NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY PENTON, Petitioner-Appellant, v. A. MALFI, Respondent-Appellee.	No. 19-56201 D.C. No. 3:06-cv-0023 3-WQH-RBM MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted November 18, 2020**
Pasadena, California

(Filed Apr. 16, 2021)

Before: CALLAHAN, BUMATAY, and VANDYKE, Circuit Judges.

Petitioner Anthony Penton appeals the district court's denial of his habeas petition under 28 U.S.C. § 2254, raising seven claims. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we review the

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

district court's decision de novo. *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011). We affirm.[1]

First, the state trial court did not err in imposing the upper term sentence based on its finding that Petitioner's "prior convictions are numerous and of increasing seriousness." Petitioner argues that the "narrow" prior conviction exception discussed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and *Cunningham v. California*, 549 U.S. 270, 275, 288–89 (2007) ("*Apprendi* claim") does not apply to the state trial judge's determination. But the Supreme Court did not specify the prior conviction exception's precise contours, which we have subsequently recognized as a lack of clearly established law on its scope. *See Kessee v. Mendoza-Powers*, 574 F.3d 675, 676–77, 679 (9th Cir. 2009). And other courts have interpreted the prior conviction exception in such a way that comports with the state trial court's determination here. *See*, *e.g.*, *People v. Towne*, 186 P.3d 10, 16 (Cal. 2008).[2] The state court's rejection of Petitioner's *Apprendi* claim was not contrary to or an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).[3]

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[1] Because the parties are familiar with the facts, we recite them here only as necessary.

[2] The Supreme Court in *Cunningham* reiterated that the fact of a prior conviction remains an exception to *Apprendi*; it did not delineate the exception's scope. *See Cunningham*, 549 U.S. at 274–75, 288–89 (2007). *Cunningham* therefore does not squarely address or clearly extend to Petitioner's *Apprendi* claim. *See Moses v. Payne*, 555 F.3d 742, 754 (9th Cir. 2009).

[3] Petitioner's argument that the state trial judge unreasonably determined the facts pertaining to Petitioner's sentencing fail

Second, the state court's rejection of Petitioner's claim that the prosecutor suppressed allegedly exculpatory police reports was not objectively unreasonable. *See* 28 U.S.C. § 2254(d); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). While Petitioner argues that the prosecutor's untimely production of the reports materially impacted his defense, the state court reasonably determined that Petitioner already knew the information contained within the reports and could have presented it had he elected to take the stand. *See Milke v. Ryan*, 711 F.3d 998, 1017 (9th Cir. 2013). Petitioner already knew when he had reported his rental car as stolen and he already knew Thess Good, a friend of his discussed in one of the reports. Additionally, the jury heard multiple witnesses identify Petitioner as the culprit, and that Petitioner was linked to phone numbers that had made numerous calls in the same area as the crime, during the same time as the crime (and victims had observed that one of the perpetrators used a cell phone during the commission of the crime). The jury also learned that a search of Petitioner's home revealed an identification card with Petitioner's picture alongside the last name of the subscriber of one of the phone numbers that had made those many suspicious calls. Considering the substantial incriminating evidence presented at trial, and the fact that Petitioner chose not to pursue the information contained within the reports that he already knew, earlier disclosure of

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because they are based on alleged errors of state law, which does not warrant habeas relief. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam).

the reports would not have reasonably resulted in a different outcome. *See Turner v. United States*, 137 S. Ct. 1885, 1893 (2017).[4]

Third, the state court's exclusion of evidence pertaining to a stolen rental car was not contrary to or an unreasonable application of any clearly established Supreme Court precedent. *See Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (per curiam); *United States v. Scheffer*, 523 U.S. 303, 308 (1998). The state trial court only excluded statements that qualified as hearsay, and allowed Petitioner to testify on the topic if he so chose. And as discussed, limiting the admissibility of those statements to Petitioner's testimony does not contradict or unreasonably apply *Mitchell*. *See supra* n.4.[5] But even if the state trial court unconstitutionally excluded hearsay evidence, the exclusion did not have

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[4] By limiting the admissibility of certain evidence to Petitioner's testimony, the state trial court did not contradict or misapply *Mitchell v. United States*, 526 U.S. 314, 327–28 (1999). *Mitchell* does not squarely address or clearly extend to the application of well-established evidence exclusion rules and the need for a defendant's testimony to introduce otherwise-excluded evidence. *See id.* at 316–17, 27–28; *Moses*, 555 F.3d at 754. Moreover, we have previously upheld a trial judge's evidentiary ruling even when it meant that the admission of certain evidence required the requisite foundation, which could only occur through the defendant's testimony. *See Menendez v. Terhune*, 422 F.3d 1012, 1030–31 (9th Cir. 2005).

[5] While Petitioner argues that the state trial court unreasonably excluded the evidence under the factors discussed in *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985), the *Miller* factors do not constitute clearly established Supreme Court precedent for the purposes of habeas relief under AEDPA. *See Moses*, 555 F.3d at 759.

substantial and injurious effect or influence in determining the jury's verdict—especially given that, for the reasons discussed above, "the State's evidence of guilt was, if not overwhelming, certainly weighty." *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993); *see also Kyles v. Whitley*, 514 U.S. 419, 435 (1995).[6] Indeed, Petitioner's argument that the excluded evidence was "highly probative of the lack of a relationship between [Petitioner] and [his codefendant]," is belied by Petitioner's own statement to the police that he drove his "friend" and co-defendant who he had known "for . . . a few weeks" to the store and left the co-defendant in his rental car with the keys in the ignition.

Fourth, the state court reasonably rejected Petitioner's argument that testimony in a post-trial hearing, in the absence of Petitioner's presence, did not violate Petitioner's rights under the Confrontation Clause. There is no clearly established Supreme Court precedent extending the Confrontation Clause to post-trial hearings; indeed, the Supreme Court has repeatedly referred to the Confrontation Clause right as a trial right. *See*, *e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 52–53 (1987); *California v. Green*, 399 U.S. 149, 157 (1970). While Petitioner argues that the Confrontation Clause should apply in post-trial determinations of

[6] Neither did the state trial court's evidentiary ruling constitute an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). The state trial court reasoned that "[t]he timing [of the reporting] is unique only in that it puts in issue the credibility of [Petitioner] who obviously would be subject to cross-examination if he took the stand." The timing of Petitioner's reporting did not affect the admissibility of the excluded evidence.

guilt, habeas review is not the appropriate place to extend Supreme Court precedent. Neither was the state court's rejection of this claim an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). Even if confrontation rights apply in hearings adjudicating motions for new trials, the state court reasonably determined that the testimony at issue was only part of the reason the trial court denied his motion, which is a reasonable determination especially considering the weight of the evidence implicating Petitioner. As such, any alleged error did not have a substantial or injurious effect on the outcome of the proceeding. *See Brecht*, 507 U.S. at 637.

Fifth, the state court's rejection of Petitioner's attempt to collaterally attack a prior conviction due to the lack of appellate counsel was not contrary to or an unreasonable application of *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 404 (2001); 28 U.S.C. § 2254(d)(1). *Lackawanna* explicitly delimited its exception to rights protected by the Sixth Amendment and *Gideon v. Wainwright*, 372 U.S. 335 (1963), and "[t]he Sixth Amendment does not include any right to appeal." *Martinez v. Ct. of Appeal of Cal., Fourth App. Dist.*, 528 U.S. 152, 160 (2000). Because *Lackawanna* does not clearly extend to appellate counsel, the state court reasonably rejected this claim. *See Hooper v. Shinn*, 985 F.3d 594, 614–15 (9th Cir. 2021).

Sixth, the state court did not unreasonably reject Petitioner's ineffective assistance of appellate counsel claim. Petitioner fails to establish how his appellate counsel's representation fell below an objective

standard of reasonableness, or how the results of the proceeding would have been different had his appellate counsel raised claims that multiple courts have since rejected, or that any unraised claims were plainly stronger than the claims raised. *See Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017); *Harrington v. Richter*, 562 U.S. 86, 104 (2011), *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner merely reincorporates the same arguments made throughout his briefings that we reject herein, and unpersuasively argues that the unraised claims were non-frivolous. *Cf. Davila*, 137 S. Ct. at 2067 ("Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed.").

Seventh, for the reasons stated herein, none of Petitioner's alleged errors combine for a cumulative effect that is so prejudicial as to require reversal. *See Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002).

Finally, we deny Petitioner's pending motion to stay appellate proceedings as moot in lieu of this disposition. Petitioner requests a stay and order that the district court hold his petition in abeyance pending the resolution of his "forthcoming filing of an actual innocence claim in state court," but has not indicated that he has initiated any such state court proceedings. A claim of actual innocence does not independently warrant federal habeas relief, *Herrera v. Collins*, 506 U.S. 390, 400, 404 (1993), and Petitioner has not demonstrated how his proffered evidence strengthens his existing claims to the point that his arguments

become potentially meritorious. *Cf. Gonzalez v. Wong*, 667 F.3d 965, 986 (9th Cir. 2011). Finally, the denial of his stay motion in federal court will not prevent him from pursuing his actual innocence claim in state court.[7]

The district court is **AFFIRMED**, and Petitioner's motion to stay is **DENIED**.

[7] Because we deny Petitioner's motion as moot in lieu of this disposition, we likewise deny Petitioner's alternate request to allow Petitioner an evidentiary hearing before the district court as moot as well.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY PENTON, Petitioner, v. A. MALFI, Respondent.	Case No.: 6-cv-233-WQH-RBM **ORDER** (Filed Dec. 4, 2019)

HAYES, Judge:

The matter before the Court is the Motion for Certificate of Appealability filed by Petitioner Anthony Penton. (ECF No. 79).

I. BACKGROUND

On January 31, 2006, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. (ECF No. 1). On October 2, 2006, Petitioner filed an Amended Petition against Respondent A. Malfi. (ECF No. 21). On August 31, 2007, the Magistrate Judge issued a Report and Recommendation recommending that the Court deny Petitioner's Amended Petition. (ECF No. 36). The Magistrate Judge recommended that the Court deny the claims that a new trial should have been granted under the Due Process Clause and the right to confrontation. The Magistrate Judge recommended that the Court deny Petitioner's claims that California's Three Strikes law is an ex post facto law and is void for vagueness. The Magistrate

Judge recommended that the Court deny Petitioner's claims of insufficiency of the evidence, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. The Magistrate Judge further recommended that the Court deny Petitioner's claim that the trial judge imposed "upper terms for his sentence based upon facts that were neither found by the jury nor admitted by Petitioner." (*Id.* at 25). No objections to the Report and Recommendation were filed. On December 20, 2007, the Court adopted the Report and Recommendation in its entirety and entered judgment in favor of Respondent and against Petitioner.

On May 18, 2018, Petitioner filed a Motion for Relief from Judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 53). On August 28, 2018, the Court granted Petitioner's Motion for Relief from Judgment. (ECF No. 61). The Court vacated the Judgment and the portions of the December 20, 2007, Order adopting the Report and Recommendation and denying the Amended Petition. The Court granted leave to file objections to the Report and Recommendation.

On November 26, 2018, Petitioner filed Objections to the Report and Recommendation. (ECF No. 66). On April 19, 2019, Respondent filed a Response to Petitioner's Objections. (ECF No. 70). On June 17, 2019, Petitioner filed a Reply. (ECF No. 76). On September 12, 2019, the Court issued an Order adopting all portions of the Report and Recommendation except the section entitled "**DEPRIVATION OF JURY TRIAL IN SENTENCING**," page 25, line 1, through page 31,

line 20, and denied Petitioner's Amended Petition. (ECF No. 77). The Court held that:

> the determination of the trial judge that 'Defendant's prior convictions are numerous and of increasing seriousness' and the decision to impose an upper term sentence in this case is consistent with the holding in [*People v. Black*, 41 Cal. 4th 799 (2007)] and was not an 'unreasonable application' of 'clearly established' federal law. Petitioner is not entitled to relief under [28 U.S.C.] § 2254(d)(1).

(ECF No. 77 at 7).

On October 14, 2019, Petitioner filed a Motion for Certificate of Appealability (ECF No. 79) and a Notice of Appeal (ECF No. 80). On November 15, 2019, the Court of Appeals issued an Order stating:

> The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise under 28 U.S.C. § 2254. This case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).
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> If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to issue a certificate, the court should state its

> reasons why a certificate of appealability should not be granted, and the Clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

(ECF No. 82 at 1-2).

II. DISCUSSION

Petitioner contends that the Court should certify the following issues for appeal: 1) whether Petitioner's sentence was unconstitutionally increased under California's Determinate Sentencing Law; 2) whether Petitioner's constitutional rights to due process and a fair trial were violated at trial by the prosecutor's suppression of favorable evidence; 3) whether the trial court unconstitutionally excluded evidence favorable to Petitioner; 4) whether the trial court violated Petitioner's constitutional right to confrontation; 5) whether Petitioner should have been allowed to challenge his prior conviction at sentencing; 6) whether petitioner's appellate counsel was ineffective; and 7) whether the alleged constitutional violations cumulatively prejudiced Petitioner. (ECF No. 79-1 at 8). Petitioner contends that "reasonable jurists could disagree with the Court's resolution" of these issues. (*Id.*).

A certificate of appealability must be obtained by a petitioner in order to pursue an appeal from a final order in a § 2254 habeas corpus proceeding. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has

made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "[T]he district court shall indicate which specific issue or issues satisfy the standard for issuing a certificate, or state its reasons why a certificate should not be granted." *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). A certificate should issue where the prisoner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Upon review of the record in this case, the Court concludes that issues Petitioner requests this Court certify for appeal, as raised in Petitioner's Amended Petition, are non-frivolous and debatable among reasonable jurists. Although the Court denied Petitioner's Amended Petition, the Court finds that Petitioner raised colorable constitutional arguments. Pursuant to the Order of the Court of Appeals, this Court grants a certificate of appealability as to the following claims: 1) Petitioner's sentence was unconstitutionally enhanced under California's Determinate Sentencing Law; 2) the prosecutor violated Petitioner's rights to due process and a fair trial by suppressing the Spear Report and the Good Report; 3) the trial court violated Petitioner's due process rights by excluding evidence favorable to Petitioner; 4) the trial court violated Petitioner's right to confrontation at the hearing on his motion for new trial; 5) the trial court should have allowed Petitioner to challenge his prior conviction at sentencing; 6)

Petitioner's appellate counsel was ineffective; and 7) the constitutional violations that occurred during Petitioner's trial, sentencing, and appellate proceedings cumulatively prejudiced Petitioner.

III. CONCLUSION

IT IS HEREBY ORDERED that the Motion for Certificate of Appealability (ECF No. 79) is GRANTED.

Dated: December 4, 2019

/s/ William Q. Hayes
Hon. William Q. Hayes
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Anthony PENTON, Petitioner, v. Scott KERNAN, Warden, Respondent.	Case No.: 06-cv-00233-WQH-PCL **ORDER** (Filed Sep. 12, 2019)

HAYES, Judge:

The matter before the Court is the Petitioner's Objections (ECF No. 66) to the Report and Recommendation (ECF No. 36) of the Magistrate Judge, recommending that the Court deny Petitioner's Writ of Habeas Corpus.

BACKGROUND

On January 31, 2006, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

On October 6, 2006, Petitioner filed a First Amended Petition presenting only his exhausted claims. (ECF No. 21).

On March 28, 2007, Respondents filed an Answer to the Petition.

On August 31, 2007, the Magistrate Judge issued a Report and Recommendation recommending that this Court deny Petitioner's Writ of Habeas Corpus. (ECF No. 36). The Magistrate Judge recommended

that the Court deny the claims that a new trial should have been granted under the due process clause, and the right to confrontation. The Magistrate Judge recommended that the Court deny Petitioner's claims that the Three Strike law is an ex post facto law and void for vagueness. The Magistrate Judge recommended that the Court deny Petitioner's claims of insufficiency of the evidence, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. The Magistrate Judge further recommended that the Court deny Petitioner's claim that the trial judge imposed "upper terms for his sentence based upon facts that were neither found by the jury nor admitted by Petitioner." (ECF No. 36 at 25.) No objections were filed. On December 20, 2007, this Court adopted the Report and Recommendation in its entirety and entered judgment in favor of Respondent and against Petitioner. (ECF No. 45).

On May 18, 2018, Petitioner filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). On August 28, 2018, this Court granted Petitioner's Motion for Relief from Judgment. The Court vacated the Judgment, and the portions of the Order adopting the Report and Recommendation and denying the Amended Petition for Writ of Habeas Corpus. (ECF No. 61). The Court granted leave to file objections to the Report and Recommendation. *Id.* at 8.

On November 26, 2018, Petitioner filed Objections to the Report and Recommendation. (ECF No. 66).

On April 19, 2019, Respondent filed a Response to the Petitioner's Objections to the Report and Recommendation. (ECF No. 70).

On June 17, 2019, Petitioner filed a Reply in Support of Objections to the Report and Recommendation. (ECF No. 76).

LEGAL STANDARD

The duties of the district court in connection with a Report and Recommendation of a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). When the parties object to a Report and Recommendation, "[a] judge of the [district] court shall make a de novo determination of those portions of the [Report and Recommendation] to which objection is made." 28 U.S.C. § 636(b)(1); *see also Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). A district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

RULING OF THE COURT

The Court has reviewed de novo of all portions of the Report and Recommendation addressed by the objections and adopts all portions of the Report and Recommendation (ECF No. 63) except the section entitled "**DEPRIVATION OF JURY TRIAL IN SENTENCING**," page 25, line 1 through page 31, line 20.

Petitioner contends that his sentence was unconstitutionally enhanced under California's determinate sentencing law. Petitioner contends that the trial judge violated his rights under the Sixth Amendment by imposing an upper term sentence based upon aggravating factors not found by the jury or admitted by him. Petitioner asserts that *Cunningham v. California*[1] bars the imposition of an upper term sentence based on facts found by a judge by a preponderance of the evidence. Petitioner contends that *Cunningham* applies retroactively to his case and requires the Court to conclude that his enhanced sentence is unconstitutional. Petitioner contends that *Butler v. Curry*,[2] does not extend the prior conviction exception in *Apprendi v. New Jersey*,[3] to "qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction." (ECF No. 66 at 19). Petitioner asserts that the trial court made a factual finding by a preponderance of the evidence that his prior convictions were of "increasing seriousness" and "numerous" outside of the prior conviction exception in *Apprendi*. *Id*. at 20-21.

Respondent contends that the prior conviction exception set forth in *Apprendi* allowed the trial court to determine whether prior convictions are "numerous or of increasing seriousness" in support of an upper term sentence. (ECF No. 70 at 4). Respondent contends that

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[1] 549 U.S. 270 (2007).

[2] 528 F.3d 624 (9th Cir. 2008).

[3] 530 U.S. 466, 490 (2000).

circuit court precedent, such as *Butler*, cannot be the basis of clearly established federal law for purposes of review in a habeas proceeding.

Petitioner was sentenced to an "upper, aggravated term as the base term" under California's determinate sentencing system. (ECF No. 29-9 at 208). The trial judge found the following three aggravating factors: 1) the "crime involved great violence;" 2) "the manner in which the crime was carried out indicated planning, sophistication, and professionalism;" and 3) "Defendant's prior convictions are numerous and of increasing seriousness." *Id*. at 208-209. "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." *People v. Black*, 41 Cal. 4th 799, 813 (Cal. 2007) ("Black II"). The issue presented is whether the imposition of the upper term sentence based upon the Petitioner's prior convictions violated his Sixth Amendment right to a jury trial.

The Supreme Court has held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. at 476. In *Cunningham*, the Supreme Court held California's determinate sentencing law violated the rule in *Apprendi* "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt. . . ." 549 U.S. 270, 288 (2007);

see also Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) ("In *Almendarez-Torres v. United States* . . . we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.").

The Court of Appeals for the Ninth Circuit applies a narrow interpretation of the "prior conviction" exception set forth in *Apprendi*. *See Butler*, 528 F.3d at 644 ("Under our precedents, the [prior conviction] exception does not extend to qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction."). For purposes of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), however, "*Butler* does not represent clearly established law 'as determined by the Supreme Court of the United States.'" *Kessee v. Mendoza-Powers*, 574 F.3d 675, 679 (2009) (quoting 18 U.S.C. § 2254(d)(1)).

In *Black II*, the California Supreme Court concluded that the determination by the trial judge that defendant's conviction were "numerous or of increasing seriousness" to impose the upper term satisfied the exception for prior convictions set forth in *Apprendi* and the requirements of the Sixth Amendment. The defendant in *Black II* asserted that "he was entitled to a jury trial on the aggravating circumstance of his prior criminal history because, even if the trial court properly may decide whether a defendant has suffered a prior conviction, a jury must determine whether such

convictions are numerous or increasingly serious." 41 Cal. 4th at 819. The California Supreme Court broadly applied the "prior conviction" exception in *Apprendi*, holding that the exception includes "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." *Id*. The Court explained:

> The determinations whether a defendant has suffered prior convictions, and whether those convictions are "numerous or of increasing seriousness" (Cal. Rules of Court, rule 4.421(b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is "quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court." (*McGee*, supra, 38 Cal.4th at p. 706, 42 Cal.Rptr.3d 899, 133 P.3d 1054.)

Id. at 819-20.

Under the AEDPA, a petition for habeas corpus pending before a federal court "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" resulted in a decision that either "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C.

§ 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *Id.* § 2254(d)(2). "The starting point for cases subject to § 2254(d)(1) is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Marshall v. Rodgers*, ___ U.S. ___, 133 S.Ct. 1446, 1449, 185 L.Ed.2d 540 (2013) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)). In *Robertson v. Pichon*, 849 F.3d 1173, 1182 (9th Cir. 2017), the Court of Appeals explained,

> Clearly established federal law is limited to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions," *Woods v. Donald*, ___ U.S. ___, 135 S.Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (per curiam) (quoting *White v. Woodall*, ___ U.S. ___, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014)), and "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced,'" *Lopez v. Smith*, ___ U.S. ___ ___, 135 S.Ct. 1, 4, 190 L.Ed.2d 1 (2014) (per curiam) (quoting *Marshall*, 133 S.Ct. at 1450). "[W]hen a Supreme Court decision does not 'squarely address[ ] the issue in th[e] case' or establish a legal principle that 'clearly extend[s]' to a new context to the extent required by the Supreme Court in these recent decisions, it cannot be said, under AEDPA, there is 'clearly established' Supreme Court precedent addressing the issue before us, and so we must defer to the state court's decision." *Moses v. Payne*, 555 F.3d 742, 754 (9th Cir.

> 2009) (second, third, and fourth alterations in original) (citation omitted) (quoting *Wright v. Van Patten*, 552 U.S. 120, 125, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008)). Said otherwise, "when a state court may draw a principled distinction between the case before it and Supreme Court caselaw, the law is not clearly established for the state-court case." *Murdoch*, 609 F.3d at 991.

The scope of the "prior conviction" exception as determined in *Black II* is a reasonable interpretation of the "prior conviction" exception set forth in *Apprendi*. *See Kessee*, 574 F.3d at 679 ("Because the Supreme Court has not given explicit direction and because the state court's interpretation is consistent with many other courts' interpretations, we cannot hold that the state court's interpretation was contrary to, or involved an unreasonable application of Supreme Court precedent."). In this case, the determination of the trial judge that "Defendant's prior convictions are numerous and of increasing seriousness" and the decision to impose an upper term sentence in this case is consistent with the holding in *Black II* and was not an "unreasonable application" of "clearly established" federal law. Petitioner is not entitled to relief under § 2254(d)(1).

I. CONCLUSION

IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 63) is ADOPTED except for page 25 line 1 through page 31 line 20. Petitioner's

Writ of Habeas Corpus (ECF No. 21) is DENIED. The Clerk of the Court shall enter judgment in favor of Respondent and against Petitioner.

Dated: September 12, 2019

/s/ William Q. Hayes
Hon. William Q. Hayes
United States District Court

[SEAL]

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Anthony Penton **Plaintiff,** **v.** Scott Kernan, Warden and A. Malfi **Defendant.**	**Civil Action No.** 06cv233-WQH-RBM **JUDGMENT IN A CIVIL CASE**

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

IT IS HEREBY ORDERED AND ADJUDGED:

The Report and Recommendation (ECF No. 63) is adopted except for page 25 line 1 through page 31 line 20. Petitioner's Writ of Habeas Corpus (ECF No. 21) is denied. Judgment is in favor of Respondent and against Petitioner.

Date: 9/12/19

CLERK OF COURT
JOHN MORRILL,
Clerk of Court
By: s/ A. Garcia
A. Garcia, Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY PENTON, Petitioner, vs. SCOTT KERNAN, Warden, Respondent.	CASE NO. 06-cv-233-WQH-PCL ORDER (Filed Aug. 28, 2018)

HAYES, Judge:

The matter before the Court is the motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6) filed by the Petitioner. (ECF No. 53).

BACKGROUND FACTS

On January 31, 2006, Petitioner Anthony Penton, a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On October 6, 2006, Petitioner filed a First Amended Petition presenting only exhausted claims.

On March 28, 2007, Respondent filed an Answer.

On August 31, 2007, the United States Magistrate Judge filed a Report and Recommendation recommending that this Court deny habeas relief and ordering that any party may file written objections no later than September 21, 2007. The Report and Recommendation addressed a number of issues including Petitioner's challenge to the constitutionality of the judge

determinations of penalty enhancement findings under *Cunningham v. California*, 549 U.S. 270 (January 22, 2007). The Report and Recommendation concluded that "*Cunningham* should not be retroactively applied to convictions that were final prior to its publication." (ECF No. 36 at 29).

On October 2, 2007, Petitioner filed a motion for an extension of time to file objections.

On October 22, 2007, the Court granted Petitioner's motion and ordered that objections be filed by November 7, 2007.

On October 30, 2007, Petitioner filed a motion for an order directing the litigation coordinator to grant Petitioner eight hours a week law library access.

On November 8, 2007, Petitioner was transferred from California State Prison-Sacramento to a prison in Bowling Green, Kentucky. Petitioner was denied the ability to gather legal papers and was not able to notify anyone of his departure or new address.[1]

On December 20, 2007, this Court entered an order adopting the Report and Recommendation without objections and denying the Amended Writ of Habeas Corpus.

On December 26, 2007, Judgment was entered denying the Amended Writ of Habeas Corpus. No appeal was filed.

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[1] The Court relies upon the facts stated by Petitioner in his Declaration (ECF No. 53-2) and not contested by the Respondent.

On June 9, 2008, the Court of Appeals filed an opinion in *Butler v. Curry*, 528 F.3d 624 (9th Cir. 2008) holding that "*Cunningham* [] did not announce a new rule of constitutional law and may be applied retroactively on collateral review." *Id.* at 639.

On June 19, 2008, Petitioner returned to the California State Prison-Sacramento. During the seven months period Petitioner was in Kentucky, his mail was accumulated at the California State Prison-Sacramento. No mail was forwarded to Kentucky.

On July 29, 2008, Petitioner received his accumulated mail.

On August 11, 2008, Petitioner filed a request form seeking access to the law library in an effort to prepare a Rule 60(b) motion to reinstate his habeas petition. The request was denied on the grounds that Petitioner did not provide a court-ordered deadline. Petitioner filed an inmate appeal and prison officials responded requesting previous screening forms. Petitioner responded that he had no previous screening forms.

On October 21, 2008, the Appeals Coordinator notified Petitioner "Do not return this appeal. If you do, it will be placed in your Appeals file & not be processed." (ECF No. 53-10). Petitioner states, "I felt I had to stop pursuing answers and a resolution until I was transferred out of CSP-SAC." (ECF No. 53-2 at 5).

On March 23, 2010, Petitioner was transferred to Salinas Valley State Prison. At Salinas, another prison told Petitioner about 42 U.S.C. § 1983 and Petitioner

"thought filing one might allow me back into my habeas petition." *Id*. at 5. Petitioner filed a Complaint pursuant to 42 U.S.C. § 1983 in the District Court for the Eastern District of California for violation of his right of access to courts. The district court dismissed the second amended complaint for failure to state a claim.

On February 9, 2018, the Court of Appeals for the Ninth Circuit reversed the district court's dismissal of the amended complaint. *Penton v. Pool*, 724 Fed. Appx. 546 (9th Cir. 2018). The Court of Appeals stated in part:

> Penton's FAC sufficiently pleads a causal nexus between interference with his mail and the lost "capability" of pressing an "underlying claim." *Lewis*, 518 U.S. at 356, 116 S.Ct. 2174; *Harbury*, 536 U.S. at 415, 122 S.Ct. 2179. Defendants' withholding of Penton's mail frustrated his ability to timely object to the magistrate judge's August 2007 report and recommendation, and to timely appeal the district court's December 2007 denial of his habeas petition. Accordingly, Penton has plausibly alleged that withholding his mail "hindered" his ability to access the courts to pursue his habeas petition.

Id. at 549-550.

On May 8, 2018, a Notice to Substitute Attorney was filed on behalf of Petitioner. On May 15, 2018, this Court granted the request to represent Petitioner.

On May 18, 2018, Petitioner, represented by counsel, filed the motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6) pending before this Court.

On June 29, 2018, Respondent filed an opposition to the motion for relief from Judgment.

On July 16, 2018, Petitioner filed a reply.

CONTENTIONS OF THE PARTIES

Petitioner contends that the unconstitutional denial of access to the courts in his case is an extraordinary circumstance which merits relief from judgment. Petitioner asserts that prison officials denied him access to the mail and the courts costing him the chance to object to the Report and Recommendation or file an appeal of the denial of his habeas petition. Petitioner asserts that he has been diligent in pursuing his right to file objections to the Report and Recommendation. Petitioner asserts that prison officials failed to forward his legal mail and blocked the attempts he made to pursue his grievance regarding the withholding of his mail. Petitioner contends that there is no prejudice to the Respondent in allowing him to reopen his case and file objections to the Report and Recommendation.

Respondent contends that Petitioner cannot demonstrate that he suffered any injury entitling him to relief from judgment because his objections to the Report and Recommendation have no merit. Respondent asserts that this Court should assume that Petitioner was deprived of timely access to his legal mail

and access to the prison law library and conclude that Petitioner would not be entitled to relief because the state court's decision to uphold Petitioner's upper term sentence was reasonable. Respondent contends that the aggravating circumstances found by the state court in support of the upper term sentence imposed fall within the recidivism exception to the jury-trial requirements set forth in *Cunningham*.

Petitioner, in reply, asserts that his ability to file objections to the Report and Recommendations was impaired by Defendant's conduct demonstrating an injury from circumstances beyond his control. Petitioner asserts that it is not proper for this Court to determine the merits of his objections in deciding whether to allow his Rule 60(b) motion.

APPLICABLE LAW

Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). A movant seeking relief under Rule 60(b)(6) must show "extraordinary circumstances justifying the reopening of a final judgment." *Id.* at 535. A party "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the action in a proper fashion." *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006).

"[T]he decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to

intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017) (quoting *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009)). In applying Rule 60(b)(6) in habeas cases, the Court of Appeals has considered six factors described in *Phelps v. Alameida*: (1) a showing of extraordinary circumstances, such as a change in intervening law; (2) the petitioner's exercise of diligence in pursuing the issue during federal habeas proceedings; (3) interest in finality; (4) delay between the finality of the judgment and the motion for Rule 60(b)(6) relief; (5) degree of connection between the extraordinary circumstance and the decision for which reconsideration is sought; and (6) comity. See *id*. at 1135–40. "[T]hese factors are not 'a rigid or exhaustive checklist.'" *Hall*, 861 F.3d at 987 (quoting *Phelps*, 569 F.3d at 1135).

In *Gonzalez*, the United States Supreme Court examined "whether, in a habeas case, [Rule 60(b) motions] are subject to the additional restrictions that apply to 'second or successive' habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." 545 U.S. at 526. The Supreme Court determined that using Rule 60(b) to present "new claims," "new evidence," or a "purported change in substantive law" "would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within the exception to the successive-petition bar." *Id*. at 532.

The Court stated, "That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceeding." *Id*.

The Supreme Court concluded,

> Rule 60(b) has an unquestionably valid role to play in habeas cases. The Rule is often used to relieve parties from the effect of a default judgment mistakenly entered against them, *e.g.*, *Klapprott*, 335 U.S., at 615, 69 S.Ct. 384 (opinion of Black, J.), a function as legitimate in habeas cases as in run-of-the-mine civil cases. The Rule also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction-a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In some instances, we may note, it is the State, not the habeas petitioner, that seeks to use Rule 60(b), to reopen a habeas judgment granting the writ. See, *e.g.*, *Ritter v. Smith*, 811 F.2d 1398, 1400 (C.A.11 1987).
>
> Moreover, several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA, ensuring that our harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions.

> First, Rule 60(b) contains its own limitations, such as the requirement that the motion "be made within a reasonable time" and the more specific 1-year deadline for asserting three of the most open-ended grounds of relief (excusable neglect, newly discovered evidence, and fraud). Second, our cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment. *Ackermann v. United States*, 340 U.S. 193 199, 71 S.Ct. 209, 95 L.Ed. 207 (1950); accord, *id*., at 202, 71 S.Ct. 209; *Liljeberg*, 486 U.S., at 864, 108 S.Ct. 2194; *id*., at 873, 109 S.Ct. 2194 (REHNQUIST, C. J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved"). Such circumstances will rarely occur in the habeas context. Third, Rule 60(b) proceedings are subject to only limited and deferential appellate review.

Id. at 534-35.

RULING OF THE COURT

In this case, Respondent does not contest facts in the record demonstrating that Petitioner had no access to his legal materials and his legal mail from November 8, 2007 until July 29, 2008 because he was transferred from a prison in Sacramento to a prison in Kentucky without time to gather his legal papers and his legal mail was not forwarded to Kentucky. During this period of time, the deadline to file an objection to

the Report and Recommendation passed, this Court adopted the Report and Recommendation without objections, judgment was entered against Petitioner on his Writ, and the time to file a Notice of Appeal expired. This uncontested lack of access to legal mail and the resulting inability to access the court is an extraordinary circumstance which rarely occurs.

Petitioner's exercise of diligence in pursuing relief in this federal habeas is demonstrated by a series of attempts to assert a claim for denial of his access to the courts through the prison appeals system and a separate civil action filed pursuant to 42 U.S.C. § 1983. While one can fault Petitioner for failing to file any request for relief in this habeas case, Petitioner pursued his legal claim for hindering his ability to access the courts in order to pursue his habeas petition diligently in the District Court for the Eastern District of California. Under these uncontested facts, Petitioner has demonstrated that the withholding of his legal mail and the denial of access to the courts prevented him from filing an objection to the Report and Recommendation. This injury caused by circumstances beyond his control supports relief under Rule 60(b). Petitioner is not required to demonstrate that he will prevail in his objections to the Report and Recommendations in order to obtain relief under Rule 60(b). These uncontested facts are adequate to show an injury resulting in a "defect in the integrity of the federal habeas proceeding." *Gonzalez*, 545 U.S. at 532. Respondent does not claim any undue prejudice would result from reopening this case to allow the filing of objections to the

Report and Recommendation. In this case, the consideration of objections to the Report and Recommendation will involve legal argument limited by the issues resolved in the Report and Recommendation and the narrow review of the state court rulings under the AEDPA. While the interest in finality would support denying relief under Rule 60(b), Petitioner's inability to file objections to the Report and Recommendation is directly related to the failure of prison officials to forward his legal mail. *Id*. at 529 ("[Finality], standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality.").

IT IS HEREBY ORDERED that the motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6) filed by the Petitioner (ECF No. 53) is granted.

IT IS FURTHER ORDERED that the Judgment in a civil case (ECF No. 46) and the portions of the Order (ECF No. 45 at page 45 lines 7-9) adopting the Report and Recommendation and denying the Amended Petition for Writ of Habeas Corpus (ECF No 21) are vacated. Any party may file written objections to the Report and Recommendation (ECF No. 36) within thirty days of the date of this order. Any response to the objections shall be filed within thirty days of the filing of the objection.

DATED: August 28, 2018

/s/ William Q. Hayes
WILLIAM Q. HAYES
United States District Judge

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Anthony Penton

v.

Scott Kernan; A. Malfi

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 06cv233 WQH (PCL)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

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

IT IS ORDERED AND ADJUDGED

All portions of the Report and Recommendation filed on 8/31/07 are adopted and the Amended Petition for Writ of Habeas Corpus is denied. The Motion for Order Extending Time for Appeal is denied. The Motion for Order Directing Litigation Coordinator at C.S.P. SAC "Linda Young" to Grant Petitioner (8) Hours a Week Law Library Access is denied.

December 26, 2007
Date

W. Samuel Hamrick, Jr.
Clerk

s/M. Cruz
(By) Deputy Clerk

ENTERED ON
December 26, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY PENTON, Petitioner, **v.** **SCOTT KERNAN, Warden,** Respondent.	CASE NO. 06cv233 WQH (PCL) **REPORT & RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS** (Filed Aug. 31, 2007)

I. INTRODUCTION

On January 31, 2006, Anthony Penton ("Petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) A. Malfi[1], Warden, ("Respondent") moved to dismiss the petition for failure to exhaust state court remedies on four of Petitioner's claims, (Doc. No. 9), and this Court issued a Report and Recommendation finding Petitioner's twelfth and thirteenth claims unexhausted. (Doc. No. 18.) On October 6, 2006, Petitioner filed a First Amended Petition ("Petition") presenting only exhausted claims (Doc. No. 21.) On March 28, 2007, Respondents filed an Answer to the Petition along with a Memorandum of Points and

[1] Scott Kernan, Warden, was originally named as one of the respondents. However, he was terminated on October 2, 2006.

Authorities in support thereof, (Doc. No. 28 at Part 1, 3), and lodged portions of the state court record ("Lodgment"). (Id. at Part 4.) Petitioner lodged portions of the state court record on May 4, 2007. (Doc. No. 29.) Petitioner also filed a Traverse ("Trav."). (Doc. No. 35.) After reviewing the Petition, Respondent's Answer, and Petitioner's Traverse, this Court recommends[2] that Petitioner be **DENIED** habeas corpus relief.

II. FACTUAL BACKGROUND & STATE PROCEEDINGS

A. The Attempted Robbery and the Car Chase

On June 26, 1999, two black males attempted to rob Symbolic Motors ("Symbolic"), (Lodgment 11 at 1), a car dealership in La Jolla, California. (Lodgment 2 at 43.) In the course of the perpetrators' unsuccessful attempt to obtain the keys to Symbolic's safe, they "attempted to rob, imprison, and terrorize five Symbolic employees, one customer, and two daughters of one of the employees." (Lodgment 11 at 1.) The perpetrators held the various Symbolic employees at gunpoint and compelled them to move to the back of Symbolic's showroom, forcing them to lie face down on the floor. (Lodgment 2 at 106-111.) They took a car key out of a victim's pocket. (Lodgment 5 at 6.) A few victims saw one of the perpetrators use a cellular phone several

[2] This Report and Recommendation is submitted to United States District Judge William Q. Hayes, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California.

times while they attempted to rob Symbolic. (Lodgment 2 at 325-28; 43-5.)

At one point during the attempted robbery, the perpetrators forced a Symbolic employee and his daughters to an upstairs area. (Lodgment 2 at 159, 320-323.) Once there, one perpetrator removed two handguns and duct tape from a plastic bag he was carrying, and taped the employee's arms behind his back. (Id.) He then remained upstairs with the children[3] and the employee while the other Perpetrator went back downstairs. (Id.) Approximately one-half hour later, one of the employees in the downstairs area ran out of Symbolic, and the perpetrators fled the building shortly after. (Lodgment at 112-15, 157, 165.) Another employee within Symbolic then dialed 911 on her cell phone. (Lodgment at 165.) When the police arrived at the scene, the perpetrators were not at Symbolic. However, a field evidence technician recovered a plastic bag in the upstairs area of Symbolic. Edward Jones' fingerprints were found on the bag. (Lodgment 2 at 176, 184-85, 245-46.)

A few days later, on June 29, 1999, San Diego Police Officer Andrew Spears spotted Jones speeding in a tan rental car at 10:00 a.m. (Doc. No. 21 at 164.) When Spears approached Jones in his police car, Jones sped up and turned into an alley. Spears turned on his lights and sirens and pursued Jones. (Lodgment 2 at 264-65.) While in pursuit, Spears saw Jones throw a gun out of

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[3] The employee's two daughters were six and eight years old when the Symbolic robbery took place. (Lodgment 5 at 5.)

the window of his car. Spears eventually stopped Jones and placed him under arrest at 10:02 a.m. (Doc. No. 21 at 161.)

B. Police Investigation

After Jones' arrest, the police conducted a search of the tan rental car and found a holster under the driver seat that fit the gun Jones' threw out the window. (Lodgment 2 at 266-67.) Police also determined that Petitioner had rented the tan rental car three weeks prior to the robbery incident at Symbolic. (Lodgment 2 at 259, 265.) About one and half hours after Jones' arrest, Petitioner called the police. He gave a statement claiming that the rental car was stolen and that he had called Enterprise Rental Car prior to calling the police. (Doc. No. 21 at 162.) Petitioner stated that on June 29, 1999, before Jones' arrest, he and Jones drove to Fam-Mart. Petitioner claims that he left Jones with the car and went in the store to buy a shirt. (Id.) When Petitioner returned from the store, the car was gone. (Id.) Police also interviewed an employee of Fam-Mart. The employee stated that on June 29, 1999, Fam-Mart opened at 10:00 a.m. and that he saw a black male enter sometime after the store opened. (Id. at 163.) He also stated that the black male did not tell him his car was stolen until 10:45 a.m. (Id.) The police officer who made the report stated in the report that he did not believe Petitioner's story. (Id. at 162-63.)

In further investigating the robbery, police detective Johnny Keene obtained records of phone calls

made during the morning of the Symbolic incident. (Lodgment 2 at 282-294, 304.) He learned that thirty-two phone calls had been made between two cell phone numbers in the La Jolla area before, during, and after the robbery. (Id.) The two phone numbers belonged to two people, Crini Ornelas and Tim Walker. However, while investigating the social security and driver's license numbers given to the cell phone company by these two individuals, Keene discovered that the numbers did not match the name Tim Walker, and suspected that the name was an alias. (Id.) Keene contacted Crini Ornela. She stated that she had never subscribed to a cell phone. He reviewed other phone numbers which the cell phone numbers called, and determined that the Crini Ornelas cell phone had called two of Petitioner's cell phones. Keene determined that Tim Walker's cell phone number had called Petitioner's home phone numbers in Victorville and Phoenix. (Id. at 282-294, 308-09.)

Keene executed a search warrant at Petitioner's home and found a tablecloth with Petitioner's nickname and the alias' cell phone number written on it. Police found a box of .45-caliber ammunition and a key chain with the logo for Enterprise Rental Car, which listed the make, model, and license plate number of the tan rental car Jones was driving when he was arrested. (Lodgment 2 at 303-06.) They also found a California Identification Card that had Petitioner's picture, but listed the name "Tony Lamont Walker." (Id. at 310.)

Two victims of the Symbolic robbery were able to identify Petitioner and Jones as Perpetrators in

photographic lineups and live lineups. (Lodgment 2 at 60-72, 335-43.) However, three other victims were unable to identify either Jones or Petitioner in lineups. (Lodgment 2 at 138-41, 115-18, 165.)

The police also learned that Petitioner was possibly staying at the address 4168 Lochlomond, in the Kearny Mesa area of San Diego during August of 1999. (Lodgment 1 at 426.) They maintained surveillance of the area until they saw a black male, who looked like Petitioner, get into a car and drive off. The police confirmed the person's identity with a neighbor and arrested the person. However, once the police detained him, they discovered that the black male was not Petitioner but a man named Thess Good. (Lodgment 1 at 427.) Good was an ex-convict with a history of arrests for burglary, felony assault, attempted murder, auto theft, and possession of firearms. (Id.) After questioning Good, the police found out that Good was a friend of Petitioner. Good eventually agreed to help the police find Petitioner. (Id.) Good called Petitioner, who had left the city, and asked him to come to San Diego. (Id.) Petitioner refused to return. Nonetheless, the police were able to get two of Petitioner's phone numbers through Good. (Id.)

C. Court Proceedings

On November 1, 2000, Petitioner was charged in an amended information, in case number SCD 147553, with one count of Robbery and five counts of Attempted Robbery in violation of California Penal Code ("Penal

Code") section 211, and two counts of False Imprisonment by Violence, Menace, Fraud, Deceit in violation of Penal Code section 236 and 237(a). (Lodgment 1 at 24-28.) The amended information also alleged that Petitioner personally used a fire arm in violation of section 12022.5(a)(1) during the commission or attempted commission of all of the above crimes. (Id.) In addition, the amended information alleged that Petitioner was convicted of two prison priors pursuant to Penal Code sections 667.5(b) and 668, one of which is a serious felony and strike prior under California's Three Strikes law pursuant to Penal Code sections 667.5(b), 668, 1192.7(c), and 1170.12. (Lodgment 1 at 28-29.) Petitioner waived formal reading of the information, pleaded not guilty, and denied all allegations and priors. (Lodgment 1 at 248.)

The trial began on November 1, 2000. (Lodgment 1 at 248.) Prior to the presentation of evidence, the attorney for the state moved to exclude from the trial Petitioner's statement regarding his call to report the tan rental car stolen. (Lodgment 2 at 6.) Petitioner acknowledged that the statement was hearsay, but argued that it was potentially exculpatory evidence and should be admitted. (Lodgment 5 at 9.) The court ruled that the statement amounted to inadmissible hearsay, and reasoned Petitioner could take the stand and testify about the statement if he wished. (Lodgment 2 at 8.) The court ruled to exclude the statements from trial. (Id.)

Several victims of the Symbolic incident testified on behalf of the prosecution. The two victims who

identified Petitioner and Jones as the perpetrators in lineups also identified them at trial. (Lodgment 2 at 60-72, 335-43.) One of the victims, who was unable to identify Petitioner at a photographic lineup, was able to identify him at trial. (Lodgment 2 at 138-41.) The two other victims who testified could not identify Petitioner at trial. (Lodgment 2 at 115-18, 165.)

The victims who testified also described the perpetrators. One of the victims who identified Petitioner as the taller perpetrator, described Petitioner as a tall, thin, and nicely dressed black man. (Lodgment 2 at 44.) She recalled Petitioner to have been about 6 feet, 2 inches, 200 pounds when the robbery took place. (Id. at 53.) There were minor discrepancies in other victims' descriptions of the taller perpetrator's height and weight. Some victims guessed that he was around 6 feet tall when they saw him during the Symbolic robbery, while another guessed he was 6 feet, 4 inches tall. (Id. at 107, 134, 336.) One victim testified that he was "not skinny, not heavy", (Id. at 156), while another described him as tall and skinny. (Id. At 336.) Some of the victims testified that they recalled seeing the taller perpetrator use a cell phone several times during the robbery. (Id. at 43-45; 325-28.)

Detective Johnny Keene also testified on behalf of the prosecution, divulging information he had discovered concerning the Symbolic incident, Petitioner, and Edward Jones to the court and jury. (Lodgment 2 at 280-318.)

Scott Fraser, Ph.D., a neurophysiologist, testified on behalf of Petitioner and stated that research indicated the type of identification made in this case could be inaccurate. However, Fraser could not say whether the eyewitnesses in this case accurately identified Petitioner and Jones. (Lodgment 2 at 384-85.)

On November 8, 2000, the jury found Petitioner guilty on all counts, (Lodgment 1 at 105-112), and the trial court found true that Petitioner had been convicted of the priors alleged in the information[4]. (Lodgment 1 at 257.) After considering prior convictions pursuant to California's Three Strikes Law and aggravating factors in the commission of the crime pursuant to California's Determinate Sentencing Law[5], the judge sentenced Petitioner to 54 years and 8 months in state prison. (Lodgment 1 at 440.)

Jones filed a motion for a new trial. (Lodgment 5 at 9.) Jones' wife's sister, Janice Thomas, testified on his behalf at the motion hearing. (Lodgment 2 at 630-41.) She testified that she dated Petitioner at the time of the car chase and the Symbolic incident. (Id.) She further stated she informed Petitioner of Jones' arrest

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[4] Petitioner was convicted of Robbery, CAL. PENAL. CODE § 211, in 1988. (Lodgment 1 at 4-5.) The 1988 Robbery conviction is considered a serious felony prior and a strike prior under California's Three Strikes law. (Lodgment 1 at 5.) Petitioner was also convicted of another prison prior in 1986, but that prior was neither a serious felony or a strike prior under California's Three Strikes law. (Lodgment 1 at 5.)

[5] California's Determinate Sentencing Law is described in more detail in section IV(G)(1) of this Report and Recommendation.

on June 29, 1999, in the afternoon, and Petitioner thereafter told her that he was going to report the car stolen. The court denied Jones' motion. (Id.)

Like Jones, Petitioner also filed a motion for a new trial. (Lodgment 1 at 388.) Petitioner claimed that the prosecution did not timely disclose portions of a police report, which contained a statement by Petitioner claiming that he had called to report his rental car stolen. (Lodgment 5 at 11.) Petitioner's motion was argued and heard before the court in a proceeding separate from Jones'. (Lodgment 1 at 461.) The trial court, after considering the testimony given by Janice Thomas at Jones' hearing, denied Petitioner's motion for a new trial. (Id.) The trial court concluded that Thomas's testimony effectively showed Petitioner's theory, that Jones stole the car from him, made no sense. (Lodgment 2 at 711-14.) While the trial court did not believe Thomas was credible, it concluded that Petitioner had a chance to develop his theory simply by testifying. Moreover, the court found that Jones could have done the same thing by testifying and calling Thomas to testify during trial. (Id.) The jury then could have determined Thomas's credibility. Because the opportunity for Petitioner to develop his theory was available and he simply chose not to testify, the trial court denied Petitioner's motion for new trial. (Id.)

Petitioner appealed to the California Court of Appeal, Fourth Appellate District, Division One. (Lodgment 3.) On October 2, 2002, the Court of Appeal reduced Petitioner's sentence to 52 years and 8 months in state prison, but otherwise affirmed the judgment.

(Lodgment 5.) Petitioner filed a Petition for Review in the California Supreme Court, (Lodgment 6), but the petition was denied on January 15, 2003. (Lodgment 7.)

On April 11, 2004, Petitioner filed a Petition for Writ of Habeas Corpus in the San Diego County Superior Court. (Lodgment 8) On May 5, 2004, the court denied the Petition. (Lodgment 9). Petitioner then filed a Petition for Writ of Habeas Corpus in the California Court of Appeals, Fourth Appellate District, Division One, on August 3, 2004, but that court denied the Petition in a reasoned opinion on September 14, 2004. (Lodgment 10,11.) Finally, Petitioner filed a Petition for a Writ of Habeas Corpus with the California Supreme Court on November 8, 2004, (Lodgment 12), and filed two Supplemental Petitions for the court to consider. (Lodgment 13,14.) Petitioner also filed a motion with the Superior Court in California, requesting trial transcripts for his 1988 prior conviction. However, the Superior Court denied his motion. (Doc. No. 21 at 79-88.) The California Supreme Court denied all Petitions without out comment or citation on January 18, 2006. (Lodgment 15.)

III. STANDARD OF REVIEW

Under United States law, a federal district court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he

is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a).

The application for such a writ should be granted only in two circumstances. First, the writ should be granted if the adjudication of the claims in state court "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1). A state decision is contrary to Supreme Court authority only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2001). A state court decision unreasonably applies Supreme Court authority, if it correctly identifies the governing legal principle from Supreme Court precedents but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. However, an unreasonable application of the law is different from an incorrect application of the law.

Habeas corpus relief may not be granted simply because the state court applied "federal law erroneously or incorrectly." Taylor, 529 U.S. at 411. A petitioner must also show that the application was a result of an unreasonable analysis of federal law. Id., Woodford v. Visciotti, 537 U.S. 19 (2002). While a state court's conflict with "Ninth Circuit precedent on a federal Constitutional issue" is insufficient to warrant a grant of the writ, they may be "persuasive authority for

purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law." Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000) (citing Moore v. Calderone, 108 F.3d 261, 264 (9th Cir. 1997)). Even when a state court has either ruled contrary to, or unreasonably applied, federal law, a petitioner still must show that the court's decision had "substantial and injurious effect or influence in determining the jury's verdict" so as to cause actual prejudice. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993.) In other words, but for the state's erroneous conclusions or application of the law, the petitioner would have received a more favorable outcome.

Second, the writ should be granted if the adjudication of the claims in state court "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C.A. § 2254(d)(2). However, federal habeas corpus cannot be utilized to try state issues *de novo*, Milton v. Wainwright, 407 U.S. 371, 377 (1972); factual determinations by the state court are presumed reasonable "absent clear and convincing evidence to the contrary." Miller-El v. Cockrell, 537 U.S. 322, 123 (2003); see Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (stating that deference is owed to factual findings of both state trial and appellate courts). Thus, a petitioner's conclusory allegations unsupported by facts from the record are insufficient to warrant habeas corpus relief. Boeheme v. Maxwell, 423 F.2d 1056, 1058 (9th Cir. 1970.) Even if the state court's factual determination is flawed, an application of a writ of

habeas corpus should not be granted unless an error "resulted in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962).

When reviewing the merits of a petitioner's habeas corpus claim, a federal court should look to the last reasoned state court opinion as the basis of the state court's decision. Robinson v. Ignacio, 360 F3d 1044, 1045 (9th Cir. 2004). If the state court decides a claim on the merits but does not provide a reasoned opinion for their decision, the federal court should independently review the record to determine the merits of that claim. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2002). However, even when independently reviewing a claim, the federal court must "still defer to the state court's ultimate decision." Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)

IV. DUE PROCESS & RIGHT TO CONFRONTATION

Petitioner alleges that his federal constitutional right to confrontation was violated when the court considered Janice Thomas's testimony, given in a separate hearing, in denying his motion for a new trial. (Doc. No. 21 at 13-21; Trav. at 1-13.)

Petitioner further alleges that his constitutional right to due process was violated when the court denied his motion for a new trial. He contends the prosecution did not timely disclose to defense counsel a portion of a police report, which contained a statement

made by Petitioner claiming that the rental car Jones was driving at the time of his arrest was stolen. (Id.) Petitioner claims that the report is exculpatory evidence, and that if Petitioner had the report earlier, he could have better prepared a defense. (Id.) Petitioner maintains that because failure to disclose the report was a due process violation during trial proceedings, the trial court should have granted the his motion for a new trial. He claims the denial of his new trial motion was therefore a violation of due process.

The California Supreme Court rejected both claims without comment. (Lodgment 15.) However, the state appellate court rejected both claims in a reasoned opinion on direct appeal. (Lodgment 5.) This Court considers the reasoning developed in the state appellate court's opinion. Robinson, 360 F3d at 1045, and finds that the state court's rejection of these claims was not an unreasonable applications of, or contrary to, clearly established federal law as determined by the Supreme Court.

A. Confrontation

The Confrontation Clause of the Sixth Amendment provides that the accused has the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The U.S. Supreme Court ("Supreme Court") explained that the primary object of the confrontation clause was to "prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of

the witness" at trial. Mattox v. U.S., 156 U.S. 237, 242 (1895). Cross-examination gives the accused an opportunity, not only to "test the recollection and [sift] the conscience of the witness," but also to compel "him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Id. at 242-43. The Confrontation Clause, therefore, is designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination, Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987), and to use physical confrontation at trial to enhance "the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person." Maryland v. Craig, 497 U.S. 836, 846 (1990).

The Supreme Court held the right to be applicable to the states through the Fourteenth Amendment because the right to confrontation is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. State of Texas, 380 U.S. 400, 405 (1965). However, "the right to confrontation is a trial right," and thus does not apply to other court proceedings that are not part of the jury trial. See Ritchie, 480 U.S. at 52 (emphasis in original) (holding that a defendant does not have right to confrontation in a pretrial hearing).

In this case, Petitioner motioned for a new trial, claiming that the trial court errored when it excluded portions of a police report that contained Petitioner's statement about the tan rental car. Janice Thomas

testified at Jones' hearing for his new trial motion. She claimed she informed Petitioner that Jones was arrested and, in response, Petitioner told her that he was going to call the police to report the tan rental car stolen. (Lodgment 5 at 9.) The trial court considered her testimony and denied Petitioner's motion for a new trial. (Lodgment 2 at 712.) Petitioner claims that he was deprived a chance to cross examine Thomas in his post-conviction, new trial motion hearing. (Doc. No. 21 at 13.) Petitioner maintains this violated his right to confrontation. (Id.) The appellate court rejected his claim, reasoning that Jones' wife's testimony was only a portion of the evidence considered by the court in denying Petitioner's motion for a new trial. (Lodgment 5 at 16.) The state appellate court explained, "[o]f primary importance was the fact that [Petitioner]'s report to police of the vehicle being stolen was within his own knowledge and he could have testified to these facts at trial. His election not to testify, however, rendered any claim of prejudice in the People's failure to turn over the actual report of no moment." (Id.)

In order to be entitled to habeas corpus relief, a petitioner must show that the state court's decision was an unreasonable application of, or contrary to, federal law, 28 U.S.C.A. § 2254(d)(1), and that the state court's conclusion prejudiced the petitioner. Brecht, 507 U.S. at 637 (1993). The Court finds that Petitioner has failed to demonstrate either. First, Petitioner does not have a right to confrontation at a post-conviction new trial motion hearing because the right is a trial right. Ritchie, 480 U.S. at 52. He was not deprived of

the opportunity to cross examine Janice Thomas at trial because she was not a witness. (Cf. Lodgment 2 at vi; Cf. Lodgment 2 at x.[6]) The jury did not consider Jones' wife's testimony, and their verdict was not influenced by her potentially inculpating statements. (Cf. Id.) Therefore, her testimony did not influence the jury to "wrongfully implicate an innocent person." Craig, 497 U.S. at 846 (1990).

Second, assuming *arguendo* that Petitioner had a right to confrontation at his new trial motion hearing, Petitioner still is not entitled to relief because the failure to cross-examine Thomas did not prejudice him. Brecht, 507 U.S. at 637 (1993). While the trial court considered Janice Thomas' "incriminating" statements, it found her untrustworthy. (Lodgment 2 at 711-14.) Therefore, the trial court did not deny Petitioner's motion because Thomas inculpated Petitioner. Rather, the trial court denied Petitioner's motion because he had a chance to develop his theory, even after the trial court excluded the police report of Jones' arrest from the trial. As the state appellate court explained, "[o]f primary importance was the fact that [Petitioner]'s report to police of the vehicle being stolen was within his own knowledge and he could have testified to these facts at trial." (Lodgment 5 at 16.) Regardless of Thomas's disbelieved testimony, the trial

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[6] Page vi of Lodgement 2 is a list of witnesses who testified at trial. Page x has a list of Jones' witnesses who testified at his new trial motion hearing. Janice Thomas' name is not on page vi, but is on page x. She testified at the new trial motion hearing, but did not testify at trial.

court would have come to the conclusion that Petitioner had the opportunity to testify about the events described in the police report, (Lodgment 5 at 16), and denied his motion. Because the failure to confront Janice Thomas did not result in a less favorable outcome for Petitioner, he was not prejudiced, and is not entitled to habeas corpus relief. Brecht, 507 U.S. at 637.

B. Due Process

In a criminal case, "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Therefore, the prosecution has a duty to disclose evidence that is materially favorable to the accused, even if the accused does not request it. Strickler v. Greene, 527 U.S. 263, 280 (1999). Favorable evidence encompasses both impeachment and exculpatory evidence. United States v. Bagley, 473 U.S. 667 (1985). Evidence favorable to the defendant is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different." Id. at 682.

Here, Petitioner claims the prosecution was late in disclosing portions of the police report of Jones' arrest. (Doc. No. 21 at 13-21.) The portion in question contained Petitioner's statement describing the events

immediately preceding Jones' arrest[7]. (Doc. No. 21, 163.) While the disclosure was late, the trial court did not believe the tardiness amounted to a due process violation. The trial court thus rejected Petitioner's motion for a new trial. (Lodgment 2 at 708-14; Lodgment 5 at 11-12.) The appellate court applied the Brady standard and affirmed the trial court's judgment, reasoning: 1) Petitioner's counsel acknowledged that the police report was inadmissible hearsay; 2) Petitioner was obviously aware he made a statement and could have testified to it regardless of whether or not the prosecutor turned the report over to the defense; and 3) the information was not exculpatory for Petitioner. (Lodgment 5 at 14-16.) The court concluded that there was no reasonable probability the outcome of the proceedings would have been different had the police report been turned over punctually. (Id.)

The Court finds that the state appellate court reasonably applied federal law as determined by the Supreme Court. 28 U.S.C.A. § 2254 (d)(1). First, defense counsel acknowledged that Petitioner's statement in the report was inadmissible hearsay. (Lodgment 5 at 15.) As such, even if that portion of the report was timely disclosed, it would not have been admissible. (Id.) Second, the information in the police report was

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[7] In Petitioner's statement, he claims that he and Jones drove to Fam-Mart the morning of the arrest. Petitioner maintains he left the car with Jones and went in the store to get a shirt. When he returned to the car, he discovered that Jones had driven off with it. Petitioner claims he called the police to report his car missing shortly after discovering that his car was missing. (Doc. No. 21 at 163.)

available to Petitioner prior to its disclosure. (Id.) Petitioner knew what he had said to the police when he called to report the tan rental car missing. He, therefore, could have chosen to take the stand and tell the jury what happened between him and Jones prior to the car being stolen. Despite Petitioner's contention that his statement was exculpatory, he chose not to take the stand. (Id.)

Third, the California Court of Appeals reasonably concluded that the belatedly disclosed portion of the police report was not exculpatory. While the police report does include a statement that weakens the link between Jones and Petitioner, the statement was made by Petitioner, and upon scrutiny, appears to be untrustworthy. Petitioner's statement regarding the rental car is inconsistent with a statement given by the Fam-Mart employee within the same police report. (Doc. No. 21 at 163.). Petitioner stated that on June 29, 1999, he drove with Jones to Fam-Mart where his car was stolen; he had left Jones in the car and entered the store to buy a shirt. (Lodgment 1 at 404.) The Fam-Mart employee stated that a black male did not enter the store until sometime after the store opened at 10:00 a.m. Furthermore, the black male did not tell the employee that his car was missing until 10:45 a.m., approximately 45 minutes after Jones had been arrested. (Id.) Given that Spears spotted Jones at 10:00 a.m. and pursued him for a while before arresting him at 10:02 a.m., (Lodgment 1 at 264-65; Doc. No. 21 at 162-64.), Jones must have driven off from Fam-Mart sometime before 10:00 a.m., before Petitioner entered the store. Yet

Petitioner insists that Jones drove off after he had entered Fam-Mart.

The timing of Petitioner's call to the police was also peculiar. The officer who wrote the police report stated that Petitioner called to report the car missing at about 11:30 a.m., approximately one and half hour after Jones was arrested. (Lodgment 1 at 264-65.) It was also approximately 45 minutes after he had told the Fam-Mart employee that his car was missing. (Lodgment 1 at 404.) In observing the timing of the call and the inconsistencies between the stories provided by the witnesses, it is apparent Petitioner contacted the police in an attempt to distance himself from Jones and the vehicle. Therefore, the court's conclusion, that Petitioner only called the police after learning of Jones was arrested, was reasonable. (Lodgment 5 at 9.) Petitioner statement was more inculpatory than exculpatory, diminishing his credibility.

Regardless of the truth of Petitioner's assertions about the morning of June 29, 1999, the Symbolic incident occurred three days earlier. The report does not contradict that some of the Symbolic incident victims identified Petitioner as one of the perpetrators during the robbery on June 26, 1999. Nor does the report put in question other circumstantial evidence recovered during police's search of Petitioner's house[8]. Even

[8] In a search of Petitioner's house the police recovered ammunition, a key chain with the tan rental car information on it, a table cloth with a phone number written on it, and an apparently fake California Identification card with Petitioner's photograph, but the name "Walker" listed. This evidence links Petitioner to

assuming that Petitioner's story is true, Petitioner is still connected to Jones, who is connected to the crime scene. Therefore, the appellate court reasonably inferred that the untimely disclosed information was not exculpatory evidence because Petitioner's statement would not have refuted other inculpating evidence presented at trial.

V. EX POST FACTO CLAUSE

Petitioner argues that he obtained his strike prior conviction before California's Three Strikes law was enacted[9] and, therefore, enhancing his sentence because of his prior is a violation of the Ex Post Facto Clause of the U.S. Constitution. (Doc. No. 21 at 23; Trav. at 20-23.) Petitioner presented this claim to the Superior Court of California, and that court rejected it in a reasoned decision. (Lodgment 9 at 3.) The Superior Court held that "the use of a prior conviction which predates the three strikes law to sentence a defendant under that law does not violate the *ex post facto* provisions of either the state or the federal constitution." (Lodgment 9 at 3.) Petitioner also presented this claim to the California Supreme Court in a writ of habeas corpus. The state high court rejected the claim without

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Jones and links Petitioner to the cell phone numbers called thirty-two times in the La Jolla area before, during, and after the robbery. (Lodgment 2 at 303-10.)

[9] Petitioner was convicted of his strike prior in 1988. (Lodgment 1 at 4-5.) California's Three Strikes law became effective on March 7, 1994. People v. Cargill, 38 Cal. App. 4th 1551, 1554-55, 45 Cal. Rptr. 2d 480 (Cal. Ct. App. 1995).

comment. (Lodgment 12 at 4B, 13-14; Lodgment 15.) Therefore, the Court looks through to, and considers, the Superior Court's decision. Robinson, 360 F.3d at 1045.

The U.S. Constitution prohibits states from passing any *ex post facto* laws. U.S. CONST. art. I, § 10, cl. 1. The U.S. Supreme Court defined an *ex post facto* law to be one that "retroactively . . . increase[s] the punishment for criminal acts," Collins v. Youngblood, 497 U.S. 37 (1990). However, the application of a sentence enhancing law based on prior convictions is not "invalidly retroactive" simply because one of the prior convictions took place before the enactment of the law. See Gryger v. Burke, 334 U.S. 728, 732 (1948). In Gryer, the Court explained that an enhanced sentence based on a prior conviction should not be "viewed as . . . an additional penalty for the earlier crimes." Id. Instead, it should be viewed as a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." Id. More recently, the Ninth Circuit also held that "application of a sentencing enhancement law due to a prior conviction does not violate the Ex Post Facto Clause" as long as they are not retroactively applied to triggering offenses. Brown v. Mayle, 283 F.3d 1019 at 1040 (9th Cir. 2002), vacated on other grounds, Mayle v. Brown, 538 U.S. 901 (2003); United States v. Sorenson, 914 F.2d 173, 174 (9th Cir. 1990).

Here, California's Three Strikes law enhances sentences of criminals who are convicted of a crime after its enactment. CAL. PENAL. CODE. §§ 667.5(b), 668,

1192(a). The Three Strikes law enhances the sentences of such criminals based on their prior convictions. CAL. PENAL. CODE. §§ 667.5(b), 668, 1192(a). As noted above, Supreme Court authority permits a law like California's to enhance the sentence of a criminal whose prior convictions occurred before its enactment. See Gryer, 344 U.S. at 732. Specifically, the Ninth Circuit held that application of California's Three Strikes law against a criminal whose prior conviction occurred before the law's enactment was constitutional. Brown, 283 F.3d at 1040 (9th Cir. 2002), vacated on other grounds, Mayle v. Brown, 538 U.S. 901 (2003). Petitioner's sentence was enhanced by the Three Strikes law. (Lodgment 1 at 440.) The Supreme Court would explain Petitioner's sentence enhancement as a "stiffened penalty" for his latest crime because it is an aggravated offense due to its repetitive nature[10] rather than increased punishment for his earlier conviction. See Gryer, 344 U.S. at 732 (1948). Therefore, the Three Strikes law is not an *ex post facto* law as applied in Petitioner's case.

VI. VAGUENESS

Petitioner further contends that California's Three Strikes law is void for vagueness. Petitioner claims the law does not "specifically list 'ROBBERY PEN. C 211' and 'HS 11350 (a)' as a prior conviction of

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[10] Petitioner was convicted of Robbery, CAL. PENAL. CODE § 211, in 1988 before being convicted of Robber CAL. PENAL. CODE § 211, again in the instant case. (Lodgment 1 at 4 5.)

a felony," and therefore the qualifying priors are not clearly defined. (Doc. No. 21 at 27; Trav. at 24-31.) Petitioner presented this claim only to the California Supreme Court. The California Supreme Court reviewed this claim and rejected it without comment. (Lodgment 12 at 4B, 13-14; Lodgment 15.) The Court independently reviews this claim and finds it meritless. Himes, 336 F.3d at 853; Delgado, 223 F.3d at 981-82.

The Constitution is designed to "maximize individual freedoms within a frame work of ordered liberty." Kolender v. Lawson, 461 U.S. 352, 357 (1983). A statute that limits such freedoms must be "examined for substantive authority and content as well as for definiteness and certainty of expression." Id. Thus, the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Id. For vagueness challenges to statutes which do not involve First Amendment freedoms, a court should examine the statute "in the light of the facts of the case at hand." United States v. Powell, 423 U.S. 87, 92 (1975).

A statute is sufficiently definite only if the legislature "establishes minimal guidelines to govern [its] enforcement." Smith v. Goguen, 415 U.S. 566, 574 (1974). Accordingly, in Kolender, the Court held that a California statute "requiring persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when

requested by a police officer" was unconstitutionally vague. 461 U.S. at 574. Justice O'Connor explained, "[the statue] contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether he has satisfied the statute." Id. The Supreme Court's main concern was that this lack of clarity had the potential to lead to the arbitrary suppression of the freedoms of speech and movement because the law seemingly allowed a person to walk freely on a public street "only at the whim of any police officer." See id.

The Court must now examine whether California's Three Strikes law, as it is phrased, uses minimal guidelines in determining when sentences should be enhanced. Smith, 415 U.S. at 574. For the purpose of sentence enhancement, the Three Strikes law defines a qualifying prior conviction as "any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony." CAL. PENAL. CODE. § 667 (d)(1). If a criminal's prior conviction is for a crime listed in subdivision (c) of either section 667.5 or 1192.7, then it may be used to enhance the sentence for his latest offense. The state court may not arbitrarily decide whether a prior is a serious or violent felony, it must impose sentence enhancements only if the prior is one of the listed offenses. CAL. PENAL. CODE. § 667.5 (d)(1). Through reference, California's Three Strikes law sets

minimal guidelines on which prior convictions may be used to enhance sentences.

As applied to Petitioner, California's Three Strikes law is not unconstitutionally vague. Under Section 1192.7, subdivision (c), robbery is listed as an serious felony offense. CAL PENAL. CODE. § 1192.7(c)(19). Under Section 667.5, subdivision (c), robbery is listed as a violent felony. CAL. PENAL. CODE § 667.5(c)(9). The trial court found that Petitioner had been convicted of robbery in 1988. (Lodgment 1 at 28-29.) Because robbery is listed as both a violent felony and a serious felony, the court imposed a sentence enhancement based on Petitioner's 1988 prior conviction. The court did not arbitrarily impose an enhanced sentence on Petitioner, but instead relied on clearly defined qualifying priors. As such, the state court's rejection of this claim was not inconsistent with the Supreme Court's void-for-vagueness doctrine.

VII. INSUFFICIENT EVIDENCE

Petitioner claims there was insufficient evidence presented at trial to show that he was one of the perpetrators during the Symbolic robbery. (Doc. No. 21. at 28-31;Trav. at 32-43.) The state courts rejected this claim without comment.[11] (Lodgment 15.) As there is

[11] The Superior Court of California did provide a reasoned analysis regarding Petitioner's issue with the disclosure of the police report of Edward Jones arrest, which was under the heading "DISCOVERY AND SUFFICIENCY OF EVIDENCE CLAIMS." (Lodgment 9 at 3.) However, the Superior Court did not address whether the evidence presented at trial was sufficient to convict

no state court opinion to review, the Court independently reviews this claim and finds that it is without merit. Himes, 336 F.3d at 853 (holding that the court should "perform an 'independent review of the record' to ascertain whether the state court's decision was objectively reasonable."); Delgado, 223 F.3d at 981-82.

Under Supreme Court authority, a habeas corpus petitioner has a valid claim for insufficient evidence only if "it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). When reviewing the record, the federal court should view "the evidence in the light most favorable to the prosecution." Id. at 319. Thus, a rational trier of fact can rely on "the testimony of one witness, if solidly believed," to find the defendant to be the perpetrator of the crime. United States v. Ginn, 87 F.3d 367, 369 (9th Cir. 1996).

In Petitioner's case, two victims identified him as one of the perpetrators at photo lineups, live lineups, and at trial. (Lodgment 2 at 60-72, 138-41, 335-43.) Two telephone numbers linked to Petitioner had made thirty-two phone calls from and to the La Jolla area the morning of the Symbolic robbery. (Lodgment 2 at 282-94, 304.) Jones' fingerprints were found at Symbolic, (Lodgment 2 at 176, 184-85, 245-46), and Petitioner had rented the car that Jones was driving when he was arrested. (Lodgment 2 at 259, 265.)

Petitioner. No reasoned opinions regarding the insufficiency issue from the state appellate court was lodged with this Court. The Supreme Court of California rejected this claim without comment. (Lodgement 15.)

Not only was there one "solidly believed" witness who testified against Petitioner, there were additional witnesses and a plethora of other inculpating circumstantial evidence presented at trial. Ginn, 87 F.3d at 369. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact, could have easily found Petitioner to be one of the perpetrators of the Symbolic robbery.

VIII. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Petitioner claims that his trial counsel was ineffective. He contends that his trial counsel failed to spend time to: 1) interview Thess Good and William Diglio;[12] 2) investigate a meeting that Symbolic victims had following the robbery; 3) bring to the jury's attention the transcript of one of the victim's 911 calls; and 4) investigate what people at neighboring businesses witnessed prior to the robbery. (Doc. No. 21 at 33-35; Trav. at 44-56.) Had his trial counsel done the above, Petitioner maintains there would have been substantial third party culpability and misidentification evidence that could have changed the outcome of the proceedings. The state appellate court and the California Supreme Court did not address these claims. (Lodgment 12 at 24-26; Lodgment 15.) However, the Superior Court of California rejected these claims in a reasoned decision. (Lodgment 9 at 3-5.) The Superior Court of California explained that Petitioner did not

[12] Diglio's name appears for the first time in Petitioner's Petition for Writ of Habeas Corpus. No mention of Diglio appears in the records of this case.

show that his counsel's conduct was: 1) objectively unreasonable; and 2) prejudicial to Petitioner. (Lodgment 9 at 5.) The Court looks through to the Superior Court's opinion and finds that the state court's denial of Petitioner's ineffective counsel claim was not an unreasonable application of, or contrary to, federal law as determined by the U.S. Supreme Court. Robinson, 360 F3d at 1045.

Under federal law, a petitioner is entitled to habeas corpus relief for ineffective assistance of counsel only if he can show that his "counsel's representation fell below an objective standard of reasonableness," and, as a result, he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. If a petitioner is challenging his counsel's reasonableness in deciding not to investigate certain aspects of his case, then the court should assess the counsel's decision by "applying a heavy measure of deference to counsel's judgments." Id. at 691. Thus, a petitioner's conclusory allegations of ineffective assistance of counsel that are unsupported by the record are insufficient to warrant relief on federal habeas corpus. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994). Furthermore, the failure to make a futile motion is not ineffective assistance, and the failure to investigate inadmissible evidence is not considered deficient representation. See id. 27. A petitioner is prejudiced if his "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687-88. In other words, but for the counsel's errors, the petitioner would have received a more favorable result. Id.

A. Failure to Investigate Potential Third-Party Culpability

Here, Petitioner claims that if his counsel had interviewed Thess Good, then he would have discovered more third-party culpability evidence. Petitioner insists that his counsel would have learned that the police offered Good benefits in exchange for information about Petitioner's whereabouts. (Doc. No. 21 at 33.) Armed with this information, Petitioner argues that his counsel could have put Good on the witness stand before the jury and presented Good's past criminal history, demonstrated Good's physical resemblance to Petitioner, and presumably, allowed them to conclude that Good had framed the Symbolic robbery on Petitioner. (Id.)

In order to determine whether defense counsel's failure to investigate Petitioner's allegations about Good amounted to ineffective counsel, the Court must measure the likelihood that evidence obtained from Good would have been admissible in California trial court. See James, 24 F.3d at 27. Under California law, "there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime" in order for that third-party culpability evidence to be admitted. People v. Avila, 38 Cal. 4th 491, 578 (2006).

The record supports three allegations about Good: 1) he looks like Petitioner, 2) he knows Petitioner, and 3) he has a criminal history. (Lodgment 1 at 426-27.) But, nothing from the record shows that Good was

linked to Symbolic. There is no evidence connecting Good to Jones and no witnesses identifying Good as one of the perpetrators. Alone, Good's physical features, relationship to Petitioner, and criminal history are insufficient to establish a link between him and Symbolic. Therefore, information and testimony provided by Good would have been inadmissible as third-party culprit evidence. Avila, 38 Cal. 4th at 578. Furthermore, if the jury had been informed of Good's past criminal history and his association to Petitioner, it would have reflected poorly on Petitioner's moral character. The jury would have wondered why Petitioner kept in contact with an ex-felon, and may have developed suspicions about the type of conduct in which Petitioner engages. Thus, the defense counsel's decision to not investigate inadmissible, or otherwise inculpating, evidence was not unreasonable.

Petitioner also claims that his trial counsel should have investigated and interviewed William Diglio. (Doc. No. 21 at 33.) He claims that trial counsel would have discovered that Diglio's cell phone had Symbolic's phone number programed into it. (Id.) Petitioner explained that since Diglio is a federal parole violator, the discovery of a link between him and Symbolic would have been favorable evidence for Petitioner. (Id.) The Court finds that this claim is without merit. The record has no information about William Diglio. The Court can not simply assume that Petitioner's unsupported allegations about William Diglio are true. As such, Petitioner's conclusory allegation that Diglio is a federal parole violator and is connected to Symbolic, is

unsupported by the record and insufficient for an ineffective assistance of counsel claim. James, 24 F.3d at 26.

Regardless of the admissibility or truth of Petitioner's allegations about third party culprits, it is unlikely that the testimony or information provided by Good and Diglio would have led the jury to reach a more favorable outcome for Petitioner. At trial, three victims identified Petitioner, and there was circumstantial evidence that linked Petitioner to Jones, who was linked to Symbolic by fingerprints. (Lodgment 2 at 60-72, 335-43, 138-41, 176, 184-85, 245-46, 266-67.) Good and Diglio, on the other hand, were not linked to Jones in anyway, other than by self-serving statements made by Petitioner. (Lodgment 1 at 437.) Considering these facts, it does not appear that Good's and Diglio's testimonies would have exonerated Petitioner. The failure to investigate Good and Diglio, therefore, was not prejudicial to Petitioner.

For the foregoing reasons, Petitioner has not offered sufficient support to overcome the Court's strong presumption of reasonable professional assistance by Petitioner's trial counsel. Strickland, 466 U.S. at 689. Further, Petitioner has not shown that the failure to investigate third party culpability evidence was prejudicial to him. As such, this Court finds that the state court's rejection of the claim was not contrary to, or an unreasonable application of, clearly established Supreme Court authority.

B. Failure to Investigate Victims' Meeting

Petitioner claims that the victims met and shared their recollections of the robbery after it took place, and contends that trial counsel should have investigated this meeting. (Doc. No. 21 at 34.) Petitioner also argues that had trial counsel done so, he would have learned that the victims' recollections of the robbery at the meeting were inconsistent with their testimonies and statements to the police. (Id.) Petitioner maintains that his counsel could have then presented his findings to the jury as impeachment evidence against the victims that identified Petitioner. (Doc. No. 21 at 34.)

Despite his detailed accusations, Petitioner offers no evidence from the record that shows a meeting occurred. Further, he offers no support for his assertion that the victims' recollections of the robbery differed between their alleged meeting and at trial. Thus, Petitioner's allegation of a victims' meeting is unsupported by the record and cannot overcome the strong presumption that trial counsel's assistance was reasonable. James, 24 F.3d at 26.

Even if trial counsel had investigated the incident and found impeachment evidence, there is no reason to believe the information discovered and presented would have changed the jury's impression of the victims. At trial, there were already conflicting stories about the description of the perpetrators. Some victims could identify the perpetrators, some could not. (Lodgment 2 at 60-72, 138-141, 335-43.) Each victim's description of the taller perpetrator, who was identified

by two victims as Petitioner, was slightly different. Some victims described the Petitioner as being six feet, four inches tall, some as being six feet tall. Some victims thought Petitioner was skinny, some did not. (Id. at 107, 134, 156, 336.) Yet despite the differences in the victims' testimonies, the jury still found Petitioner guilty. It appears that the jury found the victims credible despite their already conflicting testimony. Petitioner has failed to demonstrate that additional conflicting recollections would have made a difference. As such, the lack of an investigation into the meeting did not prejudice Petitioner.

For the above reasons, the Court holds that the state court's rejection of this claim was a reasonable application of Supreme Court precedent.

C. Failure to bring 911 Call to Jury's Attention

Petitioner maintains that trial counsel should have presented evidence of an emergency call made by a victim that contained descriptions of the perpetrators which were inconsistent with the descriptions that same victim later gave at trial. (Doc. No. 21 at 34.) For similar reasons to those discussed above, the Court finds that this claim has no merit. Petitioner does not supported his allegation with evidence; the Court is offered solely a naked claim. Moreover, Petitioner offers no support suggesting, that had the purported call been presented to the jury, he would have received a more favorable outcome.

D. Failure to Investigate What Neighboring Business Witnessed

Petitioner alleges trial counsel should have presented evidence that a neighboring business had noticed Symbolic was under surveillance by people in a vehicle prior to the robbery. (Doc. No. 21 at 34.) He claims that further investigations would have led to third party culpability evidence. However, Petitioner is again short on evidence and specifics. Petitioner does not explain how the investigation would have led to exculpatory evidence. He offers no rationale on how the evidence would have changed the outcome of the proceedings. Petitioner offers no support for the contention that counsel acted unreasonably. Furthermore, Petitioner has not shown how his counsel's actions prejudiced him. Unsupported contentions are not sufficient to overcome the Court's strong presumption that counsel acted reasonably. James, 24 F.3d at 26. As such, the state court's denial of this claim was a reasonable application of Supreme Court law.

IX. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Petitioner claims that his appellate counsel was ineffective because he failed to bring certain claims raised in this Petition before the state court on direct appeal. (Doc. No. 21 at 37; Trav. at 57-61.) Petitioner complains that his appellate counsel raised only his confrontation claim and sentencing issues with the California Court of Appeals when his other unraised

claims[13] were clearly meritorious. (Id.) This issue was presented only to the California Supreme Court. The state high court denied Petitioner without comment. (Lodgment 12; Lodgment 15.) Therefore, the Court independently reviews this contention. Himes, 336 F.3d at 853; Delgado, 223 F.3d at 981-82.

When a petitioner asserts that he received ineffective appellate counsel because his attorney failed to raise particular claims, the court should apply the Strickland standard. The two prongs of the Strickland standard consist of determining whether the failure to raise claims was reasonable conduct, and whether that failure prejudiced the petitioner. Smith v. Robbins, 528 U.S. 259, 288 (2000). Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather, may select from among them in order to maximize the likelihood of success on appeal." Id. In determining the reasonableness of appellate counsel, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288, quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

Here, Petitioner complains his appellate counsel did not raise the following issues on direct appeal: 1) trial court erred in denying Petitioner's motion for new trial and that error violated Petitioner's due process

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[13] Petitioner is referring to, among other things, his due process, Ex Post Facto Clause, void-for vagueness, and insufficient evidence attacks on his conviction and sentence. None of these claims were raised by appellate counsel on direct appeal to the California Court of Appeals. (Lodgment 3.)

rights; 2) California's Three Strikes law, as applied to Petitioner's sentence, violates the Ex Post Facto Clause of the Constitution; 3) California's Three Strikes law is void for vagueness; 4) Petitioner was convicted with insufficient evidence. (Lodgment 3.) On the other hand, Petitioner's appellate counsel did raise a confrontation claim, as discussed in Section IV (A)(1) of this Report and Recommendation. His appellate counsel also raised sentencing issues. (Doc. No. 21 at 37; Trav. at 57-61.) The state appellate court rejected Petitioner's confrontation claim, but found that the sentencing issues raised by appellate counsel had merit and reduced Petitioner's sentence to 52 years and 8 months. (Lodgment 5.) Since the state appellate court ruled for Petitioner, the four unraised claims were not "clearly stronger" than the sentencing issue. Smith, 528 U.S. at 288.

As to Petitioner's confrontation claim versus the four claims not raised on appeal, the Court has spent the preceding thirty pages discussing their merits. To summarize and avoid repetition, it will suffice to say all claims concerned here are weak or spurious. The confrontation issue is the best of the lot, but still deficient, unsupported by authority. Comparing the abominable against the merely bad, the four unraised claims are not "clearly stronger" than the confrontation claim. Smith, 528 U.S. at 288. Further, even had the unraised claims been argued by appellate counsel, success was implausible. See discussions supra Sections IV - VIII. Petitioner, then, was not prejudiced. Accordingly,

Petitioner has not overcome the presumption of effective assistance of counsel. Id.

For reasons discussed above, the Court finds that the state court's rejection of Petitioner's ineffective appellate counsel claim was a reasonable application of Supreme Court precedent.

X. DEPRIVATION OF JURY TRIAL IN SENTENCING

Petitioner contends that his rights to due process and a trial by jury were violated when the trial court judge imposed upper terms for his sentence based on facts that were neither found by the jury nor admitted by Petitioner. (Doc. No. 21 at 71; Trav. at 62-104.) Petitioner presented this claim only to the California Supreme Court. The state high court rejected the claim without comment. This court independently reviews the merits of this claim. Himes, 336 F.3d at 853; Delgado, 223 F.3d at 981-82.

A. California Determinate Sentencing Law

California's Determinate Sentencing Law requires a sentencing judge to select the middle term for a conviction unless she finds aggravating factors by a preponderance of the evidence, which allow imposition of the upper term. CAL. PENAL. CODE. § 1170(b). Some of the aggravating factors include a determination of whether the crime was committed violently, whether the crime involved great bodily harm or threat of great

bodily harm, whether the crime was carried out in a sophisticated fashion, whether the victims were particularly vulnerable, and whether the criminal had prior offenses. CAL. R. CT. 4.421(a)(1), 4.421(a)(8), 4.421 (b)(2). Since this sentencing scheme allows the judge (instead of a jury) to find factors in determining punishment and sets the standard of finding these factors to be a preponderance of the evidence, it is subject to scrutiny under the Supreme Court's interpretation of the Fifth and Sixth Amendment.

B. Constitutionality of Judge Determinations of Penalty Enhancing Findings

In Apprendi v. New Jersey, the Supreme Court held, other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 490 (2000). The Supreme Court clarified its position in Blakley v. Washington, 542 U.S. 296, 303 (2004), stating, the "statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." A defendant forfeits his right to contest an Apprendi error on appeal if he fails to object to that error at trial unless the unraised error seriously affected the "fairness, integrity, and public reputations of the judicial proceedings." U.S. v. Cotton, 535 U.S. 625, 631 (2002). Thus, if a defendant fails to object to an Apprendi sentencing error at trial and later claims such an error for habeas corpus relief, a

reviewing court should determine whether the factors relied upon to enhance the defendant's sentence were "uncontroverted at trial and supported by overwhelming evidence." See Cotton, 535 U.S. at 633. If the record reflects that the factors were overwhelmingly supported by evidence, then the defendant is barred from raising the claim.

When determining sentences within a prescribed statutory range, a judge is permitted to consider factors based on facts found by the jury during trial. Apprendi, 530 U.S. at 481. Indeed, "both before and since the American colonies became a nation, courts in this country . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and the extent of punishment to be imposed within limits fixed by law." Williams v. New York, 337 U.S. 241, 241 (1949). In U.S. v. Booker, 534 U.S. 220 (2005), the high court held that the Federal Sentencing Reform Act ("SRA") was unconstitutional because it bound district judges to mandatorily impose a higher penalty for a convicted defendant upon finding any statutorily proscribed aggravating factors by a preponderance of the evidence. 543 U.S. at 258.

Nevertheless, instead of invalidating the entire statute, the Supreme Court severed the mandatory provisions of the SRA. Id. at 259. The end result was that a district judge may impose a higher sentence within the maximum penalty prescribed by law upon finding an aggravating factor, but need not do so. Id. At 264. The Supreme Court found that the SRA was

constitutional if it served as an advisory sentencing guideline for judges. Id. at 233. Indeed, a constitutional question on the SRA would have been "avoided entirely if Congress had omitted . . . the provisions that make the Guidelines binding on judges." Id. Justice Stevens explained, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." Id.

The high court's rationale for its severing efforts was to preserve the goal of Congress to "move the sentencing system in the direction of increased uniformity" between the real conduct of offenders and their sentences. Id. at 253. To illustrate, the Court used the following hypothetical:

> Now imagine two former felons, Johnson and Jackson, each of whom engages in identical criminal behavior: threatening a bank teller with a gun, securing $50,000, and injuring an innocent bystander while fleeing the bank. Suppose prosecutors charge Johnson with one crime (say, illegal gun possession, see 18 U.S.C. § 922(g)), and Jackson with another (say, bank robbery, see § 2113(a))."

Booker, 534 U.S.at 253.

Under the SRA, a judge would have been required to sentence both Johnson and Jackson similarly for their identical conduct because, presumably, he would find identical aggravating factors in the commission of their crimes. Id. By making the SRA an advisory

sentencing guideline, the high court ensured that judges retained the discretion to sentence Johnson and Jackson similarly. Id. The Supreme Court was concerned that if the SRA was completely invalidated or altered such that aggravating factors must be submitted to juries, then two criminals who engage in similar conduct, but are charged with different crimes, would be sentenced differently. Id. Such results would undermine the Congressional intent of moving punishment and real conduct "in the direction of increased uniformity." Id.

The Supreme Court's analysis of the hypothetical makes clear that judges are permitted to exercise discretion on sentencing, using factors based on evidence produced at trial. See Apprendi, 530 U.S. at 481; see also, Booker, 543 U.S. at 253, Williams, 337 U.S. at 241. The majority opinion went as far as to suggest that a sentencing judge is permitted to interpret evidence adduced at trial, find that the defendant engaged in certain conduct, and impose a sentence based on that conduct – even if a jury's verdict does not reflect that conduct. See Booker, 543 U.S. at 253. For example, in the high court's hypothetical, Johnson might be convicted of illegal gun possession without the jury finding that Johnson committed bank robbery.[14] However, a sentencing judge would be permitted to examine the evidence, come to a conclusion that Johnson's conduct was dangerous and similar to a bank robbery, and sentence him to a term similar to that of a criminal

[14] Under the Supreme Court's hypothetical, the prosecutor does not charge Johnson with bank robbery.

convicted of bank robbery. Thus, while under Apprendi and Blakey a judge may only enhance a sentence based on jury found facts, Blakley, 542 U.S. at 303, Booker suggests that aggravating factors based on these facts need not be found by the jury. 543 U.S. at 253.

The California Supreme Court, after considering Apprendi, Blakley, and Booker, held that "the judicial [fact-finding] that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to jury trial." People v. Black, 35 Cal.4th 1238, 1244 (2005). The state high court reasoned that Blakley and Apprendi did not hold that all sentencing schemes that involve judicial fact-finding were unconstitutional. Id. at 1253. Relying on Booker, the state high court concluded that judges are permitted "to engage in the type of judicial factfinding typically and traditionally involved in the exercise of judicial discretion employed in selecting a sentence from within the range prescribed for an offense." Id. The California Supreme Court explained that the high court's goal in Blakley and Apprendi was to overrule sentencing schemes that "assign judges the type of factfinding role traditionally exercised by juries in determining the existence or non-existence of elements of an offense." Id.

The state high court concluded that similar to the SRA as revised by Booker, California's determinate sentencing scheme "afforded judges the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the

defendant justify a higher sentence. Such a system does not diminish the power of the jury . . . " to find elements of offenses. Id. Thus, the California Supreme Court held that California's sentencing system is consistent with Booker and is not contrary to Apprendi or Blakely. Id. But the U.S. Supreme Court overruled Black in Cunningham v. California, 127 S. Ct. 856, 868 (Jan. 22, 2007), holding California's determinate sentencing scheme unconstitutional because it lacked the jury trial and reasonable doubt elements of due process[15]. Three Supreme Court Justices[16] agreed with the state high court, and dissented in Cunningham. They stated, "[t]he California sentencing law that the court strikes down . . . is indistinguishable in any constitutionally significant respect from the advisory Guideline scheme that the [Supreme] Court approved in [Booker]." 127 S. Ct. at 873.

C. Retroactivity

Despite the overturning, the Supreme Court's holding in Cunningham does not apply retroactively on federal collateral review to upset a state conviction or sentence. See Schardt v. Payne, 414 F.3d 1025, 1027 (9th Cir. 2005); see also Teague v. Lane, 489 U.S. 288 (1989). Under Teague, a new procedural rule of constitutional law cannot be retroactively applied on federal

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[15] As discussed earlier, California's Determinate Sentencing Law requires that a sentencing judge find an aggravating factor by a preponderance of the evidence before she may impose an upper term sentence for a conviction.

[16] Justice Alito, Justice Breyer, and Justice Kennedy.

collateral review to upset a state conviction. 489 U.S. 288. There are two exceptions to this rule. First, the new rule may be applied retroactively if it forbids "punishment of certain primary conduct" or if it prohibits "a certain category of punishment for a class of defendants because of their status or offense." Beard v. Banks, 542 U.S. 406, 416-17 (2004). Second, the new rule may be applied if it is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id.

After Beard, the Ninth Circuit held that the rule in Blakley does not retroactively apply to convictions that became final prior to its final publication in June 24, 2004. Schardt, 414 F.3d at 1027. The Ninth Circuit's reasoning was that Blakley presented a new procedural rule because it merely allocated some of the decision-making authority previously held by judges to juries. Id. at 1036. Furthermore, the Ninth Circuit reasoned that the rule in Blakley did not fall within either exceptions discussed in Beard. Id. Similar to Blakley, Cunningham shifted the decision-making authority previously held by judges to juries, making it a procedural rule rather than a substantive rule. Cunningham merely suggested that aggravating factors in the California Determinate Sentencing Scheme used to impose an upper term must be found by a jury instead of a judge. See Cunningham, 127 S. Ct. 856, 868; see also Apprendi, 530 U.S. at 490, Blakley, 542 U.S. at 303. Thus, like Blakley, Cunningham should not be

retroactively applied to convictions that were final prior to its publication.[17]

D. Analysis

Here, Petitioner's conviction became final on March 18, 2006, ninety days after the California Supreme Court denied Petitioner's petition. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Petitioner was sentenced to several upper terms as a result of the conviction after the sentencing judge found several aggravating factors beyond a preponderance of the evidence. (Doc. No. 21 at 75.) Cunningham was decided on January 22, 2007. Thus, for reasons discussed above, it may not be applied to Petitioner's case. Teague, 489 U.S. 288.

On the other hand, Blakey, as noted before, was decided on June 24, 2004, and Booker was decided on February 22, 2005. Accordingly, the rules established in Apprendi and its progenies prior to Cunningham do apply to Petitioner's case, and the Court must determine if Petitioner is barred from raising his Apprendi

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[17] While the retroactivity of Cunningham has not been addressed by the Ninth Circuit, several district courts, in their unpublished opinions, also found that Cunningham is non-retroactive. Bouie v. Kramer, No. CIV S06-1082-GEBGGHP, 2007 WL 2070330 (E.D. Cal. Jul. 13, 2007), Rosales v. Horel, No. 06-CV-2327-JMAJB, 2007 WL 1852186 (S.D. Cal June 26, 2007), Fennen v. Nakayema, No. 2:05-CV-1776-GEBGGHP, ___ F.Supp.2d ___, 2007 WL 1742339 (E.D. Cal. June 14, 2007), Hally v. Scribner, No. CIV S-04-0828RBBCMKP, 2007 WL 809710 (E.D. Cal. Mar. 15, 2007); see Dropalski v. Stewart, No. C06 5697 FDB/KLS 2007 WL 963989 (W D Wash Mar 28 2007).

claim because he failed to raise the claim in trial court. Cotton, 535 U.S. at 633.

As previously discussed, when a defendant fails to raise an Apprendi claim at the trial court level, he is barred from raising the issue on collateral review if factors used in enhancing his sentence were "uncontroverted at trial and supported by overwhelming evidence." See Cotton 535 U.S. at 633. Petitioner did not raise his Apprendi error claim for direct appeal from trial court. (See Lodgement 3 at i-iii.) Therefore, the Court should determine whether the factors used to enhance his sentence were uncontroverted and supported by overwhelming evidence. See id.

In sentencing Petitioner, the trial judge found that: 1) the crime involved great violence; 2) there was threat of great bodily harm; and 3) the manner in which the crime was carried out indicated planning, sophistication, and professionalism. (Doc. No. 21 at 71.) The evidence showed that two black males used guns to rob Symbolic. (Lodgement 11 at 1.) The robbers forced Symbolic's employees to move to the back of Symbolic's showroom and threatened to shoot them if they did not comply. (Lodgement 2 at 106-111.) These facts show that the robbers were engaging in violent conduct. Moreover, they show that robbers threatened to inflict great bodily harm on the victims. Victims testified that the robbers used cell phones to communicate and to discuss plans during the robbery. (Lodgement 2 at 325-28; 43-5.) This fact shows that the robbers used fairly sophisticated communications equipment to plan out their robbery. And, of course, the jury found

that Petitioner committed the Symbolic robbery. (Lodgment 1 at 105-112) In light of the record, threat of great bodily harm and a high degree of sophistication in committing the crime were overwhelmingly supported by the facts of the case. Enhancing Petitioner's sentence based on these factors did not seriously affect the "fairness, integrity, and public reputations of the judicial proceedings." Cotton, 535 U.S. at 631. Petitioner's claim is therefore barred. Cotton, 535 U.S. at 631.

XI. VALIDITY OF PRIORS

Petitioner claims that he was denied due process when he was deprived of an opportunity to attack the prior conviction that was used to enhance his sentence. He contends that he was not provided appellate counsel to appeal his prior conviction. Also, on April 15, 2005, Petitioner filed a motion requesting trial transcripts for his 1988 conviction, and it was denied by the state court. (Doc. No. 21 at 87-88.) Petitioner maintains that because he was denied counsel as well as the opportunity to review his trial transcripts, he was deprived of his chance to attack the constitutionality of his prior conviction. The state courts did not address this issue. This Court independently reviews the factual record and finds the claim without merit. See Himes, 336 F.3d at 853.

In Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001), the Supreme Court held that, generally, a petitioner for a writ of habeas corpus has no right to collaterally attack the validity of a prior

conviction used to enhance his sentence. Id. at 396. The Court's rationale behind the general Lackawanna rule is to prevent defendants from attacking the validity of their prior convictions after they failed to "pursue those remedies while they were available" during the court proceedings for these prior charges. Id.

From Petitioner's allegations, the Court's best inference is that Petitioner did not pursue an appeal after he was convicted of the prior. He did not request court transcripts soon after his 1988 conviction. Instead, he waited 18 years after he found out that the prior was going to be used to enhance his sentence before filing a motion to request the transcripts. (Trav. at 106.) Petitioner is collaterally attacking the validity of his prior only after he had learned that it would be used to enhance the sentence of his most recent conviction. Petitioner's conduct is a textbook example of one attempting to untimely challenge the validity of his prior after he failed to do so at the appropriate juncture.

There is an exception to the Lackawanna rule: a petitioner may challenge his prior conviction if he was not appointed trial counsel. Lackawanna, 532 U.S. at 404. However, Petitioner complains of a lack of appellate counsel not trial counsel, and the exception does not apply. Accordingly, Petitioner is procedurally barred from attacking the validity of his prior conviction in this Court. See id. at 406.

XII. PROSECUTOR'S ERRORS

Petitioner makes several claims, alleging that the prosecution did not timely disclose various facts, police reports, and portions of police reports at trial. He contends: 1) the prosecution did not timely disclose page one and page two of the police report for Edward Jones' arrest, (doc. no. 21 at 92-97; Trav. at 109-112); 2) the prosecution failed to timely disclose the police report of Thess Good's arrest and detention, (Doc. No. 21 at 97-99); 3) the prosecution failed to disclose the criminal history of one of the victims of the Symbolic robbery, (doc. no. 21 at 99-100); and 4) the prosecution misidentified Petitioner's pager number and presented it as Petitioner's cell phone number to the jury. Petitioner claims that the number was not Petitioner's cell phone number, but instead, his pager number. (Doc. No. 21 at 101-103.)

Petitioner asserts that the prosecutor's errors amounted to a due process violation because the untimely disclosed and misidentified evidence was exculpatory. Had the proper disclosures been made, they could have been more thoroughly investigated during discovery. Further, Petitioner maintains that he was prejudiced at trial as a result of these errors. (Lodgment 5 at 14-18; Lodgment 15.) To evaluate this claim, the Court will use the standard of review for disclosures by the prosecution discussed in section IV(A)(2) of this Report and Recommendation. In short, for relief to be granted, Petitioner must show that the information that the prosecutor either failed to disclose or untimely disclosed was exculpatory evidence and such prosecutorial misconduct prejudiced Petitioner from

receiving a more favorable verdict. Brady, 373 U.S. at 87.

A. Failure to Disclose Portions of Police Report for Edward Jones' Arrest

Petitioner contends that the prosecutor failed to timely disclose page one and page two of the police report describing Edward Jones' arrest. However, page one and page two of that police report were disclosed to the defense on November 6, 1999, two days before trial ended. (Doc. No. 21 at 100.) Page one and page two of that police report has Petitioner's statement describing his version of what happened on the day Jones was arrested. (Lodgment 1 at 404.) It also has a statement made by Enterprise-Rent-A-Car employee Jennifer Poulin, who recalled that Petitioner called Enterprise at around 9:30 a.m. to report the rental car missing. (Lodgment 1 at 403.)

As discussed earlier, the state appellate court found that Petitioner's counsel acknowledged that the evidence in page one and page two of the police report is hearsay. (Lodgment 5 at 14-16.) Thus, even if the pages were disclosed earlier, they could not have been admitted as evidence. See CAL. EVID. CODE § 1200. Further, because Petitioner knew that he made a statement to the police, he could have simply chosen to take the stand and testify as to what happened on the day of Jones' arrest. Lastly, Petitioner's statement is hardly credible and not exculpatory because he "only called police to report the vehicle stolen after Jones was

arrested while driving in it." (Lodgement 5 at 15.) Accordingly, the Court finds that the state appellate court's ruling was not contrary to, or an unreasonable application of, federal law. Robinson, 360 F3d at 1045.

The Court independently reviews Petitioner's claim regarding Jennifer Poulin's statement because the state courts did not address the claim in their decisions. See Himes, 336 F.3d at 853; Delgado, 223 F.3d at 981-82. Jennifer Poulin's statement does not exculpate Petitioner. As discussed earlier, Petitioner's story was already inconsistent with the Fam-Mart employee's recollection of events. Poulin's statement also contradicted Petitioner's representations and would have further clouded Petitioner's story. According to the police report, Fam-Mart did not open until 10:00 a.m. on the day of Jones' arrest. (Lodgment 1 at 405.) According to Petitioner, he did not discover that his car was stolen until after he entered Fam-Mart, which had to be sometime after 10:00 a.m, according to the Fam-Mart employee. (Id.) Yet, Petitioner called Poulin at around 9:30 a.m. to report that the car was stolen. (Id.) Such inconsistencies would not have been favorable to Petitioner. Instead they would have made the jury further question Petitioner's credibility. Thus, Poulin's statement would not have exculpated Petitioner. Since Poulin's recollection would not have been exculpatory, the failure to timely disclose her statement did not harm Petitioner's defense and is not prejudicial.

B. Failure to Disclose Police Report of Thess Good's Arrest and Detention

Petitioner alleges that prosecution did not disclose the police report of Thess Good's arrest and detention until November 6, 1999, two days before the trial ended. He claims that this lateness in disclosure was prejudicial to him. (Doc. No. 21 at 97-99.) Petitioner asserts that the police report mentioned that Good, who allegedly looks like Petitioner, was detained. Petitioner further claims that the report failed to mention that incriminating items were confiscated from Good's home, such as "hand guns, cell phones, etc." (Doc. No. 21 at 98.) Petitioner maintains that these items and the police's description of Good would have been exculpatory evidence had they been presented to the jury at trial. (Id.) The state courts did not issue a reasoned decision addressing this claim. Thus, the Court will independently review Petitioner's contentions. See Himes, 336 F.3d at 853.

As previously discussed,[18] in order for a petitioner to succeed on a claim of suppression of evidence by the prosecution, he must show that the evidence withheld by the prosecution was favorable to him. Brady, 373 U.S. at 87. Additionally, he must show that prosecution's suppression of the evidence prejudiced him. Id. Conclusory allegations unsupported by specific statements of facts are insufficient to warrant habeas corpus relief. Boeheme, 423 F.2d at 1058. Thus, a

[18] The Court discussed the standard of review for a suppression of evidence claim in section IV (A)(2) of this Report and Recommendation.

petitioner's unsupported allegations of suppression of evidence that was favorable to him and resultantly prejudiced him is insufficient to warrant habeas corpus relief. See id.

With regard to Good's physical similarities and relationship to Petitioner, the Court has discussed earlier that information about Good would not have been admissible as third-party culprit evidence.[19] Thus, even if the report were disclosed to Petitioner earlier, it would not have led to a more favorable outcome because the information in the report would not have been presentable to the jury at trial. Furthermore, regardless of the likely admissibility of the information in question, the report was indeed disclosed to Petitioner before the end of trial, and Petitioner had time to look at the report and use its information to develop a defense. (Doc. No. 21 at 97-99.) Thus, the untimely disclosure of the Thess Good report did not prejudice Petitioner.

With regard to Good's items, Petitioner simply has not offered any support for the contention that "guns, cell phones, etc." were confiscated from Good's home. (Doc. No. 21 at 98.) In fact, Petitioner even notes that the Thess Good police report failed to state that any items were confiscated (Id.) (emphasis added). As habeas corpus relief can not be granted based on Petitioner's unsupported allegations, Boeheme, 423 F.2d at 1058, it should be denied as to this claim.

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[19] Please refer to section IV (E)(2) of this Report and Recommendation.

C. Failure to Disclose Criminal History of Victim

Petitioner claims that the criminal history of a Symbolic robbery victim was not disclosed by the prosecution. He claims that the failure to disclose the criminal history prevented his counsel from presenting impeachment evidence against this victim, who identified Petitioner as one of the perpetrators of the Symbolic robbery at trial, but failed to do so at lineups. (Doc. No. 21 at 99.) The state courts did not address this claim in a reasoned decision. After independent review, the Court finds that this claim is without merit. See Himes, 336 F.3d at 853.

Under California law, a witness may be impeached with a criminal record only where the offense is one of "moral turpitude." People v. Wheeler, 4 Cal.4th 284, 296 (Cal. 1992). Here, Petitioner has not specified the crimes with which the victim has been convicted. Rather, Petitioner appears to be unsure of whether or not the victim even has a criminal history. He states, "information regarding a potential criminal history of [victim]" was realized at trial. (Doc. No. 21 at 102 (emphasis added).) Conclusory allegations that border on speculation are all that Petitioner has offered to the Court. As unsupported contentions are not enough to warrant habeas corpus relief, Boeheme, 423 F.2d at 1058, Petitioner's claim should be denied.

D. Allegation of Misidentifying a Pager Number

Petitioner alleges Detective Keene falsely reported his pager number 619-907-0408 as a cell phone number and testified accordingly at trial. (Doc. No. 21 at 101.) Petitioner claims that he only has a pager number. (Id.) Therefore, had Keene's information been corrected at trial, it would have been exculpatory for Petitioner because witnesses testified that the Symbolic robbers used cell phones, not pagers. (Id. at 102.) Respondents admit that the phone number was indeed a pager number. (Doc. No. 28 at 28.) However, Respondents note that cell phones subscribed under the names Tim Walker and Crini Ornelas[20] called Petitioner's pager several times. (Doc. No. 28 at 28; Doc. No. 21 at 147.) The state courts did not address this claim; thus, the Court will independently review its merits. See Himes, 336 F.3d at 853.

To prevail on a claim that prosecutorial misconduct allowed the introduction of false evidence or testimony into a trial, a petitioner must show: 1) "the testimony (or evidence) was actually false," and 2) "the prosecution knew or should have known that the evidence or testimony was actually false." United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003). Petitioner must establish a factual basis for attributing to the government knowledge of false evidence of perjury. See Morales v. Woodford, 388 F.3d 1159, 1179 (9th Cir.

[20] As discussed earlier, Detective Keene discovered that two cell phones had called each other thirty-two times on the morning of the Symbolic robbery. He discovered that the two cell phone numbers were subscribed to two persons under the names of Tim Walker and Crini Ornelas. (Lodgment 2 at 282-84)

2004) Additionally, a petitioner must show that the false evidence, whether deliberately or inadvertently disclosed by the prosecution, prejudiced the Petitioner such that there is any reasonable likelihood that the false evidence could "have affected the judgement of the jury. . . ." Giglio v. United States, 405 U.S. 150, 154 (1972); Zuno-Arce, 339 F.3d at 889.

Here, Respondents admit that Detective Keene falsely identified the number 619-907-0408 as Petitioner's cell phone number. However, Petitioner fails to support his contention that the prosecution knew or should have known that Keene testified erroneously during trial. As Petitioner failed to provide factual basis for attributing to the government knowledge of false evidence, he has not proven one of the elements of a prosecutorial misconduct claim. See Morales, 388 F.3d at 1179.

Furthermore, Petitioner has not shown that the false information was prejudicial. See Giglio, 405 U.S. at 154. Petitioner does not dispute that the pager number was his, and the evidence shows that the cell phones subscribed to persons under the names of Tim Walker and Crini Ornelas called the pager several times. (Doc. No. 21 at 147.) The prosecution theorized that these cell phones were fraudulently obtained by Petitioner and another accomplice through the use of aliases. (See Lodgement 2 at 282-94.) Petitioner and the accomplice communicated through these cell phones to plan the robbery several days before and during its commission. (Lodgement 2 at 282-94.) While the prosecution and Defective Keene erroneously

represented that the fraudulent cell phones were used to contact Petitioner's cell phone instead of his pager, this misrepresentation was not prejudicial to Petitioner. Whether the fraudulently obtained cell phones called Petitioner's pager number or cell phone number is immaterial because either way, one of the users of the cell phones attempted to communicate with Petitioner, as the prosecution theorized. (See Lodgment 2 at 282-94.) Petitioner has not shown how Keene's mistaken testimony or police report, if corrected, would have thwarted the prosecutor's theory. Even if Keene had testified that the number 619-907-0408 was Petitioner's pager number, the prosecutors still would have established a link between Petitioner's number and the cell phones subscribed to persons under Tim Walker's and Crini Ornelas' names. As such, Petitioner has not shown that Keene's false testimony prejudiced him. Thus, Petitioner should not be entitled to habeas corpus relief as to the prosecutorial misconduct claim.

XIII. LACK OF DUE PROCESS AT TRIAL

Petitioner claims that the trial court erred when it excluded the first two pages of the police report for Edward Jones' arrest. (Doc. No. 21 at 106; Trav. at 112-13.) As discussed earlier, those pages contained Petitioner's statement as to what happened prior to, and shortly after, Jones' arrest. The trial court excluded the two pages from evidence as inadmissible hearsay. (Id.) Petitioner claims that exclusion of such information was a due process violation. (Id.) The state courts did

not address this claim in a reasoned decision.[21] After independent review of this claim, this Court finds that it is without merit. See Himes, 336 F.3d at 853.

Under Supreme Court authority, "erroneous exclusions of critical, corroborative defense evidence may violate the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." Depetris v. Kukeyndall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers v. Mississippi, 410 U.S. 284, 294 (1973)). However, a defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. Taylor v. Illinois, 484 U.S. 400, 410 (1988). Indeed, states have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. U.S. v. Sheffer, 523 U.S. 303, 308 (1998). A defendant must comply with these rules of evidence "designed to assure fairness and reliability." Chambers, 410 U.S. at 302. Under Supreme Court authority, an exclusion of evidence on hearsay grounds amounts to a due process violation if the hearsay statement is material to the trial and the statement "bears persuasive assurances of trustworthiness." Chambers, 410 U.S. at 302 (1973).

An example of a material statement that bears persuasive assurances of trustworthiness is illustrated

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[21] While the California Court of Appeals did address whether the untimely disclosed police report amounted to a prosecutorial error, (Lodgement 5 at 14-18), and explained why the exclusion of the report was harmless to Petitioner, it did not analyze whether the information on the report was properly excluded from evidence b the trial court.

in Chambers. In that case, the defendant was accused of murdering a police officer at a riot. Id. at 285. The police officer was shot and a subsequent autopsy revealed that he had been hit with four .22-caliber bullets. A third party, Gabe McDonald, was also at the riot the evening of the police officer's death. Id. at 287. Shortly after the riot, McDonald gave a sworn statement to defendant's attorney, confessing that he had shot the police officer with a .22-caliber revolver he owned. Id. However, McDonald later retracted his confession. Id. Nevertheless, the defendant tried to develop the theory that McDonald shot the police officer. Id. at 289. The defendant had multiple witnesses, who were good friends of McDonald, who testified that they saw McDonald shoot the police officer. Id. However, the defendant's efforts were partly thwarted. The state court did not allow the defendant to bring McDonald on the stand as an adverse witness, and the prosecution chose not to have him testify. Id. at 291-92. In addition, the state court excluded three of defendants witnesses, who planned to testify that McDonald had admitted to shooting the police officer. Id. at 293. The three witnesses were all long time friends of McDonald. Id. at 292-93. The court excluded these witnesses on hearsay grounds. Id. at 292.

However, the Supreme Court held that the defendant was deprived of a constitutional right to either cross examine McDonald or bring in evidence of his confession. Id. The Supreme Court found that the three witnesses were trustworthy because "each of McDonald's confessions were made spontaneously to a close

acquaintance shortly after the murder had occurred" and "each one was corroborated by some other evidence in the case – McDonald's sworn confession, the testimony of an eyewitness to the shooting, and proof of his prior ownership of a .22-caliber revolver." Id. at 300. Thus, the high court ruled that because the witnesses' hearsay statements were material to the case and they were trustworthy, the trial court committed a due process violation when it excluded their testimony from evidence. Id. at 302.

As for the hearsay statement at issue in the instant case, Petitioner's version of what happened on the morning of Jones' arrest that was documented in the police report of Edward Jones' arrest is substantially different from the hearsay statements in Chambers. In Chambers, witnesses saw McDonald shoot the police officer. McDonald confessed to the shooting. McDonald had a gun of the same caliber as the bullets found in the police officer's body. Lastly, the people who were to offer the hearsay statements were close friends of McDonald. The totality of the evidence that corroborated the hearsay statements in the case made them trustworthy. Chambers, 410 U.S. at 302. Conversely, Petitioner has provided almost no corroborating evidence that comports with the version presented in the police report. Petitioner asserts that Edward Jones stole his car. The only evidence that remotely corroborates Petitioner's assertion is that Edward Jones was arrested while driving Petitioner's rental car. (Lodgement 2, 264-65.) But there is no evidence supporting the contention that Jones stole the car from Petitioner.

In fact, there are even inconsistencies between Petitioner's statement and the ones made by other witnesses in the same report. Petitioner's statement is inconsistent with Jennifer Poulin's statement and the Fam-Mart employee's statement.[22] Furthermore, not only are there no assurances that Petitioner's hearsay statement is trustworthy, there is also no evidence that admission of the statement could have made the jury doubt Petitioner's already waning credibility and moral character at trial. Detective Johnny Keene found potentially incriminating telephone numbers, ammunition, and an identification card that appeared to be a fake in Petitioner's home. Keene's testimony regarding these items were submitted to the jury. (Lodgment 2 at 280-318.) In light of the evidence presented, Petitioner's credibility was already in question at trial. The presentation of his statement to the jury would have only further damned his chances at receiving a favorable impression. Thus, this Court finds that the trial court's exclusion of Petitioner's statement was a reasonable application of Supreme Court authority.

XIV. CONCLUSION

For all of the foregoing reasons, it is hereby recommended that the Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered **DENYING**

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[22] These inconsistencies are discussed earlier in this Report and Recommendation.

Petitioner's writ of habeas corpus and dismissing this action.

IT IS ORDERED that no later than **September 21, 2007**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **September 28, 2007**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 99th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

DATED: August 31, 2007

/s/ Peter C. Lewis
Peter C. Lewis
U.S. Magistrate Judge
United States District Court

cc: The Honorable William Q. Hayes
All Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY PENTON, Petitioner-Appellant, v. A. MALFI, Respondent-Appellee.	No. 19-56201 D.C. No. 3 :06-cv-0023 3-WQH-RBM Southern District of California, San Diego ORDER (Filed May 26, 2021)

Before: CALLAHAN, BUMATAY, and VANDYKE, Circuit Judges.

The panel judges have voted to deny the appellant's petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and rehearing en banc, filed April 30, 2021 (ECF 43), is DENIED.

S129053

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ANTHONY PENTON on Habeas Corpus

(Filed Jan. 18, 2006)

Petition for writ of habeas corpus is DENIED.

Chin, J., was absent and did not participate.

/s/ George
Chief Justice

COURT OF APPEAL –
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANTHONY PENTON on Habeas Corpus.	D044788 (San Diego County Super. Ct. No. SCD 147553) (Filed Sep. 14, 2004)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices McIntyre and Irion.

Petitioner and his co-defendant, Edward Jones, were charged and convicted of one count of robbery, five counts of attempted robbery and two counts of false imprisonment by violence/menace as well as multiple firearm allegations. The court found true multiple prior conviction allegations. Petitioner was sentenced to a term of 54 years and 8 months under the three strikes law. This court upheld the convictions in the consolidated appeal *People v. Jones et al.* D038250/D039422. We take judicial notice of the appeal file. (Evid. Code, § 459.)

Petitioner and Jones attempted to rob the company safe at Symbolic Motors in La Jolla, California. In the course of their unsuccessful attempt to obtain

the keys to the safe, the defendants for 45 minutes robbed, attempted to rob, imprisoned and terrorized five Symbolic employees, one customer and two daughters (ages eight and six) of one employee. During the course of the incident, petitioner made and received multiple telephone calls apparently getting instructions. One employee escaped and called police. The perpetrators left before police arrived. Jones was later apprehended in connection with unrelated charges. He was driving petitioner's rented car. Jones's fingerprint was later found at the scene of the robbery. It was also determined that two cellular telephone numbers linked to petitioner had made and received 32 telephone calls from the La Jolla area the morning of the robbery. Three adult victims identified petitioner as a perpetrator in a combination of photographic lineups, live lineups, the preliminary hearing and trial.

The petition is denied.

/s/ McIntyre
McINTYRE, Acting P. J.

Copies to: All parties

**THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

IN THE MATTER OF THE APPLICATION OF:	HC 17680 1st Petition SCD 147553
ANTHONY PENTON, Petitioner.	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
	(Filed May 5, 2004)

AFTER REVIEWING THE PETITION FOR WRIT OF HABEAS CORPUS AND THE COURT FILE IN THE ABOVE REFERENCED MATTER, THE COURT FINDS AS FOLLOWS:

In an amended information filed November 2000, the District Attorney for San Diego County charged Petitioner and Edward Jones under Penal Code section 211 with robbery (count 1), under sections 664 and 211 with five counts of attempted robbery (counts 2-6), and under section s 236 and 237, sub(a) with two counts of false imprisonment by violence, menage, fraud or deceit (counts 7 and 8). The information also alleged under section 12022.53 on all counts that Petitioner and Jones each personally used a firearm. It was also alleged under section 667.5 sub (b) that Petitioner served two prior prison terms; under section 667 sub(a)(1) that he had a prior serious felony conviction; and under section 667 sub(b) through (i) and 1170.12 that he had a prior strike conviction. Petitioner and Jones pleaded

not guilty and denied all allegations. The jury convicted both men on all charges and found the special allegations true. The court found true the remaining prior conviction allegations against both Petitioner and Jones. Petitioner was sentenced to a term of 54 years 8 months.

Petitioner filed a timely notice of appeal and argued the following on appeal: (1) the court erred in denying his motion for a new trial brought on the grounds that the People violated their discovery obligations and his right to confrontation by relying on improper hearsay; (2) the court failed to exercise its discretion to determine if his sentences should run concurrently or consecutively; (3) his sentence in the subsequent San Bernardino County case No. FV1010921 must be modified to a sentence of one-third the midterm; and (4) the court failed to exercise its discretion to determine if it should dismiss his prior allegation. On October 2, 2002, the Court of Appeal, Fourth Appellate District, Division One, issued an opinion modifying the San Bernardino sentence and affirming the judgment in all other respects. A remittitur was issued on January 22, 2003

In this Petition, Petitioner claims (1) that he was denied his right to due process where the prosecution deliberately withheld or failed to timely disclose material and favorable evidence; (2) that he was denied due process when he was convicted with insufficient evidence of robbery and attempted robbery; (3) that use of a pre-1994 conviction for sentencing pursuant to Penal Code section 667(b)-(i) violates the proscription

against ex post facto laws and (4) that he was denied effective assistance of counsel.

DISCOVERY AND SUFFICIENCY OF THE EVIDENCE CLAIMS

Habeas corpus cannot serve as a second appeal, and matters raised and rejected on appeal are not cognizable on state habeas corpus in the absence of special circumstances. (In re Huffman (1986) 42 Cal.3d 552, 554-555; In re Terry (1971) 4 Cal.3d 911, 927).

As noted, in his appeal, Petitioner asserted that the People's alleged failure to turn over a police report concerning his report to police that his rental car was stolen shortly after Jones was arrested violated his federal due process rights and California statutory provisions (sections 1054 et. seq.). That conclusion was rejected on appeal, and Petitioner may not raise this issue again.

In that same vein, the general rule is that habeas corpus cannot serve as a substitute for an appeal and that matters that "could have been but were not, raised on a timely appeal from a judgment of conviction" are not cognizable on habeas corpus in the absence of special circumstances warranting departure from that rule. (In re Clark (1962) 58 Cal.2d 133, 140-41).

Thus, Petitioner's claims that he was denied timely discovery of a report entitled "The Detention of Thess Good" as well as other discovery claims and his contention that there is insufficient evidence to

support the judgment should have been raised on appeal. These claims are not cognizable on habeas corpus.

EX POST FACTO CLAIM

Petitioner next contends that the Three Strikes laws as applied are ex post facto violations. This claim has no merit.

The use of a prior conviction which predates the three strikes law to sentence a defendant under that law does not violate the ex post facto provisions of either the state or federal constitutions. (Peo v Hatcher (1995) 33 Cal.App.4th 1526, 1527-1528; accord Peo v Brady (1995) 34 Cal.App.4th 65, 71-72). Further, a conviction which predates the enactment of the three-strikes law may properly be used as a felony strike. (Peo v Turner (1995) 40 Cal.App.4th 733, 738-739).

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's final claim is that he was denied effective assistance of counsel where counsel failed to properly investigate and discover exculpatory evidence to support his misidentification defense. Specifically, Petitioner argues that counsel failed to conduct a follow-up investigation regarding the police reports regarding the detention of Thess Good and the police report by Officer Spear which mentioned that Petitioner reported his car stolen prior to Jones' arrest, failed to interview Hess Good and to capitalize on his likeness to Petitioner, failed to investigate William

Diglio, an alleged parole violator, whose cell phone had the number of Symbolic Motors programmed into it, failed to further investigate a gathering of the victims after the robbery wherein they discussed the events and described the perpetrators thus losing the opportunity to discover any inconsistent statements in their descriptions, and failed to investigate the phone call made by Shannon Williams during the robbery to see if her description was inconsistent with her later statements.

To show that counsel was ineffective, Petitioner must show (1) counsel's representation was deficient, in that it "fell below an objective standard of reasonableness . . . under prevailing professional norms," and (2) counsel's deficient performance prejudiced his defense. Strickland v Washington (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674]; Peo v Ledsema (1987) 43 Cal.3d 171.

The first prong is reviewed under a standard of deferential scrutiny. Strickland, supra, at p. 689; Ledsema, supra, at p. 216. Counsel is given the benefit of a strong presumption that his or her conduct fell within the "wide range of reasonable professional assistance." Id. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." In re Marquez (192) 1 Cal.4th 584, 603, citing Strickland, supra, at p. 689.

Second, if counsel's performance is shown to be deficient, the Petitioner must show that the deficient performance prejudiced his defense. Strickland, supra, at P. 687; Ledsema, supra, at p. 216. This prong must be affirmatively proved." To prove prejudice, a Petitioner cannot merely show that the errors had some conceivable effect on the outcome of the proceeding. Peo v Davis (1995) 10 Cal.4th 463, 503, citing Ledsema, supra, at p. 215. Instead, Petitioner must establish there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, supra, 466 U.S. at p. 694 [89 L.Ed.2d at 698].

Petitioner cannot make the showing here. The police reports, which were turned over to the defense during trial, did not contain any new evidence or facts that were not known to counsel. Furthermore, three of the five victims identified Petitioner in a phot line-up and at trial. Defense counsel presented an expert witness concerning the reliability of eyewitness identification.

Petitioner cannot establish that there is a reasonable probability that but for counsel's failure to obtain evidence, speculative at best, of inconsistent descriptions the result would have been different.

The petition is therefore DENIED for the reasons specified herein.

It is further ordered that a copy of this Order be served upon Petitioner and the San Diego Office of the District Attorney (Kin-Thoa Hoang).

IT IS SO ORDERED.

DATED: 5 May 05 /s/ Christine V. Pate
CHRISTINE V. PATE
JUDGE OF THE
SUPERIOR COURT

[Certificate Of Service Omitted]

S111271

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

EDWARD JONES et al., Defendants and Appellants.

In re EDWARD JONES on Habeas Corpus

(Filed Jan. 15, 2003)

Petition for review DENIED.

GEORGE
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EDWARD JONES et al., Defendants and Appellants.	D038250 (Super. Ct. No. SCD147553) (Filed Oct. 2, 2002)
In re EDWARD JONES on Habeas Corpus.	D039422

APPEAL from judgments of the Superior Court of San Diego County, William D. Mudd, Judge. Judgments affirmed as modified. Petition for writ of habeas corpus denied.

In an amended information filed in November 2000, the District Attorney for San Diego County charged defendants Anthony Penton and Edward Jones under Penal Code[1] section 211 with robbery (count 1), under sections 664 and 211 with five counts of attempted robbery (counts 2-6), and under sections 236 and 237, subdivision (a) with two counts of false imprisonment by violence, menace, fraud or deceit

[1] All further statutory references are to the Penal Code unless otherwise specified.

(counts 7 & 8). The information also alleged under section 12022.53 on all counts that Penton and Jones each personally used a firearm. It was also alleged under section 667.5, subdivision (b) that Penton served two prior prison terms; under section 667, subdivision (a)(1) that he had a prior serious felony conviction; and under sections 667, subdivisions (b) through (i) and 1170.12 that he had a prior strike conviction. The information alleged under section 667.5, subdivision (b) that Jones had served four prior prison terms. Penton and Jones pleaded not guilty and denied all allegations.

Penton and Jones were tried together in a jury trial commencing in November 2000. The jury convicted them on all charges and also found the special allegations true. The People dismissed two of the section 667, subdivision (b) prior prison term allegations as to Jones, and the court found true the remaining prior conviction allegations against both Penton and Jones. The court sentenced Penton to a term of 54 years 8 months and Jones to a term of 37 years.

In March 2000, prior to the trial in this matter, Penton pleaded guilty in San Bernardino County case No. FV1010921 to a violation of Health and Safety Code section 11359, possession of marijuana for sale. Penton was sentenced to a term of 32 months in prison in that matter. In its sentencing of Penton in this case, the court stated that the sentence in this matter was "to run consecutive to FV1010921."

On appeal, Jones contends that (1) the court erred in denying his motion for new trial brought on the grounds that he received ineffective assistance of counsel; (2) the evidence is insufficient to convict him on counts 2 through 7 and to support the finding that he personally used a firearm on these counts; (3) the court failed to exercise its discretion to determine if Jones's sentences should run concurrently or consecutively; and (4) the court's instruction under CALJIC No. 17.41.1 violated his right to a fair trial. Jones also joins in the arguments raised by Penton to the extent they benefit him. In January 2002 Jones also filed a petition for writ of habeas corpus (petition), asserting that the judgment must be reversed because he rejected a plea offer based upon incorrect information given by the court and counsel concerning the maximum term he could receive upon conviction. The petition has been consolidated with the appeal for purposes of disposition.

On his appeal, Penton asserts that (1) the court erred in denying his motion for a new trial brought on the grounds that the People violated their discovery obligations and his right to confrontation by relying on improper hearsay evidence; (2) the court failed to exercise its discretion to determine if his sentences should run concurrently or consecutively; (3) his sentence in San Bernardino County case No. FV1010921 must be modified to a sentence of one-third the midterm; and (4) the court failed to exercise its discretion to determine if it should dismiss his prior strike allegation.

We conclude that Penton's sentence in San Bernardino County case No. FV1010921 must be modified to reflect a sentence of one-third the midterm under section 1170.1, with credit for presentence custody in that case, and order the court to modify the abstract of judgment to reflect this modified sentence. In all other respects the judgments are affirmed. Jones's petition is denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

On June 26, 1999, at approximately 9:30 a.m., Roy French stopped at Symbolic Motors in La Jolla, California, to see what types of classic cars they had in their showroom. While there, French saw Penton and Jones enter. One was talking on a cellular telephone. The two men walked up to French and Symbolic sales representative Roger Phillips, pushed them, and told them to move to the back of the showroom. Phillips objected, and Penton pulled out a handgun.

Once they were at the back of the showroom, Jones demanded French's wallet, took money out of it, and moved French into a small office. Jones ordered French to lie down on the floor between a desk and wall.

Phillips was moved into the office with French, and Penton demanded that Phillips tell him where the company's safe was. When Phillips stated that he did not know where the safe was, Penton slapped him in the back of his head. Penton was talking on a cellular

telephone during this period, apparently getting instructions. Penton told Jones to "put one in the back of his head" and see if Phillips could open the safe then. French looked up at Jones, who had his gun pointed at him. The discussion was interrupted by a sound coming from outside the office. Penton and Jones left to investigate.

At approximately 10:15 a.m., Ramon Bazaldua, a car detailer, arrived for work at Symbolic. As he entered the showroom, Penton asked him, "Are you the big guy?" Bazaldua replied that he was just a detailer and began to proceed through the showroom. However, Penton put a gun in Bazaldua's back and stated, "Walk this way, mother-fucker. Some people want to see you."

Bazaldua was taken to the office with Phillips and French. Jones bound the feet and hands of French, Phillips and Bazaldua with duct tape and made them lie down together on the floor. At one point French looked up from the floor and Penton put his foot on French's back, stating, "I think you're trying to eyeball me, boy," and threatened to shoot him. Penton asked who owned the black Jaguar parked in front of Symbolic and French stated that it belonged to him. Jones then took the keys to French's Jaguar out of French's pants pocket.

Sean Hughes arrived for work at Symbolic shortly thereafter, accompanied by his two daughters, ages six and eight. Penton encountered Hughes in the showroom and asked if he was the owner. Hughes replied, "No," and Penton ordered Hughes to the back of the

showroom. Hughes could tell from the tone of Penton's voice that something was wrong and asked if his daughters could wait out in his car. Penton said, "No." Penton then led Hughes and his daughters to the back, where they encountered Jones. Penton and Jones led Hughes and his daughters to an upstairs office where Symbolic's two safes were located. The men asked Hughes if he had a key to unlock the door to the office. Hughes demonstrated for Jones and Penton that his keys would not open the door.

Penton and Jones then forced Hughes to lie down on the floor with his daughters. Jones removed duct tape and two handguns from a plastic bag he was carrying and taped Hughes's arms behind his back. While Hughes was on the floor, Penton received a call on his cellular telephone. Jones handed one of the guns to Penton, who went back downstairs. Jones remained upstairs with Hughes and his daughters. Jones asked Hughes what he had in his pockets. Hughes replied that he had $10 and a cellular telephone. Jones stated that he did not want the $10 and turned off Hughes's cellular telephone. The men had said they were looking for cash.

After approximately one-half hour, Hughes heard someone yelling, "[H]e's running." Jones ran down the stairs and did not return. When Hughes heard police officers on a bullhorn, he broke free from the duct tape, locked his daughters and himself in another office upstairs, and called 911. Hughes stayed on the telephone with police until officers came upstairs and led him and his daughters outside.

Shannon Williams arrived for work at approximately 10:15 a.m. When she entered the showroom she saw Penton talking on his cellular telephone. Williams asked Penton if he needed any help. Penton took a gun out of his belt and told her to follow him.

Robert Kueber arrived for work shortly after Williams. Penton displayed his gun to Kueber and ordered Kueber and Williams to Williams's office. Halfway through the showroom, Kueber ran out and across the street, where he telephoned police from a gas station.

Penton took Williams to her office and instructed her to sit on the floor. Penton threatened that if she moved he would come back and shoot her. Penton and Jones then ran out of the building. Williams dialed 911 on her cellular telephone.

After police arrived, a field evidence technician recovered a plastic bag from the upstairs area of Symbolic. Upon subsequent examination, Jones's fingerprints were found on the bag.

Several days later, on June 29, 1999, San Diego Police Officer Andrew Spear saw Jones speeding in a tan rental car. When Officer Spear approached the vehicle in his police car, Jones sped up and turned into an alley. Officer Spears activated his lights and siren and pursued Jones. While in pursuit, Officer Spear saw Jones throw a gun out the window of his car. Jones was eventually stopped and placed under arrest. A search of the vehicle found a holster under the driver's seat that fit the gun Jones had thrown out the window. It was also

determined that Penton had rented the car on June 4, 1999, about three weeks prior to the charged crimes.

Police determined that two cellular telephone numbers linked to Penton had made and received 32 telephone calls to and from the La Jolla area the morning of the robbery. Police executed a search warrant at Penton's home and recovered a tablecloth with his nickname, "Mr. Goo," and one of the telephone numbers called the morning of the robbery written on it. Police also found a box of .45-caliber ammunition and a key chain with the logo for Enterprise Rental Car listing the make, model and license plate number of the car Penton was driving when he was arrested.

Williams and Hughes identified Penton and Jones in photographic lineups, live lineups and at trial. Kueber identified Penton in lineups and at trial. French and Bazaldua were unable to identify Penton and Jones in lineups or at trial.

B. *Defense Case*

Scott Fraser, Ph.D., a neurophysiologist, testified on Penton's behalf concerning the reliability of eyewitness identification. Doctor Fraser testified that research indicated that the type of identifications made in this case could be inaccurate. However, Dr. Fraser could not say whether the eyewitnesses in this case accurately identified Penton and Jones.

C. *The New Trial Motions*

1. *Jones's motion*

Following his conviction, Jones filed a motion for new trial. Jones argued that his trial counsel was ineffective, citing his counsel's alleged failure to interview potential alibi witnesses, to consult possible expert witnesses, to present exculpatory evidence concerning an alibi defense, to investigate physical evidence, and also challenging several tactical decisions made during trial.

In support of his motion, Jones pointed out that his trial counsel objected to the testimony of the People's forensics specialist because he had only received photographs showing Jones's fingerprints on the bag the morning of the first day of trial and other documents concerning the fingerprint analysis the day before. Trial counsel argued to the court that he had asked for discovery concerning the fingerprints but had not received it. The court found that because defense counsel had known about the bag with Jones's fingerprint on it since the preliminary hearing and had the opportunity to conduct an independent analysis of that evidence, counsel could not claim surprise. However, the court gave counsel three days to consult with an expert and go over the evidence. Thereafter, defense counsel did not provide any forensic evidence concerning the fingerprint.

Counsel for Jones also informed the court that he would be calling Jones's mother to testify as an alibi witness for Jones. However, Jones's mother was

unavailable at the time of Jones's defense case, and Jones rested without calling her as a witness.

At the hearing on Jones's motion for new trial, Jones called his wife, Latania Jones (Latania), to testify. Latania testified that Jones was at home with her on the morning of the robbery. Janice Thomas, the sister of Latania, was dating Penton at the time of the attempted robbery of Symbolic. She also testified that she did not own her own car and would travel between San Diego and Los Angeles to visit Penton in cars rented by Penton. Janice also stated that she informed Penton that Jones had been arrested in Penton's rental car. Penton told Janice that he was going to report the car stolen.

Joyce Thomas, Latania's mother, also testified. She stated that she came to Jones's house at approximately 9:45 a.m. that morning and saw Jones there. Loretta Bradley, a neighbor of the Jones's, testified that she saw Jones in the apartment complex laundry room at approximately 10:00 a.m. on the date of the robbery.

Jones also called forensics specialist Lisa Di Meo to testify in support of his motion for a new trial. Di Meo testified that the fingerprint left on the plastic bag belonged to Jones. However, she also testified that the duct tape used to bind Hughes, which was not tested by the People, had fingerprints that did not match Jones's.

Jones's trial counsel, Michael Taggart, testified that he spoke with Jones's wife and Jones about a possible alibi defense. He stated that he did not hire an

investigator to talk to witnesses because he did not have the money. He told Jones that Jones would have to pay for an investigator. Jones's counsel testified that he was now aware that he could have obtained county funds for an investigator.

Counsel for Jones admitted that he knew there was fingerprint evidence almost immediately after being retained. He made a general request for discovery at the beginning of the case and made oral requests to the prosecutor for fingerprint evidence. However, he never made written requests specifically for fingerprint evidence, nor did he bring a motion to compel.

When the court gave counsel time to hire an expert, he could not remember if he was aware that he could obtain county funding for such services. Counsel made no attempt to contact an expert during the recess from Thursday afternoon until Monday.

Counsel did not recall Jones giving him the names of other potential alibi witnesses. Counsel stated that he advised Jones not to testify.

Jones also testified on his motion for new trial. Jones testified that he fired his first attorney, John Covey, because he did not have an investigator. Jones stated that he hired Taggart because of his assurances that there would be a full investigation. Jones testified that he gave the names of all potential witnesses to Taggart. The retainer Jones gave Taggart was supposed to be for all expenses related to trial. Taggart never told him he needed extra funds for an investigator or expert advice. In response to cross-examination

by the People, Jones stated that he had never met Penton.

The court denied Jones's motion for new trial, finding that "completely [i]nsurmountable problems that counsel had in this matter" precluded his claim of ineffective assistance of counsel. The court stated that counsel could not have overcome (1) the identification of Jones by the victims; (2) his fingerprint on the bag found at the scene; (3) the fact Jones was driving Penton's rental car when apprehended; and (3) his being in possession of a gun that matched the one used in the robbery when apprehended. The court also found that Jones's alibi defense was simply not credible.

2. *Penton's motion for new trial*

Penton brought a motion for new trial on the basis that a police report indicating that he had reported his rental car stolen shortly after Jones was arrested was not timely disclosed by the People. According to counsel for Penton, that report was not turned over to the defense until during the trial. Penton would have used this report to argue that he would not have reported the car stolen if he were involved in the charged crimes. He would have argued that he and Jones did not know each other and Jones committed the robbery with someone else.

The court denied Penton's motion. First, the court noted the lack of credibility to Penton's defense that he did not know Jones or that his rental car was stolen. The court pointed to the testimony at Jones's motion

for new trial of Janice Thomas, Jones's wife's sister. As discussed, *ante*, Janice testified that she was Penton's girlfriend at the time, that Penton knew Jones through her, that Jones would let her use his rental cars, and that on the day Jones was arrested, Penton had loaned the car to Jones. The court also noted that Thomas testified that after Jones was arrested, she called Penton to let him know that he had been arrested in Penton's rental car. The court noted that it was only *after* Jones was arrested and Penton was informed of the arrest that he notified the police that his car was stolen.

The court also stated that information concerning the police report was available to Penton. The court further observed that it would not have allowed the report to come in unless Penton took the stand and testified, as the report was inadmissible hearsay. The court found it was unlikely the defense would have called Penton to testify given the facts of the case.

DISCUSSION

I. *The Appeals*

A. *Motions for New Trial*

1. *Standard of review*

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.] '"[I]n determining whether there has been a proper exercise of discretion on such motion, each

case must be judged from its own factual background."' [Citation.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

2. *Jones's motion*

Jones contends that the court should have granted his motion for a new trial on the basis that his trial attorney rendered ineffective assistance of counsel. We reject this contention.

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants." (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland v. Washington* (1984) 466 U.S. 668, 690 (*Strickland*) & *People v. Freeman* (1994) 8 Cal.4th 450, 513.) "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]'" (*People v. Holt, supra*, 15 Cal.4th at p. 703.)

Further, on appeal we apply a deferential standard in determining whether an ineffective assistance of counsel claim has merit. "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .' [Citation.]" (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) We may not "second-guess" counsel's strategic decisions and there is a "strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra*, 466 U.S. at p. 689.)

Here, even assuming that Jones could show ineffective assistance of counsel, he cannot meet the second prong of the *Strickland* test: that there is a reasonable probability that but for counsel's errors a determination more favorable to Jones would have resulted. Therefore, we need not even consider whether Jones's counsel's performance was deficient. (*Strickland, supra*, 446 U.S. at p. 697.)

The evidence of Jones's guilt was overwhelming. This included the undisputed fingerprint evidence on the bag carrying the guns and tape, the eyewitness identifications, and Jones's capture after fleeing police in Penton's rental car and throwing a gun out the window of the car. Thus, it is not reasonably probable that but for counsel's alleged deficiencies Jones would have received a more favorable result, and the court did not abuse its discretion in denying Jones's motion for new trial.

3. *Penton's motion*

Penton asserts that the People's alleged failure to turn over a police report concerning his report to police that his rental car was stolen shortly after Jones was arrested violated his federal due process rights and California statutory provisions (§ 1054 et seq.) concerning discovery obligations and the court therefore

erred in denying his motion for a new trial. We reject this conclusion.

"The obligation of the People to disclose information to the defense is dependent upon whether that obligation has a constitutional or statutory basis. As articulated by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, the prosecution has a sua sponte obligation, pursuant to the due process clause of the United States Constitution, to disclose to the defense information within its custody or control which is material to and exculpatory of, the defendant. [Citations.] This constitutional duty is independent of and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense. [Citations.] The California statutory scheme, adopted by initiative in 1990, requires that the prosecution disclose specified information to the defense, as set out in section 1054.1, including, among other things, the names and addresses of witnesses which the prosecution intends to call at trial. [Citation.]" (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 804-805 (*Bohannon*).)

A claim that the prosecution has violated its obligations to disclose evidence under section 1054 et seq. subjects the prosecution to possible sanctions if brought to the court's attention prior to the close of trial. (*Bohannon, supra*, 82 Cal.App.4th at p. 805.) If such a request is not made, however, and a challenge is only made by appeal from a judgment, our review is governed by the same standards as those applied to an alleged constitutional violation. (*Ibid.*) Under this

standard, "the defendant must establish that the information not disclosed was exculpatory and that ' "there is a reasonable probability that, had the evidence been disclosed . . . , the result of the proceedings would have been different." ' [Citations.] Evidence is material in the context of review of a discovery violation postconviction if 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation.]" (*Ibid.*)

On this record, we conclude that there is no reasonable probability that the outcome of the trial would have been different had the police report of Penton's call reporting his vehicle stolen been turned over sooner by the People to Penton's counsel. As the court noted, and Penton's counsel acknowledged at trial, the police report was inadmissible hearsay. (See Evid.Code, § 1200.)[2] Penton, obviously aware of his own report to police, could have testified to this incident. However, Penton elected to not testify. Further, the information was hardly exculpatory. Penton only called police to report the vehicle stolen after Jones was arrested while driving in it. This was after, and presumably in response to, his girlfriend's telling him of Penton's arrest. The circumstances of Penton's call, contrary to Penton's assertion, actually strengthened

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[2] Evidence Code section 1200 provides in part: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible."

the People's case as it indicated an attempt to distance himself from Jones and the vehicle. There is no reasonable probability that the result would have been different had the police report been turned over to Penton earlier.

Penton also asserts that the court's consideration of testimony taken from the hearing on Jones's new trial motion, when Penton was not present and was unable to cross-examine witnesses, was improper because the evidence was inadmissible hearsay and violated his constitutional right to confront witnesses against him. We reject this contention. That evidence was only a portion of the facts that the court considered in rejecting Penton's motion for a new trial. Of primary importance was the fact that Penton's report to police of the vehicle being stolen was within his own knowledge and he could have testified to these facts at trial. His election not to testify, however, rendered any claim of prejudice in the People's failure to turn over the actual report of no moment. Further, as discussed, *ante*, given the circumstances under which Penton reported his vehicle stolen, the report was simply not exculpatory. The court did not err in denying Penton's motion for a new trial.

B. *Sufficiency of the Evidence*

Jones asserts that the evidence is insufficient to support his conviction for the attempted robbery of Bazaldua, Kueber or Williams. Jones also contends that the evidence is insufficient to support the

enhancement that he personally used a firearm when he and Penton attempted to rob these individuals. We reject these contentions.

1. *Standard of review*

On an appeal contending there is insufficient evidence to support a verdict, we review the evidence in the light most favorable to the judgment and, in so doing, determine whether there is substantial evidence such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) The reviewing court will presume in support of the trial court's judgment the existence of every fact the trier of fact could reasonably infer from the evidence. (*People v. Iniguez* (1994) 7 Cal.4th 847, 854.) "The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on '"isolated bits of evidence."' [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) "That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial." (*People v. Holt, supra*, 15 Cal.4th at p. 669; *People v. Berryman* (1993) 6 Cal.4th 1048, 1084.)

Further, it is the exclusive function of the trier of fact to assess the credibility of witnesses. (*People v. Alcala* (1984) 36 Cal.3d 604, 623; *People v. Lopez* (1982) 131 Cal.App.3d 565, 571.) We will "'not substitute our evaluation of a witness's credibility for that of the fact finder.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206;

see also *People v. McLead* (1990) 225 Cal.App.3d 906, 917.) Moreover, it is not our function to reweigh the evidence. (*People v. Perry* (1972) 7 Cal.3d 756, 785, overruled in part on other grounds in *People v. Green* (1980) 27 Cal.3d 1.) Thus, a judgment will not be overturned even if we might have made contrary findings or drawn different inferences, as "[i]t is the jury, not the appellate court, that must be convinced beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

2. *Analysis*

a. *Attempted robbery counts*

Robbery is the "taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) An attempted robbery occurs when there is "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) Although the act must constitute more than mere preparation, it need not be the last proximate or ultimate step toward commission of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

Jones asserts that the attempted robbery counts cannot stand as he and Penton only had the intent to rob the business of Symbolic, not the individual employee victims. This contention is unavailing.

To convict a person of robbery, or attempted robbery, possession of the property by the victim may be actual or constructive. (*People v. Nguyen* (2000) 24

Cal.4th 756, 762; CALJIC No. 1.24.) The theory of constructive possession has been used to expand the concept of possession to include store employees not in actual possession of property as victims of robbery: "'Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property.' [Citation.]" (*People v. Miller* (1977) 18 Cal.3d 873, 880.) Indeed, employees may be victims of robbery even if they did not have a specific responsibility for handling money for the business that is robbed. (*People v. Jones* (2000) 82 Cal.App.4th 485, 490.)

Here, it is undisputed that Bazaldua, Kueber and Williams were employees of Symbolic, acting in their representative capacities at the time of the attempted robbery. Thus, it matters not, as Jones argues, that he did not have the intent to rob these individuals, only Symbolic. There is sufficient evidence to support Jones's conviction on the attempted robbery counts.

b. *Personal use of firearm enhancement*

On the attempted robbery counts it was also alleged under section 12022.53, subdivision (b) that Jones personally used a firearm in the commission of those crimes. Section 12022.53, subdivision (b) provides in part that "any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in

the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony." Subdivision (a)(4) specifies robbery as one of the felonies subjecting a defendant to the terms of section 12022.53.

Jones asserts that the court improperly imposed the firearm use enhancement on his conviction for the attempted robbery of Bazaldua, Kueber and Williams as two of the victims did not see him with a gun, and the third victim only saw him with a gun as he ran from the showroom and he did not point the gun at that victim. The case of *People v. Granado* (1996) 49 Cal.App.4th 317 (*Granado*) disposes of this contention.[3]

As the court stated in *Granado*, the term "use of a firearm" is not limited in "its application to situations where the gun is pointed at the victim or the defendant issues explicit threats of harm." (*Granado, supra*, 49 Cal.App.4th at p. 322.) Moreover, "a gun may be used '"in the commission of'" a given crime even if the use is directed toward someone other than the victim of that crime." (*Id.* at pp. 329-330.) Thus, "a defendant uses a gun 'in the commission' of a crime when he or she employs the gun to neutralize the victim's companions, bystanders, or other persons who might otherwise

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[3] *Granado* concerned the interpretation of section 12022.5, subdivision (a)(1), which provides for an enhancement to be imposed on "any person who personally uses a firearm in the commission or attempted commission of a felony. . . ."

interfere with the successful completion of the crime." (*Id.* at p. 330.)

Here, although two of the victims did not see Jones display a gun and the gun was not pointed at the third victim, there is substantial evidence that Jones used the gun to control French, Phillips and Hughes. These individuals could have aided Bazaldua, Kueber and Williams. Accordingly, there is substantial evidence to support the section 12022.53, subdivision (b) enhancements.

C. *Instruction under CALJIC No. 17.41.1*

Jones contends the court erred by instructing the jury under CALJIC No. 17.41.1. Jones asserts that these instructions impermissibly infringed on his federal and state constitutional rights to a fair trial by eroding the privacy and secrecy of jury deliberations, thereby chilling the free exchange of jurors' views and their independent judgment, and pressuring minority jurors to acquiesce in the views of the majority jurors. We reject these contentions.

The court instructed the jury under CALJIC No. 17.41.1 as follows:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any

> other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The issue of the constitutionality of CALJIC No. 17.41.1 was decided by the California Supreme Court on July 18, 2002, in the case *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*).) In that case, the court concluded that CALJIC No. 17.41.1 "does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict. . . ." (*Id.* at pp. 439-440.) Nevertheless, the high court also held that "CALJIC No. 17.41.1 should not be given in the future. The law does not require that the jury be instructed in these terms, and the instruction, by specifying at the outset of deliberations that a juror has the obligation to police the reasoning and decisionmaking of other jurors, creates a risk of unnecessary intrusion on the deliberative process." (*Id.* at p. 441.)

In rejecting the defendant's assertion that CALJIC No. 17.41.1 violated his right to a trial by jury and a unanimous jury verdict by impairing the free and private exchange of views by jurors in the deliberation process, the court stated that "although the secrecy of deliberations is an important element of our jury system," (*Engelman, supra*, 28 Cal.4th at p. 443), there is no authority for the proposition that "the federal constitutional right to trial by jury (or parallel provisions of the California Constitution, or other state law) requires absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror

misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Ibid.*) "[A] juror is required to apply the law as instructed by the court, and refusal to do so *during deliberations* may constitute a ground for discharge of the juror. [Citation.] Refusal to deliberate also may subject a juror to discharge [citation], even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations-if, after *reasonable inquiry* by the court, it appears 'as a "demonstrable reality" that the juror is unable or unwilling to deliberate.' [Citation.]" (*Id.* at pp. 443-444.)

The court also rejected the defendant's claim that instructing the jury under CALJIC No. 17.41.1 violated his right to a unanimous jury verdict and to the independent and impartial decision of each juror because "[t]he instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror." (*Engelman, supra*, 28 Cal.4th at p. 444.].) The court also found that the giving of CALJIC No. 17.41.1 was not overly coercive to deadlocked juries or a holdout juror, as it "is not directed at a deadlocked jury and does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment. The instruction does not suggest that a doubt may be unreasonable if not shared by a majority of the jurors, nor does it direct that the jury's

deliberations include such an extraneous factor." (*Engelman, supra*, 28 Cal.4th at pp. 444-445.)

However, after rejecting the defendant's constitutional claims, the high court went on to criticize CALJIC No. 17.41.1 as unnecessary and creating at least a *risk* of the type of problems the defendant highlighted: "There is risk that the instruction will be misunderstood or that it will be used by one juror as a tool for browbeating other jurors. The instruction is given immediately before the jury withdraws to commence its deliberations and, unlike other instructions cautioning the jury against misconduct such as visiting the scene of the crime or consulting press accounts, it focuses on the process of deliberation itself. We believe it is inadvisable and unnecessary for a trial court to create the risk of intrusion upon the secrecy of deliberations or of an adverse impact upon the course of deliberations by giving such an instruction." (*Engelman, supra*, 28 Cal.4th at p. 445.) The court also noted that juries are already given adequate instructions that guard against juror misconduct and explain the jury's duty to follow the law as given in the instructions. (*Id.* at pp. 448-449.) Therefore, the court concluded that while CALJIC No. 17.41.1 was not constitutionally infirm, courts were directed not to instruct juries with this provision in the future. (*Engelman, supra*, 28 Cal.4th at p. 449.)

Based upon this direction from the California Supreme Court, we must also conclude that CALJIC No. 17.41.1 is not constitutionally infirm. The court thus

did not err in instructing the jury under this provision in the instant case.

Further, even if it had been improper for the court to instruct the jury under CALJIC No. 17.41.1, any such error would have been harmless beyond a reasonable doubt. There is no evidence there was a deadlock or any holdout jurors. There is no evidence that any juror refused to follow the law. Further, the evidence of Jones's guilt, given his identification by several eyewitnesses, was overwhelming. Because there is no evidence "that CALJIC No. 17.41.1 had any effect on this case whatsoever" (*People v. Brown* (2001) 91 Cal.App.4th 256, 271), any error by the court in instructing the jury under CALJIC No. 17.41.1 did not constitute reversible error. (*People v. Brown, supra*, 91 Cal.App.4th at p. 271; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.)

D. *Court's Decision to Impose Consecutive Sentences upon Jones and Penton*

Jones and Penton both contend that because the record indicates that the court did not know that it had the discretion in this case to sentence them concurrently rather than consecutively, the matter must be remanded to the superior court to allow the trial judge to exercise such discretion. We reject these contentions as the record demonstrates that the court did exercise its discretion in sentencing Jones and Penton, but elected to impose consecutive, not concurrent sentences.

1. *Discretion to impose concurrent sentence as to Jones*

a. *Standard of review*

We review a court's discretionary sentencing decisions under the abuse of discretion standard. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) This discretion is only abused if the court's decision "'exceeds the bounds of reason, all of the circumstances being considered.'" (*Ibid.*)

b. *Analysis*

In *People v. Hendrix* (1997) 16 Cal.4th 508, 514-515, the California Supreme Court held that courts have the discretion to impose consecutive or concurrent sentences where a defendant has two or more prior felony convictions and commits serious or violent felonies against multiple victims on the same occasion as to the present crimes. Here, it is undisputed that all of the charged offenses occurred on the same occasion, giving the court the discretion to impose concurrent or consecutive sentences against Jones and Penton.

Moreover, in exercising this sentencing discretion, the court must state reasons for its decision on the record. (*People v. Champion* (1995) 9 Cal.4th 879, 934; § 1170, subd. (c).) However, in making such a statement, the court need not state facts, only reasons for the sentencing choice. (*People v. Granado* (1994) 22 Cal.App.4th 194, 203.) "'[S]o long as the record discloses facts which adequately support those reasons, the trial court's choice will be presumed to have been

made on the basis of those facts. . . .' [Citation.] The presumption is rebuttable." (*Ibid.*)

Here, Jones and Penton assert that the record is unclear as to whether the court understood that it had the discretion to sentence Penton and Jones concurrently or consecutively, and thus this case must be remanded to allow the court to consider whether concurrent or consecutive sentences are warranted. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 137-141 [remand required where record failed to disclose whether court understood it had discretion to impose concurrent terms].)

The record adequately demonstrates, however, that the court understood that it had the discretion to impose concurrent sentences on Jones and Penton but, based upon the circumstances of the crimes, chose to impose consecutive sentences. In sentencing Jones the court stated:

> "[T]his case had probably the most potential for harm for a group of people I have ever seen in a robbery. Had it not been for the courage of the one employee to escape, God knows what would have happened to these people. Mr. Penton, Mr. Jones were armed. It is obvious there was somebody else that was assisting them in the commission of this offense. This was a set up. Whether it was somebody inside or from the outside, I know not. But this was set up. These people were bound. And there's no telling what the ultimate result of

> this robbery could have been if the one employee did not escape.
>
> "*All of the victims are separate and distinct in this case, justifying the court in imposing consecutive sentencing.*" (Italics added.)
>
> In sentencing Penton, the court stated:
>
> "Counts two, three, four, five[,] six, seven, and eight all represent different victims, different locations, *justifying the utilization of consecutive sentencing.* It goes without saying that this crime is one of the most violent, it involved numerous victims, they are not individually capable of being lumped together, they are separate and distinct, including the two minor children whose future having been part of this is certainly in doubt in terms of their emotional well-being.
>
> "At any rate, the court *specifically elects to impose consecutive sentencing*. . . ." (Italics added.)

The court's use of the words "justifying" and "elects" demonstrates that the court understood that it had the discretion not to impose a consecutive sentence. The court would not have used these words if it believed it was *required* to impose consecutive sentences in this case. Further, the court's description of the serious and violent nature of the crimes, and the fact there were multiple victims, including two minor children, would not have been necessary if the court believed it was required to impose consecutive sentences. Thus, there is no basis for a remand for

resentencing for the court to exercise its discretion to impose consecutive or concurrent terms.[4] The court understood its discretion, exercised such discretion, and found, based upon the seriousness of the crime and the multiple victims, that consecutive sentences were warranted.[5]

E. *Sentence in San Bernardino Case*

Penton contends that the court improperly imposed a full term 32-month consecutive sentence in San Bernardino County case No. FV1010921, instead of one-third the midterm. The People agree and request that we order the judgment modified to reflect the correct sentence and also that he is awarded presentence custody credits in that case.

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[4] The People also argue that the court's sentence as to Penton was appropriate as it found it did *not* have the discretion to impose concurrent terms because his crimes were not committed on the same occasion and from the same set of operative facts. However, the court's comments concerning the different victims and different locations was not a statement explaining that Penton could not be given a concurrent sentence. Rather, the court's statements were concerning the multiple offenses and the seriousness of those offenses, thereby justifying consecutive sentences. It is clear that because there was "a close temporal and spatial proximity between the acts underlying the current convictions," they occurred on the "same occasion" and could support consecutive sentencing. (*People v. Deloza* (1998) 18 Cal.4th 585, 595.)

[5] This also disposes of Jones's contention that his trial counsel was ineffective in failing to object to the consecutive sentence imposed against him.

Section 1170.1, subdivision (a) provides in part:

> "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, *whether in the same proceeding or court or in different proceedings or courts*, and whether by judgment rendered by the same or by a different court, *and a consecutive term of imprisonment is imposed under Sections 669 and 1170*, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. *The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.*" (Italics added.)

Prior to the trial of this matter, Penton pleaded guilty in San Bernardino County case No. FV1010921 to a charge of possession of marijuana for sale. Penton was sentenced in that case to 32 months in prison. However, when the court sentenced Penton in this matter, the court simply ruled that the sentence in the

present cases was to run "consecutive to the term [Penton] is currently sentenced to receive in [San Bernardino County case No.] FV1010921." The court did not reduce the sentence in the San Bernardino case to one-third the midterm as required by section 1170.1, subdivision (a). Further, the court failed to give credit for his presentence custody in that case. (See *People v. Lacebal* (1991) 233 Cal.App.3d 1061, 1065.) Accordingly, as the People concede, Penton's sentence in San Bernardino County case No. FV1010921 must be modified and credit awarded for his presentence custody in that case.

F. *Penton's Motion to Dismiss a Strike*

Penton contends that because the court was unaware it had the discretion to dismiss a strike allegation, this matter must be remanded in order to allow the court to exercise such discretion. We reject this contention.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the California Supreme Court held that a trial court retains the power to dismiss a strike on its own motion in the interests of justice. (*Id.* at p. 504.) The high court further held that where the record is unclear as to whether the trial court understood it had such discretion, remand for an exercise of discretion was not necessary where "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Id.* at p. 530, fn. 13.)

Here, Penton filed a written motion requesting that the court dismiss a strike. At sentencing, the court indicated that it had considered Penton's motion. The parties then argued the merits of Penton's motion. However, when the court imposed Penton's sentence, it did not specifically indicate that it was denying his motion.

On this record, we conclude that the court did understand that it had the power to dismiss a strike, but simply rejected Penton's motion. The court acknowledged that it had considered the motion and listened to arguments of counsel. There was no comment by the court or the People indicating a belief that the court did not have the discretion to dismiss a strike. On the contrary, the court's discussion of the sophistication of the crimes, the threat of violence, and the impact upon the victims in sentencing Penton demonstrates that the court did understand it possessed the discretion to strike a strike, but simply refused to exercise it. Moreover, it is clear that the court, by its comments concerning the nature of the crimes, would not have dismissed a strike in any event. Accordingly, there is no basis for a remand to allow the court to exercise its discretion to strike a strike.

II. *The Petition*

Accompanying this appeal is a petition for writ of habeas corpus filed by the defendant Jones in January 2002. In the petition, Jones contends that the judgment must be reversed because he rejected a plea offer

based upon incorrect information given by the court and counsel concerning the maximum term he could receive upon conviction if he went to trial. Specifically, Jones asserts that at the time of the plea offer he was advised that he faced a possible maximum term of 24 years in prison and that he was actually sentenced to a term of 37 years in prison.

However, the record reflects that at the time of the plea offer, Jones was charged with two counts of robbery, four counts of attempted robbery, and two counts of false imprisonment by violence, menace, fraud or deceit, which would only subject him to a term of 24 years. It was only *after* he rejected the plea offer that the People amended the information to change one of the robbery counts to attempted robbery, and, allege as to all counts that he personally used a firearm. The amended information thus made Jones subject to a term of 37 years in prison. Accordingly, based upon these facts, the petition is summarily denied as not having made a prima facie showing for habeas corpus relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

DISPOSITION

The court is instructed to modify the judgment as to defendant Penton to reflect a sentence of one third the midterm in San Bernardino County case No. FV1010921. The court is ordered to correct the abstract of judgment and to forward a corrected copy to the

Department of Corrections. In all other respects the judgments are affirmed. The petition is denied.

/s/ Nares
NARES, J.

WE CONCUR:

/s/ Kremer
KREMER, P.J.

/s/ Benke
BENKE, J.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 40
HON. WILLIAM D. MUDD, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. ANTHONY PENTON, EDWARD JONES, DEFENDANTS.	CASE NO. SCD147553

REPORTER'S TRANSCRIPT

JULY 23, 2001

APPEARANCES:

FOR THE PLAINTIFF: PAUL J. PFINGST, ESQ.
DISTRICT ATTORNEY
BY: DENNIS PANISH, ESQ.
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FOR THE
DEFENDANT ANTHONY PENTON:

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92101

ROBERT F. STARK, CSR #5104
OFFICIAL COURT REPORTER
SAN DIEGO, CALIFORNIA
92101

* * *

[712] THE COURT: NO.

ONE OF THE TRULY UNIQUE THINGS ABOUT PEOPLE WHO TESTIFY UNDER OATH, WHAT THEY SAY, BRINGS TO MIND HOW GREAT IT WOULD BE IF WE PUT ALL THESE FOLKS IN THE SAME ROOM AND THEY TOLD THEIR STORIES. SEE, THE PROBLEM, MR. PENTON, IS THAT IN THE MATTER OF EDWARD JONES AND HIS MOTION FOR A NEW TRIAL, HIS WIFE LATANIA TESTIFIED, LATANIA JONES, GIVING MR. PENTON AN ALIBI, I MEAN GIVING MR. EDWARD JONES AN ALIBI. BUT A LADY BY THE NAME OF JOYCE THOMAS, WHO IS LATANIA JONES' SISTER, TOOK THE STAND AND UNDER OATH TOLD US A NUMBER OF THINGS. SURPRISE. NUMBER ONE, SHE WAS YOUR GIRLFRIEND AT THIS POINT IN TIME, THAT YOU KNEW EDWARD JONES THROUGH HER, THAT YOU WOULD LET HER USE YOUR RENTAL CARS, THAT ON THE DAY THAT MR. JONES WAS ARRESTED DRIVING YOUR

RENTAL CAR, SHE HAD DRIVEN DOWN FROM THE LOS ANGELES AREA WHERE YOU WERE AND HAD LOANED THE CAR TO MR. JONES, WASN'T PICKED UP AT A 7-ELEVEN, IT WASN'T ANYTHING NEAR WHAT YOU'VE SIGNED A DECLARATION UNDER PENALTY OF PERJURY.

[713] BUT THE MOST TELLING THING, MR. PENTON, AND I WANT YOU TO HEAR THIS SO YOU UNDERSTAND, SHE TESTIFIED THAT SHE CALLED YOU TO LET YOU KNOW THAT MR. JONES HAD BEEN ARRESTED IN YOUR CAR.

DEFENDANT PENTON: AND I WAS IN LOS ANGELES?

THE COURT: I HAVE NO IDEA EXACTLY WHERE YOU WERE.

THE BOTTOM LINE, MR. PENTON, IS THAT ALL OF THIS STUFF WAS AVAILABLE TO YOU HAD YOU WANTED TO PUT IT ON, JUST LIKE IT WAS TO MR. JONES IF HE HAD WANTED TO PUT IT ON.

THE CONFLICTS WERE INCREDIBLE. YOUR STORY ABSOLUTELY MAKES NO SENSE. YOU WERE IDENTIFIED BY THE WITNESSES IN THIS PROCEEDING. THERE IS NO UNTIMELY FAILURE TO DISCLOSE. I MADE IT QUITE CLEAR THAT THE ONLY WAY THAT YOUR REPORTING THE CAR STOLEN WAS GOING TO GET IN WAS IF YOU TESTIFIED. AND MY REVIEW OF THE POLICE REPORTS CLEARLY SHOW, NUMBER ONE, THE

POLICE DIDN'T BELIEVE YOU; AND, NUMBER TWO, THE TIME LINE SHOWS THAT MR. EDWARD JONES' ACTIVITIES IN YOUR CAR OCCURRED BEFORE YOU REPORTED IT STOLEN.

SO HOW MUCH WEIGHT THE JURY WOULD HAVE GIVEN, I DON'T KNOW. WHETHER THE PROSECUTION EVER WOULD HAVE FOUND LATANIA JONES AND HER SISTER JOYCE THOMAS, I HAVE NO IDEA. BUT ALL OF THESE FOLKS CONVENIENTLY COME OUT OF THE WOODWORK AFTER THE FACT. AND, FRANKLY, THERE'S NO BASIS FOR A NEW TRIAL IN THIS MATTER. THERE'S NO HIDE THE BALL. ALL THIS STUFF COULD HAVE COME IN IF MR. PENTON HAD ELECTED TO TAKE THE STAND. I THINK HIS LAWYER EXERCISED AN ENORMOUS AMOUNT OF GOOD JUDGMENT IN KEEPING HIM OFF OF THE STAND. IT'S VERY CLEAR THAT THIS COURT HAS HEARD BETWEEN – AT LEAST THREE DIFFERENT WITNESSES UNDER [714] OATH, TAKING MR. PENTON'S DECLARATION UNDER OATH, AT LEAST TWO COMPLETELY DIAMETRICALLY OPPOSED VERSIONS.

ONE OTHER THING YOU OUGHT TO KNOW, MR. PENTON. ALL THIS CAME AROUND TO THE FACT THAT THE CAR THAT MISS THOMAS HAD BORROWED FROM YOU HAD THE BAG IN IT THAT EVENTUALLY HAD THE GUNS AND THE TAPE IN IT.

SO, AT ANY RATE, THE MOTION FOR A NEW TRIAL IS DENIED.

MR. COX: YOUR HONOR, I WOULD SAY THAT WE HAD SOMEWHAT OF A PREVIEW OF THAT INFORMATION FROM THE COUNSEL THAT PUT ON THE EVIDENCE. AND AS FAR AS WE COULD FIND OUT, IT WAS NOT A SHRED OF TRUTH IN IT.

THE COURT: WELL, THERE MAY NOT HAVE BEEN. AS A MATTER OF FACT, THE COURT FOUND IT NOT TO BE CREDIBLE, AS I FOUND YOUR CLIENT'S STATEMENT NOT CREDIBLE. THIS STUFF COULD HAVE ALL BEEN PRESENTED TO THE JURY IF EITHER OR BOTH OF THESE GENTLEMEN HAD DECIDED TO DO IT.

THE COURT IN THIS MATTER HAS RECEIVED AND READ AND THIRTEEN PAGES LONG, WITH THE DATE OF DECEMBER 12TH OF 2000. THE PROBATION OFFICER IN THE CASE, CAROLINE LEWINSKY, IS CURRENTLY ILL; BUT SHE PHONED IN A CUSTODY UPDATE OF 405 ACTUAL DAYS, 60 2933.1 CREDITS, FOR A TOTAL OF 465 DAYS. HOWEVER, SHE FURTHER REMINDED US THAT THE DEFENDANT IS CURRENTLY SERVING ANOTHER SENTENCE AND IS NOT ENTITLED TO ANY CREDITS.

IN ADDITION TO THAT, UNDER SEPARATE COVER MR. COX HAS FILED A STATEMENT IBN MITIGATION AND A REQUEST TO STRIKE THE DEFENDANT'S STRIKE, POINTS AND AUTHORITIES

IN SUPPORT THEREOF. MR. PANISH HAS FILED A SENTENCING MEMORANDUM IN SUPPORT OF THE [715] PEOPLE'S POSITION ON SENTENCING.

AND, FINALLY, THE PROBATION OFFICER IN THIS MATTER HAS BROUGHT TO THE COURT'S ATTENTION A MISTAKE IN THE REPORT. IT'S AT PAGE 10, PARAGRAPH 9, WHICH IS THE LAST PARAGRAPH BEFORE THE WORD EVALUATION, WHERE IT SAYS IT IS RECOMMENDED THIS SENTENCE RUN CONCURRENT WITH THE PRESENT PRISON SENTENCE HE'S NOW SERVING IN FV1010921. THE PROBATION OFFICER REMINDED THE COURT THAT SINCE THERE IS A STRIKE INVOLVED, THE SENTENCE MUST BY LAW BE SERVED CONSECUTIVELY.

MR, COX, ANY COMMENTS?

OH, IN ADDITION TO THAT, I HAVE RECEIVED A LETTER FROM HIS MOTHER, NELLIE SANDOVAL, AND A LETTER FROM HIS SISTER, PATRICIA PERRY DASH FRAIRE, F-R-A-I-R-E.

MR. COX.

MR. COX: YOUR HONOR, WE ARE REQUESTING THAT THE COURT STRIKE A STRIKE IN THIS MATTER FOR THE REASONS THAT WE'VE ALREADY PUT IN OUR MEMORANDUM. AND I BELIEVE IF THE COURT DOESN'T STRIKE A STRIKE, THE SENTENCE IS PRETTY MUCH SET. SO THAT WOULD BE MY REQUEST TO FIND OUT

WHETHER YOU WERE INTENDING TO STRIKE A STRIKE IN THIS MATTER.

THE COURT: ALL RIGHT.

MR. PANISH.

MR. PANISH: YOUR HONOR, WE'RE OPPOSED TO THE COURT STRIKING A STRIKE IN THIS CASE. THIS IS NOT THE APPROPRIATE TYPE OF CASE TO STRIKE IT. FIRST OF ALL, THE PRIOR IS VIOLENT. IT'S A ROBBERY WITH A GUN, AS IS THE CONDUCT IN THIS CASE. AND SO THIS IS NOT THE CASE THAT THE COURT WOULD OR I THINK SHOULD IN THE INTEREST OF JUSTICE STRIKE THE STRIKE. HE SHOULD BE [716] SENTENCED FOR WHAT HE DID AND FOR THE STRIKE PRIOR. SO WE ARE OPPOSED TO THE COURT STRIKING THE STRIKE.

THE COURT: MR. PENTON, IS THERE ANYTHING YOU WOULD LIKE TO SAY, SIR?

DEFENDANT PENTON: NO. NOT AT ALL.

THE COURT: ALL RIGHT.

WELL, MR. PENTON, I'M GOING TO TELL YOU BASICALLY WHAT I TOLD YOUR COLLEAGUE MR. JONES. I'M ABSOLUTELY SATISFIED THAT IT'S NOT JUST THE TWO OF YOU, THAT AT LEAST ONE IF NOT MORE INDIVIDUALS WERE INVOLVED IN THIS. THIS IS A SOPHISTICATED, WELL-THOUGHT-OUT CRIMINAL ENTERPRISE. THE PROBLEM WAS THAT WHOEVER HAD THE

INFORMATION REGARDING THE SAFE DIDN'T HAVE IT RIGHT. BUT I'M ABSOLUTELY CERTAIN THAT THIS JURY DID THE RIGHT THING. I'M ABSOLUTELY CERTAIN THAT YOU PARTICIPATED IN THIS CRIME AS DID MR. JONES. AND I'M EQUALLY SATISFIED THAT OUT THERE RUNNING AROUND PERHAPS RIGHT NOW IS SOMEONE ELSE THAT ASSISTED YOU.

THE COURT WILL SET AS THE BASE COUNT COUNT ONE, THE COMPLETED AND FULLY EXECUTED ROBBERY OF ROY FRENCH, AS THE BASE COUNT. THE COURT WILL SET THE UPPER, AGGRAVATED TERM AS THE BASE TERM FOR THE FOLLOWING REASONS:

THIS CRIME INVOLVED GREAT VIOLENCE, THE THREAT OF GREAT BODILY HARM. I MEAN HAD IT NOT BEEN FOR THE FORTITUDE OF THE ONE EMPLOYEE, MR. KUEBER, WHO ESCAPED, GOD ONLY KNOWS WHAT WOULD HAVE HAPPENED TO ALL THE PEOPLE THAT WERE INVOLVED AS VICTIMS. AT ANY RATE, THE CRIME HAD THE THREAT OF EXCEPTIONALLY GREAT VIOLENCE AND GREAT BODILY HARM.

SECOND, THE MANNER IN WHICH THE CRIME WAS CARRIED OUT [717] INDICATES PLANNING, SOPHISTICATION, AND PROFESSIONALISM.

AND, FINALLY, THE DEFENDANT'S PRIOR CONVICTIONS ARE NUMEROUS AND OF INCREASING SERIOUSNESS. THE COURT DOES NOTE THAT HE HAS SERVED A PRIOR PRISON TERM FOR

ANOTHER VIOLENT ROBBERY UTILIZING A GUN AS THE BASIS FOR THE INCREASING SERIOUSNESS ALLEGATION OR CONDITION.

AT ANY RATE, THE COURT SETS FIVE YEARS, TO BE DOUBLED ON THE BASE TERM, WHICH, THEREFORE, IS TEN YEARS ON THE BASE COUNT NUMBER ONE. THE 12022.53 IS TEN YEARS CONSECUTIVE, FOR A TOTAL ON COUNT ONE OF TWENTY YEARS.

COUNTS TWO, THREE, FOUR, FIVE SIX, SEVEN, AND EIGHT ALL REPRESENT DIFFERENT VICTIMS, DIFFERENT LOCATIONS, JUSTIFYING THE UTILIZATION OF CONSECUTIVE SENTENCING. IT GOES WITHOUT SAYING THAT THIS CRIME IS ONE OF THE MOST VIOLENT, IT INVOLVED NUMEROUS VICTIMS, THEY ARE NOT INDIVIDUALLY CAPABLE OF BEING LUMPED TOGETHER, THEY ARE SEPARATE AND DISTINCT, INCLUDING THE TWO MINOR CHILDREN WHOSE FUTURE HAVING BEEN PART OF THIS IS CERTAINLY IN DOUBT IN TERMS OF THEIR EMOTIONAL WELLBEING.

AT ANY RATE, THE COURT SPECIFICALLY ELECTS TO IMPOSE CONSECUTIVE SENTENCING, WHICH MEANS ON COUNT TWO IT'S ONE-THIRD THE MID TERM OR ONE YEAR, FOUR MONTHS. ONE-THIRD THE ENHANCEMENT, THREE YEARS, FOUR MONTHS.

COUNT THREE IS THE SAME. ONE-THIRD THE MID TERM, FOUR YEARS, OR ONE YEAR,

FOUR MONTHS, PLUS ONE-THIRD THE TEN YEARS, THREE YEARS, FOUR MONTHS.

COUNT FOUR IS ONE-THIRD THE MID TERM OF FOUR YEARS, OR ONE YEAR, FOUR MONTHS, ONE-THIRD THE ENHANCEMENT, OR THREE YEARS, FOUR MONTHS.

[718] COUNT FIVE IS ONE-THIRD THE MID TERM OF FOUR YEARS, OR ONE YEAR, FOUR MONTHS, ONE-THIRD THE ALLEGATION OF TEN YEARS, OR THREE YEARS, FOUR MONTHS.

COUNT SIX IS ONE-THIRD THE MID TERM OF FOUR YEARS, WHICH IS ONE YEAR, FOUR MONTHS, ONE-THIRD THE ENHANCEMENT, WHICH IS THREE YEARS, FOUR MONTHS.

COUNT SEVEN IS ONE-THIRD THE MID TERM OF FOUR YEARS, WHICH IS ONE YEAR, FOUR MONTHS. ONE-THIRD THE 12022.5 VICARIOUS ARMING ALLEGATION, WHICH IS ONE YEAR, FOUR MONTHS.

COUNT EIGHT IS ONE-THIRD THE MID TERM OF FOUR YEARS, OR ONE YEAR, FOUR MONTHS, AND ONE-THIRD THE MID TERM OF THE VICARIOUS ARMING, WHICH IS ONE YEAR, FOUR MONTHS.

THE COURT SPECIFICALLY ELECTS TO IMPOSE THE FIRST PRISON PRIOR, SECOND PRISON PRIOR WILL NOT BE IMPOSED. THE PRIOR UNDER 667(A)(1) IS FIVE YEARS CONSECUTIVE MANDATORY.

THIS ENTIRE SENTENCE BY LAW IS TO BE CONSECUTIVE TO THE TERM THAT THE DEFENDANT IS CURRENTLY SENTENCED TO RECEIVE IN – GET THE CASE NUMBER CORRECT – FV1010921.

AS A RESULT, MR. PENTON, YOU'RE HEREBY SENTENCED TO THE DEPARTMENT OF CORRECTIONS FOR THE TOTAL TERM OF FIFTY-FOUR YEARS AND EIGHT MONTHS.

YOU'RE ENTITLED TO NO CREDITS.

THE COURT WILL SET AS THE FINE THE MAXIMUM FINE IN THE AMOUNT OF $10,000.00, MAXIMUM RESTITUTION FINE IN THE AMOUNT OF $10,000.00.

SIR, THIS SENTENCE IS BEING IMPOSED AS A RESULT OF A JURY VERDICT IN YOUR CASE. YOU HAVE A RIGHT TO APPEAL FROM THE IMPOSITION OF SENTENCE TODAY. IF YOU DESIRE TO APPEAL, YOU MUST [719] FILE A WRITTEN NOTICE OF YOUR INTENT TO APPEAL WITHIN SIXTY DAYS OF TODAY'S DATE. THE NOTICE MUST BE IN WRITING; IT MUST BE SIGNED BY YOU, YOUR ATTORNEY, OR BOTH OF YOU; AND IT MUST SPECIFY WHAT IT IS YOU'RE APPEALING FROM.

YOU'RE ENTITLED TO A COPY OF THE TRANSCRIPT OF THESE PROCEEDINGS WITHOUT COST TO YOU.

YOU'RE ENTITLED TO A COURT-APPOINTED LAWYER IF YOU'RE UNABLE TO RETAIN COUNSEL OF YOUR OWN.

YOUR APPEAL PAPERS MUST BE FILED IN THE SUPERIOR COURT AND NOT IN THE COURT OF APPEALS.

MR. COX, WILL YOU ASSIST MR. PENTON IN THE EVENT HE ELECTS TO APPEAL?

MR. COX: YOUR HONOR, WE WILL FILE PAPERWORK.

THE COURT: ALL RIGHT. THAT WILL BE THE ORDER.

MR. PANISH: YOUR HONOR, ONE OTHER THING. DID THE COURT SET RESTITUTION AT THE LAST HEARING AT $12,500.00, WITH $10,510.00 TO THE HUGHES FAMILY?

THE COURT: THAT'S CORRECT. IT WILL BE THE SAME ORDER BECAUSE IT'S JOINT AND SEVERAL AS TO MR. PENTON. IT WILL BE JOINT AND SEVERAL AS TO MR, JONES AS WELL.

ALL RIGHT.

MR. PANISH: THANK YOU.

– – oOo – –

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Robbery, in violation of Penal Code section 211, as charged in Count One of the Amended Information. (VICTIM: ROY FRENCH.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count Two of the Amended Information. (VICTIM: SEAN HUGHES.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count One of the Amended Information. (VICTIM: SHANNON WILLIAMS.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count One of the Amended Information. (VICTIM: ROGER PHILLIPS.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count One of the Amended Information. (VICTIM: RAMON BALZUDA.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count One of the Amended Information. (VICTIM: ROBERT KUEBER.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count One of the Amended Information. (VICTIM: KIRRAN HUGHES.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ANTHONY PENTON, Defendant(s).	Department ___ Case No. SCD147553 - 01 D.A. No. AAA710 - 01 **VERDICT**

We, the jury in the above entitled cause, find the defendant, ANTHONY PENTON, Guilty
[Guilty] [Not Guilty]
of the crime of Attempt Robbery, in violation of Penal Code sections 664 and 211, as charged in Count One of the Amended Information. (VICTIM: ELISE HUGHES.)

And we further find that in the commission of the. above offense, the said defendant Did
[Did] [Did Not]
personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b).

Dated 11-8-00 #11
Foreperson

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 40
HON. WILLIAM D. MUDD, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. ANTHONY PENTON, EDWARD JONES, DEFENDANTS.	CASE NO. SCD147553

REPORTER'S TRANSCRIPT

NOVEMBER 1, 2000

APPEARANCES:

FOR THE PLAINTIFF: PAUL J. PFINGST, ESQ.
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BY: DENNIS PANISH, ESQ.
DEPUTY DISTRICT ATTORNEY
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SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT ANTHONY PENTON:	PAUL W. BLAKE, JR. ESQ. 402 WEST BROADWAY, SUITE 400 SAN DIEGO, CALIFORNIA 92101
FOR THE DEFENDANT EDWARD JONES:	MICHAEL B. TAGGART, ESQ. 5965 SEVERIN DRIVE, SUITE 239 LAS MESA, CALIFORNIA 91942
	ROBERT F. STARK, CSR #5104 OFFICIAL COURT REPORTER SAN DIEGO, CALIFORNIA 92101

* * *

[8] THE COURT: MR. PANISH, I NEED AN OFFER OF PROOF TO FULLY UNDERSTAND THE SITUATION. AT WHAT POINT IN TIME VIS-A-VIS THE ARREST OF MR. JONES IN THE AUTOMOBILE WAS THE REPORT FILED WITH THE RENT-A-CAR COMPANY?

MR. PANISH: THE SAME DAY MR. PENTON CALLED THE RENTAL CAR AGENCY. AND THE DAY OF THE ARREST WAS – I BELIEVE IT WAS THREE DAYS LATER. AFTER THE ROBBERY OCCURRED, THREE DAYS LATER MR. JONES WAS STOPPED. THAT SAME DAY OF THE ARREST OF MR. JONES MR. PENTON CALLED THE RENTAL CAR AGENCY, SPOKE WITH A FEMALE THERE,

AND SAID MY CAR WAS STOLEN. SHE SAID, WELL, WE CAN'T DO ANYTHING ABOUT IT; CALL THE POLICE.

THE COURT: AND IS THERE ANY INDICATION THAT A POLICE REPORT WAS MADE OR THAT A REPORT WAS MADE TO THE POLICE?

MR. PANISh: YOUR HONOR, I DON'T HAVE ANY INFORMATION THAT AN ACTUAL POLICE REPORT WAS TAKEN. THERE COULD HAVE BEEN. I DON'T KNOW.

THE COURT: ALL RIGHT.

IT AMOUNTS TO A HEARSAY DECLARATION. THE TIMING OF IT IS UNIQUE ONLY IN THAT IT PUTS IN ISSUE THE CREDIBILITY OF MR. PENTON WHO OBVIOUSLY WOULD BE SUBJECT TO CROSS-EXAMINATION IF HE [9] TOOK THE STAND. WITHOUT IT THE JURY IS NOT GOING TO BE EXPOSED TO HIS POTENTIAL INCRIMINATING RECORD WHICH IS VERY INCRIMINATING. SO AT THIS POINT IT APPEARS TO BE DIRECT HEARSAY, AND THE COURT WILL NOT ALLOW REFERENCE TO IT EITHER IN THE PEOPLE'S OPENING STATEMENT, THE DEFENSE' OPENING STATEMENT. IF MR. PENTON WANTS TO GET THAT IN ISSUE, HE CAN DO SO BY TAKING THE STAND.

ANYTHING ELSE, MR. PANISH?

MR. PANISH: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

WHAT ABOUT THE USE OF PRIORS IF EITHER OR BOTH OF THESE FELLOWS ELECT TO TAKE THE STAND?

MR. BLAKE: YOUR HONOR, WITH RESPECT TO MR. PENTON, I WOULD BE MOVING TO EXCLUDE THE PRIORS SHOULD MR. PENTON ELECT TO TAKE THE STAND.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANTHONY PENTON, dob 10/10/66; EDWARD JONES, dob 04/22/74; Defendants	CT No. SCD147553 DA No. AAA710 AMENDED INFORMATION (Filed Nov. 1, 2000)

CHARGE SUMMARY

Count	Charge	Issue Type	Sentence Range	Special Allegations	Allegation Effect
1	PC211	Felony	2-3-5		
	PENTON, ANTHONY			PC12022.53(b)	+10 Yrs
	JONES, EDWARD			PC12022.53(b)	+10 Yrs
2	PC664\PC211	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.53(b)	+10 Yrs
	JONES, EDWARD			PC12022.53(b)	+10 Yrs
3	PC664\PC211	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.53(b)	+10 Yrs
	JONES, EDWARD			PC12022.53(b)	+10 Yrs
4	PC664\PC211	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.53(b)	+10 Yrs
	JONES, EDWARD			PC12022.53(b)	+10 Yrs
5	PC664\PC211	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.53(b)	+10 Yrs
	JONES, EDWARD			PC12022.53(b)	+10 Yrs
6	PC664\PC211	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.53(b)	+10 Yrs
	JONES, EDWARD			PC12022.53(b)	+10 Yrs
7	PC236\237(a)	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.5(a)(1)	+3-4-10
	JONES, EDWARD			~~PC12022.53(b)~~ [PC12022.5(a)(1)]	~~+10 Yrs~~
8	PC236\237(a)	Felony	16-2-3		
	PENTON, ANTHONY			PC12022.5(a)(1)	+3-4-10
	JONES, EDWARD			~~PC12022.53(b)~~ [PC12022.5(a)(1)] [Amended by interview on 11-7-20 Refusal]	~~+10 Yrs~~

PC667(b) thru (i) and PC1170.12 “THREE STRIKES LAW”

The District Attorney of the County of San Diego, State of California, accuses the Defendant(s) of committing, in the County of San Diego, State of California, the following crime(s):

CHARGES

COUNT 1 – ROBBERY

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully and by means of force and fear take personal property from the person, possession and immediate presence of ROY FRENCH, in violation of PENAL CODE SECTION 211.

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

COUNT 2 – ATTEMPT ROBBERY

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully and by means of force and fear attempt to take personal property from the person, possession and immediate presence of SEAN HUGHES, in violation of

PENIAL CODE SECTION 211 and PENAL CODE SECTION 664.

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

COUNT 3 – ATTEMPT ROBBERY

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully and by means of force and fear attempt to take personal property from the person, possession and immediate presence of SHANNON WILLIAMS, in violation of PENAL CODE SECTION 211 and PENAL CODE SECTION 664.

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

COUNT 4 – ATTEMPT ROBBERY

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully and by means of force and fear attempt to take personal property from the person, possession and immediate presence of ROGER PHILLIPS, in violation of PENAL CODE SECTION 211 and PENAL CODE SECTION 664.

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, ANTHONY PENTON, personally used a firearm, to wit: handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

COUNT 5 – ATTEMPT ROBBERY

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully and by means of force and fear attempt to take personal property from the person, possession and immediate presence of RAMON BALZUDA, in violation of PENAL CODE SECTION 211 and PENAL CODE SECTION 664.

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

COUNT 6 – ATTEMPT ROBBERY

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully and by means of force and fear attempt to take personal property from the person, possession and immediate presence of ROBERT KUEBER, in violation of PENAL CODE SECTION 211 and PENAL CODE SECTION 664,

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.53(b).

COUNT 7 – FALSE IMPRISONMENT BY VIOLENCE, MENACE, FRAUD, DECEIT

On or about June 26, 1999, ANTHONY PENTON and EDWARD JONES did unlawfully violate the personal liberty of KIRRAN HUGHES, said violation being effected by violence, menace, fraud and

deceit, in violation of PENAL CODE SECTIONS 236 AND 237(a).

And it is further alleged that in the commission and attempted commission of the above offense, the said defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.5(a)(1).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION ~~12022.53(b)~~. [12022.5(a)(1)]

COUNT 8 – FALSE IMPRISONMENT BY VIOLENCE, MENACE, FRAUD, DECEIT

On or about June 26 1999, ANTHONY PENTON and EDWARD JONES did unlawfully violate the personal liberty of ELISE HUGHES, said violation being effected by violence, menace, fraud and deceit, in violation of PENAL CODE SECTIONS 236 AND 237(a).

And it is further alleged that in the commission and attempted commission of the above offense, the said defendant, ANTHONY PENTON, personally used a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION 12022.5(a)(1).

And it is further alleged that in the commission and attempted commission of the above offense, the defendant, EDWARD JONES, personally used

a firearm, to wit: a handgun, within the meaning of PENAL CODE SECTION ~~12022.53(b)~~. [12022.5(a)(1)]

PRIORS

ANTHONY PENTON:

FIRST PRISON PRIOR

And it is further alleged that said defendant, ANTHONY PENTON served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge	Date of Conviction	Court Number
HS11350(a)	11/12/1986	A915909

Court	County	State
Superior	Los Angeles	CA

SECOND PRISON PRIOR

And it is further alleged that said defendant, ANTHONY PENTON served separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he

has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge	Date of Conviction	Court Number
PC211	05/12/1988	A920446

Court	County	State
Superior	Los Angeles	CA

ANTHONY PENTON:

FIRST SERIOUS FELONY PRIOR

And it is further alleged that said defendant, ANTHONY PENTON, was convicted of the following serious felony(ies), separately brought and tried, which under California law is punishable by imprisonment in state prison, within the meaning of PENAL CODE SECTIONS 667(a)(1), 668, AND 1192.7(c).

Charge	Date of Conviction	Court Number
PC211	05/12/1988	A920446

Court	County	State
Superior	Los Angeles	CA

STRIKE PRIOR(S)

And it is further alleged pursuant to Penal Code sections 667(b) through (i), 1170.12, and 668 that the defendant, ANTHONY PENTON, has suffered

the following prior conviction(s) and juvenile adjudication(s), which are now serious or violent felonies under California law whether committed in California or elsewhere.

Charge	Date of Conviction	Court Number
PC211	05/12/1988	A920446

Court	County	State
Superior	Los Angeles	CA

EDWARD JONES:

PROBATION DENIAL PRIORS

And it is further alleged that said defendant, EDWARD JONES, was previously convicted twice or more in this state of a felony, and in any other place of a public offense which if committed in this state would be punished as a felony, within the meaning of PENAL CODE SECTION 1203(e)(4).

Charge	Date of Conviction	Court Number
HS11351.5	10/11/1995	SCD114153
PC12021(a)(1)	05/01/1997	LA076468
PC12021(a)(1)	07/13/1999	SCD146141
PC4573.8	04/07/2000	SCS147831

Court	County	State
Superior Court	San Diego	CA
Superior Court	Los Angeles	CA
Superior Court	San Diego	CA
Superior Court	San Diego	CA

EDWARD JONES:

FIRST PRISON PRIOR

And it is further alleged that said defendant, EDWARD JONES served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge	Date of Conviction	Court Number
HS11351.5	10/11/1995	SCD114153

Court	County	State
Superior Court	San Diego	CA

SECOND PRISON PRIOR

And it is further alleged that said defendant, EDWARD JONES served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge	Date of Conviction	Court Number
PC12021(a)(1)	05/01/1997	LA076468

Court	County	State
Superior Court	Los Angeles	CA

THIRD PRISON PRIOR

And it is further alleged that said defendant, EDWARD JONES served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prisons custody and free of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge	Date of Conviction	Court Number
PC12021(a)(1)	07/13/1999	SCD146141

Court	County	State
Superior Court	San Diego	CA

EDWARD JONES:

FOURTH PRISON PRIOR

And it is further alleged that said defendant, EDWARD JONES served a separate prison term for such offense(s), which under California law is punishable by imprisonment in state prison whether in California or elsewhere, and that he has not remained free of prison custody and free

of the commission of an offense resulting in a felony(ies) conviction for five years subsequent to his release from prison for the felony(ies) below, within the meaning of PENAL CODE SECTION 667.5(b) AND 668.

Charge	Date of Conviction	Court Number
PC4573.8	04/07/2000	SC5147831

Court	County	State
Superior Court	San Diego	CA

THIS INFORMATION, NUMBERED SCD147553, CONSISTS OF 8 COUNTS.

Paul J. Pfingst
District Attorney
County of San Diego
State of California
by:

1 November 2000
Date

/s/ [Illegible]
Deputy District Attorney

DECLARATION OF DAWN CHILDERS

I, DAWN CHILDERS, declare:

1. I make this declaration of my own personal knowledge, and if called upon to do so, I could and would testify to the facts stated herein.

2. In roughly 2000. I dated a man whom I knew as Tony Cooper, but whose real name was Thess Good. We dated for about a year. I was living in Vista, CA at the time. Vista is a suburb north of San Diego. I know Tony's real name was Thess Good because I researched his property in San Diego and saw his legal name as well as his aliases. Attached to this declaration as Exhibit A is a photograph I took of Tony during the time we were dating.

3. I knew that Tony did not have a real job yet he always had a lot of money. He owned a house. He was always very well dressed. I knew he sold drugs. Tony kept me away from his criminal life.

4. I do not recall knowing anything about an attempted robbery at Symbolic Motors in La Jolla, but then again, Tony would not have told me if he had been involved in a robbery. He tried to maintain the image as being above that.

5. Tony was always looking for legitimate business opportunities. At one point, Tony wanted me to open a postal annex. He was always looking for legitimate means of income.

6. Tony had me visit a man whom I believe to be Anthony Penton two times. The man was in jail in San Diego. Tony accompanied me on one of the visits. On the second visit, I went to see the man alone. The man I visited was African American. He was either bald or had very short shaved hair. He was younger than Tony. When I went to see him with Tony, the man seemed scared. Tony and the man did not talk aloud. Tony wrote on a piece of paper in addition to communicating with hand signals and lip reading. I do not remember what was communicated.

7. At some point during the time Tony and I were dating, I recall being in the kitchen and Tony saying something about Anthony Penton. I remember him saying, "He caught a case, and now he's singing the blues." I understood Tony to be saying that Anthony had been locked up for something and was complaining to him (Tony/Thess) about it. I understood this to mean that Anthony was taking the blame for something and Tony wanted him to be quiet about it

8. I do not recall exactly what I discussed with the man I suspect was Anthony Penton when I went to visit him alone. I just remember that Tony had me go to talk to him to say something along the lines that he needed to "zip his lips." He wasn't supposed to talk. That visit with the man was not long before I moved to Northern California.

I swear under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of July of 2021.

/s/ Dawn Childers
DAWN CHILDERS

DECLARATION OF EDWARD JONES

1. My name is Edward Jones. I was born on March 22, 1974 in Jackson, Mississippi. I grew up around southern California, in Los Angeles, Riverside, and San Diego counties. I now live in Wildemar, California. I have prepared this declaration to prove that Anthony Penton is innocent of the crime that he was convicted of. I have personal knowledge of all facts stated in this declaration and could and would testify to them if called to do so.

2. Following a trial and conviction in 2000 for robbing Symbolic Motors, a car dealer in La Jolla, I was in prison for 20 years and 3 months. I was released from prison on September 18, 2020 under a provision of the California Penal Code which I understand provides for a youth offender parole hearing of any prisoner who was 25 years of age or younger at the time of the offense. I was released on parole and I currently work for Amazon. I am also studying to become a truck driver.

3. Anthony Penton was my co-defendant at my robbery trial. At the time, I knew that he had no involvement whatsoever in the robbery. However, I did not testify as to his innocence because I was afraid that my testimony would further incriminate me and jeopardize the safety of myself and my family from retribution by associates of my actual co-conspirator, Thess Good. After feeling remorse and responsibility for Mr. Penton's undeserved incarceration, and understanding that Thess Good has since passed away, I now make

this declaration to state that Mr. Penton is innocent of the robbery for which he was convicted.

4. By the time of the Symbolic Motors robbery, I had known Thess Good for some time. We were both from Los Angeles and we had committed crimes together, including multiple robberies.

5. On or around June 25, 1999, Thess Good informed me of a tip that Symbolic Motors, a car dealership in La Jolla, California, had $150,000 or more in their safe.

6. On June 26, 1999, Thess Good and I—and no one else—entered Symbolic Motors and attempted to rob it. Good and I entered the dealership, threatened the employees with guns, and tied up some of the employees with duct tape. While inside Symbolic Motors, Thess Good was in contact by cell phone with a third person serving as a lookout to see who was coming in and out of the building. The robbery was not successful because Good and I couldn't get into the safe, but we escaped without being caught by the police. Anthony Penton was not with us that day, he was not the lookout, and he was not otherwise involved at all in the robbery.

7. Afterwards, I made arrangements with Thess Good to travel to the Los Angeles area three days later. Thess Good arranged for me to be picked up by Anthony Penton from San Diego in the morning of June 29, 1999. At no point on or prior to June 29, 1999 did I meet or otherwise become acquainted with Anthony Penton.

8. At the outset of our trip, Mr. Penton and I made a stop by the Fam-Mart swap meet in the San Diego area. Mr. Penton had left the car to make a telephone call. Mr. Penton had left the car unattended with the keys in the ignition.

9. I decided to steal the car, thinking I could use it for the robbery I was planning, and as revenge against Thess Good for making the June 26, 1999 robbery go wrong.

10. While I was driving the car that morning, the police recognized me. After a highspeed chase, I was arrested.

11. Looking back, Mr. Penton and Thess Good were also around the same height and build. And they looked alike since they were both bald headed.

12. Mr. Penton asked me to testify at trial and tell the truth about how I stole the car and how Mr. Penton was not involved in the Symbolic Motors robbery at all.

13. I did not testify at trial to Mr. Penton's innocence because I was worried about my own conviction and thought that I would look bad in front of the jury if they knew that I stole the car.

14. I was also afraid of telling the truth and implicating Thess Good because I was afraid of retribution from his associates, who I believed could harm me or my family for being a snitch. I was worried that if I snitched, another gang or my own gang would kill me, even in prison.

15. I was convicted on November 8, 2000.

16. After my conviction, I moved for a new trial. I felt that the prosecution's whole case was linked to Mr. Penton and the car, and I wanted to separate myself from both of those things in a new trial.

17. As part of my motion for a new trial, I convinced a woman named Janice Thomas to testify for me. Because of my status on the streets at the time as a gang member, she was willing to do what I asked so that she could get in my good graces. I convinced her to lie and say that I got the car from her. I also convinced her to lie and say that she knew Mr. Penton, when really she didn't know Mr. Penton at all.

18. I feel like it's my fault that Mr. Penton was—and still is—locked up. As part of starting a new life following my release from prison, I would like to set the record straight and correct the harm I have caused Mr. Penton.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Feb. 15th, 2021, at Wildemar, California.

By: /s/ Edward Jones
Edward Jones

DECLARATION OF JANICE THOMAS

I, JANICE R. THOMAS, declare:

1. I make this declaration of my own personal knowledge, and if called upon to do so, I could and would testify to the facts stated herein.

2. I am a ~~48~~[/s/ [/s/ JRT] 49-year-old resident of Imperial, California. I am employed full-time as a cashier. I live with my 24-year-old daughter, who is studying to become a nurse.

3. I am the older sister of Latania Jones. Latania died earlier this year. During her lifetime, Latania was married to Edward Jones. Latania and Edward were together (i.e., still romantically involved) during most of Edward's roughly 20-year incarceration. They had four children together. I was aware that, prior to Edward's incarceration, Edward was a drug dealer. He sold crack cocaine.

4. I grew up in the Imperial Valley of California. I moved to San Diego in 1994. In 1999, I was living in San Diego, as were Latania and Edward. At one point, they lived at a house on Altadena. Their home there was raided by the police.

5. As far as I know Anthony Penton and Edward Jones were not friends. Edward hanged out with his fellow gang members from the "Four Tres" (4-3) gang, a Crips gang from Los Angeles. I knew most of Edward's fellow gang members. Anthony was not among them.

6. I only met Anthony once, when I went to visit him in a jail in San Diego, just prior to when I testified in Edward's attempted robbery case. I met Anthony in a visiting room and spoke with him through the glass. The meeting was short. It lasted less than 30 minutes.

7. I had gone to visit Anthony at the request of Latania and Edward. I had multiple conversations with Latania and one telephone conversation with Edward, during which Latania and Edward communicated to me that I needed to testify in Edward's case and tell a story that was concocted by Edward (described below). I understood from speaking to Latania and Edward that before I was to testify, Edward wanted me to visit Anthony so it would seem as though I knew Anthony, when, in fact, I had never met him before.

8. During my visit with Anthony, he professed his innocence of the attempted robbery charge for which he was in custody. I felt his energy and I believed him when he said he was innocent. He also told me not to get on the stand and lie. He told me to do the right thing.

9. Edward and Latania told me what to say in my testimony. They told me to say that I was involved in some kind of relationship with Anthony Penton; that Anthony knew Edward Jones through me; that Anthony had loaned rental cars to me in the past; and that I had called Anthony to alert him that Edward had been arrested in Anthony's car. None of that was true. Prior to visiting Anthony in jail, which was just

prior to when I testified, I had never met or even spoken to Anthony.

9. I testified just as Edward and Latania had instructed me to. I felt like I had no choice. I was afraid of Edward. I knew that he was a scary guy—he had guns and had spent time in state prison. He was very intimidating. I was a single mother at the time, and I feared retaliation. I was afraid that Edward or his gang associates could have come after me and my family if I refused to testify like they told me to.

10. In the years leading up to Edward's incarceration, I spent some time with Latania and Edward in the company of their friends, including Edward's fellow gang members. I met and knew of many of them. I had never heard of Anthony Penton until they told me to go see Anthony in jail. I had never heard Anthony's name prior to that. As far as I know, Anthony and Edward did not know each other before Edward's arrest in this case.

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

Executed this 30 day of June of 2021 in Imperial, California.

/s/ Dawn Childers
DAWN CHILDERS

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S FOLLOW-UP REPORT

DATE: (of Inc.) September 3rd, 1999

TIME: (of Inc.) 9:57 am.

LOCATION: 4100 Kirkcaldy

SUBJECT: Detention of Thess Good

ORIGIN:

I received information from Detective Johnny Keene that an Anthony Penton had been identified as one of the suspects in a take-over style robbery that had occurred at the Symbolic Motor Cars Company in La Jolla in June, 1999, and that probable cause existed to arrest Penton for robbery. Anthony Penton was a 32-year-old black male, 6-3" and 180 lbs, with a shaved head and a medium-moustache. According to Detective Keene, Penton was possibly staying at 4168 Lochlomond in the Kearny Mesa area of San Diego.

Detective Keene also gave this information to Sgt. Tim Muren. On Thursday evening, September 2nd, Sgt, Muren and several detectives placed the Lochlomond address under surveillance. The detectives observed a black male inside the residence; the male looked just like Anthony Penton and the detectives believed that it was Anthony Penton. The detectives interviewed a neighbor who confirmed that a black male named "Tony" matching the description of Anthony Penton, lived at that address.

At the time, although probable cause to arrest existed, no arrest warrant had been issued. Sgt. Muren maintained the surveillance for most of the evening, but the black male inside 4168 Lochlomond never came outside. Sgt. Muren finally terminated the surveillance and passed the information about Penton on to me via voice-mail.

OFFICER STATEMENT:

On Friday morning, August, I drove to the area of 4100 Lochlomond. I saw a black male riding a bicycle southbound on a nearby cross-street, and I watched the male go into the house at 4168 Lochlomond. The male appeared to be in his mid-to-late 30's, he had a shaved head and a moustache, and he looked like the photograph of Anthony Penton. I radioed for some additional units; however, before any officers had arrived, the male got into an 87 Cadillac, 4GHT547 and drove away. While watching the location, a neighbor saw me and walked up to my car to find out what I was doing. He saw the flier of Anthony Penton on my front seat, and stated "That's him" as the Cadillac was driving away. The neighbor stated that he knew "Tony" and provided some additional information about his neighbor, including the fact that Tony lived by himself with his six-year-old son and often left the son atone during the day.

Two additional detectives and one marked unit arrived to assist. As these officers were getting into position, the Cadillac returned to the area. This time there were

two black males in the car. Officer Ed Obayashi stopped the Cadillac on 4100 Kirkcaldy. The driver was the same person I had seen; but unfortunately was not Anthony Penton, but an entirely different person named Thess Good. Neither was the passenger the suspect we wanted.

According to a records check, Thess Good was an ex-con with a history of arrests for burglary, felony assault, attempted murder, auto theft and possession of firearms. I later learned that Thess Good also uses the nick-name 'Tony" and looks very much like his friend Anthony Penton, which accounted for the confusion of his neighbors. Good's passenger also had a criminal history and was on probation with a fourth-waiver.

When questioned, Thess Good made no mention of the fact that he lived right around the corner; in fact he stated that he was just giving his friend a ride through the area on the way to the freeway. He became visibly shaken when we told him we knew he lived around the corner. He eventually admitted that he did live around the corner at 4168 Lochlomond, and that his six-year-old son was home alone.

Several detectives went to 4168 Lochlomond to check on the child's welfare. We knocked on the door and were admitted by the very frightened six-year-old boy, who was in the house by himself with no supervision. While checking the house, Sgt. Tim Muren looked in the garage and saw a stripped Chevy van. Sgt. Muren ran the V.I.N. and learned that the van had been stolen the day before.

At this point Thess-Good stated that he knew why we were here, that we were looking for Anthony Penton. Good told us that Penton had stayed with him for a short time a few months ago, but that Penton was now living in Victorville. Good agreed to cooperate in our investigation by attempting to locate Penton and, if possible, to arrange for Penton to come to San Diego. We agreed to keep intonation about Good's cooperation confidential.

During the course of several hours that afternoon, Good placed several phone calls to Penton. We obtained a home phone number, and a cell phone number for Penton. We gave the phone number to the Victorville office of the San Bernardino Sheriff's Office and they provided an address that corresponded with the phone number; apparently SBSO had been out to Penton's house on a previous domestic violence call and had Penton's address and phone number in their records. This address was the same as a possible address that Detective Keene had independently developed.

Ultimately, Thess Good was unable to persuade Penton to come down to San Diego.

Good was released at his house and was not booked for any charges. Good's son was placed in the care of a responsible neighbor who knows the family, and who would in turn hold the child under the child's mother arrived to pick him up. Good's passenger was detained, interviewed and released.

Thess Good's Qualcomm cell phone number is (619) 890-2074.

/s/ Anthony Johnson
Anthony Johnson Sergeant
SDPD Robbery Unit

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

LOCATION: 3676 Van Dyke Ave. DATE: 06-29-99
TIME: 1000

BOOKING #: 99146099A
SUSPECT NO. 1: Jones,Edward IN CUSTODY: YES
DOB: 03-22-74
SS#: 547-43-6754
FBI#: 939764MA4
CDC#: K52736

REQUESTED
CHARGES: 12021(A) 1 P.C. Felon in possession of firearm
12316(b) 1 P.C. Felon in possession of ammunition
2800.2(a) C.V.C. Felony evading police
20002(a) C.V.C. Hit and run
496(a) P.C. Possession of stolen property
12031(a) P.C. Carry loaded firearm in public place
3056 P.C. Parole Violation

ARRESTING OFFICER(S): A. Spear #4349 & S. Lynn #5276
EVIDENCE/IMPOUND TAG #: 786441
INCLUDED WITH THIS REPORT ARE THE FOLLOWING:

(X) ARREST REPORT	(X) 4th WAIVER PRINTOUT/ PAROLE O.N.S.
( ) CASE REPORT	(X) RAP SHEETS
(X) PHOTOGRAPHS	(X) COPY OF IMPOUND TAG

SUMMARY:

The attached reports have been reviewed. All the necessary elements of the offense are present; the contact with and or detention of the suspect was appropriate; and there was probable cause or other legal basis to arrest and/or search the suspect(s). Unless there are additional comments below it is felt that the attached reports by the participating officers are complete and sufficient ad it is requested that the District Attorney's Office issue a complaint charging the suspect(s) with the listed violations together with any additional charges and/or sentencing enhancements as may be appropriate.

ADDITIONAL COMMENTS:

On 06-29-99 at about 1000 hours Officer Lynn #5276 and I attempted to stop a vehicle for speeding. The vehicle failed to yield and led us on a pursuit. During the pursuit the driver, Howard Jones threw a loaded semi automatic pistol from the driver's window. Jones was the only person in the vehicle.

The bottom of the magazine broke upon impact and the 9mm ammunition scattered all over the ground. I observed approximately ten, 9mm rounds on the ground. Due to the continuing pursuit we were unable to take the time to recover the ammunition. We did recover the pistol. Jones was caught with the use of the police helicopter after he hit two parked cars and fled on foot. A records check later revealed that the gun was reported stolen, taken in a vehicle burglary, S.D.P.D.

Case #98-027844 (report attached). Jones is known to me from several prior arrests and parole contacts. A records check confirmed that Jones is on state parole, C.D.C. #K52736, a convicted felon, a narcotics registrant and a documented "Four Trey Gangster Crip" street gang member from Los Angeles. Attached is a C.A.D. print out of the incident #P9906006295, O.N.S. print outs of Jones' narcotics registration, gang membership and active parole status. I've requested from the crime lab that the gun be checked for latent finger prints, be tested for operation and checked in drug fire. I also request that Jones be charged with possession of stolen property, hit and run and carrying a loaded firearm in public. The car that Jones was driving during the pursuit was a rental car registered to Enterprise Leasing, rented to Anthony Penton. Minutes after the pursuit, Penton called police and wanted to report the car stolen. Detective Thrasher responded and spoke with Penton. Detective Thrasher did not place a lot of credibility in Penton's statement. Penton is a convicted felon and has served time in state prison. A stolen vehicle case was not taken.

DETECTIVE: A. SPEAR id#: 4439 DIVISION: MID-CITY

APPROVED:_____ DATED:____ PHONE #: 516-3024