No. _____

IN THE

Supreme Court of the United States

DERRICK ARNOLD JOHNSON,

Petitioner,

v.

RAYBON JOHNSON, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

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

DERRICK ARNOLD JOHNSON, Petitioner-Appellant, v. JOHN SOTO, Respondent-Appellee.	No. 19-55853 D.C. No. 2:14-cv-09441-CAS-RAO Central District of California, Los Angeles ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) 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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DERRICK ARNOLD JOHNSON,

Petitioner,

v.

JOHN SOTO, Warden,

Respondent.

Case No. CV 14-09441 CAS (RAO)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has reviewed the Amended Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Amended Report and Recommendation, filed June 7, 2019, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253, Fed. R. App. P. 22(b); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

IT IS ORDERED that the Certificate of Appealability is denied.

DATED: June 25, 2019

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DERRICK ARNOLD JOHNSON,

Petitioner,

v.

JOHN SOTO, Warden,

Respondent.

Case No. CV 14-09441 CAS (RAO)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, all of the records and files herein, and the Magistrate Judge's Amended Report and Recommendation. Further, the Court has engaged in a *de novo* review of those portions of the Report and Recommendation to which Petitioner objected. The Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

IT IS ORDERED that the First Amended Petition is denied, and Judgment shall be entered dismissing this action with prejudice.

DATED: June 25, 2019

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

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

DERRICK ARNOLD JOHNSON, Petitioner, v. JOHN SOTO, Warden, Respondent.	Case No. CV 14-9441 CAS (RAO) AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Amended[1] Report and Recommendation is submitted to the Honorable Christina A. Snyder, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

In 1993, a jury in the Los Angeles County Superior Court convicted Derrick Arnold Johnson ("Petitioner") of second degree murder and evading an officer causing death. (Clerk's Transcript ("CT") 192-93.) The trial court found Petitioner

[1] On March 6, 2019, this Court issued a Report and Recommendation addressing the instant Petition. (Docket Nos. 81-82.) On April 3, 2019, Petitioner filed Objections to the Report and Recommendation. (Docket No. 85.) This Amended Report and Recommendation addresses Petitioner's Objections.

had three prior felony convictions and sentenced him to 22 years to life in prison. (CT 208-11.)

Petitioner appealed to the California Court of Appeal, which reduced his sentence to 21 years to life, but otherwise affirmed the judgment in a reasoned decision. (Lodg. No. 1.) Petitioner did not file a petition for review in the California Supreme Court.

Nearly 20 years later, in February 2014, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, raising 11 grounds for relief, all of which were denied on procedural grounds or on the merits. (Lodg. No. 2.) Subsequent petitions raised in the California Court of Appeal and California Supreme Court in 2014 were denied summarily. (Lodg. Nos. 3-6.)

On November 30, 2014, Petitioner, a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, raising numerous grounds for relief. (Docket No. 1.) On February 13, 2015, pursuant to Petitioner's request, the Court appointed counsel to represent Petitioner in this matter. (Docket No. 11.) Thereafter, Respondent filed a motion to dismiss the Petition, arguing that it was untimely under the one-year statute of limitations for federal habeas petitions. (Docket No. 31.) On January 29, 2016, the Court denied the motion without prejudice, finding that the record regarding Petitioner's mental health was not sufficiently developed to determine whether Petitioner was entitled to equitable tolling during the relevant period. (Docket No. 42.) For the sake of efficiency, the parties agreed to defer the question of timeliness of the Petition until after litigating the merits of Petitioner's claims. (Docket No. 43.)

On August 15, 2016, Petitioner, through counsel, filed a First Amended Petition for Writ of Habeas Corpus ("FAP"), raising eight claims, and requested a stay and abeyance to return to state court to exhaust several of the claims therein. (Docket No. 47.) The Court granted Petitioner's request (Docket No. 59) and,

thereafter, Petitioner filed a habeas petition in the Los Angeles County Superior Court. (Lodg. No. 8.) On March 7, 2017, the superior court denied the petition on procedural grounds and on the merits. (Lodg. No. 9.) Subsequent petitions in the California Court of Appeal and California Supreme Court were denied summarily. (Lodg. Nos. 10-13.)

On September 26, 2018, after the stay and abeyance was lifted, Respondent filed an Answer to the FAP and a supporting memorandum ("Answer"). (Docket No. 74.) Respondent also lodged the relevant state records. (*See* Docket No. 75.) On December 6, 2018, Petitioner filed a Traverse. (Docket No. 79.)

II. PETITIONER'S CLAIMS

The Petition raises eight grounds for relief, as follows:

1. The trial court's failure to hold a competency hearing violated Petitioner's right to due process.

2. Petitioner was incompetent to stand trial.

3. The trial court improperly granted Petitioner's *Faretta* motion.

4. Petitioner was unconstitutionally restrained at trial.

5. Petitioner was forced to appear in jailhouse attire.

6. Marsy's Law violates Petitioner's rights under the Ex Post Facto Clause.

7. The jury instructions diluted the prosecution's burden of proof in violation of Petitioner's right to due process.

8. The cumulative impact of errors at Petitioner's trial violated his constitutional rights.

(FAP at 12-44.)

III. FACTUAL SUMMARY

The Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction on appeal.[2]

[2] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." *Tilcock v.*

> Shortly before 11 p.m. on November 17, 1992, two 2-officer Pasadena Police Department marked patrol cars responded to gunshots near Church's Chicken stand at the Fair Oaks/Orange Grove Boulevards intersection. When [Petitioner] drove a Cadillac containing three other men unsafely away from the approaching police cars at high speed, the officers chased him for nine minutes over nearly ten miles. Throughout the chase, [Petitioner] drove far above the applicable speed limits at speeds up to 100 miles per hour and ran several stop lights and stop signs, barely missing colliding with many other vehicles. [Petitioner] entered the Myrtle Avenue/Evergreen intersection at about 80 miles per hour against a red light and crashed into a Toyota driven by Herman Basulto, Jr., who lived two blocks away. [Petitioner's] Cadillac stopped between 150 and 200 feet away, exploded, and burned. The Toyota came to rest about 200 feet from the point of impact. Basulto was thrown about 130 feet. He died in an ambulance en route to a hospital of massive head, brain, chest, lung, and liver trauma.
>
> In defense, [Petitioner] claimed he was not driving the Cadillac and could not get out during the chase. [Petitioner] claimed he and his friends fled because they were scared by the police chase. [Petitioner] refused to say who was driving because he would be threatened or killed if he did so. [Petitioner] admitted his prior convictions and altering his hairstyle between the date of Basulto's death and trial.

(Lodg. No. 1 at 2-3.)

IV. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for

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Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). Because Petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. *Tilcock*, 538 F.3d at 1141.

evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal citation and quotations omitted).

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court need not cite or even be aware of the controlling Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L.Ed.2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was

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deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (citing *Richter*, 562 U.S. at 99).

Here, Petitioner raised all eight of his claims for relief in the California courts either on direct appeal in 1994 or in two subsequent rounds of collateral review in 2014 and 2017. (*See* Lodg. Nos. 1, 2-6, 8-13.) Each of the claims was rejected on the merits—and, in some instances, also for procedural reasons—in a reasoned opinion by the California Court of Appeal or Los Angeles County Superior Court. (Lodg. Nos. 1, 2, 9.) Because the California Supreme Court denied all the claims without comment or citation (Lodg. Nos. 6, 13), under the "look through" doctrine, these claims are deemed to have been rejected for the reasons given in the last reasoned decision on the merits, which was either the Court of Appeal's or Superior Court's written opinion, and entitled to AEDPA deference. *Ylst*, 501 U.S. at 803; *see also Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1194, 200 L.Ed.2d 530 (2018) (reaffirming *Ylst*'s "look through" doctrine).

V. DISCUSSION

A. Grounds One and Two : Competency to Stand Trial

In Ground One, Petitioner claims that the trial court violated his due process rights by failing to hold a hearing to determine his competence to stand trial. He

argues that there was sufficient medical evidence before the court to raise a "bona fide doubt" about his competency. (FAP at 12-18.) In Ground Two, Petitioner contends that he was, in fact, incompetent at the time of trial because he lacked the capacity to understand the nature of the proceedings against him or to assist in his own defense. (FAP at 18-22.)

1. *Background*

At his arraignment, Petitioner waived his right to counsel and elected to represent himself at trial. (Reporter's Transcript ("RT") 1-31.) During the waiver of rights colloquy, Petitioner told the court that he had not "seen the doctor yet," despite the court faxing an order to the jail so that Petitioner could go to the infirmary. (RT 12-14.) Petitioner told the court he did not have a copy of the order, but had asked the jail nurse to be seen by a doctor. (RT 14-15.) The court told Petitioner to ask for the "legal sergeant" and to report back if they "didn't honor the court's order." (RT 14-15.) After explaining the responsibilities of proceeding *pro se* to Petitioner, the court asked him whether he "still need[ed] that medical examination?" (RT 30.) Petitioner confirmed that he did, and the court "re-order[ed]" that Petitioner be seen by the doctor. (RT 30.)

Petitioner appeared in court several times thereafter for pre-trial proceedings without mentioning any issue about seeing the jail doctor. At the hearings, Petitioner filed and argued several motions, made requests to view evidence, rejected a plea offer from the prosecution, and got an order from the court to hire an investigator. (RT 32-79.)

On May 12, 1993, a jury was selected, the prosecutor gave an opening statement, and Petitioner filed several motions, including one to have advisory counsel appointed. (RT 80-105.) The following day, advisory counsel was appointed and spoke to Petitioner about his case. (RT 107-17.) Thereafter, Petitioner reserved his opening statement, and the prosecutor called his first witness. During the witness's testimony, Petitioner made several objections and

cross-examined the witness about his recollection of the details of the police chase and car crash. (RT 118, 154, 171, 207-22.)

On May 17, 1993, Petitioner appeared in court and made an oral motion for mistrial. (RT 232-33.) In arguing his motion, the following exchange took place:

> [Petitioner]: I'm on Thorazine for my medication –
>
> The Court: Do you want Thorazine?
>
> [Adv. Counsel]: Your Honor, he indicated he is presently on Thorazine and he thinks he is not thinking –
>
> [Petitioner]: The police gave it to me.
>
> [Adv. Counsel]: He gets Thorazine every day for seizures.
>
> The Court: He seems to be okay.
>
> [Petitioner]: Seems okay.
>
> The Court: Do you want me to take you off the Thorazine? Is that what you want?
>
> [Petitioner]: No. Wait a minute.
>
> The Court: Wait. You answer my question. You don't want the Thorazine? I will take you off the Thorazine if that's what you want.
>
> [Petitioner]: I am just informing you what I am on, Your Honor.
>
> The Court: Doesn't seem to be stopping you from doing your thing.
>
> [Petitioner]: That's your opinion; okay?

(RT 233.) Shortly thereafter, the court again asked Petitioner whether he wished to remain on Thorazine during the trial. (RT 237.) After having a discussion with his advisory counsel, Petitioner and the court discussed the matter, as follows:

> [Petitioner]: If you take me off, then I have seizures. Then I don't think I can prepare myself as defense if you take me off my medication, Your Honor.
>
> The Court: You are saying Thorazine affects your ability to understand what is going on?
>
> [Petitioner]: Yes.

> The Court: Is that what you are telling me?
>
> [Petitioner]: Yes.
>
> The Court: You seem to be doing all right in this courtroom.
>
> [Petitioner]: You are not a doctor.
>
> The Court: You are responsive to everything the court has said.
>
> [Petitioner]: Right.
>
> The Court: You are responsive to the evidence, your cross-examination of the first witness, not the second one, because the second one didn't have much to say. [¶] But the first witness was quite remarkable, and I don't think – I don't think that the Thorazine is causing you any unconsciousness to the point where you don't know what is happening. [¶] You seem to be doing very well, and you seem to be very responsive to the court now, and in light of all the motions that you just – the oral motions that you just made, you seemed to be knowing what is happening.

(RT 237-38.)

Petitioner continued to argue for a mistrial, claiming that the jury had seen him in leg restraints and that the court had not allowed him to wear civilian clothes. (RT 238-40.) Petitioner again told the court that he was on Thorazine since being in jail. The court responded by noting that the pre-plea probation report indicated that Petitioner was on "medication for seizures, and his condition is under control with medication. It appears that the court has seen no adverse reaction to Thorazine in his ability to defend himself." (RT 241.) The court continued, noting that since the arraignment:

> I have not seen the affect [*sic*] of anything of the Thorazine on him whatsoever. [¶] His speech is not slurred. He does not appear to be slow or sedated because of the Thorazine, and he has been with me ever since the information was filed back in February of 1993. [¶] And the court would state that if I thought that the Thorazine which he controls his seizures in any way would affect his ability to understand what was proceeding, the court would have stayed these proceedings.

(RT 243-44.) The prosecutor concurred, stating that he had not "found the defendant

to be under any sort of disability in terms of his medication." (RT 244.) He noted that Petitioner had arranged for and viewed the discovery—including a 35-minute video tape—without issue. (RT 244-45.)

Nevertheless, Petitioner asked the court for an order to see the doctor because he felt "confused." (RT 245-46.) Advisory counsel addressed the court and stated that Petitioner told her that he felt "confused," that "his thinking is slowed down," and the proceedings were "going too fast for him." (RT 246.) She told the court that, after explaining California Penal Code § 1368 to him, Petitioner had a "doubt of his competency to stand trial."[3] (RT 247-48.) The court agreed to order a medical doctor to see Petitioner regarding his Thorazine dosage, but rejected any assertion that Petitioner was incompetent:

> He is not 1368 . . . . He knows where he is. He knows what he is doing and he knows the charges . . . . I am satisfied that Thorazine has no effect upon him, and that this is simply a ruse on his part this morning to put this trial over.

(RT 247-48.) In doing so, the court noted Petitioner's effectiveness in cross-examining the prosecution's first witness; that Petitioner responded adequately, coherently, and immediately to the court's questions; and that Petitioner had "no difficulties" understanding the court proceedings. (RT 248, 251.)

The court again asked why he wanted to see a doctor. (RT 252-53.) According to advisory counsel, Petitioner said the medication made him feel "slowed down" and believed that he may not have been receiving the right dosage. (RT 253.) The court ordered Petitioner to see the jailhouse doctor regarding his Thorazine dosage. (RT 253-54; CT 123.) The court, however, refused to grant Petitioner a continuance in the trial:

> All through this proceeding, and even up to this morning [Petitioner] was always oriented to time, place and

[3] California Penal Code § 1368 requires a trial court to suspend criminal proceedings if it reasonably doubts a defendant's mental competence. *People v. Ary*, 51 Cal.4th 510, 517, 120 Cal.Rptr.3d 431, 246 P.3d 322 (2011).

> person. [¶] He knew what the time was. He knew where he was, and he knew who the parties were. This has always been the case including this morning. [¶] He has been responsive to the court's statements. In fact, he has argued with me a number of times as to my statements. He has always been responsive to the District Attorney's presentations and statements, and he doesn't appear to the court whatsoever to be in any physical discomfort at this time. [¶] However, I have signed the order for the doctor to see him. I don't know for what reason, but I have done that out of an abundance of caution, but I see no reason to grant this continuance.

(RT 257-58.)

The following day, Petitioner again asked for a continuance of the trial because he had not been seen by the doctor pursuant to the court's order. (RT 393-94.) The court denied the motion because Petitioner was "very coherent" and "responsive to everything that's been going on." (RT 394.) Later that same day, in denying a petition for writ of mandate filed by Petitioner, the court stated:

> All through proceedings today the defendant has been animated. He is conversing with his advisory attorney. He is listening to his advisory attorney. He appears to the court to have a knowledge of what is proceeding against him and of his right to cross-examination of all witnesses. . . .

(RT 408.)

2. *State Court Opinion*

In 2014, the Los Angeles County Superior Court denied Petitioner's claim in Ground One on collateral review, as follows:

> The Court of Appeal reviewed the trial record [on direct appeal], including the trial testimony and motions, and concluded that petitioner was able to perform the functions required of a defendant who exercises his Sixth Amendment right to represent himself. Petitioner consulted with the deputy public defender before deciding to represent himself, was provided advisory counsel throughout the trial proceedings, and was represented by an attorney on appeal. In his habeas petition, petitioner fails to support his claims, made two decades after the fact, that he was incompetent during the trial proceedings, other than his own assertions. Were this a genuine issue at the time, it is reasonable to expect that the deputy public defender counseling petitioner about whether to represent himself, or [have] counsel appointed to advise

> petitioner throughout the trial, would have raised this question before the trial court. Moreover, were this a genuine issue at the time, it is reasonable to expect that petitioner's appellate counsel would have raised the issue on appeal, particularly since the issue of self-representation was directly and vigorously challenged.

(Lodg. No. 2 at 4.)

In 2017, the superior court denied his claim in Ground Two, again finding that the record did not demonstrate that Petitioner was incompetent at the time of trial:

> Petitioner's claim he was incompetent to stand trial, at the time of trial, is without merit. As noted in the direct appeal, petitioner responded to testimony through cross-examination and made numerous motions related to discovery, bifurcation of priors, sufficiency of the evidence, and mistrial. Also, petitioner had advisory counsel throughout the proceedings, and presumably if there was an issue as to competency to stand trial, it would have been raised. Further given petitioner's performance at trial, there has been nothing demonstrated as to his failure to understand the nature of the proceedings, or that he was unable to assist in his own defense.

(Lodg. No. 9 at 2 (internal citations omitted).)

3. *Applicable Federal Law*

The Due Process Clause prohibits the criminal prosecution of a defendant who is not competent to stand trial. *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); *see also Indiana v. Edwards*, 554 U.S. 164, 170, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) ("[T]he Constitution does not permit trial of an individual who lacks 'mental competency'."). Federal courts have recognized two distinct aspects to competency claims: (1) a procedural due process claim challenging a court's failure to hold a competency hearing; and (2) a substantive due process claim asserting that the defendant was tried while actually incompetent. *See, e.g., Davis v. Woodford*, 384 F.3d 628, 644-47 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 603-10 (9th Cir. 2004).

A trial judge has an affirmative responsibility to conduct a competency hearing "whenever the evidence before the judge raises a bona fide doubt about the

defendant's competence to stand trial." *Williams*, 384 F.3d at 603. A "bona fide doubt" exists when "a reasonable judge . . . should have experienced doubt with respect to competency to stand trial." *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011); *see also Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009) (holding that a competency hearing is required only if "there is substantial evidence that the defendant may be mentally incompetent to stand trial") (citation and internal quotation marks omitted). The judge's responsibility to assess a defendant's competency continues throughout the trial. *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Although no particular fact signals a defendant's incompetence, "evidence 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," and "one of these factors standing alone may, in some circumstances, be sufficient." *Id*. at 180.

The test for incompetency is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam); *Clark v. Arnold*, 769 F.3d 711, 729 (9th Cir. 2014). A defendant may have a mental illness and still be able to understand the proceedings against him and assist in his defense. *See Bassett v. McCarthy*, 549 F.2d 616, 619 (9th Cir. 1977) (finding "mental infirmity" did not "necessarily imply that he did not understand the proceeding or could not cooperate with his counsel"); *see also Grant v. Brown*, 312 F.App'x 71, 73 (9th Cir. 2009) ("[M]ental illness does not necessarily equate to incompetence.") (unpublished). The issue is not whether the petitioner suffered from a mental illness per se, but whether the petitioner had the ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a

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rational as well as factual understanding of the proceedings against him.[4] *Eddmonds v. Peters*, 93 F.3d 1307, 1314 (7th Cir. 1996).

4. *Analysis of Procedural Due Process Claim*

A state trial court's finding that no competency hearing was required is a factual determination entitled to deference unless it is unreasonable within the meaning of § 2254(d)(2). *Mendez*, 556 F.3d at 771 (9th Cir. 2009). Having carefully reviewed the record, the Court concludes that the California Court of Appeal's finding that no competency hearing was required was a reasonable factual determination under § 2254(d)(2). Specifically, it was reasonable to find that the evidence before the trial judge did not raise a "bona fide doubt" about Petitioner's competency to stand trial.

Petitioner argues that his mental health records demonstrate that the trial court acted unreasonably in not ordering a competency evaluation of Petitioner during trial. In support, he offers a pre-plea probation report given to the trial judge that documented a 1984 arrest for robbery, during which the criminal proceedings were temporarily suspended because Petitioner was "mentally incompetent." (FAP, Exh. 10 at 78.) That incident, however, occurred nearly a decade before Petitioner's trial in this matter. *See Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981) ("[A]n old psychiatric report indicating incompetence in the past may lose its probative value by the passage of time and subsequent facts and circumstances that all point to present competence."). Moreover, the pre-plea report did not indicate any other mental health issues, noting only that he was on medication for seizures. (FAP, Exh. 10 at 80.)

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[4] Courts reviewing a defendant's competency at trial have considered the defendant's ability to communicate with counsel even when the defendant represented himself during the proceedings. *See, e.g., Muhammad v. McDonough*, No. 3:05-cv-62-J-32, 2008 WL 818812, at *2, 21 (M.D. Fla. Mar. 26, 2008) (applying both prongs of the *Dusky* standard for competence in evaluating the appeal of a defendant who had represented himself in the trial court).

He also points to the fact that he has been involuntarily medicated for schizophrenia while in prison since 2001. (*See* FAP, Exh. 6.) Again, however, the "bizarre behavior" described in these records occurred many years after Petitioner's trial. At most, the totality of his mental health records—from 1985 until 2015—demonstrates that he was likely suffering from mental illness at the time of his trial in 1993. "Evidence of mental illness does not, by itself, raise" a bona fide doubt about a defendant's competency to stand trial. *Triggs v. Chrones*, 346 F.App'x 173, 175 (9th Cir. 2009); *see also Nakhei v. Warden,* Case No. SACV 13-851 DSF (JC), 2015 WL 5818727, at *15 (C.D. Cal. Aug. 19, 2015) ("By itself, evidence that an accused suffers from a mental illness, such as bipolar disorder and schizophrenia (with paranoid delusions), does not generate a real, substantial and legitimate doubt as to the accused's competence."), *report and recommendation adopted by*, 2015 WL 5768378 (C.D. Cal. Sept. 30, 2015).

Importantly, what is generally lacking in support of Petitioner's claim is any contemporaneous evidence at the time of trial that he was unable to understand the proceedings against him or assist in his defense. *See United States v. Garza*, 751 F.3d 1130, 1136 (9th Cir. 2014) ("Even a mentally deranged defendant is out of luck if there is no indication that he failed to understand or assist in his criminal proceedings."). The record is devoid of any irrational behavior by Petitioner or displays of unusual demeanor at trial. Although Petitioner complained at one point that he felt "confused" and that the proceedings were "going too fast for him," the trial court reasonably could have attributed his comments to the difficulties faced by any *pro per* attempting to defend himself at trial against a murder charge, rather than substantial evidence of mental incompetence. *See Steinsvik v. Vinzant*, 640 F.2d 949, 952 (9th Cir. 1981) (holding that a defendant's statement that he was a "little confused" prior to the entry of his plea was not sufficient to raise a bona fide doubt about competency).

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Furthermore, though Petitioner was taking medication during the trial, Petitioner has not demonstrated that it materially impaired his ability to understand the nature of the proceedings against him or assist in the preparation of his defense. *See Contreras v. Rice*, 5 F.Supp.2d 854, 864-65 (C.D. Cal. 1998) ("[T]he mere fact that the petitioner was taking medications during his trial does not raise a bona fide doubt as to his competence to stand trial.") Here, the trial court was aware that Petitioner was taking anti-seizure medication and attempted—apparently unsuccessfully—to assist him in being seen by the jailhouse doctor to check his dosage level.[5] Nevertheless, on several occasions, the trial court stated that Petitioner's behavior at trial was responsive and coherent, and that he demonstrated no difficulty in understanding the court proceedings while on his medication. (*See* RT 241 ("[T]he court has seen no adverse reaction to Thorazine in his ability to defend himself.").) The totality of the record, including Petitioner's numerous filed motions and extensive cross-examination of witnesses, supports this finding.

In short, the record does not compel a finding that Petitioner had such a "history of pronounced irrational behavior" that required the trial court to order a competency hearing. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Nor does evidence of his mental illness alone constitute substantial evidence to raise a bona fide doubt of his competency. *See Boyde v. Brown*, 404 F.3d 1159, 1166 (9th Cir. 2005) (concluding that "major depression" and "paranoid

[5] Respondent contends that trial court's observations should not be relied on, in part, because Thorazine is generally prescribed as an anti-psychotic medication, not an anti-seizure medication. (Objections at 4.) Even if true, however, nothing in the record suggested that Petitioner was receiving the drug at the time of trial for purposes of controlling any psychotic behavior. The pre-plea report stated and both Petitioner and advisory counsel told the court that he took the medication for seizures. (*See* RT 233, 237-38; FAP, Exh. 10 at 80.) Petitioner also told the court that he did not want to be "off" the medication because then he would not be able to prepare a defense by himself. (RT 237.) Thus, there is no evidence that the court knew he was on anti-psychotic medication and no reason to discount the trial court's observations of Petitioner that he appeared mentally able to understand the proceedings.

delusions" do not necessarily raise a doubt regarding a defendant's competence); *Bassett*, 549 F.2d at 619 (finding no error from failure to hold competency hearing despite defendant's history of mental illness from early childhood and paranoid schizophrenia accompanied by delusions and hallucinations). Petitioner fails to identify any Supreme Court precedent mandating that the trial court hold a competency hearing under these circumstances. Because the state courts did not contravene or unreasonably apply clearly established federal law or unreasonably determine the facts in determining that there was not substantial evidence raising a bona fide doubt of incompetence, Petitioner's claim must be denied. *See* 28 U.S.C. § 2254(d)(1) & (2).

5. *Analysis of Substantive Due Process Claim*

Petitioner's related claim—that he was, in fact, incompetent at trial—is equally unavailing. A state court's finding of competency to stand trial is presumed correct if fairly supported by the record. *Deere v. Cullen*, 718 F.3d 1124, 1145 (9th Cir. 2013). A petitioner "must come forward with clear and convincing evidence to rebut the presumption." *Id*. Petitioner has not done so in this case.

In an attempt to show that he was incompetent at the time of trial, Petitioner relies on much of the same prison mental health records discussed previously, including a psychiatric evaluation several months after his conviction that found he suffered from "Psychosis, NOS with depression, probable schizoaffective disorder." (*See* FAP, Exhs. 3-5.) He has also submitted a 2016 declaration from his sister Tina Howse, stating that at the time of trial she noticed his medication was "affecting him" by making him "slower" and more difficult to understand. (FAP, Exh. 8.) What is lacking, however, is evidence that Petitioner failed to understand the proceedings, competently represent himself, or effectively consult with advisory counsel. In fact, the record contradicts any such claim.

Competence to stand trial requires only that the defendant have the "capacity to understand the nature and object of the proceedings against him, to consult with

counsel, and to assist in preparing his defense." *Drope*, 420 U.S. at 171. Throughout the proceedings, in which Petitioner chose to represent himself rather than rely on counsel, he filed motions, argued them before the court, and cross-examined the prosecution's witnesses. He also testified in his own defense and gave a closing statement attempting to convince the jury that he was not the driver in the fatal car accident. In addition, he successfully moved to have advisory counsel appointed to assist him in his defense. Petitioner routinely consulted with advisory counsel, and counsel never indicated any difficulty understanding Petitioner or suggested that Petitioner lacked the ability to present a defense with her assistance. Petitioner's actions of competently representing himself in consultation with advisory counsel demonstrated that he had a rational and factual understanding of the proceedings and could adequately assist in presenting a defense. *See Apelt v. Ryan*, 878 F.3d 800, 821 (9th Cir. 2017) (holding that, because defendant was "actively involved in his defense and the trial proceedings" and "his trial testimony revealed no traces of incompetence," the record did not support a finding that defendant was incompetent).

Finally, Petitioner's sister's claim, made more than 20 years after the trial, that the anti-seizure medication Petitioner was taking made him slower and more difficult to understand does not alter the outcome. Even if there were some side effects from the medication he was taking, Petitioner has not demonstrated that they substantially impaired his "capacity" to rationally understand the proceedings against him or to prepare his defense. *See Drope*, 420 U.S. at 171; *see also Williams v. Sisto*, 2011 WL 4337032, at *15 (C.D. Cal. Mar. 16, 2011) (finding petitioner failed to demonstrate that anti-psychotic medication rendered him incompetent despite feeling "somewhat dazed" and "fuzzy and cloudy" at times). Petitioner points to no incidents during trial that suggested he was incompetent. Nor has he offered sufficient evidence to overcome the trial court's observations that Petitioner was, at all times, coherent and responsive to the proceedings, appropriately engaged with his advisory

attorney, and knowledgeable about the circumstances he was facing.[6] *See Stanley*, 633 F.3d at 861 (finding trial judge's indication that Petitioner's "demeanor in the courtroom did not raise a doubt as to his competency" was entitled to deference unless it was unreasonable).

On this record, the state court's determination that there was not substantial evidence that Petitioner was incompetent was not "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Further, the state court's decision on habeas review rejecting Petitioner's claim was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

B. Ground Three: Improper Granting of *Faretta* Motion

In Ground Three, Petitioner claims that the trial court improperly granted Petitioner's *Faretta* motion to represent himself at trial. (FAP at 22-27.) He argues that he was not mentally competent to waive his right to counsel and that, while representing himself, he attempted to invoke his right to counsel several times during the proceedings. (FAP at 25-27.)

1. *Background*

Prior to the start of trial, Petitioner indicated he was unsure whether he wanted to represent himself or be represented by counsel. (RT 1.) At the court's behest, Petitioner spoke with an attorney from the public defender's office prior to making a decision, and thereafter elected to proceed *pro se*. (RT 1-2.) Petitioner told the court

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[6] Petitioner does offer a 2017 declaration from Dr. Nathan Lavid, a clinical and forensic psychologist, that Petitioner suffers from "severe and chronic mental illness." (Docket No. 66, Exh. 15.) That declaration, offered 24 years after Petitioner's trial, acknowledges, however, that he was only able to review mental health records in the years after his conviction and subsequent imprisonment. (*Id.* at p.2.) Thus, at best, he speculates that Petitioner's mental illness "might have made him incompetent to stand trial." (*Id.* at p. 7.) The Court does not find this to be persuasive evidence to undermine the trial court's observations and conclusions.

that he had represented himself twice before in criminal cases, both of which ended in plea bargains. (RT 7-8.) The court explained in detail that he would have to do all the things normally done by a lawyer, including filing motions, partaking in voir dire, and putting on evidence. (RT 8-9.) Petitioner told the court he understood this. (RT 9.) The court "urge[d him] to accept the services of an attorney" and warned that self-representation was "almost always unwise." (RT 9.) Petitioner said he understood this, but wished to proceed *pro per* and was doing so freely and voluntarily. (RT 9-11.)

Later in the proceedings, Petitioner asked for advisory counsel to be appointed. (RT 99-102, 106-07.) The following day, the court appointed advisory counsel to assist Petitioner. (RT 107, 112.) The court asked whether he wanted her "only" as advisory counsel or whether she should "take over the case and be counsel of record." (RT 107.) After Petitioner was granted time to speak to counsel, he told the court that he was electing to proceed *pro per* with counsel only in an advisory role. (RT 116-17.)

2. *State Court Opinion*

In denying Petitioner's claim on appeal, the California Court of Appeal noted the trial court's precautionary steps prior to allowing Petitioner to represent himself:

> The trial court warned [Petitioner] of the dangers and disadvantages of self-representation and inquired about his level of education. [Petitioner] replied he had a 10th grade education, had successfully represented himself twice before and negotiated his own plea bargains, understood the proceedings, and wished to represent himself. The trial court permitted [Petitioner] to consult with a public defender before making his decision.

(Lodg. No. 1 at 4.) The appellate court also detailed Petitioner's actions during the course of the trial, which supported his competence and desire to act as his own counsel:

> [Petitioner] was under medication to control seizures. Shortly before trial, the trial court granted [Petitioner's] request for advisory counsel, who assisted [Petitioner] throughout the trial. Before and during trial, [Petitioner]

> made a discovery motion, demurred, successfully moved to bifurcate trial of his prior convictions, successfully moved to appear before the jury without restraints, moved for a mistrial because the trial court removed all except the leg restraints, petitioned for a writ of mandate regarding the leg restraints, sought a mistrial based on lack of access to a law library, investigator, and other pro. per. privileges, sought dismissal based on discriminatory prosecution, during a motion to dismiss at the close of the prosecution's case successfully moved the trial court to find that he could be convicted at most of second degree murder because premeditation evidence was insufficient, cross-examined all prosecution witnesses, testified, and presented his defense.
>
> Throughout the case, the trial court repeatedly asked [Petitioner] if he wished to have counsel appointed, and [Petitioner] always refused. A few times, [Petitioner] and his advisory counsel said that events were happening too fast for him to respond, and that this may be caused by his seizure mediation. The trial court noted that [Petitioner] did not claim he did not understand things, and both the trial court and the prosecutor noted without objection that [Petitioner] always responded appropriately and immediately to questions, had no difficulty speaking or moving, and never exhibited confusion.

(Lodg. No. 1 at 4-5 (internal citations omitted).)

Finally, the California Court of Appeal rejected Petitioner's claim that his failure to subpoena corroborating witnesses demonstrated his lack of capacity to represent himself:

> The record demonstrates that the unsubpoenaed witnesses were inmates who may have been the other occupants of the Cadillac during the chase. During his testimony, [Petitioner] refused to name the other occupants because he feared he would be attacked as an informer if he did so, and also said he chose not to even subpoena them for the same reason. Moreover, [Petitioner] did not claim he did not understand the proceedings, only that they were going too fast for him. Because [Petitioner's] *Faretta* motion was timely, the trial court lacked discretion to deny it (*Faretta v. California, supra,* 422 U.S. 806; *People v. Bloom* (1989) 48 Cal.3d 1194, 1219-1220), especially in light of [Petitioner's] repeated refusals to relinquish self-representation. [Petitioner] was active throughout. There was no error.

(Lodg. No. 1 at 6.)

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3. *Federal Law and Analysis*

A criminal defendant has the right to waive the assistance of counsel and represent himself, provided that the waiver is timely, knowing, intelligent, voluntary, and unequivocal. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *see also Godinez v. Moran*, 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) ("[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted."). Before allowing a defendant to represent himself, the trial court must make sure that he is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Snook v. Wood*, 89 F.3d 605, 613 (9th Cir. 1996) (quoting *Faretta*, 422 U.S. at 835). While a trial judge may doubt the quality of representation that a defendant may provide for himself, the defendant must be allowed to exercise his right to self-representation so long as he "knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by [the] rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

The Court previously determined that there was insufficient evidence in the record to demonstrate that Petitioner was incompetent to stand trial. Petitioner points to no additional evidence suggesting that his waiver of the right to counsel was not knowing, intelligent, and voluntary due to his mental health issues. The record clearly indicates that the court conducted a thorough screening with Petitioner prior to allowing him to represent himself. This included having Petitioner speak to an attorney about the efficacy of self-representation prior to waiving his rights, a detailed recitation of the severity of the charges he was facing, and an explicit warning that self-representation was likely not in his best interests. Despite this, Petitioner unequivocally elected to waive his rights and proceed *pro per*. "If a 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." *United States v. Maness*, 566 F.3d 894, 896 (9th Cir. 2009).

Nevertheless, Petitioner argues that the trial court failed to properly consider the effects of his medication and his request to see a doctor in finding that he had the ability to represent himself. The Supreme Court, however, has never adopted a bright-line test for determining when a criminal defendant lacks sufficient mental capability to conduct his own defense. Rather, the Supreme Court has stated that the "Constitution permits judges to take realistic account of the particular defendant's mental capacities" in making such determinations. *Edwards*, 554 U.S. at 177-78 ("[T]he trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."). In the instant case, the court was cognizant of Petitioner's use of Thorazine to control his seizures, as well as his requests to see a doctor regarding his dosage levels while in jail, when it conducted its inquiry and determined that Petitioner was capable of representing himself. Nothing in the record shows that the trial court erred in its assessment that Petitioner had the mental capacity to knowingly and voluntarily waive his right to representation. *See, e.g., Wolfe v. Cate*, No. 2:02-cv-01958 KS, 2011 WL 202463, at *10 (E.D. Cal. Jan. 20, 2011) (rejecting *Faretta* violation due to mental incapacity where the "trial court was informed of [defendant's] use of medications and conducted a thorough inquiry to ensure that [defendant] was capable of representing himself").

Petitioner also argues that he revoked his *Faretta* waiver when, in response to the court's question of whether he wanted a "lawyer to run the show," he answered, "Sure. Why not? Why not?" (*See* RT 101.) But, an examination of the record makes clear that the discussion between Petitioner and the court concerned the appointment of advisory counsel and not a relinquishment of his right to represent himself at trial. (*See* RT 102 ("This is as to advisory counsel requested by the defendant.").) Similarly, after the appointment of advisory counsel, Petitioner waffled on whether

he wanted her to remain as advisory counsel or step in as counsel of record. (RT 106-14.) After Petitioner was given time to discuss the matter with counsel, he made clear that he would remain *pro per*, unequivocally stating that she was to remain as advisory counsel "only." (RT 116-17.) Thus, there is no factual basis for the claim that Petitioner attempted to withdraw his *Faretta* waiver during trial.

In sum, Petitioner has not demonstrated that the state court's rejection of this claim was contrary to or an unreasonable application of clearly established Supreme Court law.

C. Ground Four: Visible Restraints at Trial

In Ground Four, Petitioner contends that he was unconstitutionally restrained at trial. (FAP at 27-34.) He argues that the trial court failed to determine whether the leg shackles he was forced to wear during trial were visible to members of the jury and whether the restraints were actually justified by an essential state interest. (FAP at 31-33.) He claims that the use of the restraints violated his rights to due process and a fair trial, as well as abridged his right to self-representation. (FAP at 33.)

1. *Background*

Prior to the start of Petitioner's trial, the prosecutor informed the court that Petitioner had a "pending escape charge" in a separate case from a different courthouse where he was also proceeding *pro per*. (RT 46.) Thereafter, following the prosecutor's opening statement, Petitioner filed a motion to appear without physical restraint. (RT 98.) The following exchange took place:

> Court: You are not physically restrained now, are you?
>
> [Petitioner]: Yes.
>
> Court: Where?
>
> Bailiff: He has leg chains at the moment.
>
> Court: Is there a need—the leg chains, I wasn't able to see them. Therefore, I feel comfortable in believing the jury didn't see those. They have always been underneath

> the counsel table and that the defendant has not arose before the jury. [¶] Is there any need for those leg chains while we are in trial?
>
> Bailiff: Yes, your honor. [Petitioner] was an escaped prisoner in Santa Anita Court.
>
> Court: They did file that new case against him, for which they are transferring from—to our court very shortly. That case number is VA018228 for which the defendant has been charged with the crime of escape. Thank you. [¶] Well, let's just—I am going to limit that to the leg chains so long as they are discrete and they won't be observed by the jury members. [¶] What we will do is bring the microphone closer to the defendant so that he may use the microphone. If there is a need for him to stand and see the exhibits, I am going to ask that we remove the leg chains for that moment; okay, during that period of the court's session. [¶] We will do that as it is needed and that will be the order as to the defendant's motion regards to restraints.

(RT 98-99; *see also* CT 109.)

Shortly thereafter, the court inquired about the status of the escape charge in the separate filing. (RT 102.) The prosecutor gave the court the file, which indicated that the case had been transferred to that courtroom for arraignment and plea. (RT 102-03.) Later, during trial, Petitioner renewed his motion to appear without restraints. (RT 230-31.) The trial court denied the motion, stating that "discrete shackles" were permitted because "there are escape charges filed against the defendant." (RT 231.)

The next day, Petitioner moved for a mistrial on several grounds, including appearing with restraints. (RT 232-33.) He argued that "[a]t least four jurors" had seen him wearing the leg chains. (RT 239-40.) The court denied the motion, again finding the restraints were necessary "because on or about March the 19th, 1993, while he was in custody on these proceedings, there was an attempt to escape on his part whereby he was—that attempted escape was filed by law enforcement." (RT 250.) The court also confirmed that Petitioner had been "held to answer" and an information was being filed by the district attorney's office. (RT 250-52.)

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After denying Petitioner's motion, the court asked whether he wanted the jury admonished regarding his leg restraints, though the court was "sure the jury ha[d] not seen them." (RT 254-55, 364.) The court elaborated that on "every occasion [Petitioner] is seated before the jury enters the courtroom, and during the course of the few days he has been here with the jury, his foot area has been covered by a large cellophane sheeting, and that the jury is not enabled to see the leg restraints." (RT 364.) Petitioner declined the court's offer to admonish the jury regarding the leg restraints. (RT 364-65.)

Several arrangements were made to prevent the jury from seeing the leg restraints during the course of the trial. Petitioner's advisory counsel was permitted to approach the bench to argue objections raised by Petitioner. (RT 429-31.) The leg restraints were covered by cellophane so that they were not visible to the jurors. (RT 557.) When he took the stand to testify, he did so out of the presence of the jury and the trial court confirmed that the restraints were not visible to the jurors before bringing them back to their seats. (RT 557-59.) Before the start of the prosecutor's closing argument, the court noted that Petitioner's leg restraints were concealed, as they had been "throughout the course of the trial." (RT 625.) Precautions were also taken to hide the restraints prior to Petitioner giving his closing argument. (RT 650.)

In 2016, more than 20 years after the trial, Tina Howse, Petitioner's sister, submitted a declaration stating that she had been present at Petitioner's trial in 1993 and was able to see and hear his shackles from the audience seats. (FAP, Exh. 8.) She avers that the jury must have known Petitioner was wearing shackles because he did not "move around freely" in the courtroom like the prosecutor. (FAP, Exh. 8.) Additionally, Petitioner has submitted photographs taken in 2016 from the courtroom where Petitioner was tried suggesting that Petitioner's feet were visible to jurors sitting in the elevated jury box. (FAP, Exh. 9.)

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2. *State Court Opinion*

In denying Petitioner's claim of constitutional error on direct appeal, the California Court of Appeal recounted the relevant facts:

> [Petitioner] attempted to escape during municipal court proceedings in this case. Escape charges were filed and eventually the case was brought to the trial court where it trailed this case. Because of these facts, the trial court refused to release [Petitioner] from his leg restraints. However, the trial court had [Petitioner's] feet covered while he was at counsel table and on the witness stand, and he was not moved when the jury was present. The trial court told [Petitioner] it would consider removal of the restraints at particular sessions if [Petitioner] needed to move about to examine exhibits or witnesses. [Petitioner] never made such a request. The trial court told [Petitioner] it would admonish the jury to ignore the restraints if [Petitioner] so desired, but [Petitioner] rejected the offer. . . . There is no evidence in the record that any juror saw the restraints.

(Lodg. No. 1 at 6-7.) The state appellate court rejected Petitioner's claim that the trial court abused its discretion in requiring the restraints while in the courtroom:

> The trial court restrained [Petitioner] because he had attempted to escape during earlier proceedings in this case. That attempt resulted in the filing of formal charges. The trial court initiated extensive and successful efforts to minimize the restraints and assure the jury remained unaware of them. There was no error.

(Lodg. No. 1 at 7.)

When Petitioner raised this claim again—this time with additional evidence including photographs of the courtroom and the declaration of Petitioner's sister—the Los Angeles County Superior Court also found no constitutional error:

> [T]his claim was raised in a previous proceeding and soundly rejected by the Court of Appeal. The Court of Appeal determined there was no manifest abuse of discretion given [P]etitioner's attempt to escape in a previous proceeding related to this case. Further, [P]etitioner never made a request to remove the restraints when the court offered to consider removal for specific exhibits or witnesses, and likewise rejected the court's offer to admonish the jury. Photographs and a declaration offered two decades later does not persuade this court of any constitutional malady.

(Lodg. No. 9 at 2 (internal citation omitted).[7])

3. *Federal Law and Analysis*

A criminal defendant has a constitutional right to appear before a jury free of visible restraints "absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 626-29, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). Thus, courts cannot routinely place defendants in shackles or other physical restraints visible to the jury without particular concerns such as special security needs or escape risks related to the defendant on trial. *Id.* at 628.

To succeed on a claim that shackling violated a defendant's constitutional rights, a petitioner must establish that (1) he was "physically restrained in the presence of the jury"; (2) "that the shackling was seen by the jury"; (3) "that the physical restraint was not justified by state interests"; and (4) that "he suffered prejudice as a result." *Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002).

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[7] Respondent contends that the Los Angeles County Superior Court's 2017 order is the relevant decision for this Court's consideration on habeas review. (Traverse at 28.) Respondent is correct that this is the last "reasoned" decision by the state court. Because the superior court decision incorporated the California Court of Appeal's reasoning in denying the claim, however, this Court may consider both decisions to determine whether the denial of the claim was contrary to, or an unreasonable application of, controlling Supreme Court law. *See Amado v. Gonzalez,* 758 F.3d 1119, 1130 (9th Cir. 2014) (stating that where lower state court decision agrees with state appellate court decision, and appellate court adopts or substantially incorporates a lower state court decision, federal habeas court may review lower state court decisions as part of review); *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) ("Although AEDPA generally requires federal courts to review one state decision, if the last reasoned decision adopts or substantially incorporates the reasoning from a previous state court decision, we may consider both decisions to fully ascertain the reasoning of the last decision.") (internal quotations and citation omitted); *see also Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003) ("Because [the appellate court's] decision affirmed the trial court and adopted one of the reasons cited by the trial court, however, our analysis will necessarily include discussion of the trial court's decision as well.").

Prejudice is particularly likely when at least one juror sees a defendant's shackles during the trial from the jury box. *Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir. 2003). However, "a jury's brief or inadvertent glimpse of a defendant in physical restraints is not inherently or presumptively prejudicial to a defendant." *United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995). Rather, improper in-court shackling only requires reversal if there was a substantial and injurious effect on the jury's determination of guilt. *Duckett v. Godinez,* 67 F.3d 734, 749 (9th Cir. 1995).

Here, the first criterion was met because the record clearly shows Petitioner was shackled with leg chains throughout the entirety of the trial. He has not, however, met his burden of demonstrating the second criterion—that the physical restraints were seen by the jury. The California Court of Appeal found there was "no evidence in the record that any juror saw the restraints." (Lodg. No. 1 at 7.) Petitioner has not rebutted this finding with clear and convincing evidence. *See United States v. Mejia*, 559 F.3d 1113, 1117-18 (9th Cir. 2009) ("[W]e accept as fact the district court's finding that the jury could not see Mejia's shackles."). The trial judge, who himself was initially unaware that Petitioner had been appearing in court with restraints, made numerous findings that Petitioner's leg chains were concealed from the jury's view throughout the course of the trial. (*See* RT 98, 364, 557-59, 625.) Although Petitioner complained to the court—in an effort to get a mistrial—that several of the jurors had seen his leg chains (RT 239-40), his unsupported claim is insufficient to overcome the state court's determination that the shackles were not visible to the jury.[8] *See, e.g., Ballard v. Small*, No. 09-CV-957-IEG (CAB), 2010

[8] Petitioner argues pursuant to *Dyas*, 317 F.3d at 936-37, that the trial court's conclusion that the restraints were not visible is not reliable because he merely presumed that the jurors could not see the restraints and failed "to question the jurors about [Petitioner's] restraints" in a hearing. (*See* FAP at 31; Traverse at 29-31.) As noted previously, however, the trial court made several detailed inquiries with the bailiff to verify that the leg chains could not be seen by the jurors. (RT 98-99, 557-59.) Thus, in this instance, the trial court did not simply presume the restraints were not visible. Moreover, Petitioner has not pointed to any Supreme Court law which

WL 2721281, at *6 & n.6 (S.D. Cal. Jul. 6, 2010) (finding defendant's declaration was "insufficient by itself to contradict by clear and convincing evidence the state court's determination that the shackles were not visible to the jury").

Petitioner's attempts to supplement the record more than 20 years later do not alter the Court's conclusion. Tina Howse's declaration states only that she could see Petitioner's shackles from where she was seated—presumably in the audience—and not from the jury box, where the jurors were seated. Further, the record made clear that the trial court seated Petitioner at counsel's table and on the witness stand out of the presence of the jury to limit the possibility that the jury would inadvertently see Petitioner's restraints. Similarly, the photographs implying that Petitioner's feet were visible to jurors sitting in the elevated jury box do not account for the fact that Petitioner's feet were concealed during trial with cellophane sheeting to hide them from view.[9] *See Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir. 1999) (finding no constitutional error where defendant was only shackled with ankle chains during trial and shackles were behind curtain or skirt placed around the defense table to ensure that they were not visible to the jury).

Moreover, regarding the third criterion, the record establishes that the physical restraints used in this case were justified by state interests. Here, Petitioner was charged with attempting to escape "while he was in custody on these proceedings." (RT 250.) Further, the court confirmed that the attempted escape charge had been filed by law enforcement, that Petitioner had been "held to answer," and an

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requires the trial court to hold a hearing and question the jurors in making such a determination.

[9] Although Petitioner suggests that this was inadequate because "cellophane is ordinarily a transparent material" (FAP at 31), at no time during the trial did Petitioner complain that the jurors could see his restraints through the sheeting. Nor has Petitioner offered any evidence that the cellophane in this case failed to obscure the view of the leg chains.

information was being filed by the district attorney's office. (RT 250-52.) Based on the legal filings alone, the trial court had probable cause to believe the escape allegation.[10] The essential state interest in preventing Petitioner from escaping justified use of the restraints. *See Crittenden v. Ayers*, 624 F.3d 943, 971 (9th Cir. 2010) ("[Defendant] fail[ed] to rebut by clear and convincing evidence the trial court's finding on the record that the restraints were justified by a state interest specific to [his] trial, namely his likelihood of escape . . . ."); *Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989) ("Shackling is proper where there is a serious threat of escape or danger to those in and around the courtroom, or where disruption in the courtroom is likely if the defendant is not restrained.").[11]

Finally, as to the fourth criterion, even if the jury caught a brief or inadvertent glimpse of Petitioner's restraints or simply deduced that he was being restrained from his lack of movement around the courtroom, Petitioner has failed to demonstrate prejudice. In this instance, the trial court took numerous steps to minimize the chances that the jury would be able to see Petitioner's restraints. Furthermore, this was not the type of case in which the jury would have been concerned about the potential for violent conduct by Petitioner. Also, the evidence against Petitioner was

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[10] Petitioner argues that the trial court improperly relied on the bailiff's representations in concluding that the restraints were justified. (FAP at 32-33.) Even were this so, it would not justify habeas relief. *See Hedlund v. Ryan*, 854 F.3d 557, 569 (9th Cir. 2017) ("While the trial court based its conclusion regarding the escape plot on information provided by jail personnel, the trial court's reliance on this testimony was not contrary to, or an unreasonable application of, clearly established federal law."). In any event, the record is clear that the trial court did not solely rely on the bailiff's representations in making his conclusion.

[11] Petitioner asserts that the trial court should have considered "less restrictive alternatives" to shackling Petitioner for the trial. (FAP at 32.) There is, however, no clearly established Supreme Court authority requiring that the trial court do so. *See Crittenden*, 624 F.3d at 971 & n.19 (rejecting contention that trial court had to pursue less restrictive alternatives to shackling because established Supreme Court law "did not require such procedures").

quite strong, as multiple police officers testified that Petitioner was driving the car at the time of the fatal crash. (RT 130-31, 202, 278, 342, 437-38.) Under these circumstances, Petitioner has not shown that any accidental viewing of Petitioner's restraints prejudiced the outcome of his case. *See Walker v. Martel*, 709 F.3d 925, 942-43 (9th Cir. 2013) (finding that, despite jury's "awareness" of defendant's leg restraint, he suffered no prejudice because the shackle was unobtrusive, did not suggest a "proclivity for violence," and the evidence against the defendant was "robust"); *see also Wilson v. McCarthy,* 770 F.2d 1482, 1485-86 (9th Cir. 1985) (finding the jury's brief viewing of defendant's shackles as he left the witness stand at the conclusion of his testimony was not prejudicial).

For these reasons, the Court finds that the California courts' rejection of this claim was not contrary to or an unreasonable application of clearly established Supreme Court law. Nor was it based on an objectively unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Accordingly, this claim must be denied.

D. Ground Five: Forced to Wear Jailhouse Attire

In Ground Five, Petitioner claims that his constitutional rights were violated when "he was forced to appear and represent himself in jailhouse clothing in front of the jury." (FAP at 34.)

1. *Background*

On May 11, 1993, at the start of voir dire, Petitioner, who was representing himself, was introduced to the jury while dressed in jail-issued clothing. (RT 57 ("wearing the blue top").) After the potential jurors were released for the day, Petitioner told the court his legal runner was having "no success" in bringing him civilian clothing to wear at trial. (RT 77-78.) The trial court continued the case until the following day and granted Petitioner three telephones calls to contact his legal runner. (RT 78 (stating he would "put it in the remanding order").)

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The following day, on May 12, 1993, Petitioner again appeared for voir dire dressed in jailhouse attire, but did not raise any issue regarding civilian clothing. (RT 80.) The jury was selected, and the prosecutor gave an opening statement. (RT 89-97.) After the jury was dismissed for the evening, Petitioner raised the issue about his physical restraints, but never objected to the fact that he was wearing jail attire. (*See* RT 97-105.)

On May 13, 1993, Petitioner appeared and requested that advisory counsel be appointed, which the court did. (RT 106-16.) Thereafter, Petitioner elected to reserve his opening statement, and several witnesses testified, all while Petitioner was in his jail-issued clothes. (*See* RT 131 (identifying Petitioner with his "blue L.A. County jumpsuit on"). Again, Petitioner did not object to the fact that he was not wearing civilian clothing.

The trial resumed on May 17, 1993, and Petitioner filed a mistrial motion, arguing, among other things, that he had not been "provided citizen clothing." (RT 232-33.) The prosecutor opposed the motion, stating that the court had "asked defendant what he wanted to do about civilian clothes" and that Petitioner had "continued to go forward and indicate to this court that he is ready, willing and able to go forward with his trial based on the way he is dressed." (RT 242.) The court agreed that Petitioner had been given numerous opportunities to acquire civilian clothing, but he chose to proceed with the trial without them:

> He wants civilian clothing now, for which we have given him the opportunity numerous times to acquire, and the response is always he will take care of it. Does he want civilian clothing? Perhaps he can call his wife who he hasn't seen in a long while to bring him the clothing.

(RT 247-48.) The court denied the motion, finding that Petitioner "has put himself in the position he is in now on his own volition, this court having offered him the – and asked him and inquired of him about the civilian clothing, and his wish to go forward with trial." The court did, however, permit Petitioner to "call his family to bring him clothing." (RT 250.) Petitioner apparently did not avail himself of the

opportunity, telling the court it would "be totally impossible" for them to get him clothing today. (RT 251.) The court informed Petitioner that he intended to admonish the jury that Petitioner's attire "play no part in their deliberations" unless he objected. (RT 255.) Without hearing anything further from Petitioner, the court admonished the jury not to draw an adverse inference based on Petitioner's clothing. (RT 273.)

In 2016, Tina Howse, Petitioner's sister, filed a declaration that she had been Petitioner's "legal runner" and that "the jail would not let me give my brother the clothes" to wear at trial, despite the court's order. (FAP, Exh. 8.)

2. *State Court Opinion*

In 2017, on collateral review, the Los Angeles County Superior Court denied the claim, in part, because the "claim was not raised on appeal and is therefore unavailable for review," citing *In re Harris*, 5 Cal.4th 813, 825 (1993) and *In re Dixon*, 41Cal.2d 756, 759 (1953). (Lodg. No. 9 at 2.) The superior court also rejected the claim on its merits, finding that Petitioner "had an opportunity to obtain civilian clothes at the start of trial, proceeded to trial anyway, and then after the trial commenced, requested a mistrial based on the fact he was not provided with civilian clothes." (Lodg. No. 9 at 2-3.)

3. *Procedural Default*

Under the procedural default doctrine, "[a] federal habeas court will not review a claim rejected by a state court if the decision . . . rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315, 131 S.Ct. 1120, 179 L.Ed.2d 62 (2011) (internal quotations omitted). A state procedural rule is considered to be an "independent" bar if it is not interwoven with federal law. *Cooper v. Neven*, 641 F.3d 322, 332 (9th Cir. 2011). In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991) (internal quotations

omitted). Nevertheless, "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez v. Ryan*, 566 U.S. 1, 10, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *see also Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (holding that a federal habeas court may consider a procedurally barred claim if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice").

Here, the Los Angeles County Superior Court rejected Petitioner's claim in Ground Five, in part, because he failed to raise it on direct appeal, citing *In re Harris*, 5 Cal.4th 813, 825 (1993) and *In re Dixon*, 41 Cal.2d 756, 759 (1953). (Lodg. No. 9 at 2.) Respondent argues that California's *Dixon* rule (i.e., that courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal) constitutes an independent an adequate to bar federal habeas review. (Answer at 8-12.)

In *Johnson v. Lee*, the Supreme Court recognized that the procedural rule announced by the California Supreme Court in *Dixon* is an adequate and independent state procedural basis sufficient to bar a claim from federal habeas review under the procedural default doctrine. __ U.S. __, 136 S.Ct. 1802, 1806, 195 L.Ed.2d 92 (2016); *see also Linares v. California*, Case No. SACV 16-0835-AG (JEM), 2017 WL 2494659, at *3 (C.D. Cal. Feb. 14, 2017), *report and recommendation adopted by*, 2017 WL 2495179 (C.D. Cal. May 19, 2017); *Randel v. Keeton*, Case No. 14-CV-05478-JST (JR), 2016 WL 3916317, at *11 n.11 (N.D. Cal. Jul. 20, 2016).

Nevertheless, Petitioner argues that the claim is not defaulted because counsel was ineffective in failing to raise this "meritorious record-based claim[] on direct appeal." (Traverse at 12.) Appellate counsel's failure to preserve an issue for appeal can establish cause to excuse a procedural default if the failure was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451, 120

S.Ct. 1587, 146 L.Ed.2d 518 (2000); *see also Martinez v. Ryan*, 566 U.S. 1, 11, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) ("[A]n attorney's errors during an appeal on direct review may provide cause to excuse procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims.").

The Court need not decide this issue, however, because the Court is empowered to bypass a procedural default issue in the interests of judicial economy when the procedural default issue is complex and the claim clearly fails on the merits. *See Flournoy v. Small*, 681 F.3d 1000, 1004 n.1 (9th Cir. 2012) ("While we ordinarily resolve the issue of procedural bar prior to any consideration of the merits on habeas review, we are not required to do so when a petition clearly fails on the merits."); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("[C]ourts are empowered to, and in some cases should, reach the merits of habeas petitions if they are . . . clearly not meritorious despite an asserted procedural bar."); *see also Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (noting that, in the interest of judicial economy, courts may resolve easier matters where complicated procedural default issues exist). Accordingly, for the sake of judicial efficiency, the Court will proceed to address the merits of Petitioner's claim in Ground Five.[12]

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[12] Because the Los Angeles County Superior Court alternatively rejected this claim on its merits in a reasoned decision, AEDPA deference applies. *See Apelt*, 878 F.3d at 825 ("[W]hen a state court 'double-barrels' its decision—holding that a claim was procedurally barred and denying the claim on its merits—both its procedural default ruling and its merits ruling are entitled to deferential review by federal courts, as intended by AEDPA."); *Clabourne v. Ryan*, 745 F.3d 362, 383 (9th Cir. 2014) (holding that where state court simultaneously rejected claim on procedural ground and on the merits, AEDPA deference applies to "alternative holding on the merits"), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc).

4. *Federal Law and Analysis*

A defendant "may not be compelled" to wear "identifiable prison clothes." *United States v. Rogers*, 769 F.2d 1418, 1420 (9th Cir. 1985) (citing *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). To establish a constitutional violation, a petitioner must establish "that the appearance in jail clothing was involuntary, that a juror would recognize the clothing as issued by a jail, and that the error was not harmless." *See Jeffers v. Ricketts*, 832 F.2d 476, 481 (9th Cir. 1987) (internal citations omitted), *rev'd on other grounds*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). "[T]he failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Estelle v. Williams*, 425 U.S. at 512-13.

Here, the state court denied Petitioner's claim, finding that Petitioner was not compelled to wear prison attire because he had been given the "opportunity to obtain civilian clothes at the start of trial," but voluntarily "proceeded to trial" without them. (Lodg. No. 9 at 2-3.) This is a reasonable conclusion based on the record. On the first day of voir dire, Petitioner appeared in front of potential jurors in his jail garb. Although he complained that he was having "no success" getting civilian clothing, he never objected to the trial proceedings, and the court granted him additional phone calls to obtain the clothing from his legal runner. Petitioner appeared the following day, again in jail garb and again without objecting to the trial commencing with opening statements and testimony from witnesses. Only on May 17, 1993, Petitioner actually did object—by requesting a mistrial because the court had not "provided" clothing. Even after denying the motion, the trial court offered to let Petitioner phone his family to bring him clothes, but Petitioner declined. Under these circumstances, the Court cannot conclude that Petitioner was compelled by the court to wear prison clothing during his trial. *See, e.g., Spencer v. Castro*, No. 2:05-cv-2456 GEB KJN P, 2010 WL 3186772, at *17-18 (E.D. Cal. Aug. 9, 2010) (finding no compulsion

where defendant was "given the option" of "wearing civilian clothing on several occasions," but refused), *report and recommendation adopted by*, 2011 WL 13134274 (E.D. Cal. Jan. 18, 2011); *see also Black v. Miller*, No. CV 12-10875-PSG (E), 2013 WL 6002896, at *20 (C.D. Cal. Nov. 6, 2013) (finding no compulsion where petitioner never made a "timely objection to appearing at trial in jail clothing").

Furthermore, Petitioner cannot obtain habeas relief on this claim because he is unable to show that his wearing of jail-issued clothing "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks and citation omitted); *see also Villafuerte v. Stewart*, 111 F.3d 616, 628 (9th Cir. 1997) (applying *Brecht* to claim that defendant was compelled to wear prison clothing on habeas review). Here, the trial court explicitly told the jury that "[t]he clothing of the defendant should have no bearing whatsoever in your verdict." (RT 273.) The Court presumes the jury heeded this admonishment. *See Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("A jury is presumed to follow its instructions.").

Moreover, while testifying in his own defense, Petitioner told the jury of the difficulties he was having trying to represent himself while in jail for the past four and a half months. (RT 568-75.) He testified that the other people in the Cadillac had been released from jail, but they "didn't let [him] go." (RT 571-72.) He also told the jury that he had been charged in a separate case for attempting to escape from custody following his arrest in this matter. (RT 580-81.) Thus, based on his own admissions, the jury was acutely aware of his custody status regardless of the clothing he wore at trial. *See Villafuerte*, 111 F.3d at 628 (finding no prejudice under *Brecht* from wearing prison garb at trial where defendant "volunteered . . . that he had been in jail for five months"). Accordingly, the Court finds no prejudice from Petitioner's attire at trial.

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Because the Court finds that the California courts' rejection of this claim was not contrary to or an unreasonable application of clearly established Supreme Court law, Petitioner is not entitled to habeas relief.

E. Ground Six: Marsy's Law is Unconstitutional

In Ground Six, Petitioner claims that the enactment and application of Proposition 9, commonly known as Marsy's Law, violates his rights under the Ex Post Facto Clause of the Constitution. (FAP at 37-40.) He argues that, because Marsy's Law increases the time between parole hearings, the retroactive application of its provisions significantly increases the risk of a longer sentence for him and, as such, is unconstitutional. (FAP at 39-40.)

In 2008, California voters approved Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law," which modified the availability and frequency of parole hearings for convicted prisoners. *See* Cal. Penal Code § 3041.5(b)-(d). Specifically, Proposition 9 provides that the parole board will hear a prisoner's case every 15 years, unless it opts to schedule the next hearing in three, five, seven or ten years. Cal. Penal Code § 3041.5(b). The most significant changes are that the minimum deferral period is increased from one year to three years, the maximum deferral period is increased from five years to 15 years, and the default deferral period is changed from one year to 15 years. *See Gilman v. Schwarzenegger*, 638 F.3d 1101, 1104-05 (9th Cir. 2011). Nevertheless, Marsy's Law also amended the law governing parole deferral periods by authorizing that hearings in advance of this schedule can be held at the parole board's discretion or at the request of a prisoner, although the inmate is limited to one such request every three years. *Id.* at 1105.

On collateral review, the Los Angeles County Superior Court rejected Petitioner's claim that the application of Marsy's Law, which was enacted 15 years after he was convicted at trial, violated the Ex Post Facto Clause. (Lodg. No. 2.) The superior court found no evidence that there was a "significant risk" that Marsy's Law

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would result in a longer period of incarceration, noting that Petitioner had waived his most recent parole suitability hearing in 2010. (Lodg. No. 2 at 4-5.)

In general, the Ex Post Facto Clause forbids applying retroactively legislation that "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). To date, however, the Ninth Circuit has rejected all ex post facto challenges to the constitutionality of Marsy's Law. *See Gilman v. Brown*, 814 F.3d 1007, 1016-21 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 650 (2017); *see also Borstad v. Hartley*, 668 F. App'x 696, 697 (9th Cir. 2016) (finding that challenges to Marsy's Law do not go to the "validity of any confinement or . . . the particulars affecting its duration, but rather only the timing of each petitioner's next parole hearing," and therefore district courts lacked habeas jurisdiction to consider challenges) (internal citation omitted). Petitioner fails to identify any Supreme Court precedent that suggests a different result. In fact, Petitioner concedes that Ninth Circuit authority precludes relief and simply raises the claim "in the event that the Supreme Court overturns" these cases. (FAP at 40.) As such, Petitioner has not demonstrated that the state court unreasonably rejected this claim under the law, and it must be denied.

F. Ground Seven: Improper Jury Instructions

In Ground Seven, Petitioner claims that the jury instructions diluted the prosecution's burden of proof and negated the presumption of innocence in violation of his right to due process. (FAP at 40.) He contends that CALJIC Nos. 2.01 and 2.02 allowed the jury to convict him if the jury found the prosecution's theory of guilt to be reasonable and the defense theory unreasonable, even if it were true. (FAP at 43.)

1. *Background*

After the close of evidence and without objection, the trial court instructed the jury with CALJIC Nos. 2.01 and 2.02 regarding the sufficiency of circumstantial evidence generally and to prove the necessary mental state.

As given, CALJIC No. 2.01stated:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence [as to any particular count] is susceptible to two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to [his] guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 139-40.)

CALJIC No. 2.02 instructed, as follows:

> The [specific intent] [or] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged [in Count[s] One and Two] unless the proved circumstances are not only (10 consistent with the theory that the defendant had the required [specific intent] [or] [mental state] but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to [any] such [specific intent] [or] [mental state] is susceptible of two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to the absence of the [specific intent] [or] [mental state], you must adopt that interpretation which points to the absence of the [specific intent] [or] [mental state]. If, on the other hand, one interpretation of the evidence as to such [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 141-42.)

2. *State Court Opinion*

On direct appeal, the California Court of Appeal rejected Petitioner's claim that instructing the jury with CALIC Nos. 2.01 and 2.02 violated his constitutional rights:

> [Petitioner] now claims the instructions are erroneous because that portion of them which instructs the jury to reject an unreasonable, and accept a reasonable, interpretation of circumstantial evidence might compel the jury to reject an unreasonable but true interpretation, thus lessening the prosecution's burden of proof.
>
> We disagree. Here, the prosecution was proceeding on an implied malice theory, and there was no direct evidence of [Petitioner's] mental state, which had to be inferred from circumstantial evidence. In such a case, it would be error to fail to give CALJIC Nos. 2.01 and 2.02. Moreover, this record demonstrates no interpretation of evidence which could possibly be considered unreasonable and, at the same time, true. There was no error.

(Lodg. No. 1 at 10 (internal citation omitted) (emphasis in original).)

3. *Federal Law and Analysis*

A claim of instructional error does not warrant federal habeas relief unless the error "so infected the entire trial that the resulting conviction violates due process[.]" *Waddington v. Sarausad*, 555 U.S. 179, 191, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009) (citation and internal quotation marks omitted). The reviewing court must not view the challenged instruction in isolation, but should consider it in the context of the instructions as a whole and the trial record. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). To obtain relief, a habeas petitioner must show that there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (per curiam) (internal quotations omitted); *see also Waddington*, 555 U.S. at 191 ("[I]t is not enough that there is some slight possibility that the jury misapplied the instruction.") (internal quotations

omitted). Even if a constitutional error occurred, federal habeas relief is unavailable unless the error caused prejudice, i.e., the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 623.

Here, Petitioner suggests that the two instructions—CALJIC Nos. 2.01 and 2.02—lowered the prosecution's burden of proof because the jurors were only required to decide that the prosecution's theory was more reasonable than the defense theory to find Petitioner guilty. But this argument fails to account for the instructions as a whole, which specifically required a finding that Petitioner be found guilty beyond a reasonable doubt. (CT 155 (CALJIC No. 2.90).) "A jury is presumed to follow its instructions." *Weeks*, 528 U.S. at 234. There is no reason to think otherwise in this matter.

Moreover, Petitioner fails to cite any legal precedent suggesting that either instruction violates constitutional norms. In fact, both instructions routinely have been upheld against any such challenges. *See, e.g., Carpenter v. Chappell,* No. C 98-2444 MMC, 2014 WL 1319260, at *23 (N.D. Cal. Apr. 1, 2014) (finding CALJIC Nos. 2.01 and 2.02 did not "compel[] the jurors to disregard the reasonable doubt standard"); *Lara v. Allison*, No. CV 10-4439 JFW (RNB), 2011 WL 835594, at *13 (C.D. Cal. Jan. 12, 2011) (concurring with the "numerous California Supreme Court cases holding that CALJIC No. 2.01 does not reduce the Peoples burden of proof"), *report and recommendation adopted by*, 2011 WL 845008 (C.D. Cal. Mar. 7, 2011); *Romero v. Runnels*, No. CIV S-04-0459-MCE-CMK P, 2009 WL 1451713, at *8-11 (E.D. Cal. May 22, 2009) (finding "no constitutional error with respect to" CALJIC Nos. 2.01 and 2.02).

Finally, Petitioner has pointed to no evidence in the record demonstrating that the jury may have improperly rejected a defense theory which was "unreasonable yet true." (*See* FAP at 43.) Rather, the weight of evidence against Petitioner was substantial, if not overwhelming, and was contradicted only by Petitioner's self-serving denial in which he claimed he was not the driver but refused to name who

was. Under these circumstances, Petitioner has failed to show a "reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the" beyond a reasonable doubt standard. *See Victor v. Nebraska*, 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Nor has he shown that the challenged instructions had a substantial effect on the outcome of the case. For these reasons, this claim must be denied.

G. Ground Eight: Cumulative Error

In Ground Eight, Petitioner claims that the "cumulative effect" of several "combined errors" at trial violated his due process rights and requires his conviction and sentence to be reversed. (FAP at 43-44.) The Los Angeles County Superior Court denied his claim, finding that "each individual claim" was "without merit." (Lodg. No. 9 at 3.) The Court agrees that Petitioner is not entitled to relief.

"Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (internal quotations omitted), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *see also Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.").

Here, Petitioner has not demonstrated any single instance of constitutional error in his underlying claims, let alone multiple errors that combined to prejudice the outcome of his trial. For this reason, Petitioner's claim of cumulative error necessarily fails. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."); *Mancuso*, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a

constitutional violation."). Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

VI. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Amended Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: June 7, 2019

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

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

DERRICK ARNOLD JOHNSON, Petitioner, v. JOHN SOTO, Warden, Respondent.	Case No. CV 14-9441 CAS (RAO) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. INTRODUCTION

In 1993, a jury in the Los Angeles County Superior Court convicted Derrick Arnold Johnson ("Petitioner") of second degree murder and evading an officer causing death. (Clerk's Transcript ("CT") 192-93.) The trial court found Petitioner had three prior felony convictions and sentenced him to 22 years to life in prison. (CT 208-11.)

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Petitioner appealed to the California Court of Appeal, which reduced his sentence to 21 years to life, but otherwise affirmed the judgment in a reasoned decision. (Lodg. No. 1.) Petitioner did not file a petition for review in the California Supreme Court.

Nearly 20 years later, in February 2014, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, raising 11 grounds for relief, all of which were denied on procedural grounds or on the merits. (Lodg. No. 2.) Subsequent petitions raised in the California Court of Appeal and California Supreme Court in 2014 were denied summarily. (Lodg. Nos. 3-6.)

On November 30, 2014, Petitioner, a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, raising numerous grounds for relief. (Docket No. 1.) On February 13, 2015, pursuant to Petitioner's request, the Court appointed counsel to represent Petitioner in this matter. (Docket No. 11.) Thereafter, Respondent filed a motion to dismiss the Petition, arguing that it was untimely under the one-year statute of limitations for federal habeas petitions. (Docket No. 31.) On January 29, 2016, the Court denied the motion without prejudice, finding that the record regarding Petitioner's mental health was not sufficiently developed to determine whether Petitioner was entitled to equitable tolling during the relevant period. (Docket No. 42.) For the sake of efficiency, the parties agreed to defer the question of timeliness of the Petition until after litigating the merits of Petitioner's claims. (Docket No. 43.)

On August 15, 2016, Petitioner, through counsel, filed a First Amended Petition for Writ of Habeas Corpus ("FAP"), raising eight claims, and requested a stay and abeyance to return to state court to exhaust several of the claims therein. (Docket No. 47.) The Court granted Petitioner's request (Docket No. 59) and, thereafter, Petitioner filed a habeas petition in the Los Angeles County Superior Court. (Lodg. No. 8.) On March 7, 2017, the superior court denied the petition on

procedural grounds and on the merits. (Lodg. No. 9.) Subsequent petitions in the California Court of Appeal and California Supreme Court were denied summarily. (Lodg. Nos. 10-13.)

On September 26, 2018, after the stay and abeyance was lifted, Respondent filed an Answer to the FAP and a supporting memorandum ("Answer"). (Docket No. 74.) Respondent also lodged the relevant state records. (*See* Docket No. 75.) On December 6, 2018, Petitioner filed a Traverse. (Docket No. 79.)

II. PETITIONER'S CLAIMS

The Petition raises eight grounds for relief, as follows:

1. The trial court's failure to hold a competency hearing violated Petitioner's right to due process.

2. Petitioner was incompetent to stand trial.

3. The trial court improperly granted Petitioner's *Faretta* motion.

4. Petitioner was unconstitutionally restrained at trial.

5. Petitioner was forced to appear in jailhouse attire.

6. Marsy's Law violates Petitioner's rights under the Ex Post Facto Clause.

7. The jury instructions diluted the prosecution's burden of proof in violation of Petitioner's right to due process.

8. The cumulative impact of errors at Petitioner's trial violated his constitutional rights.

(FAP at 12-44.)

III. FACTUAL SUMMARY

The Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction on appeal.[1]

[1] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). Because Petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. *Tilcock*, 538 F.3d at 1141.

> Shortly before 11 p.m. on November 17, 1992, two 2-officer Pasadena Police Department marked patrol cars responded to gunshots near Church's Chicken stand at the Fair Oaks/Orange Grove Boulevards intersection. When [Petitioner] drove a Cadillac containing three other men unsafely away from the approaching police cars at high speed, the officers chased him for nine minutes over nearly ten miles. Throughout the chase, [Petitioner] drove far above the applicable speed limits at speeds up to 100 miles per hour and ran several stop lights and stop signs, barely missing colliding with many other vehicles. [Petitioner] entered the Myrtle Avenue/Evergreen intersection at about 80 miles per hour against a red light and crashed into a Toyota driven by Herman Basulto, Jr., who lived two blocks away. [Petitioner's] Cadillac stopped between 150 and 200 feet away, exploded, and burned. The Toyota came to rest about 200 feet from the point of impact. Basulto was thrown about 130 feet. He died in an ambulance en route to a hospital of massive head, brain, chest, lung, and liver trauma.
>
> In defense, [Petitioner] claimed he was not driving the Cadillac and could not get out during the chase. [Petitioner] claimed he and his friends fled because they were scared by the police chase. [Petitioner] refused to say who was driving because he would be threatened or killed if he did so. [Petitioner] admitted his prior convictions and altering his hairstyle between the date of Basulto's death and trial.

(Lodg. No. 1 at 2-3.)

IV. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal citation and quotations omitted).

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court need not cite or even be aware of the controlling Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L.Ed.2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts'

denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (citing *Richter*, 562 U.S. at 99).

Here, Petitioner raised all eight of his claims for relief in the California courts either on direct appeal in 1994 or in two subsequent rounds of collateral review in 2014 and 2017. (*See* Lodg. Nos. 1, 2-6, 8-13.) Each of the claims was rejected on the merits—and, in some instances, also for procedural reasons—in a reasoned opinion by the California Court of Appeal or Los Angeles County Superior Court. (Lodg. Nos. 1, 2, 9.) Because the California Supreme Court denied all the claims without comment or citation (Lodg. Nos. 6, 13), under the "look through" doctrine, these claims are deemed to have been rejected for the reasons given in the last reasoned decision on the merits, which was either the Court of Appeal's or Superior Court's written opinion, and entitled to AEDPA deference. *Ylst*, 501 U.S. at 803; *see also Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1194, 200 L.Ed.2d 530 (2018) (reaffirming *Ylst*'s "look through" doctrine).

V. DISCUSSION

A. Grounds One and Two : Competency to Stand Trial

In Ground One, Petitioner claims that the trial court violated his due process rights by failing to hold a hearing to determine his competence to stand trial. He argues that there was sufficient medical evidence before the court to raise a "bona fide doubt" about his competency. (FAP at 12-18.) In Ground Two, Petitioner contends that he was, in fact, incompetent at the time of trial because he lacked the

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capacity to understand the nature of the proceedings against him or to assist in his own defense. (FAP at 18-22.)

1. *Background*

At his arraignment, Petitioner waived his right to counsel and elected to represent himself at trial. (Reporter's Transcript ("RT") 1-31.) During the waiver of rights colloquy, Petitioner told the court that he had not "seen the doctor yet," despite the court faxing an order to the jail so that Petitioner could go to the infirmary. (RT 12-14.) Petitioner told the court he did not have a copy of the order, but had asked the jail nurse to be seen by a doctor. (RT 14-15.) The court told Petitioner to ask for the "legal sergeant" and to report back if they "didn't honor the court's order." (RT 14-15.) After explaining the responsibilities of proceeding *pro se* to Petitioner, the court asked him whether he "still need[ed] that medical examination?" (RT 30.) Petitioner confirmed that he did, and the court "re-order[ed]" that Petitioner be seen by the doctor. (RT 30.)

Petitioner appeared in court several times thereafter for pre-trial proceedings without mentioning any issue about seeing the jail doctor. At the hearings, Petitioner filed and argued several motions, made requests to view evidence, rejected a plea offer from the prosecution, and got an order from the court to hire an investigator. (RT 32-79.)

On May 12, 1993, a jury was selected, the prosecutor gave an opening statement, and Petitioner filed several motions, including one to have advisory counsel appointed. (RT 80-105.) The following day, advisory counsel was appointed and spoke to Petitioner about his case. (RT 107-17.) Thereafter, Petitioner reserved his opening statement, and the prosecutor called his first witness. During the witness's testimony, Petitioner made several objections and cross-examined the witness about his recollection of the details of the police chase and car crash. (RT 118, 154, 171, 207-22.)

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On May 17, 1993, Petitioner appeared in court and made an oral motion for mistrial. (RT 232-33.) In arguing his motion, the following exchange took place:

> [Petitioner]: I'm on Thorazine for my medication –
>
> The Court: Do you want Thorazine?
>
> [Adv. Counsel]: Your Honor, he indicated he is presently on Thorazine and he thinks he is not thinking –
>
> [Petitioner]: The police gave it to me.
>
> [Adv. Counsel]: He gets Thorazine every day for seizures.
>
> The Court: He seems to be okay.
>
> [Petitioner]: Seems okay.
>
> The Court: Do you want me to take you off the Thorazine? Is that what you want?
>
> [Petitioner]: No. Wait a minute.
>
> The Court: Wait. You answer my question. You don't want the Thorazine? I will take you off the Thorazine if that's what you want.
>
> [Petitioner]: I am just informing you what I am on, Your Honor.
>
> The Court: Doesn't seem to be stopping you from doing your thing.
>
> [Petitioner]: That's your opinion; okay?

(RT 233.) Shortly thereafter, the court again asked Petitioner whether he wished to remain on Thorazine during the trial. (RT 237.) After having a discussion with his advisory counsel, Petitioner and the court discussed the matter, as follows:

> [Petitioner]: If you take me off, then I have seizures. Then I don't think I can prepare myself as defense if you take me off my medication, Your Honor.
>
> The Court: You are saying Thorazine affects your ability to understand what is going on?
>
> [Petitioner]: Yes.
>
> The Court: Is that what you are telling me?
>
> [Petitioner]: Yes.

> The Court: You seem to be doing all right in this courtroom.
>
> [Petitioner]: You are not a doctor.
>
> The Court: You are responsive to everything the court has said.
>
> [Petitioner]: Right.
>
> The Court: You are responsive to the evidence, your cross-examination of the first witness, not the second one, because the second one didn't have much to say. [¶] But the first witness was quite remarkable, and I don't think – I don't think that the Thorazine is causing you any unconsciousness to the point where you don't know what is happening. [¶] You seem to be doing very well, and you seem to be very responsive to the court now, and in light of all the motions that you just – the oral motions that you just made, you seemed to be knowing what is happening.

(RT 237-38.)

Petitioner continued to argue for a mistrial, claiming that the jury had seen him in leg restraints and that the court had not allowed him to wear civilian clothes. (RT 238-40.) Petitioner again told the court that he was on Thorazine since being in jail. The court responded by noting that the pre-plea probation report indicated that Petitioner was on "medication for seizures, and his condition is under control with medication. It appears that the court has seen no adverse reaction to Thorazine in his ability to defend himself." (RT 241.) The court continued, noting that since the arraignment:

> I have not seen the affect [*sic*] of anything of the Thorazine on him whatsoever. [¶] His speech is not slurred. He does not appear to be slow or sedated because of the Thorazine, and he has been with me ever since the information was filed back in February of 1993. [¶] And the court would state that if I thought that the Thorazine which he controls his seizures in any way would affect his ability to understand what was proceeding, the court would have stayed these proceedings.

(RT 243-44.) The prosecutor concurred, stating that he had not "found the defendant to be under any sort of disability in terms of his medication." (RT 244.) He noted

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that Petitioner had arranged for and viewed the discovery—including a 35-minute video tape—without issue. (RT 244-45.)

Nevertheless, Petitioner asked the court for an order to see the doctor because he felt "confused." (RT 245-46.) Advisory counsel addressed the court and stated that Petitioner told her that he felt "confused," that "his thinking is slowed down," and the proceedings were "going too fast for him." (RT 246.) She told the court that, after explaining California Penal Code § 1368 to him, Petitioner had a "doubt of his competency to stand trial."[2] (RT 247-48.) The court agreed to order a medical doctor to see Petitioner regarding his Thorazine dosage, but rejected any assertion that Petitioner was incompetent:

> He is not 1368 . . . . He knows where he is. He knows what he is doing and he knows the charges . . . . I am satisfied that Thorazine has no effect upon him, and that this is simply a ruse on his part this morning to put this trial over.

(RT 247-48.) In doing so, the court noted Petitioner's effectiveness in cross-examining the prosecution's first witness; that Petitioner responded adequately, coherently, and immediately to the court's questions; and that Petitioner had "no difficulties" understanding the court proceedings. (RT 248, 251.)

The court again asked why he wanted to see a doctor. (RT 252-53.) According to advisory counsel, Petitioner said the medication made him feel "slowed down" and believed that he may not have been receiving the right dosage. (RT 253.) The court ordered Petitioner to see the jailhouse doctor regarding his Thorazine dosage. (RT 253-54; CT 123.) The court, however, refused to grant Petitioner a continuance in the trial:

> All through this proceeding, and even up to this morning [Petitioner] was always oriented to time, place and person. [¶] He knew what the time was. He knew where he was, and he knew who the parties were. This has

[2] California Penal Code § 1368 requires a trial court to suspend criminal proceedings if it reasonably doubts a defendant's mental competence. *People v. Ary*, 51 Cal.4th 510, 517, 120 Cal.Rptr.3d 431, 246 P.3d 322 (2011).

> always been the case including this morning. [¶] He has been responsive to the court's statements. In fact, he has argued with me a number of times as to my statements. He has always been responsive to the District Attorney's presentations and statements, and he doesn't appear to the court whatsoever to be in any physical discomfort at this time. [¶] However, I have signed the order for the doctor to see him. I don't know for what reason, but I have done that out of an abundance of caution, but I see no reason to grant this continuance.

(RT 257-58.)

The following day, Petitioner again asked for a continuance of the trial because he had not been seen by the doctor pursuant to the court's order. (RT 393-94.) The court denied the motion because Petitioner was "very coherent" and "responsive to everything that's been going on." (RT 394.) Later that same day, in denying a petition for writ of mandate filed by Petitioner, the court stated:

> All through proceedings today the defendant has been animated. He is conversing with his advisory attorney. He is listening to his advisory attorney. He appears to the court to have a knowledge of what is proceeding against him and of his right to cross-examination of all witnesses. . . .

(RT 408.)

2. *State Court Opinion*

In 2014, the Los Angeles County Superior Court denied Petitioner's claim in Ground One on collateral review, as follows:

> The Court of Appeal reviewed the trial record [on direct appeal], including the trial testimony and motions, and concluded that petitioner was able to perform the functions required of a defendant who exercises his Sixth Amendment right to represent himself. Petitioner consulted with the deputy public defender before deciding to represent himself, was provided advisory counsel throughout the trial proceedings, and was represented by an attorney on appeal. In his habeas petition, petitioner fails to support his claims, made two decades after the fact, that he was incompetent during the trial proceedings, other than his own assertions. Were this a genuine issue at the time, it is reasonable to expect that the deputy public defender counseling petitioner about whether to represent himself, or [have] counsel appointed to advise petitioner throughout the trial, would have raised this question before the trial court. Moreover, were this a

> genuine issue at the time, it is reasonable to expect that petitioner's appellate counsel would have raised the issue on appeal, particularly since the issue of self-representation was directly and vigorously challenged.

(Lodg. No. 2 at 4.)

In 2017, the superior court denied his claim in Ground Two, again finding that the record did not demonstrate that Petitioner was incompetent at the time of trial:

> Petitioner's claim he was incompetent to stand trial, at the time of trial, is without merit. As noted in the direct appeal, petitioner responded to testimony through cross-examination and made numerous motions related to discovery, bifurcation of priors, sufficiency of the evidence, and mistrial. Also, petitioner had advisory counsel throughout the proceedings, and presumably if there was an issue as to competency to stand trial, it would have been raised. Further given petitioner's performance at trial, there has been nothing demonstrated as to his failure to understand the nature of the proceedings, or that he was unable to assist in his own defense.

(Lodg. No. 9 at 2 (internal citations omitted).)

3. *Applicable Federal Law*

The Due Process Clause prohibits the criminal prosecution of a defendant who is not competent to stand trial. *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); *see also Indiana v. Edwards*, 554 U.S. 164, 170, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) ("[T]he Constitution does not permit trial of an individual who lacks 'mental competency'."). Federal courts have recognized two distinct aspects to competency claims: (1) a procedural due process claim challenging a court's failure to hold a competency hearing; and (2) a substantive due process claim asserting that the defendant was tried while actually incompetent. *See, e.g., Davis v. Woodford*, 384 F.3d 628, 644-47 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 603-10 (9th Cir. 2004).

A trial judge has an affirmative responsibility to conduct a competency hearing "whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial." *Williams*, 384 F.3d at 603. A "bona fide

doubt" exists when "a reasonable judge . . . should have experienced doubt with respect to competency to stand trial." *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011); *see also Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009) (holding that a competency hearing is required only if "there is substantial evidence that the defendant may be mentally incompetent to stand trial") (citation and internal quotation marks omitted). The judge's responsibility to assess a defendant's competency continues throughout the trial. *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Although no particular fact signals a defendant's incompetence, "evidence 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," and "one of these factors standing alone may, in some circumstances, be sufficient." *Id*. at 180.

The test for incompetency is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam); *Clark v. Arnold*, 769 F.3d 711, 729 (9th Cir. 2014). A defendant may have a mental illness and still be able to understand the proceedings against him and assist in his defense. *See Bassett v. McCarthy*, 549 F.2d 616, 619 (9th Cir. 1977) (finding "mental infirmity" did not "necessarily imply that he did not understand the proceeding or could not cooperate with his counsel"); *see also Grant v. Brown*, 312 F.App'x 71, 73 (9th Cir. 2009) ("[M]ental illness does not necessarily equate to incompetence.") (unpublished). The issue is not whether the petitioner suffered from a mental illness per se, but whether the petitioner had the ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a

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rational as well as factual understanding of the proceedings against him.[3] *Eddmonds v. Peters*, 93 F.3d 1307, 1314 (7th Cir. 1996).

4. *Analysis of Procedural Due Process Claim*

A state trial court's finding that no competency hearing was required is a factual determination entitled to deference unless it is unreasonable within the meaning of § 2254(d)(2). *Mendez*, 556 F.3d at 771 (9th Cir. 2009). Having carefully reviewed the record, the Court concludes that the California Court of Appeal's finding that no competency hearing was required was a reasonable factual determination under § 2254(d)(2). Specifically, it was reasonable to find that the evidence before the trial judge did not raise a "bona fide doubt" about Petitioner's competency to stand trial.

Petitioner argues that his mental health records demonstrate that the trial court acted unreasonably in not ordering a competency evaluation of Petitioner during trial. In support, he offers a pre-plea probation report given to the trial judge that documented a 1984 arrest for robbery, during which the criminal proceedings were temporarily suspended because Petitioner was "mentally incompetent." (FAP, Exh. 10 at 78.) That incident, however, occurred nearly a decade before Petitioner's trial in this matter. *See Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981) ("[A]n old psychiatric report indicating incompetence in the past may lose its probative value by the passage of time and subsequent facts and circumstances that all point to present competence."). Moreover, the pre-plea report did not indicate any other mental health issues, noting only that he was on medication for seizures. (FAP, Exh. 10 at 80.)

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[3] Courts reviewing a defendant's competency at trial have considered the defendant's ability to communicate with counsel even when the defendant represented himself during the proceedings. *See, e.g., Muhammad v. McDonough*, No. 3:05-cv-62-J-32, 2008 WL 818812, at *2, 21 (M.D. Fla. Mar. 26, 2008) (applying both prongs of the *Dusky* standard for competence in evaluating the appeal of a defendant who had represented himself in the trial court).

He also points to the fact that he has been involuntarily medicated for schizophrenia while in prison since 2001. (*See* FAP, Exh. 6.) Again, however, the "bizarre behavior" described in these records occurred many years after Petitioner's trial. At most, the totality of his mental health records—from 1985 until 2015—demonstrates that he was likely suffering from mental illness at the time of his trial in 1993. "Evidence of mental illness does not, by itself, raise" a bona fide doubt about a defendant's competency to stand trial. *Triggs v. Chrones*, 346 F.App'x 173, 175 (9th Cir. 2009); *see also Nakhei v. Warden,* Case No. SACV 13-851 DSF (JC), 2015 WL 5818727, at *15 (C.D. Cal. Aug. 19, 2015) ("By itself, evidence that an accused suffers from a mental illness, such as bipolar disorder and schizophrenia (with paranoid delusions), does not generate a real, substantial and legitimate doubt as to the accused's competence."), *report and recommendation adopted by*, 2015 WL 5768378 (C.D. Cal. Sept. 30, 2015).

Importantly, what is generally lacking in support of Petitioner's claim is any contemporaneous evidence at the time of trial that he was unable to understand the proceedings against him or assist in his defense. *See United States v. Garza*, 751 F.3d 1130, 1136 (9th Cir. 2014) ("Even a mentally deranged defendant is out of luck if there is no indication that he failed to understand or assist in his criminal proceedings."). The record is devoid of any irrational behavior by Petitioner or displays of unusual demeanor at trial. Although Petitioner complained at one point that he felt "confused" and that the proceedings were "going too fast for him," the trial court reasonably could have attributed his comments to the difficulties faced by any *pro per* attempting to defend himself at trial against a murder charge, rather than substantial evidence of mental incompetence. *See Steinsvik v. Vinzant*, 640 F.2d 949, 952 (9th Cir. 1981) (holding that a defendant's statement that he was a "little confused" prior to the entry of his plea was not sufficient to raise a bona fide doubt about competency).

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Furthermore, though Petitioner was taking medication during the trial, Petitioner has not demonstrated that it materially impaired his ability to understand the nature of the proceedings against him or assist in the preparation of his defense. *See Contreras v. Rice*, 5 F.Supp.2d 854, 864-65 (C.D. Cal. 1998) ("[T]he mere fact that the petitioner was taking medications during his trial does not raise a bona fide doubt as to his competence to stand trial.") Here, the trial court was aware that Petitioner was taking anti-seizure medication and attempted—apparently unsuccessfully—to assist him in being seen by the jailhouse doctor to check his dosage level.[4] Nevertheless, on several occasions, the trial court stated that Petitioner's behavior at trial was responsive and coherent, and that he demonstrated no difficulty in understanding the court proceedings while on his medication. (*See* RT 241 ("[T]he court has seen no adverse reaction to Thorazine in his ability to defend himself.").) The totality of the record, including Petitioner's numerous filed motions and extensive cross-examination of witnesses, supports this finding.

In short, the record does not compel a finding that Petitioner had such a "history of pronounced irrational behavior" that required the trial court to order a competency hearing. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Nor does evidence of his mental illness alone constitute substantial evidence to raise a bona fide doubt of his competency. *See Boyde v. Brown*, 404 F.3d 1159, 1166 (9th Cir. 2005) (concluding that "major depression" and "paranoid delusions" do not necessarily raise a doubt regarding a defendant's competence); *Bassett*, 549 F.2d at 619 (finding no error from failure to hold competency hearing despite defendant's history of mental illness from early childhood and paranoid schizophrenia accompanied by delusions and hallucinations). Because the state court reasonably determined that there was not substantial evidence raising a bona fide doubt of incompetence, Petitioner's claim must be denied.

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[4] Petitioner told the court that he did not want to be "off" the medication because then he would not be able to prepare a defense by himself. (RT 237.)

5. *Analysis of Substantive Due Process Claim*

Petitioner's related claim—that he was, in fact, incompetent at trial—is equally unavailing. A state court's finding of competency to stand trial is presumed correct if fairly supported by the record. *Deere v. Cullen*, 718 F.3d 1124, 1145 (9th Cir. 2013). A petitioner "must come forward with clear and convincing evidence to rebut the presumption." *Id*. Petitioner has not done so in this case.

In an attempt to show that he was incompetent at the time of trial, Petitioner relies on much of the same prison mental health records discussed previously, including a psychiatric evaluation several months after his conviction that found he suffered from "Psychosis, NOS with depression, probable schizoaffective disorder." (*See* FAP, Exhs. 3-5.) He has also submitted a 2016 declaration from his sister Tina Howse, stating that at the time of trial she noticed his medication was "affecting him" by making him "slower" and more difficult to understand. (FAP, Exh. 8.) What is lacking, however, is evidence that Petitioner failed to understand the proceedings, competently represent himself, or effectively consult with advisory counsel. In fact, the record contradicts any such claim.

Competence to stand trial requires only that the defendant have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U.S. at 171. Throughout the proceedings, in which Petitioner chose to represent himself rather than rely on counsel, he filed motions, argued them before the court, and cross-examined the prosecution's witnesses. He also testified in his own defense and gave a closing statement attempting to convince the jury that he was not the driver in the fatal car accident. In addition, he successfully moved to have advisory counsel appointed to assist him in his defense. Petitioner routinely consulted with advisory counsel, and counsel never indicated any difficulty understanding Petitioner or suggested that Petitioner lacked the ability to present a defense with her assistance. Petitioner's actions of competently representing himself in consultation with advisory counsel

demonstrated that he had a rational and factual understanding of the proceedings and could adequately assist in presenting a defense. *See Apelt v. Ryan*, 878 F.3d 800, 821 (9th Cir. 2017) (holding that, because defendant was "actively involved in his defense and the trial proceedings" and "his trial testimony revealed no traces of incompetence," the record did not support a finding that defendant was incompetent).

Finally, Petitioner's sister's claim, made more than 20 years after the trial, that the anti-seizure medication Petitioner was taking made him slower and more difficult to understand does not alter the outcome. Even if there were some side effects from the medication he was taking, Petitioner has not demonstrated that they substantially impaired his "capacity" to rationally understand the proceedings against him or to prepare his defense. *See Drope*, 420 U.S. at 171; *see also Williams v. Sisto*, 2011 WL 4337032, at *15 (C.D. Cal. Mar. 16, 2011) (finding petitioner failed to demonstrate that anti-psychotic medication rendered him incompetent despite feeling "somewhat dazed" and "fuzzy and cloudy" at times). Petitioner points to no incidents during trial that suggested he was incompetent. Nor has he offered sufficient evidence to overcome the trial court's observations that Petitioner was at all times coherent and responsive to the proceedings, appropriately engaged with his advisory attorney, and knowledgeable about the circumstances he was facing. *See Stanley*, 633 F.3d at 861 (finding trial judge's indication that Petitioner's "demeanor in the courtroom did not raise a doubt as to his competency" was entitled to deference unless it was unreasonable).

On this record, the state court's determination that there was not substantial evidence that Petitioner was incompetent was not "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Further, the state court's decision on habeas review rejecting Petitioner's claim was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

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B. Ground Three: Improper Granting of *Faretta* Motion

In Ground Three, Petitioner claims that the trial court improperly granted Petitioner's *Faretta* motion to represent himself at trial. (FAP at 22-27.) He argues that he was not mentally competent to waive his right to counsel and that, while representing himself, he attempted to invoke his right to counsel several times during the proceedings. (FAP at 25-27.)

1. *Background*

Prior to the start of trial, Petitioner indicated he was unsure whether he wanted to represent himself or be represented by counsel. (RT 1.) At the court's behest, Petitioner spoke with an attorney from the public defender's office prior to making a decision, and thereafter elected to proceed *pro se*. (RT 1-2.) Petitioner told the court that he had represented himself twice before in criminal cases, both of which ended in plea bargains. (RT 7-8.) The court explained in detail that he would have to do all the things normally done by a lawyer, including filing motions, partaking in voir dire, and putting on evidence. (RT 8-9.) Petitioner told the court he understood this. (RT 9.) The court "urge[d him] to accept the services of an attorney" and warned that self-representation was "almost always unwise." (RT 9.) Petitioner said he understood this, but wished to proceed *pro per* and was doing so freely and voluntarily. (RT 9-11.)

Later in the proceedings, Petitioner asked for advisory counsel to be appointed. (RT 99-102, 106-07.) The following day, the court appointed advisory counsel to assist Petitioner. (RT 107, 112.) The court asked whether he wanted her "only" as advisory counsel or whether she should "take over the case and be counsel of record." (RT 107.) After Petitioner was granted time to speak to counsel, he told the court that he was electing to proceed *pro per* with counsel only in an advisory role. (RT 116-17.)

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2. *State Court Opinion*

In denying Petitioner's claim on appeal, the California Court of Appeal noted the trial court's precautionary steps prior to allowing Petitioner to represent himself:

> The trial court warned [Petitioner] of the dangers and disadvantages of self-representation and inquired about his level of education. [Petitioner] replied he had a 10th grade education, had successfully represented himself twice before and negotiated his own plea bargains, understood the proceedings, and wished to represent himself. The trial court permitted [Petitioner] to consult with a public defender before making his decision.

(Lodg. No. 1 at 4.) The appellate court also detailed Petitioner's actions during the course of the trial, which supported his competence and desire to act as his own counsel:

> [Petitioner] was under medication to control seizures. Shortly before trial, the trial court granted [Petitioner's] request for advisory counsel, who assisted [Petitioner] throughout the trial. Before and during trial, [Petitioner] made a discovery motion, demurred, successfully moved to bifurcate trial of his prior convictions, successfully moved to appear before the jury without restraints, moved for a mistrial because the trial court removed all except the leg restraints, petitioned for a writ of mandate regarding the leg restraints, sought a mistrial based on lack of access to a law library, investigator, and other pro. per. privileges, sought dismissal based on discriminatory prosecution, during a motion to dismiss at the close of the prosecution's case successfully moved the trial court to find that he could be convicted at most of second degree murder because premeditation evidence was insufficient, cross-examined all prosecution witnesses, testified, and presented his defense.
>
> Throughout the case, the trial court repeatedly asked [Petitioner] if he wished to have counsel appointed, and [Petitioner] always refused. A few times, [Petitioner] and his advisory counsel said that events were happening too fast for him to respond, and that this may be caused by his seizure mediation. The trial court noted that [Petitioner] did not claim he did not understand things, and both the trial court and the prosecutor noted without objection that [Petitioner] always responded appropriately and immediately to questions, had no difficulty speaking or moving, and never exhibited confusion.

(Lodg. No. 1 at 4-5 (internal citations omitted).)

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Finally, the California Court of Appeal rejected Petitioner's claim that his failure to subpoena corroborating witnesses demonstrated his lack of capacity to represent himself:

> The record demonstrates that the unsubpoenaed witnesses were inmates who may have been the other occupants of the Cadillac during the chase. During his testimony, [Petitioner] refused to name the other occupants because he feared he would be attacked as an informer if he did so, and also said he chose not to even subpoena them for the same reason. Moreover, [Petitioner] did not claim he did not understand the proceedings, only that they were going too fast for him. Because [Petitioner's] *Faretta* motion was timely, the trial court lacked discretion to deny it (*Faretta v. California, supra,* 422 U.S. 806; *People v. Bloom* (1989) 48 Cal.3d 1194, 1219-1220), especially in light of [Petitioner's] repeated refusals to relinquish self-representation. [Petitioner] was active throughout. There was no error.

(Lodg. No. 1 at 6.)

3. *Federal Law and Analysis*

A criminal defendant has the right to waive the assistance of counsel and represent himself, provided that the waiver is timely, knowing, intelligent, voluntary, and unequivocal. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *see also Godinez v. Moran*, 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) ("[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted."). Before allowing a defendant to represent himself, the trial court must make sure that he is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Snook v. Wood*, 89 F.3d 605, 613 (9th Cir. 1996) (quoting *Faretta*, 422 U.S. at 835). While a trial judge may doubt the quality of representation that a defendant may provide for himself, the defendant must be allowed to exercise his right to self-representation so long as he "knowingly and intelligently forgoes his right to counsel and that he is

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able and willing to abide by [the] rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

The Court previously determined that there was insufficient evidence in the record to demonstrate that Petitioner was incompetent to stand trial. Petitioner points to no additional evidence suggesting that his waiver of the right to counsel was not knowing, intelligent, and voluntary due to his mental health issues. The record clearly indicates that the court conducted a thorough screening with Petitioner prior to allowing him to represent himself. This included having Petitioner speak to an attorney about the efficacy of self-representation prior to waiving his rights, a detailed recitation of the severity of the charges he was facing, and an explicit warning that self-representation was likely not in his best interests. Despite this, Petitioner unequivocally elected to waive his rights and proceed *pro per*. "If a 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." *United States v. Maness*, 566 F.3d 894, 896 (9th Cir. 2009).

Nevertheless, Petitioner argues that the trial court failed to properly consider the effects of his medication and his request to see a doctor in finding that he had the ability to represent himself. The Supreme Court, however, has never adopted a bright-line test for determining when a criminal defendant lacks sufficient mental capability to conduct his own defense. Rather, the Supreme Court has stated that the "Constitution permits judges to take realistic account of the particular defendant's mental capacities" in making such determinations. *Edwards*, 554 U.S. at 177-78 ("[T]he trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."). In the instant case, the court was cognizant of Petitioner's use of Thorazine to control his seizures, as well as his requests to see a doctor regarding his dosage levels while in jail, when it conducted its inquiry and determined that Petitioner was capable of representing himself. Nothing in the record shows that the

trial court erred in its assessment that Petitioner had the mental capacity to knowingly and voluntarily waive his right to representation. *See, e.g., Wolfe v. Cate*, No. 2:02-cv-01958 KS, 2011 WL 202463, at *10 (E.D. Cal. Jan. 20, 2011) (rejecting *Faretta* violation due to mental incapacity where the "trial court was informed of [defendant's] use of medications and conducted a thorough inquiry to ensure that [defendant] was capable of representing himself").

Petitioner also argues that he revoked his *Faretta* waiver when, in response to the court's question of whether he wanted a "lawyer to run the show," he answered, "Sure. Why not? Why not?" (*See* RT 101.) But, an examination of the record makes clear that the discussion between Petitioner and the court concerned the appointment of advisory counsel and not a relinquishment of his right to represent himself at trial. (*See* RT 102 ("This is as to advisory counsel requested by the defendant.").) Similarly, after the appointment of advisory counsel, Petitioner waffled on whether he wanted her to remain as advisory counsel or step in as counsel of record. (RT 106-14.) After Petitioner was given time to discuss the matter with counsel, he made clear that he would remain *pro per*, unequivocally stating that she was to remain as advisory counsel "only." (RT 116-17.) Thus, there is no factual basis for the claim that Petitioner attempted to withdraw his *Faretta* waiver during trial.

In sum, Petitioner has not demonstrated that the state court's rejection of this claim was contrary to or an unreasonable application of clearly established Supreme Court law.

C. Ground Four: Visible Restraints at Trial

In Ground Four, Petitioner contends that he was unconstitutionally restrained at trial. (FAP at 27-34.) He argues that the trial court failed to determine whether the leg shackles he was forced to wear during trial were visible to members of the jury and whether the restraints were actually justified by an essential state interest. (FAP at 31-33.) He claims that the use of the restraints violated his rights to due

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process and a fair trial, as well as abridged his right to self-representation. (FAP at 33.)

1. *Background*

Prior to the start of Petitioner's trial, the prosecutor informed the court that Petitioner had a "pending escape charge" in a separate case from a different courthouse where he was also proceeding *pro per*. (RT 46.) Thereafter, following the prosecutor's opening statement, Petitioner filed a motion to appear without physical restraint. (RT 98.) The following exchange took place:

> Court: You are not physically restrained now, are you?
>
> [Petitioner]: Yes.
>
> Court: Where?
>
> Bailiff: He has leg chains at the moment.
>
> Court: Is there a need—the leg chains, I wasn't able to see them. Therefore, I feel comfortable in believing the jury didn't see those. They have always been underneath the counsel table and that the defendant has not arose before the jury. [¶] Is there any need for those leg chains while we are in trial?
>
> Bailiff: Yes, your honor. [Petitioner] was an escaped prisoner in Santa Anita Court.
>
> Court: They did file that new case against him, for which they are transferring from—to our court very shortly. That case number is VA018228 for which the defendant has been charged with the crime of escape. Thank you. [¶] Well, let's just—I am going to limit that to the leg chains so long as they are discrete and they won't be observed by the jury members. [¶] What we will do is bring the microphone closer to the defendant so that he may use the microphone. If there is a need for him to stand and see the exhibits, I am going to ask that we remove the leg chains for that moment; okay, during that period of the court's session. [¶] We will do that as it is needed and that will be the order as to the defendant's motion regards to restraints.

(RT 98-99; *see also* CT 109.)

Shortly thereafter, the court inquired about the status of the escape charge in the separate filing. (RT 102.) The prosecutor gave the court the file, which indicated

that the case had been transferred to that courtroom for arraignment and plea. (RT 102-03.) Later, during trial, Petitioner renewed his motion to appear without restraints. (RT 230-31.) The trial court denied the motion, stating that "discrete shackles" were permitted because "there are escape charges filed against the defendant." (RT 231.)

The next day, Petitioner moved for a mistrial on several grounds, including appearing with restraints. (RT 232-33.) He argued that "[a]t least four jurors" had seen him wearing the leg chains. (RT 239-40.) The court denied the motion, again finding the restraints were necessary "because on or about March the 19th, 1993, while he was in custody on these proceedings, there was an attempt to escape on his part whereby he was—that attempted escape was filed by law enforcement." (RT 250.) The court also confirmed that Petitioner had been "held to answer" and an information was being filed by the district attorney's office. (RT 250-52.)

After denying Petitioner's motion, the court asked whether he wanted the jury admonished regarding his leg restraints, though the court was "sure the jury ha[d] not seen them." (RT 254-55, 364.) The court elaborated that on "every occasion [Petitioner] is seated before the jury enters the courtroom, and during the course of the few days he has been here with the jury, his foot area has been covered by a large cellophane sheeting, and that the jury is not enabled to see the leg restraints." (RT 364.) Petitioner declined the court's offer to admonish the jury regarding the leg restraints. (RT 364-65.)

Several arrangements were made to prevent the jury from seeing the leg restraints during the course of the trial. Petitioner's advisory counsel was permitted to approach the bench to argue objections raised by Petitioner. (RT 429-31.) The leg restraints were covered by cellophane so that they were not visible to the jurors. (RT 557.) When he took the stand to testify, he did so out of the presence of the jury and the trial court confirmed that the restraints were not visible to the jurors before bringing them back to their seats. (RT 557-59.) Before the start of the prosecutor's

closing argument, the court noted that Petitioner's leg restraints were concealed, as they had been "throughout the course of the trial." (RT 625.) Precautions were also taken to hide the restraints prior to Petitioner giving his closing argument. (RT 650.)

In 2016, more than 20 years after the trial, Tina Howse, Petitioner's sister, submitted a declaration stating that she had been present at Petitioner's trial in 1993 and was able to see and hear his shackles from the audience seats. (FAP, Exh. 8.) She avers that the jury must have known Petitioner was wearing shackles because he did not "move around freely" in the courtroom like the prosecutor. (FAP, Exh. 8.) Additionally, Petitioner has submitted photographs taken in 2016 from the courtroom where Petitioner was tried suggesting that Petitioner's feet were visible to jurors sitting in the elevated jury box. (FAP, Exh. 9.)

2. *State Court Opinion*

In denying Petitioner's claim of constitutional error on direct appeal, the California Court of Appeal recounted the relevant facts:

> [Petitioner] attempted to escape during municipal court proceedings in this case. Escape charges were filed and eventually the case was brought to the trial court where it trailed this case. Because of these facts, the trial court refused to release [Petitioner] from his leg restraints. However, the trial court had [Petitioner's] feet covered while he was at counsel table and on the witness stand, and he was not moved when the jury was present. The trial court told [Petitioner] it would consider removal of the restraints at particular sessions if [Petitioner] needed to move about to examine exhibits or witnesses. [Petitioner] never made such a request. The trial court told [Petitioner] it would admonish the jury to ignore the restraints if [Petitioner] so desired, but [Petitioner] rejected the offer. . . . There is no evidence in the record that any juror saw the restraints.

(Lodg. No. 1 at 6-7.) The state appellate court rejected Petitioner's claim that the trial court abused its discretion in requiring the restraints while in the courtroom:

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> The trial court restrained [Petitioner] because he had attempted to escape during earlier proceedings in this case. That attempt resulted in the filing of formal charges. The trial court initiated extensive and successful efforts to minimize the restraints and assure the jury remained unaware of them. There was no error.

(Lodg. No. 1 at 7.)

When Petitioner raised this claim again—this time with additional evidence including photographs of the courtroom and the declaration of Petitioner's sister—the Los Angeles County Superior Court also found no constitutional error:

> [T]his claim was raised in a previous proceeding and soundly rejected by the Court of Appeal. The Court of Appeal determined there was no manifest abuse of discretion given [P]etitioner's attempt to escape in a previous proceeding related to this case. Further, [P]etitioner never made a request to remove the restraints when the court offered to consider removal for specific exhibits or witnesses, and likewise rejected the court's offer to admonish the jury. Photographs and a declaration offered two decades later does not persuade this court of any constitutional malady.

(Lodg. No. 9 at 2 (internal citation omitted).[5])

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[5] Respondent contends that the Los Angeles County Superior Court's 2017 order is the relevant decision for this Court's consideration on habeas review. (Traverse at 28.) Respondent is correct that this is the last "reasoned" decision by the state court. Because the superior court decision incorporated the California Court of Appeal's reasoning in denying the claim, however, this Court may consider both decisions to determine whether the denial of the claim was contrary to, or an unreasonable application of, controlling Supreme Court law. *See Amado v. Gonzalez,* 758 F.3d 1119, 1130 (9th Cir. 2014) (stating that where lower state court decision agrees with state appellate court decision, and appellate court adopts or substantially incorporates a lower state court decision, federal habeas court may review lower state court decisions as part of review); *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) ("Although AEDPA generally requires federal courts to review one state decision, if the last reasoned decision adopts or substantially incorporates the reasoning from a previous state court decision, we may consider both decisions to fully ascertain the reasoning of the last decision.") (internal quotations and citation omitted); *see also Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003) ("Because [the appellate court's] decision affirmed the trial court and adopted one of the reasons cited by the trial court, however, our analysis will necessarily include discussion of the trial court's decision as well.").

3. *Federal Law and Analysis*

A criminal defendant has a constitutional right to appear before a jury free of visible restraints "absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 626-29, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). Thus, courts cannot routinely place defendants in shackles or other physical restraints visible to the jury without particular concerns such as special security needs or escape risks related to the defendant on trial. *Id.* at 628.

To succeed on a claim that shackling violated a defendant's constitutional rights, a petitioner must establish that (1) he was "physically restrained in the presence of the jury"; (2) "that the shackling was seen by the jury"; (3) "that the physical restraint was not justified by state interests"; and (4) that "he suffered prejudice as a result." *Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002). Prejudice is particularly likely when at least one juror sees a defendant's shackles during the trial from the jury box. *Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir. 2003). However, "a jury's brief or inadvertent glimpse of a defendant in physical restraints is not inherently or presumptively prejudicial to a defendant." *United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995). Rather, improper in-court shackling only requires reversal if there was a substantial and injurious effect on the jury's determination of guilt. *Duckett v. Godinez,* 67 F.3d 734, 749 (9th Cir. 1995).

Here, the first criterion was met because the record clearly shows Petitioner was shackled with leg chains throughout the entirety of the trial. He has not, however, met his burden of demonstrating the second criterion—that the physical restraints were seen by the jury. The California Court of Appeal found there was "no evidence in the record that any juror saw the restraints." (Lodg. No. 1 at 7.) Petitioner has not rebutted this finding with clear and convincing evidence. *See United States v. Mejia*, 559 F.3d 1113, 1117-18 (9th Cir. 2009) ("[W]e accept as fact the district court's finding that the jury could not see Mejia's shackles."). The trial judge, who

himself was initially unaware that Petitioner had been appearing in court with restraints, made numerous findings that Petitioner's leg chains were concealed from the jury's view throughout the course of the trial. (*See* RT 98, 364, 557-59, 625.) Although Petitioner complained to the court—in an effort to get a mistrial—that several of the jurors had seen his leg chains (RT 239-40), his unsupported claim is insufficient to overcome the state court's determination that the shackles were not visible to the jury.[6] *See, e.g., Ballard v. Small*, No. 09-CV-957-IEG (CAB), 2010 WL 2721281, at *6 & n.6 (S.D. Cal. Jul. 6, 2010) (finding defendant's declaration was "insufficient by itself to contradict by clear and convincing evidence the state court's determination that the shackles were not visible to the jury").

Petitioner's attempts to supplement the record more than 20 years later do not alter the Court's conclusion. Tina Howse's declaration states only that she could see Petitioner's shackles from where she was seated—presumably in the audience—and not from the jury box, where the jurors were seated. Further, the record made clear that the trial court seated Petitioner at counsel's table and on the witness stand out of the presence of the jury to limit the possibility that the jury would inadvertently see Petitioner's restraints. Similarly, the photographs implying that Petitioner's feet were visible to jurors sitting in the elevated jury box do not account for the fact that Petitioner's feet were concealed during trial with cellophane sheeting to hide them

[6] Petitioner argues pursuant to *Dyas*, 317 F.3d at 936-37, that the trial court's conclusion that the restraints were not visible is not reliable because he merely presumed that the jurors could not see the restraints and failed "to question the jurors about [Petitioner's] restraints" in a hearing. (*See* FAP at 31; Traverse at 29-31.) As noted previously, however, the trial court made several detailed inquiries with the bailiff to verify that the leg chains could not be seen by the jurors. (RT 98-99, 557-59.) Thus, in this instance, the trial court did not simply presume the restraints were not visible. Moreover, Petitioner has not pointed to any Supreme Court law which requires the trial court to hold a hearing and question the jurors in making such a determination.

from view.[7] *See Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir. 1999) (finding no constitutional error where defendant was only shackled with ankle chains during trial and shackles were behind curtain or skirt placed around the defense table to ensure that they were not visible to the jury).

Moreover, regarding the third criterion, the record establishes that the physical restraints used in this case were justified by state interests. Here, Petitioner was charged with attempting to escape "while he was in custody on these proceedings." (RT 250.) Further, the court confirmed that the attempted escape charge had been filed by law enforcement, that Petitioner had been "held to answer," and an information was being filed by the district attorney's office. (RT 250-52.) Based on the legal filings alone, the trial court had probable cause to believe the escape allegation.[8] The essential state interest in preventing Petitioner from escaping justified use of the restraints. *See Crittenden v. Ayers*, 624 F.3d 943, 971 (9th Cir. 2010) ("[Defendant] fail[ed] to rebut by clear and convincing evidence the trial court's finding on the record that the restraints were justified by a state interest specific to [his] trial, namely his likelihood of escape . . . ."); *Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989) ("Shackling is proper where there is a serious

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[7] Although Petitioner suggests that this was inadequate because "cellophane is ordinarily a transparent material" (FAP at 31), at no time during the trial did Petitioner complain that the jurors could see his restraints through the sheeting. Nor has Petitioner offered any evidence that the cellophane in this case failed to obscure the view of the leg chains.

[8] Petitioner argues that the trial court improperly relied on the bailiff's representations in concluding that the restraints were justified. (FAP at 32-33.) Even were this so, it would not justify habeas relief. *See Hedlund v. Ryan*, 854 F.3d 557, 569 (9th Cir. 2017) ("While the trial court based its conclusion regarding the escape plot on information provided by jail personnel, the trial court's reliance on this testimony was not contrary to, or an unreasonable application of, clearly established federal law."). In any event, the record is clear that the trial court did not solely rely on the bailiff's representations in making his conclusion.

threat of escape or danger to those in and around the courtroom, or where disruption in the courtroom is likely if the defendant is not restrained.").[9]

Finally, as to the fourth criterion, even if the jury caught a brief or inadvertent glimpse of Petitioner's restraints or simply deduced that he was being restrained from his lack of movement around the courtroom, Petitioner has failed to demonstrate prejudice. In this instance, the trial court took numerous steps to minimize the chances that the jury would be able to see Petitioner's restraints. Furthermore, this was not the type of case in which the jury would have been concerned about the potential for violent conduct by Petitioner. Also, the evidence against Petitioner was quite strong, as multiple police officers testified that Petitioner was driving the car at the time of the fatal crash. (RT 130-31, 202, 278, 342, 437-38.) Under these circumstances, Petitioner has not shown that any accidental viewing of Petitioner's restraints prejudiced the outcome of his case. *See Walker v. Martel*, 709 F.3d 925, 942-43 (9th Cir. 2013) (finding that, despite jury's "awareness" of defendant's leg restraint, he suffered no prejudice because the shackle was unobtrusive, did not suggest a "proclivity for violence," and the evidence against the defendant was "robust"); *see also Wilson v. McCarthy,* 770 F.2d 1482, 1485-86 (9th Cir. 1985) (finding the jury's brief viewing of defendant's shackles as he left the witness stand at the conclusion of his testimony was not prejudicial).

For these reasons, the Court finds that the California courts' rejection of this claim was not contrary to or an unreasonable application of clearly established Supreme Court law. Nor was it based on an objectively unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

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[9] Petitioner asserts that the trial court should have considered "less restrictive alternatives" to shackling Petitioner for the trial. (FAP at 32.) There is, however, no clearly established Supreme Court authority requiring that the trial court do so. *See Crittenden*, 624 F.3d at 971 & n.19 (rejecting contention that trial court had to pursue less restrictive alternatives to shackling because established Supreme Court law "did not require such procedures").

Accordingly, this claim must be denied.

D. Ground Five: Forced to Wear Jailhouse Attire

In Ground Five, Petitioner claims that his constitutional rights were violated when "he was forced to appear and represent himself in jailhouse clothing in front of the jury." (FAP at 34.)

1. *Background*

On May 11, 1993, at the start of voir dire, Petitioner, who was representing himself, was introduced to the jury while dressed in jail-issued clothing. (RT 57 ("wearing the blue top").) After the potential jurors were released for the day, Petitioner told the court his legal runner was having "no success" in bringing him civilian clothing to wear at trial. (RT 77-78.) The trial court continued the case until the following day and granted Petitioner three telephones calls to contact his legal runner. (RT 78 (stating he would "put it in the remanding order").)

The following day, on May 12, 1993, Petitioner again appeared for voir dire dressed in jailhouse attire, but did not raise any issue regarding civilian clothing. (RT 80.) The jury was selected, and the prosecutor gave an opening statement. (RT 89-97.) After the jury was dismissed for the evening, Petitioner raised the issue about his physical restraints, but never objected to the fact that he was wearing jail attire. (*See* RT 97-105.)

On May 13, 1993, Petitioner appeared and requested that advisory counsel be appointed, which the court did. (RT 106-16.) Thereafter, Petitioner elected to reserve his opening statement, and several witnesses testified, all while Petitioner was in his jail-issued clothes. (*See* RT 131 (identifying Petitioner with his "blue L.A. County jumpsuit on"). Again, Petitioner did not object to the fact that he was not wearing civilian clothing.

The trial resumed on May 17, 1993, and Petitioner filed a mistrial motion, arguing, among other things, that he had not been "provided citizen clothing." (RT 232-33.) The prosecutor opposed the motion, stating that the court had "asked

defendant what he wanted to do about civilian clothes" and that Petitioner had "continued to go forward and indicate to this court that he is ready, willing and able to go forward with his trial based on the way he is dressed." (RT 242.) The court agreed that Petitioner had been given numerous opportunities to acquire civilian clothing, but he chose to proceed with the trial without them:

> He wants civilian clothing now, for which we have given him the opportunity numerous times to acquire, and the response is always he will take care of it. Does he want civilian clothing? Perhaps he can call his wife who he hasn't seen in a long while to bring him the clothing.

(RT 247-48.) The court denied the motion, finding that Petitioner "has put himself in the position he is in now on his own volition, this court having offered him the – and asked him and inquired of him about the civilian clothing, and his wish to go forward with trial." The court did, however, permit Petitioner to "call his family to bring him clothing." (RT 250.) Petitioner apparently did not avail himself of the opportunity, telling the court it would "be totally impossible" for them to get him clothing today. (RT 251.) The court informed Petitioner that he intended to admonish the jury that Petitioner's attire "play no part in their deliberations" unless he objected. (RT 255.) Without hearing anything further from Petitioner, the court admonished the jury not to draw an adverse inference based on Petitioner's clothing. (RT 273.)

In 2016, Tina Howse, Petitioner's sister, filed a declaration that she had been Petitioner's "legal runner" and that "the jail would not let me give my brother the clothes" to wear at trial, despite the court's order. (FAP, Exh. 8.)

2. *State Court Opinion*

In 2017, on collateral review, the Los Angeles County Superior Court denied the claim, in part, because the "claim was not raised on appeal and is therefore unavailable for review," citing *In re Harris*, 5 Cal.4th 813, 825 (1993) and *In re Dixon*, 41Cal.2d 756, 759 (1953). (Lodg. No. 9 at 2.) The superior court also rejected the claim on its merits, finding that Petitioner "had an opportunity to obtain civilian

clothes at the start of trial, proceeded to trial anyway, and then after the trial commenced, requested a mistrial based on the fact he was not provided with civilian clothes." (Lodg. No. 9 at 2-3.)

3. *Procedural Default*

Under the procedural default doctrine, "[a] federal habeas court will not review a claim rejected by a state court if the decision . . . rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315, 131 S.Ct. 1120, 179 L.Ed.2d 62 (2011) (internal quotations omitted). A state procedural rule is considered to be an "independent" bar if it is not interwoven with federal law. *Cooper v. Neven*, 641 F.3d 322, 332 (9th Cir. 2011). In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991) (internal quotations omitted). Nevertheless, "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez v. Ryan*, 566 U.S. 1, 10, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *see also Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (holding that a federal habeas court may consider a procedurally barred claim if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice").

Here, the Los Angeles County Superior Court rejected Petitioner's claim in Ground Five, in part, because he failed to raise it on direct appeal, citing *In re Harris*, 5 Cal.4th 813, 825 (1993) and *In re Dixon*, 41 Cal.2d 756, 759 (1953). (Lodg. No. 9 at 2.) Respondent argues that California's *Dixon* rule (i.e., that courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal) constitutes an independent an adequate to bar federal habeas review. (Answer at 8-12.)

In *Johnson v. Lee*, the Supreme Court recognized that the procedural rule announced by the California Supreme Court in *Dixon* is an adequate and independent state procedural basis sufficient to bar a claim from federal habeas review under the procedural default doctrine. __ U.S. __, 136 S.Ct. 1802, 1806, 195 L.Ed.2d 92 (2016); *see also Linares v. California*, Case No. SACV 16-0835-AG (JEM), 2017 WL 2494659, at *3 (C.D. Cal. Feb. 14, 2017), *report and recommendation adopted by*, 2017 WL 2495179 (C.D. Cal. May 19, 2017); *Randel v. Keeton*, Case No. 14-CV-05478-JST (JR), 2016 WL 3916317, at *11 n.11 (N.D. Cal. Jul. 20, 2016).

Nevertheless, Petitioner argues that the claim is not defaulted because counsel was ineffective in failing to raise this "meritorious record-based claim[] on direct appeal." (Traverse at 12.) Appellate counsel's failure to preserve an issue for appeal can establish cause to excuse a procedural default if the failure was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000); *see also Martinez v. Ryan*, 566 U.S. 1, 11, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) ("[A]n attorney's errors during an appeal on direct review may provide cause to excuse procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims.").

The Court need not decide this issue, however, because the Court is empowered to bypass a procedural default issue in the interests of judicial economy when the procedural default issue is complex and the claim clearly fails on the merits. *See Flournoy v. Small*, 681 F.3d 1000, 1004 n.1 (9th Cir. 2012) ("While we ordinarily resolve the issue of procedural bar prior to any consideration of the merits on habeas review, we are not required to do so when a petition clearly fails on the merits."); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("[C]ourts are empowered to, and in some cases should, reach the merits of habeas petitions if they are . . . clearly not meritorious despite an asserted procedural bar."); *see also Lambrix v.*

Singletary, 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (noting that, in the interest of judicial economy, courts may resolve easier matters where complicated procedural default issues exist). Accordingly, for the sake of judicial efficiency, the Court will proceed to address the merits of Petitioner's claim in Ground Five.[10]

4. *Federal Law and Analysis*

A defendant "may not be compelled" to wear "identifiable prison clothes." *United States v. Rogers*, 769 F.2d 1418, 1420 (9th Cir. 1985) (citing *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). To establish a constitutional violation, a petitioner must establish "that the appearance in jail clothing was involuntary, that a juror would recognize the clothing as issued by a jail, and that the error was not harmless." *See Jeffers v. Ricketts*, 832 F.2d 476, 481 (9th Cir. 1987) (internal citations omitted), *rev'd on other grounds*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). "[T]he failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Estelle v. Williams*, 425 U.S. at 512-13.

Here, the state court denied Petitioner's claim, finding that Petitioner was not compelled to wear prison attire because he had been given the "opportunity to obtain civilian clothes at the start of trial," but voluntarily "proceeded to trial" without them.

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[10] Because the Los Angeles County Superior Court alternatively rejected this claim on its merits in a reasoned decision, AEDPA deference applies. *See Apelt*, 878 F.3d at 825 ("[W]hen a state court 'double-barrels' its decision—holding that a claim was procedurally barred and denying the claim on its merits—both its procedural default ruling and its merits ruling are entitled to deferential review by federal courts, as intended by AEDPA."); *Clabourne v. Ryan*, 745 F.3d 362, 383 (9th Cir. 2014) (holding that where state court simultaneously rejected claim on procedural ground and on the merits, AEDPA deference applies to "alternative holding on the merits"), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc).

(Lodg. No. 9 at 2-3.) This is a reasonable conclusion based on the record. On the first day of voir dire, Petitioner appeared in front of potential jurors in his jail garb. Although he complained that he was having "no success" getting civilian clothing, he never objected to the trial proceedings, and the court granted him additional phone calls to obtain the clothing from his legal runner. Petitioner appeared the following day, again in jail garb and again without objecting to the trial commencing with opening statements and testimony from witnesses. Only on May 17, 1993, Petitioner actually did object—by requesting a mistrial because the court had not "provided" clothing. Even after denying the motion, the trial court offered to let Petitioner phone his family to bring him clothes, but Petitioner declined. Under these circumstances, the Court cannot conclude that Petitioner was compelled by the court to wear prison clothing during his trial. *See, e.g., Spencer v. Castro*, No. 2:05-cv-2456 GEB KJN P, 2010 WL 3186772, at *17-18 (E.D. Cal. Aug. 9, 2010) (finding no compulsion where defendant was "given the option" of "wearing civilian clothing on several occasions," but refused), *report and recommendation adopted by*, 2011 WL 13134274 (E.D. Cal. Jan. 18, 2011); *see also Black v. Miller*, No. CV 12-10875-PSG (E), 2013 WL 6002896, at *20 (C.D. Cal. Nov. 6, 2013) (finding no compulsion where petitioner never made a "timely objection to appearing at trial in jail clothing").

Furthermore, Petitioner cannot obtain habeas relief on this claim because he is unable to show that his wearing of jail-issued clothing "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks and citation omitted); *see also Villafuerte v. Stewart*, 111 F.3d 616, 628 (9th Cir. 1997) (applying *Brecht* to claim that defendant was compelled to wear prison clothing on habeas review). Here, the trial court explicitly told the jury that "[t]he clothing of the defendant should have no bearing whatsoever in your verdict." (RT 273.) The Court presumes the jury heeded this admonishment. *See Weeks v. Angelone*, 528 U.S. 225,

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234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("A jury is presumed to follow its instructions.").

Moreover, while testifying in his own defense, Petitioner told the jury of the difficulties he was having trying to represent himself while in jail for the past four and a half months. (RT 568-75.) He testified that the other people in the Cadillac had been released from jail, but they "didn't let [him] go." (RT 571-72.) He also told the jury that he had been charged in a separate case for attempting to escape from custody following his arrest in this matter. (RT 580-81.) Thus, based on his own admissions, the jury was acutely aware of his custody status regardless of the clothing he wore at trial. *See Villafuerte*, 111 F.3d at 628 (finding no prejudice under *Brecht* from wearing prison garb at trial where defendant "volunteered . . . that he had been in jail for five months"). Accordingly, the Court finds no prejudice from Petitioner's attire at trial.

Because the Court finds that the California courts' rejection of this claim was not contrary to or an unreasonable application of clearly established Supreme Court law, Petitioner is not entitled to habeas relief.

E. Ground Six: Marsy's Law is Unconstitutional

In Ground Six, Petitioner claims that the enactment and application of Proposition 9, commonly known as Marsy's Law, violates his rights under the Ex Post Facto Clause of the Constitution. (FAP at 37-40.) He argues that, because Marsy's Law increases the time between parole hearings, the retroactive application of its provisions significantly increases the risk of a longer sentence for him and, as such, is unconstitutional. (FAP at 39-40.)

In 2008, California voters approved Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law," which modified the availability and frequency of parole hearings for convicted prisoners. *See* Cal. Penal Code § 3041.5(b)-(d). Specifically, Proposition 9 provides that the parole board will hear a prisoner's case every 15 years, unless it opts to schedule the next hearing in three, five, seven or ten years.

Cal. Penal Code § 3041.5(b). The most significant changes are that the minimum deferral period is increased from one year to three years, the maximum deferral period is increased from five years to 15 years, and the default deferral period is changed from one year to 15 years. *See Gilman v. Schwarzenegger*, 638 F.3d 1101, 1104-05 (9th Cir. 2011). Nevertheless, Marsy's Law also amended the law governing parole deferral periods by authorizing that hearings in advance of this schedule can be held at the parole board's discretion or at the request of a prisoner, although the inmate is limited to one such request every three years. *Id.* at 1105.

On collateral review, the Los Angeles County Superior Court rejected Petitioner's claim that the application of Marsy's Law, which was enacted 15 years after he was convicted at trial, violated the Ex Post Facto Clause. (Lodg. No. 2.) The superior court found no evidence that there was a "significant risk" that Marsy's Law would result in a longer period of incarceration, noting that Petitioner had waived his most recent parole suitability hearing in 2010. (Lodg. No. 2 at 4-5.)

In general, the Ex Post Facto Clause forbids applying retroactively legislation that "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). To date, however, the Ninth Circuit has rejected all ex post facto challenges to the constitutionality of Marsy's Law. *See Gilman v. Brown*, 814 F.3d 1007, 1016-21 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 650 (2017); *see also Borstad v. Hartley*, 668 F. App'x 696, 697 (9th Cir. 2016) (finding that challenges to Marsy's Law do not go to the "validity of any confinement or . . . the particulars affecting its duration, but rather only the timing of each petitioner's next parole hearing," and therefore district courts lacked habeas jurisdiction to consider challenges) (internal citation omitted). Petitioner fails to identify any Supreme Court precedent that suggests a different result. In fact, Petitioner concedes that Ninth Circuit authority precludes relief and simply raises the claim "in the event that the Supreme Court overturns" these cases.

///

(FAP at 40.) As such, Petitioner has not demonstrated that the state court unreasonably rejected this claim under the law, and it must be denied.

F. Ground Seven: Improper Jury Instructions

In Ground Seven, Petitioner claims that the jury instructions diluted the prosecution's burden of proof and negated the presumption of innocence in violation of his right to due process. (FAP at 40.) He contends that CALJIC Nos. 2.01 and 2.02 allowed the jury to convict him if the jury found the prosecution's theory of guilt to be reasonable and the defense theory unreasonable, even if it were true. (FAP at 43.)

1. *Background*

After the close of evidence and without objection, the trial court instructed the jury with CALJIC Nos. 2.01 and 2.02 regarding the sufficiency of circumstantial evidence generally and to prove the necessary mental state.

As given, CALJIC No. 2.01stated:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence [as to any particular count] is susceptible to two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to [his] guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 139-40.)

CALJIC No. 2.02 instructed, as follows:

> The [specific intent] [or] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged [in Count[s] One and Two] unless the proved circumstances are not only (10 consistent with the theory that the defendant had the required [specific intent] [or] [mental state] but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to [any] such [specific intent] [or] [mental state] is susceptible of two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to the absence of the [specific intent] [or] [mental state], you must adopt that interpretation which points to the absence of the [specific intent] [or] [mental state]. If, on the other hand, one interpretation of the evidence as to such [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 141-42.)

2. *State Court Opinion*

On direct appeal, the California Court of Appeal rejected Petitioner's claim that instructing the jury with CALIC Nos. 2.01 and 2.02 violated his constitutional rights:

> [Petitioner] now claims the instructions are erroneous because that portion of them which instructs the jury to reject an unreasonable, and accept a reasonable, interpretation of circumstantial evidence might compel the jury to reject an unreasonable but true interpretation, thus lessening the prosecution's burden of proof.
>
> We disagree. Here, the prosecution was proceeding on an implied malice theory, and there was no direct evidence of [Petitioner's] mental state, which had to be inferred from circumstantial evidence. In such a case, it would be error to fail to give CALJIC Nos. 2.01 and 2.02. Moreover, this record demonstrates no interpretation of evidence which could possibly be considered unreasonable and, at the same time, true. There was no error.

(Lodg. No. 1 at 10 (internal citation omitted) (emphasis in original).)

3. *Federal Law and Analysis*

A claim of instructional error does not warrant federal habeas relief unless the error "so infected the entire trial that the resulting conviction violates due process[.]" *Waddington v. Sarausad*, 555 U.S. 179, 191, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009) (citation and internal quotation marks omitted). The reviewing court must not view the challenged instruction in isolation, but should consider it in the context of the instructions as a whole and the trial record. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). To obtain relief, a habeas petitioner must show that there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (per curiam) (internal quotations omitted); *see also Waddington*, 555 U.S. at 191 ("[I]t is not enough that there is some slight possibility that the jury misapplied the instruction.") (internal quotations omitted). Even if a constitutional error occurred, federal habeas relief is unavailable unless the error caused prejudice, i.e., the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 623.

Here, Petitioner suggests that the two instructions—CALJIC Nos. 2.01 and 2.02—lowered the prosecution's burden of proof because the jurors were only required to decide that the prosecution's theory was more reasonable than the defense theory to find Petitioner guilty. But this argument fails to account for the instructions as a whole, which specifically required a finding that Petitioner be found guilty beyond a reasonable doubt. (CT 155 (CALJIC No. 2.90).) "A jury is presumed to follow its instructions." *Weeks*, 528 U.S. at 234. There is no reason to think otherwise in this matter.

Moreover, Petitioner fails to cite any legal precedent suggesting that either instruction violates constitutional norms. In fact, both instructions routinely have been upheld against any such challenges. *See, e.g., Carpenter v. Chappell,* No. C 98-2444 MMC, 2014 WL 1319260, at *23 (N.D. Cal. Apr. 1, 2014) (finding CALJIC

Nos. 2.01 and 2.02 did not "compel[] the jurors to disregard the reasonable doubt standard"); *Lara v. Allison*, No. CV 10-4439 JFW (RNB), 2011 WL 835594, at *13 (C.D. Cal. Jan. 12, 2011) (concurring with the "numerous California Supreme Court cases holding that CALJIC No. 2.01 does not reduce the Peoples burden of proof"), *report and recommendation adopted by*, 2011 WL 845008 (C.D. Cal. Mar. 7, 2011); *Romero v. Runnels*, No. CIV S-04-0459-MCE-CMK P, 2009 WL 1451713, at *8-11 (E.D. Cal. May 22, 2009) (finding "no constitutional error with respect to" CALJIC Nos. 2.01 and 2.02).

Finally, Petitioner has pointed to no evidence in the record demonstrating that the jury may have improperly rejected a defense theory which was "unreasonable yet true." (*See* FAP at 43.) Rather, the weight of evidence against Petitioner was substantial, if not overwhelming, and was contradicted only by Petitioner's self-serving denial in which he claimed he was not the driver but refused to name who was. Under these circumstances, Petitioner has failed to show a "reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the" beyond a reasonable doubt standard. *See Victor v. Nebraska*, 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Nor has he shown that the challenged instructions had a substantial effect on the outcome of the case. For these reasons, this claim must be denied.

G. Ground Eight: Cumulative Error

In Ground Eight, Petitioner claims that the "cumulative effect" of several "combined errors" at trial violated his due process rights and requires his conviction and sentence to be reversed. (FAP at 43-44.) The Los Angeles County Superior Court denied his claim, finding that "each individual claim" was "without merit." (Lodg. No. 9 at 3.) The Court agrees that Petitioner is not entitled to relief.

"Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Mancuso v. Olivarez*, 292 F.3d 939,

957 (9th Cir. 2002) (internal quotations omitted), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *see also Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.").

Here, Petitioner has not demonstrated any single instance of constitutional error in his underlying claims, let alone multiple errors that combined to prejudice the outcome of his trial. For this reason, Petitioner's claim of cumulative error necessarily fails. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."); *Mancuso*, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation."). Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law.

VI. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: March 6, 2019

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

S242255

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DERRICK ARNOLD JOHNSON on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DERRICK ARNOLD JOHNSON on Habeas Corpus.	B281737 (Super. Ct. L.A. County No. GA013457) (ROBIN MILLER SLOAN, Judge) ORDER

THE COURT*:

The petition for writ of habeas corpus, filed April 6, 2017, has been read and considered.

The petition is denied.

* ROTHSCHILD, P. J. CHANEY, J. JOHNSON, J.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

IN RE DERRICK A. JOHNSON Petitioner, On Habeas Corpus,	Case No. GA013457 ORDER SUMMARILY DENYING PETITION FOR WRIT OF HABEAS CORPUS

On May 25, 1993, Petitioner Derrick A. Johnson was convicted of the crime of murder in the second degree, in violation of California Penal Code section 187(a), and evading an officer causing death, in violation of California Vehicle Code section 2800.3. Petitioner with the assistance of advisory counsel, represented himself at trial. Because of having suffered prior felony convictions and serving a prior prison term, petitioner was sentenced to twenty-two years to life, which was later reduced to twenty-one years to life.

Petitioner appealed his conviction to the California Court of Appeal. The conviction was thereafter affirmed with a one year reduction based upon a sentencing error. Subsequently, petitioner filed a Petition for Writ of Habeas Corpus in the Los Angeles Superior Court, the California Court of Appeal, and the California Supreme Court. All petitions were denied. Thereafter, petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, Central District. The Central District of the United States District Court granted a stay and leave to amend the petition. On January 19, 2017, this petition was filed. The Court, having considered the Petition for Writ of Habeas Corpus filed in this matter, all attachments thereto, and the court file, hereby summarily denies the Petition.

Petitioner has asserted four claims in support of his petition: (1) He was incompetent to stand trial; (2) He was unconstitutionally restrained at trial; (3) He was forced to appear in jailhouse attire, and (4) cumulative error.

Petitioner's claims that he was incompetent to stand trial, and that he was unconstitutionally restrained at trial, were raised and rejected in previous filings. Therefore these claims must be denied. *In re Martinez* (2009) 46 Cal.4th 945, 956; *In re Clark* (1993) 5Cal.4th 750,767, 798. Further, the facts now stated by petitioner do not support his claims. Petitioner's claim he was incompetent to stand trial, at the time of trial, is without merit. As noted in the direct appeal, petitioner responded to testimony through cross-examination and made numerous motions related to discovery, bifurcation of priors, sufficiency of the evidence, and mistrial. *People* v. *Johnson,* No. B077201(unpublished). Also, petitioner had advisory counsel throughout the proceedings, and presumably if there was an issue as to competency to stand trial, it would have been raised. *Ibid.* Further given petitioner's performance at trial, there has been nothing demonstrated as to his failure to understand the nature of the proceedings, or that he was unable to assist in his own defense. *Pen. Code section 1367(a).*

The claim as to petitioner being unconstitutionally restrained is also without merit. Again, this claim was raised in a previous proceeding and soundly rejected by the Court of Appeal. The Court of Appeal determined there was no manifest abuse of discretion given petitioner's attempt to escape in a previous proceeding related to this case. Further, petitioner never made a request to remove the restraints when the court offered to consider removal for specific exhibits or witnesses, and likewise rejected the court's offer to admonish the jury. *Johnson* at p. 11. Photographs and a declaration offered two decades later does not persuade this court of any constitutional malady.

Petitioner's claim of error based upon his appearance at trial in jail attire is also without merit. This claim was not raised on appeal and is therefore unavailable for review. *In re Harris* (1993) 5 Cal.4th 813, 825; *In re Dixon* (1953) 41 Cal.2d 756, 759. Petitioner's oblique statement that this claim was not raised on direct appeal based upon appellate counsel's deficient performance is unsupported by the record. Moreover, the record suggests petitioner had an

opportunity to obtain civilian clothes at the start of trial, proceeded to trial anyway, and then after the trial commenced, requested a mistrial based upon the fact he was not provided with civilian clothes. (1 RT 1, 2, 19; 2 RT 247-248.) Petitioner cannot now claim error. *Estelle* v. *Williams* (1976) 425 U.S. 501, 512; *People v. Hernandez* (1979) 100 Cal.App.3d 637, 646.)

Finally, petitioner's claim of cumulative error also fails. As each individual claim is procedurally barred and without merit, no cumulative error claim can be asserted.

March 6, 2017

ROBIN MILLER SLOAN
Judge of the Superior Court

Clerk to give notice.

Appellate Courts Case Information

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Supreme Court

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Docket (Register of Actions)

JOHNSON (DERRICK ARNOLD) ON H.C.
Case Number S221364

Date	Description	Notes
09/19/2014	Petition for writ of habeas corpus filed	Petitioner: Derrick Arnold Johnson Pro Per Exhibits attached with petition.
11/19/2014	Petition for writ of habeas corpus denied	

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DERRICK ARNOLD JOHNSON on Habeas Corpus.	B258077 (L.A.S.C. No. GA013457) (STANLEY BLUMENFELD, Judge) ORDER

THE COURT*:

The petition for writ of habeas corpus, filed August 8, 2014, has been read and considered.

The petition is denied.

*ROTHSCHILD, P. J. JOHNSON, J. WILEY, J.**

** Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
NORTH EAST DISTRICT

IN RE
DERRICK ARNOLD JOHNSON,

Petitioner.

On Habeas Corpus.

No. GA013457

ORDER SUMMARILY DENYING PETITION FOR WRIT OF HABEAS CORPUS

On May 25, 1993, Petitioner Derrick Arnold Johnson was convicted of the crimes of murder in the second degree, in violation of Cal. Pen. Code § 187(a), and felony evading of an officer causing death, in violation of Cal. Pen. Code § 2800.3. Petitioner represented himself at trial with the assistance of advisory counsel. More than twenty years later, Petitioner has filed a petition for habeas corpus, asserting numerous grounds for relief. In that petition, Petitioner states that he did file a direct appeal, and that he was represented by counsel on appeal. But "due to [his] mental illness," he claimed to be unable to identify the grounds asserted on appeal.

This court ordered an informal response to obtain documents related to the petition. Respondent has filed an informal response, attaching the decision on appeal affirming the judgment in the trial court. Petitioner responded to that informal response on July 13, 2014. The court now summarily denies the petition because the claims asserted in that petition, other than the claim about being denied parole, were or could have been asserted on appeal and otherwise are untimely. The parole claim lacks merit for other reasons explained below.[1]

[1] After the court ordered an informal response, petitioner sought the appointment of counsel, claiming that he has stated a prima facie case for relief. This court, however, has not made a

Petitioner asserts eleven grounds for relief, including:

- He was denied parole in violation of Marsy's law (Ground 1);
- He was shackled during trial in violation of his right to due process (Grounds 2-5, 7);
- He was denied a competency hearing in violation of his right to due process (Ground 6);
- He was forced to proceed in pro per in violation of his right to counsel (Ground 8); and
- He was denied a fair trial in that the prosecution exercised peremptory challenges in a discriminatory fashion (Grounds 9 – 11).

Most of these claims are procedurally barred in that they were or could have been raised on appeal. *In re Waltreus*, 62 Cal. 2d 218 (1965) (claim previously raised on appeal generally barred); *In re Dixon*, 41 Cal. 2d 756, 759 (1953) ("The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction."); see *In re Reno*, 55 Cal. 4th at 476-77 (2012) (reaffirming these principles).

On direct appeal, the court rejected the challenge to the use of shackles in this case. *People v. Johnson*, No. B077201 (unpublished). The Court of Appeal concluded that the trial court did not abuse its discretion in finding that there was a manifest need to shackle petitioner during the trial. The court reasoned:

> Johnson's claim that the trial court abused its discretion lacks merit. The trial court restrained Johnson because he had attempted to escape during earlier proceedings in this case. That attempt resulted in the filing a formal charges. The trial court initiated extensive and successful efforts to minimize the restraints and assure the jury remained unaware of them. There was no error.

Id., at 6-7.

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prima face finding. Rather, the court requested an informal response for purposes of obtaining documents necessary to review the petition on the merits. Having now done so, the court finds that petitioner has not set forth a prima facie case and declines to appoint counsel. *See* Cal. R. Ct. 4.551(c) (requiring appointment of counsel upon issuance of an order to show cause based on a prima facie showing).

The Court of Appeal also rejected the challenge to allowing petitioner to represent himself at trial. The Court of Appeal reasoned:

> The trial court warned Johnson of the dangers and disadvantages of self-representation and inquired about his level of education. Johnson replied he had a 10th grade education, had successfully represented himself twice before and negotiated his own plea bargains, understood the proceedings, and wished to represent himself. The trial court permitted Johnson to consult with a public defender before making his decision.
>
> Johnson was under medication to control seizures. Shortly before trial, the trial court granted Johnson's request for advisory counsel, who assisted Johnson throughout the trial. Before and during trial, Johnson made a discovery motion, demurred, successfully moved to bifurcate trial of his prior convictions, successfully moved to appear before the jury without restraints, moved for a mistrial because the trial court removed all except leg restraints, petitioned for a writ of mandate regarding the leg restraints, sought a mistrial based on lack of access to a law library, investigator, and other pro per privileges, sought dismissal based on discriminatory prosecution ..., successfully moved the trial court to find that he could be convicted at most of second degree murder because the premeditation evidence was insufficient, cross-examined all prosecution witnesses, testified, and presented his defense.
>
> Throughout the case, the trial court repeatedly asked Johnson if he wished to have counsel appointed, and Johnson always refused. A few times, Johnson and his advisory counsel said that events were happening too fast for him to respond, and that this may be caused by his seizure medication. The trial court noted that Johnson did not claim he did not understand things, and both the trial court and the prosecutor noted without objection that Johnson always responded appropriately and immediately to questions, had no difficulty speaking or moving, and never exhibited confusion.
>
> Johnson claims the record shows he did not understand the proceedings, pointing to his failure to subpoena corroborating witnesses and his claim that his medication may have limited his understanding of [the] proceedings. Thus, Johnson claims, the trial court erred in granting him self-representation.
>
> We disagree. The record demonstrates that the unsubpoenaed witnesses were inmates who may have been the other occupants of the Cadillac during the chase. During his testimony, Johnson refused to name the other occupants because he feared he would be attacked as an informer if he did so, and also said he chose not to even subpoena them for the same reason. Moreover, Johnson did not claim he did not understand the proceedings, only that they were going too fast for him. Because Johnson's *Faretta* motion was timely, the trial court lacked discretion to deny it ..., especially in light of Johnson's repeated refusals to relinquish self-representation. Johnson was active throughout. There was no error.

Id., at 6.

Based on the Court of Appeal's decision, petitioner's claims that his rights were violated because he was permitted to represent himself and was denied a competency hearing must fail. The Court of Appeal reviewed the trial record, including the trial testimony and motions, and concluded that petitioner was able to perform the functions required of a defendant who exercises his Sixth Amendment right to represent himself. Petitioner consulted with the deputy public defender before deciding to represent himself, was provided advisory counsel throughout the trial proceedings, and was represented by an attorney on appeal. In his habeas petition, petitioner fails to support his claims, made two decades after the fact, that he was incompetent during the trial proceedings, other than his own assertions. Were this a genuine issue at the time, it is reasonable to expect that the deputy public defender counseling petitioner about whether to represent himself, or counsel appointed to advise petitioner throughout the trial, would have raised this question before the trial court. Moreover, were this a genuine issue at the time, it is reasonable to expect that petitioner's appellate counsel would have raised the issue on appeal, particularly since the issue of self-representation was directly and vigorously challenged. Thus, petitioner's claims that he was denied his right to a fair trial by being permitted to represent himself is barred because he either raised or could have raised these issues on appeal, and they now come too late twenty years later.[2]

Finally, petitioner claims that he was improperly denied parole based on Marsy's Law, which he contends violates the Ex Post Facto Clause of the U.S. Constitution as applied against him. Petitioner has not made a prima facie showing with respect to this claim either. *See People v. Duvall*, 9 Cal. 4th 464, 474 (1995) (requiring petitioner to state facts underlying the claim fully and particularly and to "include copies of reasonably available documentary evidence supporting the claim"). Here, petitioner has not submitted any evidence that there is a significant risk that

[2] For the same reason, petitioner's claims that the prosecution engaged in discrimination during jury selection come too late. Petitioner has provided no reason for failing to present these claims on direct appeal.

Marsy's Law will result in a longer period of incarceration for him. Indeed, respondent has provided documents showing that petitioner waived his right to a parole hearing on February 11, 2010, stating that he would not be suitable for parole for another ten years. Exh. B (attached to Informal Response).

Accordingly, the petition is summarily denied for failure to state a prima facie case for habeas relief.

Dated: July 19, 2014

Stan Blumenfeld
Los Angeles Superior Court Judge

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DERRICK ARNOLD JOHNSON, Defendant and Appellant.	No. B077201 (Super. Ct. No. GA 013457)

COURT OF APPEAL - SECOND DIST.

FILED

SEP 29 1994

JOSEPH A. LANE Clerk

VICTOR I. SALAS Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Jack B. Tso, Judge. Modified and affirmed.

Kevin C. McLean, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George H. Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Linda C. Johnson and Stephen M. Kaufman, Deputy Attorneys General, for Plaintiff and Respondent.

Derrick Arnold Johnson appeals from the judgment entered following his conviction by jury of second degree murder and evading an officer causing death, and true findings by the court that he suffered three prior felony convictions, one serious and two for which he served prison terms. (Pen. Code, §§ 187, subd. (a), 189; Veh. Code, § 2800.3; Pen. Code, §§ 667, subd. (a), 667.5, subd. (b).) Johnson received a 22 years-to-life sentence. We accept only Johnson's sentencing error claim. We reduce the sentence to 21 years-to-life and otherwise affirm the judgment.

FACTS

Johnson does not challenge the sufficiency of the evidence. Shortly before 11 p.m. on November 17, 1992, two 2-officer Pasadena Police Department marked patrol cars responded to gunshots near Church's Chicken stand at the Fair Oaks/Orange Grove Boulevards intersection. When Johnson drove a Cadillac containing three other men unsafely away from the approaching police cars at high speed, the officers chased him for nine minutes over nearly ten miles. Throughout the chase, Johnson drove far above the applicable speed limits at speeds up to 100 miles per hour and ran several stop lights and stop signs, barely missing colliding with many other vehicles. Johnson entered the Myrtle Avenue/Evergreen intersection at about 80 miles per hour against a red light and crashed into a

Toyota driven by Herman Basulto, Jr., who lived two blocks away. Johnson's Cadillac stopped between 150 and 200 feet away, exploded, and burned. The Toyota came to rest about 200 feet from the point of impact. Basulto was thrown about 130 feet. He died in an ambulance en route to a hospital of massive head, brain, chest, lung, and liver trauma.

In defense, Johnson claimed he was not driving the Cadillac and could not get out during the chase. Johnson claimed he and his friends fled because they were scared by the police chase. Johnson refused to say who was driving because he would be threatened or killed if he did so. Johnson admitted his prior convictions and altering his hairstyle between the date of Basulto's death and trial.

Additional relevant facts are contained in the appropriate discussion sections.

ISSUES

Johnson contends the trial court erred in (I) granting his self-representation motion; (II) shackling him during trial; (III) denying him money, materials, evidence and law library access; (IV) admitting a prejudicial photograph of the victim's body; (V) giving CALJIC Nos. 2.01 and 2.02; and (VII) sentencing him to two consecutive one-year prior prison term enhancements for a single confinement period. Johnson also contends (VI) the prosecutor committed misconduct during

cross-examination and argument, and (VIII) the cumulative errors require reversal.

DISCUSSION

I

At his first appearance in the trial court, Johnson, who was in custody throughout the proceedings, represented himself. After some brief continuances, at the March 2, 1993, arraignment the trial court granted Johnson's motion for self-representation. (Faretta v. California (1975) 422 U.S. 806.) The trial court warned Johnson of the dangers and disadvantages of self-representation and inquired about his level of education. Johnson replied he had a 10th grade education, had successfully represented himself twice before and negotiated his own plea bargains, understood the proceedings, and wished to represent himself. The trial court permitted Johnson to consult with a public defender before making his decision.

Johnson was under medication to control seizures. Shortly before trial, the trial court granted Johnson's request for advisory counsel, who assisted Johnson throughout the trial. Before and during trial, Johnson made a discovery motion, demurred, successfully moved to bifurcate trial of his prior convictions, successfully moved to appear before the jury without restraints, moved for a mistrial because the trial court removed all except leg restraints, petitioned for a writ

of mandate regarding the leg restraints, sought a mistrial based on lack of access to a law library, investigator, and other pro. per. privileges, sought dismissal based on discriminatory prosecution (Murgia v. Municipal Court (1975) 15 Cal.3d 286), during a motion to dismiss at the close of the prosecution's case (Pen. Code, § 1118.1) successfully moved the trial court to find that he could be convicted at most of second degree murder because premeditation evidence was insufficient, cross-examined all prosecution witnesses, testified, and presented his defense.

Throughout the case, the trial court repeatedly asked Johnson if he wished to have counsel appointed, and Johnson always refused. A few times, Johnson and his advisory counsel said that events were happening too fast for him to respond, and that this may be caused by his seizure medication. The trial court noted that Johnson did not claim he did not understand things, and both the trial court and the prosecutor noted without objection that Johnson always responded appropriately and immediately to questions, had no difficulty speaking or moving, and never exhibited confusion.

Johnson claims the record shows he did not understand the proceedings, pointing to his failure to subpoena corroborating witnesses and his claim that his medication may have limited his understanding of proceedings. Thus, Johnson claims, the trial court erred in granting him self-representation.

We disagree. The record demonstrates that the unsubpoenaed witnesses were inmates who may have been the other occupants of the Cadillac during the chase. During his testimony, Johnson refused to name the other occupants because he feared he would be attacked as an informer if he did so, and also said he chose not to even subpoena them for the same reason. Moreover, Johnson did not claim he did not understand the proceedings, only that they were going too fast for him. Because Johnson's Faretta motion was timely, the trial court lacked discretion to deny it (Faretta v. California, supra, 422 U.S. 806; People v. Bloom (1989) 48 Cal.3d 1194, 1219-1220), especially in light of Johnson's repeated refusals to relinquish self-representation. Johnson was active throughout. There was no error.

II

Johnson attempted to escape during municipal court proceedings in this case. Escape charges were filed and eventually the case was brought to the trial court where it trailed this case. Because of these facts, the trial court refused to release Johnson from his leg restraints. However, the trial court had Johnson's feet covered while he was at counsel table and on the witness stand, and he was not moved when the jury was present. The trial court told Johnson it would consider removal of the restraints at particular sessions

if Johnson needed to move about to examine exhibits or witnesses. Johnson never made such a request. The trial court told Johnson it would admonish the jury to ignore the restraints if Johnson so desired, but Johnson rejected the offer. The trial court did admonish the jury to ignore Johnson's jail clothing. There is no evidence in the record that any juror saw the restraints.

A defendant may be restrained in the jury's presence only upon a showing of manifest need, based on unruliness, a liklihood of escape, or disruptive conduct. While a formal hearing is not required, the trial court must act on facts, not rumor, but may consider hearsay reports. The trial court should exercise its discretion and employ the minimal restraints necessary to meet the specific need. A trial court's finding that restraints are required can be reversed only upon a showing of manifest abuse. (People v. Price (1991) 1 Cal.4th 324, 403; People v. Cox (1991) 53 Cal.3d 618, 651-652; People v. Stankewitz (1990) 51 Cal.3d 72, 94-97.)

Johnson's claim that the trial court abused its discretion lacks merit. The trial court restrained Johnson because he had attempted to escape during earlier proceedings in this case. That attempt resulted in the filing of formal charges. The trial court initiated extensive and successful efforts to minimize the restraints and assure the jury remained unaware of them. There was no error.

III

Before trial, the trial court appointed an investigator for Johnson, allocated funds for a runner, and told him that pro. per. privileges were coordinated by a different judge, and specific requests must be directed to that judge. The trial court made sure Johnson received the autopsy report. Johnson repeatedly refused to waive time and announced he was ready for trial. During trial, Johnson moved for a mistrial, claiming he had been denied law library access, been unable to meet with his investigator, had not received the preliminary hearing transcript or police reports, and lacked paper for writing motions. Johnson said he made one attempt to contact the judge supervising pro. per. privileges, but when told the judge was on vacation, made no further effort. The trial court denied the mistrial motion.

The trial court did not abuse its discretion. Johnson repeatedly announced he was ready for trial and did not want to waive time. Johnson did not make these claims until trial commenced, and neither below nor on appeal makes any showing why they were not discussed before trial.

In any event, Johnson demonstrated no prejudice. As discussed above, Johnson litigated a plethora of motions, some of which were successful. He actively cross-examined adverse witnesses, presented his defense, and has made no showing how his defense was impaired or what motions he was prevented from making. Any conceivable error was harmless.

IV

Without objection, the jury heard extensive testimony from police officers, paramedics, and others regarding the victim's location, condition, injuries, attempted treatment, and cause of death. Several autopsy pictures showing the victims' injuries were received without objection. Johnson objected only to a single picture showing the victim lying at the scene, claiming it was prejudicial. The trial court found the picture demonstrated the victim's injuries and location and overruled the objection. Johnson claims the trial court abused its discretion in admitting the picture because its prejudicial effect outweighed its probative value. (Evid. Code, § 352.)

We disagree. Although the trial court later found no evidence of premeditation and removed first degree murder from the range of available verdicts, the prosecution had to prove the implied malice element of second degree murder. The nature and extent of the victim's injuries were relevant to show the speed with which Johnson entered the intersection, the lack of braking, and other factors which demonstrated implied malice. Thus, there was no abuse of discretion. (People v. Wilson (1992) 3 Cal.4th 926, 938.)

In any event, any conceivable error was harmless. The challenged photograph was no more graphic than the numerous photos which were admitted without objection, and merely visually depicted evidence about which there was extensive oral testimony. Any conceivable error was harmless.

V

Without objection, the trial court gave CALJIC Nos. 2.01 (5th ed. 1988) and 2.02 (1992 revision) regarding the sufficiency of circumstantial evidence generally and to prove a specific mental state. Without citation to relevant authority, Johnson now claims the instructions are erroneous because that portion of them which instructs the jury to reject an unreasonable, and accept a reasonable, interpretation of circumstantial evidence might compel the jury to reject an unreasonable but true interpretation, thus lessening the prosecution's burden of proof.

We disagree. Here, the prosecution was proceeding on an implied malice theory, and there was no direct evidence of Johnson's mental state, which had to be inferred from circumstantial evidence. In such a case, it would be error to fail to give CALJIC Nos. 2.01 and 2.02. (People v. Wilson, supra, 3 Cal.4th at pp. 942-943.) Moreover, this record demonstrates no interpretation of evidence which could possibly be considered unreasonable and, at the same time, true. There was no error.

VI

During cross-examination, the prosecutor asked Johnson how the four police officers could have identified him as the driver if, as he claimed, he was the passenger. Johnson replied that the officers were lying, as had the officers in the notorious Rodney King beating case. The prosecutor then

asked if all the officers were lying, and Johnson answered, essentially, that the officers were part of a conspiracy to falsely convict him, and the conspiracy also involved denying him pretrial discovery, access to necessary pro per privileges, and mentioned the fact that he had another case pending. When the prosecutor asked him what that other case involved, Johnson first answered it was irrelevant, and then blurted out that it was for escape. The trial court then sustained its own relevance objection to further reference to the escape case. Johnson did not otherwise object to the questions and never asked for an admonition.

During argument, Johnson referred to the victim as a dude. In rebuttal, the prosecutor showed the jury the collision scene photograph of the victim and argued that Johnson showed no compasssion, caring, or mercy, and that the victim deserved better than to be called a dude. Johnson did not object to the argument or request an admonition.

Johnson's claim that the challenged questions and argument constituted prejudicial misconduct lacks merit. First, Johnson waived the issue by failing to object and request admonitions. (People v. Price, supra, 1 Cal.4th at pp. 447, 484-485; People v. Wharton (1991) 53 Cal.3d 522, 591.)

Second, all the challenged conduct was in response to Johnson's statements. Johnson first accused the officers of lying, and then accused the criminal justice system of

conspiring to falsely convict him. The prosecutor's questions were proper responses to Johnson's statements. (See People v. Price, supra, 1 Cal.4th at p. 485; People v. Perez (1967) 65 Cal.2d 615, 620-621.) The prosecutor neither told the jury they had to find the officers liars to acquit, nor mischaracterized Johnson's testimony.

Finally, in any event, any conceivable error was harmless. The questions and argument all responded to earlier statements by Johnson. Despite Johnson's contrary claim, given that all four pursuing officers identified Johnson as the driver both during the chase and after the crash, the evidence of Johnson's guilt was overwhelming.

VII

Regarding Johnson's prior prison term felony convictions, although they resulted from separate charges, cases, and sentences, the later sentence was imposed consecutive to the earlier sentence while Johnson was serving his earlier prison term. Thus, the terms consisted of a single uninterrupted confinement period. As conceded by the People, in such a case, only one 1-year enhancement may be imposed. (People v. Perez (1992) 4 Cal.App.4th 893, 910-911; People v. Medina (1988) 206 Cal.App.3d 986, 992.) We reduce Johnson's sentence by one year and order the trial court to prepare a new abstract of judgment and forward it to the Department of Corrections.

VIII

Because, other than in sentencing, we find no error, we need not consider the cumulative effect of any error.

DISPOSITION

We modify the judgment to stay one of the 1-year prior prison term enhancements, thus reducing Johnson's term to 21 years-to-life. The trial court is ordered to prepare a modified abstract of judgment reflecting this change and forward it to the Department of Corrections. In all other respects, we affirm the judgment.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MASTERSON, J.

DECLARATION OF NATHAN LAVID

I, Nathan Lavid, M.D., declare as follows:

1. I am a clinical and forensic psychiatrist, licensed to practice medicine in the states of California and New York. I am board certified by the American Board of Psychiatry and Neurology. I am also a California state expert with the Medical Board of California.

2. Among other medical practices, I provide clinical evaluations and treatments of individuals with suspected psychiatric illnesses. Other services which I provide include independent medical examinations, medical record review, utilization review and consulting to industrial, legal, government, pharmaceutical and academic institutions. A true and correct copy of my curriculum vitae is attached here as Appendix A.

3. I was retained by the Office of the Federal Public Defender to evaluate Derrick Johnson's competence at the time of his trial. I have reviewed the documents listed in Appendix B, which were provided to me by the Federal Public Defender. These are the types of documents typically relied upon by doctors to reach the opinions and conclusions below.

4. Mr. Johnson is a 56-year-old male, date of birth 03/06/1961, who was born in California and lived in the Monrovia and Pasadena area for most of his life. His childhood was chaotic and traumatic. He was involved in a motor vehicle accident as an infant, which caused head trauma. Since this head trauma, he has suffered from grand mal seizures and required treatment for these seizures.

5. Mr. Johnson's youth childhood was marked by placement in various group homes. His counsel has informed me that the group homes he attended have destroyed his records as they are over 7 years old. Moreover, his mental health records from prior psychiatric treatment, such as in 1985 when he was hospitalized on a psychiatric unit, have also been destroyed. As such, there are no available contemporaneous records for review that document

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Initials

when his mental illness first emerged. What is confirmed in records is that Mr. Johnson dropped out of high school in the 10th grade and never earned a General Equivalency Diploma (GED). Also, he had a history of abusing alcohol, methamphetamine, phencyclidine (PCP) and cocaine.

6. While the mental health records prior to his current period of incarceration are unavailable for review, he has had extensive mental health evaluation and treatment since sentenced to prison on 06/10/1993 for convictions of second-degree murder and evading a police officer. These convictions stem from an incident where Mr. Johnson crashed his vehicle into the victim's vehicle on 11/17/1992 after being involved in police chase.

7. With prospective and extensive mental health evaluation, Mr. Johnson has been diagnosed with Schizophrenia. Mr. Johnson has severe mental illness requiring eleven prior inpatient admissions to the Department of Mental Health and Department of State Hospital Facilities since 1985; one at Patton State Hospital, two at Atascadero Hospital, and eight admissions at DMH-Vacaville Psychiatric Program.

8. That Mr. Johnson has been diagnosed with a severe mental illness requiring extensive treatment is understandable. Mr. Johnson has many risk factors for mental illness. He has a history of head trauma that caused a seizure disorder. Head trauma is a risk factor for the subsequent development of mental illness. Also, he had a chaotic and traumatic childhood with his father dying in a motor vehicle accident and with many different group home placements. The psychosocial stressor of the chaotic and traumatic childhood that Mr. Johnson suffered from is itself a risk factor for the development of mental illness. Moreover, he has a history of alcohol and illicit drug use, which can exacerbate and facilitate the development of mental illness. This drug use might be a predisposing factor that contributes to his mental illness.

Initials

9. Schizophrenia is a chronic and severe mental illness with psychotic episodes. Psychosis is a collective term that refers to symptoms where patients are unable to interpret reality correctly. Psychotic symptoms of schizophrenia include delusions, which are fixed false beliefs; hallucinations, which are perceptions of the senses occurring without any external stimulus; and disorganized speech and grossly disorganized behavior, which is a result of psychosis, that impairs a person's rational thinking such that illogical thinking is persistent. Illogical thinking is the loss of the normal connections and associations between ideas. This leads to the observed psychotic symptoms in schizophrenia of disorganized speech and disorganized behavior.

10. Mr. Johnson has demonstrated the following symptoms attributable to schizophrenia:

- Paranoia.
- Auditory and visual hallucinations.
- Delusions.
- Disorganized and self-injurious behavior.
- Bizarre behavior, such as smearing feces.
- Psychomotor agitation.
- Sleep disturbance.
- Responding to internal stimuli.
- Motor retardation
- Social withdrawal.

11. These symptoms have required aggressive psychotropic medication to treat. Also, as should be examined in full in a forensic setting, the possibility that Mr. Johnson is malingering

Initials

mental illness has been evaluated multiple times. There is a clear consensus among the mental health professionals who have evaluated Mr. Johnson that he is not malingering mental illness. For example, he was hospitalized at Atascadero State Hospital in 2003 where the treating psychiatrist writes the following: "In his clinical history, the issue of malingering has been raised. We saw quite clearly during his hospitalization on Unit 8 that in the absence of medication, Mr. Johnson quickly decompensated. The nature of his decompensation is consistent with schizophrenia. The clinical course and treatment is also consistent with schizophrenia. His illness has been severe enough, in my opinion, to require the use of two antipsychotics just to bring about a modicum of stabilization."

12. Moreover, as is common in those suffering from psychotic disorders, Mr. Johnson has demonstrated poor insight into his mental illness. This lack of insight has required the administration of involuntary medication on a consistent basis. He was first placed on an Involuntary Medical Order on 12/19/2001, which was continued up until 2008 where it expired due to an oversight. Mr. Johnson eventually started accepting but "cheeking" his medication and demonstrated bizarre behaviors, such as spreading feces in his cell and then overtly began refusing psychotropic medication. His behaviors required emergency administration of medication. He was subsequently placed on another Involuntary Medical Order, which has been continued to the present.

13. The rationale for continuing this order is well-conveyed in a Petition for Renewal of Involuntary Medication Order where the psychiatrist writes, "Given Mr. Johnson's history of cheeking and refusing medication and poor participation in activities, his statements on the matters of his medication, mental illness and his refusal to meet with psychiatric staff, it is clear that Mr. Johnson lacks insight into his mental illness and its severity and the need for medication.

Initials

Due to the lack of insight, he remains incompetent to provide informed consent to medication. Further, Mr. Johnson's history of refusing medication as demonstrated by his prior PC2602 Order and his lack of insight of his illness clearly indicates that without a court order, Mr. Johnson would discontinue taking psychiatric medication. But for the medication, Mr. Johnson would revert to a state of severe psychosis during which he will again decompensate to the point of grave disability. The administration of involuntary medication is in Mr. Johnson's best medical interest and the least restrictive means of protecting his health and safety."

14. Schizophrenia is a condition that typically first emerges in one's late adolescent/early adulthood, though it can present later or earlier in life. At that time of Mr. Johnson's trial in May 1993, Mr. Johnson was 32 years old and most likely was experiencing symptoms of schizophrenia at that time. Also, interestingly while there are no mental health records available for review during the time of his trial, there are notations in the trial transcript of mental health treatment. On 05/17/1993, Mr. Johnson informed the Court that he is on Thorazine (chlorpromazine). Mr. Johnson and his Advisory Council both informed the Court that Thorazine is for his seizure disorder. Furthermore, Mr. Johnson informed the Court that Thorazine is affecting his ability to understand the proceedings. Also Advisory Council conveyed that Mr. Johnson has told her that he feels confused, his thinking is slowed and he is having trouble and that everything is going too fast for him.

15. Both Mr. Johnson and his Advisory Council are wrong regarding the clinical indication for Thorazine. Thorazine (chlorpromazine) is an old antipsychotic medication that can be used for schizophrenia. Thorazine was the first antipsychotic synthesized and its primary use was in the 1950s, 1960s and 1970s until other antipsychotic medications with less adverse effects were synthesized and made available. It is typically no longer used for schizophrenia, as

Initials

there are adverse effects such as significant sedation. Moreover, it has anticholinergic properties, which can lead to confusion. Also, regarding Thorazine and other antipsychotic medications, they are not given for seizure disorders. In fact, Thorazine and other antipsychotic medications lower the seizure threshold and can make an individual who suffers from epilepsy or prone to seizures, more apt to have a seizure.

16. Regarding Mr. Johnson possibly being on Thorazine was conveyed by the Court's reference to a probation report typed on 04/01/1993, where the Court states that Thorazine was an effective treatment for his seizures. However, a review of this probation report only states the following: "Probation records indicates defendant suffers from epilepsy since birth and experiences grand mal seizures. He indicated he was on medication at the time." There is no mention of Thorazine or any other type of mental health treatment noted in the probation report. With further review of these records, there is an understanding by the Court that Mr. Johnson does require a medical evaluation and that it will order a doctor to evaluate Mr. Johnson. However, the following day, 05/18/1993, Mr. Johnson tells the Court that he has not been evaluated by a doctor. Nothing in the records reviewed reveals that Mr. Johnson did receive the recommended medical evaluation during his trial.

17. I agree with the Superior Court judge's recommendation at this time, especially in light of reviewing the extensive mental health records for Mr. Johnson since this trial. Mr. Johnson does suffer from severe and chronic mental illness and also has been diagnosed with a seizure disorder that has been treated with various anticonvulsant medications while he has been incarcerated. At that time of the trial, he would definitely have been in the age group that one would expect to be experiencing the symptoms of schizophrenia. If he was prescribed Thorazine at this time, this might have been helpful in alleviating his symptoms of schizophrenia.

Initials

18. However, as mentioned earlier, Thorazine in itself is associated with a number of side effects and is rarely used now due to these adverse effects, namely sedation and at times confusion. That Mr. Johnson is conveying to the Court that Thorazine is for a seizure disorder is incorrect and likely a reflection of his lack of insight.

19. No matter the reasoning for the confusion, there is clearly confusion on Mr. Johnson's part at the time of the trial. From a mental health standpoint, in light of his confusion with an understanding that he does suffer from schizophrenia that he might have been exhibiting symptoms of schizophrenia at this time, which might have made him incompetent to stand trial. Also, he has subsequently had evaluations at Atascadero State Hospital and other facilities regarding his competency to stand trial and has been found incompetent to stand trial.

20. Considering Mr. Johnson may or may not have been receiving mental health treatment at the time of his trial, was clearly confused at the time of his trial, suffers from schizophrenia, which has been definitively diagnosed by multiple clinicians prospectively over years, and in prior evaluations has been found incompetent to stand trial, it is clearly indicated with my review that he needed an evaluation to determine if he was competent to stand trial. Also, a mental health evaluation around this time would have clarified what, if any, psychotropic medication he was prescribed for his mental illness or seizure disorder.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct. Executed on May 27, 2017, at Long Beach, California.

NATHAN LAVID, M.D.

APPENDIX A

Nathan E. Lavid, MD

Curriculum Vitae

Clinical Office
(All Appointments)
834. E. 4th Street, Suite F
Long Beach, CA 90802

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Tel: (562) 912-4646
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Email: nlavid@nathanlavidmd.com
www.nathanlavidmd.com

EDUCATION

University of Southern California: Los Angeles, California
Forensic Fellow – USC Institute of Psychiatry, Law & Behavioral Science
Department of Psychiatry July 2001 – June 2002

University of California, Irvine: Orange, California
Resident – Department of Psychiatry and Human Behavior July 1998 – June 2001
Intern – Departments of Medicine, Neurology, Pediatrics, and Psychiatry and Human Behavior July 1997 – June 1998

University of Kansas School of Medicine: Kansas City, Kansas
M.D. August 1993 – May 1997

University of Kansas: Lawrence, Kansas
B.A. August 1988 – May 1993
Major: Microbiology

LICENSURE

California – A67055
New York – 220451
DEA

CERTIFICATION

American Board of Psychiatry and Neurology – January 2003, with continued Maintenance of Certification

USMLE:
Step 1 – June 1995
Step 2 – August 1996
Step 3 – May 1998

CURRENT OCCUPATION

Private Practice. Clinical and Forensic Psychiatry. General psychiatric practice based in Long Beach, CA. Forensic psychiatric practice primarily serving Southern California. July 2002 – present.

Psychiatric Consultant. Provide psychiatric consultations and treatment for patients receiving care at New Found Life, a nationally renowned residential facility for patients recovering from addiction located in Long Beach, California. February 2005 – present.

Expert Reviewer. Medical Board of California. March 2007 – present.

Psychiatric Consultant. Psychotropic Medication Consultation Pilot Project. Judicial Council of California. April 2007 – present.

Review Editor. Frontiers in Forensic Psychiatry. March 2011 – present.

PROFESSIONAL EXPERIENCE

Academic Appointments and Administrative Psychiatry

Dsm-5 Field Trials Collaborating Physician Investigator. American Psychiatric Association. March 2011 – January 2012.

Clinical Instructor. University of Southern California School of Medicine, Department of Psychiatry, Institute of Psychiatry, Law and Behavioral Science, Los Angeles, CA. July 2001 – June 2002. Supervision and teaching of residents and medical students performing forensic evaluation and testimony.

Resident Clinical Forensic Instructor. University of California, Irvine College of Medicine, Department of Psychiatry and Human Behavior, Orange, CA. July 2000 – July 2001. Supervision and teaching of junior psychiatry residents and medical students performing and learning forensic psychiatry.

Resident Chairman of The Quality Assurance and Maintenance Committee University of California, Irvine College of Medicine, Department of Psychiatry and Human Behavior Orange, CA. July 1999 – July 2000. Management of physician and patient concerns at the UCI Neuropsychiatric clinic.

Co-Chairman of Morning Report. University of California, Irvine College of Medicine, Department of Psychiatry and Human Behavior Orange, CA. July 1999 – July 2000. Supervision of on-call patient sign out and teaching of junior psychiatry and neurology residents.

Clinical Psychiatry

Consulting Psychiatrist. The Center for Discovery and Adolescent Change. Downey, Lakewood, and Long Beach, CA. May 2002 – November 2003. Evaluation and treatment of adolescents with eating disorders and addictions in a residential treatment setting.

Staff Child and Adolescent Psychiatrist. Children's Outpatient Clinic. Pacific Clinics, Orange and Santa Ana, CA. October 2000 – July 2001. Evaluation and treatment of mental illness in children and adolescents in Orange County, CA.

Staff Child and Adolescent Psychiatrist. Children's Day Treatment and Assessment Center. Pacific Clinics, Santa Ana, CA. October 2000 – February 2001. Evaluation and treatment of mental illness in children and adolescents in Orange County, CA.

Staff Psychiatrist. Pacific Clinics, Orange, CA. August 2000 – October 2000. Evaluation and treatment of severe and chronic mental illness in adults in Orange County, CA.

Forensic Psychiatry

Social Security Panel Psychiatrist. Orange and Los Angeles Counties, CA. Consultative psychiatric examinations assessing the impact of a mental impairment on the claimant's functioning for the Departments of Social Services, Rehabilitation, and Employment Development. August 2000 – September 2010.

Consulting Psychiatrist. Department of the Coroner, Los Angeles, CA. July 2001 – June 2002. Forensic psychiatric autopsy investigation for the Forensic Medical Division.

Consulting Psychiatrist. Department of Mental Health of Los Angeles County, Los Angeles, CA. July 2001 – June 2002. Evaluation and treatment of incarcerated mentally ill adult outpatients at the Inmate Reception Center, Twin Towers Correctional Facility.

Consulting Psychiatrist. Los Angeles County Superior Court D95, Los Angeles, CA. July 2001 – June 2002. Evaluation of criminal and mentally ill defendants on the day of their hearing providing recommendations and testimony to the court on issues including competency to stand trial, drug addiction, LPS conservatorship, and restoration of competency and firearms.

Forensic Psychiatrist. LAC + USC Medical Center Ingleside Campus, Rosemead, CA. July 2001 – June 2002. Civil commitment evaluations and

testimony as an expert witness for mentally ill inpatients at Los Angeles County Superior Court D95.

Group Therapy Leader. Department of Health Services, LAC + USC Medical Center, Los Angeles, CA. July 2001 – 2002. Evaluation and treatment of sex offenders.

Member, Los Angeles County Superior Court Expert Panel of Psychiatrists. LAC + USC Medical Center, Los Angeles, CA. July 2001 – June 2002. 730 E.C. evaluations and testimony including competency to stand trial and for decision-making, civil commitment, dangerousness, diminished intent, disability, domestic relations, drug addiction, fitness, harassment, insanity, personal injury, placement, psychiatric evaluation for treatment, relationship between parent and child, restoration of competency, sex offender evaluations, and trial strategy.

Resident Psychiatrist. University of California, Irvine. Orange, CA. July 2000 – July 2001. Forensic evaluations and testimony as an expert witness for mentally ill inpatients at Orange County Superior Court L53.

RESEARCH and PRESENTATIONS

Books

Lavid N. 2003. *Understanding Stuttering*. University Press of Mississippi, Jackson.

Book Chapters

Lavid N, 2008. "Forensic Psychiatric Examination of the Noncompliant Examinee: Application of Computerized Content Analysis;" *Computerized Content Analysis of Speech and Verbal Texts*. Eds. Gottschalk, LA. & Bechtel , RJ. Chapter 12: 133-40. Nova Science Publishers, New York.

Lavid N, Gottschalk L, Bechtel R. 2005. "Computerized measurement of neuropsychiatric traits in adolescents with eating disorders;" *Adolescent Eating Disorders*. Ed. Swain, P. Chapter 1: 1-11. Nova Science Publishers, New York.

Invited Publications

Lavid N. 2009. The Psychiatric Autopsy and Its Application in Law. Expert Article, Atrium Psychological Group Monthly Newsletter Vol 5, Issue 3.

Lavid N. 2005. Serotonin-dopamine antagonists in the treatment of stuttering. International Stuttering Awareness Day Online Conference.

Lavid N. 2002. The relevance of speech therapy: A physician's viewpoint from a clinical and neuroscience perspective. International Stuttering Awareness Day Online Conference.

Refereed Publications

Reviewer. 2017. *Practice Guidelines for the Pharmacological Treatment of Patients with Alcohol Use Disorder*. American Psychiatric Association, Washington, DC.

Lavid N. 2008. "Ask the Expert" column on Akathisia for *Medscape Psychiatry and Mental Health*. www.medscape.com

Reviewer. 2006. *Practice Guidelines for the Treatment of Eating Disorders, 3rd edition*. American Psychiatric Association, Washington, DC.

Lavid N, Grayden T, Gottschalk L, Bechtel R. 2002. Computerized Analysis of Refusal of Treatment: A Preliminary Study of the Influence of Neuropsychiatric Traits on Judicial Decision. *American Journal of Forensic Psychiatry*; 23 (3): 55-69.

Lavid N. 2000. The Interface of Neuropsychiatric Disorders in the Elderly. *Resident & Staff Physician*; Oct. 23-26.

Lavid N, Budner L. 2000. Review of the Pharmacological Treatment of Delirium in the Pediatric Population with Accompanying Protocol. *The Jefferson Journal of Psychiatry*; 15 (1): 25-33.

Lavid N, Franklin DL, Maguire GA. 1999. Management of Child and Adolescent Stuttering with Olanzapine: Three Case Reports. *Annals of Clinical Psychiatry*; 11 (4): 233-236.

Lavid N, DePaolis D, Pope T, Hinson G, Munns S, Batnitzky S, Wetzel L, Wilkinson S, Gordon M. 1996. Analysis of Three-Dimensional Computerized Representations of Articular Cartilage Lesions. *Investigative Radiology*; 31 (9): 577-585.

Refereed Abstracts

Lavid N, Franklin DL, Maguire GA 2000. The Treatment of Adult Stuttering with Olanzapine: An Open Label Prospective Analysis. Presented at the Annual Meeting of the American Psychiatric Association, May 13-18, Chicago, IL.

Selected Presentations

"How Do Psychotropic Medications Affect Youth?" Faculty, Beyond the Bench 23: User Experience Conference, Judicial Council of California, Center for Families, Children & the Courts, Anaheim, CA – December 3, 2015.

"Rule 3-110 and Substance Abuse: A Judicial Perspective." Panelist, State Bar of California 2015 Annual Meeting, Anaheim, CA – October 11, 2015.

"How to Explain Mental Illness to Those Who Do Not Know: Focusing on Depression and Bipolar Disorders." Depression and Bipolar Support Alliance Orange County, Educational Meeting – September 21, 2015.

"Substance Abuse Issues in Custody Litigation." with Jason M. Schwartz, CFLS and Courtney L. Shepard, CFLS for Orange County Chapter of the Association of Certified Family Law Specialists, Orange, CA, November 17, 2014.

"Attorney as Patient: The Neuroscience of Addiction." Newport Harbor Bar Association, Newport Beach, CA – April 9, 2014.

"Depression: An Understanding from Antiquity to the Present." Depression and Bipolar Support Alliance Orange County, Educational Meeting – February 18, 2013.

"The Neuroscience of Addiction: It's Implication in Treatment." Saint Yared General Hospital, Addis Ababa, Ethiopia – December 28, 2011.

"Legal Aspects of Psychiatric Treatment: Involuntary Hospitalizations and Medications." NAMI Orange County Educational Meeting – February 10, 2011 & November 12, 2009.

"Neuroscience of Addiction and the Legal Implications in the Treatment of Addiction." NAMI Orange County Educational Meeting – May 13, 2010.

"Attorney as Patient: The Neuroscience of Addiction." AttorneyCredits.com – Continue Legal Education Course, first posted – March 2010.

"The Psychiatric Autopsy and Its Application in Law." AttorneyCredits.com – Continue Legal Education Course, first posted – January 2010.

"Competency and Insanity," Dynamics of Addiction and Criminal Behavior Course. Loyola Marymount University, Guest Lecture – April 3, 2008.

"The Disability Determination Process: Focus on the Social Security Administration Programs." University of California, Irvine, Department of Psychiatry and Human Behavior, Grand Rounds – February 25, 2003

"Understanding Stuttering: Discoveries in the Neurosciences." Good Samaritan Regional Medical Center, Phoenix, AZ, Department of Psychiatry, Grand Rounds – October 26, 2001.

"A History of the Western Conceptualization of the Mind and its Implications in Medicine." Long Beach Veteran's Administration Hospital, Long Beach, CA, Department of Psychiatry, Grand Rounds – December 15, 2000.

"Review of the Pharmacological Treatment of Delirium in the Pediatric Population with Accompanying Protocol." University of California, Irvine, Department of Psychiatry and Human Behavior, Grand Rounds – July 11, 2000.

"Analysis of Three-Dimensional Computerized Representations of Articular Cartilage Lesions." University of Kansas School of Medicine, Kansas City, KS, Student Research Forum – April 11, 1996.

"Comparison of the structural integrity of genetically engineered beta subunit from the chloroplast ATP synthase with the native beta subunit." University of Kansas, Lawrence, KS, Summer Research Symposium – July 26, 1992.

Television and Radio

"A Look Inside." Nathan Lavid, MD and Tom Grayden, MD, A review of the Andrea Yates case, September 20, 2002 KUCI 88.9 FM.

HONORS and AWARDS

Awarded position for Resident & Staff Physician's Resident Correspondent Program. May 2000. Selected to write an article summarizing a presentation at the annual American Psychiatric Association Meeting in Chicago, IL.

Shawn M. Storm, M.D. Memorial Award. May 1997. Presented to the senior student who is entering residency in psychiatry and is perceived by the faculty to be most likely to succeed in the profession.

Paul F. Funk Memorial Scholarship. January 1997

The Lattner Foundation Grant, Menninger Medical Student Program. January 1997

Elwood and Mamie S. Sharp Scholarship in Medicine. August 1996

Kansas Technology Enterprise Corporation Grant. August of 1995 and September of 1996

R.M. Gouldner Memorial Scholarship. 1995 – 1997 school years

Harry and Georgie Trowbridge Scholarship. 1995 – 1996 school year

Howard Hughes Biomedical Research Award. June 1992

Endowment Merit Scholarship. 1988 – 1992 school years

PROFESSIONAL AFFILIATIONS

Family Law Panel, Child Custody Evaluator – Orange County 2009 – present

Forensic Expert Witness Association 2009 – present

American Academy of Psychiatry and the Law 2000 – present

Orange County Psychiatric Society 1997 – present

Distinguished Fellow, American Psychiatric Association 1996 – present

VOLUNTEER and COMMUNITY SERVICE

Representative. Orange County Psychiatric Society to the Judicial Action Committee of the California Psychiatric Association, June 2014 – present

Member. Orange County Psychiatric Society Ethics Committee, 2003 – present

Member. Orange County Psychiatric Society Distinguished Fellowship Committee, 2014 – present

Volunteer Physician. USA Amateur Boxing, 1997 – 2008

Volunteer Physician. Downtown Youth Center, Anaheim CA, 1997 – 2001

Volunteer facilitator. UCI Medical Center Alliance for the Mentally Ill Support Group, 1998 – 2000

Monitor. Annual Meeting of the American Academy of Child and Adolescent Psychiatry, fall of 1998

Mentor. Junior National Health Service Corps, 1995 – 1997

Volunteer Medical Evaluator. Shriners Hospitals Orthopedic and Burn Screening Clinic, 1995

Volunteer. Sunflower State Games, 1990 – 1995

PERSONAL

Birth date: October 20, 1970

APPENDIX B

Documents Reviewed re Derrick Arnold Johnson

No.	Description	Bates No.
1.	Petitioner's Motion for Leave to File an Amended Petition and Motion to Stay the Federal Habeas Action; Proposed Order	NL-1 to 80
2.	Order Granting Petitioner's Motion for Leave to File an Amended Petition and Motion to Stay the Federal Habeas Action	NL-81 to 88
3.	Probation Report re Los Angeles Superior Court Case No. GA013457 and GA001172, June 6, 1993 *(Submitted Under Seal as Exhibit 10 to the First Amended Petition)*	NL-89 to 102
4.	California Department of Corrections - Chronos, 1993 *(Submitted Under Seal as Exhibit 3 to the First Amended Petition)*	NL-103 to 111
5.	California Department of Corrections - Progress Notes, 1993 *(Submitted Under Seal as Exhibit 4 to the First Amended Petition)*	NL-112 to 119
6.	California Department of Corrections - Psychiatric Evaluation *(Submitted Under Seal as Exhibit 5 to the First Amended Petition)*	NL-120 to 121
7.	California Department of Corrections - Medication Administration *(Submitted Under Seal as Exhibit 2 to the First Amended Petition)*	NL-122 to 141
8.	California Department of Corrections - Psychological Orders, 1993 *(Submitted Under Seal as Exhibit 1 to the First Amended Petition)*	NL-142-144
9.	Excerpts of CDC medical records for 1996 *(Submitted Under Seal as Exhibit 14 to the First Amended Petition)*	NL-145 to 157
10.	Approval for Transfer to Atascadero State Hospital, December 15, 1998 *(Submitted Under Seal as Exhibit 12 to the First Amended Petition)*	NL-158 to 159
11.	Notice of Transfer to California Medical Facility for Mental Health Treatment, March 24, 1999 *(Submitted Under Seal as Exhibit 13 to the First Amended Petition)*	NL-160
12.	Petition for Interim Order regarding Involuntary Medication, December 6, 2000	NL-161 to 164
13.	Order for Interim Involuntary Medication, December 11, 2000	NL-165
14.	Verified Petition for Judicial Determination regarding Involuntary Medication, December 11, 2000	NL-166 to 175
15.	Verified Petition for Judicial Determination regarding Involuntary Medication, December 7, 2001	NL-176 to 182
16.	Order on Petition for Judicial Determination regarding Involuntary Medication, December 19, 2001	NL-183
17.	Verified Petition for Renewal of Judicial Determination regarding Involuntary Medication, November 21, 2002	NL-184 to 191
18.	Order on Verified Petition for Renewal of Judicial Determination regarding Involuntary Medication, December 11, 2002	NL-192
19.	Sacramento County Superior Court Order for Commitment to State Hospital, February 10, 2003	NL-193 to 194
20.	Verified Petition for Renewal Judicial Determination regarding Involuntary Medication, November 18, 2005	NL-195 to 203
21.	Order on Verified Petition for Renewal Judicial Determination regarding Involuntary Medication, December 6, 2005	NL-204

Documents Reviewed re Derrick Arnold Johnson

No.	Description	Bates No.
22.	Verified Petition for Renewal Judicial Determination regarding Involuntary Medication, November 17, 2006	NL-205 to 217
23.	Order on Verified Petition for Renewal Judicial Determination regarding Involuntary Medication, November 29, 2006	NL-218
24.	Order on Petition for Involuntary Medication, November 15, 2007	NL-219
25.	Order on Petition for Involuntary Medication, August 26, 2010	NL-220
26.	Verified Petition for Renewal Judicial Determination regarding Involuntary Medication, July 19, 2011	NL-221 to 235
27.	Order on Petition for Involuntary Medication, August 18, 2011	NL-236
28.	Order on Petition for Involuntary Medication, August 16, 2012	NL-237
29.	Order on Petition for Involuntary Medication, August 8, 2013	NL-238
30.	Order on Petition for Involuntary Medication, July 24, 2014	NL-239
31.	Petition for Renewal Judicial Determination regarding Involuntary Medication, June 24, 2014	NL-240 to 256
32.	Order on Petition for Involuntary Medication, July 9, 2015	NL-257
33.	Declaration of Trina Howse, August 9, 2016 *(Submitted as Exhibit 8 to the First Amended Petition)*	NL-258 to 259
34.	Declaration of Stephanie Johnson, August 9, 2016 *(Submitted as Exhibit 7 to the First Amended Petition)*	NL-260
35.	Medical records of Derrick Johnson from Lancaster Correctional Facility	NL-261 to 5320
36.	Medical records of Derrick Johnson from Vacaville Correctional Facility	NL-5321 to 6523
37.	Medical records of Derrick Johnson from Atascadero Correctional Facility	NL-6524 to 6841
38.	Reporter's transcript of proceedings in *People v. Johnson*, Vol. 1, pages 1-175	NL-6842 to 7022
39.	Reporter's transcript of proceedings in *People v. Johnson*, Vol. 2, pages 176-367	NL-7023 to 7220
40.	Reporter's transcript of proceedings in *People v. Johnson*, Vol. 3, pages 368-513	NL-7221 to 7372
41.	Reporter's transcript of proceedings in *People v. Johnson*, Vol. 4, pages 514-707	NL-7373 to 7572
42.	Reporter's transcript of proceedings in *People v. Johnson*, Vol. 5, pages 708-794	NL-7573 to 7672
43.	Juvenile Court Records, In the Matter of Derrick Arnold Johnson, Case No. 518723-0519002-WSFV-IDC-NEW	NL-7673-7735

Documents Reviewed re Derrick Arnold Johnson

No.	Description	Bates No.
44.	Excerpts of Records Received from Family, County of Los Angeles Sheriff's Department, Nurses Medication Record, 1988	NL-7736-7737
45.	Social History Report created by Mary Veral, Investigator, Federal Public Defender, March 8, 2017	NL-7738-7740

DECLARATION OF STEPHANIE JOHNSON

I, Stephanie Johnson, declare as follows:

1. I am Derrick Johnson's sister.

2. When Derrick was released from state prison in Chino, California, he came to live with me and my mother. This was about thirty years ago.

3. Derrick suffered many seizures after he came to live with us. The seizures were serious. He would convulse, black out, and fall to the floor.

4. I also remember Derrick talking to himself quite a bit. I asked Derrick about this. He said something to the effect of, "You don't see the people I am talking to?"

5. I regularly visit Derrick in prison. If he is released, my family and I will continue to support him, and we will help him find employment.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

DATED: 8/9/16

Stephanie Johnson
STEPHANIE JOHNSON

Initials

Exhibit 7-60

DECLARATION OF TRINA HOWSE

I, Trina Howse, declare as follows:

1. I am Derrick Johnson's younger sister. I was present during his 1993 trial in Pasadena and served as his runner during the beginning of trial.

2. All throughout his trial, my brother wore leg shackles. From where I was seated in the courtroom, I could see the shackles. I could also hear the shackles every time he moved. And while I did not see him walk around, I do remember him standing up at counsel table.

3. I could also tell that the jury knew he was shackled for a couple of reasons. The jury box was raised such that the jury could easily see my brother's entire body. It was also very obvious that my brother was shackled because my brother did not walk around the courtroom. However, the prosecutor moved around freely when he was talking to the witnesses and jury. There is no way that the jury did not know of, see, or hear the shackles on my brother.

4. As my brother's legal runner I frequently attempted to file motions for him. However, every time I tried to push paperwork for him, the jail prevented me from doing so. I was not even allowed to visit him through a legal visit. Instead I had to use his social visits to help him with his legal work. This cut down the meeting time from up to two hours to only fifteen minutes. The court granted a motion for Derrick to wear regular clothes in court, because he had been wearing his jailhouse clothing the entire time. However, the jail would not let me give my brother the clothes, and my brother had to finish trial with the jailhouse clothes. I was eventually not allowed to be his legal runner because the jail said that relatives cannot be legal runners.

5. Derrick told me the jail was giving him medication. I could tell that the medications the jail gave my brother were affecting him. He became much slower. He had to write notes to himself to remember to tell me things. He also began talking to me in code, using

TH
Initials

Exhibit 8-61

slang lingo when trying to communicate. Sometimes I could not understand him. It made it increasingly difficult to know what he needed me to do for him. He kept telling me that he needed to see a doctor because the medications were affecting him.

6. Currently, my brother's mental awareness is almost nonexistent. He can barely function, and it takes him nearly 30 minutes just to get a phrase out of him. The prison forces him to take medication that makes him tired and spaced out all the time. My brother wants to come home. Our family is ready to help him find appropriate mental health treatment and find employment.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

DATED: 8/9/2014

Trina Howse
TRINA HOWSE

Initials

Exhibit 8-62

B011201

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF AND RESPONDENT,

VS.

DERRICK JOHNSON,

DEFENDANT AND APPELLANT.

SUPERIOR COURT
NO. GA013457

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE JACK B. TSO, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
STATE ATTORNEY GENERAL
300 S. SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CA 90013

DEFENDANT-APPELLANT: IN PROPRIA PERSONA

ONE OF FIVE VOLUMES
PAGES 1 TO 175, INCL.

ORIGINAL

SHARON BOYER, CSR #4329
RHONDA A. BROWN, CSR #8134
OFFICIAL REPORTERS

YOU THEN RETURNED TO THIS COURTROOM AND SAID YOU WANTED TO PROCEED WITHOUT COUNSEL. WHAT IS YOUR WISH, MR. JOHNSON.

DEFENDANT JOHNSON: I WOULD LIKE TO GO PRO PER, YOUR HONOR.

THE COURT: THANK YOU. YOU HAVE THAT RIGHT.

NOW, MR. JOHNSON, I HAVE TO GO AND FIND OUT SOMETHING, BUT NOW, MR. JOHNSON, DO YOU UNDERSTAND THAT IF YOU DON'T HAVE THE FUNDS TO SECURE PRIVATE COUNSEL, THAT THE COURT WOULD APPOINT COUNSEL FOR YOU?

DEFENDANT JOHNSON: RIGHT.

THE COURT: DO YOU UNDERSTAND THIS?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

NOW, LET ME TELL YOU WHAT THE CHARGES ARE IN THIS CASE. THERE ARE TWO COUNTS IN THE INFORMATION FILED ON FEBRUARY THE 17TH, 1993.

AS SOON AS YOUR ARRAIGNMENT AND PLEA AGAINST YOU. WE WILL GIVE YOU A COPY OF THAT INFORMATION.

DEFENDANT JOHNSON: RIGHT.

THE COURT: COUNT 1 CHARGES YOU WITH THE CRIME OF A VIOLATION OF SECTION 187 OF THE PENAL CODE. THIS IS THE CRIME OF MURDER ON NOVEMBER THE 17TH. THE ALLEGATION DATE IS NOVEMBER THE 17TH, 1992.

THE ALLEGATION IS THAT YOU DID WILFULLY, UNLAWFULLY, WITH MALICE AFORETHOUGHT, MURDER HERMAN

BASULTO, B-A-S-U-L-T-O, A HUMAN BEING.

COUNT 2 CHARGES YOU ON THAT SAME DATE OF NOVEMBER THE 17TH, 1992, WITH A VIOLATION OF SECTION 2800.3 OF THE VEHICLE CODE.

THIS IS A FELONY CHARGE OF EVADING AN OFFICER.

DEFENDANT JOHNSON: EXCUSE ME, EXCUSE ME. WHERE IS IT YOU ARE READING AT?

THE COURT: I AM GOING TO GIVE YOU A COPY.

MR. JOHNSON: FOR THE RECORD, HE WAS GIVEN A COPY OF THE FELONY INFORMATION ON FEBRUARY THE 17TH, 1993, ON HIS FIRST APPEARANCE HERE IN THIS COURTROOM WHICH TIME HE WISHED TO PUT OVER, THE ARRAIGNMENT, TO THE FOLLOWING DAY.

DEFENDANT JOHNSON: YES. ARE YOU FINISHED?

HE GAVE ME A PIECE OF PAPER. I AM NOT DENYING THAT, BUT IT WAS ALTERCATION IN THE BULL PEN, AND YOU KNOW I AM NOT AWARE OF THAT, YOUR HONOR. I CAME UP HERE AND I WAS TALKING TO THE COUNSEL --

THE COURT: WE WILL GET YOU ANOTHER COPY TODAY.

DEFENDANT JOHNSON: OKAY.

THE COURT: BUT THE SECOND COUNT IS EVADING AN OFFICER CAUSING THE DEATH, IN VIOLATION OF THE VEHICLE CODE.

NOW, LET ME TELL YOU THE CRIME OF MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING WITH MALICE

AFORETHOUGHT. IF YOU WERE CONVICTED OF MURDER IN THE FIRST DEGREE, IT IS PUNISHABLE BY STATE IMPRISONMENT BY 25 YEARS TO LIFE.

IF IT IS SECOND DEGREE, IT IS PUNISHABLE BY 15 YEARS TO LIFE. THERE IS A LESSER INCLUDED OFFENSE OF MANSLAUGHTER, EITHER VOLUNTARY, VEHICULAR OR INVOLUNTARY.

THE CHARGE OF EVADING AN OFFICER CAUSING THE DEATH IS PUNISHABLE BY STATE IMPRISONMENT FOR EITHER TWO, THREE OR FOUR YEARS.

THEREFORE, IF YOU WERE CONVICTED OF BOTH CHARGES, YOU WOULD HAVE TO HAVE THE DETERMINATE SENTENCE BEFORE YOU OF THE INDETERMINATE SENTENCE.

THEREFORE, AS TO THE TWO COUNTS, YOUR MAXIMUM EXPOSURE TO STATE IMPRISONMENT WOULD BE 25 YEARS TO LIFE.

THERE ARE THREE SPECIAL ALLEGATIONS FILED BY THE DISTRICT ATTORNEY'S OFFICE. THE FIRST IS UNDER THE AUTHORITY OF 667 OF THE PENAL CODE.

THIS IS AN ALLEGATION THAT ON FEBRUARY THE 7TH, 1985, IN THE SUPERIOR COURT OF THIS STATE AND COUNTY, YOU WERE CONVICTED IN CASE NUMBER A908379 OF THE CHARGE OF ROBBERY.

THIS IS THE PRIOR SERIOUS FELONY ALLEGATION. SHOULD YOU BE CONVICTED OF COUNT 1, THIS COULD BE AN ENHANCEMENT. THAT IS, THEY CAN INCREASE THAT SENTENCE BY AN ADDITIONAL FIVE YEARS.

THERE IS A SECOND ALLEGATION UNDER

667.5(B), AN ALLEGATION THAT ON OR ABOUT OCTOBER THE 18TH, 1983, IN THE SUPERIOR COURT OF THIS STATE AND COUNTY, YOU WERE CONVICTED OF THE CRIME OF A VIOLATION OF SECTION 10851 OF THE VEHICLE CODE, IN CASE NUMBER A564536. THAT IS A NORTHEAST DISTRICT, PASADENA CASE NUMBER. THIS CHARGES YOU WITH TAKING THE AUTOMOBILE OF ANOTHER WITHOUT CONSENT.

IF YOU WERE CONVICTED OF EITHER COUNT 1 OR COUNT 2, THIS COULD BE AN ENHANCEMENT. THAT COULD INCREASE THE SENTENCE BY AN ADDITIONAL ONE YEAR.

THERE IS A SECOND 667.5(B) ENHANCEMENT, AND THE ALLEGATION IS THAT ON OCTOBER THE 21ST OF 1983, IN THE SUPERIOR COURT OF THIS STATE AND COUNTY, IN CASE NUMBER A382333, YOU WERE CONVICTED OF THE CRIME OF SECOND DEGREE BURGLARY.

IF YOU WERE CONVICTED OF EITHER COUNT 1 IN OUR INFORMATION AND THIS ALLEGATION WAS FOUND TRUE, THIS COULD INCREASE YOUR POSSIBLE SENTENCE BY AN ADDITIONAL ONE YEAR.

THEREFORE, IF YOU TAKE BOTH COUNTS AND THE THREE SPECIAL ALLEGATIONS, YOUR MAXIMUM EXPOSURE TO STATE IMPRISONMENT WOULD BE 36 YEARS TO LIFE.

DEFENDANT JOHNSON: THIRTY-SIX YEARS TO LIFE. HOW MUCH DO I GET TO SERVE OF THAT 36?

THE COURT: WAIT, WAIT. THAT'S THE MAXIMUM POSSIBLE.

DEFENDANT JOHNSON: RIGHT.

THE COURT: THAT'S NOT WHAT WE'RE SAYING YOU WILL GET.

NOW, IF YOU SHOULD BE SENTENCED TO STATE PRISON, YOU WOULDN'T BE ELIGIBLE FOR PAROLE UNTIL YOU SERVE AT LEAST ONE-HALF OF WHATEVER THE COURT'S SENTENCE IS.

DEFENDANT JOHNSON: OKAY.

THE COURT: LESS ANY ACTUAL CREDITS THAT YOU ARE ENTITLED TO.

I AM NOT SAYING THAT YOU WILL BE PLACED ON PROBATION -- PAROLE AFTER SERVING AT LEAST ONE-HALF OF THE COMMITTED PERIOD. THAT SIMPLY MEANS YOU WILL BE ELIGIBLE FOR PAROLE AFTER YOU SERVE AT LEAST ONE-HALF OF WHATEVER THE COURT'S SENTENCE IS.

THIS PAROLE BUSINESS MEANS YOU WILL BE UNDER THE SUPERVISION OF A STATE PAROLE OFFICER IN THIS CASE IF YOU ARE CONVICTED OF ANY DEGREE OF MURDER FOR LIFE.

IF YOU ARE VIOLATED ON PAROLE, YOU COULD BE RETURNED TO THE DEPARTMENT OF CORRECTIONS OR -- AND THEY CAN KEEP YOU.

DEFENDANT JOHNSON: SAY THAT AGAIN, EXCUSE ME.

THE COURT: ALL RIGHT.

IF YOU ARE PLACED ON PAROLE, IT WOULD BE FOR LIFE BECAUSE THE COUNT 1 IS A LIFE TERM. IF YOU ARE VIOLATED ON PAROLE, THE DEPARTMENT OF CORRECTIONS CAN KEEP YOU IN STATE PRISON FOR THE TERM PRESCRIBED BY LAW.

NOW, THOSE ARE THE CHARGES AND THE CONSEQUENCES THAT CAN FALL UPON YOU. OF COURSE, TECHNICALLY, YOU CAN BE PLACED ON PROBATION IF YOU ARE CONVICTED OF SECOND DEGREE MURDER.

DEFENDANT JOHNSON: RIGHT.

THE COURT: OR EVEN FIRST DEGREE MURDER, BECAUSE I DON'T KNOW IF THAT'S TRUE. IS IT? I THINK IT IS, BECAUSE THERE IS NO --

MR. JOHNSON: SECOND DEGREE, BUT NOT FIRST DEGREE.

DEFENDANT JOHNSON: THIS IS SECOND DEGREE RIGHT NOW, YOUR HONOR.

THE COURT: YOU MEAN YOU COULD BE PLACED ON PROBATION?

DEFENDANT JOHNSON: RIGHT.

THE COURT: IF THAT SHOULD HAPPEN --

DEFENDANT JOHNSON: I'M AWARE OF THAT.

THE COURT: IF YOU ARE SUCCESSFUL IN THE TERMS OF PROBATION, THE CASE ENDS. IF YOU MESS UP, YOU CAN GO TO STATE PRISON UNDER THE TERMS.

DEFENDANT JOHNSON: FOR LIFE?

THE COURT: NOW, MR. JOHNSON --

DEFENDANT JOHNSON: YES.

THE COURT: -- HAVE YOU EVER PROCEEDED PRO PER BEFORE?

DEFENDANT JOHNSON: YES.

THE COURT: IN HOW MANY CASES?

DEFENDANT JOHNSON: TWO.

ARE SET BY THE POLICY OF THE SUPERIOR COURT AS PROMULGATED THIS YEAR, AND YOU WILL BE GETTING ALL THE NECESSARY PRO PER EQUIPMENT SUCH AS THE USE OF THE SUBPOENA POWERS, THE LIBRARY, TELEPHONE PRIVILEGES, THE LEGAL FORM, THE LEGAL VISITS, LEGAL SUPPLIES, AND IF YOU NEED AN INVESTIGATOR, WE WILL APPOINT ONE FROM THE LIST FOR YOU.

NOW, MR. JOHNSON, THIS IS -- THESE ARE SERIOUS CHARGES, AND YOU HAVE THE RIGHT TO AN ATTORNEY, AND I URGE YOU TO ACCEPT THE SERVICES OF AN ATTORNEY.

HOWEVER, YOU HAVE THE RIGHT TO REPRESENT YOURSELF IF YOU CAN KNOWINGLY, INTELLIGENTLY AND FREELY AND VOLUNTARILY DO THE JOB OF A LAWYER.

DO YOU UNDERSTAND THIS?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: AND YOU UNDERSTAND, TO REPRESENT ONE'S SELF IS ALMOST ALWAYS UNWISE, AND THAT YOU MIGHT CONDUCT A DEFENSE TO YOUR VERY DETRIMENT IN LIGHT OF THE CHARGES AGAINST YOU?

DO YOU UNDERSTAND THIS?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT THIS?

DEFENDANT JOHNSON: (NO AUDIBLE RESPONSE.)

THE REPORTER: YOUR ANSWER?

DEFENDANT JOHNSON: NO, NO, NO.

THE COURT: DO YOU UNDERSTAND THAT YOU WILL

NOT BE ENTITLED TO AND NOT RECEIVE ANY SPECIAL TREATMENT BY THE COURT, AND YOU WILL BE TREATED LIKE THE COURT TREATS ANY ATTORNEY THAT APPEARS BEFORE IT.

DO YOU UNDERSTAND THAT?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: AND YOU MUST FOLLOW ALL OF THE RULES OF LAW, PROCEDURES AND EVIDENCE IN MAKING MOTIONS, OBJECTIONS, PRESENTATIONS OF EVIDENCE, VOIR DIRE AND ARGUMENTS.

AND THE PROSECUTION WILL BE REPRESENTED BY AN EXPERIENCED LAWYER IN THE CRIMINAL FIELD IN THIS CASE, MR. JOHNSON, WHO HAS TRIED A NUMBER OF CASES HERE IN THE NORTHEAST DISTRICT, INCLUDING THE CHARGE OF MURDER.

DO YOU UNDERSTAND THIS?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: AND THEN THE CLIENT PRIVILEGES AND OTHER PRO PER PRIVILEGES WILL BE LIMITED TO WHAT THE COURT INDIGENT COMMITTEE HAS PROMULGATED AS POLICY.

DEFENDANT JOHNSON: YES.

THE COURT: DO YOU UNDERSTAND THAT IF YOU REPRESENT YOURSELF AND THE COURT PERMITS YOU TO DO THIS, YOU CANNOT, AS A GROUNDS OF APPEAL, ASSERT THAT YOU HAD AN INADEQUATE LAWYER.

DO YOU UNDERSTAND THIS?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: THAT RIGHT OF APPEAL ON THAT

GROUND GOES AWAY.

DO YOU UNDERSTAND THIS?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: DO YOU STILL WISH TO PROCEED PRO PER?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: WELL, OKAY.

CAN YOU TELL ME HOW FAR ALONG YOU WENT IN SCHOOL, PLEASE?

DEFENDANT JOHNSON: THE 10TH GRADE, YOUR HONOR.

THE COURT: DO YOU UNDERSTAND THE CONSEQUENCES OF WHAT YOU ARE DOING?

DEFENDANT JOHNSON: YES, I GOT MY LIFE IN MY OWN HANDS. I'M AWARE OF THAT.

THE COURT: ARE YOU DOING THIS FREELY AND VOLUNTARILY?

DEFENDANT JOHNSON: YES.

THE COURT: DO YOU HAVE ANY QUESTIONS OF THE COURT? IF I CAN ANSWER THEM, I WILL BE GLAD TO DO SO.

DEFENDANT JOHNSON: OKAY. AS FAR AS PRO PER?

THE COURT: YES.

DEFENDANT JOHNSON: NO, NO. I UNDERSTAND THAT NOW, AND I COMPREHEND, YOUR HONOR.

THE COURT: DO YOU HAVE ANY QUESTIONS?

DEFENDANT JOHNSON: NO, NOT ABOUT THAT. NO, YOUR HONOR.

THE COURT: HAVE YOU ANYTHING, MR. JOHNSON, YOU FEEL THE COURT SHOULD INQUIRE?

MR. JOHNSON: YOUR HONOR, BECAUSE OF THE SERIOUS NATURE OF THE CHARGES AT THE PRELIMINARY HEARING STAGE, WE DID INDICATE TO MR. JOHNSON, THE DEFENDANT, THAT THIS WAS A MURDER CHARGE BASED ON A WATSON THEORY OF MURDER, AND SECOND DEGREE.

I WOULD ASK THE COURT AND PERHAPS INVITE THE COURT TO HAVE MR. JOHNSON READ THE INFORMATION TO US SO THAT THE COURT IS SATISFIED FULLY AND COMPLETELY.

DEFENDANT JOHNSON: I OBJECT, YOUR HONOR. I ALREADY DID THAT IN MUNICIPAL. WHY DO IT AGAIN? I ALREADY DID IT.

THE COURT: THE MOTION YOU FILED ON FEBRUARY THE 17TH, IS THAT IN YOUR HANDWRITING?

DEFENDANT JOHNSON: AND --

THE COURT: DID YOU MAKE THIS MOTION YOURSELF OR SOMEBODY HELPED YOU WITH IT?

DEFENDANT JOHNSON: WHICH ONE, THE DISCOVERY MOTION?

THE COURT: THE ONE YOU FILED ON FEBRUARY THE 17TH.

DEFENDANT JOHNSON: SOMEBODY WROTE IT DOWN, YES.

THE COURT: DID YOU WRITE IT?

DEFENDANT JOHNSON: NO, NO, I DIDN'T WRITE IT DOWN.

THE COURT: ARE YOU CAPABLE OF READING AND WRITING?

DEFENDANT JOHNSON: YES, YOUR HONOR, I AM. THE REASON WHY THAT IS, YOUR HONOR, IS BECAUSE I BORROWED THE PAPER FROM HIM. SO, HE HAD TO WRITE IT DOWN AND THEN I HAD TO GET IT TO HIM. LIKE I AM HAVING PROBLEMS JUST LIKE, YOU KNOW, AS FAR AS YOU HAD THE LAST TIME I WAS IN COURT, YOU GAVE ME A COURT ORDER TO SEE THE DOCTOR. I HAVEN'T SEEN THE DOCTOR YET.

THE COURT: WHAT DO YOU MEAN?

DEFENDANT JOHNSON: I HAVEN'T SEEN THE COURT ORDER. I HAVEN'T BEEN SEEN BY THE DOCTOR.

THE COURT: WHY NOT?

DEFENDANT JOHNSON: WHY? I DON'T KNOW. YOU GOT TO CALL DOWN THERE.

THE COURT: NO.

DIDN'T YOU ASK FOR INFIRMARY?

DEFENDANT JOHNSON: YES.

THE COURT: WHEN DID YOU ASK FOR IT? ALL YOU HAD TO DO WAS ASK FOR IT AND SHOW THEM THE ORDER.

DEFENDANT JOHNSON: YOUR HONOR --

THE COURT: HERE IT IS HERE. I HAVE THE ORIGINAL.

DEFENDANT JOHNSON: RIGHT.

THE COURT: AND IT WAS FAXED TO THE JAIL ON FEBRUARY THE 22ND.

DEFENDANT JOHNSON: RIGHT.

SHERIFF.

DEFENDANT JOHNSON: I UNDERSTAND. I AM AWARE OF THAT. I AM NOT DENYING THAT. I HEARD YOU SAY IT, BUT WE STILL HAVE NOT ACCOMPLISHED. WHY, I DON'T KNOW. I AM JUST INCARCERATED.

THE COURT: WELL, FIND OUT.

DEFENDANT JOHNSON: OKAY. I WOULD LIKE TO PUT THIS OFF.

THE COURT: WHAT DO YOU MEAN, "PUT THIS OFF?"

DEFENDANT JOHNSON: SCHEDULE IT OFF.

THE COURT: WHAT?

DEFENDANT JOHNSON: THE -- WE ARE IN PRELIM.

THE COURT: WHAT?

DEFENDANT JOHNSON: THE PRELIMINARY. THIS IS OUR PRELIMINARY RIGHT NOW.

THE COURT: NO, THIS IS ARRAIGNMENT.

DEFENDANT JOHNSON: ARRAIGNMENT FOR THE PRELIMINARY, RIGHT?

THE COURT: DO YOU UNDERSTAND AN ARRAIGNMENT IS SIMPLY THE COURT WILL TELL YOU WHAT THE CHARGES ARE. I WILL GIVE YOU A COPY OF THE COMPLAINT.

DEFENDANT JOHNSON: RIGHT.

THE COURT: WHICH IS THE INFORMATION. AND THEN I WILL ASK YOU TO ENTER YOUR PLEA.

DEFENDANT JOHNSON: OKAY.

THE COURT: IF YOU ENTER A PLEA OF NOT GUILTY, I WILL SET IT FOR PRE-TRIAL CONFERENCE ABOUT THREE WEEKS DOWN THE LINE.

DEFENDANT JOHNSON: RIGHT.

THE COURT: AND I WILL ORDER A PRE-PLEA PROBATION REPORT.

DEFENDANT JOHNSON: OKAY.

THE COURT: FIND OUT WHY, CAROL. CAN YOU CALL THE NUMBER THAT'S ON THE BOTTOM OF THE COURT ORDER AND FIND OUT WHY HE WAS NOT SEEN BY THE MEDICAL STAFF AS ORDERED ON FEBRUARY THE 22ND.

NOW, DO YOU UNDERSTAND THE NATURE AND CONSEQUENCES THAT MIGHT ARISE AS TO THOSE CHARGES?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: DO YOU UNDERSTAND THE NATURE OF THE CHARGES AND THE CONSEQUENCES?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: AND YOU ARE DOING THIS FREELY AND VOLUNTARILY?

DEFENDANT JOHNSON: YES.

THE COURT: IS THIS YOUR WISH --

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: -- TO PROCEED WITHOUT COUNSEL? THANK YOU.

YOU CAN READ AND WRITE?

DEFENDANT JOHNSON: YES, YOUR HONOR.

THE COURT: OKAY.

WELL, IT IS TIMELY MADE, MR. JOHNSON, AND IT APPEARS TO THE COURT THAT THE DEFENDANT UNDERSTANDS HIS RIGHT TO COUNSEL, PRIVATE OR APPOINTED, AND HE HAS BEEN TOLD WHAT THE RISKS ARE,

DEFENDANT JOHNSON: RIGHT NOW I AM NOT READY FOR MY PRELIMINARY TRIAL BECAUSE THE MOTION I GAVE YOU FOR MY DISCOVERY MOTION AS FAR AS MY TRANSCRIPTS AND EVERYTHING --

THE COURT: IF I DON'T ARRAIGN YOU, I CAN'T DO ANYTHING FOR YOU. THAT'S WHERE THE COURT GETS JURISDICTION, UPON ARRAIGNMENT.

DEFENDANT JOHNSON: OKAY. OKAY. ALL RIGHT, YOUR HONOR.

THE COURT: IF YOU DON'T KNOW THIS --

DEFENDANT JOHNSON: OKAY, OKAY, OKAY.

THE COURT: -- YOU ARE IN A BAD FIX IF YOU GO TO TRIAL. I URGE YOU, MR. JOHNSON, TO TAKE THE ATTORNEY THAT THE COURT WILL APPOINT FOR YOU. NO?

DEFENDANT JOHNSON: OKAY -- NO, NO, NO.

THE COURT: FOR ARRAIGNMENT, THEN, ARE YOU READY?

DEFENDANT JOHNSON: NO -- YES, YOUR HONOR. YES, I AM READY.

THE COURT: OKAY.

LISTEN CAREFULLY, PLEASE, AND THEN WE WILL GET YOU A COPY OF THE INFORMATION AS WELL.

MR. JOHNSON: OKAY.

DERRICK ARNOLD JOHNSON, IS THAT YOUR TRUE AND CORRECT NAME?

DEFENDANT JOHNSON: YES.

MR. JOHNSON: HAVE YOU ALSO USED THE NAME OF DERRICK JOHNSON?

B097201

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF AND RESPONDENT,

VS.

DERRICK JOHNSON,

DEFENDANT AND APPELLANT.

SUPERIOR COURT
NO. GA013457

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE JACK D. TSO, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN,
STATE ATTORNEY GENERAL
300 S. SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CA 90013

DEFENDANT-APPELLANT: IN PROPRIA PERSONA

TWO OF FIVE VOLUMES
PAGES 176 TO 367, INCL.

SHARON BOYER, CSR #4329
RHONDA A. BROWN, CSR #8134
OFFICIAL REPORTERS

ORIGINAL

DEFENDANT JOHNSON: RIGHT.

THE COURT: WHAT DO YOU WANT TO DO WITH YOUR THORAZINE? DO YOU WANT TO GO OFF OF IT WHILE IN TRIAL? I HAVE NO PROBLEMS. I WILL TAKE YOU OFF OF IT IF YOU THINK IT IS WISE.

(A DISCUSSION WAS HELD BETWEEN THE DEFENDANT AND HIS ADVISORY COUNSEL OUT OF THE HEARING OF THE REPORTER:)

DEFENDANT JOHNSON: IF YOU TAKE ME OFF, THEN I HAVE SEIZURES. THEN I DON'T THINK I CAN PREPARE MYSELF AS DEFENSE IF YOU TAKE ME OFF MY MEDICATION, YOUR HONOR.

THE COURT: YOU ARE SAYING THORAZINE AFFECTS YOUR ABILITY TO UNDERSTAND WHAT IS GOING ON?

DEFENDANT JOHNSON: YES.

THE COURT: IS THAT WHAT YOU ARE TELLING ME?

DEFENDANT JOHNSON: YES.

THE COURT: YOU SEEM TO BE DOING ALL RIGHT IN THIS COURTROOM.

DEFENDANT JOHNSON: YOU ARE NOT A DOCTOR.

THE COURT: YOU ARE RESPONSIVE TO EVERYTHING THE COURT HAS SAID.

DEFENDANT JOHNSON: RIGHT.

THE COURT: YOU ARE RESPONSIVE TO THE EVIDENCE, YOUR CROSS-EXAMINATION OF THE FIRST

THE REPORTER: DID YOU SAY "I FEEL CONFUSED?"

DEFENDANT JOHNSON: I FEEL CONFUSED, IN ALL SENSE --

THE COURT: YOU APPEAR TO BE ALL RIGHT TO ME, BUT WHAT IS IT? DO YOU HAVE AN UPSET STOMACH OR WHAT? YOU HAVE BEEN RESPONSIVE TO EVERYTHING WE HAVE BEEN SAYING.

DEFENDANT JOHNSON: MAY I HAVE -- OKAY. WHAT I AM ASKING IS THIS. MAY I HAVE A MEDICAL ORDER TO BE SEEN BY A DOCTOR? I FEEL CONFUSED, YOUR HONOR.

MS. HATTERSLEY: YOUR HONOR, MAY I --

THE COURT: I WILL SUSPEND PROCEEDINGS IF YOU FEEL CONFUSED AND CANNOT FOLLOW. I WILL GET YOU 1368 TO THE STATE HOSPITAL RIGHT NOW.

MS. HATTERSLEY: YOUR HONOR, WHAT HE RELAYED TO ME EARLIER IS THAT HE FEELS CONFUSED THAT HIS THINKING IS SLOWED DOWN AND HE IS HAVING TROUBLE -- EVERYTHING IS GOING TOO FAST FOR HIM.

THE COURT: HE HAS VERBALIZED THAT, BUT THAT DOESN'T SEEM RESPONSIVE TO HIS MOTION, THE MANNER IN WHICH HE ADDRESSED THE MOTION AND WHAT HE HAS BEEN DOING IN COURT THROUGH THE LAST FEW MONTHS AND TODAY.

(A DISCUSSION WAS HELD BETWEEN THE DEFENDANT AND HIS ADVISORY COUNSEL OUT OF THE HEARING OF THE REPORTER:)

CLOTHING.

(A DISCUSSION WAS HELD BETWEEN THE DEFENDANT AND HIS ADVISORY COUNSEL OUT OF THE HEARING OF THE REPORTER:)

THE COURT: RING AND ASK THE JURY TO COME BACK AT 1:45. WE WILL NOT BE ABLE TO DEAL WITH THEM.

(A DISCUSSION WAS HELD BETWEEN THE DEFENDANT AND HIS ADVISORY COUNSEL OUT OF THE HEARING OF THE REPORTER:)

MS. HATTERSLEY: YOUR HONOR, I HAVE EXPLAINED AGAIN 1368 TO HIM BECAUSE HE WAS ASKING MORE QUESTIONS. HE WANTS ME TO RELATE TO THE COURT HE HAS A DOUBT OF HIS COMPETENCY TO STAND TRIAL.

THE COURT: THANK YOU.

HE HAS BEEN DOING VERY WELL, MS. HATTERSLEY. AS YOU KNOW, THE CROSS-EXAMINATION OF THE FIRST WITNESS, OFFICER --

MR. JOHNSON: DURHAM.

THE COURT: -- OFFICER DURHAM WAS QUITE RELEVANT AND I AM SATISFIED THAT THORAZINE HAS NO EFFECT UPON HIM, AND THAT THIS IS SIMPLY A RUSE ON HIS PART THIS MORNING TO PUT THIS TRIAL OVER.

DEFENDANT JOHNSON: RIGHT NOW, IT IS LUNCHTIME, YOUR HONOR, AND SHE IS AT WORK. IT WOULD BE TOTALLY IMPOSSIBLE FOR HER TO GO GET SOME CLOTHES AND GET IT TO ME TODAY.

THE COURT: THIS IS WHAT MAKES ME BELIEVE THAT THIS THORAZINE BUSINESS IS A RUSE. EVERYTHING I SAY HE RESPONDS ADEQUATELY. HE RESPONDS COHERENTLY, AND HE RESPONDS IMMEDIATELY. THERE IS NO DIFFICULTIES WITH HIM UNDERSTANDING THE COURT'S PROCEEDING OR STATEMENTS.

WHAT I AM GOING TO DO IS, THEN, RESUME THE TRIAL IN THIS CASE. HOWEVER, I AM GOING TO -- I NOW HAVE THE DEFENDANT'S OTHER CASE, CASE NUMBER VA018228, FOR WHICH THE PROSECUTION HAS FILED AN INFORMATION. HE WAS HELD TO ANSWER, THE INFORMATION HAS NOT BEEN -- ARE YOU FILING THE INFORMATION NOW, OR HAS IT BEEN FILED?

MR. JOHNSON: YOUR HONOR, I WOULD PRESUME IT WAS FILED ON OR ABOUT MAY THE 11TH, 1993, IN THE NORWALK SUPERIOR COURT.

THE COURT: NO, NO. ON MAY THE 11TH THE MATTER WAS PUT OVER UNTIL TODAY FOR ARRAIGNMENT BASED UPON THE DEFENDANT'S REQUEST.

SO, LET'S GET THE INFORMATION FILED THIS AFTERNOON; OKAY, PLEASE?

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: AND WE WILL GO THROUGH WHATEVER WE MUST DO.

SHE AIN'T HELPING ME IF YOU ARE SAYING NOT TO SAY NOTHING. THEN YOU CAN CROSS-EXAMINE. HOW CAN I CROSS-EXAMINE IF I DON'T ASK HER, YOU KNOW, TO ADVISE ME ON SOMETHING.

THE COURT: YOU SEEM TO FORGET WHEN I ARRAIGNED --

DEFENDANT JOHNSON: I FORGET --

THE COURT: I TOOK THE FERRETA. I GAVE YOU YOUR FERRETA. I TOLD YOU IT IS UNWISE FOR YOU TO PROCEED WITHOUT COUNSEL. YOU SAID "I HAVE DONE IT BEFORE, I WILL DO IT AGAIN," AND YOU HAVE DONE IT BEFORE AND YOU GOT YOURSELF CONVICTED WHEN YOU DID IT BEFORE.

DEFENDANT JOHNSON: I AM NOT DENYING I HAVEN'T DONE IT BEFORE.

THE COURT: WHAT DO YOU MEAN, YOU DIDN'T DO IT BEFORE? YOU WERE PRO PER ON THE CASE IN WHICH YOU ARE ON PROBATION.

DEFENDANT JOHNSON: YES, BUT I AM SAYING THIS. I WASN'T ON MEDICATION EITHER, YOU KNOW.

THE COURT: YOU WERE ON MEDICATION IN 1990, ON THE PRE-PLEA PROBATION REPORT.

DEFENDANT JOHNSON: NOT ON THORAZINE.

THE COURT: IN THE 1990 CASE?

DEFENDANT JOHNSON: NOT ON THORAZINE.

THE COURT: IT SAYS YOU WERE ON THORAZINE FOR SEIZURES.

DEFENDANT JOHNSON: CHECK THE RECORDS. I AM

B077201

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL - SECOND DIST.
FILED
DEC 8 1993
JOSEPH A. LANE Clerk
G. MERCIER Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA,	
PLAINTIFF AND RESPONDENT,	SUPERIOR COURT
VS.	NO. GA013457
DERRICK JOHNSON,	
DEFENDANT AND APPELLANT.	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONOR[illegible]ACK B. TSO, JUDGE PRESIDING

REPOR[illegible] TRANSCRIPT ON A

APPEARANCES:

FOR PLAINTIFF-RI : DANIEL E. LUNGREN,
[illegible]TATE ATTORNEY GENERAL
[illegible]0 S. SPRING STREET
[illegible]ORTH TOWER, SUITE 5001
LOS ANGELES, CA 90013

DEFENDANT-APPELLANT: IN PROPRIA PERSONA

FOUR OF FIVE VOLUMES
PAGES 514 TO 707, INCL.

ORIGINAL

SHARON BOYER, CSR #4329
RHONDA A. BROWN, CSR #8134
OFFICIAL REPORTERS

A NO. YOU SAID DID I TAKE THE CAR? I DIDN'T TAKE THE CAR. I DROVE THE CAR, YOU KNOW. IT WAS LIKE YOU LET ME USE YOUR CAR, BUT NOW YOU MAD AT ME, AND THEN I CALL THE POLICE.

BUT THEN LATER DOWN THE LINE YOU DROPPED YOUR CAR, BUT IT IS LIKE NOW YOU WANT TO DROP THE CHARGES, BUT, NO, NOW YOU TAKE THIS -- THEY ARE GOING TO DROP IT DOWN -- WE ARE GOING TO DROP IT DOWN TO DRIVING WITHOUT CONSENT. ALL RIGHT. COME ON. IT IS COUNTY JAIL.

Q YOU PLED NO CONTEST?

A YES. YES, I DID.

Q IS IT TRUE THAT ON FEBRUARY THE 7TH, 1985, YOU WERE CONVICTED OF THE CRIME OF ROBBERY?

A YES.

Q A FELONY?

A YES, YES. WAS I CONVICTED? I WENT TO THE STATE HOSPITAL, PATTON, YES. THAT'S ON THERE. WHY YOU DIDN'T READ THAT?

MR. JOHNSON: THANK YOU.

NO FURTHER QUESTIONS, YOUR HONOR.

DEFENDANT JOHNSON: OKAY.

THE COURT: DO YOU HAVE ANY RESPONSE, MR. JOHNSON? YOU MAY RESPOND.

DEFENDANT JOHNSON: YOU KNOW, I MEAN, I WASN'T THE DRIVER. HEY, I APOLOGIZE THAT THE DUDE DIED, BUT I WASN'T THE DRIVER. I COULDN'T STOP IT. THAT'S ALL I GOT TO SAY.

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ORIGINAL

DEC - 7 1993

COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
C-1 R-5

COURT OF APPEAL - SECOND DIST.
FILED
DEC 8 1993
JOSEPH A. LANE Clerk
G. MERCIER
Deputy Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff
and Respondent/~~Appellant~~

VS

T/N JOHNSON, DERRICK ARNOLD
AKA DEREK JOHNSON
AKA MICHAEL JOHNSON Defendant
and Appellant/~~Respondent~~

No. GA013457-01
6-10-93

CLERK'S TRANSCRIPT

Appearances:

Counsel for Plaintiff and Respondent:
THE ATTORNEY GENERAL

Counsel for Defendant and Appellant:

Kevin C. Mclean,Esq
6265 Greenwich Drive
Suite 250
San Diego, CA 92122-5917

Appeal from the Superior Court,
County of Los Angeles

Honorable JACK B. TSO Judge

Date Mailed to:

Defendant (in pro per) _____

Defendant's Trial Attorney _____

Defendant's Appellate Attorney DEC 07 1993

District Attorney _____

Attorney General DEC 07 1993

76C742 - (REV. 1-85) 4-88

9/27/93 CB

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT.** NEJ

Date:	5-17-93				
HONORABLE:	JACK B. TSO	JUDGE	J. GARCIA	123	Deputy Clerk
	M. LUNA	Deputy Sheriff	S. CHURCH		Reporter

GA013457-01 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA
VS
01) JOHNSON, DERRICK ARNOLD
187A 01CT; V2800.3 01CT

Counsel for People:
DEPUTY DISTRICT ATTY: B. JOHNSON

Counsel for Defendant: IN PRO PER

ADVISORY COUNSEL FOR DEFENDANT: P. HATTERSLEY, 987.2

NATURE OF PROCEEDINGS JURY TRIAL REM 2-17-93

The trial resumes from 5-13-93 with all counsel, jurors, and defendant present as heretofore.

OUT OF THE PRESENCE OF THE JURY:
Defendant's motion for physical restraints to be removed during trial is again denied.
Defendant's motion for mistrial is heard and denied. (Motion made orally).
Defendant's motion for daily transcript is denied.
Defendan'ts request for Medical Order for examination re dosage of thorazine is granted. Order is faxed to County Jail.

Defendant's motion to continue trial is denied.

Defendant's motion for dismissal for discriminatory prosecution is set for hearing on 5-27-93 at 9:00AM in this department.

IN THE PRESENCE OF THE JURY:
Shade Durham, previously sworn, is called to testify out of order for the defense.

Robin Stinson and John A. Bentley are sworn and testify for the People.

The jurors are admonished and the trial is recessed to 5-18-93 at 11:00AM in this department. Defendant is ordered to return.

REM

MINUTES ENTERED
5-17-93
COUNTY CLERK

REM 413L C-120 7/89

MINUTE ORDER