APPENDIX A

FILED

FEB 12 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DEANE SCHWARTZ,

Petitioner-Appellant,

v.

DOMINGO URIBE, Jr., Warden; MATTHEW CATE, Director of California Department of Corrections and Rehabilitation,

Respondents-Appellees.

No. 19-55450

D.C. No. 5:11-cv-01174-MWF-KES
Central District of California,
Riverside

ORDER

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT DEANE SCHWARTZ,
Petitioner,
v.
DOMINGO URIBE, JR., Warden,
Respondent.

Case No. 5:11-cv-01174-MWF (KES)

JUDGMENT

Pursuant to the Court's Order Accepting Report and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Second Amended Petition is denied and this action is dismissed with prejudice.

DATED: March 26, 2019

MICHAEL W. FITZGERALD
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT DEANE SCHWARTZ,

Petitioner,

v.

DOMINGO URIBE, JR., Warden,

Respondent.

Case No. 5:11-cv-01174-MWF-KES

ORDER DENYING CERTIFICATE OF APPEALABILITY

"Unless a circuit justice or judge issues a certificate of appealability ["COA"], an appeal may not be taken to the court of appeals from … the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides in relevant part:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If

> the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 11, Rules Governing 28 U.S.C. § 2254 Cases.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473 (2000), the United States Supreme Court held that, to obtain a COA under § 2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Id. at 483-84 (citation omitted). "The COA inquiry … is not coextensive with a merits analysis." Buck v. Davis, 137 S. Ct. 759, 773 (2017). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); see also Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) ("The standard for granting a certificate of appealability is low.").

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In the present case, the Court finds that Petitioner has not made the foregoing showing with respect to any of the grounds for relief alleged in the Petition. None of Petitioner's nine claims are debatable, and Petitioner has not made a substantial showing of the denial of any constitutional right. Accordingly, a COA is denied in this case.

DATED: March 26, 2019

MICHAEL W. FITZGERALD
United States District Judge

Presented by:

KAREN E. SCOTT
United States Magistrate Judge

APPENDIX D

O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT DEANE SCHWARTZ,

Petitioner,

v.

DOMINGO URIBE, JR., Warden,

Respondent.

Case No. 5:11-cv-01174-MWF-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Second Amended Petition (Dkt. 18), the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge (Dkt. 167). Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections (Dkt. 173) have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition with prejudice.

DATED: March 26, 2019

MICHAEL W. FITZGERALD
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT DEANE SCHWARTZ,

Petitioner,

v.

DOMINGO URIBE, JR., Warden,

Respondent.

Case No. 5:11-cv-1174-MWF-KES

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I.

PRIOR PROCEEDINGS.

On June 22, 2011 (proof of service date), Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody. (Dkt. 1.) The Petition challenged a 2008 methamphetamine possession conviction sustained in San Bernardino County Superior Court, for which Petitioner received an

indeterminate sentence of 26 years to life on January 30, 2009, pursuant to California's Three Strikes Law. See Cal. Penal Code § 667(e). The Petition alleged six separate grounds for relief.

Concurrently with the Petition, Petitioner filed a document requesting that the Petition be held in abeyance pending the disposition of a petition for writ of habeas corpus mailed to the California Supreme Court on June 20, 2011. (Dkt. 2.) Although Petitioner asserted that "some claims herein were NOT presented to the California Supreme Court on direct review" (id. at 4), it did not appear to the Court from its comparison of the six grounds for relief being alleged in the Petition to the claims raised in the Petition for Review (a copy of which was attached to the Petition) that Petitioner had exhausted his state remedies with respect to any of the grounds for relief alleged in the Petition.

Before ruling on Petitioner's stay-and-abeyance request, the Court afforded Respondent the opportunity to be heard. On August 2, 2011, the Court ordered service on Respondent and set a deadline for Respondent to serve and file either an opposition or a statement of non-opposition to Petitioner's stay-and-abeyance request. (Dkt. 4.)

On August 29, 2011, Respondent filed an Opposition to Petitioner's stay-and-abeyance request. (Dkt. 7.) Following an extension of time, Petitioner filed a Reply to Respondent's Opposition on or about October 25, 2011. (Dkt. 14 [signature date].) Concurrently, Petitioner filed a First Amended Petition that, according to Petitioner's Reply, was "effectively a verbatum [sic] duplicate of [his] State Supreme Court petition." (Dkt. 13; Dkt. 14 at 5.) Since Petitioner's California Supreme Court habeas petition remained pending, the Court issued a Report and Recommendation on November 10, 2011, recommending (1) that Petitioner's stay-and-abeyance request be denied because the proposed First Amended Petitioner was wholly unexhausted, and (2) that the District Judge issue an Order directing that Judgment be entered dismissing this action without

prejudice for failure to exhaust state remedies. (Dkt. 16.)

On or about December 1, 2011, Petitioner filed objections to the Report and Recommendation, which included a Second Amended Petition ("SAP"). (Dkt. 17 [signature date].) In his objections, Petitioner apprised the Court that, on November 16, 2011, the California Supreme Court had denied his pending habeas petition. (Id. at 1.) In view of the California Supreme Court's denial, the Court issued an Order re Further Proceedings on December 12, 2012, in which it (1) vacated its November 10, 2011 Report and Recommendation (and thereby rendered moot Petitioner's objections to the Report and Recommendation), and (2) ordered the SAP filed. Further, the Court ordered Respondent to file a response to the SAP. (Dkt. 19.)

Following four extensions of time, Respondent filed an Answer ("Ans.") to the SAP, along with a supporting Memorandum of Points and Authorities ("Ans. Mem."), on May 17, 2012. (Dkt. 32, 33.) Respondent contended in the Answer and supporting Memorandum that seven of Petitioner's nine grounds for relief were still unexhausted because the California Supreme Court's citation to People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In re Swain, 34 Cal. 2d 300, 304 (1949), in its November 16, 2011 order denying Petitioner's habeas petition in Case No. S194323 indicated that the state high court did not reach the merits of Petitioner's claims, but instead denied the petition due to procedural deficiencies. Specifically, the Duvall citation signified that Petitioner's claims had not been presented with sufficient particularity and supporting documentary evidence. See King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003), abrogated on other grounds by Evans v. Chavis, 546 U.S. 189 (2006). Likewise, the Swain citation signified that the habeas petition was being denied for failure to allege with particularity the facts that form the basis of the claims for relief. See Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986); Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973 (1975). Although Respondent expressly

stated that the exhaustion of state remedies requirement was not being waived, Respondent requested that the Court exercise its discretion under 28 U.S.C. § 2254(b)(2) to deny Petitioner's unexhausted claims on the merits for not being colorable.

However, based on its review of Respondent's Answer and supporting Memorandum, and its comparison of Grounds One through Seven as alleged in the SAP to the corresponding claims alleged in Petitioner's California Supreme Court habeas petition in Case No. S194323, the Court decided to bifurcate the issue of whether the SAP constituted a mixed petition containing unexhausted claims from the issue of whether the Court should exercise its discretion under 28 U.S.C. § 2254(b)(2) to deny any unexhausted claims on the merits. The Court explained its reasoning in an Order re Further Proceedings issued on May 30, 2012. (Dkt. 38.) The Court noted therein that in Kim, 799 F.2d at 1319-20, the Ninth Circuit held that a state court's denial of a habeas petition for lack of particularity does not necessarily establish that state remedies have not been exhausted. Rather, fair presentation requires only that the claims be pled with as much particularity as is practicable, and it is incumbent on the federal court to independently examine Petitioner's state habeas petition to make this determination. See id. at 1320. It was not enough, then, for Respondent simply to point to the California Supreme Court's citation of Duvall and Swain, declare that the federal claims must have been insufficiently pled in state court, and leave it at that, as Respondent had done here. Further, it appeared to the Court from Respondent's analysis of Grounds One through Seven that Respondent might be conflating the issue of whether Petitioner had stated a colorable federal claim with the issue of whether Petitioner had stated a meritorious federal claim. See Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005) cert denied, 546 U.S. 1172 (2006), (concluding, without expressing a view on the merits of the petitioner's due process claim, that the district court had erred in denying his petition on the merits under § 2254(b)(2) because it could not be said

that it was perfectly clear that the petitioner had failed to present a colorable constitutional claim). Further, although Grounds One through Seven of the SAP were difficult to decipher because each ground for relief appeared to encompass multiple separate federal constitutional claims, Respondent had done an inadequate job of demonstrating that Petitioner's allegedly unexhausted claims were not colorable because (1) Respondent had not even addressed all of the claims that appeared to be encompassed by each ground for relief, and (2) in several instances Respondent had done too cursory a job addressing the claim for the Court to find that the claim was not even colorable. The Court proceeded to list all of the federal constitutional claims that Petitioner appeared to be alleging in the SAP, and to identify those that Respondent had either not addressed or had inadequately addressed.[1] Finally, the Court noted that, if it ultimately concluded that the SAP constituted a mixed petition containing both exhausted and unexhausted claims, then the Court likely would not be inclined to reach the issue of whether the unexhausted claims were colorable, but rather likely would be inclined to recommend to the District Judge that the Petition be dismissed without prejudice unless Petitioner withdrew each of his unexhausted claims.

The Court therefore ordered Respondent to (1) lodge with the Court a copy of the exhibits lodged by Petitioner in California Supreme Court Case No. S194323; (2) lodge with the Court complete copies of the Clerk's Transcript and

[1] The Court disregarded Petitioner's substantive claims of state law or state constitutional error because federal habeas relief only is available if Petitioner is contending that he is in custody in violation of the Constitution or laws or treaties of the United States. See 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution.").

the Reporter's Transcript; and (3) file a Supplemental Answer that, on a ground-by-ground and claim-by-claim basis, specified each of the claims alleged in the SAP that Respondent was contending the Court should find was not pled with as much particularity as was practicable for purposes of the determination the Court needed to make under Kim, and also set forth the basis for such contention. (Dkt. 38.)

Following two extensions of time, Respondent filed a Supplemental Answer ("Suppl. Ans.") on August 6, 2012. (Dkt. 51.) Based on its review of the Supplemental Answer, the Court issued a Minute Order on August 29, 2012. (Dkt. 54.) The Court noted therein that, in his original Answer, Respondent had conceded that Grounds Eight and Nine of the SAP were exhausted. In his Supplemental Answer, Respondent now was conceding that the following claims (numbered in accordance with the breakdown set forth in the Court's May 30, 2012 Order) also were fairly presented to the California Supreme Court and thus were exhausted: Claims 1(a), 1(b), 1(c), 2(h), 3(a) (in part), 3(e) (in part), 3(f) (in part), 4(c) (in part), 4(d), 5(b), 5(e), 5(f), 6(b) (in part), 7(a), 7(b), 7(d), and 7(e). However, Respondent continued to maintain that the following claims were unexhausted because they were not fairly presented to the California Supreme Court: Claims 1(d), 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 2(i), 2(j), 2(k), 3(a) (in part), 3(b), 3(c), 3(d), 3(e) (in part), 3(f) (in part), 4(a), 4(b), 4(c) (in part), 4(e), 5(a), 5(c), 5(d), 5(g), 6(a), 6(b) (in part), 6(c), 7(c), 7(f), 7(g), and 7(h). As to each of those claims, it would be necessary for the Court to independently examine Petitioner's California Supreme Court habeas petition and make its own determination whether the claim was pled with as much particularity as was practicable. See Kim, 799 F.2d at 1319-20.

The Court therefore ordered Petitioner to file a Reply to the Answer and Supplemental Answer, limited to the exhaustion of state remedies issue. (Dkt. 54.) The Court instructed Petitioner that the Reply should address, on a claim by claim basis, each of the claims that Respondent continued to maintain were unexhausted

and respond to Respondent's contentions regarding that particular claim. Following three extensions of time, Petitioner filed his Reply to the Answer and Supplemental Answer ("Reply") on or about December 21, 2012. (Dkt. 61 [signature date].) Concurrently, Petitioner lodged a set of exhibits in support of his Reply. (Dkts. 63 through 63-2.)

On January 29, 2013, the Court issued a Report and Recommendation with respect to the exhaustion of state remedies issue. (Dkt. 66.) As to some of the claims that Respondent maintained were unexhausted because they were not "fairly presented" to the California Supreme Court, the Court disagreed with Respondent. However, as to other claims that Respondent maintained were unexhausted (i.e., Claims 2(b), 2(c), 2(e), 2(g), 3(d), 4(b), 5(a), 5(c), 6(a), 7(c), and 7(f)), the Court concurred with Respondent that Petitioner did not plead those claims with as much particularity as was practicable in his California Supreme Court habeas petition. Accordingly, the Court recommended that this action be dismissed without prejudice for failure to exhaust state remedies unless Petitioner filed a notice of withdrawal of those unexhausted claims.

On March 19, 2013, after making a de novo determination of those portions of the Report and Recommendation to which Petitioner had interposed objections, the assigned District Judge issued an Order accepting the Magistrate Judge's findings and recommendations and ordering that Judgment be entered denying the SAP and dismissing this action without prejudice for failure to exhaust state remedies unless Petitioner filed a notice of withdrawal of his unexhausted claims. (Dkt. 70.)

Petitioner attempted to appeal from the District Judge's March 19, 2013 Order. (Dkt. 71.) He also filed a request for a stay of the district court proceedings pending the determination of his appeal by the Ninth Circuit. (Dkt. 73.) In the same filing, Petitioner advised that he was electing to withdraw any claims that ultimately were determined to be unexhausted, which Petitioner acknowledged as

of that time were Claims 2(b), 2(c), 2(e), 2(g), 3(d), 4(b), 5(a), 5(c), 6(a), 7(c), and 7(f). Per a Minute Order issued on April 22, 2013, the Court advised Petitioner that his request for a stay pending his appeal of the District Judge's March 19, 2013 Order was denied because the Order in itself was a non-appealable interlocutory order.[2] (Dkt. 75.) The Court further advised Petitioner that, since the March 19, 2013 Order was non-appealable, Petitioner's filing of a Notice of Appeal from the Order did not transfer jurisdiction to the appellate court. Consequently, the ordinary rule that the district court cannot act until the mandate has issued on an appeal did not apply. Accordingly, in view of Petitioner's election to withdraw his unexhausted claims, the Court issued a separate Minute Order on April 22, 2013, ordering Respondent to serve and file a Second Supplemental Answer that addressed on the merits, under a de novo standard of review, the claims that Respondent had maintained were unexhausted, but which the Court had found were "fairly presented" to the California Supreme Court (i.e., Claims 1(d), 2(a), 2(d), 2(f), 2(i), 2(j), 2(k), 3(a) (first part), 3(b), 3(c), 3(e) (first two parts), 3(f) (first, second, third, and final parts), 4(a), 4(c) (second part), 4(e), 5(d), 5(g), 6(b) (first and third parts), 6(c), 7(g), and 7(h)). (Dkt. 76.)

Following multiple extensions of time, Respondent filed a Second Supplemental Answer to the SAP ("SSA"), together with a supporting Memorandum of Points and Authorities ("SSM"), on November 18, 2013. (Dkt. 101, 103.)

Petitioner requested and the Court granted multiple extensions of time to file his Reply to the Answer, Supplemental Answer, and Second Supplemental Answer ("Reply"). (Dkts. 109-116.) On May 14, 2014, Petitioner informed the Court that he had been transported from North Kern State Prison to Centinela State Prison.

[2] Ultimately, the Ninth Circuit dismissed Petitioner's appeal for lack of jurisdiction on this ground. (Dkt. 80.)

(Dkt. 117; see Dkt.122.) Petitioner subsequently requested and the Court granted multiple further extensions of time to file his Reply based on his continued detention without access to legal files. (Dkt. 123-130, 133.) On November 25, 2014, the Court sua sponte appointed counsel for Petitioner due to Petitioner's lack of access to his legal files. (Dkt. 134.) On February 24, 2015, Petitioner's appointed counsel filed a status report proposing a deadline of June 9, 2015, for the filing of Petitioner's Reply, based on Petitioner's simultaneous and ongoing state court litigation to determine if he was eligible for relief from the Three Strikes Law sentencing scheme under "Propositions 35 and 47 [sic]," as this relief would potentially render the habeas petition moot. (Dkt. 136.) On February 25, 2015, the Court set June 9, 2015, as the new filing deadline for Petitioner's Reply, noting that it would be amenable to granting a further extension of time if necessary. (Dkt. 137.) Petitioner requested and the Court granted multiple additional extensions of this deadline. (Dkt. 138, 139, 141-152, 154, 155.) On March 30, 2017, Petitioner filed an ex parte application for an order to continue the deadline for Petitioner's Reply, noting the ongoing litigation in his state court case, including Marsden and Faretta hearings. (Dkt. 156.) Because a timeline for final resolution of the state proceedings was unknown, Petitioner's counsel informed the court that it believed it to be in Petitioner's best interest to proceed with his federal habeas petition, and requested an additional continuance of the deadline to file the Reply to April 28, 2017. (Id.) Petitioner subsequently filed his Reply on April 28, 2017. (Dkt. 158.) Therein, Petitioner reiterated that he was "entitled to relief on all … claims," but focused solely on Claims 1(b), 3(f), and 5(d). (Id. at 3, 4-7.)

Thus, this matter now is ready for decision. For the reasons discussed below, the Court recommends that the SAP be DENIED. The Court also recommends that Petitioner's request for an evidentiary hearing be denied.

II.

BACKGROUND.

On November 6, 2008, a San Bernardino County Superior Court jury convicted Petitioner of unlawful possession of a controlled substance. (See 2 Clerk's Transcript on Appeal ["CT"] 253, 257; 2 Reporter's Transcript ["RT"] 286.) The next day, following a bifurcated proceeding, the jury also found true various sentence enhancement allegations. (See 2 CT 258-61, 267; 2 RT 354-56.) In accordance with California's Three Strikes Law, the trial court sentenced Petitioner on January 30, 2009, to state prison for an indeterminate term of 26 years to life. (See 2 CT 355-58; 2 RT 378.)

Petitioner appealed from the judgment of conviction, raising claims that generally encompass Grounds Eight and Nine of the SAP. (See Lodgment 1.) On April 9, 2010, in an unpublished decision, the California Court of Appeal rejected Petitioner's claims and affirmed the judgment. People v. Schwartz, Case No. E047789, 2010 Cal. App. Unpub. LEXIS 2572, at *1 (Cal. Ct. App. Apr. 9, 2010). Petitioner then raised the same claims in a Petition for Review to the California Supreme Court, which was summarily denied without citation of authority on June 23, 2010. (See SAP Ex. 1, 2.)

Petitioner's only collateral challenge to his conviction and sentence was the petition for writ of habeas corpus that he filed in the California Supreme Court on June 24, 2011. Petitioner alleged therein seven grounds for relief that mirror claims in Grounds One through Seven of the SAP. (See Lodgment 2.) Concurrently with his filing of the state petition, Petitioner lodged a volume of exhibits. (See Lodgments 10, 3A.) As noted above, the California Supreme Court denied that petition on November 16, 2011 with citations to Duvall and Swain. (See Lodgment 3A.)

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III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL.

A. Prosecution Evidence On The Drug Possession Charge.

On October 8, 2004, at about 7:00 p.m., Ronald Whitmer, a San Bernardino police officer with training and experience relative to controlled substances, was on patrol near 896 North H Street with his partner, Adam Affrunti. (1 RT 138-139.) He was responding to a "service call" which he described as stating that a Black male was selling drugs at that location. (Id. at 139-140.)

Both officers were in a police vehicle. As they pulled into the driveway at the H Street address, Whitmer saw several subjects standing in front of the building. He "took note of" two: Petitioner and a Black male, later identified as Eric Pace, the only Black male present. They were about an arm's length apart. (Id. at 142, 150.)

Whitmer testified that Petitioner looked directly at the patrol car and started walking, initially toward the street. Then, when the officers stopped their vehicle, Petitioner turned around and began to walk down the side of a garage. (Id. at 143-144.)

Whitmer left his vehicle. Affrunti approached Eric Pace. Whitmer followed Petitioner. He did not consider the other individuals present to be "persons of interest," and they "scattered." (Id. at 144-145.)

Officer Whitmer proceeded "at a fast pace" to try to catch up to Petitioner. Petitioner walked around a corner and stood in the rear of the residences. (Id. at 145.) Petitioner was standing "with his back facing away from" Whitmer, who told him to turn around. Petitioner complied. (Id. at 146.) As he did so, he put a cigarette in his mouth. Whitmer observed something in one of Petitioner's hands. (Id.) Petitioner did not appear to be under the influence of drugs. (Id. at 151-153.)

Whitmer asked Petitioner to show him what was in his hand. Petitioner handed the object to Whitmer who observed it to be a brown bag, such as a grocery

store bag. Wrapped inside was a pipe which Whitmer described as a "meth pipe" and also as an "opium pipe." (1 RT 146.)

Whitmer then escorted Petitioner back to the front of the building and arrested him. He searched Petitioner and found a second pipe in his right rear pocket. In Petitioner's shirt pocket, Whitmer discovered a plastic baggy containing two other baggies. Inside the latter baggies was a white powder. Chemical analysis showed it to be methamphetamine. (Id. at 147-148, 175-177.)

B. Defense Evidence.

Both Petitioner and his brother, William Allen Schwartz, testified for his defense. Petitioner admitted he had methamphetamine and two pipes in his pockets on the date he was arrested. (Id. at 185, 186-187, 189.) Petitioner testified that he had had an argument that day with Melody Maffey, whom Petitioner described as "bipolar" and with whom he shared a home, and that both he and she had used methamphetamine. (Id. at 185-186.)

Petitioner said he took the drugs and pipes from Maffey to keep her from using more, and possessed them at the time of his arrest only to keep Maffey from using them and to dispose of them. (Id. at 186-187, 200-201, 213.) Petitioner had consumed a large amount of alcohol, was intoxicated, and had no particular plan to dispose of the drugs. (Id. at 187-88.)

After leaving the residence he shared with Maffey, Petitioner went with his brother to a smoke shop where he bought some cigarettes, then to the apartments on H Street to help a person load an engine hoist which Petitioner's brother was obtaining from him. When they arrived, however, the individual was not there. Petitioner was waiting in the driveway with his brother when the police arrived. (Id. at 187-188, 199.) He walked away, and intended to dispose of the drugs in a trash can, but when Officer Whitmer followed him and asked what he had, Petitioner gave the drugs to him. (1 RT 189.)

Petitioner admitted he told the police that two Black men had given him the

drugs. He also admitted having been convicted of a felony. (Id. at 190.)

Petitioner's brother, William Schwartz, confirmed that he had arrived at the residence Petitioner shared with Maffey and that they were having an argument. He also agreed he had gone with Petitioner to a smoke shop or video store, and then to the H Street apartment to locate the man with his engine hoist. (Id. at 216.) He did eventually make contact with this man. (Id. at 221.) William Schwartz was there with Petitioner, trying to find this person when the police arrived and Petitioner walked away. As he did so, one of the officers called to Petitioner. (Id. at 216.) William Schwartz had not spoken with Petitioner about this incident since the latter's arrest. (Id. at 218.)

C. Prosecution Evidence On Sentence Enhancement Allegations.

After the jury found Petitioner guilty of the underlying drug possession charge, a bifurcated trial was held on the sentence enhancement allegations. The prosecution presented expert witness testimony, which was based on documentary evidence in the form of a certified "rap sheet" for Petitioner and certified California Department of Corrections records pertaining to Petitioner, that (1) Petitioner had been convicted of two counts of attempted voluntary manslaughter offenses on October 14, 1994 in San Bernardino County Superior Court, and (2) Petitioner had not been continuously free from custody for the five-year period preceding the commission of the drug possession offense on October 8, 2004. (See 2 RT 301-15; 2 CT 376-80, 381-89.)

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IV.

PETITIONER'S REMAINING FEDERAL CONSTITUTIONAL CLAIMS.[3]

Petitioner asserts the following nine grounds for relief:

Ground One: (a) Petitioner's Fourth Amendment right to a prompt judicial determination of probable cause was violated when he was detained for more than 48 hours following his arrest on October 8, 2004; (b) Petitioner's Sixth Amendment right to counsel at all critical stages of the proceedings was violated when he was arraigned without counsel on January 31, 2005; (c) Petitioner's federal constitutional rights were violated when he was asked at his arraignment to admit the truth of the prior conviction allegations without being properly advised; and (d) Petitioner received ineffective assistance of trial counsel and appellate counsel when the foregoing claims were not preserved and/or raised on appeal. (See SAP at 5, 9-11.)

Ground Two: (a) California's Three Strikes Law violates Petitioner's federal constitutional right to due process because it is overbroad; (b) [withdrawn]; (c) [withdrawn]; (d) Petitioner's right to due process was violated by the failure of his counsel and the trial court to declare a doubt as to Petitioner's competency to stand trial; (e) [withdrawn]; (f) Petitioner's constitutional right to allocution prior to the imposition of sentence was violated; (g) [withdrawn]; (h) Petitioner's Three Strikes sentence violated the Eighth Amendment proscription against cruel and unusual punishment because the sentence was "grossly disproportionate to the gravity of the offense of minor drug possession," when considered in light of his lack of a long history of felony recidivism; (i) since Petitioner "probably" would not have faced a Three Strikes Law sentence if prosecuted in Los Angeles County,

[3] To avoid confusion, the Court will continue to refer to Petitioner's claims in accordance with the breakdown set forth in its May 30, 2012 Order re Further Proceedings. (See Dkt. 38.)

his prosecution in San Bernardino County as a Three Strikes Law offender violated his federal constitutional right to equal protection of the law; (j) Petitioner's sentence resulted from the ineffective assistance of trial counsel; and (k) Petitioner's appellate counsel rendered ineffective assistance when he failed to augment the record and raise all of these issues relating to Petitioner's sentence on direct appeal. (See SAP at 5, 12-18.)

Ground Three: (a) Petitioner suffered per se prejudice in violation of his federal constitutional right to a fair trial because the trial judge was biased and prejudiced against him and lacked jurisdiction to proceed after Petitioner filed a statement of disqualification against him; (b) Petitioner's trial counsel rendered ineffective assistance when he failed to join in Petitioner's motion to disqualify the trial judge; (c) Petitioner's appellate counsel rendered ineffective assistance when he failed to augment the record and raise Petitioner's claims relating to the disqualification issue on direct appeal; (d) [withdrawn]; (e) Petitioner's trial counsel rendered ineffective assistance when he failed to present evidence in support of Petitioner's defense of transitory possession and necessity, failed to subject the prosecution to meaningful adversarial testing, failed to investigate and contact witnesses and secure other records that would have established violence at Petitioner's home by Melody Maffey on another occasion, and failed to investigate and present evidence concerning the circumstances of the prior convictions; and (f) appellate counsel rendered ineffective assistance when he failed to challenge the constitutionality of Petitioner's prior convictions, failed to challenge the trial judge's denial of an opportunity to even present a new trial motion, failed to challenge the trial court's consideration of the improper factors of Petitioner's religious and political beliefs as circumstances in aggravation to justify Petitioner's Three Strikes sentence, and failed to raise the issues of "once in jeopardy" and Cal. Penal Code section 654's bar to multiple punishments. (See SAP at 5-6, 19-31.)

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Ground Four: (a) the trial court lost jurisdiction to impose additional punishment of imprisonment when Sheriff's Deputies subjected Petitioner to "trial by ordeal" when they tortured him with the Black Box mechanical restraint when transporting him between jail and the court, because use of the Black Box constituted cruel and unusual punishment, implicated the Double Jeopardy Clause's proscription against multiple punishments, and violated the United States Convention Against Torture; (b) [withdrawn]; (c) appellate counsel rendered ineffective assistance when he failed to augment the record in order to raise this "once in jeopardy" claim, and when he failed to request augmentation of the record to include jury voir dire to show that Petitioner's trial counsel was friends with the courtroom deputy; (d) trial counsel rendered ineffective assistance in failing to move for dismissal based on the outrageous conduct of the Sheriff's deputies in using the Black Box to inflict pain and suffering at least nine times; and (e) the subjection of Petitioner to "extrajudicial summary cruel and unusual punishment under color of law" deprived him of his federal constitutional due process right to be tried by a "legally constituted court." (See SAP at 6, 31-37.)

Ground Five (which relates to Petitioner's sentencing hearing on January 30, 2009): (a) [withdrawn]; (b) the trial judge improperly denied Petitioner's motion to substitute counsel based on various instances of ineffective assistance; (c) [withdrawn]; (d) the trial judge improperly refused to allow Petitioner to make a Faretta motion; (e) the trial judge improperly refused to allow Petitioner to raise the issue of mitigating circumstances in allocution; (f) trial counsel rendered ineffective assistance in failing to argue Petitioner's failing health as a mitigating factor and falsely characterizing Petitioner as a drug addict; and (g) the findings by the jury and the judge regarding the prior conviction, other enhancements, and other aggravating circumstances were not supported by sufficient evidence. (See SAP at 6, 37-41.)

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Ground Six: (a) [withdrawn]; (b) Petitioner received ineffective assistance of counsel when his trial counsel failed to investigate impeachment evidence that was relevant and material to Petitioner's 2008 motion for reconsideration of the 2005 denial of his original motion to suppress, mistakenly stated that the officers were dispatched to the crime scene, and failed to investigate the identity of the confidential informant used to entrap Petitioner to find out if the informant had a grudge against Petitioner; and (c) because the 2005 denial of Petitioner's original motion to suppress was based on false or misstated evidence, the trial court erred in denying Petitioner's 2008 reconsideration motion. (See SAP at 7, 41-45.)

Ground Seven: (a) Petitioner was denied his right to trial by a fair and impartial jury when extra security measures were implemented during jury selection following an ex parte in chambers meeting and when Sheriff's Deputies rushed past the jurors to pile onto Petitioner and "chicken-wing" him; (b) Petitioner was prejudiced as a result of being shackled without a sufficient showing of a manifest need; (c) [withdrawn]; (d) the prosecutor engaged in misconduct by going into the nature and circumstances of Petitioner's prior conviction after Petitioner admitted the fact of the prior conviction; (e) the trial court denied Petitioner his right to a jury trial by failing to instruct the jury on transitory possession and necessity defenses; (f) [withdrawn]; (g) insufficient evidence was presented to prove that Petitioner was convicted of committing a felony within five years of his release from prison; and (h) Petitioner's counsel rendered ineffective assistance in failing to consult with him before the case was called. (See SAP at 7, 45-49.)

Ground Eight: The trial court erred in denying Petitioner's motion to suppress evidence of the methamphetamine found on Petitioner by the arresting officers because the search and seizure resulted from a violation of Petitioner's Fourth Amendment rights in that (a) neither the detention of Petitioner nor its prolongation were justified based on reasonable suspicion of criminal activity, and (b) the illegal detention vitiated any subsequent consent by Petitioner to

interrogation and search. (See SAP at 8, incorporating attached Petition for Review.)

Ground Nine: In sentencing Petitioner under California's Three Strikes Law, the trial court abused its discretion when it failed to dismiss one of Petitioner's two prior strikes because both prior strikes resulted from one incident. (See SAP at 8, incorporating attached Petition for Review.)

V.

STANDARD OF REVIEW.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Here, claims corresponding to Grounds Eight and Nine of the SAP were raised by Petitioner on direct appeal and denied by the California Court of Appeal in a reasoned decision. Those claims were then presented in Petitioner's Petition for Review, which the California Supreme Court denied. Thus, for purposes of applying the AEDPA standard of review here, the California Court of Appeal's decision on direct appeal constitutes the relevant state court adjudication on the merits. See Berghuis v. Thompkins, 560 U.S. 370, 380 (2010) (where state supreme court denied discretionary review of decision on direct appeal, the decision on direct appeal is the relevant state-court decision for purposes of the AEDPA

standard of review). As discussed hereafter, however, neither Ground Eight nor Ground Nine is cognizable on federal habeas review.

In Respondent's SSA and accompanying SSM, Respondent took the position that the California Supreme Court's denial of Petitioner's habeas petition with citations to Duvall and Swain constituted an adjudication on the merits for purposes of the AEDPA standard of review and that the Court's consideration the claims encompassed by Grounds One through Seven of the SAP was therefore governed by the AEDPA standard of review. However, in a Minute Order issued on November 21, 2013, the Court rejected Respondent's position as contrary to binding Ninth Circuit precedent that, for purposes of federal habeas review, the California Supreme Court's denial of habeas petition with citations to Swain and/or Duvall is not a final ruling on the merits, but rather constitutes a denial on procedural grounds. See, e.g., Gaston v. Palmer, 417 F.3d 1030, 1038-39 (9th Cir. 2005), amended by order, 447 F.3d 1165 (2006); Cross v. Sisto, 676 F.3d 1172, 1176-78 (9th Cir. 2012); Curiel v. Miller, 830 F.3d 864, 870-71 (9th Cir. 2016); Kim, 799 F.2d at 1319; see also Sierra v. McEwen, Case No. 13-cv-114-DOC-AJW, 2013 U.S. Dist. LEXIS 158464, at *12 n.2 (C.D. Cal. Nov. 3, 2013) (noting that Respondent's argument that a California Supreme Court denial with citations to Swain and Duvall amounted to an adjudication on the merits lacked legal support); Sherwood v. Sherman, Case No. 15-55659, 2018 U.S. App. LEXIS 12672, at *3 n.1 (9th Cir. May 16, 2018).[4] Because there was no state court

[4] In its November 21, 2013 Minute Order, the Court also noted that the California Attorney General's Office had conceded as much in other cases (see, e.g., Murguia v. Ollison, Case No. 06-cv-5087-ODW-E, 2008 U.S. Dist. LEXIS 51010, at *15 n.6 (C.D. Cal. June 9, 2008)); that, contrary to Respondent's characterization, neither Cullen v. Pinholster, 563 U.S. 170 (2011) nor Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013) stood for a contrary proposition because neither case involved a California Supreme Court denial of a habeas petition with citations to Swain and/or Duvall; and that it appeared from Respondent's SSA and accompanying SSM that Respondent had conflated the concepts of "independent

adjudication on the merits of the claims encompassed by Grounds One through Seven of the SAP, the governing standard of review for those claims is de novo. See Nulph v. Cook, 333 F.3d 1052, 1056-57 (9th Cir. 2003) (holding that "AEDPA's deferential standard" does not apply "[b]ecause the state court did not issue a decision on the merits"); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002) ("[W]hen it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo."), cert. denied, 539 U.S. 916 (2003); see also, e.g., Williams v. Ryan, 623 F.3d 1258, 1264 (9th Cir. 2010) (where state court denies claim on inadequate procedural ground, "[t]he deference AEDPA requires for state court determinations … does not apply and [federal court] review of the claim is de novo"). In reviewing Petitioner's claims de novo, factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e).

VI.

DISCUSSION.

A. Habeas Relief Is Not Warranted With Respect To Any Of Petitioner's Claims Encompassed By Ground One Of The SAP.

1. Claim 1(a): Petitioner's Fourth Amendment Right To A Prompt Judicial Determination Of Probable Cause Was Violated When He Was Detained For More Than 48 Hours Following His Arrest On October 8, 2004.

The record reflects that Petitioner was arrested for possession of methamphetamine at approximately 7:00 p.m. on October 8, 2004. (See 1 CT 136-37.) According to Petitioner, he was not arraigned on this drug charge within 48 hours of his arrest or prior to him being released on bail five days after his arrest, and no criminal citation or notice to appear was issued when he was released on

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review" and "de novo review."

bail. It was not until two months later that he received a notice to appear for arraignment on an amended complaint filed by the prosecution. Petitioner contends that the prosecutor's failure to have him arraigned within 48 hours of his arrest violated his Fourth Amendment rights and barred his future prosecution for the drug offense. (See SAP at 9, 11.)

In Gerstein v. Pugh, 420 U.S. 103, 124-26 (1975), the Supreme Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to continued detention following a warrantless arrest. In County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991), the Supreme Court established that "prompt" generally means within 48 hours of the warrantless arrest, and that a longer delay violates the Fourth Amendment absent extraordinary circumstances. California law also requires that a complaint be issued by a judge upon a showing of probable cause within 48 hours of a warrantless arrest. See Cal. Penal Code §§ 825, 849.

However, even if there was a Gerstein violation here, the Supreme Court made clear in Gerstein that it was not "retreat[ing] from the established rule that illegal arrest or detention does not void a subsequent conviction." See Gerstein, 420 U.S. at 119; see also, e.g., Terrovona v. Kincheloe, 852 F.2d 424, 427 (9th Cir. 1988) ("An illegal arrest or detention does not void a subsequent conviction." (citation omitted)); Myers v. Rhay, 577 F.2d 504, 507 (9th Cir. 1978), cert. denied, 439 U.S. 968 (1978); Rose v. Mitchell, 443 U.S. 545, 576 (1979).

The Court therefore finds that habeas relief is not warranted on this claim.

2. Claim 1(b): Petitioner's Sixth Amendment Right To Counsel At All Critical Stages Of The Proceedings Was Violated When He Was Arraigned Without Counsel On January 31, 2005.

On January 31, 2005, an amended complaint was filed in San Bernardino County Superior Court charging Petitioner with one count of possession of a controlled substance. The amended complaint also contained sentence

enhancement allegations based on two prior serious or violent felony convictions sustained in 1994 and a prior prison term. (See 1 CT 4-6.) That same date, Petitioner appeared in court for arraignment on the charges. According to the minutes of proceedings, Petitioner signed an advisal of rights, gave his true name as charged, and pled not guilty to the charges. The court appointed the Public Defender to represent Petitioner, set a preliminary hearing date, denied Petitioner's motion for release on his own recognizance, and instead set bail in the amount of $400,000. Petitioner was then remanded into custody. (See 1 CT 7.)

Petitioner contends that this arraignment without counsel violated his Sixth Amendment right to counsel and that because the trial court accepted his admission that he was convicted of the two 1994 crimes without first advising him of his federal and state constitutional rights, the trial court violated California law when it subsequently sentenced Petitioner to a 26-year-to-life term under the state's Three Strikes Law. (See SAP at 9-11.)

The law is well-established that a person accused of a crime has a constitutional right to representation by counsel at all "critical stages" of the proceedings against him. See Coleman v. Alabama, 399 U.S. 1, 7 (1970); United States v. Wade, 388 U.S. 218, 226-27 (1967). The Supreme Court has identified as critical stages those pre-trial procedures that would impair defense on the merits if the accused is required to proceed without counsel. This includes "the pretrial type of arraignment where certain rights may be sacrificed or lost." See Coleman, 399 U.S. at 7 (citing Hamilton v. Alabama, 368 U.S. 52, 54, (1961)).

The Court notes that the issue here is not whether the right to counsel "attached" at the January 31, 2005 arraignment, which marked the start of adversary judicial proceedings. It clearly did. See Rothgery v. Gillespie County, Tex., 554 U.S. 191, 213 (2008) (reaffirming that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that

trigger attachment of the Sixth Amendment right to counsel"). Rather, the issue here is whether the right to have counsel present at all "critical stages" applied at the January 31, 2005 arraignment. See id. at 212 ("[T]he question whether arraignment signals the initiation of adversary judicial proceedings ... is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel.'") (citation omitted).

Citing United States v. Perez, 776 F.2d 797, 800 (9th Cir. 1985), overruled on other grounds by United States v. Cabaccang, 332 F.3d 622, 634-35 (9th Cir.2003) (en banc), Respondent contends that Petitioner's January 31, 2005 arraignment was not a critical stage of the proceedings at which the constitutional right to counsel applied. (See SSM at 46-47[5].) There, the Ninth Circuit held:

> An initial appearance before a magistrate at which the indictment is read, the name of the defendant asked, the defendant is apprised of his Miranda rights, and counsel is appointed lacks the adversary character of later proceedings. Nothing at this stage of the proceedings (at least before counsel takes over) impairs the defense of the accused and therefore there is no constitutional right for counsel to be present.

Perez, 776 F.2d at 800.

However, in the Court's view what differentiates this case from Perez is that the initial appearance court here asked Petitioner to plead to the charges against him. Whether or not Petitioner admitted the truth of the prior conviction allegations, the fact remains that asking him to plead to the charges and to the truth of the prior conviction allegations had the potential to impair his defense. Also militating in favor of finding that the arraignment here constituted a critical stage of the proceedings is the fact that the court denied Petitioner's motion for release on his own recognizance and instead set bail in the amount of $400,000. In this regard, one of the considerations underlying the Supreme Court's conclusion in

[5] Citations to the SSM refer to the EC/CMF pagination.

Coleman that the Alabama preliminary hearing in question was a "critical stage" of the state's criminal process was that counsel could "also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." See Coleman, 399 U.S. at 9-10.

In any event, even if the failure to provide Petitioner with counsel at his January 31, 2005 arraignment was a constitutional violation, then the violation still is subject to harmless error analysis. See Coleman, 399 U.S. at 11; Perez, 776 F.2d at 800; see also United States v. Owen, 407 F.3d 222, 226 (4th Cir. 2005) (distinguishing between when denial of counsel at a critical stage of proceedings is subject to harmless error analysis and when it constitutes structural error), cert. denied, 546 U.S. 1098 (2006). Accordingly, Petitioner would not be entitled to relief on federal habeas review unless the Court was prepared to find that the constitutional violation had a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (holding that, on federal habeas review, the prejudicial impact of constitutional error in a state-court criminal trial must be assessed under the Brecht standard whether or not the state court applied the Chapman standard); Merolillo v. Yates, 663 F.3d 444, 455 (9th Cir. 2011) (on federal habeas review, courts apply the Brecht test without regard for the state court's harmlessness determination), cert denied, 568 U.S. 927 (2012); Pulido v. Chrones, 629 F.3d 1007, 1012 (9th Cir. 2010) (same), cert denied 565 U.S. 918 (2011).

Here, Petitioner's allegation that he admitted the truth of the prior conviction allegations at the January 31, 2005 arraignment is not substantiated by the minutes. (See 1 CT 7.) Moreover, the record reflects that, at his felony arraignment on the information on February 22, 2005, Petitioner denied the special allegations and denied all priors. (Id. at 29.) As a result of Petitioner's denial, the sentence

enhancement allegations were tried to the jury following Petitioner's conviction of the underlying drug possession charge. At the bifurcated trial, the prosecution did not adduce evidence of Petitioner's supposed admission at the January 31, 2005 arraignment in support of the sentence enhancement allegations, but rather relied exclusively on expert witness testimony, which was based on documentary evidence in the form of a certified "rap sheet" for Petitioner and certified California Department of Corrections records pertaining to Petitioner, that (1) Petitioner had been convicted of two counts of attempted voluntary manslaughter offenses on October 14, 1994, in San Bernardino County Superior Court, and (2) Petitioner had not been continuously free from custody for the five-year period preceding the commission of the drug possession offense on October 8, 2004. (See 2 RT 301-15; 2 CT 376-80, 381-89.)

The Court therefore finds that the constitutional error in arraigning Petitioner without counsel did not have a substantial and injurious effect or influence in determining the jury's verdict and that habeas relief accordingly is not warranted on this claim.

3. Claim 1(c): Petitioner's Federal Constitutional Rights Were Violated When He Was Asked At His Arraignment To Admit The Truth Of The Prior Conviction Allegations, Without Being Properly Advised.

Petitioner contends that the use of his prior convictions to enhance his sentence should be barred and his Three Strikes Law sentence should be voided because he was asked at the January 31, 2005 arraignment to admit the truth of the prior conviction allegations without being advised of his constitutional rights as required by California law and Boykin v. Alabama, 395 U.S. 238 (1969). (See SAP at 11.) Since federal habeas relief only is available if Petitioner is being held in custody in violation of the Constitution or laws or treaties of the United States, the Court will confine its attention to the alleged Boykin violation.

In Boykin, 395 U.S. at 243-44, the Supreme Court held that, for a guilty plea to be valid, it must be knowing and intelligent, which means the defendant must be informed that he has the right against self-incrimination, the right to a trial by jury, and the right to confront his accusers; and he must affirmatively waive those rights. Further, the plea must be given with sufficient awareness of the relevant circumstances and likely consequences. See Brady v. United States, 397 U.S. 742, 747-48 (1970). However, the Supreme Court has not yet decided whether the procedural protections of Boykin admonitions apply to the admission of prior conviction allegations. See Dombrowski v. Mingo, 543 F.3d 1270, 1276 (11th Cir. 2008) (holding there is no clearly established Supreme Court precedent requiring sentencing courts to either determine that a defendant knows and understands the consequences of his admission to prior convictions for sentence enhancement purposes or to advise a defendant of his Fifth Amendment right against self-incrimination before hearing such an admission), cert. denied, 556 U.S. 1246 (2009); Schwenk v. McDonald, Case No. 5:14-cv-04971-EJD, 2018 U.S. Dist. LEXIS 71438, at *31 (N.D. Cal. Apr. 27, 2018) ("The Supreme Court has not yet considered whether Boykin applies to the admission of prior conviction allegations." (citation omitted)). Moreover: This Court is bound by Ninth Circuit jurisprudence for purposes of de novo review, and a three-judge panel of the Ninth Circuit held in Wright v. Craven, 461 F.2d 1109, 1109 (9th Cir. 1972), that an admission of prior convictions that subjects the defendant to an enhanced sentence is the "functional equivalent" of a guilty plea to a substantive criminal charge. Nonetheless, an en banc panel of the Ninth Circuit subsequently acknowledged that Wright did not consider the applicability of Boykin and interpreted the holding in Wright to require only that the trial court determine whether the defendant knowingly and voluntarily agreed to the stipulation of the fact of a prior conviction. See Adams v. Peterson, 968 F.2d 835, 841 n.4 (9th Cir. 1992), cert. denied, 507 U.S. 1019 (1993).

The minutes of the January 31, 2005 arraignment do not substantiate Petitioner's allegation that he was not fully apprised of his constitutional rights and, more importantly, do not substantiate Petitioner's allegation that he admitted the truth of the prior conviction allegations at that time. (See 1 CT 7.) Moreover, as noted in the preceding section, at the bifurcated trial, the prosecution did not adduce evidence of Petitioner's supposed admission at the January 31, 2005 arraignment in support of the sentence enhancement allegations. Since Petitioner's Three Strikes Law sentence stemmed from the jury's true finding with respect to the prior conviction allegations and the jury's true finding did not stem from Petitioner's supposed admission at the January 31, 2005 arraignment, the Court finds that Petitioner's claim that he was not properly advised at the arraignment does not warrant habeas relief.

4. Claim 1(d): Petitioner Received Ineffective Assistance Of Trial Counsel And Appellate Counsel When Claims 1(a), 1(b), and 1(c) Were Not Preserved And/Or Raised On Appeal.

a. Governing Law.

In Strickland v. Washington, 466 U.S. 668, 694 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "deficient performance" and "prejudice." "Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. See Strickland, 466 U.S. at 688-89. To show "deficient performance," Petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Further, Petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." Id. The Supreme Court in

Strickland recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Accordingly, to overturn the strong presumption of adequate assistance, Petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." See Lord v. Wood, 184 F.3d 1083, 1085 (9th Cir. 1999), cert. denied, 528 U.S. 1198 (2000).[6]

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, Petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See Strickland, 466 U.S. at 694; see also Harrington v. Richter, 562 U.S. 86, 111 (2011) ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."); Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (noting that the "prejudice" component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

Moreover, it is unnecessary to address both Strickland requirements if Petitioner makes an insufficient showing on one. See Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."); Rios v. Rocha, 299 F.3d

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[6] Because the standard for "deficient performance" is an objective one, a reviewing court is not confined to evidence of counsel's subjective state of mind, "[a]lthough courts may not indulge [in] 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions …." Richter, 562 U.S. 86, 109-10 (citation omitted)

796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other."); Williams v. Calderon, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995), cert. denied, 516 U.S. 1124 (1996) (disposing of an ineffective assistance of counsel claim without reaching the issue of deficient performance because Petitioner failed to make the requisite showing of prejudice).

The Strickland standard also applies to claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285 (2000). Thus, a habeas Petitioner must show (1) that appellate counsel's advice fell below an objective standard of reasonableness, and (2) that, but for appellate counsel's professional errors, there is a reasonable probability that Petitioner would have prevailed on appeal. See, e.g., Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010), cert. denied, 548 U.S. 927 (2011); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). However, as the Ninth Circuit observed in Miller, the two Strickland prongs "partially overlap" when evaluating appellate counsel's failure to raise particular claims:

> In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy…. Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason—because she declined to raise a weak issue.

Miller, 882 F.2d at 1434 (citations and footnotes omitted).

Accordingly, in the absence of a showing that, but for appellate counsel's failure to raise the omitted claim(s), there is a reasonable probability that Petitioner would have prevailed on appeal, neither Strickland prong is satisfied. See, e.g., Moormann, 628 F.3d at 1109; Pollard v. White, 119 F.3d 1430, 1435-37 (9th Cir. 1997); Miller, 882 F.2d at 1434-35.

b. Analysis.

With respect to Claim 1(a), the Court explained above that illegal arrest or detention does not void a subsequent conviction. Therefore, Petitioner is unable to meet his burden of showing that but for his trial counsel's failure to preserve or raise the alleged Gerstein violation, there is a reasonable probability that the outcome of the trial (i.e., conviction) would have been different. Likewise, Petitioner is unable to show that, but for appellate counsel's failure to raise Claim 1(a) on direct appeal, there is a reasonable probability that Petitioner would have prevailed on appeal.

With respect to Claims 1(b) and 1(c), Petitioner has failed to convince the Court that, if trial counsel had moved to strike the prior conviction allegations or objected to Petitioner's Three Strikes Law sentence based on the constitutional violations that allegedly occurred at the January 31, 2005 arraignment, then there is a reasonable probability that the trial court would have granted the motion or sustained the objection. The failure to take futile action does not constitute ineffective assistance of counsel. See, e.g., Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection."), cert. denied, 546 U.S. 1137 (2006); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance …."), cert. denied, 519 U.S. 1142 (1997); James v. Borg, 24 F.3d 20, 27 (9th Cir.), cert. denied, 513 U.S. 935 (1994); Morrison v. Estelle, 981 F.2d 425, 429 (9th Cir. 1992), cert. denied, 508 U.S. 920 (1993). Petitioner also has failed to convince the Court that, but for appellate counsel's failure to raise Claims 1(b) and 1(c) on direct appeal, there is a reasonable probability that Petitioner would have prevailed on appeal.

The Court therefore finds that habeas relief is not warranted on this claim.

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B. Habeas Relief Is Not Warranted With Respect To Any Of Petitioner's Remaining Claims Encompassed By Ground Two Of The SAP.

1. Claim 2(a): California's Three Strikes Law Violates Petitioner's Federal Constitutional Right To Due Process Because It Is Overbroad.

Petitioner appears to base his overbreadth challenge to the Three Strikes Law on his contention that "[p]ossession of dope is neither serious nor violent, thus not a strike." (See SAP at 11.)

However, in a non-First Amendment context, in order to succeed on his facial attack, Petitioner would have to establish that "no set of circumstances exist under which [the Three Strikes Law] would be valid" or that the Three Strikes Law lacks any "plainly legitimate sweep." See United States v. Stevens, 559 U.S. 460, 472 (2010) (citing and quoting United States v. Salerno, 481 U.S. 739, 745 (1987) and Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J. concurring in judgment)). Here, Petitioner has not even purported to satisfy this burden.

Moreover, the United States Supreme Court repeatedly has upheld statutes that punish recidivists more severely than first offenders against constitutional challenges. See, e.g., Parke v. Raley, 506 U.S. 20, 27 (1992) ("[W]e have repeatedly upheld recidivism statutes against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." (internal quotations omitted).). The Court's rationale for doing so is that "a charge under a recidivism statute does not state a separate offense, but goes to punishment only." See id. As the Supreme Court stated in McDonald v. Massachusetts, 180 U.S. 311, 313 (1901), "The punishment is for the new crime only, but is the heavier if [a defendant] is an habitual criminal." Indeed, in Ewing v. California, 538 U.S. 11 (2003), the Supreme Court foreclosed constitutional challenges to life sentences

under California's Three Strikes Law for even relatively minor offenses. There, the petitioner had received a 25 years to life sentence following a third strike conviction for shoplifting three golf clubs worth approximately $1,200 and was claiming that his sentence violated the Eighth Amendment prohibition on cruel and unusual punishment. Id. at 18-20. In rejecting this claim, the Supreme Court held: "When the California Legislature enacted the Three Strikes Law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." Id. at 25.

The Court therefore finds that habeas relief is not warranted on this claim.

2. Claim 2(d): Petitioner's Right To Due Process Was Violated By The Failure Of His Counsel And The Trial Court To Declare A Doubt As To Petitioner's Competency To Stand Trial.

Petitioner contends that "both counsel and judge should have recognized doubt as to [his] competency …." (SAP at 12.)[7] Petitioner argues that neither the "court nor appointed ringer could risk [Petitioner's] establishing the TRUTH of [his] allegations to psych. experts at [a California Penal Code section 1368] competency evaluation …." (Id.)[8] Petitioner cites portions of a November 7, 2008 transcript in which he argued that his trial counsel had stated Petitioner was "stupid," misunderstood case law, did not "know what [he was] talking about," and was "incompetent." (Id. (citing 2 RT 351).) Regarding these alleged comments from counsel, Petitioner stated, "[I]f I don't know what the cases are saying then you're right, that does raise the issue of incompetence and we should go 1368." (2

[7] Petitioner qualifies his statement, "unless what I said was and is true. I say it is true." (SAP at 12.) The Court liberally construes the SAP to raise a competency claim.

[8] California Penal Code section 1368 sets forth the procedure in California for determining when a competency hearing should take place.

RT 351.) Petitioner also claimed that he had a conflict with his counsel over "1368." (2 RT 353.)

a. Governing Law.

"[T]he criminal trial of an incompetent defendant violates due process." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (citations omitted); Medina v. California, 505 U.S. 437, 453 (1992); Drope v. Missouri, 420 U.S. 162, 171-72 (1975). A defendant is competent to stand trial if he or she has "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as a factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 396 (1993); Dusky v. United States, 362 U.S. 402 (1960); see also Cal. Penal Code § 1367(a) ("A defendant is mentally incompetent … if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.").

"[A] due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial." De Kaplany v. Enomoto, 540 F.2d 975, 980-81 (9th Cir. 1976) (en banc) (citing Moore v. United States, 464 F.2d. 663, 666 (9th Cir. 1972)), cert. denied, 429 U.S. 1075 (1977); McMurty v. Ryan, 539 F.3d 1112, 1119 (9th Cir. 2008) ("If a reasonable judge would have had such a [bona fide] doubt, [defendant] was entitled to a competency hearing, and the failure to hold such a hearing violated his right to due process"). "Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial." De Kaplany, 540 F.2d at 981 (citation omitted); see also Torres v. Prunty, 223 F.3d 1103, 1108 (9th Cir. 2000); Moore, 464 F.2d at 666 ("Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency … Once there is such evidence from any source, there is doubt that cannot be dispelled by resort to conflicting

evidence."). "'Evidence' encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court." Moore, 464 F.2d at 666. "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required …." Drope, 420 U.S. at 180; see also Amaya-Ruiz v. Stewart, 121 F.3d 486, 489 (9th Cir. 1997), cert. denied, 522 U.S. 1130 (1998); Bassett v. McCarthy, 549 F.2d 616, 619-20 (9th Cir. 1977), cert denied 434 U.S. 849 (1977).

b. Analysis.

Petitioner cites no medical records or other reports filed with the trial court demonstrating that he could not consult with his counsel or that he could not understand the proceedings. Petitioner contends that the trial judge should have declared a doubt as to his competency due to counsel's alleged statements that Petitioner was "stupid" and did not know "what [he was] talking about." (2 RT 351.) Even assuming that trial counsel made such statements, they do not provide grounds to doubt Petitioner's competency. Although Petitioner requested a "1368" hearing following the jury's guilty verdict in the first trial phase, he also coherently presented at that time several legal bases for requesting substitute counsel. (Id. at 350-353.) Petitioner's argument was consistent with his active participation throughout the proceedings, during which he regularly dialogued with the trial court. At Petitioner's sentencing, the judge noted that Petitioner was an "intelligent man" (Id. at 375) who had "availed [himself of] more remedies than most criminal defendants know exist." (id. at 377.) The record does not support a finding that Petitioner was incompetent to stand trial.

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3. Claim 2(f): Petitioner's Constitutional Right To Allocution Prior To The Imposition Of Sentence Was Violated.

Petitioner contends that he was denied the opportunity to make a statement in response to the factors considered by the sentencing court before it imposed sentence. (See SAP at 14.)

Respondent correctly points out that, while Rule 32 of the Federal Rules of Criminal Procedure mandates that a federal criminal defendant be allowed to address the sentencing court prior to the imposition of sentence, a violation of this Federal Rule of Criminal Procedure in itself is not an error of constitutional dimension. See Hill v. United States, 368 U.S. 424, 428 (1962); see also Boardman v. Estelle, 957 F.2d 1523, 1526 (9th Cir. 1992), cert. denied, 506 U.S. 904 (1992). As Respondent also points out, the Supreme Court explicitly recognized in McGautha v. California, 402 U.S. 183, 218 n.22 (1971) that it had not "directly determined whether or to what extent the concept of due process requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." However, since this Court is considering Claim 2(f) under a de novo standard of review, it is bound by the Ninth Circuit's holding in Boardman that "allocution is a right guaranteed by the due process clause of the Constitution" and by the Ninth Circuit's limitation of that holding to "circumstances in which a defendant, either unrepresented or represented by counsel, makes a request that he be permitted to speak to the trial court before sentencing," and the request is denied. See Boardman, 957 F.2d at 1530.

Here, prior to the January 30, 2009 sentencing hearing, Petitioner's counsel filed a motion to dismiss the prior strike convictions pursuant to Cal. Penal Code section 1385 and the trial court's discretionary authority under People v. Superior Court (Romero), 13 Cal. 4th 497 (1996). (See 2 CT 275-81; see also 2 CT 282-85.) At the sentencing hearing, after entertaining argument on the motion from

Petitioner's counsel and the prosecution, the trial court acceded to Petitioner's request to be heard. (2 RT 367-73.) Petitioner argued to the court that he did not get "fair notice" that he would be subjected to a Three Strikes Law sentence, and that his prior attempted manslaughter convictions did not qualify as crimes for which a Three Strikes sentence should be imposed. He noted that the argument to the jury in support of attempted manslaughter had been that he had an honest but unreasonable belief in the need to defend himself. When the trial court then remarked that these arguments had no bearing on the question whether Petitioner fell outside the spirit of the Three Strikes Law, Petitioner asserted that they were "mitigating circumstances." When the trial court rejected that assertion, Petitioner asked the court for its mercy when imposing a "righteous judgment." (See 2 RT 373-75.)

The trial court then ruled that Petitioner fell within the spirit of the Three Strikes Law and explained the basis for this ruling. (See id. at 375-76.) The trial court asked if there was any legal cause why judgment could not be pronounced at this time. After both Petitioner's counsel and the prosecution responded in the negative, Petitioner interjected that he would like to make a motion for new trial and arrest of judgment. The trial court denied that motion, remarking that it was clear that Petitioner was "manipulating the system to avoid the imposition of judgment." (See id. at 376-77.) The trial court then proceeded to sentence Petitioner in accordance with California's Three Strikes Law to an aggregate indeterminate term of 26 years to life. (See id. at 377-78.)

Thus, the record here establishes that this is not an instance of the trial court denying a request by Petitioner that he be permitted to speak to the trial court before sentencing. Accordingly, the Court finds that habeas relief is not warranted.

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4. Claim 2(h): Petitioner's Three Strikes Sentence Violated The Eighth Amendment Proscription Against Cruel And Unusual Punishment Because The Sentence Was "Grossly Disproportionate To The Gravity of The Offense of Minor Drug Possession," When Considered In Light Of His Lack Of A Long History Of Felony Recidivism.

Increased punishment for recidivists imposed pursuant to state statutory schemes have regularly survived Eighth Amendment challenges. For example, in Rummel v. Estelle, 445 U.S. 263, 272 (1980), the Supreme Court stated that "for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Id. at 274. Noting that it would only employ a proportionality principle in an "extreme" case (see id. at 274 n.11), the Supreme Court upheld against an Eighth Amendment challenge a mandatory sentence of life imprisonment with the possibility of parole imposed on a Texas recidivist[9] who had been convicted of obtaining $120.75 under false pretenses, after prior convictions for fraudulent use of a credit card to obtain $80.00 worth of goods or services, and for passing a forged check for $28.36. See id. at 266, 285.

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[9] The Supreme Court described the purpose of a recidivist statute as follows (see Rummel, 445 U.S. at 284):

> Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on the person's most recent offense but also on the propensities he has been convicted of and sentenced for other crimes.

Three years after the Rummel decision, in Solem v. Helm, 463 U.S. 277, 290 (1983), the Supreme Court held that federal habeas review of a sentence will lie if the state has imposed a sentence disproportionate to the crime committed in violation of the Eighth Amendment. The Court listed the following "objective" factors as those to be considered when reviewing a sentence under the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. See id. at 290-92.

Although there was no majority opinion on the proportionality issue in the Supreme Court's subsequent decision rejecting an Eighth Amendment challenge in Harmelin v. Michigan, 501 U.S. 957 (1991), the Ninth Circuit has construed Harmelin as standing for the rule that the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the particular crime. See United States v. Harris, 154 F.3d 1082, 1084 (9th Cir. 1998), cert. denied, 528 U.S. 830 (1999); United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992), cert. denied, 506 U.S. 858 (1992).

Here, the current offense for which Petitioner was being punished (i.e., possession of a controlled substance) and the prior convictions on which the enhancement was based (i.e., two attempted voluntary manslaughter convictions), were substantially more serious than the corresponding current offense (i.e., obtaining $120.75 under false pretenses) and the prior convictions (i.e., fraudulent use of a credit card to obtain $80 worth of goods or services, and passing a forged check for $28.36) in Rummel. Thus, based on Rummel alone, the Court finds that Petitioner's sentence did not constitute cruel and unusual punishment in violation of the Eighth Amendment. See Solem, 463 U.S. at 303-04 n.32 (indicating that Rummel remains controlling in a similar factual situation); Cocio v. Bramlett, 872 F.2d 889, 891 (9th Cir. 1989) (noting that the analysis in Rummel "must be applied in a situation similar to the facts presented to the Supreme Court in that case"); see

also United States v. Bonat, 106 F.3d 1472, 1478-79 (9th Cir. 1997) (upholding sentence against Eighth Amendment challenge where circumstances and sentence were "not sufficiently different" from the sentence in Rummel), cert. denied, 522 U.S. 874 (1997).

Alternatively, after considering the prior serious felony convictions which led to Petitioner's status as a habitual offender (see Solem, 463 U.S. at 296-97; Bland, 961 F.2d at 129), and the fact that Petitioner here did not receive a life without parole sentence as the petitioner in Solem did (see Solem, 463 U.S. at 297), the Court finds that Petitioner's sentence was not excessively harsh in relation to the gravity of his offenses. See Alford v. Rolfs, 867 F.2d 1216, 1222 (9th Cir. 1989) (although the petitioner's prior offenses were nonviolent, his sentence of life imprisonment was not considered excessive since he was eligible for parole). Where, as here, a comparison of the gravity of Petitioner's offenses with the harshness of his sentence does not raise an inference of gross disproportionality, the Court need not consider the remaining Solem factors. See, e.g., Harris, 154 F.3d at 1084; Cacoperdo v. Demosthenes, 37 F.3d 504, 508 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995); Bland, 961 F.2d at 129.

Accordingly, the Court finds that habeas relief is not warranted.

5. Claim 2(i): Since Petitioner "Probably" Would Not Have Faced A Three Strikes Sentence If Prosecuted In Los Angeles County, His Prosecution In San Bernardino County Violated His Federal Constitutional Right To Equal Protection of The Law.

a. Governing Law.

The United States Supreme Court has recognized that "'the presumption of regularity supports' … prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (addressing federal prosecutors under the equal protection component of the

Fifth Amendment). A prosecutor's discretion is confined by the principle that the "decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification ….'" Id. (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)); see also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("some selectivity" in enforcement not in itself a constitutional violation if not "deliberately based upon an unjustifiable standard"). Selective prosecution claims are governed by ordinary equal protection standards, which require Petitioner to show that the prosecution had a discriminatory effect and was motivated by a discriminatory purpose. Armstrong, 517 U.S. at 465; Wayte v. United States, 470 U.S. 598, 608 (1985). "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" Armstrong, 517 U.S. at 465 (citing United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926)). Unsupported allegations of selective prosecution are not sufficient. See United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994), cert. denied, 516 U.S. 971 (1995).

b. Analysis.

In support of his argument that he was denied equal protection because he faced a Three Strikes Law sentence in San Bernardino County, Petitioner relies on Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). (SAP at 16.) That case cited an "internal policy memorandum" dated December 19, 2000, from Los Angeles County District Attorney Steve Cooley to all Deputy District Attorneys in the County. Id. at 771-72. [10] The memorandum explained that it is prosecutors' "legal

[10] Ramirez cited this memorandum in conducting an "intrajurisdictional comparative analysis" pursuant to Solem, 463 U.S. at 277 to determine whether the defendants' sentence "violate[d] the gross disproportionality principle of the Eight Amendment." Ramirez, 365 F.3d at 770, 772. Because the Court has determined in Section VI.B.4, supra, that Petitioner's sentence is not "grossly disproportionate," it need not conduct the same "intrajurisdictional" review here.

and ethical obligation" to exercise discretion under the Three Strikes Law in a "manner that assures proportionality." Id. The Ramirez opinion also quoted a Los Angeles Times article dated March 5, 2004, which stated that then-District Attorney Cooley had declined "to prosecute 'most nonviolent offenses and lesser drug charges as third strikes,' even though Los Angeles County generates approximately 40% of the Three Strikes cases in California." Ramirez, 356 F.3d at 772.

Based on these documents, Petitioner concludes that he "probably" would not have faced a "[three]-strikes sentence" had he been apprehended in Los Angeles County, such that his sentence in San Bernardino County violates his right to equal protection. (SAP at 16.)

As an initial matter, Petitioner's citation to Ramirez does not demonstrate that, had Petitioner been prosecuted and sentenced in Los Angeles County as opposed to San Bernardino County, he would not have been sentenced under the Three Strikes Law. While the Los Angeles Times article that Ramirez cites indicates that "most" lesser drug charges were not prosecuted as third strikes in Los Angeles County, Ramirez, 365 F.3d at 772, Petitioner provides no blanket rule that the Three Strikes Law would not be invoked following a methamphetamine conviction like his, particularly given the nature of his prior felonies.

Moreover, even if he had made such a showing, then Petitioner does not cite authority for the proposition that different charging policies between San Bernardino and Los Angeles Counties are based on an unjustifiable classification. At least one out-of-Circuit district court has concluded that geographic location could serve as the basis for a selective prosecution claim. See Ingram v. United States, 296 F. Supp. 3d 1076, 1083 (N.D. Iowa 2017) ("Thus, the question is whether 'geographic location' is or can be an 'unjustifiable standard' or an 'impermissible motive,' because, for example, it is an 'arbitrary classification.'"). That same court also found that because "geographic location is not a suspect classification … an equal protection claim based on geographic location is subject

only to rational basis scrutiny." Id. at 1084; c.f. People v. Andrews, 65 Cal. App. 4th 1098, 1103 (1998) ("There is no current authority which requires intercounty or intercase proportionality review.").

To sustain an equal protection challenge under the rational basis standard, the challenging party must "prove that there exist no legitimate grounds to support the classification." United States v. Harding, 971 F.2d 410, 413 (9th Cir. 1992) (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)). Preserving prosecutorial discretion and resource allocation within differently situated counties constitute reasonably conceivable sets of facts providing a rational basis for the classification. Petitioner has therefore not shown that the alleged charging discrepancies between San Bernardino and Los Angeles Counties lack a rational basis, rendering habeas relief on this claim unavailable.

6. Claim 2(j): Petitioner's Sentence Resulted From The Ineffective Assistance Of Trial Counsel.

Petitioner argues that his trial counsel "depriv[ed]" him of defenses and "reduce[ed] the trial court proceedings to a farce and sham" by (1) failing to "join in [Petitioner's] motion to disqualify Judge Brodie," and (2) "failing to do Murgia, Pitchess, Trombetta, Twiggs, and other motions to challenge constitutionality of prior, so on and so forth …." (SAP at 17.) Petitioner contends that such "failures" were "imposed by per se conflict of no funding for certain motions by County Indigent Defense Program …." (Id.)

As explained in Section VI.C.1, infra, Petitioner has not provided grounds to question the trial judge's neutrality. He has therefore not shown that counsel's failure to join a disqualification motion fell below professional norms. Counsel may have concluded that pursuing meritless disqualification arguments would be prejudicial to Petitioner. (See Dkt. 63-1 [11/3/08 Marsden transcript] at 67 (counsel advising the trial court, "I am not joining in any motion to disqualify this Court"); Strickland, 466 U.S. at 681 ("Because advocacy is an art and not a science, and

because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment.").) Further, Petitioner has not demonstrated a reasonable probability that his trial outcome would have been different had counsel joined his disqualification motion.

Petitioner's arguments concerning "Murgia, Pitchess, Trombetta, [and] Twiggs" motions are conclusory and do not adequately explain how counsel's failure to bring such motions amounted to deficient performance or caused prejudice. See Martin v. United States, 461 Fed. App'x 587, 588 (9th Cir. 2011) (affirming denial of Strickland claims which were "vague, speculative and conclusory"); Borg, 24 F.3d at 26 ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted where claims for relief are unsupported by facts).

Murgia v. Municipal Court, 15 Cal. 3d 286 (1975), addressed a criminal defendant's right to discovery of discriminatory enforcement of penal statutes. To establish the defense of discriminatory enforcement, a defendant "must prove: (1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion; and (2) that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." Baluyut v. Superior Court, 12 Cal. 4th 826, 832 (1996) (citation omitted). As explained above, Petitioner has not asserted a valid selective prosecution claim based on his geographic location.[11] Petitioner alleges that he was improperly prosecuted under

[11] Petitioner also argues that he was improperly prosecuted under the Three Strikes Law based on (1) his "religious and political beliefs or opinions" (SAP at 11), and (2) for sending for sending the San Bernardino City Clerk an adversarial October 2008 appeal letter concerning a code enforcement action. (SAP at 12-13.) The Court previously found these claims to be unexhausted. (Dkt. 66 at 18, 25.)

the Three Strikes Law based his "single prior felony conviction" relating to a police officer shooting. (Id. at 18.) The fact that the prosecutor pursued a sentence under the Three Strikes Law based on Petitioner's prior violent crimes does not demonstrate reliance on any "invidious criterion." Petitioner challenges the facts underlying those prior convictions (SAP at 12), but it was not within trial counsel's purview to re-litigate earlier jury findings.[12] (See Section VI.C.4, infra.)

Pitchess v. Superior Court, 11 Cal.3d 531 (1974) established that criminal defendants may compel the discovery of relevant evidence in an arresting law enforcement officer's personnel file. Id. at 536-40. Petitioner's argument that an arresting officer's personnel file may have contained damaging material is speculative, foreclosing relief. Moreover, Petitioner conceded at trial that he had methamphetamine in his possession at the time that the officer apprehended him, so he cannot demonstrate that he suffered prejudice by counsel's failure to bring a Pitchess motion. (1 RT 208 ("If the cops arrest me and search me, oh, I just happen to have this dope in my pocket.").)

Petitioner does not explain how California v. Trombetta, 467 U.S. 479 (1984) applies. Trombetta addressed the destruction of exculpatory evidence. 467 U.S. at 489; see also Arizona v. Youngblood, 488 U.S. 51 (1988). Petitioner does not allege how the prosecution wrongfully destroyed potentially exculpatory evidence concerning his methamphetamine charge.

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[12] Petitioner also cites Twiggs v. Superior Court, 34 Cal. 3d 360 (1983), which states, "Where the defendant shows that the prosecution has increased the charges in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness." Id. at 371 (citation omitted). In its earlier January 2013 Report and Recommendation, the Court found that Petitioner's claim that he was "subjected to a vindictive prosecution in violation of due process" was unexhausted. (Dkt. 66 at 26-27.)

7. Claim 2(k): Petitioner's Appellate Counsel Rendered Ineffective Assistance When He Failed To Augment The Record And Raise All Of The Foregoing Claims Relating To Petitioner's Sentence On Direct Appeal.

Petitioner faults his appellate counsel for failing to "request augmentation of the record on appeal" such that the reporter's transcripts of "very significant proceedings which are of substantial consequence to the determination of the merits" were omitted. (SAP at 18.) In particular, Petitioner cites a December 22, 2006 pre-trial hearing. (Id.) Petitioner argues that during that proceeding, the district attorney (1) stated that she was willing to dismiss a separate domestic violence case, and (2) "impl[ied] a negotiated plea deal" in Petitioner's methamphetamine case. (Id.) Petitioner notes that the minutes of that hearing state, "Defense counsel intends to file a motion," perhaps related to a plea deal. (Id. (citing 1 CT 82).) Petitioner also argues, "[T]he record on appeal was not augmented to include proceedings from Judge Cara Hudson's Dept. S18 either, despite [his] request for them." (Id.)

Petitioner does not explain how appellate counsel's failure to include transcripts of specific proceedings amounted to ineffective assistance. While Petitioner argues that a transcript of a December 2006 hearing "implies" that he "negotiated" a plea deal, Petitioner does not contend that he ever formally entered a plea agreement and does not cite to any portion of the record memorializing such a deal. Moreover, he knowingly proceeded to a jury trial. He has not demonstrated a reasonable probability that he would have prevailed on appeal had appellate counsel included such transcripts.

Petitioner also references "proceedings from Judge Cara Hudson's" department, including "transcript of [his] raising [California Penal Code section 654] bar to additional punishment," proceedings about torture, and entry of a once in jeopardy plea. (SAP at 18, 25.) Under California law, "even when multiple

punishment for separate offenses has been barred under section 654 in an earlier proceeding, the Legislature is free to authorize the designation of such prior felony convictions as separate priors for purposes of determining the appropriate sentence following a subsequent conviction." People v. Benson, 18 Cal. 4th 24, 29 (1998). Therefore, counsel was not deficient for failing to challenge Petitioner's Three Strikes Law sentence pursuant to California Penal Code section 654. As explained below in Section VI.D, Petitioner's arguments concerning torture and his once in jeopardy plea do not warrant relief relating to Petitioner's conviction, so counsel was not deficient for omitting them from his appeal. Petitioner has not demonstrated a reasonable probability that he would have prevailed on appeal had appellate counsel included challenges on these grounds.

Although Petitioner argues appellate counsel omitted other "very significant proceedings," he provides no description of those hearings. As set forth herein, Petitioner has not raised a valid challenge to his sentence. Petitioner appears to allege that appellate counsel's failure to include transcripts in the appellate record permanently foreclosed him from obtaining copies of those transcripts, thereby prejudicing him in seeking collateral review. (SAP at 18 ("[S]ince appellate counsel failed to request augmentation of the record on appeal as I asked him to do, there is no reporter's transcript of this ….").) Petitioner, however, provides no facts supporting the conclusion that this entitles him to habeas relief, or that he could not have obtained trial transcripts independently by timely contacting the court reporter.

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C. Habeas Relief Is Not Warranted With Respect To Any Of Petitioner's Remaining Claims Encompassed By Ground Three Of The SAP.

1. Claim 3(a): Petitioner Suffered Per Se Prejudice In Violation Of Federal Constitutional Right To A Fair Trial Because The Trial Judge Was Biased And Prejudiced Against Him And Lacked Jurisdiction After Petitioner Filed a Statement Of Disqualification.

a. Factual Background.

Petitioner's trial proceeded before Hon. Kyle S. Brodie of San Bernardino Superior Court. (SAP at 19.) A jury was empaneled on November 5, 2008. (1 RT 130.) Before that date, Petitioner filed on October 3 and October 24, 2008, two statements of disqualification for cause pursuant to California Code of Civil Procedure section 170.3(b) which sought Judge Brodie's recusal. (Lodgment 10, Exs. 3F, 3A.)

Petitioner's first October 3, 2008 disqualification statement was based on several events, including the following:

- On or about August 8, 2008, Petitioner filed five ex parte applications before Judge Brodie. (Lodgment 10, Ex. 3F at 3/9[13].) Judge Brodie allegedly stated that the requests were "reasonable," but after review, denied all of them but one. (Id. at 4/9.)
- On or about August 15, 2008, Judge Brodie granted a request for release of certain information related to indigent defense programs, but later "corrected" that order to provide only a list of pro per investigators. (Id.)

[13] The Court draws this information from trial court filings included among the exhibits accompanying Petitioner's California Supreme Court habeas petition in Case No. S194323. (See Lodgment 10.) For sake of clarity, the Court cites to these exhibits in a "page / total page" format. For example, a citation to "3/9" references the third of nine pages in an exhibit.

- On or about August 15, 2008, Judge Brodie denied Petitioner's request for an order to allocate funds for telecommunications. (Id. at 5/9.)
- On or about August 15, 2008, Judge Brodie denied Petitioner's request for four hours of library time. (Id.)
- On August 15, 2008, Judge Brodie denied Petitioner's request for release of funds for pro per defense. (Id. at 6/9.)
- On or about August 21, 2008, Judge Brodie denied Petitioner's request for free copies of court records, including records related to a prior civil case "Kelso v. San Bernardino, et al., Case # SCV269269." (Id. at 8/9.)

On October 14, 2008, Judge Brodie filed a verified answer to Petitioner's first disqualification statement. (Lodgment 10, Ex. 3G.) In that answer, he noted that Petitioner had two criminal cases pending before him, i.e. (1) the matter giving rise to the instant petition (in which Petitioner was represented by counsel); and (2) a second, separate domestic violence matter (in which Petitioner was pro per). (Id. at 1/4-2/4.) Judge Brodie wrote that he had confirmed in open court that Petitioner's counsel in the first matter did not join the disqualification motion. (Id. at 2/4.) As a result, he concluded that Petitioner's disqualification request in the criminal case underlying this habeas matter was improper.[14] In his October 14 answer, though, he liberally construed the October 3 disqualification statement to apply to the second, separate matter in which Petitioner was appearing pro per. (Id.)

Judge Brodie responded to Petitioner's disqualification statement by indicating that he had "no particular interest" in Petitioner's matters. (Id. at 1/4.)

[14] Judge Brodie later stated on the record that he had "spent a lot of time researching" whether Petitioner "has an independent right to file a disqualification in a case [in] which he is represented by counsel," and concluded that he was "not aware of any cases" giving such a right. (1 RT 65.)

With respect to Petitioner's ex parte applications, Judge Brodie stated that his rulings were based on the "substantive merits" of the requests, and not "any personal bias or prejudice" against Petitioner. (Id. at 2/4.) Judge Brodie's response also addressed Petitioner's claims that he had improperly corrected a minute order and improperly denied Petitioner case files. (Id. at 2/4-4/4.) Judge Brodie declined to recuse himself. (Id. at 4/4.)

Thereafter, Petitioner filed his second, October 24, 2008 disqualification statement. (Lodgment 10, Ex. 3A.) That filing took issue with factual statements in Judge Brodie's October 14 answer. (See id. at 3/9.) It also raised new complaints about Judge Brodie and the justice system more broadly, including (1) that Judge Brodie had deprived Petitioner of his "right to challenge the charges by way of his own pleas of once-in jeopardy;" (2) Judge Brodie had refused to allow Petitioner to object to his "unlawful and unilateral acts" on the record; and (3) that there was a "blood relationship" between a member of the indigent defense program and Petitioner's former counsel. (Id. at 4/9; 7/9.)

In response, Judge Brodie filed a further statement dated November 3, 2008. (Lodgment 10, Ex. 3B.) He again reiterated that his response was confined to the matter in which Petitioner represented himself pro per. (Id. at 2/3.) He confirmed that he had no bias against Petitioner and he stated that the basis of many of Petitioner's complaints appeared to be substantive disagreement with Judge Brodie's rulings. (Id.) Judge Brodie again declined to recuse himself. (Id.)

Judge Brian Lamb of the Inyo County Superior Court was then assigned to determine the question of disqualification pursuant to California Code of Civil Procedure section 170.3(c)(5). (Lodgment 10, Ex. 3E.) On December 22, 2008, Judge Lamb issued a ruling determining that Judge Brodie was not disqualified. (Id.) Judge Lamb stated that he intended his decision to apply to both of Petitioner's matters pending before Judge Brodie, notwithstanding Judge Brodie's "doubt" about whether Petitioner was authorized to file a challenge in a case in

which he had counsel. (Id. at 3/7-4/7.) He concluded that "[a]ffiant's allegations, given their maximum credit, allege only legal error and not bias or prejudice." (Id. at 5/7.) Judge Lamb further concluded that Petitioner's allegations that Judge Brodie "erred in denying most of his ex parte requests" did not mandate disqualification. (Id.) Petitioner contends that he did not receive notice of this ruling until after May 25, 2010. (Lodgment 10, Ex. 3E [slipsheet].)

b. Governing Law.

"While most claims of judicial bias are resolved 'by common law, statute, or the professional standards of the bench and bar,' the 'floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case.'" Hurles v. Ryan, 752 F.3d 768, 788 (9th Cir. 2014) (quoting Bracy v. Gramley, 520 U.S. 899, 904-05 (1997)). "The Constitution requires recusal where 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" Id. (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). In determining whether this standard is satisfied, the relevant inquiry is "whether the average judge in [the relevant] position was likely to be neutral or whether there existed an unconstitutional potential for bias." Id. at 789 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009)). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994) (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).

In addressing due process concerns, United States Supreme Court has ruled that circumstances making recusal necessary include those where a judge: has a direct, personal and substantial pecuniary interest in convicting a defendant, Tumey v. Ohio, 273 U.S. 510, 523 (1927); acts as part of the accusatory process, In re Murchison, 349 U.S. 133, 137 (1955); becomes "embroiled in a running, bitter controversy" a defendant, Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); or

becomes "so enmeshed in matters involving [a litigant] as to make it most appropriate for another judge to sit.'" Johnson v. Mississippi, 403 U.S. 212, 215-16 (1971).

c. Analysis.

The record does not reflect that any of these circumstances existed, nor that there was any other objective basis for questioning Judge Brodie's neutrality. Judge Brodie declared in connection with Petitioner's disqualification requests that he had "no particular interest" in Petitioner (Lodgment 10, Ex. 3G at 1/4); that he had "not become embroiled in the case" (Lodgment 10, Ex. 3B at 2/3); and that he was "committed to presiding over [Petitioner's] matters in a neutral and fair manner." (Id.) Judge Lamb independently reviewed Petitioner's filings and also determined that Judge Brodie was not disqualified. (Lodgment 10, Ex. 3E) This Court sees no evidence that Judge Brodie became embroiled in a personal controversy with Petitioner or acted as part of the accusatory process. As summarized above, the issues that Petitioner raised in demanding disqualification relate to his dissatisfaction with Judge Brodie's legal rulings rather than a showing of bias. Petitioner's proper recourse for legal error is appeal, not disqualification. Liteky, 510 U.S. at 555 ("Almost invariably, [judicial rulings] are proper grounds for appeal, not for recusal."). Lacking evidence that would demonstrate an unconstitutional potential for bias (or any resulting loss of "jurisdiction"), Petitioner's claim is denied.

2. Claim 3(b): Petitioner's Trial Counsel Rendered Ineffective Assistance When He Failed To Join In Petitioner's Motion To Disqualify The Trial Judge.

It follows from the Court's finding in the preceding section that Petitioner's disqualification motion was devoid of merit that it would have been futile for trial counsel to join in the disqualification motion. Since, under the authorities cited above, the failure to take futile action does not constitute ineffective assistance of

counsel, habeas relief is not warranted on this claim.

3. Claim 3(c): Petitioner's Appellate Counsel Rendered Ineffective Assistance When He Failed To Augment The Record And Raise Petitioner's Claims Relating To The Disqualification Issue.

It also follows from the Court's finding above, i.e., that Petitioner's disqualification motion was devoid of merit, that Petitioner is unable to meet his burden of showing ineffective assistance of appellate counsel.

The Court therefore finds that habeas relief is not warranted on this claim.

4. Claim 3(e): Petitioner's Trial Counsel Rendered Ineffective Assistance When He Failed To Present Evidence In Support Of Petitioner's Defense Of Transitory Possession And Necessity, Failed To Subject The Prosecution To Meaningful Adversarial Testing, Failed To Investigate And Contact Witnesses And Secure Other Records That Would Have Established Violence At Petitioner's Home By Melody Maffey On Another Occasion, And Failed To Investigate And Present Evidence Concerning The Circumstances Of The Prior Convictions.

a. Evidence of Transitory Possession.

Petitioner alleges that his trial counsel was ineffective because he "had proof in hand to support [Petitioner's] defenses of transitory possession and necessity in the form of witnesses and physical evidence from the case file in [Petitioner's domestic violence case] of Melody Maffey's bi-polar disorder and prior acts of violence of attacking [Petitioner] with two butcher knifes, and more." (SAP at 27.) Evidence of Maffey's prior violence could have supported Petitioner's theory—underlying his momentary possession defense—that he needed to remove methamphetamine from her possession to avoid another violent episode. He states that "representation cannot be characterized as informed tactical decision in light of [trial counsel's] abject failure" to have an investigator contact sources with

potential knowledge of prior violence. (SAP at 28 (emphasis in original).)

Petitioner ignores, however, that his trial counsel vigorously advocated for an instruction on the momentary possession defense. (1 RT 231-248.) The trial court denied that instruction based on Petitioner's own testimony that he intended to dispose of the drugs to prevent law enforcement from obtaining them. (Id. at 243-248; see Section VI.G.4, infra (addressing Petitioner's challenge to this decision).) Accordingly, counsel's alleged failure to investigate additional background relating to prior disputes with Maffey did not prejudice Petitioner. Strickland, 466 U.S. at 694.

This conclusion is supported by the fact that the evidence at trial overwhelmingly established that Petitioner did not momentarily possess the methamphetamine with the intent to dispose of it in a manner consistent with the public policy underlying the defense. As the trial court noted, Petitioner testified that he intended to give it to a friend because he "didn't want it to go to waste" (1 RT 204), and only sought to "get rid of" the drugs when approached by a police officer. (Id. at 208.) Before that encounter, Petitioner had stopped at a smoke shop, but he had not thrown the drugs away there. (Id. at 187.) He testified that he had developed no plan for disposing of them, and when apprehended, he had a meth pipe on his person, suggesting that he intended to smoke methamphetamine. (Id. at 187, 146.) On cross-examination, Petitioner stated that it was "[n]ot [his] job" to destroy the drugs, and if there was a "reasonable alternative" he would have "taken that." (Id. at 211.) He did not tell the police at the time of his arrest that he intended to dispose of the drugs. (Id. at 190.)[15]

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[15] After trial, Petitioner wrote a verified letter to the trial judge dated November 11, 2008, "to set the record straight" in which he stated, "I did not steal [Maffey's] dope. It was not hers, rather mine, I bought it." (2 CT at 341-42.)

Given this evidence and the trial court's conclusion that a momentary possession defense was unavailable, it was not incumbent on trial counsel to present additional evidence in support of that theory, and Petitioner did not suffer prejudice as a result of the alleged failure to do so.

b. Meaningful Adversarial Testing.

Petitioner argues that trial counsel "failed to subject the prosecution to meaningful adversarial testing, and especially in regard to [his] defenses." (SAP at 27-28.) Petitioner faults trial counsel for "fail[ing] to investigate into why [Petitioner] got the hell out of [his] own home …." (Id. at 28.) This claim appears to be a restatement of Petitioner's allegation, addressed directly above, that trial counsel failed to adequately investigate and present evidence of Maffey's episodes of violence when under the influence of methamphetamine. For the same reasons stated above, it does not entitle Petitioner to habeas relief.

c. Investigation of Prior Convictions.

According to Petitioner, he made known to "all counsel" that the "true nature and circumstances of his prior [attempted manslaughter convictions] was a cover-up of extrajudicial summary execution and torture by police …." (SAP at 29.) Petitioner contests the "constitutionality / validity" of his prior convictions, including because the case "Kelso v. City of San Bernardino, et al., [San Bernardino Superior Court Case No.] SCV-269269," "was res judicata / collateral estoppel of the trial on the prior." (SAP at 25.)[16] Petitioner appears to assert that counsel was ineffective for failing to argue Petitioner's prior convictions were invalid, thereby rendering the Three Strikes Law inapplicable.[17]

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[16] This may be a civil lawsuit arising from the events surrounding Petitioner's earlier convictions, during which "Mr. Kelso" was shot. (See SAP at 29.) The Court is unable to locate the case in online records.

[17] Petitioner also argues that his earlier shoot-out with police caused him to acquiesce to detention in violation of the Fourth Amendment. (SAP at 29 ("There

Petitioner's 2009 sentencing did not give him the opportunity to re-litigate the circumstances of his 1994 attempted manslaughter convictions or the validity of those convictions. For purposes of adjudicating prior strikes, "the trial court is bound by the record of the conviction and 'may not relitigate the circumstances of the prior crime.'" Jaime v. Almager, Case No. 08-cv-0093-JVS-JTL, 2009 U.S. Dist. LEXIS 131899, at *59 (C.D. Cal. June 9, 2009) (citing People v. Williams, 222 Cal.App.3d 911, 915 (1990)); see also Gill v. Ayers, 342 F.3d 911, 919 n.7 (9th Cir. 2003) (citing Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001)). As explained in detail below, in the second phase of Petitioner's bifurcated trial, the jury reviewed documentary evidence of Petitioner's prior convictions, including a certified "rap sheet" for Petitioner and certified California Department of Corrections records pertaining to Petitioner. (Section VI.G.5, infra.) Petitioner's counsel's role was limited to attacking the authenticity and sufficiency of those conviction documents. He did so. (2 RT 305, 315-322.) The law did not permit him to argue that evidence presented in 1994 did not support the convictions. Accordingly, counsel's alleged failure to explain the "true nature and circumstances" of Petitioner's prior convictions does not warrant relief.

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can be no, 'consentual [sic] encounter' with police after being subjected to unlawful attack in my own home, after being gunned down point blank range ….").) Petitioner does not explain how his prior encounters with law enforcement bears on the trial court's finding that his detention was based on reasonable suspicion.

5. Claim 3(f): Appellate Counsel Rendered Ineffective Assistance When He Failed To Challenge The Constitutionality Of Petitioner's Prior Convictions, Failed To Challenge The Trial Judge's Denial Of An Opportunity To Present A New Trial Motion, Failed To Challenge The Trial Court's Consideration Of The Improper Factors Of Petitioner's Religious And Political Beliefs As Circumstances In Aggravation, And Failed To Raise The Issues Of "Once in Jeopardy" And Cal. Penal Code section 654's Bar To Multiple Punishments.

Petitioner argues that appellate counsel rendered ineffective assistance of counsel for failing to raise several issues.

a. Prior Convictions.

First, Petitioner asserts that appellate counsel's performance was deficient for failing to attack the constitutionality of his prior 1994 convictions. (SAP at 29.) As explained in the preceding section, the circumstances of those convictions were not open to re-litigation.

b. New Trial Motion.

During a January 30, 2009 sealed Marsden hearing directly before sentencing, the trial court denied Petitioner's motion to substitute counsel. (Dkt. 63-1 [1/30/08 Marsden transcript] at 108.) At that hearing, trial counsel noted that Petitioner wanted to bring a motion for a new trial based on ineffective assistance of counsel. (Id. at 101.) Counsel suggested that the court appoint counsel to review the issue. (Id. at 108.) This colloquy followed:

> [The Court]: I see no grounds for doing so, frankly. What's your position on that?
> [Defense counsel]: Well, it's—I don't see any grounds for it because, of course, I am being criticized.
> [The Court]: The motion for new trial—
> [Defense counsel]: There are specific code sections that are viewed—

> certain areas that are allowed to go into, [ineffective assistance] is one of them.
> [The Court]: I didn't understand the basis for the motion for new trial—I didn't understand that's what [Petitioner] wanted; am I wrong?
> [Petitioner]: Yes, sir.
> [The Court]: What would that do to timeliness of the sentencing hearing, if I were to appoint counsel?
> [Defense counsel]: [Petitioner] would have to waive time, Counsel would look at the record, and they would talk to me and [Petitioner]. And they would determine whether or not there was grounds for a motion. That's what normally takes place. When I do those motions, it would probably be about 30 days.
> [The Court]: There would have to be some colorable showing. [¶] [Petitioner], why—you wanted a motion for new trial based on [defense counsel's] ineffective[] representation, you haven't shown that now. In the absence of that showing, I'm going to deny that request.

(Id. at 108-09.)

After Petitioner objected, the trial court further explained:

> [The Court]: [Y]ou are required to present an argument that's colorable and provides a legal basis for a motion for a new trial, at least something that would make me suggest that [defense counsel's] representation was ineffective. You've talk[ed] about this trial in great lengths and haven't demonstrated anything. I'm going to deny that request [Defense counsel] provided effective—
> [Petitioner]: I am—
> [The Court]: I have—have no doubt that the Court would rule on that primarily.

(Id. at 109.)

Thereafter, in open court and immediately before the trial court imposed judgment, the trial court had this further exchange with Petitioner:

> [The Court]: Is there any legal cause why judgment could not be pronounced at this time, [defense counsel]?
> [Defense counsel]: No, your honor.
> …

> [Petitioner]: Yes, sir. Your Honor, I'd like to make a motion for new trial and for arrest of judgment. I need to do that in writing, I believe. I need to, I believe, since [defense counsel] isn't doing it, I have to do that in pro per.

(2 RT 376-77.)

The trial court denied the request on the record as follows:

> [The Court]: Mr. Schwartz, we're going to proceed. I'm going to make a finding it's quite clear given the litigation of this case, you have taken every measure you can to delay the imposition of judgment, to delay your trial date, and to delay your sentencing hearing. You have availed yourself, frankly, [of] more remedies than most criminal defendants know exist. It's clear that you're manipulating the system to avoid the imposition of judgment. That being so, I'm denying that. We are going to proceed.

(2 RT 377.)

Petitioner now argues that appellate counsel was ineffective in failing to raise the trial court's denial on appeal. (SAP at 30.)[18]

Based on the exchanges above, the trial court's rulings could be construed either as (1) an outright denial of Petitioner's motion for a new trial based on ineffective assistance of counsel, or (2) the denial of a continuance of Petitioner's sentencing hearing to allow time for drafting such a motion pro se.[19] Under California law, either ruling would be reviewed for abuse of discretion. See People

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[18] Both Respondent and Petitioner's appointed counsel, citing this exchange in open court, conclude that Petitioner did not specify the legal grounds for his new trial motion. (See SSM at 101; Dkt. 158 at 5.) Taken in the context of the immediately preceding sealed Marsden hearing, however, Petitioner's request was based on the alleged ineffectiveness of counsel. (See SAP at 30 (citing Marsden transcript).)

[19] As explained below in Section VI.E.2, the trial court separately found Petitioner's self-representation request made directly before sentencing was untimely. Because Petitioner was represented by counsel, his attorney's refusal to join a new trial motion therefore also provided grounds for denial.

v. Hayes, 21 Cal.4th 1211, 1260-1261 (1999) ("A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."); People v. Alexander, 49 Cal.4th 846, 934 (2010) (trial court has broad discretion to determine whether good cause exists to grant continuance).

Given that deferential standard, Petitioner has not shown that appellate counsel's failure to raise the new trial motion constituted ineffective assistance. Neither Petitioner's trial counsel nor the trial judge perceived a basis for a new trial motion. The trial court indicated that Petitioner had not demonstrated "anything" to show that trial counsel was ineffective, stating that he would "rule on that primarily." (Dkt. 63-1 [1/30/09 Marsden transcript] at 109.) Based on its independent review of the record and the rulings herein, the Court agrees that there was no apparent showing of deficient performance by trial counsel.

Moreover, even if the new trial motion was meritorious, then Petitioner did not pursue it during the nearly three months between the November 7, 2008 conclusion of his bifurcated trial and his January 30, 2009 sentencing. This delay strongly supports the conclusion that the trial court did not abuse its discretion by denying Petitioner a continuance in January 2009—immediately before judgment—to pursue the motion pro se, particularly where the trial court found that Petitioner had "taken every measure" to delay the proceedings. Petitioner provides no explanation for why he did not raise the new trial motion earlier and has not shown good cause for a continuance, especially in light of the trial court's view that such a motion would be unsuccessful.

Appellate counsel was not required to raise weak or futile issues. Miller, 882 F.2d at 1434. Petitioner has not shown any reasonable probability that the California Court of Appeal would have concluded that the trial court abused its discretion in denying Petitioner's new trial motion, or in denying Petitioner a continuance to research further the issues. Thus, appellate counsel remained above

an objective standard of competence when declining to raise that issue, and Petitioner did not suffer prejudice.

c. Sentencing Factors.

Petitioner argues that appellate counsel was ineffective for failing to challenge the "improper" use of his "religious and political beliefs … as circumstances in aggravation" to justify a sentence under the Three Strikes Law. (SAP at 30.) Petitioner claims that, "in support of [his] argument," he "mailed a copy of (CT p. 333-339) to appellate counsel," along with his "copy of Part III of: People v. Taylor," 80 Cal. App. 4th 804 (2000). (Id.)

Petitioner's citation to "CT p. 333-339" is a reference to a letter Petitioner wrote to the City Clerk of the City of San Bernardino on October 7, 2008, i.e., shortly before his November 2008 trial. (2 CT 333-339.) In the letter, he opposed a code enforcement citation. (Id.) Petitioner made a number of provocative statements to the City Clerk, including the following:

- "If your demon possessed pyscopaths [sic] do not have a search warrant, then they had best keep off my property …." (2 CT 336.)
- "Ask S.B.P.D. officer Mark J. Johnson whether or not I respond favorably to the assertion of authority in violation of my [rights]." (Id. at 337.)
- "Ask Officer Johnson what I mean when I say 'Fuck-You,' to those I view as threats …." (Id.)
- "[I]t appears the entire Judiciary is sucking the dick of executive officers by acquiescence to torture …." (Id.)
- "You people appear to be attempting to also [unintelligible] me to become apostate! [B]y demonstrating to me that, 'No good deed will go unpunished,' in the Inland Empire of Satan. Particularly in your Temple of Iniquity where you offer citizens as human sacrifices to your false God, the criminal justice [and] prison system @

courthouses." (Id. at 339.)

- "I never shot anyone in my life, but I'm beginning to believe that my not shooting SBPD officers Mark J. Johnson & Mark A. Garcia when they attacked me in my home … is perhaps the most grave mistake of my life." (Id.)

At Petitioner's sentencing hearing, the trial judge referenced this correspondence as follows:

> [The Court]: It's also clear that without any hesitation on the Court's part that [Petitioner] does not intend to live by the rules that society sets for him. The recent letter to Code Enforcement is one thing. It's [sic] shows his current state. It shows someone who is not willing to—to put it really bluntly, to do what you are told to do, to do what's expected of you.

(2 CT 375-76.)

The trial court was required to determine whether to dismiss one or more strike priors in furtherance of justice under California Penal Code section 1385(a). See Romero, 13 Cal.4th 497 (holding that trial courts may dismiss strike priors in furtherance of justice over prosecution's objection). The touchstone of that analysis is "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strike Law] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." People v. Williams, 17 Cal. 4th 148, 161 (1998). If the trial court refused to dismiss the prior felony conviction, then sentencing pursuant to the Three Strikes Law was mandatory at the time of Petitioner's judgment. See Cal. Penal Code §§ 667(e)(2) (2009 version).

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Here, Petitioner's October 2008 letter to the City Clerk was probative of his background and character for purposes of determining whether to dismiss strike priors. Petitioner's prior strikes arose from his 1994 conviction for shooting two San Bernardino police officers referenced in that letter, Mark Johnson and Mike Garcia. His statements relating to those individuals, which evince a lack of remorse for his crimes, were highly relevant to whether Petitioner fell within the spirit of the Three Strikes Law. Further, Petitioner's correspondence demonstrates a lack of respect for the criminal justice system and the judiciary, suggesting a likelihood of recidivism.

Petitioner cites Taylor, 80 Cal. App. 4th 804, to support his claim of error. (SAP at 30.) As an initial matter, the California Supreme Court de-published that case upon grant of review, and it is therefore not citable. See People v. Taylor, 99 Cal. Rptr. 2d 744 (2000). Even if Taylor remained good law, it is distinguishable. Over a dissent, the Court of Appeal found that it was improper to refuse to dismiss strike priors based on the defendant's "amateurish mistakes in conducting his own defense" and the trial court's view of the defendant as a "mere public annoyance or embarrassment." (Id. at 817.) Taylor found "no correlation" between the way the defendant "conducted his defense and the interests of society in longer prison terms for repeat felons." (Id.) Here, however, there is an obvious correlation between Petitioner's lack of contrition for shooting police officers in 1994 and society's interest in imposing an extended prison term based on the possibility of recidivism.

Because Petitioner's arguments relating to the use of the October 2008 correspondence at his sentencing hearing lack merit, appellate counsel was not ineffective for failing to raise them on appeal, and Petitioner did not suffer prejudice based on that failure.

d. Once In Jeopardy / Penal Code Section 654.

Petitioner argues that appellate counsel was deficient "as to the issues of once-in-jeopardy and Pen. C. § 654." (SAP at 30.) As explained in Section VI.D,

infra, Petitioner is not entitled to relief under the theory of "once in jeopardy" and counsel's failure to raise that issue was not deficient. Further, as explained in Section VI.B.7, supra, Petitioner's contentions that counsel should have raised issues relating to California Penal Code section 654 are meritless.

D. Habeas Relief Is Not Warranted With Respect To Any Of Petitioner's Remaining Claims Encompassed By Ground Four Of The SAP.

All of Petitioner's remaining claims encompassed by Ground Four of the SAP relate to Sheriff's Deputies' use of mechanical devices (a "Black Box") when they transported Petitioner between jail and the court.[20] The relevant background is as follows: Petitioner asserts that on multiple occasions, the San Bernardino County Sheriff's Department (the "Sheriff's Department") engaged in a practice of "tricing [him] up with Black-Box secured to waist-chain behind the back with interlocked elbows, known as the dō-sē-dō style, with other detainees on both sides …." (SAP at 33.) Petitioner claims that he was subject to this treatment because he was housed in "Unit 6" at the West Valley Detention Center, which was a high security unit. (SAP at 32.) Petitioner contends that he was assigned to this unit based on a "pretextual justification" relating to the "nature and circumstances of [his] prior conviction for shooting two police officers," and "trumped up" after "allegations of possession of a razor blade" for use as a pencil sharpener. (SAP at 32.)

During his confinement, Petitioner asserts that the Black Box was applied to him on February 17, 2006; March 3, 2006; March 9, 2006; March 26, 2006; April 7, 2006; May 5, 2006; May 19, 2006; July 14, 2006; and September 8, 2006.[21]

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[20] A "Black Box" has been described as "a rectangular device" which, when "placed over the chain of a pair of handcuffs … both limits a prisoner's ability to move his hands, and prevents access to the handcuffs' keyholes." Davis v. Peters, 566 F. Supp. 2d 790, 798 (N.D. Ill. 2008).

[21] Based on the available record, it appears that these events occurred when

(SAP at 33.) Petitioner contends that the Sheriff's Department then discontinued the practice. (Id.) Petitioner asserts that the use of the device caused "gratuitous infliction of wanton and unnecessary pain and suffering for hours at a time" (id. at 36), and amounted to "positional torture." (Id. at 33.) He also submitted to the California Supreme Court affidavits from three other prisoners attesting to the pain caused by the Black Box. (Lodgment 10, Ex. 4D.).

1. Claim 4(a): The Trial Court Lost Jurisdiction To Impose Additional Punishment Of Imprisonment When Sheriff's Deputies Subjected Petitioner To "Trial By Ordeal" When They Tortured Him With The Black Box When Transporting Him, Because Use Of The Black Box Constituted Cruel And Unusual Punishment, Implicated The Double Jeopardy Clause's Proscription Against Multiple Punishments, And Violated The United States Convention Against Torture.

Based on use of the Black Box, Petitioner asserts violations of (1) the Fifth Amendment's Double Jeopardy Clause's proscription against multiple punishments; (2) his right to be free from cruel and unusual punishment; and (3) a United Nations convention and protocol. (SAP at 31-32.)

a. Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend V. The Clause prevents both "successive punishments and … successive prosecutions." United States v. Dixon, 509 U.S. 688, 696 (1993) (citing North Carolina v. Pearce, 395 U.S. 711 (1969)). The protection against multiple punishments prohibits the Government from "punishing twice, or attempting a second time to punish criminally, for the same offense." Witte v. United States,

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Petitioner was confined as a pre-trial detainee.

515 U.S. 389, 396 (1995) (emphasis deleted) (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

Petitioner asserts that because he was tortured via "extra judicial summary corporal punishment" with the Black Box device, the Double Jeopardy Clause was "implicat[ed]" and the trial court "lost jurisdiction to impose additional punishment of imprisonment." (SAP at 31.) The Court interprets this as an argument that Petitioner was punished for possessing methamphetamine through the use of pre-trial restraints and therefore could not be punished again through a prison sentence.

Petitioner has not shown that the pre-trial use of the Black Box was punitive for double jeopardy purposes. It is axiomatic that a criminal defendant can be detained before trial—and then subsequently sentenced after a guilty verdict—without violating the Double Jeopardy Clause. During pre-trial detention, detainees may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others. Legitimate, non-punitive governmental objectives include "maintaining security and order" and "operating the [detention facility] in a manageable fashion." Pierce v. County of Orange, 526 F.3d 1190, 1205 (9th Cir. 2008) (citation omitted), cert. denied 555 U.S. 1031 (2008). The Black Box has been found to serve those ends. See Hargett v. Adams, No. 02-cv-1456, 2005 U.S. Dist. LEXIS 6240, at *4 (N.D. Ill. Jan. 14, 2005) ("[T]here are legitimate security concerns underlying the past and present use of the Black Box.").

Moreover, even if use of the Black Box could be considered a form of administrative discipline arising from Petitioner's drug arrest (as opposed to his prior crimes and in-custody conduct), the Ninth Circuit has concluded that "the prohibition against double jeopardy does not bar criminal prosecution for conduct that has been the subject of prison disciplinary sanctions …." United States v. Brown, 59 F.3d 102, 104 (9th Cir. 1995). In Brown, the criminal defendant had participated in a prison riot. Id. at 103. In a prison disciplinary hearing, he was found to have committed assault and lost forty-one days of good credit time. Id.

He was subsequently indicted for assaulting a federal officer and destruction of government property based on the same conduct. Id. After he moved to dismiss the indictment on double jeopardy grounds, the district court denied the motion. Id. The Court of Appeals affirmed, concluding that "the sanctions [were] not punishment for purposes of double jeopardy because they [were] solely remedial." Id.; see also Barker v. Baca, Case No. 09-cv-00440-PSG-VBK, 2011 U.S. Dist. LEXIS 47732, at *25-26 (C.D. Cal. Mar. 25, 2011) ("[T]he Ninth Circuit has squarely held that the bar against double jeopardy does not preclude criminal prosecution for conduct for which prison authorities have already imposed administrative discipline.").

b. Conditions of Confinement.

"The Supreme Court has recognized that '[f]ederal law opens two main avenues to relief on complaints related to imprisonment: [1] a petition for habeas corpus, 28 U.S.C. § 2254, and [2] a complaint under the Civil Rights Act of 1871 … 42 U.S.C. § 1983.'" Nettles v. Grounds, 830 F.3d 922, 927 (9th Cir. 2016) (citing Muhammad v. Close, 540 U.S. 749, 750 (2004) (per curiam)), cert. denied, 137 S. Ct. 645 (2017). In this case, Petitioner choose to pursue a habeas petition under § 2254, not a civil rights claim under § 1983. Federal habeas relief is available "only on the ground that [an inmate] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Civil rights claims, on the other hand, can be used to remedy the "deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws" by a person acting under color of state law. 42 U.S.C. § 1983. In other words, "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented in a § 1983 action." Nettles, 830 F.3d at 927 (citing Muhammad, 540 U.S. at 750).

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To the extent that Petitioner challenges his conditions of confinement as unconstitutional based on use of the Black Box, he is seeking relief properly requested under 42 U.S.C. § 1983 as a civil rights claim, not in a habeas action. (See SAP at 32, 34 (citing 42 U.S.C. §1983).) Relief in this habeas context is therefore improper.[22] The Court notes—without ruling on the matter—that courts addressing the Black Box device have concluded that the restraint does not raise constitutional concerns. Fulford v. King, 692 F.2d 11, 14-15 (5th Cir. 1982) ("Requiring all CCR prisoners to wear a black box when outside the prison does not violate the eighth amendment. Its use may inflict some discomfort, such as numbness of the arms and temporary marks, but the record does not show that prisoners are exposed to great pain or that any of their discomfort is occasioned either deliberately, as punishment or mindlessly, with indifference to the prisoners' humanity."); Moody v. Proctor, 986 F.2d 239, 241 (8th Cir. 1993) (approving Fulford's analysis); Wean v. Budz, Case No. 11-cv-276, 2013 U.S. Dist. LEXIS 29072, at *11 (M.D. Fla. Mar. 4, 2013) ("In summary, the use of the black box [on a civil detainee] is not considered 'punishment' under constitutional standards."); Levi v. Thomas, 429 F. App'x 611, 613 (7th Cir. 2011) (use of black box on civil detainee is permissible following "major violation" of prison rules); Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004) ("[A]n individual detained under civil process—like an individual accused but not convicted of a crime—cannot be

[22] Where a complaint is "amenable to conversion on its face," a district court has discretion to "construe a petition for habeas corpus to plead a cause of action under § 1983 after notifying and obtaining informed consent from the prisoner." Nettles, 830 F.3d at 936. A complaint is "amenable to conversion" where it "names the correct defendants and seeks the correct relief." Id. (citing Glaus v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005)). The Court recommends that the Petition not be converted to a § 1983 complaint, including because it (1) does not name as defendants the individual(s) responsible for the alleged constitutional violations, and (2) seeks as a remedy Petitioner's release from custody, which is not appropriate for a civil rights claim.

subjected to conditions that 'amount to punishment.'" (citation omitted)).

c. United States Convention Against Torture.

Petitioner also challenges use of the Black Box under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the United Nations Istanbul Protocol (together, the "Conventions"). (SAP at 31-32.)[23] Petitioner does not cite authority supporting the conclusion that violations of the Conventions justify habeas relief, i.e, that the Conventions mandate the release of allegedly tortured individuals as opposed to the cessation of torture.

2. Claim 4(c): Appellate Counsel Rendered Ineffective Assistance When He Failed To Augment The Record In Order To Raise This "Once In Jeopardy" Claim And Failed To Request Augmentation Of The Record To Include Jury Voir Dire.

Petitioner asserts that his appellate counsel rendered ineffective assistance when he (1) failed to "request augmentation of … reporter's transcripts on appeal" that could support his "once in jeopardy" claim arising from the use of the Black Box (SAP at 34), and (2) failed to request augmentation of the record on appeal to include jury voir dire. (SAP at 35.) Petitioner asserts that the jury voir dire transcript reveals that his trial counsel was "friends with Dept. S27 courtroom deputy and family," and therefore had "personal bias" not to "implicate his friend [the deputy] in torture," i.e., use of the Black Box. (Id.)

As explained above, Petitioner's claims that use of the Black Box precluded criminal prosecution and sentencing are not meritorious. Section VI.D.1, supra. There is no reasonable probability that an appellate court would have reversed Petitioner's conviction based on use of the Black Box. Since, under the authorities cited above, the failure to take futile action does not constitute ineffective assistance

[23] The Court grants Petitioner's request to judicially notice these documents.

of counsel, the Court finds that habeas relief is not warranted. Juan H., 408 F.3d at 1273.

3. Claim 4(d): Trial Counsel Rendered Ineffective Assistance In Failing To Move For Dismissal Based On Sheriff's Deputies' Using The Black Box.

Petitioner argues that his trial counsel was ineffective for not "fil[ing] one moving paper for dismissal based on [the outrageous] misconduct of [the San Bernardino Sheriff's Department] …." (SAP at 36.) He asserts that the "SBSD misuse [sic] of the Black Box behind the back on at least nine (9) incidents" caused "gratuitous infliction of wanton and unnecessary pain and suffering for hours at a time that the U.S. Supreme Court has clearly prohibited." (Id.)

As explained above, Petitioner's claims that use of the Black Box precluded criminal prosecution and sentencing are not meritorious. Section VI.D.1, supra. Habeas relief is not warranted on this claim. Juan H., 408 F.3d at 1273.

4. Claim 4(e): The Subjection Of Petitioner To "Extrajudicial Summary Cruel And Unusual Punishment Under Color Of Law" Deprived Him Of His Due Process Right To Be Tried By A "Legally Constituted Court."

Petitioner asserts that the Black Box "willfully subject[ed him] to extrajudicial summary cruel and unusual corporal punishment," and "deprived [him] of Due Process Clause of 14th Amendment guarantee to be tried by a legally constituted court, not by a kangaroo court." (SAP at 37.)

As explained above, Petitioner's claims that use of the Black Box precluded criminal prosecution and sentencing are not meritorious. To the extent Petitioner asserts a violation of due process, it appears to be based on the rejection of his once-in-jeopardy plea, which the Court addressed above. Section VI.D.1, supra. Petitioner is therefore not entitled to habeas relief.

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E. Habeas Relief Is Not Warranted With Respect To Any Of Petitioner's Remaining Claims Encompassed By Ground Five Of The SAP.

All of Petitioner's remaining claims encompassed by Ground Five of the SAP relate to Petitioner's sentencing hearing on January 30, 2009. Petitioner contends that the trial court improperly "refused to substitute counsel, refused to allow motion for new trial, refused [his] Faretta motion, refused to hear mitigating circumstances/allocution, and abused discretion." (SAP at 37.)

1. Claim 5(b): The Trial Judge Improperly Denied Petitioner's Motion To Substitute Counsel.

a. Factual Background.

At the beginning of the sentencing hearing, Petitioner requested that the trial court replace his counsel pursuant to People v. Marsden, 2 Cal.3d 118 (1970).[24] Judge Brodie conducted an in camera Marsden hearing. (2 RT 365.) The transcript of the proceeding was sealed, and the sealed report was filed. (Id.) The motion was denied. (2 RT 365.)

Respondent argues that the sealed Marsden January 2009 transcript was part of neither (1) Petitioner's underlying direct appeal state court record nor (2) his state habeas petition to the California Supreme Court, and it is not in Respondent's possession. (SSM at 124, n. 35; 126.) Respondent therefore argues that this Court "has no factual basis to find fault with the state trial court's ruling denying [the] Marsden motion …." (SSM at 127.)

Petitioner, however, filed the transcript of the January 2009 Marsden hearing with this Court before Respondent submitted the SSA. (Dkt. 63-1 at 86-111.) The

[24] This request was at least the seventh Marsden request Petitioner raised. (See 1 CT 97 [3/3/08 motion], 100 [4/3/08 motion], 177 [6/6/08 motion], 198 [10/30/08 motion], 200 [11/3/08 motion]; 2 CT 214 [11/5/08 motion], 355 [1/30/09 motion].) Petitioner has filed transcripts from each of these hearings. (Dkt. 63 at 77 through Dkt. 63-1 at 111.)

Court has independently reviewed that transcript. Based on that review, Petitioner raised the following issues in January 2009 concerning his defense counsel's competence:

- Petitioner had complained "to the state bar" about counsel and was "contemplating a case for fraud." (Id. at 87.)
- Counsel had failed to communicate with Petitioner and had treated him like a "strange man," perhaps a reference to "straw man." (Id. at 88.)
- Counsel had failed to assist Petitioner in getting adequate medical treatment in custody. (Id. at 88-90.)
- Counsel had failed to file a motion for a new trial based on ineffective assistance of counsel. (Id. at 92, 96, 101.)
- Counsel had failed to effectively rebut the government's arguments about Petitioner's prior strikes or challenge their "constitutionality." (Id. at 92, 96.)
- Counsel had failed to challenge the "probation report" and failed to present mitigating evidence. (Id. at 93.)
- Counsel was conflicted because if he went "against the county on this," he would be "pretty much retaliated against." (Id. at 95-96.)
- Counsel failed to "challenge" Petitioner's trial under California Penal Code section 1004, which provides a criminal defendant grounds for demurrer, where Petitioner contended the trial judge lacked jurisdiction to hear the trial based on a pending disqualification motion. (Id. at 96-97.)
- Counsel failed to raise an unspecified "issue of collateral estoppel," apparently based on separate civil litigation in the matter Kelso v. San Bernardino, et al., Case # SCV269269. (Id. at 97.)

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- Counsel allowed the jury to receive a mistaken jury verdict form indicating that Petitioner was charged with voluntary manslaughter. (Id. at 98.)
- Counsel failed to adequately advance Petitioner's "once in jeopardy" theory relating to use of the Black Box. (Id. at 94-95, 103.)

After noting that Petitioner had raised a "huge number of grounds" (Id. at 97), trial court summarily denied the Marsden motion, reasoning on the record as follows:

> [The Court]: … [M]ost – vast – the vast bulk of what [Petitioner] has described as an issue to the proceedings before the Court or – demonstrates nothing more than routine disagreement over trial tactics. Trial tactics are the purview of the defense counsel. In the absence of some showing that [counsel's] representation has fallen below the acceptable – the minimum professional standards, nothing that has been argued here even comes … close. It does demonstrate that [Petitioner] is not happy with the way [counsel] represents him. Does not require a substitution of counsel.

(Id. at 107.)

b. Analysis.

"On appeal, a claim a trial court unconstitutionally denied a defendant's Marsden motion is in essence a claim that the trial court failed to recognize that the defendant's complaints as to his counsel were such that, if true, counsel's performance fell below the Sixth Amendment standard for effective assistance of counsel." Robinson v. Kramer, 588 F.3d 1212, 1216 (9th Cir. 2009), cert. denied, 562 U.S. 844 (2010).

As explained above, under Strickland, Petitioner must show (1) deficient performance and (2) prejudice. He "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. To overturn the strong presumption of adequate assistance, Petitioner must demonstrate that "the challenged action cannot

reasonably be considered sound trial strategy under the circumstances of the case." See Lord, 184 F.3d at 1085.

Petitioner failed to adequately explain at the Marsden hearing or in subsequent briefing why counsel's specified acts or omissions gave rise to ineffective assistance. See Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977) (summary disposition of habeas petition appropriate where allegations are vague or conclusory; "the petition is expected to state facts that point to a real possibility of constitutional error") (citation and internal quotation marks omitted); Gomez, 66 F.3d at 205 (conclusory allegations unsupported by a statement of specific facts do not warrant habeas relief). For example, Petitioner provides no factual explanation of his assertions that (1) counsel was ineffective in addressing the "issue of collateral estoppel" based on the Kelso case, (2) that San Bernardino County might "retaliate" against counsel for adequately representing Petitioner, or (3) that Petitioner was prejudiced by counsel's alleged refusal to communicate with him. See Anderson v. Calderon, 232 F.3d 1053, 1086 (9th Cir. 2000) (alleged failure of attorney to meet with defendant in jail prior to capital murder trial did not result in ineffective assistance of counsel), abrogated on other grounds by Osband v. Woodford, 290 F.3d 1036, 1043 (9th Cir. 2002).

Further, as noted by the trial judge, some of the complaints Petitioner raised at the Marsden hearing did not affect the result of his criminal proceeding. These include the contentions that (1) Petitioner had submitted a state bar complaint concerning his trial counsel, and (2) that counsel had not adequately represented Petitioner in connection with his medical complaints in custody. (See Dkt. 63-1 [1/30/09 Marsden transcript] at 100 ("The medical issues involving [Petitioner] do not appear to involve his criminal matter.").) Therefore, these issues provide no basis for relief.

The Court has rejected elsewhere Petitioner's arguments that counsel rendered ineffective assistance by (1) failing to raise a motion for a new trial

(Section IV.C.5), (2) failing to adequately advance Petitioner's "once in jeopardy" theory, (Section VI.D.1) and (3) failing to join Petitioner's disqualification motion. (Section VI.C.1).

Even overlooking his conclusory pleading, Petitioner has also not shown deficient performance or prejudice with respect to the remaining issues. Petitioner asserts that counsel did not effectively challenge his prior strikes, but counsel filed a Romero motion seeking to dismiss those strikes. (2 CT 275-280.) To the extent that Petitioner disagreed with the arguments made in that motion, those arguments involve tactical decisions appropriately left to the discretion of counsel. Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) ("disagreement with trial counsel's tactical decision cannot form the basis for a claim of ineffective assistance of counsel").

Petitioner argues that counsel failed to attack a probation report and failed to submit mitigating evidence at sentencing. The record reflects that counsel did object at sentencing to portions of Petitioner's probation report and the trial judge sustained some objections. (2 RT 372-73.) Further, Petitioner had the opportunity to present mitigating evidence, including letters from employers and argument relating to his drug addiction. (Id. at 367-68, 372, 375.) Even if Petitioner had received ineffective assistance regarding his probation report or mitigating evidence, he has not shown a reasonable probability that he would have achieved a different outcome where the trial judge found at sentencing that it was "clear" that Petitioner fell "within the spirit of the three strikes law," and ruled "without any hesitation" that Petitioner "does not intend to live by the rules that society sets for him." (Id. at 375.)

Petitioner argues that counsel was ineffective in challenging an erroneous verdict form. When the trial court initially sent the jury to deliberate, the jury was provided with an erroneous verdict form stating that Petitioner was charged with "voluntary manslaughter." (Id. at 280; 2 CT 263.) The jury returned a verdict on

that form indicating that Petitioner was guilty of that crime rather than methamphetamine possession as charged. (Id.) Petitioner's counsel immediately moved for a mistrial and expressed a concern that the jury members had "already made up their mind about his priors." (2 RT 281-82.)[25] The trial judge denied the mistrial motion, stating "[t]he entire charge to the jury has made it clear to them what the case is about. There's no question that [Petitioner] is charged with any other crime …. This would appear to be nothing more than a – it's a draftsman error in the verdict form. Frankly, it's on the Court …. But be that as it may, I don't think it warrants granting a mistrial." (Id. at 282.) The trial court then provided the jury with a corrected verdict form; it again returned a guilty verdict. (Id. at 285; 2 CT 257.) Petitioner does not explain how his counsel's performance was deficient in this instance; counsel promptly moved for a mistrial following the incident, which the trial judge denied. While counsel expressed concern that the improper verdict form colored the jury's perception concerning Petitioner's prior convictions, Petitioner had already testified to his prior convictions.

Petitioner has not demonstrated entitlement to habeas relief with respect to the trial court's denial of his January 2009 Marsden motion.

2. Claim 5(d): The Trial Judge Improperly Refused To Allow Petitioner To Make A Faretta Motion.

The trial court denied as untimely a self-representation request that Petitioner brought at his sentencing hearing pursuant to Faretta v. California, 422 U.S. 806 (1975). (2 RT 366-67.) Faretta does not articulate a specific timeframe in which a claim for self-representation qualifies as timely. It indicates only that a motion for self-representation made "weeks before trial" is timely. Faretta, 422 U.S. at 835; see also United States v. Maness, 566 F.3d 894, 896 (9th Cir. 2009) ("If a

[25] Petitioner had already admitted on direct examination that he had been convicted of two counts of attempted voluntary manslaughter. (1 RT 182.)

defendant's request to proceed pro se is timely, not for purposes of delay, unequivocal, voluntary, intelligent and the defendant is competent, it must be granted."), cert. denied, 546 U.S. 1196 (2006). Under Ninth Circuit precedent, a "demand for self-representation is timely if made before meaningful trial proceedings have begun." United States v. Bishop, 291 F.3d 1100, 1114 (9th Cir. 2002), cert. denied, 537 U.S. 1176 (2003). In jury trials, the Ninth Circuit has "held that a request is timely if made before the jury is selected or before the jury is empaneled, unless it is made for the purpose of delay." Id. (citing United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986)).[26]

Here, Petitioner did not make the challenged Faretta request until nearly three months after Petitioner's November 2008 trial and conviction. This was long after "meaningful trial proceedings" had begun. Id. Moreover, in seeking to represent himself, Petitioner simultaneously requested to continue the sentencing proceedings. (2 RT 366-67.) At the same hearing, the trial court found, in denying a motion for a new trial, that Petitioner had "taken every measure [he could] to delay the imposition of judgment, to delay [his] trial date, and to delay [his] sentencing hearing." (Id. at 377.) A trial court does not err in denying a self-representation motion made for the purpose of delay. Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985) ("A request for self-representation … must not be a tactic to secure delay.").[27]

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[26] Applying AEDPA's deferential standard, the Ninth Circuit stated in Marshall v. Taylor, 395 F.3d 1058, 1061 (9th Cir. 2005), cert. denied, 546 U.S. 860 (2005), that, "[b]ecause the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." As explained above, however, the Court reviews this claim de novo and relies on Circuit authority.

[27] Based on its independent review of the record, the Court notes that on November 5, 2008 (i.e., the date Petitioner's trial began), Petitioner made an "equivocal" request to represent himself after the jury was selected, but directly

In Petitioner's counseled Reply to the SSA addressing his Faretta claim, he argues, "the record is clear that [Petitioner] had attempted to replace his appointed counsel on several prior occasions, before, during, and after trial," through Marsden motions. (Dkt. 158 at 6.) Petitioner argues this it was "[o]nly after repeated denials of his Marsden motions" and "after his appointed attorney did not raise a motion for a new trial," that he requested to represent himself. (Id.) Petitioner thus contends that the Faretta motion was made because Petitioner "had no other choice if he wanted to raise and preserve his motion for a new trial." (Id. at 7.)

The Court rejects these arguments. As the Ninth Circuit explained in Robinson, Marsden, and Faretta requests serve distinct purposes. 588 F.3d 1212, 1216-17 ("Therefore, we cannot construe [Petitioner's] Marsden claim as a Faretta claim."). In adjudicating a Faretta request, "[c]ounsel's effectiveness, or lack thereof, is not part of the inquiry at all." Id. at 1216. Accordingly, the fact that Petitioner had previously requested substitute counsel through numerous failed Marsden motions does not render timely his late-stage request to represent himself. See id. ("At the trial level, Faretta and Marsden requests are as distinct as would be a request to be allowed to drive a car from a request for a driver to drive it.").

3. Claim 5(e): The Trial Judge Improperly Refused To Allow Petitioner To Raise The Issue Of Mitigating Circumstances In Allocution.

The Court's rationale above for finding that habeas relief is not warranted on Claim 2(f) applies with equal force to this claim.

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before it was empaneled. (Dkt. 63-1 at 81.) The trial court emphasized it was "not finding that [the request] was unequivocal," but concluded, "even an unequivocal request would be untimely …." (Id.) Petitioner does not challenge this denial, and in any event, has made no showing it was improper. See Armant, 772 F.2d 552, 555 (request must be "unequivocal," "timely," and not a "tactic to secure delay.").

4. Claim 5(f): Trial Counsel Rendered Ineffective Assistance In Failing To Argue Petitioner's Poor Health As A Mitigating Factor And Falsely Characterizing Petitioner As A Drug Addict.

a. Poor Health.

Petitioner argues that trial counsel was ineffective for failing to "put at issue [Petitioner's] failing health or Nov. 14, 2008 heart attack up for mitigating consideration" at sentencing. (SAP at 38.) Accepting the SAP's allegations, the at-issue heart attack occurred (1) after Petitioner's November 2008 conviction and (2) before his January 2009 sentencing.[28]

As explained above, the trial court was required to determine at the sentencing hearing whether to dismiss strikes prior in furtherance of justice under California Penal Code section 1385(a), see Romero, 13 Cal.4th 497, by evaluating "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strike Law] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." Williams, 17 Cal. 4th at 161.

Respondent notes there is no evidence in the record substantiating Petitioner's claim of a November 2008 heart attack. (SSM at 135.) This alone is grounds to deny habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2003) ("The Petitioner carries the burden of proving by a preponderance of the evidence that he is entitled to habeas relief.").

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[28] Respondent misreads this allegation and asserts Petitioner "has not shown any connection to him allegedly experiencing a heart attack in 1998, and how that 10-year-old medical event should have been considered a mitigating factor …." (SSM at 136.)

Even assuming, however, that Petitioner did in fact suffer a heart attack in November 2008, he has not shown how counsel's failure to raise that event in support of Petitioner's motion to dismiss prior strikes amounts to deficient performance. Petitioner does not explain how suffering a heart attack in 2008 would put him outside the spirit of the Three Strikes Law, or why that medical condition would affect the trial court's evaluation of "the nature and circumstances of his present felonies and prior serious and/or violent felony convictions." Williams, 17 Cal. 4th at 161.

Further, Petitioner has failed to demonstrate prejudice, because he has not shown that the mitigating evidence allegedly omitted by counsel, if presented, would have resulted in a reasonable probability of a different sentence. See Strickland, 466 U.S. at 694. The trial court was aware, based on a statement in a December 2008 probation report, that Petitioner suffered "[h]eart problems." (2 CT 310.) Further, directly before his sentencing, Petitioner informed the trial court at a Marsden hearing that he "wanted to bring up another issue of heart problems – heart attack." (Dkt. 63-1 [1/30/09 Marsden transcript] at 89.) The trial court said that he would "accept" that Petitioner "could "have health problems." (Id. at 90.) Nonetheless, the trial court subsequently imposed Petitioner's sentence based on the conclusion that it was "clear" that Petitioner "fall[s] within the spirit of the three strikes law." (2 RT 375.)

b. Drug Addiction.

Petitioner argues that counsel was ineffective for stating Petitioner had a "drug addiction," because, according to Petitioner, he has at times "used/abused drugs," but he is not an addict. (SAP at 39.)

At Petitioner's January 2009 sentencing hearing, his trial counsel argued as follows in support of striking Petitioner's prior convictions:

> [Defense counsel]: [Y]our honor, [p]eople don't choose drug addiction. It's usually something inherent in their body. They might

> choose to use drugs that gets the thing triggered, but the drug addiction is an illness and that's what [Petitioner] had and that's what got him in this situation right now …. And I don't see that as being -- that he is a recidivist that the [Three Strikes Law] intended to go after.

(2 RT 372.)

The trial court responded:

> [The Court]: I will grant you … that drug addiction is widely viewed as an illness. It is also equally true that there is an utter lack of any evidence … that [Petitioner] has done anything to address that drug addiction in a systematic way. Furthermore, his attitude now does not appear to be the product of drug addiction, but merely of his own view that the world should be structured as he wishes, not as society.

(Id. at 376.)

Counsel's statement does not reflect deficient performance, but rather, the use of reasonable professional judgment. Counsel asserted that Petitioner had a drug addiction in an attempt to persuade the trial court to dismiss Petitioner's prior strikes. California courts have recognized that drug addiction may contribute to a finding that a criminal defendant is outside of the Three Strikes Law's spirit. See People v. Garcia, 20 Cal. 4th 490, 503 (1999) (among other cumulative circumstances, the fact that criminal defendant's crimes "were related to drug addiction" supported trial court's discretion to dismiss prior conviction allegation). Accordingly, where the record reveals few other mitigating circumstances, counsel's citation to Petitioner's drug addiction was a reasonable tactical decision.

Further, even if counsel had rendered deficient performance in citing Petitioner's drug addiction, then his statements were not prejudicial. See Strickland, 466 U.S. at 694. By Petitioner's January 2009 sentencing hearing, the record contained ample evidence of Petitioner's drug abuse. (See 1 RT 186 ("Q: [D]id you use methamphetamine with her? Petitioner: Yes sir."); id. at 211 ("Q: [Y]ou use narcotics? Petitioner: Look at the problem I'm in."); id. at 201-02 ("Petitioner: [I]f someone brings some dope over and wants to share … I will

usually say thank you."); 2 CT 283-85 (Petitioner's January 2009 personal history statement indicating that he would take prescription drugs in junior high, that he did not succeed in football "because of the drugs," and that his brother "feels extremely guilty" because he is "responsible for [Petitioner's] drug habit").) Accordingly, even without counsel's comment, the trial court knew sufficient facts to conclude that Petitioner suffered from a drug dependence.

Lastly, the trial court's rejection of counsel's arguments about drug use belies Petitioner's claim of prejudice. The court accepted that drug addiction could be a mitigating factor, but found Petitioner's attitude "does not appear to be the product of drug addiction, but merely of his own view that the world should be structured as he wishes …." (2 RT 376.) The trial court therefore did not rely on Petitioner's alleged addiction in denying his request to strike his prior convictions.

5. Claim 5(g): The Findings Regarding The Prior Conviction, Other Enhancements, And Other Aggravating Circumstances Were Not Supported By Sufficient Evidence.

Petitioner's sentence was as follows: (1) twenty-five years to life pursuant to the Three Strikes Law, (2) a stayed two year sentence for an enhancement found true by the jury that Petitioner was on bail at the time of his methamphetamine offense, and (3) a consecutive one year term pursuant to California Penal Code section 667.5(b) based on Petitioner's prior prison term. (2 RT 377; 2 CT 357-58 [abstract of judgment].) Petitioner now requests that the Court "overturn the jury verdicts or findings as to the prior and other enhancements based on 'Certified Rap Sheet' and Pen. C. § 969b packet," because they are "absurd." (SAP at 40.) He also objects to the trial court's jury instructions during the bifurcated prior conviction stage. (Id.)

a. Evidence Presented

During the first stage of his trial, Petitioner admitted to prior felony convictions. (1 RT 182-183; see id. at 211-212.) Thereafter, Petitioner requested a

bifurcated jury trial pertaining to special sentencing enhancements. (See 2 RT 288.) At the bifurcated trial, the government relied on three exhibits, namely, Exhibits 3, 4 and 5. Exhibit 3 was a fingerprint card. (2 CT 374-75.) Exhibit 4 was a certified criminal rap sheet. (Id. at 376-80.) Exhibit 5 was a certified "969b packet" including a chronological history of Petitioner's movements in the Department of Corrections, a previous abstract of judgment, a fingerprint card, and a photograph. (Id. at 382-389; see Cal. Penal Code §969b (certified records of correctional facility may be introduced as evidence of prior conviction).)

Before the bifurcated trial began, the trial court received testimony from Paul Larson and Melissa Morrell, Sheriff's Department employees, concerning Petitioner's fingerprint cards. (2 RT 289-94.) Based on that testimony, the trial court determined that Petitioner was the person referenced in Exhibits 3 and 5, and instructed the jury of that fact. (Id. at 295; 2 CT 247 ("It has already been determined that the defendant is the person named in exhibit[s] 3 + 5."); see People v. Kelii, 21 Cal. 4th 452, 458 (1999) ("The trial court might choose to determine first whether the defendant is the person who suffered the conviction.").)

Deputy District Attorney Douglas Poston testified to the jury. (2 RT 301-327.) He opined based on the trial exhibits that (1) Petitioner had been convicted of two counts of attempted voluntary manslaughter in October 1994, and (2) had not subsequently been free from custody for a period of five years. (Id. at 309-11.)

The trial judge also took judicial notice of the fact that, in a separate criminal matter pending before the trial court, People v. Robert Schwartz, San Bernardino Superior Court Case No. FSB-043694 (2004) (the "Domestic Violence Case"), Petitioner had (1) posted bond and was released from custody on April 2, 2004, and (2) was out of custody at the time that he committed the October 8, 2004 drug offense. (2 RT 328.) The trial court instructed the jury "that you should accept that fact as proof." (Id.)

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Based on this evidence, the jury reached the following verdicts: (1) Petitioner had suffered two prior convictions of a serious or violent felony based on his prior convictions for attempted voluntary manslaughter; (2) Petitioner committed the methamphetamine offense within five years of the conclusion of the prison term for those felonies; and (3) at the time of the methamphetamine offense, Petitioner was released from custody on bail or his own recognizance in the Domestic Violence Case. (2 CT 258-261.) Each of these findings contributed to Petitioner's sentence.

b. Governing Law Concerning Sufficiency of the Evidence.

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); accord Juan H., 408 F.3d at 1274. Thus, a state prisoner who alleges that the evidence introduced at trial was insufficient to support the jury's findings states a cognizable federal habeas claim. Herrera v. Collins, 506 U.S. 390, 401-02 (1993). The prisoner, however, faces a "heavy burden" to prevail on such a claim. Juan H., 408 F.3d at 1274. Evidence is sufficient to support a conviction if, viewing all the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); see United States v. Okafor, 285 F.3d 842, 847-48 (9th Cir. 2002), cert. denied, 537 U.S. 989 (2002) ("Evidence of the prior conviction is sufficient if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the fact of the prior conviction beyond a reasonable doubt.").

When determining the sufficiency of the evidence, a reviewing court makes no determination of the facts in the ordinary sense of resolving factual disputes. Sarausad v. Porter, 479 F.3d 671, 678 (9th Cir. 2007), vacated in part, 503 F.3d 822 (9th Cir. 2007), rev'd on other grounds, 555 U.S. 179 (2009). Rather, the

reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); see also Jackson, 443 U.S. at 319, 324, 326.

While "mere suspicion or speculation cannot be the basis for the creation of logical inferences," Maass, 45 F.3d at 1358 (citation and internal quotation marks omitted), "[c]ircumstantial evidence can be used to prove any fact, including facts from which another fact is to be inferred, and is not to be distinguished from testimonial evidence insofar as the jury's fact-finding function is concerned." United States v. Stauffer, 922 F.2d 508, 514 (9th Cir. 1990) (citation omitted). Furthermore, "to establish sufficient evidence, the prosecution need not affirmatively rule out every hypothesis except that of guilt." Schell v. Witek, 218 F.3d 1017, 1023 (9th Cir. 2000) (en banc) (citation and internal quotation marks omitted).

c. Analysis Concerning Sufficiency of the Evidence.

Here, sufficient evidence supports each of the jury's findings concerning Petitioner's prior convictions and sentence enhancements.

First, Petitioner admitted before the jury that he suffered prior convictions. (1 RT 182-183.)

Second, the evidence and testimony presented at the bifurcated trial were sufficient to allow a rational trier of fact to determine that Petitioner had not been released from prison for five years at the time that he committed the methamphetamine offense. Based on Petitioner's prison records and rap sheet, he committed several parole violations after his release from incarceration for the 1994 crimes, which caused him to be taken into custody. (See SSM at 169 ("Those prison records show Petitioner was sentenced to prison for his attempted manslaughter convictions on December 22, 1994, he was paroled but violated

parole on June 22, 1999, he was paroled and returned to prison on November 5, 1999, for violating parole, he was paroled and returned to prison on June 29, 2001, for violating parole, and he was discharged from parole on January 28, 2003." (citations omitted).) Although Petitioner's counsel objected to the introduction of certain records at trial based on hearsay, that objection implicated state law and was overruled. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Further, while Petitioner asserts that "there is no evidence of any felony conviction because one does not exist within five years of release from prison," (SAP at 41 (emphasis added)), he appears to misconstrue California Penal Code section 667.5(b), which addresses the "commission" of a crime. In other words, while Petitioner was not convicted of the possession charge until November 2008, he committed the crime in October 2004, within five years of his January 2003 discharge from parole.

Third, based on facts judicially noticed by the trial court, sufficient evidence existed for the jury to conclude that Petitioner was on bail when he committed the October 4, 2004 crime. Particularly where the Domestic Violence Case was pending before the same trial judge presiding over Petitioner's criminal trial, that judge was competent to take judicial notice of facts relevant to Petitioner's bail status. Although Petitioner contends that the district attorney later dismissed the Domestic Violence Case as "bogus" (SAP at 41), that does not change the fact that Petitioner was released on bail when he committed the methamphetamine offense.

d. Jury Instructions.

With respect to the second bifurcated trial stage, Petitioner also contends that the trial court (1) erred in instructing the jury that Petitioner had been determined to be the person named in Exhibits 3 and 5, and (2) erred in "omit[ing] any and all definitions as to what [California Penal Code section 667(b)-(i)] actually means—what its elements are. Same for [California Penal Code section 1170.12(a)-(d)]." (SAP at 40-41.) Those statutes define a prior serious or violent felony conviction.

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The fact that the trial court determined that Petitioner was the person named in Exhibits 3 and 5 (and so instructed the jury) does not give rise to grounds for habeas relief, as the right to jury trial on prior convictions does not implicate federal constitutional rights. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added).

To the extent that Petitioner contends that the trial court erred in instructing the jury that Petitioner was the person named in Exhibits 3 and 5 for purposes of assessing a prior prison term—as opposed to prior convictions—it is unclear that Petitioner has a right to a jury trial on such findings. See People v. Towne, 44 Cal. 4th 63, 79 (2008) ("[W]e agree with the majority of state and federal decisions holding that the federal constitutional right to a jury trial and proof beyond a reasonable doubt on aggravating circumstances does not extend to the circumstance that a defendant … has served a prior prison term."); Lucas v. Marshall, No. 08-cv-5647 DMG (FFM), 2011 U.S. Dist. LEXIS 154592, at *53 (C.D. Cal. Dec. 20, 2011) ("[A]lthough the Supreme Court has not specifically held that a prior prison term falls within the prior conviction exception, it is not unreasonable to interpret Apprendi in that fashion."). And even if he did, any sentencing error would be subject to harmless error review. Washington v. Recuenco, 548 U.S. 212, 221-22 (2006). "Under that standard, we must grant relief if we are in 'grave doubt' as to whether a jury would have found the relevant aggravating factors beyond a reasonable doubt." Butler v. Curry, 528 F.3d 624, 648 (9th Cir. 2008) (citing O'Neal v. McAninch, 513 U.S. 432, 436 (1995)), cert. denied 555 U.S. 1089 (2008). Here, based on an independent review of the evidence, there is no "grave doubt" about whether the jury would have found that Petitioner suffered a prior prison term in the absence of the trial court's instruction that Petitioner was the person named in Exhibits 3 and 5.

Further, Petitioner cites no authority requiring a trial court to include the specified statutory "elements" in its jury instructions, nor does he contend that his 1994 convictions for attempted voluntary manslaughter do not qualify as "serious and/or violent felony convictions" for purpose of applying the Three Strikes Law. Accordingly, the allegedly improper jury instructions do not justify habeas relief.

F. Habeas Relief Is Not Warranted With Respect To Either Of Petitioner's Remaining Claims Encompassed By Ground Six Of The SAP.

The remaining claims encompassed by Ground Six of the SAP relate to the trial judge's denial in 2008 of Petitioner's motion for reconsideration of the 2005 denial of his original motion to suppress. The relevant facts are as follows:

On March 10, 2005, Petitioner's former defense counsel Michael Chiriatti filed a motion to suppress (the "2005 Suppression Motion") drug evidence seized by police. (1 CT 31-38.) Through that motion, Petitioner argued that the arresting officer did not have reasonable suspicion for detaining Petitioner, and therefore, all evidence obtained because of that illegal detention should be suppressed. (Id. at 34-35.) After Respondent opposed the motion (id. at 41-48), the responding officer gave testimony, and it was argued before Judge Brian McVarville and denied on April 15, 2005. (1 RT 1-25; 1 CT 53.) Judge McVarville found that the arresting officer had reasonable suspicion to carry out a brief investigatory stop of Petitioner based on (1) the officer's experience, (2) a reasonable suspicion of narcotics activity in the area based on general information about the location received the week before, (3) the fact that there was a pending report of a Black man selling drugs at the location, and (4) the fact that Petitioner was in close proximity to a Black man when officers arrived, made eye contact with the officers, and then walked in the other direction. (See 1 RT 1-25.)

On April 7, 2008, Petitioner's trial counsel filed a second suppression motion (the "2008 Suppression Motion") pursuant to California Penal Code section 1538.5(h), which allows for a motion to suppress "during the course of trial" if the

"opportunity for [the] motion did not exist or the defendant was not aware of the grounds for the motion" before trial. (1 CT 101-114.) In that motion, Petitioner argued that the seizure of drug paraphernalia was unlawful because officers had acted upon an anonymous tip and did not have reasonable suspicion to detain Petitioner. (Id. at 103, 110.) Petitioner argued that the anonymous nature of the tip was not known by Chiriatti in 2005 (or at least was not presented by him), rendering the second motion proper. (Id. at 104.) Respondent responded that the 2008 Suppression Motion was repetitive of the 2005 Suppression Motion. (1 CT 118-124.)

On November 3, 2008, the trial judge considered the 2008 Suppression Motion and denied it because defense counsel knew the pertinent facts in 2005. (1 RT 93-103 [found at Dkt. 165-1].)

1. Claim 6(b): Petitioner Received Ineffective Assistance of Counsel When His Trial Counsel Failed To Investigate Impeachment Evidence That Was Relevant And Material To Petitioner's 2008 Motion To Reconsider The 2005 Denial Of His Original Motion To Suppress, Mistakenly Stated That The Officers Were Dispatched To The Crime Scene, And Failed To Investigate The Identity Of The Confidential Informant.

Petitioner contends that he received ineffective assistance because his trial counsel (1) failed to properly investigate evidence material to the 2008 Suppression Motion (SAP at 43 ("No communication and no investigation by any defense counsel … implicate my rights to effective assistance of counsel ….")); (2) mistakenly stated that officers were "dispatched" to the crime scene (id. ("Once DPD Chiriatti made the mistake of saying Officer[s] Whitmer and Affrunti were 'dispatched' to [the crime scene], it was all bad from then on ….")); and (3) failed to investigate the identity of the anonymous tipster, who Petitioner characterizes as a "confidential informant" (id. at 44 ("Having the suspected informant testify for

the defense, without investigation by trial counsel, changes everything; especially if the informant has a grudge against [Petitioner].")).

While Petitioner's allegations are vague, the main thrust of Petitioner's ineffective assistance claim appears to be that counsel did not uncover the identity of the anonymous tipster who directed police to the crime scene in October 2004. Petitioner does not explain, however, how this amounted to deficient performance or prejudiced him. See Pizzuto v. Arave, 280 F.3d 949, 974 (9th Cir. 2002) (citation omitted) ("[I]neffective assistance claim lacks merit when Petitioner fails to specify what further investigation would uncover."). In denying the 2005 Suppression Motion, the trial court relied on the circumstances of Petitioner's detention—not the nature of the anonymous tip—to find that reasonable suspicion existed to detain Petitioner. (1 RT 1-25.) Once Petitioner was detained, the arresting officer located drugs and drug paraphernalia on his person. Knowing the identity of the anonymous tipster would not have exonerated Petitioner.[29]

While Petitioner suggests that a "confidential informant" may have had a "grudge" against him, or may have been "used to entrap" him, he provides no facts in support of these speculative theories. (SAP at 44; Gonzalez v. Knowles, 515 F.3d 1006, 1016 (9th Cir. 2008) ("Such speculation is plainly insufficient to establish prejudice." (citation omitted)).) Further, even if the anonymous tipster had been a confidential informant with incentive to secure Petitioner's prosecution, Petitioner still does not explain how counsel's failure to uncover that individual's identity prejudiced him where Petitioner (1) was arrested with drugs on his person, and (2) does not claim that the drug dealer participated in entrapment.

Beyond his allegations relating to the tipster, Petitioner asserts that trial

[29] To the extent that Petitioner intends to assert that trial counsel was ineffective for failing to investigate whether Chiriatti knew of the anonymous tipster in 2005, such a claim is defective for the same reasons.

counsel was ineffective for stating that officers were "dispatched" to the crime scene. (SAP at 43.) Petitioner provides no explanation of how this statement prejudiced him. The arresting officer testified during the hearing on the 2005 Suppression Motion that "Dispatch had a pending call at that location regarding narcotics activity," and the October 4, 2004 police report indicates, "Dispatch had a call pending at [the crime scene] advising that there were subjects to the front of the property dealing drugs." (1 RT 3; 1 CT 136.) While Petitioner argues that the arresting officer's trial testimony discloses that he was "not to respond to calls for service but to go out and be 'proactive'" (SAP at 43), the officer actually testified at trial that he "saw a call for service that was pending, and … responded over to that location." (1 RT 139.) Accordingly, the record substantiates both (1) that counsel's characterization was accurate, and (2) that the trial court had ample evidence from other sources that the officers had been "dispatched," thereby eliminating any alleged prejudice.

2. Claim 6(c): Because the Trial Court's 2005 Denial Of Petitioner's Original Motion To Suppress Was Based On False Or Misstated Evidence, The Trial Court Erred In Denying Petitioner's 2008 Reconsideration Motion.

To the extent that Petitioner merely is challenging the trial court's determination that he had not made a sufficient showing under California Penal Code section 1538.5(h) for reconsideration of the 2005 denial of his original motion to suppress, Petitioner has not stated a claim cognizable on federal habeas review. See, e.g., Poland v. Stewart, 169 F.3d 573, 584 (9th Cir. 1999) ("Federal habeas courts lack jurisdiction … to review state court applications of state procedural rules."), cert. denied, 528 U.S. 845 (1999); Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1997) (holding that "alleged errors in the application of state law are not cognizable in federal habeas corpus" proceedings), cert. denied, 522 U.S. 881 (1997); see also Little v. Crawford, 449 F.3d 1075, 1083 n.6 (9th Cir. 2006) ("We

cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."), cert. denied, 551 U.S. 1118 (2007).

To the extent that this claim could be construed as directed to the 2005 denial of Petitioner's original motion to suppress on Fourth Amendment grounds the evidence of the methamphetamine found on his person by the arresting officers, the Court concurs with Respondent that consideration of this claim is precluded by Stone v. Powell, 428 U.S. 465 (1976). There, the Supreme Court held that, where "the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at trial." See Stone, 428 U.S. at 494 (emphasis added). California provides criminal defendants with such a full and fair opportunity through the procedures of California Penal Code section 1538.5, which permits defendants to move to suppress evidence on the ground that it was obtained in violation of the Fourth Amendment. See Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990); see also Locks v. Sumner, 703 F.2d 403, 408 (9th Cir. 1983), cert. denied, 464 U.S. 933 (1983); Mack v. Cupp, 564 F.2d 898, 901 (9th Cir. 1977).

Here, before trial, Petitioner filed a motion pursuant to California Penal Code section 1538.5 to suppress on Fourth Amendment grounds evidence of the methamphetamine found on his person by the arresting officers. (See 1 CT 31-38.) The record reflects that the trial court subsequently held a hearing on Petitioner's suppression motion; that one of the arresting officers testified at the hearing and was subjected to cross-examination by Petitioner's counsel; that the trial court afforded Petitioner the opportunity to present evidence in support of the motion, but Petitioner elected to submit on the evidence already provided; that the trial court afforded Petitioner's counsel the opportunity to argue the motion; and that the trial court gave ample consideration to Petitioner's arguments before ruling. (See 1 RT

1-25.)

In determining whether there was a full and fair opportunity for litigation of a habeas Petitioner's Fourth Amendment claim, courts also consider the extent to which the claim was briefed before and considered by the state appellate courts. See Terrovona v. Kincheloe, 912 F.2d 1176, 1178-79 (9th Cir. 1990), cert. denied, 499 U.S. 979 (1991); Abell v. Raines, 640 F.2d 1085, 1088 (9th Cir. 1981). Here, the record reflects that Petitioner's Fourth Amendment claim was briefed before and considered by the California Court of Appeal, which issued a reasoned decision rejecting the claim. (See Lodgment 1 at 6-22; Schwartz, 2010 Cal. App. Unpub. LEXIS 2572, at *5-13.) The Fourth Amendment claim also was briefed before and considered by the California Supreme Court. (See SAP Ex. 2 at 8-23; SAP Ex. 1.)

Thus, based on the Court's own review of the record, the Court finds that Petitioner did receive a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. Accordingly, to the extent that Claim 6(c) is construed as a Fourth Amendment claim, it is not cognizable on federal habeas review since it is barred by Stone.

G. Habeas Relief Is Not Warranted With Respect To Any Of Petitioner's Remaining Claims Encompassed By Ground Seven Of The SAP.

1. Claim 7(a): Petitioner Was Denied His Right To Trial By A Fair And Impartial Jury When Extra Security Measures Were Imposed On Him.

Petitioner claims that he is entitled to relief based on (1) security measures imposed following an incident in the trial courtroom, and (2) the fact that prospective jury members saw sheriff's deputies "rush" into the courtroom after that incident.

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a. Factual Background.

According to their statements on the record, law enforcement officers had security concerns about Petitioner at the time of trial arising from (1) his assignment to a high security housing unit and a 2005 incident in which Petitioner was written up for possessing razor blades in jail, (2) uncooperative behavior by Petitioner in a separate court proceeding, (3) Petitioner's prior history of shooting two police officers with an assault rifle, and (4) a letter than Petitioner mailed to the City Clerk regarding a code enforcement issue that contained threats. (1 RT 121-125; 2 CT 334-339.)

In light of these concerns, on the afternoon of November 3, 2008, or the morning of November 4, 2008, the lieutenant and sergeant in charge of security at the trial courthouse conducted an ex parte meeting with the trial judge in chambers to discuss available security options. (1 RT 108.) On the morning of November 4, 2008, Petitioner's trial counsel objected to not being present at the meeting. (Id.) The Court indicated that he had not received evidence ex parte or learned the grounds for the security concerns, but had "dealt" with the meeting "almost [as] a research issue on [his] end," concerning "the operational options … should security measures [need to] be in place." (Id. at 109.) Defense counsel requested an opportunity to research security measures and the trial court indicated he was "not doing anything [that] morning" concerning the matter. (Id.)

Jury selection occurred in part on November 4, 2008. (Id. at 113.) Petitioner contends that during these proceedings, (1) "there were additional sheriffs [sic] deputies present in the courtroom … causing jurors to look at each [other] like 'what is all of this?,'" and (2) deputies "made blatant 'flinching'-type reactions every time [Petitioner] would reach for a pencil or piece of paper right … on the table" in front of him. (SAP at 46.) When Petitioner later complained about these issues to the trial court, the judge indicated that he had "not perceived any conduct on behalf of the bailiff or any other member of the court staff that is even remotely inappropriate." (Id. at 118.)

A lunch recess was taken on November 4, 2008. (Id. at 114.) After the parties went back on the record following that recess, they discussed outside the presence of the jury a "dust up" that had occurred when deputies had attempted to escort Petitioner from the courtroom for the recess. (Id. at 114-116, 122.) According to statements from court security officers, a deputy requested three times that Petitioner stand up from his seat to leave. (Id. at 115.) Petitioner responded to the deputy, "shut the fuck up, bitch." (Id. at 122.) Thereafter, court security attempted to assist Petitioner out of his seat. (Id. at 115.) Petitioner stiffened his body and refused commands to place his hands behind his back, so he was tackled to the ground, handcuffed, and escorted out of the courtroom. (Id. at 116.) Petitioner alleges that, during this event, "numerous other sheriff's deputies rush[ed] past the jurors who were in the hallway," and "came rushing so quickly [Petitioner] would suspect and … believe they were waiting for the signal to rush in." (SAP at 47.)

After hearing statements concerning this event, the trial court determined that Petitioner's legs would be shackled during trial. (1 RT 126.) In reaching that decision, the trial court cited "the fact that there's conduct here in court that requires the application of physical force," and Petitioner's "oppositional nature." (Id. at 125.) The trial court conditioned its order on the existence of a drape around the defense table so that the jury could not observe the shackles, and further provided that, if Petitioner took the witness stand (from which the shackles could not be seen), then he would do so outside the presence of the jury. (Id. at 126.) Petitioner does not allege that the jury saw him in leg shackles.

b. Use of Leg Shackles.

The Supreme Court held in Deck v. Missouri that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." 544 U.S.

622, 624 (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986)) (emphasis in original). In evaluating the government's justification, a court may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." Id. at 629. While the decision whether to shackle is entrusted to the court's discretion, routine shackling is not permitted. Id. at 629, 633. Instead, courts must make specific determinations of necessity in individual cases. Id. at 633.

"A trial court may order that a defendant be shackled during trial only after the trial court is 'persuaded by compelling circumstances that some measure is needed to maintain security of the courtroom' and if the trial court pursues 'less restrictive alternatives before imposing physical restraints.'" United States v. Cazares, 788 F.3d 956, 965 (9th Cir. 2015) (citing Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995)), cert. denied, 136 S.Ct. 2484 (2016). "Visibility of the shackles is critical to the determination of the due process issue." Id. at 966 (citing United States v. Mejia, 559 F.3d 1113, 1117 (9th Cir. 2009); Williams v. Woodford, 384 F.3d 567, 592 (9th Cir. 2004)). The decision to shackle defendants during trial is reviewed under an abuse of discretion standard. Morgan v. Bunnell, 24 F.3d 49, 50 (9th Cir. 1994) (per curiam).

In this case, Petitioner does not provide any reason to believe that jurors saw him shackled. Based on Petitioner's criminal background and his conduct during court proceedings, including the November 4, 2008 in-court incident that required law enforcement officers to wrestle Petitioner to the ground, compelling circumstances existed justifying additional security measures.[30] The trial court took

[30] While Petitioner objects that the trial court held an ex parte chambers meeting with court officers concerning security, the trial court advised that it did not make any decisions about appropriate security measures at that time. (1 RT 108-09.) The trial court conferred with Petitioner's counsel and allowed him to lodge objections before ordering restraints.

steps to ensure that the presumption of innocence was not reversed (i.e., jury members did not view the restraints), and Petitioner makes no showing that the restraints impaired his mental ability, impeded communication with counsel, or caused him pain. See Cazares, 788 F.3d at 965. According, the use of hidden leg shackles was an appropriately restrictive restraint.

c. Presence of Officers.

The Supreme Court has determined that the "deployment of security personnel in a courtroom" is not the "sort of inherently prejudice practice" that must be justified by an essential state interest. Holbrook, 475 U.S. at 568-69. Rather, in light of the variety of ways that security guards can be deployed, courts must determine prejudice on a case-by-case basis. Id. at 569. In federal habeas corpus proceedings, courts reviewing the constitutionality of security personnel used at trial must "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." Id. at 572; see also Ainsworth v. Calderon, 138 F.3d 787, 797 (9th Cir. 1998).

Nothing in the Petition permits a finding of inherent or actual prejudice based on the presence of law enforcement officers. Petitioner does not describe how many officers were present or make any factual showing that the jury interpreted their presence as a "sign he [was] particularly dangerous or culpable." Holbrook, 475 U.S. at 569. "Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence." Id. "Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards." Id.

d. Officers' "Rush" Past Jurors.

Although Petitioner contends that prospective jury members "in the hallway"

saw law enforcement officers "rush" into the courtroom to address the November 4, 2008 incident and were thereby prejudiced (SAP at 47), the record provides no evidentiary support for this claim and Petitioner did not raise the issue before the trial court. Borg, 24 F.3d at 26; Gomez, 66 F.3d at 205. Further, Petitioner's argument would allow him to benefit from his own misconduct, i.e., his refusal to cooperate with court security. It is well-established that courts deny such relief. See United States v. McCormac, 309 F.3d 623, 626 (9th Cir. 2002) ("Were we to adopt a contrary rule and find error in this case, [defendant] would profit from her own misconduct, which of course would not be correct."). The trial court instructed jurors not to let "bias, sympathy, prejudice, or public opinion" influence their decision (1 RT 251-52), and admonished them to "disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses." (Id. at 255.) The jurors presumably heeded such instructions. McCormac, 309 F.3d at 626 ("[J]uries are presumed to heed cautionary instructions by the court.").

2. Claim 7(b): Petitioner Was Prejudiced As A Result Of Being Shackled Without A Sufficient Showing Of Manifest Need.

Petitioner contends that the trial judge had a "fake hearing on manifest need to shackle" him. (SAP at 46.) Under California law, "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." People v. Duran, 16 Cal. 3d 282, 290-91 (1976). As noted above, Petitioner is only entitled to federal habeas relief if he is being held "in custody in violation of the Constitution or laws or treaties of the United States." Although the Ninth Circuit has held that "California's and the Ninth Circuit's respective physical restraint doctrines are, despite some linguistic distinctions, largely coextensive," see Gonzalez v. Pliler, 341 F.3d 897, 901 n.1 (9th Cir. 2003), the requirement that the trial court make a finding of "manifest need" before imposing physical restraints in

a courtroom is a judicially-created requirement of California state law. See Duran, 16 Cal. 3d at 290-91. It is not a requirement of federal law. Thus, the proper inquiry is not whether a "manifest need" justified the use of a physical restraint, but rather whether the restraint violated Petitioner's right to due process of law under the Fourteenth Amendment. As explained above, it did not in this case. (Section VI.G.1, supra.)

3. Claim 7(d): The Prosecutor Engaged In Misconduct By Going Into The Nature And Circumstances Of Petitioner's Prior Conviction After Petitioner Admitted The Fact Of The Prior Conviction.

Petitioner contends that after he "had admitted the fact of prior conviction," the prosecutor "engaged in knowing misconduct of going into the nature and circumstances of that prior, particularly the AK-47 gun use." (SAP at 47.) Petitioner argues that the prosecutor's "misconduct" had "such a prejudicial impact on [the] jury's decision making process (combined with SBSD misconduct) they came back with a verdict of guilty of a crime I was not even on trial for." (SAP at 48.)[31] In support of his claim, Petitioner cites the following trial testimony:

> [Prosecutor]: Now, Counsel asked you … [whether] you were convicted of two separate counts of voluntary attempted manslaughter using a firearm?
> [Petitioner]: Was that the end of the question?
> [Prosecutor]: Yes.
> [Petitioner]: That's what I was convicted. The incident happened December 22, 1991.
> [Prosecutor]: But you did use a firearm?
> [Petitioner]: I was convicted of it, yes. I didn't shoot anybody.
> [Prosecutor]: I'm sorry?
> [Defense counsel]: Objection. Nonresponsive—
> [Petitioner]: I didn't shoot anybody—
> [Defense counsel]: Motion to strike.

[31] This is presumably a reference to the erroneous verdict form first supplied to the jury.

> [The Court]: Overruled.
> [Prosecutor]: You said you never shot anybody in your life?
> [Petitioner]: I never shot anybody in my life.
> [Prosecutor]: So you are saying the jury was wrong when they convicted you?
> [Petitioner]: Yes.
> [Prosecutor]: How did those two people get shot?
> [Petitioner]: One of them shot the other one, his self and the other one, by accident.
> [Prosecutor]: At the time of the shooting, were you in possession of an AK-47?
> [Defense counsel]: Objection. Relevance.
> [Conference held at the bench, not reported.]
> [The Court]: Objection based on Evidence Code Section 352 is sustained.

(1 RT 211-212.)

a. Governing Law.

To warrant habeas relief, prosecutorial misconduct must have "so infect[ed] the trial with unfairness so as to make the resulting conviction a denial of due process." Woodford, 384 F.3d at 644 (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)); Duckett, 67 F.3d at 743. The standard of review is the narrow one of due process, and not the broad exercise of supervisory power. Darden, 477 U.S. at 181; see also Thompson v. Borg, 74 F.3d 1571, 1577 (9th Cir. 1996), cert. denied, 519 U.S. 889 (1996).

To determine whether a comment rendered a trial constitutionally unfair, courts consider (1) whether the comment misstated the evidence; (2) whether the judge admonished the jury to disregard the comment; (3) whether the comment was invited by defense counsel; (4) whether defense counsel had an adequate opportunity to rebut the comment; (5) the prominence of the comment in the context of the entire trial; and (6) the weight of the evidence. Hein v. Sullivan, 601 F.3d 897, 912-13 (9th Cir. 2010), cert. denied, 563 U.S. 935 (2011).

Even if the prosecutorial misconduct amounted to a due process violation,

then federal habeas relief is appropriate only if the due process violation had a substantial and injurious effect or influence in determining the jury's verdict. Brecht, 507 U.S. at 637.

b. Analysis.

The prosecutor's question concerning the AK-47 did not render Petitioner's trial fundamentally unfair. The prosecutor posed the question in response to Petitioner's assertion that he did not "shoot anybody." Whether Petitioner possessed a firearm in 1994 is relevant to the veracity of that claim. Accordingly, while the trial court found that inquiry would be more prejudicial than probative pursuant to California Evidence Code section 352, the prosecutor's follow-up question was a reasonable attempt at impeachment and was not a misstatement of the evidence. The alleged misconduct involved only one question tangentially related to the charged drug offense and defense counsel promptly objected.

Moreover, based on the trial court's ruling, Petitioner was never required to answer whether or not he possessed an AK-47. At the beginning and end of trial, the Court instructed the jury that questions alone were not evidence and that the jury needed to ignore questions to which the trial court sustained objections. (1 RT 131 ("The questions they ask aren't evidence. It's only the answers that count."); id. at 255 ("If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, don't guess at what the answer might have been or why I ruled as I did."). The jury is presumed to have followed these instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). Petitioner cannot demonstrate that the question rendered his trial fundamentally unfair, nor that the prosecutor's passing comment had a substantial or injurious influence in determining the jury's verdict.

4. Claim 7(e): The Trial Court Denied Petitioner His Right To A Jury Trial By Failing To Instruct The Jury On Transitory Possession And Necessity Defenses.

Petitioner argues that the trial judge "denied [him] his right to jury trial by failing to instruct the jury on transitory possession and necessity defenses." (SAP at 48.)

a. Factual Background.

Before the prosecution put on its case, defense counsel requested that the trial court give a momentary possession defense instruction based on the theory that Petitioner was in possession of methamphetamine in order to remove it from the possession of his girlfriend and destroy it. (1 RT 89; see CALCRIM No. 2305 ("Momentary Possession of Controlled Substance").) The current version of the requested instruction states that to establish the momentary possession defense, a defendant must prove by a preponderance of the evidence that (1) "[t]he defendant possessed [the controlled substance] only for a momentary or transitory period;" (2) "the defendant possessed [the controlled substance] in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;" and (3) "[t]he defendant did not intend to prevent law enforcement officials from obtaining the [controlled substance]." CALCRIM No. 2305. The bench notes to the instructions cite People v. Mijares, 6 Cal. 3d 415, 420 (1971). The California Supreme Court ruled in Mijares that the trial court had an obligation to instruct on the defense of momentary possession, but observed that its decision "in no way insulates from prosecution under the narcotics laws those individuals who, fearing they are about to be apprehended, remove contraband from their immediate possession." Id. at 422.

At the close of trial, the court heard argument concerning whether the momentary possession instruction should be given. (1 RT 231-248.) Ultimately, the trial court denied the instruction, finding:

> [The Court]: [T]here's no showing in any of [Petitioner's] testimony that his actions would be consistent with the public policy goals elected by this defense which are to encourage disposal and destruction of dangerous substances … [T]here's no effort [on Petitioner's behalf] to affirmatively dispose of [the drugs] while he has them in his possession. So even if his original intent has one purpose, his failure to make any efforts to affirmatively dispose of those drugs except when he is in the process of trying to evade apprehension by law enforcement takes his actions squarely out of public policy goals that the momentary possession defense is crafted to recognize.

(Id. at 243-44.)

The trial court noted that Petitioner had testified "candidly" that he wanted to "get rid of" the drugs when he encountered law enforcement. (1 RT 235; see id. at 208 (Petitioner testifying, "I was going back in the—into the back part of the apartments there to … get rid of the dope.").) At trial, Petitioner had also testified that he "was thinking about giving [the drugs] to one of [his] friends or something." (Id. at 204.) The judge found that testimony "wholly inconsistent with the public policy rationale of [the] defense," stating "[t]hat's sharing the wealth, perhaps, but it's not disposal." (Id. at 246.)

b. Governing Law.

In Byrd v. Lewis, 566 F.3d 855 (9th Cir. 2009), cert. denied, 559 U.S. 1074 (2009), the Ninth Circuit described a trial court's obligation to instruct on a defense theory as follows:

> "Failure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable." Beardslee v. Woodford, 358 F.3d 560, 577 (9th Cir. 2004) (citation omitted). However, to obtain relief, "[a Petitioner] must show that the alleged instructional error had substantial and injurious effect or influence in determining the jury's verdict." Clark v. Brown, 450 F.3d 898, 905 (9th Cir. 2006), as amended (citations and internal quotation marks omitted); see also Beardslee, 358 F.3d at 578. A "substantial and injurious effect" means a "reasonable

> probability" that the jury would have arrived at a different verdict had the instruction been given. Clark, 450 F.3d at 916. To decide whether [a Petitioner] was prejudiced, we consider: (1) the weight of evidence that contradicts the defense; and (2) whether the defense could have completely absolved the defendant of the charge. See Beardslee, 358 F.3d at 578. "The burden on [the Petitioner] is especially heavy where … the alleged error involves the failure to give an instruction." Clark, 450 F.3d at 904 (citation and internal quotation marks omitted).

Id. at 860 (footnote omitted).

c. Analysis.

While the requested momentary possession defense "could have completely absolved" Petitioner of the methamphetamine offense, the weight of evidence presented at trial contradicts the defense and there is no "reasonable probability" that the jury verdict would have been different if the instruction had been given. As explained above, the evidence at trial overwhelmingly established that Petitioner did not momentarily possess the methamphetamine with the intent to dispose of it in a manner consistent with the public policy underlying the defense. Petitioner testified that he intended to give it to a friend because he "didn't want it to go to waste" (1 RT 204), and only sought to "get rid of" the drugs when approached by a police officer. (Id. at 208.) Before that encounter, Petitioner had stopped at a smoke shop, but he had not thrown the drugs away there. (Id. at 187.) He testified that he had developed no plan for disposing of them, and when apprehended, he had a meth pipe on his person, suggesting that he intended to smoke methamphetamine. (Id. at 187, 146.) On cross-examination, Petitioner stated that it was "[n]ot [his] job" to destroy the drugs, and if there was a "reasonable alternative" he would have "taken that." (Id. at 211.) He did not tell the police at the time of his arrest that he intended to dispose of the drugs. (Id. at 190.)

Based on this evidence, the momentary possession theory was not "legally sound" and the evidence in the case does not "make it applicable." The trial court

was therefore not obligated to give the instruction.

5. Claim 7(g): Insufficient Evidence Was Presented To Prove That Petitioner Was Convicted Of Committing A Felony Within Five Years of His Release From Prison.

Petitioner alleges that "there is absolutely no evidence that I was convicted of committing a felony within 5 years of release from prison." (SAP at 48.) To the extent that this claim challenges the sufficiency of the evidence underlying Petitioner's sentencing enhancements based on prior prison terms, it is rejected for the same reasons stated above in Section VI.E.5.

6. Claim 7(h): Petitioner's Counsel Rendered Ineffective Assistance In Failing To Consult With Him Before The Case Was Called.

Petitioner argues that, "If DPD Chiriatti and [trial counsel] had consulted with [him] other than while sitting in a jury box for a moment before the case is called," then Petitioner might "not have been denied [his] defenses and the outcome may have been different." (SAP at 49.)

The Clerk's Transcript reflects that Petitioner was present for at least fifty-seven pre-trial proceedings with counsel, including at least twenty-four proceedings with trial counsel. (1 CT 9 [2/8/05 represented by K. Kim]; id. at 24 [2/10/05 represented by M. Chiriatti]; id. at 29 [2/22/05 represented by M. Fitzgerald]; id. at 39 [3/11/05 represented by M. Chiriatti]; id. at 53 [4/15/05 represented by M. Chiriatti]; id. at 55 [4/26/05 represented by C. Bordner]; id. at 56 [4/27/05 represented by M. Chiriatti]; id. at 57 [5/27/05 represented by C. Bordner]; id. at 58 [7/6/05 represented by M. Chiriatti]; id. at 59 [8/17/05 represented by M. Chiriatti]; id. at 60 [10/27/05 represented by M. Chiriatti]; id. at 61 [11/17/05 represented by M. Chiriatti]; id. at 62 [1/20/06 represented by M. Chiriatti]; id. at 63 [2/17/06 represented by M. Chiriatti]; id. at 67 [3/28/06 represented by M. Chiriatti]; id. at 68 [4/7/06 represented by C. Torres]; id. at 69 [5/5/06 represented by C. Torres]; id. at 73 [6/16/06 represented by C. Torres]; id. at 74 [7/14/06 represented by C.

Torres]; id. at 76 [9/8/06 represented by C. Torres]; id. at 80 [11/21/06 represented by E. Congdon]; id. at 82 [12/22/06 represented by E. Congdon]; id. at 83 [1/19/07 represented by E. Congdon]; id. at 84 [2/16/07 represented by E. Congdon]; id. at 85 [3/23/07 represented by E. Congdon]; id. at 86 [4/20/07 represented by E. Congdon]; id. at 87 [5/18/07 represented by E. Congdon]; id. at 88 [6/22/07 represented by M. Cantrell]; id. at 89 [6/29/07 represented by E. Congdon]; id. at 90 [8/10/07 represented by E. Congdon]; id. at 91 [9/5/07 represented by E. Congdon]; id. at 93 [11/6/07 represented by E. Congdon]; id. at 94 [12/12/07 represented by E. Congdon]; id. at 95 [1/24/08 represented by trial counsel]; id. at 96 [2/28/08 represented by trial counsel]; id. at 97 [3/3/08 represented by trial counsel]; id. at 98 [3/14/08 represented by trial counsel]; id. at 99 [3/28/08 represented by trial counsel]; id. at 100 [4/3/08 represented by trial counsel]; id. at 117 [4/11/08 represented by trial counsel]; id. at 126 [4/15/08 represented by trial counsel]; id. at 173 [4/18/08 represented by trial counsel]; id. at 174 [4/21/08 represented by trial counsel]; id. at 175 [5/16/08 represented by trial counsel]; id. at 176 [5/30/08 represented by trial counsel]; id. at 177 [6/6/08 represented by trial counsel]; id. at 179 [6/10/08 represented by trial counsel]; id. at 180 [7/11/08 represented by trial counsel]; id. at 181 [8/8/08 represented by trial counsel]; id. at 183 [9/12/08 represented by trial counsel]; id. at 184 [10/3/08 represented by trial counsel]; id. at 188 [10/17/08 represented by trial counsel]; id. at 195 [10/24/08 represented by trial counsel]; id. at 196 [10/28/08 represented by trial counsel]; id. at 198 [10/30/08 represented by trial counsel]; id. at 199 [10/31/08 represented by trial counsel]; id. at 200 [11/3/08 represented by trial counsel].)

Given the large number of pre-trial hearings, counsel and Petitioner had many opportunities to interact, even if only in the "jury box" before those proceedings. The facts underlying Petitioner's methamphetamine possession were limited and largely undisputed. Petitioner's trial testimony reflected an effort to present the legal defense of momentary possession, leading to the conclusion that

Petitioner and trial counsel had discussed that defense before trial. During a sealed Marsden hearing months before trial, trial counsel indicated that he had "discussed some of the facts" with Petitioner and had "an investigator go out and talk to him." (Dkt. 63-1 [4/3/08 Marsden transcript] at 17.) He also stated that there had been "extensive investigation by others because there's been a lot of attorneys on this case," and stated, "there's been a lot of background stuff put in the file …." (Id.) After Petitioner raised the issue of his brother's testimony, trial counsel spoke with him, and he testified at trial. (Dkt. 63-1 [10/30/18 Marsden transcript] at 48; 1 RT 215-222.) Accordingly, counsel was attentive to Petitioner's case and considered his communications.

There is no minimum number of meetings necessary between counsel and a client prior to trial sufficient to prepare an attorney to provide effective assistance. Calderon, 232 F.3d at 1086; United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (citations omitted), cert. denied, 488 U.S. 850 (1988). In Calderon, the capital defendant "fail[ed] to identify any specific way in which his decisions or defense would have differed had [his lawyer] met personally with him in jail prior to trial instead of in court." Calderon, 232 F.3d at 1086. Here, the SAP suffers from the same defect. Petitioner does not make any showing that his trial counsel unreasonably failed to consult with him before trial, and does not show how the alleged lack of communication resulted in prejudice at trial.

H. Ground Eight Of The SAP Is Not Cognizable On Federal Habeas Review.

In Ground Eight of the SAP, Petitioner claims that the trial court erred in denying his motion to suppress the evidence of the methamphetamine found on his person by the arresting officers because the search and seizure resulted from a violation of Petitioner's Fourth Amendment rights in that (1) neither the detention of Petitioner nor its prolongation were justified based on reasonable suspicion of criminal activity, and (2) the illegal detention vitiated any subsequent consent by

Petitioner to interrogation and search. (See SAP at 8, incorporating attached Petition for Review.)

Respondent contends that this claim also is not cognizable on federal habeas review under Stone. (See Ans. at 8-9, Ans. Mem. at 55-59.) For the same reasons stated above in connection with Claim 6(c), the Court concurs.

I. Ground Nine Of The SAP Is Not Cognizable On Federal Habeas Review.

In Ground Nine of the SAP, Petitioner claims that, in sentencing Petitioner under California's Three Strikes Law, the trial court abused its discretion when it failed to dismiss one of Petitioner's two prior strikes because both prior strikes resulted from one incident. (See SAP at 8, incorporating attached Petition for Review.)

As noted above, federal habeas relief only is available if Petitioner is contending that he is in custody in violation of the Constitution or laws or treaties of the United States. Here, when Petitioner (through counsel) raised his claim corresponding to Ground Nine to the California courts, he did not frame the claim as a federal constitutional claim or cite any federal authority in support of the claim (see Lodgment 1 at 23-33; SAP Ex. 2 at 23-24) and, when the California Court of Appeal rejected the claim, it did so solely on the basis of state law. See Schwartz, 2010 Cal. App. Unpub. LEXIS 2572, at *13-20. In support of this claim in the SAP, Petitioner merely has incorporated his attached Petition for Review and his briefing of the claim in the Court of Appeal. (See SAP at 8.)

Accordingly, the Court finds that this sentencing error claim is not cognizable on federal habeas review because it involves solely the interpretation and/or application of state sentencing law. See Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir. 1989) (sentencing error claim under California Penal Code § 654 is not cognizable on federal habeas review); see also, e.g., Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994); Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995); Hendricks v. Zenon, 993 F.2d 664, 674

(9th Cir. 1993); Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989), cert. denied, 499 U.S. 963 (1991).

J. Petitioner's Request For An Evidentiary Hearing Should Be Denied.

Petitioner has requested an evidentiary hearing on his claims. (See SAP at 1; see also Dkt. 41 [Petitioner's "Acknowledgement Receipt of Respondent's Answer and Request for New Order re Further Proceedings"] at 5). However, in habeas proceedings, "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record." See Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) (emphasis in original). "It is axiomatic that when issues can be resolved by reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." Id. Here, the Court has been able to resolve all of Petitioner's claims by reference to the state court record. Accordingly, the Court recommends that Petitioner's request for an evidentiary hearing be denied.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered DENYING the SAP and dismissing this action with prejudice.

Dated: October 19, 2018

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

APPENDIX F

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 07/08/2020 11:33 AM

Docket (Register of Actions)

SCHWARTZ (ROBERT DEANE) ON H.C.
Division SF
Case Number S194323

Date	Description	Notes
06/24/2011	Petition for writ of habeas corpus filed	Petitioner: Robert Deane Schwartz Pro Per 1 volume of lodged exhibits with petition.
11/16/2011	Petition for writ of habeas corpus denied	The petition for writ of habeas corpus is denied. (See People v. Duvall (1995) 9 Cal.4th 464, 474; In re Swain (1949) 34 Cal.2d 300, 304.)

Click here to request automatic e-mail notifications about this case.

APPENDIX G

2010 WL 1413110
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,
v.
Robert Deane SCHWARTZ,
Defendant and Appellant.

No. E047789.
|
(Super.Ct.No. FSB047468).
|
April 9, 2010.

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Attorneys and Law Firms

George O. Benton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RAMIREZ, P.J.

***1** Defendant and appellant Robert Deane Schwartz appeals from a jury conviction for possession of methamphetamine. (Health & Saf.Code, § 11377, subd. (a).) He argues the trial court erroneously denied his motion to suppress evidence (Pen.Code, § 1538.5) and his motion to dismiss one or more prior strike convictions (Pen.Code, § 1385).

FACTUAL AND PROCEDURAL BACKGROUND

At a hearing on defendant's suppression motion, the arresting officer testified he and a partner were on patrol on October 8, 2004. They were dispatched to an apartment complex regarding a "pending call" of narcotics activity. A Black male had been specifically identified as possibly selling drugs at this location. The week before, officers had been told "to keep an eye on that location because they were starting to have narcotics activity at that location."

As the officer and his partner approached the apartment complex, the overhead vehicle lights were off. The officer may have put the hazard lights on after he parked the vehicle. He could see defendant in the driveway in the front of the apartment complex walking toward the patrol car. A Black man was in close proximately to defendant, about three to four feet away. As soon as defendant saw the patrol car, [1] he turned around and began walking away from the area. While his partner went to speak to the Black man, the testifying officer followed defendant on foot as he walked down a walkway toward the back of the complex. The officer was walking at a fast pace but did not draw his weapon or order defendant to halt. He followed defendant because he suspected defendant might be involved in narcotics activity and was attempting to discard contraband. With his back to the officer, defendant stopped on his own initiative in an alcove area near some trash cans behind a garage.

1 The trial court specifically found defendant made "eye contact" with the officers before he turned and walked away.

As the officer approached him from behind, defendant's hand was up toward his mouth. The officer "asked [defendant] to turn around," and as he did so, the officer could see defendant was putting a cigarette in his mouth. He also noticed a brown paper bag rolled up in defendant's hand, but the officer could not see what was inside. The officer said to defendant, "Show me what's in your hand." Defendant handed him the paper, and as the officer unrolled it he found what appeared to be a methamphetamine pipe wrapped up inside it. In his experience, the officer said people typically wrap pipes used to ingest controlled substances in paper or cloth so they will not get broken. At this point, the officer told defendant to start walking back out to the front of the property. The officer advised defendant he was under arrest when they arrived back in front of the property where the officer was in plain view of his partner. Only a couple of minutes passed from the time the officer followed defendant until the arrest was made. After the arrest, the officer also found a

powdery substance on defendant's person, which he believed was methamphetamine. Based on the officer's testimony, the trial court denied defendant's motion to suppress.

***2** At trial, the officer's testimony was consistent with the statements he made during the suppression hearing. During a search of defendant's person following the arrest, the officer further testified he found a second methamphetamine pipe in defendant's right rear pocket and two baggies of what appeared to be a useable quantity of methamphetamine. Chemical analysis confirmed the white powder was methamphetamine.

Defendant was charged with possession of methamphetamine (Health & Saf.Code, § 11377, subd. (a)) while released from custody on bail or his own recognizance (Pen.Code, § 12022.1). It was further alleged defendant had two prior convictions that qualified as strikes under Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), which also qualified as a single prior prison term within the meaning of Penal Code section 667.5, subdivision (b). A jury found defendant guilty as charged. In a bifurcated trial, the jury also found the prior conviction and on bail allegations to be true.

On January 21, 2009, defendant filed a motion to dismiss one or more of his prior strike convictions under Penal Code section 1385. On January 30, 2009, the court denied defendant's motion to dismiss. During the same hearing, the court sentenced defendant to a term of 25 years to life in state prison under the "Three Strikes" law, and a one-year consecutive term for the prior prison term enhancement. In addition, the court imposed a consecutive two-year term for the on-bail enhancement but stayed it pending the outcome of the related case.

DISCUSSION

Motion to Suppress Evidence

Defendant argues he was detained by the officer in the alcove in violation of his Fourth Amendment protection against unreasonable searches and seizures because the officer followed him based on unreliable information and/or an anonymous tip. He also contends he was unconstitutionally detained because the circumstances the officers observed when they arrived at the scene could not be interpreted as criminal behavior. Defendant believes the officer followed him based on a mere "hunch," rather than specific and articulable facts constituting reasonable suspicion of his involvement in narcotics activity. Because defendant contends the detention was unconstitutional, he argues any subsequent consent to search the paper bag was constitutionally invalid and the trial court should have suppressed this evidence.

Preliminarily, we must reject defendant's argument he was unlawfully detained because the officer followed him to the alcove area based on unreliable information and/or an anonymous tip. Specifically, defendant contends the information the officer had about narcotics activity at this location was unreliable because it was not specific enough and was a week old. He also argues the pending dispatch about a Black man selling drugs at this location was unreliable because it was from an unknown source and was not supported by other details. However, defendant's opening brief also indicates he did not object on these grounds in the trial court. Defendant presents no argument as to why his challenge to the reliability of this evidence was not waived for failure to object pursuant to Evidence Code section 353. [2] We therefore have not considered the possibility these reports were unreliable in our analysis.

2 "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion...." (Evid.Code, § 353.)

***3** In reviewing a trial court's denial of a motion to suppress evidence, we defer to the trial court's express or implied factual findings where they are supported by substantial evidence and, based on these factual findings, we exercise our independent judgment to determine whether the search was reasonable under Fourth Amendment standards. (*People v. Glaser* (1995) 11 Cal.4th 354, 362, 45 Cal.Rptr.2d 425, 902 P.2d 729.) To determine whether evidence must be excluded because of a Fourth Amendment violation, "we look exclusively to whether its suppression is required by the United States Constitution. [Citations.]" (*Ibid.*)

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity

is afoot. [Citation.] While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. [Citation.]" (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570.) In other words, the officer must have more than a " 'hunch' " that criminal activity is occurring. (*Id.* at pp. 123–124.)

Reasonable suspicion determinations are reviewed under a " 'totality of the circumstances' " standard to see whether the officer can articulate a " 'particularized and objective basis' " for suspecting a crime is being committed. (*U.S. v. Arvizu* (2002) 534 U.S. 266, 273–274, 122 S.Ct. 744, 151 L.Ed.2d 740.) "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" (*Id.* at p. 273.) "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion. [Citations.]" (*Illinois v. Wardlow, supra,* 528 U.S. at p. 124.) "[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. [Citation.] And any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.' [Citation.] But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." (*Id.* at p. 125.)

Here, we agree with the trial court's determination that the officer had reasonable suspicion to carry out a brief investigatory stop of defendant. The officer had eight years of experience as a police officer and specific training and experience in the investigation of narcotics. There was reasonable suspicion of narcotics activity based on general information about the location received the week before. The officers were specifically dispatched to the location based on a pending report of a Black man possibly selling drugs there. A narcotics sale presumes more than one person is involved. When the officers arrived at the location, defendant was in close proximity to a Black man, made eye contact with the officers, and then turned and walked in the other direction. In other words, the circumstances the testifying officer observed at the scene were very consistent with the prior reports of narcotics activity. The officer was entitled to view defendant's conduct as nervous and evasive and to follow defendant for the purpose of making an investigatory stop to confirm or dispel his suspicion. Although defendant stopped walking on his own initiative in the alcove area, he was indeed lawfully detained when the officer asked him to turn around. At that point, it is unlikely a reasonable person in defendant's position would have believed he was simply free to walk away.

***4** Based on the foregoing, we reject defendant's claim he was unreasonably detained in violation of the Fourth Amendment. Because the detention was lawful, we also reject defendant's argument that an illegal detention vitiated any subsequent consent to search the paper bag he was carrying.

Alternatively, defendant argues he did not voluntarily consent to a search of the paper bag he was carrying when he gave it to the officer after the officer asked him, "Show me what's in your hand." Rather, he contends the evidence shows he involuntarily gave the paper bag to the officer. To support this contention, defendant cites testimony indicating he walked away in order to avoid an encounter with the police, but then found himself alone in the alcove with an armed officer. Based on these circumstances, he believed he was required to give the bag to the officer for a search based on the officer's authority over him. The trial court found "defendant's conduct was consensual."

"[A] search authorized by consent is wholly valid," (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854) because consent is one of the "specifically established exceptions to the requirements of both a warrant and probable cause.... [Citations .]" (*Id.* at p. 219.) To be voluntary, consent cannot be "coerced, by explicit or implicit means, by implied threat or covert force." (*Id.* at p. 228.) The prosecution bears " 'the burden of proving that the consent was, in fact, freely and voluntarily given.' [Citations.]" (*Id.* at p. 222.) "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." (*Id.* at p. 227.) Nor is it always necessary for police officers to inform citizens of their right to refuse to consent. Whether consent was voluntary "is a question of fact to be determined from the totality of all the circumstances." (*Ibid.*)

According to the trial court, the officer's encounter with defendant in the alcove took place at nighttime when it would have been relatively dark. For the reasons outlined above, the officer had reasonable suspicion defendant was involved in illegal narcotics activity. When the officer made contact with defendant in the alcove, he was also alone because he was "away from his partner officer." In order to further his investigation of reported narcotics activity, as well as for reasons of safety, it was reasonable for the officer to ask, "Show me what's in your hand." However, nothing about the officer's words or prior actions indicated he was commanding defendant in a coercive manner to hand over the paper bag for the purpose of a search. As the trial court observed, there were "[n]o lights, no sirens, no initial submit to authority." "There was no testimony the officer was yelling or drew his asp or weapon [or] anything of that nature." The officer did not order defendant to stop. Rather, defendant stopped walking on his own initiative. When the officer said, "Show me what's in your hand," defendant could have simply put the bag where it could be more easily seen by the officer. It is of no legal significance that the officer might then have requested consent to search the bag, which defendant could have refused. Instead, defendant simply handed the bag to the officer. "An individual's decision to cooperate must merely be consensual; it need not be intelligent, i.e ., wise, from the criminal's point of view." (*People v. Bennett* (1998) 68 Cal.App.4th 396, 403, fn. 7, 80 Cal.Rptr.2d 323.) Thus, based on the totality of the circumstances, we cannot disagree with the trial court's conclusion defendant validly consented to a search of the bag that contained a methamphetamine pipe. Defendant's motion to suppress was therefore properly denied.

Motion to Dismiss One or More Prior Strikes

***5** Defendant contends the trial court abused its discretion when it imposed a term of 25 years to life in state prison under the Three Strikes law. He argues the trial court should have avoided sentencing him under the Three Strikes law by granting his request to reduce the current felony conviction to a misdemeanor or by granting his motion to strike one or more of his two prior strike convictions. According to defendant, a 25–year–to–life sentence under the Three Strikes law was not appropriate in his case because his two prior qualifying strike convictions were remote and were part of a single transaction. Defendant also reasons his current felony conviction is a relatively minor, nonviolent, "victimless crime"; his criminal history before and after the strike offenses was not significant; and he has demonstrated the capacity to be a productive member of society.

A trial court's denial of a motion to dismiss or strike a prior serious and/or violent felony conviction allegation under Penal Code section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) A trial court deciding whether to dismiss a prior strike conviction in furtherance of justice pursuant to Penal Code section 1385, subdivision (a), "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161, 69 Cal.Rptr.2d 917, 948 P.2d 429.)

Defendant has the burden of demonstrating an abuse of discretion, and in the absence of such a showing, we presume the trial court acted correctly. (*Carmony, supra,* 33 Cal.4th at pp. 376–377.) There is a " 'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large* (2007) 41 Cal.4th 538, 551, 61 Cal.Rptr.3d 2, 160 P.3d 662.) The circumstances must be "extraordinary" for a career criminal to be deemed to fall outside the scheme of the Three Strikes law. (*Carmony, supra,* 33 Cal.4th at p. 378.) A decision to strike a prior conviction remote in time is an abuse of discretion where the defendant has not led a crime-free existence since the time of his last conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813, 68 Cal.Rptr.2d 269.)

The trial court denied defendant's motion to dismiss, because it found defendant "does fall within the spirit of the three strikes law," because the record demonstrates "without any hesitation" that defendant "does not intend to live by the rules that society sets for him." In our view, the trial court was wholly justified in reaching this conclusion. The record shows defendant's present offense, prior criminal history, background, character, and prospects do not indicate he should be deemed to fall outside the spirit of the Three Strikes law.

***6** Defendant is currently 56 years old. The probation report indicates defendant's criminal history began long ago, in 1974, when he was 21 years old. At that time, defendant was convicted of misdemeanor drunk driving. (Veh.Code, § 23102, subd. (a).) In 1976, when he was 23 years old, he was convicted of a second misdemeanor drunk driving offense. In 1990, when he was 36 years old, defendant was convicted of misdemeanor resisting a public officer. (Pen.Code, § 148.) Shortly thereafter, on December 22, 1991, he committed the two qualifying strike offenses of attempted voluntary manslaughter. (Pen.Code, §§ 664, 192.) Defendant was convicted of these strike offenses in 1994, when he was 41 years old. Defendant attempts to minimize the seriousness of these two prior strike convictions on the grounds they are remote in time and were committed during a single domestic violence incident "while he was in an agitated state." However, defendant's arguments are unconvincing. The record indicates defendant fired a fully automatic AK–47 rifle at two police officers who responded to a dispute involving domestic violence. Both officers were injured, and one of them was seriously injured. Defendant was sentenced to a total of 14 years six months in prison for these two offenses. When parole was granted, he violated it three times: June 1999; November 1999; and June 2001. Moreover, the jury in this case specifically found defendant was released on bail or his own recognizance in another case when he committed the current offense.

There is also other evidence in the record supporting the trial court's conclusion defendant is a recidivist offender who falls squarely within the Three Strikes law. For example, in 2008, after receiving a citation for property code violations, defendant wrote a four-page complaint letter to the San Bernardino City Clerk. In the letter, defendant referred to the shooting incident in 1991. His words clearly indicate he felt no remorse for firing the rifle and injuring the officers. In addition, on November 11, 2008, defendant wrote a letter to the trial court stating he lied under oath during his trial in this case when he testified the methamphetamine he possessed when arrested was not his. He also asked the court for immunity from prosecution for this transgression. Although the court did consider some mitigating circumstances in defendant's personal history, these were simply not significant enough to outweigh the factors favoring a sentence under the Three Strikes law. In other words, based on all of the information before the court at the time of sentencing, the trial court appropriately concluded defendant is a recidivist offender who has demonstrated time and again he "does not intend to live by the rules that society sets for him."

We also reject defendant's reliance on *People v. Burgos* (2004) 117 Cal.App.4th 1209, 12 Cal.Rptr.3d 566 for the proposition that it was an abuse of discretion for the trial court in this case to decline to strike one of defendant's two prior strikes because they were committed as part of a single transaction. While in jail on another matter, the defendant in *Burgos* attacked and took a pair of shoes from a fellow detainee and, as a result, was convicted of second degree robbery and assault. (*Id.* at pp. 1211–1212, 12 Cal.Rptr.3d 566.) He admitted he had two prior convictions for attempted robbery and attempted carjacking, which qualified as strikes. Both of these prior convictions arose from "the same single act." (*Id.* at p. 1216, 12 Cal.Rptr.3d 566 .) Subdivision (c) of Penal Code section 215 allows the prosecutor to charge a defendant with both of these crimes, but expressly precludes punishment for both if they arose from the same act. (*Burgos,* at p. 1216, 12 Cal.Rptr.3d 566.) In light of these circumstances and other supporting factors, the appellate court concluded the trial court abused its discretion when it failed to strike one of the defendant's prior convictions. (*Id.* at pp. 1216–1217, 12 Cal.Rptr.3d 566.) The other supporting factors included the defendant's relatively insignificant criminal history aside from the strikes, and the relatively long term of 20 years to be imposed even if one of the strikes was dismissed. (*Ibid.*)

***7** Here, defendant does not cite anything in the record suggesting his two prior convictions for attempted voluntary manslaughter were the result of a single act. As we read the record, defendant fired a rifle at two different police officers who were both injured. This does not constitute a single act, but multiple acts committed during the same course of conduct. In addition, as outlined above, the trial court's decision not to strike one of defendant's strikes is based on a number of other factors in the record. Therefore, this case is factually distinguishable from *Burgos*. Even if defendant could show his two prior strike convictions for attempted voluntary manslaughter are based on a single act, we do not read *Burgos* to require one of them to be stricken. Rather, we agree with the conclusion reached in *People v. Scott* (2009) 179 Cal.App.4th 920, 101 Cal.Rptr.3d 875, that the connection or relative closeness between two strikes is but one in a number of factors the trial court should consider when deciding whether to exercise its discretion to strike a strike. (*Id.* at p. 931, 101 Cal.Rptr.3d 875.) As we read the record and for the reasons outlined *ante,* it is clear the nature of the prior convictions was argued and considered in the analysis, but the balance of factors simply did not weigh in defendant's favor.

In sum, under the circumstances presented, we cannot disagree with the trial court's decision to deny defendant's motion to dismiss one or more prior strikes. The record indicates there are no viable grounds upon which he could validly be deemed to fall outside the Three Strikes law.

DISPOSITION

The judgment is affirmed.

We concur: HOLLENHORST and KING, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2010 WL 1413110

APPENDIX H

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 07/10/2020 08:38 AM

Docket (Register of Actions)

PEOPLE v. SCHWARTZ
Division SF
Case Number S182694

Date	Description	Notes
05/17/2010	Petition for review filed	Defendant and Appellant: Robert Deane Schwartz Attorney: George Oliver Benton
05/17/2010	Record requested	
05/20/2010	Received Court of Appeal record	one doghouse
06/23/2010	Petition for review denied	
07/01/2010	Returned record	1 doghouse

Click here to request automatic e-mail notifications about this case.

APPENDIX I

know, three, four feet away (marking).

Q Okay. Now, you marked two red "X"s in photograph "D", it would be the one to your right or left, if I'm looking at the photograph?

A The one to the right.

Q Okay. So why don't we put Number One as Mr. Schwartz, and Number Two as the other individual.

A (Marking.)

Q Now, you indicated a moment ago that this is 9th Street. Where is 9th Street on the photographs?

A Well, "A" is the best picture of 9th Street. This is 9th Street right here. This would be "H" Street. And the building is right on the southwest corner of the two. (Pointing.)

Q So it's not marked in the photograph and because it's kind of hard to put in the record, can you go ahead and put a 9th on 9th Street and an "H" where "H" is?

A (Marking.)

Q Okay. You can sit down for a minute. After you first observed the defendant, what happened next?

A As we pulled up, Officer Affrunti, of course, was in the passenger side of the vehicle. He immediately got out and contacted Mr. Pace.

Q Mr. Pace is the other individual?

A That's correct. Eric pace was his name. He was the gentleman that was standing in position Number Two. Mr. Schwartz appeared to see us, looked directly at our patrol car, started walking towards the street, initially. As soon

as he realized we came to a stop, it appeared to me that he immediately turned around and began to walk down the side of this garage right here (pointing).

Q And when you are using the pointer, you are pointing to figure "D" to the left of the garage?

A It would be a walkway down the south side of the garage.

Q Now, you indicated that he walked towards the street, that would be "H" Street or 9th Street?

A He came walking out towards "H" Street. As I pulled in, he immediately turned around, went to the -- to the walkway on the south side of the garage, and started walking towards the back of the building.

Q Okay. What did you do next?

A As I exited the driver's side of the vehicle, I went around the front of the vehicle. I then -- I observed Officer Affrunti approaching Mr. Pace. I then followed Mr. Schwartz down that alleyway or walkway.

Q At any time did you leave -- did you have visual contact with the defendant?

A I did.

Q Was there anybody else in the area at the time?

A I remember there were other people there, but I don't recall who they are.

Q And where were they?

A They were just kind of scattered out in the front. I honestly couldn't tell you where they were standing at.

Q Were they people of interest or?

A Did not appear to be at the time, no.
Q Okay. How many steps do you think you were behind Mr. Schwartz as you got out of the car?
A As I initially got out of the car, he was nearing this front corner. I then, at a fast pace, tried to catch up to him. Between six, eight feet behind him.
Q And what did you do then, next?
A As he walked down the side, he walked around the back corner here. I would almost describe as an alcove. There were trash cans. This is actually the rear of this garage right here (pointing). This is the rear corner, directly behind there -- there were trash cans. He immediately turned the corner and was standing there near the trash can.
Q You pointed to figure Number "C"; is that correct?
A That's correct.
Q Okay. Tell us what the back of that location looked like?
A Directly behind here, it's just the back side of the garage building. The back wall here butts up against this wall here. And they actually come together.
Q Okay. So is there any walkways between the buildings?
A No.
Q From say 9th Street to the alcove area?
A No. You would have to go all the way down to the end of the building to get back around towards 9th Street.
Q And at any time did you see any other people at the

Q Those are the people taking the groceries --
A Yes.
Q When your brother got out of the car, did you see him go anywhere besides across the street?
A That's it. Just right there.
Q Did he go in this apartment or anything?
A I didn't notice.
Q When the police arrived, where was your brother?
A Standing next to me, leaning up against the fender of the car. He was more towards the door, and I was more towards the headlight on the passenger side.
Q What did he do when the officers arrived?
A He just stood there. They were -- they were driving up north on "H" Street. And then, they made a u-turn. I kind of had my eye on them, you know, like what are they doing? And then, they came. Obviously, they were going to pull in. They were stopped at the light. And they was -- they were starting to pull in the driveway. I said, well, brother, it's time for me to get out of here. And so I walked the other way.
Q Were you going to walk home?
A No.
Q What were you going to do?
A I was going back in the -- into the back part of the apartments there to see what was there, get rid of the dope. What am I going to say? I'm drunk in public. If the cops arrest me and search me, oh, I just happen to have this dope in my pocket.

MR. FARQUHAR: It's -- and that comes down to --

MS. BEVAN: But he is not charged with possession in his bedroom. He is being charged with --

THE COURT: The language in the instruction says, Two or more people may possess something at the same time.

MR. FARQUHAR: Okay.

THE COURT: It's true I don't see it as relevant particularly to this case. That goes more to the situation where there's two people in a car, for example.

MS. BEVAN: Right.

THE COURT: It's in his pocket, so --

Okay. Let's talk about momentary possession, instruction 2305. Mr. Farquhar has requested this instruction based on the defense that's set forth regarding momentary possession.

Mr. Farquhar.

MR. FARQUHAR: Yes, Your Honor. This instruction deals with -- has two elements to it. One is the defendant possessed the controlled substance only for a moment or a transitory period and the defendant possessed it in order to abandon, dispose, or destroy.

Now, the evidence that was testified to at trial is that Miss Maffey had it in her purse. Apparently she controlled the drugs. And even though my client said they may have been owners, owned it together, there's a difference between possessing and owning. A person can be in possession of a car and not own a car. That's a

distinct importance here.

THE COURT: Not in contraband. There's no right to legal title with methamphetamine.

MR. FARQUHAR: What I am saying is say a person -- and that's what we are talking about because you are saying there's no legal title. So even if he did purchase the methamphetamine, he doesn't have any legal claim to it. It's the person in possession of it who has it. She had it. It was in her purse and she was in possession and control of it according to his testimony. She might have shared it with him, but she was the one who controlled it. He did not control it or possess it. She was the one with possession.

THE COURT: At what time?

MR. FARQUHAR: Well, there was discussion back at the house where he took the controlled substance from her.

THE COURT: Let's say he did not possess it. Let's accept his testimony as true at the house when she has it in her -- I think her purse.

MR. FARQUHAR: Yes. She has it in her purse.

THE COURT: I would agree with you that would not constitute possession on his part.

MR. FARQUHAR: Okay. So what we are talking about is the defendant, and that instruction --

THE COURT: Let me say this: In the absence of some other evidence over control of her purse, but nothing like that is present here. So now we have the defendant,

and as his testimony stated, he was in possession of it after he took it from her -- from her purse.

THE COURT: Okay.

MR. FARQUHAR: So as far as the first element -- and he stated that it was for a period of time that he was contemplating destroying it, getting rid of it.

Now, the second element says, Abandon, dispose of, or destroy.

THE COURT: Yes.

MR. FARQUHAR: And it does not state how. And if he was planning on abandoning it or disposing of it, even if he was to give it to another person, that is taking it out of the hands of another person he was attempting to get it out of, and I think it applies here.

THE COURT: Let me say this: The entire purpose of this judicially created defense in People versus Mijares back in 1971 and reaffirmed in People versus Martin, 25 Cal 4th 1180, at least I believe that's the most recent case to give this discussion a full reassessment.

It's a public policy defense in which we -- and we say, Look, they are dangerous substances. If someone says, I am going to possess this because I see a -- I see methamphetamine in a park, I am going to take it, I've got to get rid of this so that kids don't get it, for example, or someone is overdosing and saying, I've got to get this out of their possession, that's fine. The rationale for that public policy defense allows that to occur.

And it's a narrow exception, and I don't see how -- taking the drugs from his girlfriend and saying, I am going to give them to a friend who will appreciate them because these are expensive, I don't see how that's remotely consistent with the public policy of encouraging -- quoting now from Martin, "Encouraging disposal and discouraging retention of dangerous items such as controlled substances." It's not disposable.

MR. FARQUHAR: Okay. But, Your Honor, he stated that he was considering that, but he did not state that's what he was doing. He was also considering disposing of it also. He took it from her to get it away from her because she had a problem with the drugs, and I think that meets the first prong.

Now --

THE COURT: I agree with you.

MR. FARQUHAR: He was planning on disposing of it. He had not determined how he was going to dispose of it yet. There was questions about whether or not he was going to give it to somebody, whether or not he was going to destroy it. But his testimony was not specific, and I think that's a jury question that the jury should make a determination of.

Of course they can feel, Well, he was going to give it to somebody else, so that is something that's not abandoning or disposing of, but I think it's something that they should address, and I think it's a matter of fact, not a matter of law.

THE COURT: What did the third requirement set forth in the instruction which states that you would need to establish that -- as an affirmative defense that the defendant did not intend to prevent law enforcement officials from obtaining the controlled substances?

MR. FARQUHAR: I think that goes back to when he possessed it, and he possessed it at a house where it was being used and he took it from her.

THE COURT: On his own testimony, he possessed it continuously from that moment.

MR. FARQUHAR: For a period of ten minutes.

THE COURT: But when the law enforcement officers show up at the scene where Mr. Schwartz finds himself, he said quite candidly in his testimony, Look, I needed to get rid of the stuff because I didn't want to get caught with it.

MR. FARQUHAR: That is after the fact, though.

THE COURT: But he still possesses it at that moment.

MR. FARQUHAR: But the problem is -- then I guess the Court would require him to walk up to the officers and say, Here, take it, officers. I mean, that would be -- I don't believe that's what the law requires. He saw the officers -- and I want to point out the officers came up to him and they followed him to a position where he was trying to -- where he had -- I think the point is what we are addressing is when he picked up the drugs, what was his intention? And his intention was

to get it away from this person and dispose of it.

THE COURT: It's more than that, though. Even if his intention is pure at that moment, if the subsequent possession and retention of the controlled substances involves a lengthy period of time -- if he picks up -- let's say hypothetically a defendant says, I have to get these drugs away from these kids, and he takes them, fine. Everything is good and you get the momentary defense. If you keep them for a couple days and think, I am --

MR. FARQUHAR: There's case law on that, Your Honor.

THE COURT: Which says what?

MR. FARQUHAR: That it was perfectly fine. The family took it away from their daughter and put it in a safe and possessed it for a couple days, and the officer found it in the safe, and the Court said, That's fine.

THE COURT: But I didn't finish my hypothetical which is if you keep it for a couple days, it's one thing if you have it in a safe. If you are carrying it around on your person thinking, I don't know what to do with this, maybe I will give it to a friend, it costs a lot, I want to give it to someone who appreciates it, maybe I will toss it, I don't know what I am going to do with it, that, it seems to me, takes the actions out of the public policy purpose served by this defense.

It's narrow. I mean, it's really -- I think what it does is it recognizes that possession is one of those crimes that the minute you touch it, boom, you are

done. You are guilty. And that life being what it is, there are times when the greater good is to allow someone to possess these narcotics to prevent the greater harm.

I recognize at some point that becomes a jury question, but there's a threshold legal question of whether or not, taking the testimony as true, the public policy boundaries of this defense, that the defendant's actions can fit within those boundaries.

MR. FARQUHAR: A lot of thoughts go through people's minds every minute every day.

THE COURT: Sure.

MR. FARQUHAR: I am not just thinking about trial now. There's a lot of other things going through my mind as I am sitting here.

THE COURT: Sure.

MR. FARQUHAR: The mere fact that the thoughts cross through his mind does not negate the original intent which was to take it from her and get rid of it. And therefore, he never had an opportunity to dispose of it because he went from his house to the tobacco store to this location, and the police arrived within minutes.

If he had a safe place to dispose of it and he was presented with that situation, where do you go? Well, you know, he went by and he had a trash can, a large trash can where he could dispose of it and not have anyone else get a hold of it.

But I think it's -- his original intent is what controls here, and that was to get the drugs away from a

person who was abusing them. And the fact that he may have had thoughts of what he was going to do with it does not negate his original intent.

THE COURT: Okay.

Miss Bevan, do you need to be heard on this?

MS. BEVAN: I agree with the Court, Your Honor. This is not a disposal. His statements were, I wanted to take it away from her. He doesn't say he wants to dispose or abandon or anything else. He just didn't want her to have it. He didn't care who else had it, but he didn't want her to have it.

You're right it's a public policy issue and falls in line where officers get called all the time to the parents' house where they find drugs in the kid's bedroom and they have the officers pick it up and take it away to get rid of it. This is just -- I think it's just a stretch, and I don't think that he has met the thresholds on this. It's just not there.

MR. FARQUHAR: There's no law that requires or says they have to provide it to the officers to dispose of it.

MS. BEVAN: But the law says you have to not intend to prevent law enforcement. When he walks away and doesn't give it, he is preventing.

MR. FARQUHAR: He is trying to avoid contact with the officer. That's all he was doing. How would he know that the --

MS. BEVAN: No.

THE COURT: That's false. His testimony was clear on this point. And he said he went to the trash can specifically because he wanted to get rid of.

MR. FARQUHAR: He wanted it off his person.

THE COURT: Right. Right. He wanted to get it off his person in a trash can. The only reasonable inference to draw from that is that he didn't want the police to find him with the methamphetamine. I don't know if that testimony was expressly included or put forth, but that's plainly what was happening here. There's no other rational inference to be drawn.

MR. FARQUHAR: But that is a fact that came in, and what we have is we have a set of facts where his intentions follow what we have going on here. He picks it up to get rid of it and is moving it to dispose of it.

And there is a civil issue or a civil term. I am forgetting what it is. But we have the officers coming in. He sees them coming, knows that he is in a position where they are going to arrest him. And since he hasn't been able to get rid of it sooner, he is put in a position where he tries to walk away and gets it off of his person and tries to dispose of it.

So how does that negate his original intent which was to dispose of it just because the officers are interceding into the situation?

THE COURT: Well, there's a premise in the argument that I don't think is correct which is that he had no opportunity to dispose of it earlier. I don't

think that's true.

MR. FARQUHAR: He guess he could have thrown it onto the street.

THE COURT: He could have.

MS. BEVAN: Or the bathroom. He went to the bathroom and he didn't dispose of it.

THE DEFENDANT: That was before.

MR. FARQUHAR: That was before when he was leaving the residence.

MS. BEVAN: And he wasn't afraid to leave and take it with him.

THE COURT: Hold on. That was before -- according to his testimony, before he left the residence.

MR. FARQUHAR: Yes. When he went to the restroom, yes.

THE COURT: Then he came back, took the drugs, and left.

MR. FARQUHAR: He took the drugs -- he was at the residence and he took the drugs and left. Where is it that the Court believes he went to the bathroom at?

THE COURT: I might have been misremembering.

MS. BEVAN: When I questioned him, he said he walked by the bedroom and saw the methamphetamine in her purse and took it and also the pipes and went to the bathroom. I asked him, Did you dispose of the narcotics then? No.

THE DEFENDANT: It's backwards.

MS. BEVAN: And I believe that's what the

testimony was. But even if for sake of argument that isn't true, he told the defense on direct that he in fact was not afraid to leave with the drugs. He was not in fear for his life. And all he had to do was turn around and dump them back into the -- if he really wanted to dispose of them as counsel is arguing, he could have flushed it, again, down the toilet. His intent was not to dispose of it. His intent was to take it with him.

THE COURT: The question really before the Court is whether or not that's a jury question that I leave to them or whether or not it's a -- whether or not it's a legal question.

This bit about the intent, the view that the defense must prove that the defendant did not intend to prevent law enforcement officials from obtaining the substance, does that come from People versus Martin? Because quite frankly, that's not consistent with what I understood the defense requires specifically. But what I need to do is look at Martin closely to make sure that --

MR. FARQUHAR: There is something in the bench notes that I would like to point out.

THE COURT: Yes.

MR. FARQUHAR: Down at the end, it says, "The Martin Court did not state that the defendant must also specifically intend to end someone else's unlawful possession of the contraband or prevent someone else from obtaining the contraband."

THE COURT: That is correct.

MR. FARQUHAR: Thus, the committee did not include this as an element.

MS. BEVAN: But it doesn't say that he can give the contraband to someone else. That would be illegal.

THE COURT: Let Mr. Farquhar finish.

MR. FARQUHAR: If the Court is still pondering on what he mentioned, that he considered giving it to someone else, it doesn't say that he has to prevent someone else from obtaining the contraband. So if his disposal is to have somebody else get it away from her by having him give it to them, I don't see that as anything that would negate the defense also.

THE COURT: Okay. Give me a second.

Do you need a question resolved before you argue to the jury?

MR. FARQUHAR: Well, I am going to argue it.

THE COURT: Okay.

MR. FARQUHAR: I imagine I am probably going to argue it with or without the instruction.

THE COURT: All right. Hold on a second.

(Discussion off the record)

THE COURT: Back on the record.

In response to counsel's argument posed in the hypothetical, what was the defendant supposed to do? Throw it onto the street, the methamphetamine? Perhaps it bears noting that in the case which first recognized this defense, that it's precisely what happened. The item was just disposed of. So it's not true to say that that

action in itself would not be reasonable or that that would not support the defense. It may have not seemed like a good idea to the defendant.

Accepting the defendant's testimony as true in its entirety and including the length of time that the drugs were allegedly possessed and his salutary intent in initially taking possession of the drugs, there's no showing in any of his testimony that his actions would be consistent with the public policy goals elected by this defense which are to encourage disposal and destruction of dangerous substances.

I will take his testimony as true that he had not decided what to do with it. Maybe he was going to get rid of it or maybe he was going to give it to a friend. At best what that demonstrates is that his intent was perhaps transitory itself and that he hadn't made a firm plan about how to get rid of these drugs. He did testify he would not be taking them because it was not his drug of choice. Court will accept that as true. Had he said he was going to take them himself, that would be an easier call and he wouldn't be entitled to the defense.

But there's no effort to affirmatively dispose of them while he has them in his possession. So even if his original intent has one purpose, his failure to make any efforts to affirmatively dispose of those drugs except when he is in the process of trying to evade apprehension by law enforcement takes his actions squarely out of public policy goals that the momentary possession defense

is crafted to recognize.

MR. FARQUHAR: May I be heard?

THE COURT: And specifically, although I don't see the reference to it in Martin itself, there is the third level in the instruction that the defendant did not intend to prevent law enforcement officials from obtaining the controlled substance. I think it fails on that element alone, frankly.

MR. FARQUHAR: And if I could be heard, Your Honor. In regards to that last point, this defense then of course would almost never be able to be used because every situation where the law enforcement officers collect the evidence, if it's -- if it's taken from some place where the people have tossed it, like onto the street as in the one case, well, then, the argument is, Well, they were trying to hide it from the officers that were hiding behind them because the officers had to be there to observe it hit the street, otherwise they wouldn't have arrested them.

So the argument would always be the person is trying to hide it from the officers. So this defense would be meaningless because in every situation the claim is going to be that they were trying to hide it from the officers, and I think that would be something that is intended for the jury to determine.

Now --

THE COURT: I will agree with you, before you leave that point, that the defense is limited. I mean,

you say it would never be available. I concede it is rarely available. Because if, for example, officers are hot in pursuit of a car and drugs are flying out the car window, as a matter of actual fact, it's going to be very hard for the people in the fleeing car to establish, Well, we were just trying to keep everybody safe. That's why we were throwing heroin out the window. It is a limited defense. But I don't think that means it's unavailable in every case.

MR. FARQUHAR: Any disposal it could be argued is an attempt to keep the police from recovering it.

THE COURT: That would be a jury question. And I would think that's true. And depending on what the facts are, that may or may not be something that the jury is likely to believe.

MR. FARQUHAR: So whether or not his attempt to dispose of it when he went behind the house was an attempt to illegally dispose of it or legally dispose of it I think should be a jury question. And also, even as in contemplation of giving it to a friend, I see no case law or anything that says that that is not allowed as a form of disposal.

THE COURT: I will agree with you that I do not know in my review of the law a specific case where that has been raised as a defense where the trial court rejected the defense based on that factual scenario where a defendant has said, My giving it to a friend qualifies me for the momentary possession defense, and the trial

court denied it and the Court of Appeal addressed the propriety of denying the instruction. I agree with you I don't see cases with that scenario.

However, here we have one, and based on the cases that are out there, it is wholly inconsistent with the public policy rationale of this defense. Giving it to a friend so that -- because they might appreciate it or just giving it to a friend to hold onto, to do with -- whatever they want with it, that's not disposal. That's sharing the wealth, perhaps, but it's not disposal.

MR. FARQUHAR: And in the instructions, it mentions nothing of that. And I think we've established at least a prima facie case that should be taken to the jury where in a situation whereby denying him this instruction, you will deny him his defense.

And I believe that what we are looking at is a situation where it is -- enough facts have been established that it now goes to whether or not the jury is going to follow the instruction or if the jury decides not to, and that is something that the jury can determine on their own.

THE COURT: Let me go back to first the principles here in the case that established this, People versus Mijares, 6 Cal 3d 415. In that case, the Supreme Court emphasized as follows:

"Our decision in no way insulates from prosecution under the narcotics laws those individuals who, fearing they are about to be apprehended, remove

contraband from their immediate possession. We leave intact the rule that from such conduct it could be inferred that the defendant at one time exercised physical dominion over the narcotic."

So the Supreme Court contemplated the hypothetical you suggested which is, Gosh, this defense won't be available to people who are -- for example, risk apprehension from law enforcement.

MR. FARQUHAR: I disagree. I believe that analysis is a situation where they are saying that a person who has it in their possession all of a sudden decides now it's time to dispose of it because we see the officers, it's not addressing the situation before where the person takes it from another person with the intent to keep it from that person which is the public policy to prevent somebody else from using it.

THE COURT: Public policy which would not be served by giving it to a friend presumably.

MS. BEVAN: In fact, that would be illegal because that's another --

THE COURT: That would be furnishing.

MS. BEVAN: Yes.

MR. FARQUHAR: It's a thought, Your Honor. And, Your Honor, I have actually contemplated hurting people at other times. Haven't done it and haven't been prosecuted for that thought yet.

THE COURT: He hasn't been prosecuted for furnishing. That's true. The only question is what

intent does he establish that would allow him to avail himself of the public policy?

MR. FARQUHAR: To dispose of it to keep it from the person who has the problem with it. And the person is Miss Maffey who cannot control herself when on the drugs. So disposal, if it went to some other person, would obviously be something favorable to having Miss Maffey on it.

MS. BEVAN: But that's not disposal. "Disposal" means destroy, get rid of it, flush it.

MR. FARQUHAR: There's three things in here, abandon, dispose of, or destroy.

MS. BEVAN: And he didn't abandon it. He didn't throw it anywhere. He didn't destroy it.

MR. FARQUHAR: He was planning on disposing of it.

THE COURT: I understand the argument. I do. It's colorable. But I am going to deny the request to give the instruction.

There are several instructions that have been submitted regarding prior convictions. Those are premature if they need to be given at all. He is not charged with multiple counts.

Juror with a disability.

Are there verdict forms?

MS. BEVAN: I'm sorry?

THE COURT: Do you have a verdict form?

MS. BEVAN: They should be up there with the --

THE COURT: Oh, you did. I am sorry.

MR. FARQUHAR: Your Honor, before we move on to something else, I want to note my objection under both the Federal due process rights, Sixth Amendment of the United States Constitution, and the State of California Constitution in regards to the denial of instruction 2305.

THE COURT: Okay. And the record should be clear that the Court's refusal to give that instruction is over the defendant's objection. I think the half-hour argument on the point probably makes that.

But there's a verdict form. Mr. Farquhar, you've -- have you had a chance to review the verdict form? It just lists 1-A and 1-B as the options.

MR. FARQUHAR: I have ones with the --

THE COURT: Verdict 1-A and 1-B, guilty or not guilty. Any objection to those?

MR. FARQUHAR: No objection.

THE COURT: All right. We will get to the prior conviction issue later.

Anything else before we bring the jury in?

MR. FARQUHAR: I don't believe so, Your Honor.

THE COURT: Okay. All right. We will bring them in.

(Jury present)

MR. FARQUHAR: Your Honor, could I approach briefly?

THE COURT: Yes.

(Off-the-record side bar)

what we heard.

We did hear Mr. Schwartz state he went and pulled the items out of her purse and assumed they were drugs. But did we see there was proof they were drugs besides the officer saying we say so? We haven't seen anything tangible.

As to Mr. Schwartz' possession, assumed it was meth and necessary for him to take it from her because of her actions because she was abusing them and because she became abusive on them and became violent. Mr. Schwartz' intent was to get the drugs away from her. So where is the unlawful possession? Where is the wrongful intent?

Now, Mr. Schwartz told you his story how she was, how she acted, what he did with the drugs. He picked them up and wanted to get them out of there. Didn't want her to use those.

Where is his wrongful intent? What Mr. Schwartz did was he left with them. Does the fact that he contemplated giving them to somebody else negate his original intent in this situation? His intent was to prevent Miss Maffey from hurting herself or other people.

Some of you may think, Well, have I proved this? Well, I don't have the burden here. It's the district attorney who has the burden. She has to prove the elements of the case. It's not me who established the rules here. The government established it.

And we've heard what Mr. Schwartz said happened. And is there evidence that contradicts that? No. We

heard the officer testify that the pipe was clean, so we don't have him using the drugs. We don't have any indication that he was trying to sell any drugs. He just wanted to get them away from her. So where is the unlawful possession and where is the wrongful intent?

Now, the only evidence that we really heard as to what his intent and actions were was based on Mr. Schwartz' own testimony. The district attorney will claim undoubtedly that's circumstantial evidence of what he was intending to do with this.

Well, as the judge instructed you and as I told you during jury selection, when there's two reasonable interpretations, one for guilt and one for innocence, you have to vote for the one that's innocence. And how could it not go for innocence when you heard two reasonable interpretations of why he had the drugs?

He did not have them for wrongful intent, and there has been nothing that's offered to contradict this. We just have his testimony there. So what I am asking you to do is come back with a verdict of not guilty. Thank you.

THE COURT: Thank you, Mr. Farquhar.

Miss Bevan.

MS. BEVAN: Thank you, Your Honor.

This is just a blown-up jury instruction. Do you see anything on here where it says "wrongful intent"? No. Mere possession of an illegal substance is illegal. There's no justification for having it. The only

justification we can think of is if you are a nurse and giving morphine to somebody else or a doctor. There's no legal justification for having methamphetamine on your person.

Regardless of what your issue is, regardless of what you come up with later on during your trial, that I was going to protect my girlfriend, there's no indication whatsoever that that was his true course of action.

But what we do have is the officer and his statement on the first time he met the officer that, Two black guys gave me the drugs. Didn't you see them? They were right behind me. This is now a conjured up story four years later he comes up with.

This gentleman was in possession of methamphetamine. He saw the cops. He turned away from the cops, didn't want to get caught with the methamphetamine, and then he had to make up a story, Hey, let's blame it on the black guys. He had then unlawful possession because he is in possession of methamphetamine and he is guilty. Thank you.

THE COURT: Thank you to both of you.

All right. You've heard the closing arguments. You've heard the evidence. You've heard the instructions. You are now going to retire to deliberate.

When you go into the jury room, the first thing you should do is choose a foreperson. That person's job is to ensure that the discussions are carried on in an organized way and everyone has a chance to be heard. Your