)

A. Applicable Law

The Sixth Amendment guarantees a criminal defendant the right to a speedy trial. U.S. Const. amend. VI. The right attaches when the government officially "accuse[s]" someone of a crime, either by filing "a formal indictment or information" or arresting and holding him to answer. United States v. Marion, 404 U.S. 307, 320 (1971); see United States v. MacDonald, 456 U.S. 1, 6 (1982) (interpreting Marion to mean that "the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused"); compare People v. DePriest, 42 Cal. 4th 1, 27 (2007) (noting that speedy-trial claim under California Constitution triggered by filing of felony complaint). The Sixth Amendment's speedy-trial "guarantee protects the accused from arrest or indictment through trial, but does not apply" at the sentencing

phase, "once a defendant has been found guilty at trial or has pleaded guilty to criminal charges." See Betterman v. Montana, 136 S. Ct. 1609, 1612 (2016).

To evaluate a speedy-trial claim, a court must balance four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether and how the defendant asserted his speedy-trial right, and (4) whether the defendant suffered prejudice as a result of the delay. See Barker v. Wingo, 407 U.S. 514, 530-31 (1972); accord Doggett v. United States, 505 U.S. 647, 651 (1992). No single factor is controlling or necessary; rather, the factors "must be considered together with such other circumstances as may be relevant." Barker, 407 U.S. at 533.

B. Relevant Background

The record shows that Petitioner was arrested on January 11, 2012, held to answer at a preliminary hearing on January 30, and tried beginning on May 23. (Lodged Doc. 1, 1 Clerk's Tr. at 1, 9, 73.) Thus, he waited only four months for trial. After he was convicted, the court held a bifurcated trial on priors on June 4, 2012 (id. at 127-28), after which the parties continued the proceedings various times, resulting in his sentencing hearing being delayed until May 21, 2013 (Lodged Doc. 1, 2 Clerk's Tr. at 255).

C. Analysis

Petitioner does not specify whether he relies on his federal constitutional rights under the Sixth Amendment or on state statutes in support of his claims, though his specific reference to a "90-day" sentencing deadline appears to be based on state law. (See Pet. at 19); compare Cal. Penal Code § 1449 (limiting

postponement of sentencing in misdemeanor cases upon defendant's request to "not more than 90 additional days"), with id. § 1191 (no such 90-day limit in felony cases). Petitioner's state-law-based arguments are not cognizable on federal habeas review. See McGuire, 502 U.S. at 67-68 (holding that habeas relief will not lie to correct errors in interpretation or application of state law); Perez v. Cate, No. CV 11-10585 RGK (SS), 2012 WL 3962757, at *9 (C.D. Cal. Aug. 20, 2012) ("Petitioner's allegation that the state law is invalid under the state constitution is not cognizable on federal habeas review."), accepted by 2012 WL 3962751 (C.D. Cal. Sept. 10, 2012).

Further, he has no constitutional right to a speedy sentencing hearing, see Betterman, 136 S. Ct. at 1612, and the record shows that his trial took place only four months after his arrest, which is less than the one-year presumptively prejudicial cutoff point, see Barker, 407 U.S. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."); Doggett, 505 U.S. at 652 n.1 (noting that postaccusation delay is "presumptively prejudicial" when it "approaches one year"). In any event, both his trial and sentencing hearing were continued based on express waivers from both sides, including defense counsel, many of which took place at hearings at which Petitioner was present. See Vermont v. Brillon, 556 U.S. 81, 90-91 (2009) (noting that delay attributable or caused by defense counsel is counted against defendant). Petitioner himself apparently did not object at those hearings to the stipulated continuances. (See, e.g., Lodged Doc. 1, 1 Clerk's Tr. at 133 (July 2, 2012

hearing minutes showing granting of continuance and noting that "[d]efendant waived time for sentencing").) Thus, Petitioner's constitutional rights were not violated.

VI. Petitioner's Sentencing Claims Do Not Warrant Habeas Relief

In ground 18, Petitioner argues that his 25-years-to-life sentence constituted cruel and unusual punishment under the Eighth Amendment. (Pet. at 19.) In ground 19, he contends that his three-strike sentence should have been reduced under propositions 36 and 47.[27] (Id. at 19-20.)

A. Eighth Amendment

As a general matter, a criminal sentence that is not proportionate to the offense may violate the Eighth Amendment. Solem v. Helm, 463 U.S. 277, 284 (1983). The Supreme Court has stated:

> 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 (2003) (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

When reviewing a sentence under the Eighth Amendment, a court considers three factors: (1) the gravity of the offense and harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed

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[27] Petitioner also references the "Ex Post Facto Clause," which prohibits laws retroactively imposing greater punishment for past crimes and is inapplicable to his resentencing claims, which he seeks to benefit under subsequently enacted remedial laws that would reduce his three-strikes sentence.

for commission of the same crime in other jurisdictions. Solem, 463 U.S. at 290-92. The second and third factors need not be reached when consideration of the gravity of the offense and harshness of the penalty does not raise an "inference of gross disproportionality." Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring); see also Ramirez v. Castro, 365 F.3d 755, 756-57 (9th Cir. 2004) (as amended) (noting that gravity of offense includes "fact-specific analysis of [defendant]'s criminal history").

Applying these principles, the Supreme Court has upheld lengthy sentences under California's three-strikes law even when the offense was nonviolent or involved minimal losses, as here. See Lockyer v. Andrade, 538 U.S. 63, 66-68, 76-77 (2003) (on habeas review, holding that state court reasonably rejected Eighth Amendment challenge to three-strikes sentence of 50 years to life for two counts of petty theft involving approximately $150 worth of videotapes); Ewing, 538 U.S. at 17-18, 30-31 (on direct appeal, rejecting Eighth Amendment challenge to three-strikes sentence of 25 years to life for felony grand theft involving three $399 golf clubs). Indeed, outside the context of capital punishment, successful challenges to the proportionality of particular sentences are "exceedingly rare." Solem, 463 U.S. at 289-90 (citing Rummel v. Estelle, 445 U.S. 263, 272 (1980)); cf. Ramirez, 365 F.3d at 768, 774-75 (finding such "exceedingly rare" case in which petitioner's three-strikes sentence of 25 years to life imprisonment violated Eighth Amendment because it was "grossly disproportionate" to his crime of petty theft and because his criminal history comprised "solely" two shoplifting

convictions obtained through "single guilty plea" many years earlier).

Here, Petitioner was convicted of possessing approximately $810 in counterfeit currency, which, as his third strike, triggered a mandatory 25-year-to-life sentence. Under current Eighth Amendment jurisprudence, his sentence, though severe, was not grossly disproportionate when compared to his underlying offense conduct and extensive criminal history. See Rummel, 445 U.S. at 276 (proper inquiry was not whether state could impose life sentence upon defendant's latest crime of obtaining $120.75 by false pretenses but whether totality of circumstances, including all his prior offenses, warranted that punishment under three-strikes recidivist statute). In denying Petitioner's Romero claim on direct appeal – which he does not challenge here and in any event is not a cognizable federal habeas claim – the court of appeal thoroughly discussed his lengthy criminal history and aggravating circumstances, highlighting in particular his recidivist criminal behavior and failure to take responsibility:

> [Petitioner] contends the trial . . . court did not adequately assess the particulars of his background, character, and prospects for rehabilitation. . . .
>
> [Petitioner]'s criminal record includes a June 1994 misdemeanor conviction for exhibiting a firearm (§ 417, subd. (a)(2); 90 days jail and probation), a June 1998 misdemeanor conviction for theft of an access card (§ 484, subd. (e); 90 days jail and probation), an August 1996 felony conviction for unlawful intercourse with a minor more than three years younger (§ 261.5, subd. (c);

> 365 days jail, probation, violation of probation, 16 months prison, violation of parole), a March 1998 misdemeanor theft conviction (§ 484/490.5; 30 days jail), and August 2000 felony convictions for lewd acts on a child under age 14 (two counts) and false imprisonment (§ 288, subd. (a); § 236; 36 months prison, violation of parole). In March 2005, he suffered a felony conviction for failing to register as a sex offender (§ 290, subd. (g)(2); 36 months prison; five parole violations). In April 2011, [Petitioner] suffered a felony conviction for possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a); probation).

(See Lodged Doc. 15 at 7-8.) Further, quoting the trial judge, the court of appeal noted that Petitioner "previously had benefited from having []strikes stricken, dismissed or not charged twice already – once in 2003 and again in 2011 in Riverside County," yet "[n]either one of those encounters sobered him up for the purposes of understanding that he faced a lifetime commitment to prison [or] caused him to modify his criminal behavior in any significant way." (Id. at 9.) Accordingly, the state courts' detailed review of Petitioner's extensive criminal history shows that his sentence was not cruel or unusual within the meaning of the Eighth Amendment. See Vargas, 2012 WL 6676091, at *5-6 (rejecting Eighth Amendment challenge to three-strikes sentence based on totality review of petitioner's criminal history, which was "extensive and littered with violent crimes" for which he served "substantial prison time"). Thus, Petitioner's three-strikes sentence appears to fall within the

broad legislative discretion afforded by the Constitution to punish repeat offenders more severely by enacting recidivist-based sentencing schemes like California's three strikes law. See Andrade, 538 U.S. at 76; Rummel, 445 U.S. at 274 (for felonies and "crimes . . . classifiable as felonies" that are "punishable by significant terms of imprisonment . . . , the length of the sentence actually imposed is purely a matter of legislative prerogative"); see, e.g., Parrish v. Yates, 481 F. App'x 314, 315 (9th Cir. 2012) (in light of Andrade and Ewing, three-strikes sentence of four consecutive 25-years-to-life terms for petitioner's four felony convictions not grossly disproportionate).

B. Propositions 36 and 47

Petitioner's myriad attempts to obtain resentencing under propositions 36 and 47 have been repeatedly rejected by state courts based on his "disqualifying priors," namely, his section 288(a) convictions. (See, e.g., Lodged Doc. 15 at 7 n.2; Lodged Doc. 28; see also Lodged Doc. 2, 1 Rep.'s Tr. at 212-13 (defense counsel admitting at sentencing that it was "pretty clear" that Petitioner was ineligible for relief under Proposition 36).) To the extent Petitioner seeks relief on the ground that the state courts failed to resentence him under state law, his claim is not cognizable on federal habeas review. See Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (citing McGuire, 502 U.S. at 67); see, e.g., Holloway v. Price, No. CV 14-5987 RGK(SS), 2015 WL 1607710, at *6-8 (C.D. Cal. Apr. 7, 2015) (finding that petitioner's federal "due process" and "equal protection" claims challenging denial of resentencing under § 1170.126 were noncognizable), certificate of

appealability denied, No. 15-55655 (9th Cir. Nov. 3, 2015); Aubrey v. Virga, No. EDCV 12-822-JAK(AGR), 2015 WL 1932071, at *9-10 (C.D. Cal. Apr. 27, 2015) (same), certificate of appealability denied, No. 15-55730 (9th Cir. Jan. 20, 2016). In any event, because Petitioner was statutorily ineligible for resentencing under state law, the failure to grant him such relief could not have deprived him of any federally protected right. See Johnson v. Spearman, No. CV 13-3021 JVS (AJW), 2013 WL 3053043, at *3 (C.D. Cal. June 10, 2013).

Accordingly, habeas relief is not warranted on these grounds.[28]

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation and direct that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: August 7, 2017

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

[28] Because none of Petitioner's claims demonstrate error, the state court's denial of his cumulative-error claim was not objectively unreasonable. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) (finding that when "no error of constitutional magnitude occurred, no cumulative prejudice is possible"); Taylor v. Beard, 616 F. App'x 344, 345 (9th Cir. 2015) ("[Petitioner] has failed to demonstrate any error here; thus, there can be no cumulative error.").

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS L. ARNETT, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 16-1169-FMO (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. See 28 U.S.C. § 636. On August 24, 2017, Petitioner filed objections, in which he simply repeats arguments from the Petition and Reply. They were thoroughly addressed in the R. & R., and none of the objections are well taken. Having made a de novo determination of those portions of the R. & R. to which Petitioner objected, the Court accepts the Magistrate Judge's findings and recommendations. IT IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 25, 2017

/s/
FERNANDO M. OLGUIN
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS L. ARNETT, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 16-1169-FMO (JPR) **J U D G M E N T**

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

DATED: September 25, 2017

/s/
FERNANDO M. OLGUIN
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS L. ARNETT, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 16-1169-FMO (JPR) ORDER DENYING A CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing § 2254 Cases in the U.S. District Courts provides as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A

motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further."'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

Here, Petitioner hasn't made the necessary showing as to any of the claims in the Petition.

Accordingly, a Certificate of Appealability is denied.

DATED: September 25, 2017

/s/
FERNANDO M. OLGUIN
U.S. DISTRICT JUDGE

Presented by:

Jean Rosenbluth
U.S. Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS L. ARNETT, Petitioner-Appellant, v. DANIEL PARAMO, Warden, Respondent-Appellee.	No. 17-56820 D.C. No. 5:16-cv-01169-FMO-JPR Central District of California, Riverside ORDER

Before: FARRIS and LEAVY, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 3).

The motion for reconsideration is denied, and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.