

No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

BRADLEY DEON HOOVER,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**APPENDICES TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 23 2019

FOR THE NINTH CIRCUIT

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

BRADLEY DEON HOOVER,

No. 18-15684

Petitioner-Appellant,

D.C. No. 2:15-cv-00082-JKS

v.

MEMORANDUM*

ROSEMARY NDOH, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Jr., District Judge, Presiding

Argued and Submitted October 4, 2019
San Francisco, California

Before: PAEZ and COLLINS, Circuit Judges, and CHOE-GROVES,** Judge.

Bradley Hoover appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Reviewing de novo, *Sanders v. Cullen*, 873 F.3d 778, 793 (9th Cir. 2017), we affirm.

Following a jury trial in 2011, Hoover was convicted of kidnapping and

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

** The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

murdering Michael Agustin. The crimes took place in 1994, almost seventeen years before he was brought to trial. Hoover was sentenced to life without the possibility of parole. On direct appeal, he argued that the delay in his trial violated his federal due process right to a fair trial. Finding no prejudice, the California Court of Appeal affirmed, and the California Supreme Court denied review.

Hoover then filed a petition for habeas corpus in state court, asserting that the lengthy delay in his trial resulted in a constructive denial of effective assistance of counsel. The state trial court denied the petition. The court held that, because Hoover's claim was based on the record on his appeal of his conviction, this claim could and should have been raised on direct appeal. The court further held that, to the extent that the letter from Hoover's trial counsel submitted with the petition constituted additional evidence, it provided no new arguments, and that Hoover's claim failed on the merits. Hoover renewed his habeas corpus petition in the California Court of Appeal and in the California Supreme Court, but both courts denied relief.

Hoover then commenced this federal habeas proceeding. He again challenged his conviction on the ground that the delay in his trial violated his due process rights under *United States v. Lovasco*, 431 U.S. 783 (1977). He also renewed his claim that the delay resulted in a constructive denial of effective assistance of counsel. The district court denied the petition, and Hoover timely

appealed.

On appeal, Hoover argues that the extraordinary delay in bringing him to trial violated his due process rights under *Lovasco*. He further argues that as a result of the delay he was constructively denied his Sixth Amendment right to the effective assistance of counsel. Although our review is de novo, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996. A federal court may only grant habeas relief when the last reasoned state court decision was contrary to or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)–(2); *Williams v. Taylor*, 529 U.S. 362, 407–09 (2000); *DeWeaver v. Runnels*, 556 F.3d 995, 997 (9th Cir. 2009).

The basis for Hoover’s due process argument is the delay of almost seventeen years between the 1994 murder and the 2011 trial. About three months after the crimes, Hoover and his then-girlfriend, now-wife, Andrea Carvalho, were charged by complaint with the murder and kidnapping of Agustin. At the conclusion of Carvalho’s preliminary hearing,¹ however, the court dismissed the charges against her for insufficient evidence. Hoover was not then arraigned. Nor

¹ California law entitles persons accused by complaint of committing a felony to a preliminary hearing to determine whether sufficient cause exists to hold them to answer at trial. Cal. Penal Code § 872.

did the prosecution seek a preliminary hearing against him.² Instead, it filed a detainer against him in 1995 with the state prison system, notifying him of the murder and kidnapping charges and of his right to demand a trial. The case languished for over sixteen years until Hoover demanded a trial in January 2011. Shortly thereafter, Hoover was tried and convicted.

Trial Delay.

The contours of the Fifth Amendment’s guarantee against delay in bringing a defendant to trial are laid out in *Lovasco*, 431 U.S. at 788–96. Under *Lovasco*, proof of prejudice is a “necessary but not sufficient element of a due process claim.” *Id.* at 790. Once that is established, the court “must consider the reasons for the delay as well as the prejudice to the accused.” *Id.* A court need not address the prosecution’s reasons for the delay unless the defendant first establishes actual prejudice. *United States v. DeGeorge*, 380 F.3d 1203, 1212 (9th Cir. 2004).

Hoover argues that the almost seventeen-year delay prejudiced him because he no longer had access to the transcript of Carvalho’s preliminary hearing where the charges against her were dismissed; he was unable to corroborate his alibi that he was eating dinner at the home of Carvalho’s parents because they had since died; and his ability to challenge the state’s evidence and to pursue leads

² Hoover was incarcerated for an unrelated charge arising out of a neighboring county.

concerning alternative perpetrators was impaired by the loss of potentially exculpatory evidence including the police dispatch logs, Agustin's telephone records, and the testimony of possible witnesses who could not be located.

In finding that Hoover did not establish actual prejudice, the California Court of Appeal applied the correct legal standard under *Lovasco*. The court concluded that Hoover failed to show how the missing police dispatch logs could have been used to exculpate Hoover or impeach the officers' testimony concerning their actions. The court further reasoned that Hoover failed to show how the missing preliminary hearing transcript would have contained impeachment evidence that would have been useful to him at trial. The court further reasoned that Hoover had not shown that Carvalho's parents would have testified the way he asserted they would. Lastly, the court held that no other evidence in the record supported a finding of prejudice and that Hoover's claim that he was unable to pursue additional lines of investigation was speculative.

Although the delay in this case is extraordinary, we are unable to conclude, under the deferential standard of review we must apply under section 2254, that either the court's application of clearly established federal law or its factual determinations were unreasonable.

Ineffective Assistance of Counsel.

Hoover also argues that the delay in his trial caused him constructive denial

of the effective assistance of counsel under *United States v. Cronin*, 466 U.S. 648 (1984). *Cronin* identified three scenarios that are so prejudicial that a court need not inquire into actual prejudice: (1) when there is complete denial of counsel during a “critical stage”; (2) when counsel fails to subject the prosecution’s case to “meaningful adversarial testing”; and (3) when counsel must render assistance under circumstances where “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659–60; *Bell v. Cone*, 535 U.S. 685, 695–96 (2002).

Hoover argues that the first and third scenarios apply here. Although the State contends that Hoover failed to exhaust any claim that the first scenario applies here, the State itself argued below that Hoover’s claim in part rested on a meritless contention that he had a “right to counsel pre-indictment,” and the district court addressed that claim on the merits when it held that a “period of investigative delay” is not a “‘critical stage’ of trial for which counsel is constitutionally required.” We agree with the district court’s conclusion that, in the absence of Supreme Court authority extending the right to counsel to pre-indictment investigation, the state court’s rejection of Hoover’s claim cannot be set aside under the standards of 28 U.S.C. § 2254(d). Hoover’s second argument—that no lawyer could have effectively represented him under the circumstances—also fails

because the United States Supreme Court has not held that a lengthy trial delay creates circumstances in which no defendant could be effectively represented, and the state court did not act unreasonably in concluding that Hoover's claim was unsubstantiated.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRADLEY DEON HOOVER,

Petitioner,

vs.

SCOTT FRAUENHEIM, Warden,
Pleasant Valley State Prison,

Respondent.

No. 2:15-cv-00082-JKS

MEMORANDUM DECISION

Bradley Deon Hoover, a state prisoner proceeding *pro se*, filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Hoover is in the custody of the California Department of Corrections and Rehabilitation and incarcerated at Pleasant Valley State Prison. Respondent has answered, and Hoover has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

In 1994, victim Michael Augustin was kidnapped and killed. Hoover, along with co-defendant Andrea Marie Carvalho, was initially charged with the crimes by felony complaint filed on November 1, 1994. At that time, Hoover was incarcerated on an unrelated crime, and was subsequently convicted and sentenced to prison on the other case. It was not until 2011, 17 years after the initial felony complaint was filed, that Hoover proceeded to a jury trial on the kidnapping and murder charges. On direct appeal of his conviction, the California Court of Appeal laid out the following facts underlying the charges against Hoover and the procedural history of his case:

[Hoover's] Charging and Prosecution

1994–1995

The kidnapping and murder were alleged to have occurred in Sacramento County on August 8, 1994, but [Hoover] was not immediately charged. He was under investigation for an unrelated crime in Solano County as of March 1994 and was arrested in that case on October 20, 1994.

On November 1, 1994, the People filed a felony complaint against [Hoover] and Andrea Marie Carvalho,^{FN2} accusing both of the murder and kidnapping of victim Michael Agustin. Carvalho's preliminary hearing, held in December 1994, ended in dismissal, with the magistrate finding insufficient evidence on all counts.^{FN3} [Hoover] was not arraigned on the complaint as his Solano County case was ongoing; he was subsequently prosecuted, convicted, and sentenced to prison in the Solano County case.

FN2. Carvalho later married [Hoover].

FN3. As we discuss post, a transcript of Carvalho's preliminary hearing was not available at [Hoover's] trial.

On December 5, 1995, the Sacramento County Sheriff's Department filed a detainer against [Hoover], notifying him of the present case and his right to request its disposition under section 1381.^{FN4}

FN4. Section 1381 provides in pertinent part that a defendant serving a prison sentence, if charged in any other pending criminal proceeding, must be brought to trial within 90 days after the defendant requests trial in writing.

2011

On January 7, 2011, [Hoover] filed a demand for trial in the present case. On January 28, 2011, the District Attorney's investigator interviewed [Hoover] in prison. [Hoover] told the investigator this case had had "no bearing on [him] whatsoever for the last 16 years[,] but he had filed his request for trial now because he wanted to get a job in prison and the hold on him from this case prevented it.

On February 7, 2011, the court arraigned [Hoover] on the original complaint; three days later, the People filed an amended complaint, naming only [Hoover]. He entered a plea of not guilty. On March 1, 2011, the trial court held [Hoover] to answer on the amended complaint, then deemed it an information.

The People thereafter dismissed the original case and rearrested [Hoover] on March 29, 2011. [Hoover] waived preliminary hearing. On April 22, 2011, the People filed a new information, case No. 11F02341.

[Hoover's] Motion to Dismiss

On June 16, 2011, [Hoover] filed a "motion to dismiss or for other sanctions due to dilatory prosecution." He argued that the People violated his speedy trial rights under the California Constitution because the 17-year delay in bringing the case to trial had

prejudiced him by hindering his ability to prepare his defense. As evidence, he cited (1) his inability to recall the facts surrounding the alleged crimes; (2) the alleged destruction of the preliminary hearing transcript in Carvalho's case; (3) the disappearance of witness John Wagner, who was never interviewed by defense counsel; (4) the lack of any further investigation of the case since defendant's arrest in 1994 on the Solano County case; and (5) the unavailability of witness Terry Walling.

Opposition

The People opposed the motion, arguing that because, aside from Wagner and Walling (whose unavailability benefitted [Hoover]), all material witnesses had been located and subpoenaed, and all material physical evidence had been preserved, [Hoover] had not shown actual prejudice under the California Constitution.^{FN5}

FN5. On appeal, [Hoover] agrees that his Sixth Amendment (federal) speedy trial right is not at issue as it was not triggered until the filing of the information in case No. 11F02341. (*See, e.g., People v. Martinez* (2000) 22 Cal. 4th 750, 756 (*Martinez*).)

[Hoover's] Response

[Hoover] cited the following as further evidence of prejudice: (1) Wagner's mother informed the police in November 2009 that around the time Wagner disappeared, a cousin named Sam Kissell had threatened to kill him over a drug debt; the police had done nothing to follow up on this information, which might bear on Wagner's credibility.^{FN6} (2) The police and the District Attorney's investigator had only just interviewed Dale Allbright, whose motorcycle broke down near the Rio Vista Bridge around 2:00 a.m. on August 9, 1994, and who was picked up by an unidentified male in the only car Allbright had seen on the road that evening. Timely investigation of his story might have revealed that the unidentified male murdered the victim, or led to the discovery that someone else other than [Hoover] did so.^{FN7} (3) All police dispatch records from the night of the crime had been destroyed or purged due to the passage of time.

FN6. Wagner's mother testified that she had actually told the police about this near the time of Wagner's disappearance.

FN7. Allbright testified at trial. He could not say precisely where his motorcycle broke down or where the unknown driver (whom he described only as "a white guy") picked him up. He did not see police cars or helicopters that night.

The Trial Court's Pretrial Ruling

The trial court ruled tentatively in limine that [Hoover] had shown "some evidence of actual prejudice" from the delay in prosecution, based on the lack of a transcript of Carvalho's preliminary hearing and the destruction of the police dispatch

logs.^{FN8} The court did not mention any other item cited in defendant's briefing. It indicated it did not find defendant's claim of faded memory persuasive as to prejudice, but that it might instruct the jury on faded memories and missing witnesses if the evidence proved to warrant such instruction.

FN8. Defense counsel declared that, according to the Sacramento Court Reporter's Office, the transcript had been destroyed. The prosecutor, who had also represented the People at the preliminary hearing in 1994, declared that at the hearing Carvalho's defense attorney had argued Carvalho was merely present at the crime scene. He added that it was the policy of the Sacramento County Superior Court (in 1994 and continuing) not to prepare transcripts of preliminary hearings in cases where defendants were not held to answer unless a party so requested.

Defense counsel asserted that Carvalho had told him that at her preliminary hearing the story told by [Hoover's] accusers, as presented by the investigating officer pursuant to Proposition 115, was impeached. The prosecutor replied that, as stated in his declaration, the magistrate had not held Carvalho to answer due to the absence of proof that she had any control over the situation leading to the murder, rather than because the accusation against [Hoover] was credibly challenged.

Having found prejudice from the delay in prosecution, the trial court asked the prosecutor to justify the delay. The court said it thought the People might have been hoping witness Wagner would "resurface." The prosecutor agreed: "That is the reason." The trial court denied [Hoover's] motion to dismiss, but left open the option to revisit the issue of "faded memories" if warranted based on the evidence presented at trial.

Trial Evidence

On August 8, 1994, at 10:48 p.m., officers dispatched to a rural location near Rio Vista for a reported pedestrian-vehicle accident found victim Agustin, fatally shot in the head. Agustin had been shot first at one location, then again at another location about 200 yards away, by a single firearm.^{FN9}

FN9. The officers did not disclose to the media or the victim's family how many times Agustin was shot or at how many locations.

On the morning of August 8, 1994, Agustin visited his sister, Cynthia Hylton, at her home in Vallejo. She knew he was "involved in the drug scene" and hung out at Terry Walling's house. He did not have a job or a regular place to live. He had become increasingly fearful and paranoid in the last few months. He arrived on a new motorcycle (which he did not have the money to buy, as far as she knew) and put it in her garage; he also had a gun. He telephoned someone on her home phone, yelling, "Hey, I told you not

to tell” or “Why did you tell him?” He borrowed her car for a short time, returned it, and left again.

Alfredo Ramirez, Agustin’s nephew, saw Agustin on the afternoon of August 8, 1994.^{FN10} Ramirez had recently observed changes in Agustin’s behavior that he perceived to be related to methamphetamine use. Agustin called Ramirez from Hylton’s home, asking for a ride in his car. Ramirez took him to get money from someone, then drove him to Walling’s house and dropped him off around 3:00 or 4:00 p.m. He did not see Agustin alive after that.

FN10. The two men were six years apart in age and were like brothers

Terri Hussey, [Hoover’s] friend, was at Walling’s house, described as a “gathering place for people,” when Agustin arrived. She had seen him there before, but did not know him well.

Later, [Hoover] came to the house. After that, John Wagner (a drug user who was down on his luck and living on the streets) arrived, but tried to leave when he saw [Hoover]. [Hoover] said he needed to talk to Wagner and told him to sit down.

[Hoover] said something had happened that he needed to talk about with Agustin. A “meeting” ensued, involving [Hoover], Wagner, and Agustin, among others. [Hoover] was the dominant person in the conversation.

“[T]earing up,” Agustin said to Walling: “[P]lease don’t let him take me. I don’t want to go. Help me.” [Hoover], Wagner, and Agustin walked out of the house; [Hoover] told Agustin not to make a scene and to “act like it was a casual walk across the street.” Several people were outside, including Carvalho.

As [Hoover] was leaving, Hussey said to him: “I don’t know what’s going on here, but is it as bad as what Don had did [sic]?”^{FN11} [Hoover] said it was worse. Hussey said she did not want to know any more and went inside. After Wagner came to the house and as he was leaving, Hussey saw a red convertible Chrysler LeBaron parked outside. Wagner had borrowed a red convertible Chrysler LeBaron from his friend in August 1994 and failed to return it. It was later recovered, inoperable, in Rio Vista.

FN11. Don Riley testified that [Hoover] had beaten and humiliated him because he received a tattoo from someone [Hoover] disliked.

The next day, police officers came to the house. Hussey and the others there denied any knowledge of what had happened to Agustin. Subsequently, Hussey had a conversation with Patti Brown, at whose home she was staying. According to Hussey, Brown said Carvalho, seeming “scared” and “frantic,” had told Brown that she and [Hoover] “took [Agustin] to Yolo County out in the slough, something like that. They shot him. He was shot once in the head or something, and then they drove off and then had a funny feeling and turned around and came back and he had drug [sic] himself up into the street and they shot him again.”^{FN12}

FN12. Brown testified that she never made any such statement to Hussey or heard any such statement from Carvalho. Carvalho testified that she never made any such statement to Brown.

On or around August 18, 1994, Walling was arrested for a probation violation and held in custody in Fairfield. On August 25, 1994, Hussey called Detective Richard Lauthier, the lead investigator on the case, and said she wanted to make a statement. She went to the place where Walling was being held and spoke privately with him. Thereafter, they made a joint videotaped statement in which Hussey recounted the story she had heard from Brown.^{FN13} On October 20, 1994, Lauthier interviewed Hussey alone. She re-told the story she had heard from Brown.

FN13. Walling told the police that John Wagner had said he was in a car driven to the murder scene on August 8, 1994, by Carvalho, and was dropped off somewhere near the scene after the killing. Walling was unavailable at trial.

The portion of the videotape including the statements was not played for the jury (possibly because the sound quality was “terrible”). However, the first portion of the videotape, in which Hussey and Walling were alone together and very affectionate toward each other, was played without sound for the jury as a defense exhibit to impeach Hussey’s testimony that she and Walling were “just friends.”

On October 29, 1994, Detective Lauthier interviewed Wagner. On November 1, 1994, Wagner’s mother, who knew he had been involved in the drug scene, saw him at a Motel 6 in Fairfield; he seemed scared, but sober. She never saw him again. On December 16, 1994, Wagner’s father filed a missing persons report naming him. Wagner’s mother notified the police around that time that Wagner had been involved in a dispute with a relative.

District Attorney’s investigator Ron Garverick testified that he had tried to determine Wagner’s whereabouts, but no information subsequent to the missing persons report had turned up to indicate that Wagner might still be alive. He also tried to find Walling, who had left the state, but was unsuccessful.

Carvalho testified under a grant of immunity. She denied that she or [Hoover] had anything to do with the death of Agustin. She claimed that on the day of the crime they were eating dinner with her parents (now deceased).

[Hoover] did not present any evidence.

Renewed Request for Dismissal and Instruction

After the People rested, defense counsel raised the following observations from trial as further proof of prejudice from the delay and renewed his request for dismissal: (1) An officer who responded to the dispatch on the night of the crime testified that he could not remember to whom he had spoken at the Rio Vista Police Department, or

whether it was that department or the California Highway Patrol who had dispatched him. (2) Telephone records showing with whom the victim spoke when he called from Cynthia Hylton's home on August 8, 1994, were no longer available. (3) It was no longer possible to track down the person from whom the victim borrowed money on that date. (4) Carvalho's parents, who might have been able to corroborate [Hoover's] alibi, were now dead, and no one had ever taken statements from them.

The trial court did not explicitly rule on the renewed request for dismissal, but indicated that it would inform the jury regarding the lack of a transcript.

Ultimately, the trial court instructed the jury:

"You have heard testimony in this case concerning the government's failure to preserve certain evidence. The failure of the government to preserve this evidence may be relevant to the issues presented by this case. In evaluating the credibility and weight of the evidence, you may consider the government's failure to preserve certain evidence, specifically the preliminary hearing transcript of People versus Andrea Carvalho, December 8, 1994, and the dispatch record of various government agencies to the scene of the incident which is the subject of this case, the discovery of the body of Michael Agustin. [¶] From the fact that the government did fail to preserve such evidence, you may draw an adverse inference against the government, which may leave you with a reasonable doubt as to [Hoover's] guilt. It is for you to determine whether to draw an adverse inference from the government's failure to preserve evidence. It is also for you to decide the weight, if any, to be given to the government's failure to preserve such evidence."

People v. Hoover, No. C069060, 2013 WL 3938506, at *1-5 (Cal. Ct. App. July 29, 2013).

At the conclusion of trial, the jury found Hoover guilty of first-degree murder as charged in Count 1 and guilty of kidnapping as charged in Count 2. The jury also found that Hoover committed murder while engaged in the commission of kidnapping, an enhancement attached to Count 1.¹ The trial court subsequently found Hoover ineligible for probation and sentenced him to life imprisonment without the possibility of parole for the murder and accompanying

¹ The 2011 indictment had also alleged as to Counts 1 and 2 that Hoover personally used a firearm during the commission of the charged crimes, but the jury could not reach a decision on the firearm allegations, and the prosecutor dismissed them.

kidnapping enhancement. The trial court also imposed a 5-year imprisonment term for the kidnapping, which was stayed under California Penal Code § 654.²

Through counsel, Hoover appealed his conviction, arguing that: 1) the 17-year delay in prosecuting Hoover deprived him of his rights to due process and a fair trial; and 2) the booking and jail classification fees were unauthorized because there was no evidence that Hoover had the ability to pay. The Court of Appeal unanimously affirmed the judgment against Hoover in a reasoned, unpublished decision issued on July 29, 2013. *Hoover*, 2013 WL 3938506, at *8. Hoover petitioned for review of his untimely prosecution claim, and the California Supreme Court summarily denied the petition on October 16, 2013.

Hoover then filed a *pro se* motion for habeas relief in the Superior Court, arguing that the denial of his motion to dismiss for delayed prosecution resulted in his representation being “constructively” ineffective. The Superior Court issued a reasoned, unpublished opinion denying the petition after determining the claim should have been, but was not, raised on direct appeal, and was alternatively without merit. Hoover also raised his constructive denial of counsel claim in *pro se* habeas petitions in the Court of Appeal and Supreme Court, which were denied without comment on December 30, 2014, and May 13, 2015, respectively.

Hoover then timely filed a *pro se* Petition for a Writ of Habeas Corpus to this Court on January 5, 2015. *See* 28 U.S.C. § 2244(d)(1)(A).

² Section 654 provides in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” CAL. PENAL CODE § 654.

II. GROUNDS/CLAIMS

In his *pro se* Petition before this Court, Hoover raises two claims for relief. First, he argues that the 17-year delay in prosecution deprived him of due process and a fair trial. He relatedly argues in Ground 2 that the prosecutorial delay resulted in a constructive denial of counsel.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or “if the state court confronts a set of facts that are materially indistinguishable from a decision” of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The Supreme Court has explained that “clearly established Federal law” in § 2254(d)(1) “refers to the holdings, as opposed to the dicta, of [the Supreme Court] as of the time of the relevant state-court decision.” *Id.* at 412. The holding must also be intended to be binding upon the states; that is, the decision must be based upon constitutional grounds, not on the supervisory power of the Supreme Court over federal courts. *Early v. Packer*, 537 U.S. 3, 10 (2002). Where holdings of the Supreme Court regarding the issue presented on habeas review are lacking, “it

cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal law.’”

Carey v. Musladin, 549 U.S. 70, 77 (2006) (citation omitted).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court’s interpretation and application of state law); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

In applying these standards on habeas review, this Court reviews the “last reasoned decision” by the state court. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004) (citing *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002)). A summary denial is an adjudication on the merits and entitled to deference. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Under the AEDPA, the state court’s findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. DISCUSSION

Both of Hoover’s claims arise from the 17-year delay from the time Hoover was initially charged with the crimes by felony complaint to his trial and conviction, which the Court acknowledges is an extraordinary delay. Hoover claims that: 1) the delay deprived him of due

process and a fair trial in violation of the Fourteenth Amendment; and 2) the delay constituted the constructive denial of counsel in violation of the Sixth Amendment.

It is worth noting that Hoover did not raise on direct appeal, and does not allege here, that the delay violated his right to a speedy trial under the Sixth Amendment. *Doggett v. United States*, 505 U.S. 647, 651 (1991) (explaining that a court should assess four factors in determining whether the Sixth Amendment right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right; and (4) whether the defendant suffered prejudice as a result of the delay); *Barker v. Wingo*, 407 U.S. 514, 530 (1972). In his direct appeal, Hoover acknowledged that the indictment that was the basis for his conviction (Case No. 11F02341) was issued in April 2011,³ and he proceeded to a jury trial in June 2011. The delay therefore occurred between the murder and the indictment.⁴

³ As a general rule, in California, an order dismissing an action for violation of the speedy trial statute is a bar to further prosecution for the same offense if it is a misdemeanor, but not if it is a felony or a misdemeanor joined with a felony. 5 WITKIN, CALIFORNIA CRIMINAL LAW, Criminal Trials § 327 (3d ed.2000). Therefore, a new felony action may ordinarily be instituted after the dismissal and within the period of the statute of limitations. The California Supreme Court has explained:

Section 1387 provides that an order of dismissal of a criminal charge is not “a bar to any other prosecution for the same offense . . . if it is a felony.” Included in such orders of dismissal are those granted by reason of the fact that the defendant was not brought to trial within statutory time limits. Although the right to a speedy trial is grounded in both the United States and California Constitutions, the timely refile of charges once dismissed for denial of a speedy trial has been deemed constitutionally permissible absent a showing by the accused of actual prejudice.

Crockett v. Superior Court, 535 P.2d 321, 324 (Cal. 1975).

⁴ Moreover, Hoover properly received notice in December 1995, while in state custody on the unrelated charges, that he could request disposition of the murder charges under California Penal Code § 1381, and the State would be required to bring Hoover to trial on those charges within 90 days of the request. Hoover did not make such request until January 2011.

The Supreme Court holds that “when no indictment is outstanding, only the ‘actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the protections of the speedy trial provision of the Sixth Amendment.’” *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (quotation omitted). When the actual restraints are removed and “defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weight that time towards a claim under the Speedy Trial Clause.” *Id.* at 312. Here, Hoover was neither under indictment or held in custody on the murder charges⁵ during the relevant time period from November 1994 through 2010. Although a felony complaint was initially filed against Hoover in November 1994, “the Supreme Court has not decided whether the filing of a felony complaint is sufficiently analogous to an indictment or information to trigger the protections of the Sixth Amendment Speedy Trial Clause.” *Mann v. Beard*, 649 F. App’x 392, 393 (9th Cir. 2016).⁶ As the Ninth Circuit Court of Appeals has recognized, the circuit is split on whether the filing of a felony complaint triggers the right. *Id.* (citing cases). Because the

While a court cannot infer acquiescence to delay from a defendant’s silence alone, *Barker*, 407 U.S. at 525-26 & n.4 (waiver is an “intentional abandonment of a known right or privilege” and, therefore, cannot be presumed from a silent record), the Supreme Court has suggested that a defendant’s failure to request quick adjudication may be taken as “some indication” that the defendant did not desire a speedy resolution of the charges against him, *see United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency*, 461 U.S. 555, 569 (1983). The Supreme Court has also acknowledged that, although a prosecutor’s delay may prejudice a defendant, a defendant may choose to take advantage of the delay for tactical reasons. *See Barker*, 407 U.S. at 521 (“As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so.”).

⁵ Although he was in custody at that time on another conviction, he was not restrained on the murder charges.

⁶ Cited for its persuasive but non-precedential value. FED. R. APP. P. 32.1.

Supreme Court has not answered the question in the affirmative, there exists no clearly established Federal law on such right that would entitle Hoover to habeas relief.

Indeed, the Supreme Court has observed that the applicable statute of limitations is the “primary guarantee against bringing overly stale criminal charges.” *See United States v. Marion*, 404 U.S. 307, 322, 324 (1971) (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)). The Supreme Court has acknowledged, however, that the statute of limitations does not fully define a defendant’s rights. It has therefore found that the Fifth Amendment may, in some circumstances, require dismissal of a prosecution based on pre-indictment delay, even where the prosecution was brought within the applicable limitations period. *Id.* at 324, 326 (finding due process right but nonetheless holding that the defendant failed to establish a due process violation because “[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them”). Hoover therefore correctly raises his claim under the Fourteenth Amendment.

In *United States v. Lovasco*, 431 U.S. 7836, 790 (1977), the Supreme Court stated that in due process claims of pre-indictment delay, “proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” Where the reason for the delayed prosecution is “investigative delay,” a criminal defendant’s due process rights are not necessarily violated “even if his defense might have been somewhat prejudiced by the lapse of time.” *See id.* at 796. However, the Supreme Court in *Lovasco* declined to set out a balancing test for

determining when pre-indictment delay violates due process,⁷ and instead left it “to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.” *See id.* at 796–97.

To prevail on a due process claim based on pre-indictment delay, the Court of Appeals for the Ninth Circuit has held that a defendant must first show “actual, non-speculative prejudice from the delay.” *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007). Showing actual prejudice is a “‘heavy burden’ that is rarely met.” *Id.* (quoting *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992)). “Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice. Consequently, [a defendant] must show both that lost testimony, witnesses, or evidence meaningfully has impaired his ability to defend himself, and [t]he proof must demonstrate by definite and non-speculative evidence how the loss of a witness or evidence is prejudicial to [his] case.” *Id.* (internal quotation marks and citations omitted). Once the defendant shows actual prejudice, he must next show that this prejudice outweighs the reasons for the delay, and the delay “offends those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions.’” *Id.* (quoting *United States v. Sherlock*, 962 F.2d 1349, 1353-54 (9th Cir. 1989)).

Here, the record reveals that the trial court employed a full inquiry into Hoover’s contentions of prejudice in considering his motion to dismiss, and the Court of Appeal subsequently examined in detail every basis upon which Hoover claimed prejudice. The Court

⁷ The Ninth Circuit has recognized that the Supreme Court has never clearly established a definitive test for evaluating due process claims premised on pre-indictment delay, for purposes of federal habeas claims under 28 U.S.C. § 2254(d)(1). *See Shammam v. Paramo*, 664 F. App’x 629, 631 (9th Cir. 2016); *New v. Uribe*, 532 F. App’x 743, 744 (9th Cir. 2013); *Reed v. Schriro*, 290 F. App’x 982, 985 (9th Cir. 2008).

of Appeal thoroughly described that review in its reasoned opinion rejecting Hoover's due process claim after it disagreed with the trial court's finding of prejudice:

1. Pretrial Ruling

Here, the trial court found [Hoover] had shown actual prejudice from the 17-year delay in prosecution based on the lack of a transcript from Carvalho's preliminary hearing and the destruction of police dispatch logs from the date of the crime. The absence of these items at trial does not support a finding of prejudice.^{FN14}

FN14. Although [Hoover] argues that we were asked by the People to "re-decide an issue of fact" by claiming that defendant failed to show prejudice, we disagree and construe the People's argument that "the delay did not prejudice [Hoover]" as an integral part of the People's argument that the trial court correctly denied [Hoover's] motion to dismiss.

First, the record does not show that the lack of a transcript from Carvalho's preliminary hearing is attributable to the delay in prosecution. The People declared that preliminary hearings where defendants were not held to answer were not transcribed unless a party requested it. [Hoover's] claim that a transcript once existed but was destroyed was based only on a hearsay assertion by a person who did not testify or submit a declaration on the motion to dismiss, as we explained at footnote 8, *ante*.

Even were we to assume a transcript did exist at one time, its absence at trial did not translate into a finding that the delay in prosecuting [Hoover] *prejudiced* him. The People's failure to show probable cause to hold *Carvalho* over had no apparent tendency to exculpate [Hoover]. Although [Hoover] asserted that Carvalho had somehow impeached the version of events told by his accusers, he presented no evidence in support of the assertion. Nor did he explain how the accusers' version had been impeached, or why it was more difficult to impeach that story in 2011 than in 1994. In short, the absence of a preliminary hearing transcript in Carvalho's case did not establish that the delay in prosecution prejudiced [Hoover].

Similarly, the destruction of the police dispatch logs did not establish prejudice. The police reports from 1994 were preserved, and the officers who initially investigated the crime testified regarding the details of their dispatch to the crime scene. The record is devoid of an explanation for how the missing dispatch logs could have even speculatively impeached the officers' testimony regarding the details of their dispatch to the murder scene, or how that testimony was even relevant to the larger question of [Hoover's] culpability for the murder.

Further, we see no facts available to the trial court that it could have properly cited to support a finding of prejudice. The fact that two of the three key witnesses against [Hoover] (Wagner and Walling) were unavailable for [Hoover's] trial in 2011 forced the People to rely entirely on the double-hearsay account of Terri Hussey, whose credibility was suspect. The trial court properly discounted [Hoover's] self-serving claim that his own memory had faded. Finally, [Hoover's] speculations about failures to

investigate the alleged threat to Wagner by his cousin, or the possible role of the mystery man who picked up Dale Allbright somewhere in the vicinity of the crime, did not tend to show that further investigation of these matters in 1994 as opposed to 2011 would likely have produced anything helpful to [Hoover].

In *People v. Zapien* (1993) 4 Cal. 4th 929, 976, our Supreme Court upheld the trial court's ruling to admit evidence although the trial court gave an erroneous reason. The court noted: "'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 19.)

We conclude that the trial court's finding of prejudice was error. However, the court properly denied [Hoover's] motion to dismiss.^{FN15} "[A] proper ruling on the motion to dismiss, supported by substantial evidence, will not be reversed even though the trial court gave an incorrect reason for that ruling. [Citation.]" (*People v. Gilchrist* (1982) 133 Cal. App. 3d 38, 44.)

FN15. To the extent [Hoover] was entitled to any remedy based on the delay in prosecution, the trial court's instruction that the jury could choose to hold the absence of certain evidence against the People was sufficient.

Since [Hoover] failed to show prejudice, we uphold the trial court's ruling without considering the prosecutor's justification for the delay. (*See Lowe, supra*, 40 Cal. 4th at p. 942; *Mirenda, supra*, 174 Cal. App. 4th at pp. 1327–1328.)

2. Motion for Reconsideration

[Hoover's] later argument for reconsideration based on evidence adduced at trial was similarly unpersuasive. Although he cited one failure of memory by a testifying officer, he failed to explain how that failure of memory tended to prove prejudice from the delay in prosecution. Similarly, [Hoover's] references to persons the victim contacted on the date of the crime that could not now be tracked down and theory of third party perpetrators was entirely speculative and undeveloped. Finally, the fact that Carvalho's alibi for [Hoover] could not be corroborated by evidence from her deceased parents was not proof of prejudice from delay, because there is no reason to presume that they would have corroborated the alibi or that they would have been credible had they done so. Therefore, none of [Hoover's] arguments justified the requested relief of dismissal.

Hoover, 2013 WL 3938506, at *6-7.

On federal habeas review, this Court's task is not to make an independent, *de novo* determination as to whether Hoover suffered actual prejudice by the 17-year delay. Rather, this

Court is to determine whether the state court's conclusion that Hoover did not suffer actual prejudice was objectively reasonable. *Williams*, 529 U.S. at 412-13. Although the length of the delay here is extreme and certainly troubling, based on a review of the thorough record developed by the trial court and described on direct appeal, this Court must conclude that the state court's determination was objectively reasonable. Hoover has not shown that the California courts' findings of fact were unreasonable, or that the factual and legal conclusion that Hoover did not suffer substantial prejudice contravened or unreasonably applied clearly established federal law. Accordingly, Hoover cannot show that the pre-indictment delay violated his due process rights, and he is not entitled to relief on Ground 1.

Hoover does not fare better with respect to his Sixth Amendment claim that he was constructively denied counsel due to the delay in prosecution. In support of his argument, Hoover cites *United States v. Cronin*, where the Supreme Court identified three ineffective-assistance-of-counsel circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. 648, 659-660 (1984). Such circumstances are present when (1) there is a complete denial of counsel; (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) counsel is called on to render assistance under circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60; *see also Bell v. Cone*, 535 U.S. 685, 695-96 (2002). The absence of counsel, actual or constructive, must occur at a "critical stage" of trial. *Id.* at 659, n.25. But Hoover provides no support, much less clearly established authority from the United States Supreme Court, that establishes that a

period of investigative delay may constitute a “critical stage” of trial for which counsel is constitutionally required. In the absence of Supreme Court authority on this issue, the Court cannot say that the state courts’ rejection of Hoover’s claim was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Musladin*, 549 U.S. at 77 (brackets and internal quotation marks omitted). Hoover is therefore not entitled to relief on Ground 2 either.

V. CONCLUSION AND ORDER

Hoover is not entitled to relief on any ground raised in his Petition.

IT IS THEREFORE ORDERED THAT the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED THAT the Court issues a Certificate of Appealability with respect to both Grounds 1 and 2. *See* 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) (“To obtain a certificate of appealability, a prisoner must ‘demonstrat[e] that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed

further.’’ (quoting *Miller-El*, 537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Ninth Circuit Court of Appeals. *See* FED. R. APP. P. 22(b); 9TH CIR. R. 22-1.

The Clerk of the Court is to enter judgment accordingly.

Dated: February 23, 2018.

/s/James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

BRADLEY DEON HOOVER,

CASE NO: 2:15-CV-00082-JKS

v.

SCOTT FRAUENHEIM,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 2/23/2018**

Marianne Matherly
Clerk of Court

ENTERED: February 23, 2018

by: /s/ S. Washington
Deputy Clerk

APPENDIX C

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRADLEY DEON HOOVER,

Defendant and Appellant.

C069060

(Super. Ct. No. 11F02341)

In 1994, defendant Bradley Deon Hoover kidnapped and murdered his victim. He was first charged with these crimes in 1994, and was incarcerated on an unrelated charge that same year, but his kidnapping and murder case did not proceed to jury trial until the year 2011--a 17-year delay. Before his trial commenced, he moved to dismiss his case for dilatory prosecution. The trial court denied his motion.

The jury found him guilty of first degree murder while engaged in the commission of the crime of kidnapping (count 1; Pen. Code,¹ §§ 187, subd. (a); 190.2, subd. (a)(17)(B)) and kidnapping (count 2; § 207, subd. (a)), and the trial court sentenced him

¹ Further undesignated statutory references are to the Penal Code.

to life in prison without possibility of parole. Defendant appeals, contending that the trial court erred by denying his pretrial motion to dismiss and the delay in his prosecution deprived him of due process. He adds that the jail classification and booking fees imposed at sentencing should be stricken because there was no showing he had the ability to pay. Disagreeing, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's Charging and Prosecution

1994-1995

The kidnapping and murder were alleged to have occurred in Sacramento County on August 8, 1994, but defendant was not immediately charged. He was under investigation for an unrelated crime in Solano County as of March 1994 and was arrested in that case on October 20, 1994.

On November 1, 1994, the People filed a felony complaint against defendant and Andrea Marie Carvalho,² accusing both of the murder and kidnapping of victim Michael Agustin. Carvalho's preliminary hearing, held in December 1994, ended in dismissal, with the magistrate finding insufficient evidence on all counts.³ Defendant was not arraigned on the complaint as his Solano County case was ongoing; he was subsequently prosecuted, convicted, and sentenced to prison in the Solano County case.

² Carvalho later married defendant.

³ As we discuss *post*, a transcript of Corvalho's preliminary hearing was not available at defendant's trial.

On December 5, 1995, the Sacramento County Sheriff's Department filed a detainer against defendant, notifying him of the present case and his right to request its disposition under section 1381.⁴

2011

On January 7, 2011, defendant filed a demand for trial in the present case. On January 28, 2011, the District Attorney's investigator interviewed defendant in prison. Defendant told the investigator this case had had "no bearing on [him] whatsoever for the last 16 years[.]" but he had filed his request for trial now because he wanted to get a job in prison and the hold on him from this case prevented it.

On February 7, 2011, the court arraigned defendant on the original complaint; three days later, the People filed an amended complaint, naming only defendant. He entered a plea of not guilty. On March 1, 2011, the trial court held defendant to answer on the amended complaint, then deemed it an information.

The People thereafter dismissed the original case and rearrested defendant on March 29, 2011. Defendant waived preliminary hearing. On April 22, 2011, the People filed a new information, case No. 11F02341.

Defendant's Motion to Dismiss

On June 16, 2011, defendant filed a "motion to dismiss or for other sanctions due to dilatory prosecution." He argued that the People violated his speedy trial rights under the California Constitution because the 17-year delay in bringing the case to trial had prejudiced him by hindering his ability to prepare his defense. As evidence, he cited (1) his inability to recall the facts surrounding the alleged crimes; (2) the alleged destruction of the preliminary hearing transcript in Carvalho's case; (3) the disappearance of witness

⁴ Section 1381 provides in pertinent part that a defendant serving a prison sentence, if charged in any other pending criminal proceeding, must be brought to trial within 90 days after the defendant requests trial in writing.

John Wagner, who was never interviewed by defense counsel; (4) the lack of any further investigation of the case since defendant's arrest in 1994 on the Solano County case; and (5) the unavailability of witness Terry Walling.

Opposition

The People opposed the motion, arguing that because, aside from Wagner and Walling (whose unavailability *benefitted* defendant), all material witnesses had been located and subpoenaed, and all material physical evidence had been preserved, defendant had not shown actual prejudice under the California Constitution.⁵

Defendant's Response

Defendant cited the following as further evidence of prejudice: (1) Wagner's mother informed the police in November 2009 that around the time Wagner disappeared, a cousin named Sam Kissell had threatened to kill him over a drug debt; the police had done nothing to follow up on this information, which might bear on Wagner's credibility.⁶ (2) The police and the District Attorney's investigator had only just interviewed Dale Allbright, whose motorcycle broke down near the Rio Vista Bridge around 2:00 a.m. on August 9, 1994, and who was picked up by an unidentified male in the only car Allbright had seen on the road that evening. Timely investigation of his story might have revealed that the unidentified male murdered the victim, or led to the

⁵ On appeal, defendant agrees that his Sixth Amendment (federal) speedy trial right is not at issue as it was not triggered until the filing of the information in case No. 11F02341. (See, e.g., *People v. Martinez* (2000) 22 Cal.4th 750, 756 (*Martinez*).)

⁶ Wagner's mother testified that she had actually told the police about this near the time of Wagner's disappearance.

discovery that someone else other than defendant did so.⁷ (3) All police dispatch records from the night of the crime had been destroyed or purged due to the passage of time.

The Trial Court's Pretrial Ruling

The trial court ruled tentatively in limine that defendant had shown “some evidence of actual prejudice” from the delay in prosecution, based on the lack of a transcript of Carvalho’s preliminary hearing and the destruction of the police dispatch logs.⁸ The court did not mention any other item cited in defendant’s briefing. It indicated it did not find defendant’s claim of faded memory persuasive as to prejudice, but that it might instruct the jury on faded memories and missing witnesses if the evidence proved to warrant such instruction.

Having found prejudice from the delay in prosecution, the trial court asked the prosecutor to justify the delay. The court said it thought the People might have been hoping witness Wagner would “resurface.” The prosecutor agreed: “That is the reason.”

⁷ Allbright testified at trial. He could not say precisely where his motorcycle broke down or where the unknown driver (whom he described only as “a white guy”) picked him up. He did not see police cars or helicopters that night.

⁸ Defense counsel declared that, according to the Sacramento Court Reporter’s Office, the transcript had been destroyed. The prosecutor, who had also represented the People at the preliminary hearing in 1994, declared that at the hearing Carvalho’s defense attorney had argued Carvalho was merely present at the crime scene. He added that it was the policy of the Sacramento County Superior Court (in 1994 and continuing) *not* to prepare transcripts of preliminary hearings in cases where defendants were not held to answer unless a party so requested.

Defense counsel asserted that Carvalho had told him that at her preliminary hearing the story told by defendant’s accusers, as presented by the investigating officer pursuant to Proposition 115, was impeached. The prosecutor replied that, as stated in his declaration, the magistrate had not held Carvalho to answer due to the absence of proof that she had any control over the situation leading to the murder, rather than because the accusation against defendant was credibly challenged.

The trial court denied defendant's motion to dismiss, but left open the option to revisit the issue of "faded memories" if warranted based on the evidence presented at trial.

Trial Evidence

On August 8, 1994, at 10:48 p.m., officers dispatched to a rural location near Rio Vista for a reported pedestrian-vehicle accident found victim Agustin, fatally shot in the head. Agustin had been shot first at one location, then again at another location about 200 yards away, by a single firearm.⁹

On the morning of August 8, 1994, Agustin visited his sister, Cynthia Hylton, at her home in Vallejo. She knew he was "involved in the drug scene" and hung out at Terry Walling's house. He did not have a job or a regular place to live. He had become increasingly fearful and paranoid in the last few months. He arrived on a new motorcycle (which he did not have the money to buy, as far as she knew) and put it in her garage; he also had a gun. He telephoned someone on her home phone, yelling, "Hey, I told you not to tell" or "Why did you tell him?" He borrowed her car for a short time, returned it, and left again.

Alfredo Ramirez, Agustin's nephew, saw Agustin on the afternoon of August 8, 1994.¹⁰ Ramirez had recently observed changes in Agustin's behavior that he perceived to be related to methamphetamine use. Agustin called Ramirez from Hylton's home, asking for a ride in his car. Ramirez took him to get money from someone, then drove him to Walling's house and dropped him off around 3:00 or 4:00 p.m. He did not see Agustin alive after that.

⁹ The officers did not disclose to the media or the victim's family how many times Agustin was shot or at how many locations.

¹⁰ The two men were six years apart in age and were like brothers.

Terri Hussey, defendant's friend, was at Walling's house, described as a "gathering place for people," when Agustin arrived. She had seen him there before, but did not know him well.

Later, defendant came to the house. After that, John Wagner (a drug user who was down on his luck and living on the streets) arrived, but tried to leave when he saw defendant. Defendant said he needed to talk to Wagner and told him to sit down.

Defendant said something had happened that he needed to talk about with Agustin. A "meeting" ensued, involving defendant, Wagner, and Agustin, among others. Defendant was the dominant person in the conversation.

"[T]earing up," Agustin said to Walling: "[P]lease don't let him take me. I don't want to go. Help me." Defendant, Wagner, and Agustin walked out of the house; defendant told Agustin not to make a scene and to "act like it was a casual walk across the street." Several people were outside, including Carvalho.

As defendant was leaving, Hussey said to him: "I don't know what's going on here, but is it as bad as what Don had did [*sic*][?]"¹¹ Defendant said it was worse. Hussey said she did not want to know any more and went inside. After Wagner came to the house and as he was leaving, Hussey saw a red convertible Chrysler LeBaron parked outside. Wagner had borrowed a red convertible Chrysler LeBaron from his friend in August 1994 and failed to return it. It was later recovered, inoperable, in Rio Vista.

The next day, police officers came to the house. Hussey and the others there denied any knowledge of what had happened to Agustin. Subsequently, Hussey had a conversation with Patti Brown, at whose home she was staying. According to Hussey, Brown said Carvalho, seeming "scared" and "frantic," had told Brown that she and defendant: "took [Agustin] to Yolo County out in the slough, something like that. They

¹¹ Don Riley testified that defendant had beaten and humiliated him because he received a tattoo from someone defendant disliked.

shot him. He was shot once in the head or something, and then they drove off and then had a funny feeling and turned around and came back and he had drug [*sic*] himself up into the street and they shot him again.”¹²

On or around August 18, 1994, Walling was arrested for a probation violation and held in custody in Fairfield. On August 25, 1994, Hussey called Detective Richard Lauthier, the lead investigator on the case, and said she wanted to make a statement. She went to the place where Walling was being held and spoke privately with him. Thereafter, they made a joint videotaped statement in which Hussey recounted the story she had heard from Brown.¹³ On October 20, 1994, Lauthier interviewed Hussey alone. She re-told the story she had heard from Brown.

On October 29, 1994, Detective Lauthier interviewed Wagner. On November 1, 1994, Wagner’s mother, who knew he had been involved in the drug scene, saw him at a Motel 6 in Fairfield; he seemed scared, but sober. She never saw him again. On December 16, 1994, Wagner’s father filed a missing persons report naming him. Wagner’s mother notified the police around that time that Wagner had been involved in a dispute with a relative.

¹² Brown testified that she never made any such statement to Hussey or heard any such statement from Carvalho. Carvalho testified that she never made any such statement to Brown.

¹³ Walling told the police that John Wagner had said he was in a car driven to the murder scene on August 8, 1994, by Carvalho, and was dropped off somewhere near the scene after the killing. Walling was unavailable at trial.

The portion of the videotape including the statements was not played for the jury (possibly because the sound quality was “terrible”). However, the first portion of the videotape, in which Hussey and Walling were alone together and very affectionate toward each other, was played without sound for the jury as a defense exhibit to impeach Hussey’s testimony that she and Walling were “just friends.”

District Attorney's investigator Ron Garverick testified that he had tried to determine Wagner's whereabouts, but no information subsequent to the missing persons report had turned up to indicate that Wagner might still be alive. He also tried to find Walling, who had left the state, but was unsuccessful.

Carvalho testified under a grant of immunity. She denied that she or defendant had anything to do with the death of Agustin. She claimed that on the day of the crime they were eating dinner with her parents (now deceased).

Defendant did not present any evidence.

Renewed Request for Dismissal and Instruction

After the People rested, defense counsel raised the following observations from trial as further proof of prejudice from the delay and renewed his request for dismissal:

- (1) An officer who responded to the dispatch on the night of the crime testified that he could not remember to whom he had spoken at the Rio Vista Police Department, or whether it was that department or the California Highway Patrol who had dispatched him.
- (2) Telephone records showing with whom the victim spoke when he called from Cynthia Hylton's home on August 8, 1994, were no longer available.
- (3) It was no longer possible to track down the person from whom the victim borrowed money on that date.
- (4) Carvalho's parents, who might have been able to corroborate defendant's alibi, were now dead, and no one had ever taken statements from them.

The trial court did not explicitly rule on the renewed request for dismissal, but indicated that it would inform the jury regarding the lack of a transcript.

Ultimately, the trial court instructed the jury:

"You have heard testimony in this case concerning the government's failure to preserve certain evidence. The failure of the government to preserve this evidence may be relevant to the issues presented by this case. In evaluating the credibility and weight of the evidence, you may consider the government's failure to preserve certain evidence, specifically the preliminary hearing transcript of People versus Andrea Carvalho, December 8, 1994, and the dispatch record of

various government agencies to the scene of the incident which is the subject of this case, the discovery of the body of Michael Agustin. [¶] From the fact that the government did fail to preserve such evidence, you may draw an adverse inference against the government, which may leave you with a reasonable doubt as to the defendant's guilt. It is for you to determine whether to draw an adverse inference from the government's failure to preserve evidence. It is also for you to decide the weight, if any, to be given to the government's failure to preserve such evidence."

DISCUSSION

I

Denial of the Pretrial Motion to Dismiss

Defendant first contends the trial court erred by denying his pretrial motion to dismiss because he established prejudice from the delay in prosecution and the People failed to justify the delay; he further contends that the court's instruction on the failure to preserve evidence was an insufficient remedy. The People respond that the record shows no prejudice to defendant from the delay and, even if there were prejudice, the People's justification was sufficient. Defendant responds that a holding of no prejudice would represent a factual finding contrary to the trial court's and the People have not made the appropriate arguments necessary to obtain that result.

As we will explain, because we conclude that defendant failed to show prejudice from the delay, we do not reach his remaining contentions.

A. The Law

The state and federal Constitutions guarantee a criminal defendant's right to a speedy trial, and both guarantees operate in state criminal prosecutions. (*Martinez, supra*, 22 Cal.4th at p. 754.) Under the federal Constitution, the speedy trial right takes effect only when the defendant is formally charged by indictment or information, or when he is arrested and held to answer. (*Martinez, supra*, at p. 755.) Under the state Constitution, however, the filing of a felony complaint triggers the speedy trial right. (*Id.* at p. 754.)

Under state law, prejudice after the filing of a complaint and before the filing of an indictment or information is not presumed from the mere fact of delay. The defendant must affirmatively demonstrate prejudice. (*Martinez, supra*, 22 Cal.4th at p. 767; *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1327 (*Mirenda*).) Once the defendant has done so, the burden shifts to the People to justify the delay. (*Martinez, supra*, 22 Cal.4th at pp. 766-767; accord, *People v. Lowe* (2007) 40 Cal.4th 937, 942 (*Lowe*).)

If the defendant shows even minimal prejudice, and the People's proffered justification for the delay is insubstantial, dismissal may be required. However, the trial court must balance the prejudice from the delay against its alleged justification only if the defendant has shown actual prejudice. (*Lowe, supra*, 40 Cal.4th at p. 942; *Mirenda, supra*, 174 Cal.App.4th at pp. 1327-1328.)

The same balancing test applies to claims that the delay in prosecution resulted in a denial of the right to due process and a fair trial under the state and federal Constitutions. (*People v. Catlin* (2001) 26 Cal.4th 81, 107 (*Catlin*); *People v. Boysen* (2007) 165 Cal.App.4th 761, 772 (*Boysen*).)

Prejudice, under both the speedy trial standard and the due process standard, may be shown from the loss of evidence, whether from the loss of material witnesses or from fading memory attributable to the delay, sufficient to hinder the defendant in preparing a defense. (*Catlin, supra*, 26 Cal.4th at p. 107.)

We uphold the trial court's ruling on appeal if supported by substantial evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 874; *People v. Hill* (1984) 37 Cal.3d 491, 499.) If the ruling is correct on any theory of law applicable to the case, it must be sustained regardless of whether the court's reasoning in support of the ruling is correct. (*Mirenda, supra*, 174 Cal.App.4th at p. 1330.)

B. Analysis

1. Pretrial Ruling

Here, the trial court found defendant had shown actual prejudice from the 17-year delay in prosecution based on the lack of a transcript from Carvalho's preliminary hearing and the destruction of police dispatch logs from the date of the crime. The absence of these items at trial does not support a finding of prejudice.¹⁴

First, the record does not show that the lack of a transcript from Carvalho's preliminary hearing is attributable to the delay in prosecution. The People declared that preliminary hearings where defendants were not held to answer were not transcribed unless a party requested it. Defendant's claim that a transcript once existed but was destroyed was based only on a hearsay assertion by a person who did not testify or submit a declaration on the motion to dismiss, as we explained at footnote 8, *ante*.

Even were we to assume a transcript did exist at one time, its absence at trial did not translate into a finding that the delay in prosecuting defendant *prejudiced* him. The People's failure to show probable cause to hold *Carvalho* over had no apparent tendency to exculpate *defendant*. Although defendant asserted that Carvalho had somehow impeached the version of events told by his accusers, he presented no evidence in support of the assertion. Nor did he explain *how* the accusers' version had been impeached, or why it was more difficult to impeach that story in 2011 than in 1994. In short, the absence of a preliminary hearing transcript in Carvalho's case did not establish that the delay in prosecution prejudiced defendant.

¹⁴ Although defendant argues that we were asked by the People to "re-decide an issue of fact" by claiming that defendant failed to show prejudice, we disagree and construe the People's argument that "the delay did not prejudice [defendant]" as an integral part of the People's argument that the trial court correctly denied defendant's motion to dismiss.

Similarly, the destruction of the police dispatch logs did not establish prejudice. The police reports from 1994 were preserved, and the officers who initially investigated the crime testified regarding the details of their dispatch to the crime scene. The record is devoid of an explanation for how the missing dispatch logs could have even speculatively impeached the officers' testimony regarding the details of their dispatch to the murder scene, or how that testimony was even relevant to the larger question of defendant's culpability for the murder.

Further, we see no facts available to the trial court that it could have properly cited to support a finding of prejudice. The fact that two of the three key witnesses against defendant (Wagner and Walling) were unavailable for defendant's trial in 2011 forced the People to rely entirely on the double-hearsay account of Terri Hussey, whose credibility was suspect. The trial court properly discounted defendant's self-serving claim that his own memory had faded. Finally, defendant's speculations about failures to investigate the alleged threat to Wagner by his cousin, or the possible role of the mystery man who picked up Dale Allbright somewhere in the vicinity of the crime, did not tend to show that further investigation of these matters in 1994 as opposed to 2011 would likely have produced anything helpful to defendant.

In *People v. Zapien* (1993) 4 Cal.4th 929, 976, our Supreme Court upheld the trial court's ruling to admit evidence although the trial court gave an erroneous reason. The court noted: "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]” (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

We conclude that the trial court's finding of prejudice was error. However, the court properly denied defendant's motion to dismiss.¹⁵ "[A] proper ruling on the motion to dismiss, supported by substantial evidence, will not be reversed even though the trial court gave an incorrect reason for that ruling. [Citation.]" (*People v. Gilchrist* (1982) 133 Cal.App.3d 38, 44.)

Since defendant failed to show prejudice, we uphold the trial court's ruling without considering the prosecutor's justification for the delay. (See *Lowe, supra*, 40 Cal.4th at p. 942; *Mirenda, supra*, 174 Cal.App.4th at pp. 1327-1328.]

2. Motion for Reconsideration

Defendant's later argument for reconsideration based on evidence adduced at trial was similarly unpersuasive. Although he cited one failure of memory by a testifying officer, he failed to explain how that failure of memory tended to prove prejudice from the delay in prosecution. Similarly, defendant's references to persons the victim contacted on the date of the crime that could not now be tracked down and theory of third party perpetrators was entirely speculative and undeveloped. Finally, the fact that Carvalho's alibi for defendant could not be corroborated by evidence from her deceased parents was not proof of prejudice from delay, because there is no reason to presume that they would have corroborated the alibi or that they would have been credible had they done so. Therefore, none of defendant's arguments justified the requested relief of dismissal.

¹⁵ To the extent defendant was entitled to any remedy based on the delay in prosecution, the trial court's instruction that the jury could choose to hold the absence of certain evidence against the People was sufficient.

II

Booking and Classification Fees

Defendant contends that the trial court erred at sentencing by imposing a \$287.78 main jail booking fee and a \$59.23 main jail classification fee because the court did not find that he had the ability to pay those fees. At the time of sentencing, defendant did not object to the fees' imposition.

The People argue defendant has forfeited any challenge to the fees at issue because he raised no objection to their imposition or amount in the trial court. We agree. (*People v. McCullough* (2013) 56 Cal.4th 589, 597; see also *People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) Accordingly, we conclude defendant has forfeited his claim.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

HULL, Acting P. J.

ROBIE, J.

APPENDIX D

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: SACRAMENTO			FILED/ENDORSED AUG 19 2011 <i>S. HUDSON</i> Deputy Clerk	
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: BRADLEY HOOVER		DOB: 03-26-65	11F02341	
AKA: Michael Hoover				
CII NO.: A07776988		<input type="checkbox"/> NOT PRESENT		
BOOKING NO.:		<input type="checkbox"/> AMENDED ABSTRACT		
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT				
DATE OF HEARING 08-19-11	DEPT. NO. 11	JUDGE TRENA H. BURGER-PLAVAN		
CLERK S. HUDSON	REPORTER C. REDLICH, #4362	PROBATION NO. OR PROBATION OFFICER <input type="checkbox"/> IMMEDIATE SENTENCING A-461, 002		
COUNSEL FOR PEOPLE STEPHEN GRIPPI, DDA		COUNSEL FOR DEFENDANT <input checked="" type="checkbox"/> APPTD. J.P. BRENNAN, CAC		

1. Defendant was convicted of the commission of the following felonies:

- ☐ Additional counts are listed on attachment
 _ (number of pages attached)

☐ Additional counts are listed on attachment
 _ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY			TERM (L, M, U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIOLENT	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (under 10 years)	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED	
						JURY	COURT	PLEA								YRS.	MOS.
2	PC	207(a)	Kldnapping	1994	07/06/11	X			M						X	5	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

4. ☐ Deft. sentenced per: ☐ PC 667(b)-(l) or PC 1170.12 (two strikes) ☐ PC 1170(a)(3). Pre-confinement credits equal or exceed time imposed. (Paper Commitment.) Deft. ordered to report to local Parole Office upon release.

5. INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES:

7. ☒ Additional Indeterminate term (see CR-292).

8. TOTAL TIME EXCLUDING COUNTY JAIL TERM:

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

: 00396

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: BRADLEY HOOVER			
11F02341	-A	-B	-C
-D			

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
	per PC 1202.44 is now due, probation having been revoked.		
Case B: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
	per PC 1202.44 is now due, probation having been revoked.		
Case C: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
	per PC 1202.44 is now due, probation having been revoked.		
Case D: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
	per PC 1202.44 is now due, probation having been revoked.		

b. Restitution per PC 1202.4(f):

Case A: \$	<input type="checkbox"/> Amount to be determined	to <input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund
Case B: \$	<input type="checkbox"/> Amount to be determined	to <input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund
Case C: \$	<input type="checkbox"/> Amount to be determined	to <input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund
Case D: \$	<input type="checkbox"/> Amount to be determined	to <input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund

☐ * Victim name(s), if known, and amount breakdown in item 11, below. ☐ * Victim names(s) in probation officer's report.

c. Fine(s):

Case A: \$	per PC 1202.5. \$	per VC 23550 or	days <input type="checkbox"/> county jail <input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> concurrent <input type="checkbox"/> consecutive
<input type="checkbox"/> includes:	<input type="checkbox"/> \$50 Lab Fee per HS 11372.5(a)		<input type="checkbox"/> \$___ Drug Program Fee per HS 11372.7(a)	for each qualifying offense.
Case B: \$	per PC 1202.5. \$	per VC 23550 or	days <input type="checkbox"/> county jail <input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> concurrent <input type="checkbox"/> consecutive
<input type="checkbox"/> includes:	<input type="checkbox"/> \$50 Lab Fee per HS 11372.5(a)		<input type="checkbox"/> \$___ Drug Program Fee per HS 11372.7(a)	for each qualifying offense.
Case C: \$	per PC 1202.5. \$	per VC 23550 or	days <input type="checkbox"/> county jail <input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> concurrent <input type="checkbox"/> consecutive
<input type="checkbox"/> includes:	<input type="checkbox"/> \$50 Lab Fee per HS 11372.5(a)		<input type="checkbox"/> \$___ Drug Program Fee per HS 11372.7(a)	for each qualifying offense.
Case D: \$	per PC 1202.5. \$	per VC 23550 or	days <input type="checkbox"/> county jail <input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> concurrent <input type="checkbox"/> consecutive
<input type="checkbox"/> includes:	<input type="checkbox"/> \$50 Lab Fee per HS 11372.5(a)		<input type="checkbox"/> \$___ Drug Program Fee per HS 11372.7(a)	for each qualifying offense.

d. Court Security Fee: \$___ per PC 1465.8.

10. TESTING a. ☐ Compliance with PC 296 verified b. ☐ DNA per PC 296 c. ☐ AIDS per PC 1202.1 d. ☐ other (specify):

11. Other orders (specify):

See page 2 of CR-292 form for financial obligation orders.

Total term imposed is Life Without the Possibility of Parole.

12. IMMEDIATE SENTENCE:

☐ Probation to prepare and submit
Post-sentence report to CDCR per PC 1203c.

Defendant's race/national origin:

13. EXECUTION OF SENTENCE IMPOSED:

- a. ☒ at initial sentencing hearing.
 b. ☐ at resentencing per decision on appeal.
 c. ☐ after revocation of probation.
 d. ☐ at resentencing per recall of commitment. (PC1170(d).)
 e. ☐ other (specify):

14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
B			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
C			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
D			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
Date Sentence Pronounced:		Time Served in State Institution:	
08-19-11		DMH <input type="checkbox"/>	CDCR <input type="checkbox"/>
		CRC <input type="checkbox"/>	

15. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
 To be delivered to ☐ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☒ other (specify): **DVI**

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE

S. HUDSON

DATE

08-19-11

CR-290 (Rev. January 1, 2007)

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

Page 2 of 2



: 00397

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE
[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED]

CR-292

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: SACRAMENTO			FILED/ENDORSED	
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: BRADLEY HOOVER	DOB: 03-26-65	11F02341	<div style="border: 1px solid black; padding: 5px; text-align: center;"> AUG 19 2011 S. HUDSON <small>Deputy Clerk</small> </div>	
AKA: Michael Hoover				
CII NO.: A07776988	<input type="checkbox"/> NOT PRESENT			
BOOKING NO.:	<input type="checkbox"/> AMENDED ABSTRACT		By: S. HUDSON <small>Deputy Clerk</small>	
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT				
DATE OF HEARING 08-19-11	DEPT. NO. 11	JUDGE TRENA H. BURGER-PLAVAN		
CLERK S. HUDSON	REPORTER C. REDLICH, #4362	PROBATION NO. OR PROBATION OFFICER <input type="checkbox"/> IMMEDIATE SENTENCING A-461, 002		
COUNSEL FOR PEOPLE STEPHEN GRIPPI, DDA		COUNSEL FOR DEFENDANT J.P. BRENNAN, CAC <input checked="" type="checkbox"/> APPTD.		

1. Defendant was convicted of the commission of the following felonies:

- ☐ Additional counts are listed on attachment
 _ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY			CONCURREN	CONSECUTIVE	654 STAY
						JURY	COURT	PLEA			
1	PC	187*/190.2(a)(17)	Murder, 1st Degree	1994	07/06/11	X				X	

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☒ **LIFE WITHOUT THE POSSIBILITY OF PAROLE on count 1**
5. ☐ **LIFE WITH THE POSSIBILITY OF PAROLE on counts**
6. a. ☐ 15 years to Life on counts ___ c. ☐ ___ years to Life on counts
 b. ☐ 25 years to Life on counts ___ d. ☐ ___ years to Life on counts
 PLUS enhancement time shown above.
7. ☒ **Additional determinate term (see CR-290).**
8. Defendant was sentenced pursuant to ☐ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.61 ☐ PC 667.7 ☐ other (specify):

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for indeterminate sentences. Attachments may be used but must be referred to in this document.

: 00398

11F02341

-A

-B

-C

-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: \$ 3,500.00 per PC 1202.4(b) forthwith per PC 2085.5; \$ per PC 1202.45 suspended unless parole is revoked.
 \$ per PC 1202.44 is now due, probation having been revoked.
 Case B: \$ per PC 1202.4(b) forthwith per PC 2085.5; \$ per PC 1202.45 suspended unless parole is revoked.
 \$ per PC 1202.44 is now due, probation having been revoked.
 Case C: \$ per PC 1202.4(b) forthwith per PC 2085.5; \$ per PC 1202.45 suspended unless parole is revoked.
 \$ per PC 1202.44 is now due, probation having been revoked.
 Case D: \$ per PC 1202.4(b) forthwith per PC 2085.5; \$ per PC 1202.45 suspended unless parole is revoked.
 \$ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: \$ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
 Case B: \$ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
 Case C: \$ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
 Case D: \$ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ * Victim name(s), if known, and amount breakdown in item 11, below. ☐ * Victim names(s) in probation officer's report.

c. Fine(s):

Case A: \$ per PC 1202.5, \$ per VC 23550 or days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ \$50 Lab Fee per HS 11372.5(a) ☐ \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense.
 Case B: \$ per PC 1202.5, \$ per VC 23550 or days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ \$50 Lab Fee per HS 11372.5(a) ☐ \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense.
 Case C: \$ per PC 1202.5, \$ per VC 23550 or days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ \$50 Lab Fee per HS 11372.5(a) ☐ \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense.
 Case D: \$ per PC 1202.5, \$ per VC 23550 or days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ \$50 Lab Fee per HS 11372.5(a) ☐ \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense.

d. Court Security Fee: \$60.00 per PC 1465.8.

10. TESTING a. ☐ Compliance with PC 296 verified b. ☒ DNA per PC 296 c. AIDS per PC 1202.1 d. ☐ other (specify):

11. Other orders (specify):

Defendant pay a \$287.78 main jail booking fee and \$59.23 main jail classification fee pursuant to Section 29550.2 of the Government Code;
 pay a mandatory Court facility fee per conviction pursuant to Section 70373 of the Government Code in the amount of \$60.00 payable
 through the Court's installment process.
 \$3,500.00 restitution fine is stayed until commencement of sentence.

12. IMMEDIATE SENTENCE:

☐ Probation to prepare and submit
 Post-sentence report to CDCR per PC 1203c.

Defendant's race/national origin:

13. EXECUTION OF SENTENCE IMPOSED:

- a. ☒ at initial sentencing hearing.
 b. ☐ at resentencing per decision on appeal.
 c. ☐ after revocation of probation.
 d. ☐ at resentencing per recall of commitment. (PC1170(d).)
 e. ☐ other (specify):

14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	198 days	198 days	0 <input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
B			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
C			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
Date Sentence Pronounced:		Time Served in State Institution:	
08-19-11		DMH <input type="checkbox"/>	CDCR <input type="checkbox"/> CRC <input type="checkbox"/>

15. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
 To be delivered to ☐ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☒ other (specify): DVI

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE

S. HUDSON

DATE

08-19-11

CR-292 (Rev. January 1, 2007)

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE

Pag

: 00399