APPENDIX A

~~EXHIBIT~~

1 of 1 DOCUMENT

THE PEOPLE, Plaintiff and Respondent, v. JACQUES FEARANCE, Defendant and Appellant.

B178108

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

2005 Cal. App. Unpub. LEXIS 9797

October 26, 2005, Filed

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. NA060375. Tomson T. Ong, Judge.

DISPOSITION: Affirmed.

COUNSEL: William L. McKinney for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

JUDGES: TURNER, P.J.; ARMSTRONG, J., KRIEGLER, J. concurred.

OPINION BY: TURNER

OPINION: I. INTRODUCTION

Defendant, Jacques Omar Fearance, appeals from his convictions for first degree murder (Pen. Code, n1 § 187, subd. (a)) and possession of cocaine base for sale. *Health & Saf. Code, § 11351.5.*) The jury also found that defendant personally and intentionally discharged a firearm in the commission [*2] of the murder. (§§ 12022.53, subds. (b), (c), (d).) Defendant argues: the trial court improperly denied his substitution of counsel motion and his self-representation motion; evidence of a recorded telephone call to the police was erroneously admitted; he was denied effective assistance of counsel; the prosecutor committed misconduct; and cumulative error dictates reversal of his convictions. We affirm.

n1 All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia (1979) 443 U.S. 307, 319, 61 L. Ed. 2d 560; People v. Osband (1996) 13 Cal.4th 622, 690; Taylor v. Stainer (9th Cir. 1994) 31 F.3d 907, 908-909.)* On February 20, 2004, Sharon Carlton lived in an apartment complex at 2040 Martin Luther King Boulevard in Long Beach. Ms. Carlton had known her neighbor, Kiejuan Clay, from his childhood until he was shot to death on February 20, 2004. Ms. [*3] Carlton also knew Mr. Clay's father. Ms. Carlton also knew defendant, who was one of her tenant's sons and lived in the complex. A woman identified only as "Brandy" lived in the front building in the complex. Tanisha and Lanisha Howard lived in the same complex with their mother, Sandra Howard. n2 Lanisha was reluctant to testify

against defendant at trial because she felt like a "snitch." Lanisha, in her words, "used to hang" with defendant.

n2 For purposes of clarity and out of no disrespect, Tanisha, Lanisha, and Sandra Howard will hereafter be referred to by their first names.

On February 19, 2004, defendant and Mr. Clay were involved in a fist fight. Zouana Lindsey was at Sandra's home. Sandra was Ms. Lindsey's godmother. Ms. Lindsey saw the fight. Ms. Lindsey believed that Mr. Clay won the fight. Mr. Clay's brother was identified only as "Dario" during the trial. Mr. Clay and Dario chased after defendant. Mr. Clay, while holding, a gun, told defendant, "'No, nigger, you better not.'" Thereafter, defendant [*4] ran into his apartment. Defendant emerged carrying a gun which he unsuccessfully attempted to fire; however, the gun did not contain any bullets. Mr. Clay fled into his home. Tanisha heard a gunshot a short time later. Another nearby resident, Lisa King, heard defendant and Mr. Clay arguing on February 19, 2004, about the sale of drugs. Both defendant and Mr. Clay were selling drugs from their apartments.

On February 20, 2004, defendant knocked on Ms. Carlton's door between 5 and 6 a.m. Ms. Carlton was asleep on the couch. Mr. Clay's girlfriend, Brandy, was also in the room. Roger Finister was also present. Defendant entered the living room. Defendant spoke to Mr. Clay, who had been asleep on the love seat. Ms. Carlton could see that an argument was about to take place. Ms. Carlton told defendant to "take it outside." As defendant turned to go out the door, Brandy pushed it closed. Mr. Clay got up to walk to the kitchen. Thereupon, defendant shot Mr. Clay five times. Defendant then fled to his apartment, which was down the driveway.

Ms. Lindsey was sleeping in Sandra's living room on the morning of February 20, 2004. Ms. Lindsey was awakened by the sound of gunshots. After a short [*5] time, Ms. Lindsey opened the door. Ms. Lindsey saw three men, including defendant, running from the house in the back to the residence in the front of the property. As previously noted, defendant lived in the front residence. Defendant, who was holding a black gun, said, "'I told him, I told you nigger it was on.'" Ms. Lindsey later went to the back house, where she saw Mr. Clay's body.

Lanisha also heard four or five gunshots on the morning of February 20, 2004. When Lanisha looked out the window, she saw defendant standing near the house where Mr. Clay was shot. Defendant, who was accompanied by Mr. Finister and Clinay Brown, said "'Let's get out of here.'" Defendant and two others went to his house, where they got bicycles and rode away. Lanisha ran outside. Lanisha went to see Mr. Clay after he had been shot.

Tanisha was awakened on February 20, 2004, by Sharon screaming, "'No, no, no, don't do that in my house.'" Tanisha then heard three or four gunshots. Tanisha grabbed her children and "just laid there." When Tanisha came out of the house a short time later, she saw "a guy" ride away on a bicycle. Tanisha ran around the corner to get Mr. Clay's father and brother. Tanisha [*6] denied telling police officers that she saw defendant come out of his house on a bicycle shortly after the shots were fired. Tanisha initially denied telling a police officer that defendant said, "'I told them niggas I was going to get them[.]'" However, Tanisha later testified she related such a statement to the police because she was mad.

On February 20, 2004, Ms. King heard defendant arguing with someone. Defendant said, "'I told you I was going to get you[.]'" Ms. King heard shuffling followed by approximately five gunshots. Ms. King opened her door. Ms. King heard everyone screaming, "[Defendant] shot him, [defendant] shot him[.]" Ms. King was asked to look at Mr. Clay because she had experience as a surgical technician. Ms. King determined that Mr. Clay was still alive because his eyes were not yet fixed and dilated. Ms. King could not find Mr. Clay's carotid pulse. Because no one would telephone the police, Ms. King left and made the call.

Ms. Carlton, Ms. Lindsey, Lanisha, and Ms. King were each shown a photographic lineup. Each of them independently identified defendant as the person who shot Mr. Clay. An autopsy subsequently revealed that Mr. Clay died as the [*7] result of a gunshot wound to the chest. Other gunshot wounds contributed to his death. Criminalist Troy Ward examined the casings found at the scene of the murder, the expended bullet found outside the residence, and the bullets recovered from Mr. Clay's body. Mr. Ward believed they were all .9 millimeter casings fired from the same semi-automatic pistol.

Defendant telephoned Ms. King on a walkie-talkie after the shooting. Defendant asked Ms. King if the

police were in his house. Defendant told Ms. King that he knew "Lanisha and them" were "telling." Ms. King told defendant that everyone was saying, "'[Defendant] did it, [defendant] did it.'" Ms. King told defendant that the police were looking for him. Defendant said, "'Yeah, I know.'" With respect to Lanisha and others, defendant said, "'I'm going to get them.'" Defendant told Ms. King: "Well, I'm not going to say I did it. I'm going to say I don't know how it happened[.]'"

Long Beach Police Officer Michelle Miller arrived at the scene of the murder on February 20, 2004. Officer Miller collected evidence where Mr. Clay was killed, including: six .9 millimeter shell casings found inside the residence; a spent round found **[*8]** outside the apartment; and a clear plastic bag containing 8.02 grams of a substance containing cocaine base. Officer Miller also searched defendant's residence on February 20, 2004. Officer Miller recovered: a bill in defendant's name; three Ziploc baggies containing .96 grams, 16.71 grams, and 7.30 grams of a substance containing cocaine base; a baggie containing 1.32 grams of a substance containing marijuana; and $ 274.

Officer Richard Conant and Detective Robert Erickson investigated Mr. Clay's murder. Officer Conant arrived at the murder scene at approximately 7:20 a.m. on February 20, 2004. After speaking to various witnesses, the investigator identified defendant as the killer. A press release was issued regarding the murder, naming defendant as the suspect, which included his photograph. The article, placed in the Long Beach Press Telegram newspaper, was entitled, "Man Shot Dead in Long Beach." The article included telephone numbers of the homicide office and the police department communications center. Officer Conant tape-recorded a voice mail message left on the homicide division telephone on February 21, 2004. That tape was played for the jury at trial. The voice on the **[*9]** message was determined to be that of defendant. In the voice message, defendant made reference to the newspaper article stating: "You mother fuckers got me in the mother fucking newspaper. Ain't that a mother fucker bitch." Defendant continued: "I'm gonna kill and I'm gonna kill again, mother fucker. You can bet on . . . black son of a bitch. Fuck you. Fuck the Long Beach Police Department. Catch me if you can, mother fucker."

Detective Robert Gonzales, who was assigned to the gang violent crimes section, assisted in defendant's arrest on May 6, 2004. Defendant was the passenger in a car stopped by Detectives Gonzales, Jim Close, and Sean Hunt. The detectives were watching the area where they suspected defendant could be found. Defendant was ordered out of the car. The detectives' guns were drawn. Defendant said his name was James Elliott. Defendant had a California driver's license in the name of James Elliott in his rear pocket. Defendant's brother, Mr. Elliott, was present in court at trial. Defendant also possessed three money receipts and a bus ticket. As Detective Gonzales completed a patdown search, defendant tried to run away. Detective Gonzales pulled defendant to the ground. **[*10]** Defendant said, "'You are going to have to kill me.'" When asked if he was Jacques Fearance, defendant responded, "No."

III. DISCUSSION

A. Defendant's Counsel Related Motions

1. Subsitution of counsel motion a. factual and procedural background

Defendant was represented by Alternate Public Defender Nancy Sperber. On July 6, 2004, a date set to "kick-start the trial," Ms. Sperber advised the court that she just learned that defendant wanted to address the court. Thereafter, defendant stated, "I want to fire [Ms. Sperber] because I want to go pro per." When asked if he was ready to proceed immediately if he represented himself, defendant responded, "No." The trial court, citing to *People v. Frierson (1991) 53 Cal.3d 730, 742, 280 Cal. Rptr. 440,* explained that defendant's request to represent himself a day before the date trial was to commence was untimely. The trial court inquired whether there was any other reason defendant did not want Ms. Sperber to represent him. Defendant responded, "Conflict of interest." When asked to explain, defendant stated: "She does not accept collect calls. She hasn't supplied me with any documentation I'm entitled to **[*11]** have, and I can't get contact with her. We don't talk at all." Defendant added that Ms. Sperber had waived time without his consent. Defendant then again requested that he be allowed to "go pro per." The trial court reiterated that such a request was untimely. The court then asked what documents defendant believed he was entitled to receive. Defendant stated, "All the documents I am entitled to, the murder book, police reports, discoveries."

Ms. Sperber acknowledged that she waived time

without defendant's consent. Ms. Sperber indicated that she does accept collect calls when she is in the office. Ms. Sperber explained that defendant was given a copy of the preliminary hearing transcript. However, she does not give defendants copies of police reports. Ms. Sperber stated she had discussed this case with defendant. Defendant informed her: he had no witnesses to interview; he did not commit the crime; and, he had no alibi information. Ms. Sperber and the defense investigator had done everything necessary to prepare for trial.

The trial court indicated that defendant had voluntarily waived time. In addition, defendant had the ability to speak to an investigator and Ms. Sperber. Moreover, **[*12]** the decision to accept client calls and release documents was a tactical decision of counsel. The trial court explained: "Tactical decisions [and] choices of defense are a matter for counsel. And defendant has no right to the defense of choice, People vs. Vaughn, [], *71 Cal.3d 406,* (1969). The Supreme Court guides me, so based upon what is provided to me, I don't see any reason why Ms. Sperber and [defendant] cannot work together. [P] I do not find a breakdown in the relationship between attorney and defendant of such a kind to make it impossible for the attorney to properly represent the defendant. [P] Therefore, the Marsden motion is denied." Thereafter, defendant advised the court that he did not want to come back to this courtroom and wanted a new lawyer. The trial court informed defendant: he had to work with Ms. Sperber; he would not be allowed to represent himself due to his late request; and a jury would be selected that day. Jury selection commenced later that day. Opening statements and testimony commenced the following day.

b. the trial court could properly deny the substitution of counsel motion

Defendant argues that both his own and Ms. Sperber's **[*13]** remarks to the trial court during the substitution of counsel motion demonstrate there was an irreconcilable conflict between them. As a result, defendant argues the trial court abused its discretion in denying the substitution of counsel motion. Defendant further argues that the trial court failed to adequately inquire into his complaints. Defendant contends the trial court only considered whether his request was made in a timely fashion.

The California Supreme Court has held, "The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing." (*People v. Lucky (1988) 45 Cal.3d 259, 281, 247 Cal. Rptr. 1;* see also *People v. Padilla (1995) 11 Cal.4th 891, 927,* disapproved on another point in *People v. Hill (1998) 17 Cal.4th 800, 823, fn. 1.)* The California Supreme Court recently reiterated: "The governing legal principles are well settled. '"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to **[*14]** explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." [Citations.]'" (*People v. Hart (1999) 20 Cal.4th 546, 603,* quoting *People v. Fierro (1991) 1 Cal.4th 173, 204,* and *People v. Crandell (1988) 46 Cal.3d 833, 854, 251 Cal. Rptr. 227;* see also *People v. Nakahara (2003) 30 Cal.4th 705, 718-719* [trial court did not err in failing to hold a more extensive *Marsden* hearing where defendant wrote a letter complaining of disagreements after he testified on his own behalf]; *People v. Barnett (1998) 17 Cal.4th 1044, 1085; People v. Hines (1997) 15 Cal.4th 997, 1025.)*

In this instance, the trial court provided defendant with the ample opportunity to state his complaints. Defendant's disagreement over tactics with Ms. **[*15]** Sperber does not rise to a constitutional problem. The trial court could reasonably conclude that Ms. Sperber's representation of defendant was neither inadequate nor marked by irreconcilable conflict without inquiring further. The trial court did not abuse its discretion in denying defendant's substitution of counsel motion. Moreover, the finding that defendant's request to represent himself was untimely was separate and distinct from the trial court's denial of his substitution of counsel motion.

2. Self-representation motion

a. introduction

Defendant argues that the trial court improperly

denied his self-representation request because it was made in a timely manner in light of "the poor quality of the relationship between attorney and client . . . ." He further argues, "There was no showing that at this point in the proceedings that granting self representation would have resulted in a disruption or unreasonable delay in the proceedings."

b. without abusing its discretion, the trial court could properly deny defendant's self-representation motion

A defendant has a federal constitutional self-representation right. (*Faretta v. California (1975) 422 U.S. 806, 835-836, 45 L. Ed. 2d 562;* **[*16]** *People v. Koontz (2002) 27 Cal.4th 1041, 1069.)* Given the facts in the present case, defendant's opportunity to proceed pro se was not an unqualified right because of his delay in seeking to represent himself. The California Supreme Court has held, "In order to invoke the right he must assert it within a reasonable time before the commencement of trial." (*People v. Marshall (1996) 13 Cal.4th 799, 827; People v. Clark (1992) 3 Cal.4th 41, 98; People v. Burton (1989) 48 Cal.3d 843, 852, 258 Cal. Rptr. 184;* see also *People v. Rudd (1998) 63 Cal.App.4th 620, 625.)* In *People v. Jenkins (2000) 22 Cal.4th 900, 959,* the Supreme Court described a trial court's duties in assessing a belated self-representation request as follows: "In exercising this discretion, the trial court should consider factors such as '"the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. **[*17]** "' (*People v. Burton*[, *supra,*] *48 Cal.3d [at p.] 853* [], quoting *People v. Windham (1977) 19 Cal.3d 121, 128, 137 Cal. Rptr. 8* [].)" (See *Moore v. Calderon (9th Cir. 1997) 108 F.3d 261, 264-265; People v. Rudd, supra, 63 Cal.App.4th at pp. 627-268.)* If it appears that the defendant's self-representation request is merely a tactic designed to cause delay, the trial court has the discretion to deny the motion to proceed pro se. (*Jackson v. Ylst (9th Cir. 1990) 921 F.2d 882, 888; United States v. Flewitt (9th Cir. 1989) 874 F.2d 669, 674-675.)* Appellate courts review self-representation timeliness issues for an abuse of discretion. (*People v. Clark, supra, 3 Cal.4th at p. 98; People v. Windham, supra, 19 Cal.3d at p. 128.)*

The trial court did not abuse its discretion in denying defendant's self-representation motion. Defendant's request came on the day jury selection was to commence. Defendant indicated that he was not ready to proceed to trial if granted pro se status. Defendant's request made on the "eve of trial" almost three months **[*18]** after counsel was appointed was not made within a reasonable time prior to the commencement of trial. (*People v. Frierson, supra, 53 Cal.3d at p. 742,* quoting *People v. Burton, supra, 48 Cal.3d at p. 853.)* Here, the trial court carefully reviewed the representation of Ms. Sperber, the reasons for defendant's request to represent himself, and the expected delay if he were allowed to do so. The trial court could reasonably conclude that defendant's pro se status would cause significant delays and thereby obstruct the fair and effective administration of justice. (*United States v. Mackovich (10th Cir. 2000) 209 F.3d 1227, 1237; People v. Clark, supra, 3 Cal.4th at pp. 100-101.)* No abuse of discretion occurred.

B. Effectiveness of Counsel

1. Severance motion

Defendant argues that he was denied effective assistance of counsel because Ms. Sperber failed to move to sever the homicide charge from the drug charges. Before ineffective assistance of counsel may be found, there must be proof not only that the attorney's performance was deficient but also that defendant suffered prejudice as a consequence. (*Strickland v. Washington (1984) 466 U.S. 668, 694, 80 L. Ed. 2d 674;* **[*19]** *People v. Horton (1995) 11 Cal.4th 1068, 1122; In re Fields (1990) 51 Cal.3d 1063, 1068-1069, 275 Cal. Rptr. 384; People v. Ledesma (1987) 43 Cal.3d 171, 215-218, 233 Cal. Rptr. 404.)* Furthermore, we engage in a presumption, which it is defendant's burden to overcome, that Ms. Sperber's performance comes within the wide range of reasonable professional assistance and her actions were a matter of sound trial strategy. (*Strickland v. Washington, supra, 466 U.S. at pp. 689-690; People v. Lewis (1990) 50 Cal.3d 262, 288, 266 Cal. Rptr. 834.)*

The California Supreme Court has held that in order to prevail in a case such as this where defendant argues he was deprived of legal assistance because Ms. Sperber failed to move for severance, "[He] must show that reasonably competent counsel would have moved for severance, that such motion would have been successful, and that had the counts been severed an outcome more

favorable to him was reasonably probable." (*People v. Grant (1988) 45 Cal.3d 829, 864-865, 248 Cal. Rptr. 444;* see also *People v. Kraft (2000) 23 Cal.4th 978, 1030;* **[*20]** see generally *People v. Ledesma, supra, 43 Cal.3d at pp. 215-218.)* Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission . . . under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ." The California Supreme Court has held: """The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." [Citation.] [P] "The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials: (2) certain of the charges are unusually likely to inflame the jury against the defendant; **[*21]** (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]'" (*People v. Bradford (1997) 15 Cal.4th 1229, 1315; People v. Mayfield (1997) 14 Cal.4th 668, 721; People v. Sandoval (1992) 4 Cal.4th 155, 172-173.)* In addition, the *Bradford* court looked to whether the evidence on each of the joined charges would have been admissible under *Evidence Code section 1101,* subdivision (b), in separate trials on the other charges holding "Cross-admissibility suffices to negate prejudice . . . ." (*People v. Bradford, supra, 15 Cal.4th at p. 1315-1316;* see also *People v. Jenkins, supra, 22 Cal.4th at p. 948; People v. Sandoval, supra, 4 Cal.4th at p. 173.)*

Ms. Sperber had no constitutional duty to move to sever the drug charges. Here, several witnesses testified that defendant and the victim **[*22]** each sold drugs and fought the night before the shooting. Ms. King testified that she believed that defendant and the victim were fighting about drug sales. Both defendant and Mr. Clay brandished guns following the argument. In the early morning hours the following day, defendant entered Ms. Carlton's apartment, and awakened Mr. Clay. Defendant then shot Mr. Clay five times. Later that day, the police found significant amounts of cocaine base and marijuana in defendant's apartment. There was evidence both defendant and Mr. Clay were drug trafficking competitors. The evidence of defendant's drug possession was cross-admissible in the murder trial. Moreover, in addition to several witnesses identifying defendant as the person who fired the fatal shots, defendant called the homicide detectives' office, cursed them for placing his photo in the newspaper, and admitted that he had killed and would kill again. Given the state of the evidence and the controlling legal authority, Ms. Sperber reasonably could have concluded a severance motion was a meritless motion. The due process right to effective representation by counsel does not include the requirement that a defense attorney make a fruitless **[*23]** objection. (*People v. Frye (1998) 18 Cal.4th 894, 985, People v. Gonzalez (1998) 64 Cal.App. 4th 432, 437, fn. 1.)* Finally, given the overwhelming proof of guilt, defendant has failed to demonstrate sufficient proof of prejudice to permit reversal on ineffective assistance of counsel grounds. (*Strickland v. Washington, supra, 466 U.S. at p. 694; In re Fields, supra, 51 Cal.3d at pp. 1068-1069.)*

2. Impeachment of Ms. Lindsey

a. factual and procedural background

Defendant further argues that he was denied effective assistance of counsel because Ms. Sperber did not impeach Ms. Lindsey with a prior inconsistent statement. Ms. Lindsey testified on direct examination at trial that she saw Mr. Clay and defendant fight on the evening preceding the murder. Thereafter, Ms. Lindsey saw Mr. Clay chasing defendant with a gun. According to Ms. Lindsey, defendant went into his house for approximately 10 minutes. Defendant then emerged with a gun in his hand. Ms. Lindsey had previously testified at an *Evidence Code section 402* hearing that she saw defendant with a gun two weeks prior to the day of **[*24]** the murder. On that occasion, defendant confronted Ms. Lindsey with a gun. Ms. Lindsey also testified at the section 402 hearing that on the night prior to the murder, Mr. Clay, Dario, and defendant fought. Mr. Clay chased defendant with a gun. Ms. Lindsey presumed defendant was going to his house to get his gun. However, Mr. Clay and Dario fled. Ms. Lindsey further testified: "[Defendant] did not have a gun. I didn't see no gun on [defendant] until the next day, the next morning." At trial, Ms. Lindsey testified that

defendant had gone into his house and emerged with a gun on the night prior to the murder. Defense counsel then requested a sidebar conference. Defense counsel questioned the prosecutor's prior knowledge regarding what Ms. Lindsey's testimony would include. The prosecutor, Kenneth Lynch, stated he did not know what Ms. Lindsey's testimony would be concerning the events of February 19, 2004. The trial court agreed that Mr. Lynch did not anticipate Ms. Lindsey's answer. The court also noted that other witnesses placed a gun in defendant's hand on February 19, 2004. The court told defense counsel: "If you want to impeach her with somebody else you can, but, you know, **[*25]** if that's what she saw that's what she saw. What else can I do?" Thereafter, defense counsel cross-examined Ms. Lindsey. Ms. Lindsey testified that after the fight on February 19, 2004, Mr. Clay pulled a gun out while chasing defendant.

b. Ms. Sperber's tactical decisions

In this case, defense counsel, Ms. Sperber, was aware of her right to impeach a witness with the usual cross-examination. In fact, the trial court so advised Ms. Sperber. However, it is reasonably probable that Ms. Sperber did not impeach Ms. Lindsey for tactical reasons. Ms. Sperber avoided the specific question of whether defendant emerged from his home with a gun following the confrontation. Ms. Sperber minimized Ms. Lindsey's testimony regarding defendant's possession of a gun. Ms. Sperber emphasized that Mr. Clay was chasing defendant with a gun. The California Supreme Court has held: "Where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. [Citations.]" *(People v. Weaver (2001) 26 Cal.4th 876, 926;* **[*26]** *People v. Earp (1999) 20 Cal.4th 826, 896.)* Defendant has failed to sustain his burden of demonstrating a denial of his right to effective representation by counsel. Finally, defendant has failed to sustain his prejudice burden in connection with either or both of his ineffective assistance of counsel contentions. *(Strickland v. Washington, supra, 466 U.S. at p. 694; In re Fields, supra, 51 Cal.3d at pp. 1068-1069.)*

C. Audiotape Evidence

Defendant argues the trial court improperly admitted evidence of the tape recording of a phone call allegedly made by him to the homicide detectives. Defendant argues that the evidence was irrelevant because there was no testimony authenticating his voice as being one of the parties to the telephone conversation. He further argues the tape: had no probative value; "was cumulative"; and was highly inflammatory. In the alternative, defendant argues his counsel, Ms. Sperber, was ineffective because she did not object to the tape's admission. Preliminarily, defendant waived his admissibility of evidence claim by failing to object on those grounds in the trial court. *(Evid. Code § 353* **[*27]** *; People v. Waidla (2000) 22 Cal.4th 690, 717; People v. Medina (1995) 11 Cal.4th 694, 753.)* Notwithstanding that waiver, the trial court could properly admit the tape recording. *Evidence Code section 1401* provides: "(a) Authentication of a writing is required before it may be received in evidence. [P] (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence." Likewise, an audio tape recording must be authenticated before being admitted. *(Evid. Code § 250; People v. Mayfield, supra, 14 Cal.4th at p. 747; People v. Rich (1988) 45 Cal.3d 1036, 1086, fn. 12, 248 Cal. Rptr. 510.)* We review authentication rulings for an abuse of discretion. *(Eistrat v. Board of Civil Service Comm'rs (1961) 190 Cal. App. 2d 29, 34, 11 Cal. Rptr. 606; Adams v. City of San Jose (1958) 164 Cal. App. 2d 665, 667-668.)* Here, the tape recording of defendant's call to the homicide detectives was authenticated by his own reference to the Long Beach Press Telegram article depicting him as the suspect in the **[*28]** fatal shooting. In addition, defendant's voice was identified by Detective Conant at trial as the individual who left the message. (See *People v. Duren (1973) 9 Cal.3d 218, 243, 107 Cal. Rptr. 157* ["An officer's testimony of what he has seen and heard [] is admissible as primary evidence even though part of the same matter is incorporated into a sound recording"]; *People v. Sica (1952) 112 Cal. App. 2d 574, 588* [police officers may identify a defendant's voice based upon conversation with him after his arrest as well as before].) No abuse of discretion occurred.

Defendant's further claim that the tape recording was more prejudicial than probative pursuant to *Evidence Code section 352* n3 is also meritless. We review *Evidence Code section 352* contentions for an abuse of discretion. *(People v. Cornwell (2005) 37 Cal.4th 50, 81; People v. Baylor (2005) 130 Cal.App. 4th 355, 373.)* Although the tape recording was prejudicial, the trial court reasonably could have concluded the relevance of the evidence at issue outweighed any such prejudice. In the recording, defendant **[*29]** not only made an

incriminating admission concerning a photograph in a newspaper but said he had killed and would kill again. These admissions, coupled with the other overwhelming eyewitness testimony, identified defendant as the murderer. Moreover, as set forth previously, any error in admitting the tape recording was harmless in light of substantial evidence supporting the verdict. (*People v. Ayala (2000) 23 Cal.4th 225, 271; People v. Earp, supra, 20 Cal.4th at p. 878.)*

n3 *Evidence Code section 352* provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Finally, there is no merit to defendant's alternative theory of ineffective assistance of counsel contention. As noted previously, where the record is silent regarding **[*30]** defense counsel's trial tactics, ineffective assistance will ordinarily not be found. (*People v. Weaver, supra, 26 Cal.4th at p. 926; People v. Earp, supra, 20 Cal.4th at p. 896.)* Moreover, as noted earlier, the tape recording was admissible relevant evidence. Therefore, as noted previously, Ms. Sperber had no duty to pursue futile or meritless objections or arguments. (*People v. Ochoa (1998) 19 Cal.4th 353, 432; People v. Lewis, supra, 50 Cal.3d at p. 289.)* Finally, plaintiff has failed to sustain his prejudice burden. (*Strickland v. Washington, supra, 46 U.S. at p. 694, In re Fields, supra, 51 Cal.3d at pp. 1068-1069.)*

D. Alleged Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct during the cross-examination of Lanisha by suggesting that she had been threatened regarding her testimony. Lanisha testified that after hearing gunshots on February 20, 2004, she looked out her window and saw defendant in front of the house. Lanisha had previously signed a statement when she was shown a photographic lineup that stated she had seen defendant running **[*31]** out of the house after the gunshots were fired. After Lanisha repeated that she saw defendant outside the house, the prosecutor inquired, "Do you want to be here today?" Lanisha responded, "No." The prosecutor, Mr. Lynch, asked, "Why not?" Defense counsel's relevancy objection was overruled. Lanisha answered, "Why I don't want to be here today, because it feels if, you know, feels like I'm being a snitch." The prosecutor asked, "What happens to a snitch?" Defense counsel's relevancy objection was sustained. Thereafter, the prosecutor asked Lanisha, "Why are you afraid of being a snitch?" Lanisha explained: "I'm not afraid. It's just, God everybody knows each other, something happens and one person says something, you know, nobody don't want to talk because I grew up around the people, that's why I didn't want to be called a snitch and stuff." The prosecutor further inquired, "So you are afraid of being called a snitch?" Lanisha stated: "No, I just don't want to be here at all, not up here in this because I know the people. I know the person that did it. I know the people, come on - it's - I used to hang with [defendant]." The prosecutor asked, "So you don't want to testify against **[*32]** [defendant]?" Lanisha stated, "No, I don't really, not really." When the prosecutor asked "Why not?", Lanisha responded: "Because I don't. If I did something I wouldn't want him to testify against me." The prosecutor inquired, "Because you are [sic] it's not good to have a snitch label?" Lanisha answered, "No." Defense counsel's argumentative objection was sustained as the question was phrased. The trial court told the prosecutor to rephrase the question. The prosecutor then asked, "What is the problem with being a snitch?" Lanisha responded, "There is no problem." Defense counsel's relevancy, asked and answered, "badgering," and argumentative objections were overruled. Thereafter, Lanisha said, "The answer to the question is I don't want to be here." The prosecutor inquired, "Is there something, in addition in the audience, that's making you afraid?" Lanisha responded: "No, there is nobody in the audience that's making me afraid. I just don't want to be here." Thereafter, Lanisha again denied having told the police she saw defendant run out of the house just after the gunshots were heard. Lanisha also denied having read what was written by police on the photo lineup before initialing **[*33]** it. The prosecutor asked, "And you are afraid of being a snitch, is that right?" Lanisha responded, "No."

Preliminarily, the California Supreme Court has held that a reviewing court will generally not review a claim of prosecutorial misconduct unless an objection and request for admonishment was raised at trial unless an admonitory directive would not have cured the harm. (*People v. Navarette (2003) 30 Cal.4th 458, 507; People v. Ochoa, supra, 19 Cal 4th at p. 427; People v. Samayoa (1997) 15 Cal.4th 795, 841; People v. Gionis (1995) 9*

Cal.4th 1196, 1215; People v. Price (1991) 1 Cal.4th 324, 447.) The Supreme Court has held: "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the minds of the jury." [Citation.]' [Citation.]" (*People v. Cox (1991) 53 Cal.3d 618, 682, 280 Cal. Rptr. 692,* quoting *People v. Green (1980) 27 Cal.3d 1, 27, 164 Cal. Rptr. 1,* disapproved on another point in *People v. Hall (1986) 41 Cal.3d 826, 834, fn. 3, 226 Cal. Rptr. 112.)* **[*34]** Defendant's misconduct contentions have been waived because defense counsel failed to either object or request a curative admonition.

Notwithstanding such a waiver, we find no misconduct occurred. In reviewing the principles governing findings of prosecutorial misconduct the California Supreme Court has consistently noted: "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill, supra, 17 Cal.4th at p. 819,* quoting *People v. Gionis, supra, 9 Cal.4th at p. 1214, People v. Espinoza (1992) 3 Cal.4th 806, 820,* and *People v. Samayoa, supra, 15 Cal.4th at p. 841;* **[*35]** see also *Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-643, 40 L. Ed. 2d 431; People v. Harris (1989) 47 Cal.3d 1047, 1084, 255 Cal. Rptr. 352,* criticized on other grounds in *People v. Wheeler (1992) 4 Cal.4th 284, 299, fn. 10.)* It is well established: "'"Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. (*Evid. Code, § 780*; *People v. Warren (1988) 45 Cal.3d 471, 481, 247 Cal. Rptr. 172* [].) Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. (*People v. Malone (1988) 47 Cal.3d 1, 30, 252 Cal. Rptr. 525* [].) It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. (*People v. Green*[, *supra,*] *27 Cal.3d [at pp.] 19-20* [] [testimony witness was afraid to go to jail because defendant had friends there relevant to witness's credibility].)" (*People v. Gutierrez (1994) 23 Cal.App.4th 1576, 1587-1588* **[*36]** [].)' [Citation.].)" (*People v. Sanchez (1997) 58 Cal.App.4th 1435, 1449-1450,* quoting *People v. Olguin (1994) 31 Cal.App.4th 1355, 1368;* see also *People v. Navarette, supra, 30 Cal.4th at p. 507.)*

In this case, Ms. King testified that defendant called her following the murder. During that conversation, defendant said that he knew, "Lanisha and them were around there telling." Defendant told Ms. King, "'I'm going to get them.'" Lanisha's fear of testifying against defendant was relevant to her credibility. Moreover, it was Lanisha that admitted she did not want to be a "snitch." Therefore, the prosecutor properly focused on Lanisha's testimony that contradicted what she had told the police as well as her fear of testifying. (*People v. Navarette, supra, 30 Cal.4th at p. 507; People v. Carpenter (1999) 21 Cal.4th 1016, 1054.)*

Finally, any error in the prosecutor's questioning of Lanisha was harmless in light of the overwhelming evidence of defendant's guilt as set forth previously. (*People v. Welch (1999) 20 Cal.4th 701, 753* [prosecutor's comments not prejudicial in light of other **[*37]** evidence against defendant]; *People v. Watson (1956) 46 Cal.2d 818, 836.)* In addition, the jurors were instructed with *CALJIC No. 1.02* that they should not guess what the answer might have been to a question for which an objection was sustained. *CALJIC No. 1.02* also instructs that they not assume any insinuation suggested by a question asked of a witness to be true. The California Supreme Court has consistently stated that on appeal it is presumed that the jury is capable of following the instructions they are given. (*People v. Bradford, supra, 15 Cal.4th at p. 1337; People v. Osband, supra, 13 Cal.4th at p. 714; People v. Kemp (1961) 55 Cal.2d 458, 477, 11 Cal. Rptr. 361;* see *Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 803.)* Any purported misconduct was harmless.

E. Cumulative Error

Defendant argues that the cumulative effect of errors committed by the trial court requires the reversal of his convictions. We disagree. There has been no showing of cumulative prejudicial error. (*People v. Ochoa (2001) 26 Cal.4th 398, 447;* **[*38]** *People v. Noguera (1992) 4 Cal.4th 599, 649;* see also *People v. Cudjo (1993) 6 Cal.4th 585, 630* [no cumulative error when the few

errors which occurred during the trial were inconsequential]; *People v. Garceau (1993) 6 Cal.4th 140, 198; People v. Clark (1993) 5 Cal.4th 950, 1017.)* Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the process or accrue to defendant's detriment. (*People v. Sanders (1995) 11 Cal.4th 475, 565; People v. Cudjo, supra, 6 Cal.4th at p. 637.)* As the California Supreme Court has held, "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey (1992) 2 Cal.4th 408, 454; People v. Miranda (1987) 44 Cal.3d 57, 123, 241 Cal. Rptr. 594.)* In this case, one of essentially uncontroverted evidence of guilt, defendant received more than a fair trial.

IV. DISPOSITION

The judgment is affirmed.

TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-7152 PA (MRW)	Date	September 8, 2021
Title	Fearance v. Cueva		

Present: Hon. Michael R. Wilner, U.S. Magistrate Judge

Veronica Piper	n/a
Deputy Clerk	Court Reporter / Recorder
Attorneys for Petitioner:	Attorneys for Respondent:
n/a	n/a

Proceedings: ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

1. This is a habeas action involving a state prisoner under 28 U.S.C. § 2254. In 2021, Petitioner moved for relief from this Court's 2011 judgment dismissing the action (which, in turn, challenged Petitioner's 2004 murder conviction) for a variety of procedural reasons. (Docket # 48, 69.)

2. The motion is denied. Petitioner's 2021 motion repeats arguments that he previously asserted in this Court regarding his appellate attorney's alleged abandonment. The motion identifies no new evidence, unjust or clear error, or change in governing law that warrants reconsideration. School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1262-63 (9th Cir. 1993). Moreover, to the extent that Petitioner purports to advance new claims of attorney abandonment, he failed to obtain permission from the Ninth Circuit Court of Appeals to pursue a second or successive petition. 28 U.S.C. § 2244.

3. Petitioner's motion regarding the status of the reconsideration motion is dismissed as moot. (Docket # 70.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-7152 PA (MRW)	Date	November 16, 2021
Title	Jaques Fearence v. B. M. Cash		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS – COURT ORDER

The Court is in receipt of the Ninth Circuit's Order, issued on November 9, 2021, with instructions to vacate the magistrate judge's September 8, 2021 order denying Petitioner-Appellant Jaques Fearence's motion for relief from judgment. (See Docket No. 71.) The Court hereby vacates the Magistrate Judge's September 8, 2021 post-judgment order. Upon entry of this Order, all parties are hereby notified that the Court deems the Magistrate Judge's September 8, 2021 order a Report and Recommendation submitted to the Court on this date.

Any party having Objections to the Report and Recommendation and/or Magistrate Judge's September 8, 2021 Order shall not later than December 16, 2021 file and serve a written statement of Objections with points and authorities in support thereof before the Honorable Magistrate Judge Michael R. Wilner, United States Magistrate Judge. A party may respond to another party's Objections within 14 days after being served with a copy of the Objections.

Failure to object within the time limit specified shall be deemed a consent to any proposed findings of fact. Upon receipt of Objections and any Response thereto, upon expiration of the time for filing Objections or a Response the case will be submitted to the District Judge for disposition. Following entry of Judgment and/or Order, all motions or other matters in the case will be considered and determined by the District Judge.

The Report and Recommendation of a Magistrate Judge is not a Final Appealable Order. A Notice of Appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a Judgment and/or Order by the District Judge.

IT IS SO ORDERED.

cc: The Honorable Michael R. Wilner

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAQUES FEARENCE,

Petitioner,

v.

B.M. CASH, WARDEN,

Respondent.

Case No. CV 10-7152 PA (MRW)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the Rule 60(b)(6) motion for relief from judgment (Docket # 69), the remand order of the Ninth Circuit (Docket # 75), and the Report and Recommendation of the assigned magistrate judge (Docket # 71, 76). Further, the Court engaged in a de novo review of the matter after considering Petitioner's objections. (Docket # 78.) The Court accepts the findings and recommendation of the magistrate judge.

IT IS ORDERED that the motion for relief from judgment is DENIED.

DATE: December 22, 2021

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

[redacted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAQUES FEARENCE,

Petitioner,

v.

B.M. CASH, WARDEN,

Respondent.

Case No. CV 10-7152 PA (MRW)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts requires a district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Under 28 U.S.C. § 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."

Here, the Court accepted the Magistrate Judge's Report and Recommendation that Petitioner: (a) did not state a basis for post-judgment relief under Rule 60; and (b) failed to obtain permission from

the Court of Appeals to pursue a second or successive habeas action under 28 U.S.C. § 2244.

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the Court's determination of whether a COA should issue is governed by Slack v. McDaniel, 529 U.S. 473 (2000). Two showings are required to justify the issuance of a COA. Petitioner must show that jurists of reason would find it debatable whether: (a) "the petition states a valid claim of the denial of a constitutional right," and (b) "the district court was correct in its procedural ruling." Id. at 484. The Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds to first resolve the issue whose answer is more apparent from the record and arguments.

Id. at 485. The COA inquiry is made "without full consideration of the factual or legal bases adduced in support of the claims." Buck v. Davis, ___ U.S ___, 137 S. Ct. 759, 773-74 (2017) (quotation marks omitted).

After considering the records and files in this matter, including the Report and Recommendation of the Magistrate Judge, the Court concludes that petitioner failed to make the requisite showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Accordingly, a Certificate of Appealability is denied in this case.

DATE: December 22, 2021

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

[redacted]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 2 2022

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

JAQUES FEARENCE, Petitioner-Appellant, v. BRENDA M. CASH, Warden, Respondent-Appellee.	No. 22-55108 D.C. No. 2:10-cv-07152-PA-MRW Central District of California, Los Angeles ORDER

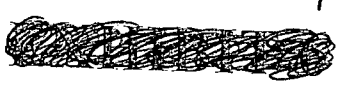
Before: CANBY and BUMATAY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Ortiz v. Stewart*, 195 F.3d 520, 520-21 (9th Cir. 1999).

Any pending motions are denied as moot.

DENIED.

APPENDIX E



MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 03/05/10

CASE NO. NA060375

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: JAQUES OMAR FEARENCE

INFORMATION FILED ON 04/22/04.

COUNT 01: 187(A) PC FEL
COUNT 02: 11351.5 H&S FEL

ON 02/26/10 AT 830 AM IN SOUTH DISTRICT DEPT SO9

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: TOMSON T ONG (JUDGE) AMY URUBURU (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

COURT HAS READ AND CONSIDERED DEFENDANTS PETITION FOR WRIT OF HABEAS CORPUS

.

THE PETITION FAILED TO SHOW A PRIMA FACIE CASE FOR RELIEF. THE BURDEN IS ON THE PETITIONER TO ESTABLISH GROUNDS FOR HIS RELEASE. MOREOVER, HABEAS CORPUS WILL NOT LIE WHERE ANY SUCH

CLAIMED ERROR COULD HAVE BEEN, BUT WAS NOT, RAISED ON APPEAL. THERE IS NO SHOWING THAT THE DIRECT REMEDY OF APPEAL IS INADEQUATE, AND ONE STATE REMEDY IS ORDINARILY ENOUGH.

.

THEREFORE, PETITION IS DENIED.

.

.

JACQUES FEARENCE, V51385
P.O. BOX 4430
LANCASTER, CA 93539
(A3-139)

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re	B223219
JAQUES FEARENCE	(Super. Ct. No. NA060375)
on	(Tomson T. Ong, Judge)
Habeas Corpus.	**ORDER**

THE COURT:

The court has read and considered the petition for writ of habeas corpus filed March 24, 2010. The petition is denied. Petitioner is procedurally defaulted from challenging the validity of his 2004 conviction due to his inadequately explained delay in seeking relief. (*In re Clark* (1993) 5 Cal.4th 750, 783.) The petition is also denied on the merits. The issues of ineffective assistance of trial counsel, evidentiary error, prosecutorial misconduct, rights to self-representation or substitution of counsel, and the legality of the search of petitioner's residence were, or could have been but were not, raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 826; *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) Petitioner's claim under *Cunningham v. California* (2007) 549 U.S. 270, 288-293, fails, as there is no showing the trial court chose an upper term from a range of sentencing options. (Pen. Code, § 12022.53, subd. (d).) The alleged error petitioner claims constitutes ineffective assistance of appellate counsel was already considered and rejected by this court in relation to petitioner's motion to recall the remittitur. (*People v. Fearence* (Feb. 21, 2008, B178108)

[nonpub. order].) Petitioner fails to support his claim that a restitution fine was improperly imposed. (Pen. Code, § 1202.4, subd. (d).) The cumulative errors petitioner alleges do not warrant the relief prayed for.

TURNER, P.J. KRIEGLER, J. FERNS, J.*

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

S183340

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAQUES FEARENCE on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Clark* (1993) 5 Cal.4th 750; *In re Robbins* (1998) 18 Cal.4th 770, 780.)

GEORGE

Chief Justice

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 11/27/13

CASE NO. NA060375

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: JAQUES OMAR FEARENCE

INFORMATION FILED ON 04/22/04.

COUNT 01: 187(A) PC FEL
COUNT 02: 11351.5 H&S FEL

ON 09/24/13 AT 830 AM IN SOUTH DISTRICT DEPT S19

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: TOMSON T ONG (JUDGE) AMY URUBURU (CLERK)
NONE (REP) NONE (DDA)

PURSUANT TO DEFENDANT'S WRITTEN REQUEST, AND NOT REPRESENTED BY COUNSEL

THE COURT HAS READ AND CONSIDERED THE PETITION FOR WRIT OF HABEAS CORPUS FILED ON SEPTEMBER 4, 2013 AND ALL RELATED MATERIALS PROVIDED BY PETITIONER.

THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED FOR THE REASONS AS INDICATED ON THE ATTACHED ORDER.

A COPY OF THIS MINUTE ORDER AND ATTACHED ORDER ARE MAILED TO THE DEFENDANT.

*** NO LEGAL FILE ***

COURT ORDERS AND FINDINGS:

-PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re, Jacques Feareance, Petitioner, On Habeas Corpus	Case No.: NA 060375-01 ORDER DENYING WRIT OF HABEAS CORPUS

The court has read and considered the Petition for Writ of Habeas Corpus filed on September 4, 2013 and all related materials provided by Petitioner.

THE PETITION FOR WRIT OF HABEAS CORPUS is DENIED for the following reasons:

1. The petition contains only vague, conclusory allegations. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief. (People v. Karis (1988) 46 Cal.3d 612, 656; People v. Duvall (1995) 9 Cal.4th 464, 474).

2. Petitioner has failed to serve the prosecuting agency. Penal Code Sections 1474 and 1475.

3. Regarding the ineffective assistance of counsel claim, this claim is one that could be, but has not raised on appeal , *In re Dixon*, (1953) 41 Cal. 2d 756, 759; *In re Harris*, (1993) 5 Cal. 4th 813, 825, fn. 3 & pp. 829-841. Additionally, petitioner has not demonstrated ineffective assistance of counsel as petitioner has not shown that counsel's performance was 'deficient' because his 'representation fell below

an objective standard of reasonableness ... under prevailing professional norms.' Also, petitioner must show prejudice flowing from counsel's performance. Prejudice is shown where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *In re Harris*, (1993) 5 Cal. 4th 813, 832-833; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Pope* (1979) 23 Cal. 3rd 412, 423-425; *In re Sixto* (1989) 48 Cal. 3rd 1247, 1257. Petitioner failed to show that trial counsels performance rendered the result of the trial unreliable, or the proceedings fundamentally unfair.

4. Regarding ineffective assistance of appellate counsel, petitioner has not shown that counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness ... under prevailing professional norms.' Also, petitioner must show prejudice flowing from counsel's performance. Prejudice is shown where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. (*In re Harris*, (1993) 5 Cal. 4th 813, 832-833; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Pope* (1979) 23 Cal. 3rd 412, 423-425; *In re Sixto* (1989) 48 Cal. 3rd 1247, 1257. Petitioner failed to show that counsel's performance rendered the result of the trial unreliable, or the appellate proceedings fundamentally unfair. Counsel is not required to raise issues that in counsel's professional judgment lack merit, *Jones v. Barnes*, 463 US 745.

5. Petitioner unjustifiably delayed the bringing of this Petition for Writ of Habeas Corpus. Delay in seeking habeas relief has been measured from the time a petitioner becomes aware of the grounds on which he seeks relief. As in this case, that may be as early as the date of the conviction. Petitioner has waited nearly 9 years since the events giving rise to this Petition for Writ of Habeas Corpus. The court considers this to be a substantial delay, for which Petitioner offers no particular circumstances sufficient to justify this delay. It has long been required

that a petitioner explain and justifies any significant delay in seeking habeas corpus relief. *In Re Clark* (1993) 5 Cal. 4th 750, 765; *In Re Stankewitz* (1985) 40 Cal. 3d 391, 397.

6. Petitioner has failed to set forth a prima facie case for relief. (*In re Crow* (1971) 4 Cal. 3d 613, 624). The burden is on the petitioner to establish grounds for his release. (*People v Duvall* (1995) 9 Cal. 4th 464, 474).

DATED: September 24, 2013

TOMSON T. ONG
Judge of the Superior Court

The clerk is to give notice.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re	B253418
JAQUES FEARENCE	(Super. Ct. No. NA060375)
on	(Tomson T. Ong, Judge)
Habeas Corpus.	**ORDER**

THE COURT:

The court has read and considered the petition for writ of habeas corpus filed December 31, 2013. The petition is denied. Petitioner is procedurally defaulted from raising the issues presented in unjustified, successive habeas corpus petitions, and from challenging the validity of his 2004 conviction due to his inadequately explained delay in seeking relief. (See *In re Clark* (1993) 5 Cal.4th 750, 771, 775, 783; see also *McCleskey v. Zant* (1991) 499 U.S. 467, 498.)

TURNER, P.J. KRIEGLER, J. MINK, J.*

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

S217184

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAQUES FEARENCE on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Clark* (1993) 5 Cal.4th 750, 767-769.)

CANTIL-SAKAUYE

Chief Justice

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAQUES FEARENCE, Petitioner, vs. B.M. CASH, Warden, Respondent.	Case No. CV 10-7152 PA (MRW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. SUMMARY OF RECOMMENDATION

This is a state habeas action. Petitioner Jaques Fearence seeks federal review of his first degree murder conviction. Petitioner filed his action in this Court nearly five years after his state court conviction became final. Based on the federal habeas statute and a recent U.S. Supreme Court decision governing habeas

actions, his claims appear to be time-barred and procedurally defaulted as a matter of law.

In response to an earlier dismissal motion, Petitioner argued that he was entitled to equitable tolling of the statute of limitations in his habeas action due to misconduct by his appellate lawyer. Yet, even giving Petitioner the benefit of such tolling, his habeas action still would fall well outside the time period mandated by statute. While he may have been poorly served by his former lawyer, Petitioner waited for years after discovering the attorney's misconduct before pursuing federal relief. Under the most lenient application of the statutory deadlines and tolling provisions, Petitioner's federal action is still untimely.

The Court previously denied a request to dismiss the action on procedural grounds. However, after considering a recently-decided Supreme Court case and reviewing the substance of the lodged documents filed in support of the answer to the petition, the Court informed the parties that it intended to take up the timeliness issue again. The Court offered Petitioner an opportunity to state his position, and provided him with a copy of the relevant Supreme Court decision. Petitioner declined to submit any response.

The Court therefore concludes that this federal habeas action is untenable, and recommends that the petition be dismissed as untimely and procedurally barred.

II. FACTS AND PROCEDURAL BACKGROUND

Petitioner shot and killed a Long Beach drug dealer in a turf-related dispute. The evidence at trial included several witnesses to the shooting and an audiorecording of a telephone call in which Petitioner told police "I'm gonna kill again, mother f***er." (Lodgment # 5.)

A jury convicted Petitioner of murder, drug, and weapons charges. In September 2004, the trial court sentenced Petitioner to a prison term of over

fifty-one years to life. (Docket # 1 (Petition) at 2.)[1] Petitioner hired a private attorney (McKinney) to represent him at sentencing and on direct appeal. Petitioner asserted numerous grounds for relief on appeal. In a detailed, 21-page decision, the California Court of Appeal affirmed Petitioner's conviction in late October 2005. (Lodgment # 5.)

A. Petitioner Fails to Seek State Supreme Court Review

Attorney McKinney did not file a petition for review in the California Supreme Court. The reasons for this are unclear from the record. However, according to declarations submitted by Petitioner, Petitioner's brother, and McKinney, it appears that McKinney failed to apprise Petitioner about the status of his state court appeal while Petitioner was in prison, and was not paid for the appellate work he performed for Petitioner.

In his declaration, Petitioner explains that he knew McKinney filed Petitioner's direct appeal in 2005. (Docket # 1 at 75.) Petitioner claims that he sent the lawyer a letter inquiring about the appeal in January 2006 that went unanswered. Petitioner also asserts that he called the lawyer's office and left messages regarding his case, but did not hear back from counsel.

Petitioner further claims that he relied on family members to contact counsel. According to the declaration of Petitioner's brother, the brother was responsible for hiring private counsel for Petitioner after his conviction. (Docket # 1 at 78.) The brother provided McKinney with some money for his fees in July 2004 in advance of sentencing, but did not pay McKinney the full amount owed. Despite trying to contact counsel numerous times, the brother never heard from counsel again. Petitioner's brother was incarcerated in an unrelated case at

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[1] All page citations to docketed documents refer to the page numbers assigned via CM/ECF.

some point, so other family members left messages with McKinney in November 2005, on several days in 2006, and in early 2007.

McKinney tells a somewhat different story. According to a declaration from the lawyer (submitted after the Court's consideration of the original dismissal motion (Lodgment # 22)), McKinney was not hired or paid to represent Petitioner in the state supreme court. McKinney acknowledges that Petitioner's brother hired him in mid-2004, and that the lawyer handled the sentencing and post-trial motions in the trial court. McKinney then filed the appellate brief in March 2005. However, Petitioner's family apparently owed the lawyer a portion of his fees. McKinney contends that he had only one contact with Petitioner's brother in 2005 to deal with the unpaid fee issue, but that McKinney received no further payment from nor had any additional contact with Petitioner or his family after that.

McKinney states that it his practice to file a petition for review in the California Supreme Court "in every case." In Petitioner's case, though, McKinney says that he received the adverse appellate court decision and determined that "filing a petition for review [in the state supreme court] would serve no purpose." McKinney believed that Petitioner had no viable claims and no "chance of success in the federal court if a federal habeas petition was filed." According to McKinney, due to an undefined "miscommunication" with his staff, the lawyer did not file a petition for review with the state supreme court. (Id. at 4.)

McKinney's declaration further states that "because of miscommunication and inadvertence within my office," McKinney failed to send Petitioner a letter informing him that the court affirmed Petitioner's conviction. The Court notes that McKinney has a disciplinary history with the State Bar in this regard. According to the bar's website, McKinney was the subject of a 2003 private reproval and a 2006 public reproval (the subject of which was failure to ensure that a criminal defense client was informed of his decision not to pursue an appeal on her behalf).

See http://members.calbar.ca.gov/fal/ Member/Detail/66803 (accessed Nov. 2, 2011).

B. Petitioner Tries to Reopen His Appeal

Because no petition for review was filed in the state supreme court, Petitioner's conviction became final in December 2005 (40 days after the decision in the state appellate court). After writing to the State Bar and another legal service agency in 2007, Petitioner contacted the California Appellate Project in Los Angeles (CAP). An attorney from CAP informed Petitioner in October 2007 that the Court of Appeals affirmed his conviction several years earlier.

The CAP attorney filed a motion in the appellate court to reopen his appeal so he could then file a petition for review in the state supreme court. The CAP attorney wrote to Petitioner and explained that she had to show the court that "you did everything you could to help yourself after sentencing" and diligently pursued the case. (Docket # 1 at 91.) In his declaration, Petitioner stated that the CAP lawyer told him that he "could proceed to federal court" if the motion was denied. (Docket # 1 at 77.) The appellate court denied the motion to reopen the appeal in February 2008 without discussion. (Docket # 1 at 94.)

C. Petitioner Files Five State Habeas Actions

Later in 2008, Petitioner filed a habeas petition in the supreme court. The habeas petition asserted the same issues that he presented in his direct appeal to the Court of Appeal. Petitioner did not appear to have the assistance of the CAP attorney or any other lawyer in submitting the habeas petition. The California Supreme Court denied the habeas petition without comment in April 2009. (Lodgment # 7.)

Petitioner then filed three additional habeas petitions in the state supreme court during 2009 and 2010. In contrast to the first habeas petition, those next petitions alleged claims that were not presented in Petitioner's original appeal. The

supreme court denied each of the three habeas petitions as untimely. The court signified this by citing to its decisions in In re Clark, 5 Cal. 4th 750 (1993), and In re Robbins, 18 Cal. 4th 770, 780 (1998). (Lodgment # 9, 11, 13.) Petitioner subsequently filed a fifth state habeas action in the California Court of Appeal in March 2010. In a brief order denying the petition, the court noted that Petitioner was procedurally defaulted from challenging the validity of his 2004 conviction due to his "inadequately explained delay" in seeking relief. The court also denied the petition on the merits. (Lodgment # 15.)

D. Petitioner's Federal Habeas Action

Petitioner ultimately filed this federal habeas action in September 2010. The petition contains eight claims – four claims that Petitioner presented on direct appeal (the "Direct Appeal Claims" (grounds 3, 5, 6, and 8 of the petition)), and four additional claims that Petitioner advanced in his later state habeas actions (the "State Habeas Claims" (grounds 1, 2, 4, and 7 of the petition)). Petitioner filed his federal action nearly five years after his conviction became final in late 2005, and three years after his former lawyer was out of the case. Looked at another way, he filed the federal petition a year and a half after the state supreme court denied the habeas petition in April 2009 in which Petitioner asserted his original appellate claims.

Respondent moved to dismiss the federal petition as untimely. (Docket # 13.) Respondent contended that Petitioner's federal claims were time-barred and that he was not entitled to any tolling of the AEDPA limitations period as a result of his state habeas filings. In response, Petitioner asserted that he was entitled to equitable tolling of the federal limitations period due to his private attorney's conduct. (Docket # 19.)

The Court agreed that Petitioner was "entitled to a period of equitable tolling on the ground of egregious attorney misconduct," although it did not specify how

long that period was. (Docket # 20 at 1.) The Court concluded that "dismissal on untimeliness grounds is not warranted at this time." However, the Court expressly granted Respondent leave to renew its dismissal request by motion or in the answer to the petition. Respondent subsequently answered the petition on the merits in May 2011. The answer included a renewed argument that the federal action was time-barred, along with an additional declaration from McKinney. (Docket # 33.)

The Court issued its order denying the dismissal request in January 2011. At the time of the order, the Court did not have the benefit of the U.S. Supreme Court's unanimous decision in Walker v. Martin, ___ U.S. ___, 131 S. Ct. 1120, 1127 (decided in February 2011). In September 2011, the Court[2] instructed the parties that they could submit supplemental briefing as to the "applicability (if any) of the Walker ruling to the claims in this action and to Petitioner's equitable tolling argument." (Docket # 45.) The Court also sent a copy of the Walker decision to Petitioner. Respondent filed a supplemental brief arguing that the Walker decision rendered several of Petitioner's claims procedurally defaulted and barred from federal review. (Docket # 46.) Petitioner failed to submit any response to the Court's order, though.

III. DISCUSSION

Petitioner's habeas petition should be dismissed on procedural grounds. The Direct Appeal Claims are time-barred under AEDPA. Assuming that Petitioner is entitled to some amount of equitable tolling due to McKinney's conduct, that period ended when Petitioner discovered the misconduct and took control of his state habeas action. The lawyer was not the cause of Petitioner's subsequent failure to file promptly in federal court after the impact of the attorney's actions

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[2] This case was originally assigned to Magistrate Judge Woehrle. It was reassigned to Magistrate Judge Wilner in April 2011.

ceased. Further, as to the State Habeas Claims, those issues are procedurally defaulted and barred from federal consideration under Walker.

A. Timeliness Requirements Under AEDPA

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), state prisoners have a one-year period within which they must seek federal habeas review of their habeas claims. 28 U.S.C. § 2244(d)(1). The limitations period is triggered when state court appellate review becomes final, an unlawful state impediment to filing is removed, a new constitutional right is made retroactive, or the factual predicate of the claim(s) presented could have been discovered with "due diligence." 28 U.S.C. § 2244(d)(1)(A-D); Lee v. Lampert, 653 F.3d 929, 933 (9th Cir. 2011).

The limitations period is tolled when a prisoner properly files an application for state post-conviction review (statutory tolling) and during the period of time between such state habeas proceedings (gap tolling). 28 U.S.C. § 2244(d)(2). However, a habeas petition rejected by a state court as untimely is not "properly filed" within the meaning of the statutory tolling provisions of AEDPA. Pace v. DiGuglielmo, 544 U.S. 408, 415 (2005); Lakey v. Hickman, 633 F.3d 782, 785-86 (9th Cir. 2011) (untimely state habeas petition subject to Clark denial "must be treated as improperly filed, or as though it never existed, for purposes of section 2244(d)").

AEDPA's statutory limitations period may also be tolled for equitable reasons "in appropriate cases." Holland v. Florida, ___ U.S. ___, 130 S. Ct. 2549, 2560 (2010). The Ninth Circuit recognized the availability of equitable tolling of the one-year statute of limitations in situations where "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003). A prisoner must establish that: (1) he has been pursuing his rights diligently; and (2) some extraordinary

circumstances caused the delay. Pace, 544 U.S. at 418. This is a highly fact-dependent determination. Spitsyn, 345 F.3d at 799.

The words "extraordinary" and "impossible" suggest the limited availability of this doctrine. Indeed, equitable tolling is "unavailable in most cases." Miles v. Prunty, 187 F.3d 1104, 1007 (9th Cir. 1999). This difficult burden ensures the exceptions do not swallow the rule. Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). The rare cases warranting relief involve extreme circumstances beyond a prisoner's control that directly prevented the petitioner from filing.[3]

At some point, though, a prisoner's entitlement to equitable tolling ends. A circumstance that prevents a timely federal habeas filing will not "toll the statute of limitations indefinitely." Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003). A habeas petitioner bears the burden of demonstrating "the necessary causal link between counsel's alleged actions and the untimeliness" of the habeas action filed in federal court. United States v. Buckles, 647 F.3d 883, 890 (9th Cir. 2011). Where additional delay in filing a federal habeas action "is not attributable to counsel," equitable tolling does not apply. Id.

The Ninth Circuit cautions federal courts to closely examine equitable tolling claims where an attorney's misconduct in state court "had no bearing on [the prisoner's] ability to file a timely federal habeas petition." Randle v.

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[3] See, e.g., Harris v. Carter, 515 F.3d 1051, 1054-57 (9th Cir. 2008) (petitioner entitled to equitable tolling because he relied on the court's legally erroneous holding); Spitsyn, 345 F.3d at 800-02 (equitable tolling available where the attorney does nothing, is completely unresponsive, and failed to return the petitioner's file after the statute of limitations had run); Corjasso v. Ayers, 278 F.3d 874, 877-79 (9th Cir. 2002) (equitable tolling warranted where district court mishandled a petition causing it to be untimely); Miles, 187 F.3d at 1107 (equitable tolling available where prison officials delayed mailing an otherwise timely petition).

Crawford, 604 F.3d 1047, 1058 (9th Cir. 2010) (counsel's failure to file appeal in state court "simply meant that [petitioner] had one year from the expiration of his time to file a notice of appeal in which to initiate a federal habeas action – it did not prevent him from filing the petition"); see also Spitsyn, 345 F.3d at 802 (prisoner must exercise reasonable diligence in attempting to file federal action after exceptional circumstances began otherwise "the link of causation between the extraordinary circumstances and the failure to file is broken"); Guillory, 329 F.3d at 1018 ("the relevant measure of diligence" for determining equitable tolling is "how quickly a petitioner sought to exhaust" claims in state court after erroneous federal court dismissal and "how quickly he returned to federal court after doing so"). Moreover, a pro se prisoner's "confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling." Waldron-Ramsay v. Pacholke, 556 F.3d 1008, 1013 n.4 (9th Cir. 2009).

B. Exhaustion and Procedural Default Under AEDPA

A prisoner must ordinarily exhaust remedies available in state court before seeking federal habeas review. 28 U.S.C. § 2254(b)(1)(A). AEDPA requires that a prisoner present his claims to the state's highest court for consideration. Rose v. Lundy, 455 U.S. 509 (1982). The state courts must be afforded the "first opportunity to address and correct alleged violations of [the] prisoner's federal rights." Walker v. Martin, ___ U.S. ___, 131 S. Ct. 1120, 1127 (2011) (quotation omitted).

A federal court may not consider a state prisoner's habeas claim "if it runs afoul of the procedural bar doctrine," a concept that is "closely related [to], but distinct" from, exhaustion. Cooper v. Neven, 641 F.3d 322, 327 (9th Cir. 2011). A claim is procedurally defaulted when: (1) a state court declines to address a petitioner's federal claims for failure to comply with a state procedural

requirement; and (2) the state court decision rests on independent and adequate state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

In Walker, the Supreme Court unanimously held that the practice of California courts to deny habeas petitions as untimely is an adequate and independent state procedural ground that bars relief in federal court. Walker, 131 S. Ct. at 1124. California courts will "signal that a habeas petition is denied as untimely by citing the controlling decisions, i.e., Clark and Robbins." Id. The Walker Court determined that the state rule established under those cases is "firmly established" and "regularly followed" by the state court. Id. at 1128-30. Therefore, when a California court issues a Clark-Robbins denial of a state habeas petition, the prisoner is procedurally defaulted from raising that claim on federal habeas review. Id.; see also Alvarez v. Wong, 425 Fed. Appx. 652, 2011 WL 1252307 (9th Cir. Apr. 5, 2011) (applying Walker to affirm dismissal of untimely petition).

As a limited exception to the procedural bar doctrine, a federal court may still consider the claim if petitioner shows: (1) good cause for his failure to exhaust the claim and prejudice from the alleged constitutional violation; or (2) a fundamental miscarriage of justice. Cooper, 641 F.3d at 327. The miscarriage of justice prong of this test is synonymous with a claim of actual factual innocence to the offense of conviction. Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992).

C. Analysis of Timeliness of Petitioner's Claims

Petitioner's federal action is untimely and certain of his claims are precluded by the procedural bar rule. The Court starts its analysis with the premise that Petitioner was not fully aware of the status of his case on state appeal as he was serving his prison term, and that he was poorly served by his appellate lawyer. The

Court previously found that Petitioner was entitled to some period of equitable tolling as a result of the lawyer's misconduct. That finding is the law of the case.[4]

From the time of the state appellate court's affirmance of Petitioner's conviction on direct appeal (October 2005) through his discovery of the actual status of his case (October 2007), Petitioner is entitled to equitable tolling of the AEDPA statute of limitations. That time period can be attributed to the attorney's actions, and continued through the time that the CAP attorney assisted Petitioner in learning the state of his appeal.

After regaining control over his case, Petitioner demonstrated some diligence in pursuing his claims in state court. He filed an unsuccessful motion for relief in the state court of appeal and a habeas petition in the state supreme court

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[4] Magistrate Judge Woehrle previously found McKinney's failure to file a petition for review in the state supreme court to be "egregious attorney misconduct" analogous to that in Holland. The Court will not revisit that determination. However, after reviewing the record and the supplemental materials filed with Respondent's answer, an argument could be made that Petitioner's circumstance differs considerably from Holland's. In Holland, petitioner was a death row inmate in a capital case for whom the state specifically appointed counsel to represent him "in all state and federal postconviction proceedings." Holland, 130 S. Ct. at 2555. Holland diligently communicated with the lawyer for the specific purpose of ensuring a timely filing of his federal habeas petition.

By contrast, in the present case: (a) Petitioner did not appear to have hired McKinney or paid his full fee for representation beyond the original sentencing and direct appeal to the California Court of Appeal; and (b) Petitioner and his representatives did not pursue McKinney with the diligence described in Holland regarding the filing of the state supreme court petition in the years following his conviction and appeal. However, given McKinney's admission that he failed to communicate properly with his incarcerated client about the status of the appeal – and the lawyer's checkered disciplinary past – the Court sees no need to reconsider the decision to extend some equitable tolling to Petitioner.

that contained the Direct Appeal Claims. Equitable tolling plausibly applies to the period during which those actions were underway and in progress (October 2007 through April 2009).

When the California Supreme Court denied Petitioner's first habeas petition in early 2009, though, he was obliged to bring his Direct Appeal Claims to federal court promptly. The supreme court's silent denial of that petition indicated that it "adjudicated the claim on the merits." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 785 (2011). The Direct Appeal Claims were then fully exhausted and ripe for potential federal habeas review with the benefit of equitable tolling as found by the Court. That comports with the CAP attorney's earlier observation to Petitioner that he could file a habeas action in federal court following the resolution of his motion to reopen his appeal in state court.

Petitioner chose not to file in federal court, though. Instead, he filed four additional petitions in the state court of appeal and supreme court in 2009 and 2010 and continued to advance his State Habeas Claims. Petitioner was not entitled to any tolling during that period. Lakey, 633 F.3d at 785-86. The state courts repeatedly told him – through the Clark-Robbins denials – that his habeas actions were untimely. Further, Attorney McKinney was out of the picture years earlier and was not to blame for Petitioner's post-2007 or post-2009 litigation decisions. As such, the causal link that previously earned him the extraordinary relief of equitable tolling was gone. Buckles, 647 F.3d at 890; Randle, 604 F.3d at 1058.

Directly put, after the state supreme court's initial adverse decision, Petitioner filed his next habeas actions in the wrong court. No attorney misadvised Petitioner or prevented him from promptly filing his petition in this Court. Petitioner was not entitled to an indefinite amount of time to file this action. Rather, as a pro se litigant, he was required to act diligently to quickly get into federal court. Guillory, 329 F.3d at 1018. By the time he did so in September

2010, seventeen months passed after the state supreme court's ruling on his Direct Appeal Claims. The Court finds that delay does not demonstrate diligence. Equitable tolling does not apply, and the federal petition was not timely filed.

* * *

In addition, the State Habeas Claims in the petition are procedurally barred under Walker. Four state courts separately determined that Petitioner's claims in his numerous state habeas filings were not timely when presented many years after Petitioner's criminal conviction. Each received Clark-Robbins denials, which, as Walker explains, bars later federal review of those claims. The direct operation of the Supreme Court's clear statement to lower federal courts in California prevents consideration of those claims.

Petitioner declined to file a response to this Court's inquiry regarding the potential impact of Walker on his State Habeas Claims. Nevertheless, the Court independently reviewed those claims in the petition and concludes that Petitioner cannot satisfy the cause/prejudice or actual innocence exceptions to the procedural bar rule under Cooper. Petition Claim 2 alleges a Fourth Amendment violation that cannot lead to federal habeas relief. See Stone v. Powell, 428 U.S. 465 (1976). Petition Claim 4 alleges ineffective assistance by Petitioner's appellate lawyer for failing to file the petition for review in the state court and thereby preventing federal court review of his claims. Yet, as explained above, Petitioner was entitled to file a timely petition in this Court asserting the Direct Appeal claims, but chose not to do so. There can be no prejudice as to the procedural bar of that claim. Petition Claim 7 alleges a restitution issue under state law that does not mention any federal constitutional violation. Finally, although Petition Claim 1 is entitled "Actual/Factual Innocence," it offers no facts or newly-discovered evidence to support his claim. At best, Petitioner argues that his upper-term sentence was

unconstitutional. However, despite several pages of legal argument, Petitioner fails to provide any facts to show how his sentence was imposed illegally.

The Court finds no basis to avoid the operation of the procedural bar doctrine to these insubstantial claims. Walker directly prohibits the Court from considering the State Habeas Claims presented in the federal petition.

IV. RECOMMENDATION

The Court closely reviewed the trial court record and appellate decision in this case. The prosecution presented considerable evidence of Petitioner's guilt regarding a particularly cold-blooded killing. The original appellate decision analyzed the facts, evidence, and legal arguments on appeal in great detail. The Court recognizes that Petitioner's appellate attorney did not adequately represent him beyond that stage, but the state supreme court apparently rectified that situation by considering Petitioner's first direct habeas action. After that, though, the responsibility to litigate this action promptly, diligently, and in compliance with federal law fell to Petitioner alone. After careful consideration of the issues, the Court finds that Petitioner failed to do so.

IT IS THEREFORE RECOMMENDED that the District Judge issue an order accepting the findings and recommendations in the Report and enter judgment dismissing this case with prejudice.

DATED: November 8, 2011

MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 9 2021

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

JAQUES FEARENCE,

Petitioner-Appellant,

v.

BRENDA M. CASH, Warden,

Respondent-Appellee.

No. 21-56162

D.C. No.
2:10-cv-07152-PA-MRW
Central District of California,
Los Angeles

ORDER

Before: IKUTA, OWENS, and BENNETT, Circuit Judges.

Appellant's notice of appeal, served on September 30, 2021 and filed in the district court on October 13, 2021, challenges the magistrate judge's September 8, 2021 post-judgment order denying appellant's motion for relief from judgment. A review of the record does not reflect that all parties consented to proceed before the magistrate judge. *See Williams v. King*, 875 F.3d 500, 503-04 (9th Cir. 2017) (all parties must consent in order for jurisdiction to vest with the magistrate judge pursuant to 28 U.S.C. § 636(c)(1)). The magistrate judge's September 8, 2021 order exceeded the limits of the magistrate judge's authority absent consent under 28 U.S.C. § 636(c), and we lack jurisdiction to review the order. *See Allen v. Meyer*, 755 F.3d 866, 867 (9th Cir. 2014) (court of appeals has authority to review the question of whether the magistrate judge validly entered judgment on behalf of the district court); *Columbia Record Productions v. Hot Wax Records, Inc.*, 966

F.2d 515, 516-17 (9th Cir. 1992) (holding that absent consent, a federal magistrate judge lacked authority to render a post-judgment decision that has a dispositive effect on the parties); *In re San Vicente Med. Partners Ltd.*, 865 F.2d 1128, 1131 (9th Cir. 1989) (order) (magistrate judge order not final or appealable). Rather than dismiss this appeal, we remand to the district court with instructions to vacate the magistrate judge's September 8, 2021 order and conduct further proceedings on appellant's motion for relief from judgment. *See Allen*, 755 F.3d at 869 (remanding to district court with instructions to vacate infirm judgment entered in excess of magistrate judge's authority). On remand, the district judge may treat the magistrate judge's order as a report and recommendation.

REMANDED.