UNITED STATES COURT OF APPEALS

FILED

MAR 22 2024

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

FOR THE NINTH CIRCUIT

ONOFRE TOMMY SERRANO, Petitioner-Appellant, v. ALEX VILLANUEVA, Respondent-Appellee.	No. 22-56173 D.C. No. 5:21-cv-00931-VBF-PLA Central District of California, Riverside ORDER

Before: CANBY and DESAI, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

App. A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

October 18, 2024

Onofre Serrano
#BX0044
480 Alta Rd.
San Diego, CA 92179

RE: Serano v. Villanueva
USAP9 No. 22-56173

Dear Mr. Serrano:

The above-entitled petition for a writ of certiorari was postmarked September 19, 2024 and received October 1, 2024. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was March 22, 2024. Therefore, the petition was due on or before June 20, 2024. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

Sincerely,
Scott S. Harris, Clerk
By:
Emily Walker
(202) 479-5955

Enclosures

App. A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

July 22, 2024

Onofre Serrano
#BX0044
480 Alta Rd.
San Diego, CA 92179

RE: "Serrano v. Villanueva"

Dear Mr. Serrano:

The above-entitled petition for writ of certiorari was postmarked June 25, 2024 and received July 15, 2024. The papers are returned for the following reason(s):

The statement of jurisdiction must show the date the judgment or order sought to be reviewed was entered and, when applicable, the date of any order respecting rehearing. Rule 14.1(e).

The lower court opinion(s) must be appended as required by Rule 14.1(i). Without the lower court opinion(s), it is impossible to determine the timeliness of the petition or what is sought to be reviewed.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

Sincerely,
Scott S. Harris, Clerk
By:

Emily Walker
(202) 479-5955

Enclosures

App-A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONOFRE SERRANO,
Appellant.
v
ALEX VILLANUEVA,
Appellee.

Case No.: 22-50173

MOTION FOR CERTIFICATE OF APPEALABILITY

Appellant moves this Court for a Certificate of Appealability within the meaning of Section 2353(c) of Title 28 of the US Code and Rule 22(b)(1) of the fed. R. App. Proc.

This motion is based on this document, on that Notice of Appeal filed on 12/2/22 [Jmada A 8, 1444] on the attached memorandum of points and authorities, and on all of the pleadings and papers on file in this action.

ONOFRE SERRANO
BK #6032688
441 Bachet Street
Los Angeles, CA. 90012

IN JURE PROPRIO

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I.

GROUNDS FOR APPLICATION

A.

NATURE OF DISTRICT COURT PROCEEDING

Appellant filed a Petition for a Writ of Habeas Corpus, as authorized by Section 2254 of Title 28 of the US Code. In that Petition, Petitioner alleged that his detention by the authorities of the State of California was unconstitutional because:

1. Ground One alleges that the attempted pat search of Petitioner was not supported by reasonable cause.

2. Ground Two alleges the detention of Petitioner for "loitering" was not supported by reasonable suspicion or probable cause.

3. Ground Three alleges the detaining officer failed and/or refused to secure a probable cause determination within 48 hours after arresting Petitioner.

4. Ground four alleges the search of a vehicle was not supported by probable cause in prior conviction.

5. Ground five alleges that in a prior strike conviction the prosecution presented hearsay evidence in a joint trial without opportunity to cross-examine out-of-court declarant(s).

6. Ground Six alleges the prosecutor failed to disclose exculpatory discovery prior to preliminary hearing.

7. Ground Seven alleges Petitioner was acquitted by jury of Pen. Code § 69, but found guilty of Pen. Code § App. B

it was error "when it refused to consider it" (Ybarra v Filson 869 F3d 1016, 1030 (9th Cir.); see Vicks v Bunnell 875 F2d 258, 259 (9th Cir.).[1]

3. Petitioner's motion for leave to conduct discovery was denied. The Answer omitted relevant portions of the record. Yates v Evatt 500 US 391, 405-406 N.10, 409-410; Kraus v Taylor 715 F3d 589, 591, 595, 598 (6th Cir.). Petitioner is entitled to discovery where he demonstrates good cause. Rule 6 (a); Pham v Terhune 400 F3d 740, 743 (9th Cir.). Petitioner could have provided the district court with the body camera video and pictures via appointed counsel.

4. Petitioner's motion for appointment of counsel was denied without prejudice. Judicial discretion is abused when appointment of counsel is necessary to prevent due process violations from occurring. Chaney v Lewis 801 F2d 1191, 1196 (9th Cir.), cert. den. 481 US 1023; Dillon v US 307 F2d 445, 446-447 (9th Cir); McLane Co. v EEOC 137 S. Ct. 1159, 1166-1168; Cranford-El v Britton 523 US 574; Koerschner v Warden, Nev. State Prison 508 F. Supp. 2d 849 (D. Nev.);

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1. Appellant also asserted that a evidentiary hearing would be required for Ground(s) four, five and nine on prior convictions. Brock v Weston 31 F3d 887, 890 N.6 (9th Cir.); see US v Clark 203 F3d 358, 369 (5th Cir.); Pogue v Ratelle 58 F. Supp. 2d 1140, 1143-1145 (S.D. Cal.), Aff'd. 532 US 1063.

148 an offense not charged by the Information and not a lesser included offense.

8. Ground Eight alleges that no public offense has been alleged due to lawful activity of the right to bear arms.

9. Ground Nine alleges that in a prior conviction the seizure of Petitioner was not supported by probable cause.

10. Ground Ten alleges that the commitment for trial is without reasonable or probable cause.

Appellant also filed several motion(s) during the district court proceedings that was denied:

1. Petitioner was not served by the Respondent of any of the lodged documents (i.e., lodgments 1-15). Petitioner did not have access to view lodgments 2, 4, 5, 8, 9, 11-15. Petitioner asserted the Answer was incomplete. See Rule 5; Thompson v Greene 427 F3d 263, 268 n. 4 (4th Cir.); Pindale v Nunn 248 f. Supp.2d 361, 365 (DPR); Chavez v Morgan 932 f. Supp. 1152 (ED. Wis.);

2. Petitioner's request for a evidentiary hearing was denied. The district court did not independently review the body camera video and pictures but instead relied on the state court's description of the relevant facts. Nasby v McDaniel 853 F3d 1049, 1054 (9th Cir.). Petitioner also asserts that the body camera video and pictures "was part of the record under [Cullen v] Pinholster [563 US 170], and that

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PINDALE v NUNN, SUPRA, 248 F.Supp.2d 361, 365 (DPR); WILLIAMS v ICC Committee 812 F.Supp. 1029, 1032-1033 (N.D. Cal.). Here, Petitioner's copy of the record documents was confiscated by police upon his arrest and not returned. Further, the state refused to provide Petitioner with the lodged documents and the district court did not provide for all of the lodged documents to be sent to Petitioner.

B.

PROCEDURAL STATUS OF THE CASE

An application to the judges of the Court of Appeals for a certificate of appealability ("COA") is appropriate at this time because:

1. The district court entered a final, appealable judgment in this matter on 11/9/22 [Rabi Al-Akhar 15, 1444] that denied Petitioner relief on his Petition for Habeas Corpus.

2. Petitioner desires to appeal this judgment, as is authorized by Section 2253(a) of Title 28 of the US Code. However, Section 2253(c)(1) and Appellate Rule 22(b)(1) require a COA as a precondition of proceeding with the appeal.

3. A timely notice of appeal was filed in this matter on 12/2/22 [Jumada Al-Awwal 8, 1444].

4. Petitioner's Statement of Objections and Memorandum of Points and Authorities in support of Petitioner's Statement of Objections liberally construed can be deemed by a district court judge to be a COA.

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Cf. Williams v. Woodford 384 F3d 567, 583 (9th Cir.); See, e.g., Wells v Ryker 591 F3d 562, 565 (7th Cir); Turner v Calderon 281 F3d 851, 864-865 (9th Cir.).

5. Petitioner filed his Statement of Objections and Memorandum of Points and Authorities on 9/20/22 [Safar 24, 1444]. Petitioner detailed the clear error of the factual determinations in the Report and Recommendation. In addition, Petitioner proposed the correct controlling law asserting the district court's conclusions of law is in fact contrary to law.

6. On 11/9/22 [Rabi Al-Akhar 15, 1444] the district court denied the Application filed in that Court for a COA.

II.

REASONS IN SUPPORT OF ISSUANCE OF CERTIFICATE OF APPEALABILITY

A. Petitioner has raised substantial showing of denial of constitutional right on the issue(s) of:

1. Petitioner's Second Amendment, right to bear arms for self-defense was violated by his conviction for unlawful possession of a weapon;

2. The habeas corpus Answer must be deemed incomplete. The Advisory Committee Notes provide specify that Rules Governing § 2254 cases U.S. Dist. Courts 5 does not indicate who the Answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has one);

3. The statutory right to have the ANSISTANCE of COUNSEL IS A direct right. The judicial discretion to prevent due process violations from occurring WAS abused;

4. Petitioner's Fifth Amendment, Right prohibiting Double Jeopardy WAS violated where he WAS ACQUITTED of Penal Code § 69, but convicted of Penal Code § 148, based on error of law;

5. The Superior Court lacked personal jurisdiction over Petitioner. Petitioner WAS denied due process of law due UNREASONABLE SEARCH and SEIZURE when A probable cause determination WAS NOT secured within 48 hours;

6. Petitioner's WAS denied due process and equal protection of the law due failure to disclose favorable evidence that WAS material;

7. Petitioner WAS denied due process and equal protection of the law due commitment without reasonable or probable cause;

8. The district court HAS A duty to grant A discovery request. The denial of Rule 6 (d) discovery that WAS essential WAS an abuse of discretion;

9. Petitioner WAS denied due process of law due insufficient evidence when his detention for "loitering" pursuant Riverside Municipal Code ("RMC") 9.64.300 WAS not supported by reasonable suspicion or probable cause;

10. Petitioner WAS denied A full and fair opportunity to litigate his Penal Code § 1538.5 (f)(1) motion due failure to provide discovery. Petitioner WAS denied due process of law due UNREASONABLE SEARCH and

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seizure when the attempted pat search by a officer was not supported by reasonable suspicion;

11. The district court erred in it's finding that Petitioner was no longer "in custody" on ground(s) four, five and nine which challenged prior conviction(s) or barred by Lackawanna. Ground four alleges Petitioner was subjected to an unreasonable search and seizure in a prior conviction when the police fabricated evidence and exhibit racial profiling. Ground five contends Petitioner due process rights were violated in a prior conviction when the prosecutor presented hearsay evidence in a joint trial without the opportunity for cross-examination. Ground nine asserts Petitioner was subjected to an unreasonable search or seizure in a prior conviction when the police did not have probable cause to detain him;

12. The district court erred in denying an evidentiary hearing. The body camera video or pictures which was part of the record was not independently reviewed; and,

13. The district court erred in it's denial to amend the petition.

B. Petitioner's showing is not only substantial, reasonable jurists could debate whether the district court was correct in its procedural ruling, and/or the habeas petition stated a valid claim that a constitutional right was denied, sufficient to merit further review by this court:

1. California has long held that the Second

Amendment does not apply to the State. In re Ramirez 193 Cal. 633. The Second Amendment was incorporated and made applicable to the states by the Due Process Clause. McDonald v City of Chicago 130 S. Ct. 3020; see also N.Y. State Rifle & Pistol Ass'n v Bruen 142 S. Ct. 2111, 2125; Young v Hawaii 2022 US App. LEXIS 23140 (9th Cir.); Martinez v Villanueva 2022 US App. LEXIS 18554 (9th Cir.). The district court's reliance on dicta from District of Columbia v Heller 554 US 570, 627 n. 26, is error. Reasonable jurist have disagreed regarding the dictum of Heller. Nordyke v King 644 f3d 776, 790 n. 5 (9th Cir.) (Gould, J., concur. opn.); cf. Birdsong v AG of the United States 836 f3d 336 (3d Cir.). Petitioner's claim in Ground Eight has merit.

2. Petitioner was not served by the state any of the lodged document(s) (i.e. lodgments 1-15). Rules Governing § 2254 Cases US Dist Court 5 requires the government to serve documents attached to and filed with the Answer on the petitioner or his attorney, if he has one. Pindale v Nuhl 248 f. Supp. 2d 361, 365 (DPR). It is obvious that the mandatory language of Rule 5 places the burden upon the State to attach all relevant sections of the transcripts to its Answer, without which a habeas corpus answer must be deemed incomplete. Thompson v Greene 427 f3d 263, 268-269 (4th Cir.). Without an Answer, the Petition should issue.

3. Petitioner was denied the statutory right to counsel. 18 USC § 3006A (a)(2)(B). The appointment of counsel

would benefit both petitioner and the district court in preventing a due process violation. See, e.g., Johnson v Howard 20 f. Supp. 2d 1128, 1129 (ND Mich.); Van Nyk v Beard 2016 WL 3381283, at 12 (CD Cal.); Koerschner v Warden, Nevada State Prison 508 f. Supp. 2d 849 (D. Nev.). Where, the district court interpreted Rule 5 to forbid petitioner from obtaining lodged documents, court should consider appointment of counsel. Cf. Johnson v Avery 383 US 483; see Chaney v Lewis 801 f2d 1191, 1196 (9th Cir), cert. den. 481 US 1023. The district court abused its discretion in failing to appoint counsel. McLane Co. v EEOC 137 S. Ct. 1159, 1166-1168; see Battle v Armontrout 902 f2d 701 (8th Cir.); Richardson v Miller 721 f. Supp. 1087 (ND. Mo.). The denial of the statutory right to counsel violated due process.

4. Petitioner's acquittal of Penal Code § 69 encompasses an acquittal of all the charges (i.e., Pen. Code, Section(s) 148 (a)(1), 29800(a)(1), 30305 (a)) as protected by the Double Jeopardy Clause. Rutledge v US 517 US 292, 307; Payne v Virginia 468 US 1062; Brown v Ohio 432 US 161, 169-170; Blockburger v US 284 US 299, 304. Reliance on an error of law, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. Arizona v Rumsey 467 US 203, 211; see Carter v US 530 US 255, 260-261; Harrison v Gillespie 636 f3d 472, 481-482 (9th Cir.); Wilson v Czerniak 355 f3d 1151, 1155-1158 (9th Cir.). The error of law is the conviction of Pen.

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Code § 148(a)(1)[2] an offense that was neither charged nor included in the crime of active resistance pursuant to Pen. Code § 69, for which petitioner was acquitted. Pen. Code § 1159; People v Totem 62 CA3d 655, 657-658 (4th App.); see People v Lopez 129 CA4th 1508, 1532 (6th App); People v Belmares 106 CA4th 19, 26 (6th App); US v Wahchumwah 710 F3d 862, 870 (9th Cir.). The state cannot hide behind state law with regard to the Double Jeopardy Clause. A federal habeas court is not to "second-guess" a state court's "construction of its own state law unless "it appears that its interpretation is an obvious subterfuge to evade consideration of a federal issue" (Hubbart v Knapp 379 F3d 773, 780 (9th Cir.)(quoting Peltier v Wright 15 F3d 860, 862 (9th Cir.)); see also Mullaney v Wilbur 421 US 684, 691 & n. 11 ("state courts are the ultimate expositors of state law" and a federal habeas court is bound by the state's interpretation unless "it appears to be an obvious subterfuge to evade consideration of a federal issue" (internal quotation marks and citation omitted)); Winters v NY 333 US 507; Herndon v Lowry 301 US 242; Stromberg v California 283 US 359. for

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2. Convictions of time barred lesser-included offenses can not stand. People v Beasley 105 CA4th 1072 (2d App.); cf. People v Athens 85 Cal. 86, 89. Petitioner was not arraigned for Pen. Code § 148(a)(1). Pen. Code § 988; see People v Lohbauer 29 C3d 364.

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these reasons, the writ should be issued for Ground Seven.

5. The State can waive a fourth Amendment claim on federal habeas review. Young v Conway 698 f3d 69, 85 (2d Cir.). Respondent did not assert the Stone v Powell 428 US 465, bar in the Answer to Ground Three. Here, relief is available because the state court's rejection of this claim was contrary to, or an unreasonable application of County of Riverside v McLaughlin 111 S.Ct. 1661; see Michigan Trust Co. v Ferry 228 US 346, 348; Owen v Weber 646 f3d 1105, 1106 (8th Cir.); Oviatt v Pearce 954 f2d 1470 (9th Cir.); Holden v Town of Merton 638 f. Supp. 2d 150, 153 (DNH); Powell v Barrett 376 f. Supp. 2d 1340, 1352-1353 (ND. Ga.); Lingenfelter v Bd. of County Comm'rs of Reno County, Kansas 359 f. Supp. 2d 1163, 1171 (D. Kan.). The superior court lost jurisdiction over the person of petitioner after 48 hours of a warrantless arrest for failure to procure an arraignment and/or probable cause determination. Consequently, habeas relief is warranted as to Ground Three.

6. Petitioner asserts that relief is warranted as to Ground Six. The withholding of impeachment evidence that Officer Rardin lied was prejudicial. Napue v Illinois 360 US 264, 269; Rodriguez v McDonald 872 f3d 908, 920 (9th Cir.); Maxwell v Roe 628 f3d 486, 512 (9th Cir.). The video and pictures are favorable to the petitioner because they constitute favorable impeachment evidence, which is a type of evidence covered by the Brady

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disclosure requirements. Norton v Spencer 351 F3d 1, 6 (1st Cir.). The video and pictures established that Officer Rardin lied about his purported reason to use force upon the petitioner. Ciminillo v Streicher 434 F3d 461, 467 (6th Cir.); See Deorle v Rutherford 272 F3d 1272, 1281 (9th Cir.). The strongest piece of evidence was the testimony with regard to petitioner's attire. "With the credibility of the strongest evidence against the [defendant] directly called into question, the prosecution's case would have collapsed" (Sykes v Anderson 625 F3d 294, 320 (6th Cir.). The state court of appeal found that petitioner was not wearing unusually baggy clothes. Miller-El v Cockrell 537 US 322, 341; Marshall v Lonberger 459 US 422, 431-437; Sumner v Mata 455 US 591-593; 28 USC § 2254(e)(1). Relief is warranted pursuant to 28 USC § 2254(d)(1)&(2). Williams v Taylor 529 US 362, 410.

7. The evidence is insufficient for lawful performance of duty in Ground Ten. Petitioner contends that the officer was not lawfully performing his duties when he used unnecessary and excessive force immediately upon exiting his service vehicle. US v Moore 332 F. Supp. 919 (ED Va.); See Deorle v Rutherford 272 F3d 1272 (9th Cir.); LaLonde v County of Riverside 204 F3d 947 (9th Cir.); Liston v County of Riverside 120 F3d 965 (9th Cir.). Excessive force triggers an individual's right of self-defense. Evans v City of Bakersfield 22 CA4th 321, 331 (5th App.). The rule allowing resistance to excessive force applies during a technically lawful or unlawful arrest,

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protects A person's right to bodily integrity, and permits resort to self-defense. People v Henderson 58 CA3d 349, 356-357 (2d App.); see Robinson v City of San Diego 954 F.Supp.3d 1010, 1023-1024 (S.D. Cal.). Officer attempts to to explain away his unprovoked grab at petitioner's arm as a stop and frisk without any credible objective factors. See Townsend v Sain 372 US 293 (the ~~state~~ factual determinations is not fairly supported by the record as a whole). Petitioner challenges the recitation of the facts drawn from the findings of fact in the opinion, post card denial, etc. 28 USC § 2254(e)(1); Miller-El v Cockrell, supra, 537 US 322, 340; Goldyn v Hayes 444 f3d 1062, 1065 n. 5 (9th Cir.). In considering a challenge to the sufficiency of evidence, speculation and conjecture cannot take the place of reasonable inferences and evidence. MacDonald v Hedpeth 907 F3d 1212, 1217-1218 (9th Cir.). Every element of the crime must be proven. Riley v Wilson 935 f3d 1068, 1073 (9th Cir); see CALCRIM 2670, Lawful Performance: Peace Officer; People v Olquin 119 CA3d 39, 46-47 (1st App.); People v White 101 CA3d 161, 169 (4th App); Susag v City of Lake Forest 94 CA4th 1401, 1409 (4th App); People v Gerberding 50 CA5th 1 (Fresno App. Dept.); Fiore v White 531 US 225, 228-229. Arrests, detentions and consentual encounters accomplished with unnecessary and excessive force is unlawful. Maxwell v County of San Diego 708 f3d 1075, 1086 (9th Cir.); B.B. v County of Los Angeles 25 CA5th 115 (2d App.);

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Petitioner asserts that relief is warranted because the state court decision was contrary to (Goldyn v Hayes, supra, 444 F3d 1062, 1070 (9th Cir.)), involved an unreasonable application of (Macdonald v Hedgpeth, supra, 907 F3d 1212, 1217-1218 (9th Cir.)), clearly established federal law, as determined by the Supreme Court; and, a unreasonable determination of the facts (Detrich v Ryan, supra, 667 F3d 958, 981 (9th Cir.)), in light of the evidence presented. 28 USC § 2254(d)(1)-(2); Williams v Taylor, supra, 529 US 362, 410.

8. The district court erred in denying petitioner's Rule 6 (a) discovery request. Bolin v Chappel 2016 US Dist. LEXIS 75493 (ED Cal). Discretion was abused in not ordering discovery that essential in establishing relief. Pham v Terhune, supra, 400 F3d 740, 743 (9th Cir.); Bracy v Gramley 520 US 899, 908-909; see Mc Lane Co. v EEOC, supra, 137 S.Ct. 1159, 1166-1168. The body camera video and pictures, i.e., depicting the actual incident is essential to petitioner's claim.

9. Ground Two challenges the sufficiency of the evidence at the time of the preliminary hearing for resisting arrest. See People v Gerberding, supra, 50 CA5th Supp. 1 (Fresno App. Dept.)(We emphasize the prosecution's choice to proceed solely on the theory of violating Fresno Municipal Code Section 13-109 constrains our review under the sufficiency-of-the-evidence test). In analyzing the sufficiency of the evidence to detain the court looks to the asserted crime for which App-B

suspicion arose. See Velazquez v City of Long Beach 793 F3d 1010, 1018 (9th Cir.). Here, any such resistance arose out of the initial suspected loitering pursuant to RMC 9.04.300. See People v Terasinski 30 C3d 822, 830 (specific intent is a required element for the offense of loitering); In re M.V. 225 CA4th 1495, 1520 (1st App.); cf. Edgerly v City & County of San Francisco 599 F3d 946, 953 (9th Cir.) (others must have probable cause for specific intent when it is a required element). RMC 9.04.300 has a "move on" clause. See Louie v McCormick & Schmick Rest. Corp. 460 F.Supp.2d 1153, 1155 n.4 (CD Cal.) (explaining that courts may take judicial notice of the legislative history of state statutes); People v Krohn 149 CA4th 1294, 1298 n.3 (4th App.). The State of California presented no evidence - whether at the preliminary hearing or at trial -- that the Other ordered or requested petitioner to "move on" prior to grabbing him by the arm. Further, the State at no point asserted that the Other exclusively had reasonable suspicion to detain petitioner for loitering pursuant to RMC 9.04.300. Thus, "[i]t was unreasonable for Other [] to suspect Appellant's conduct was illegal under [RMC 9.04.300]" (People v Gerberding, supra, 50 CA5th Supp. 1, 10 (Fresno App. Dept.)). The failure of the Other to request petitioner to "move on" upon initial encounter indicates that the Other was not acting in lawful performance of RMC 9.04.300. Velazquez v City of Long Beach, supra, 793 F3d 1010, 1023 (9th Cir.); People v Wetzell 11 C3d 104, 107-109.

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Petitioner challenges the recitation of the facts drawn from the findings of fact in the opinion, post card denial or Reporter's and Clerk's Transcripts of the California state courts whose findings are presumed correct unless rebutted by clear and convincing evidence. 28 USC § 2254(e)(1); Miller-El v Cockrell, supra, 537 US 322, 340; Goldyn v Hayes, supra, 444 F3d 438, 442-443 (9th Cir.). Petitioner contends that relief is warranted because the state decision was contrary to (Goldyn v Hayes, supra, 444 F3d 1062, 1070 (9th Cir.)), involved an unreasonable application of (Macdonald v Hedgpeth, supra, 907 F3d 1212, 1217-1218 (9th Cir.)) clearly established federal law, as determined by the Supreme Court; and a unreasonable determination of the facts (Detrich v Ryan, supra, 667 F3d 958, 981 (9th Cir.)) in light of the evidence presented. 28 USC § 2254(d)(1)-(2); Williams v Taylor, supra, 529 US 362, 410.

10. Ground One is cognizable in this federal habeas corpus. Petitioner asserts that he was denied a full and fair opportunity to litigate his fourth Amendment claim. See Townsend v Sain, supra, 372 US 293, 313 (noting circumstances when litigant does not receive full and fair hearing in state court; cited with approval in Stone v Powell, supra, 428 US 465, 494 n. 36); cf. US ex rel Bostick v Peters 3 F3d 1023, 1027 (7th Cir.). Petitioner was not provided discovery prior to the preliminary hearing (Ground Six). Currie v Superior Court 230 CA3d 83, 96 (2d App.); Stanton v Superior Court 193 CA3d 265, 269 (3d

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App.); People v Mackey 176 CA3d 177, 185-186 (1st App.). A defendant's right to due process under the California Constitution entitles a petitioner to a full and fair opportunity and entitles the defense to the discovery necessary to support a Penal Code § 1538.5(f). Motion to Suppress Evidence. Magallan v Superior Court 192 CA4th 1444, 1462-1463 n. 8 (6th App.). Thus, the failure to disclose discovery, the presentation of the Motion to Suppress Evidence (Ground One) was in fact frustrated by a failure of that mechanism. US ex rel, Bostick v Peters, supra, 3 f3d 1023, 1027 (7th Cir.). Consequently, "the fact-finding employed by the state court was not adequate to afford a full and fair hearing" (Townsend v Sain, supra, 372 US 293, 296). Illegally obtained evidence may be excluded from the trial. Young v Conway, supra, 698 f3d 69, 77 (2d Cir.), cert. den. sub nom. Unger v Young 134 S. Ct. 20. Petitioner challenges the factual summary set forth in the California Court of Appeal's Opinion seeking either to rebut that presumption with clear and convincing evidence (Miller-El v Cockrell, supra, 537 US 322, 340) and/or establish that facts was overlooked or ignored evidence highly probative and central to petitioner's claim. Kesser v Cambra 465 f3d 351, 358 (9th Cir.). Petitioner contends that relief is warranted because the state court decision was contrary to (Goldyn v Hayes, supra, 444 f3d 1062, 1070 (9th Cir.)), involved an unreasonable application of (Macdonald v Hedgpeth, supra, 907 f3d 1212, 1217-1218 (9th Cir.)) clearly

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established federal law, as determined by the Supreme Court; and a unreasonable determination of the facts (Cudjo v Ayers 698 f3d 752, 762 (9th Cir.)) in light of the evidence presented in the state court proceeding. 28 USC § 2254(d)(1)-(2); Williams v Taylor, supra, 529 US 362, 410. The other did not point to particular facts that petitioner was armed. Graves v Coeur D'Alone 339 f3d 828 (9th Cir.).

II. Petitioner is currently in custody on Grounds four, five and Nine. Petitioner challenges the conviction (Pen. Code § 29800(a)) in which a prior felony conviction is an element of the offense. People v Weathington 231 CA3d 69, 86 n. 8 (4th App.). Where the prior conviction is also felon in possession of a firearm (Pen. Code § 12021) the underlying prior conviction separately is a element of that prior conviction. further, petitioner challenged the strike prior (Pen. Code §§ 667(a)(1), 667.5(b)). See US v Clark 203 f3d 358, 369 (5th Cir.); Brock v Weston 31 f3d 887, 890 n. 6 (9th Cir); Lowery v Young 887 f2d 1309 (7th Cir.); Rawls v Hunter 2006 US Dist. LEXIS 103713 (CD Cal); Pogue v Ratelle 58 f. Supp 2d 1140, 1143-1145 (SD Col). Petitioner alleges that several exceptions pursuant to Lackawanna Cnty Dist. Atty v Coss, supra, 532 US 394 applies. Petitioner contends as to Ground(s) four and Nine that there was a failure to appoint counsel in violation of the Sixth Amendment as set forth in Gideon v Wainwright 372 US 335. On 3/30/09

Petitioner withdrew his Faretta waiver and requested appointment of counsel for both Long Beach case no. NA066369 and Compton case no. TA098295 and was no appointed counsel. Further, as to Ground five petitioner avers that he is actually innocent. Cf. Herrera v Collins 506 US 390, 409-411; see Lackawanna Cnty Dist. Att'y v Coss, supra, 532 US 394, 404.

12. Petitioner requests a evidentiary hearing. The district court's opinion does not address whether "the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" (28 USC § 2254(d)(2)); Williams v Taylor, supra, 529 US 362, 410; Kipp v Davis 971 F3d 939, 953 (9th Cir.). Hence, if the state court decision was based on an "unreasonable determination of the facts" under § 2254(d)(2), the federal district court is free to grant an evidentiary hearing and consider evidence developed in that hearing for the first time. Brumfield v Cain 135 S. Ct. 2269, 2282. Where a habeas petitioner has not failed to develop the factual basis of his claim in state court as required by 28 USC § 2254(e)(2), an evidentiary hearing is required if (1) the petitioner has shown his entitlement to an evidentiary hearing pursuant to Townsend v Sain, supra, 372 US 293, and (2) the allegations, if true, would entitle him to relief. Hurles v Ryan 752 F3d 768, 791-792 (9th Cir.); Taylor v Tewalt 2021 US App. LEXIS 30036 (9th Cir.).

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13. The court should grant leave freely to Amend the petition. Foman v Davis 83 S.Ct. 227; University of Hawaii Prof'l Assembly v Cayetano 183 F3d 1096 (9th Cir.). Fed R. Civ. P., 15 (a) applies to habeas corpus Actions. James v Giles 221 F3d 1074 (9th Cir.).

III

CONCLUSION

The Appellant has made more than a good faith effort to conform this Application to all of the requirements set out in Fed. R. App. Proc., 22 and Ninth Circuit Rule

for the reasons stated above, Petitioner and Appellant, Onofre Serrano respectfully requests that this Court issue the requested COA on all of the issues set forth in this Application.

Date: Jumada Al-Awwal 21, 1444

[12/15/22]

Appellant

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-56173

Case Name Onofre Serrano v. Alex Villanueva

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ONOFRE SERRANO, Petitioner, v. ALEX VILLANUEVA, Respondent.	No. ED CV 21-931-VBF (PLA) **ORDER DENYING CERTIFICATE OF APPEALABILITY**

Judgment has been entered in this matter denying the Second Amended Petition for Writ of Habeas Corpus and dismissing this action with prejudice.

An appeal may not be taken from the denial by a district judge of a habeas petition in which the detention complained of arises out of process issued by a state court "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. Proc. 22(b). "A certificate of appealability may issue . . . only if . . . [there is] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (citation omitted); see also Sassounian v. Roe, 230

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F.3d 1097, 1101 (9th Cir. 2000). Thus, "[w]here a district court has rejected the constitutional claims on the merits, . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484.

In accordance with 28 U.S.C. § 2253(c)(3), the Court finds that there is no substantial showing of a denial of a constitutional right with respect to the grounds for relief set forth in the Second Amended Petition.

THEREFORE, pursuant to 28 U.S.C. § 2253, a Certificate of Appealability is **DENIED.**

DATED: November 9, 2022

Valerie Baker Fairbank

HONORABLE VALERIE BAKER FAIRBANK
SENIOR UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ONOFRE SERRANO, Petitioner, v. ALEX VILLANUEVA, Respondent.	No. ED CV 21-931-VBF (PLA) **JUDGMENT**

Pursuant to the Order accepting the Magistrate Judge's Report and Recommendation,

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

DATED: November 9, 2022

Valerie Baker Fairbank

HONORABLE VALERIE BAKER FAIRBANK
SENIOR UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ONOFRE SERRANO, Petitioner, v. ALEX VILLANUEVA, Respondent.	No. ED CV 21-931-VBF (PLA) ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Second Amended Petition, the other records on file herein, the Magistrate Judge's Report and Recommendation, and petitioner's Objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the recommendations of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted.

2. Judgment shall be entered consistent with this Order.

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3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: November 9, 2022

Valerie Baker Fairbank

HONORABLE VALERIE BAKER FAIRBANK
SENIOR UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ONOFRE SERRANO, Petitioner, v. ALEX VILLANUEVA, Respondent.	ED CV 21-00931-VBF (PLA) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, Senior 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. For the reasons discussed below, the Magistrate Judge recommends that the Second Amended Petition for Writ of Habeas Corpus ("Petition") be dismissed with prejudice.

I

PROCEDURAL HISTORY

In 2018, a Riverside County Superior Court jury convicted petitioner of being a felon in possession of a firearm and ammunition in violation of California Penal Code sections 29800(a) and 30305(a), as well as a misdemeanor offense of resisting or delaying a peace officer in

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violation of California Penal Code section 148. (Clerk's Transcript ("CT") at 575-77). After determining that petitioner had a prior "strike" under California's Three Strikes law (Cal. Penal Code §§ 667(a)(1), 667.5(b)), the trial court sentenced petitioner to four years in state prison. (CT at 578-79).

Petitioner appealed and concurrently filed a habeas corpus petition in the California Court of Appeal. (See Docket Nos. 10-1 through 10-3). On May 1, 2020, the California Court of Appeal affirmed the judgment in a written opinion and denied the habeas petition summarily. (Docket Nos. 10-1 & 10-3). On July 15, 2020, the California Supreme Court denied review. (Docket No. 10-5). Thereafter, petitioner filed a habeas corpus petition in the California Supreme Court, which was denied on October 14, 2020. (Docket Nos. 10-7 through 10-10).

On May 28, 2021, petitioner initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"). (Docket No. 1). On July 8, 2021, before respondent filed a response, petitioner filed a First Amended Petition ("FAP"). (Docket Nos. 11, 12). On July 20, 2021, respondent filed a Motion to Dismiss petitioner's FAP, claiming that the Court lacked subject matter jurisdiction because petitioner was not in custody on the judgment he was challenging at the time he filed his original Petition in May 2021. (Docket No. 13). The Court denied the Motion to Dismiss, finding that, although petitioner was released from prison in July 2020, petitioner was still "in constructive custody" because he was subject to post-release community supervision in May 2021, at the time of filing his initial Petition. (Docket Nos. 32, 36). On February 10, 2022, petitioner filed a Second Amended Petition ("SAP"), raising 10 claims for relief. (Docket No. 37). On March 9, 2022, respondent filed an Answer and a supporting Memorandum of Points and Authorities ("Answer"). (Docket No. 41). On June 24, 2022, petitioner filed a Traverse and a supporting Memorandum of Points and Authorities ("Traverse, Memo."). (Docket Nos. 52-53).[1]

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[1] After filing his Traverse, petitioner submitted a Third Amended Petition, which has been filed with the Court. (Docket No. 54). Under Rule 15(a), a party may amend its pleading once as a matter of course within 21 days of service of the petition or service of a responsive pleading or motion to dismiss by respondent. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend (continued...)

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This matter is deemed submitted and is ready for a decision.

II

STATEMENT OF FACTS

The Court adopts the brief factual summary set forth in the California Court of Appeal's Opinion affirming petitioner's conviction.[2]

> A police officer responding to a loitering complaint in a high crime area, detained [petitioner] for questioning and a safety pat-down search. When [petitioner] ignored the officer's repeated requests to sit down and failed to respond, the officer told [petitioner] he was going to search [petitioner] for weapons. Upon the officer placing his hand on [petitioner's] shoulder, [petitioner] fled on foot. After being chased down, [petitioner] was searched and arrested for possessing a concealed, loaded revolver.

(Docket No. 10-1 at 2).

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[1](...continued)
its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Because petitioner has twice previously amended his petition and respondent filed an answer to the SAP more than 90 days ago, and petitioner has not obtained respondent's written consent, the filing requires the leave of the Court, which petitioner has not requested. As such, the filing must be rejected. Nevertheless, even if requested, the Court need not grant leave to amend if the amendment is futile. See Townsend v. Univ. of Alaska, 543 F.3d 478, 485 (9th Cir. 2008) ("Leave to amend need not be granted . . . where the amendment would be futile."); Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Here, in addition to the same 10 claims raised in the SAP, the proposed Third Amended Petition attempts to raise four new claims of "unreasonable search and seizure" in "prior conviction[s]," which are not cognizable on habeas review, as explained below in the denial of Grounds Four, Five, and Nine of the instant SAP. For this reason, too, the filing of the Third Amended Petition would not be proper. See, e.g., Ciotta v. Frauenheim, 2016 WL 6094843, at *1 (E.D. Cal. Oct. 18, 2016) (denying motion to amend petition that was "not cognizable in habeas" because "amendment was futile").

[2] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1). Because petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. Tilcock, 538 F.3d at 1141. To the extent that an evaluation of petitioner's individual claims depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to those claims.

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III

PETITIONER'S CONTENTIONS

1. Petitioner was subjected to an unreasonable search or seizure because there was no "reasonable cause" for the pat-down search by police. (See Docket No. 37 at 5).

2. Petitioner was subjected to an unreasonable search or seizure because petitioner's detention was not supported by reasonable suspicion or probable cause. (Id. at 5-6).

3. Petitioner's due process rights were violated because a probable cause determination was not made within 48 hours of his arrest. (Id. at 6).

4. Petitioner was subjected to an unreasonable search or seizure "in [a] prior conviction" because the police "fabricated evidence" and "racially profiled" him. (Id.).

5. Petitioner's due process rights were violated "in [a] prior conviction" when the prosecutor presented hearsay evidence in a joint trial without the opportunity for cross-examination of the witness. (Id. at 6-7).

6. Petitioner's due process rights were violated by the prosecutor's failure to disclose exculpatory evidence prior to the preliminary hearing. (Id. at 7).

7. Petitioner's due process rights were violated when he was convicted of California Penal Code section 148 but acquitted of Penal Code section 69 in violation of the Double Jeopardy Clause. (Id.).

8. Petitioner's Second Amendment right to bear arms for self-defense was violated by his conviction for unlawfully possessing a firearm. (Id. at 7-8).

9. Petitioner was subjected to an unreasonable search or seizure "in [a] prior conviction" because the police did not have probable cause to detain him. (Id. at 8).

10. There was insufficient evidence to convict petitioner of resisting or delaying a peace officer in violation of California Penal Code section 148 because the officer was not acting lawfully at the time of the arrest. (Id.).

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IV

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In Williams, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing Williams). A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Williams Court explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411; accord Lockyer

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v. Andrade, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333 n.7, and "demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Id.; see also Early v. Packer, 537 U.S. 3, 123 S. Ct. 362, 366, 154 L. Ed. 2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law (Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529 U.S. at 412; Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

A federal habeas court conducting an analysis under § 2254(d) "must determine what arguments or theories supported, or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 526 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."). In other words, to obtain habeas relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

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The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Here, petitioner presented his first two grounds for relief under the Fourth Amendment in his direct appeal to the California Court of Appeal, which issued a reasoned opinion rejecting those claims. (See Docket No. 10-1). Thereafter, the California Supreme Court summarily denied those same claims. (See Docket No. 10-10). Accordingly, this Court reviews the California Court of Appeal's reasoned opinion rejecting his claim under AEDPA's deferential standard. See Wilson v. Sellers, __ U.S. __,138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018) (holding "that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "should then presume that the unexplained decision adopted the same reasoning").

Petitioner's remaining grounds for relief were presented in a habeas petition that he filed in the California Supreme Court, which summarily denied the petition. (Docket Nos.10-7 through 10-10). The Court, therefore, reviews the California Supreme Court's decision to "determine what arguments or theories . . . could have supported . . . the state court's decision; and then [the Court] ask[s] whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." See Richter, 562 U.S. at 102; Bemore v. Chappell, 788 F.3d 1151, 1161 (9th Cir. 2015). Thus, AEDPA deference applies to petitioner's claims.

V

DISCUSSION

GROUNDS ONE, TWO, AND THREE: FOURTH AMENDMENT CLAIMS

In Grounds One and Two, petitioner contends that the police conducted an unreasonable search or seizure by detaining him without reasonable suspicion and conducting a pat-down search without "reasonable cause." (See Docket No. 37 at 5-6).

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A state prisoner may not invoke a Fourth Amendment claim on federal habeas review if he had the opportunity for "full and fair" consideration of the claim in state court. Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). "The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir.1996); see also Locks v. Summer, 703 F.2d 403, 408 (9th Cir.1983) (explaining that, even if the state courts' determination of the Fourth Amendment issues was improper, it will not be remedied in a federal habeas corpus action so long as the petitioner was provided a full and fair opportunity to litigate the issue).

California provides criminal defendants with a full and fair opportunity to litigate Fourth Amendment claims through the procedures of California Penal Code section 1538.5. Section 1538.5 permits a defendant to move to suppress evidence on the ground that it was obtained in violation of the Fourth Amendment. See Gordon v. Durán, 895 F.2d 610, 613 (9th Cir.1990). Here, petitioner filed a section 1538.5 motion in the trial court to suppress the evidence obtained after he was detained and searched by the police. (CT 35-40, 86-99). The trial court conducted a hearing, during which both the prosecution and defense had the opportunity to call witnesses and present argument, and, thereafter, denied the motion. (CT 105). Petitioner then appealed the ruling to the California Court of Appeal, arguing that the trial court erred in failing to suppress the gun and ammunition evidence. (Docket No. 42-7 & 42-9). After briefing on the issues, the California Court of Appeal denied the appeal, finding that the initial detention of petitioner was proper and the subsequent pat-down was lawful. (Docket No. 10-1).

As shown, petitioner has had a full and fair opportunity to litigate his Fourth Amendment claim. The rule of Stone v. Powell therefore bars this Court from further review. See Gordon, 895 F.2d at 613-14 ("Given that [the defendant] had an opportunity in state court for 'full and fair litigation' of his fourth amendment claim, the Constitution does not require that [he] be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."). Petitioner's arguments to the contrary (see Traverse, Memo. at 3-6) are simply attacks on the "correctness of the state court resolution, an issue which Stone v. Powell

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makes irrelevant." Siripongs v. Calderon, 35 F.3d 1308, 1321 (9th Cir. 1994); see also Newman v. Wengler, 790 F.3d 876, 880 (9th Cir. 2015) (finding habeas claim barred under Stone that was based on the argument that the state appellate court wrongly decided petitioner's Fourth Amendment claim); Mack v. Cupp, 564 F.2d 898, 902 (9th Cir. 1977) ("[T]he court's mistaken recitation of the facts, even assuming arguendo that it resulted in an incorrect decision, is not enough, in and of itself, to establish that [the petitioner's] claims were not fully and fairly considered."). Accordingly, petitioner is not entitled to habeas relief on Grounds One and Two.

Petitioner's claim in Ground Three -- that his due process rights were violated because a probable cause determination was not made within 48 hours of his arrest -- fails for the same reason. Petitioner's claim of pre-arraignment delay implicates the Fourth Amendment, which requires a determination of probable cause before or promptly after a defendant's arrest. Gerstein v. Pugh, 420 U.S. 103, 124-25, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); see also Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) (holding that, in a civil rights action, the Fourth Amendment requires judicial probable cause determinations to be made within 48 hours of a warrantless arrest, absent extraordinary circumstances). As discussed above, a Fourth Amendment claim is not cognizable on federal habeas review where, as here, the petitioner had a full and fair opportunity to litigate the claim in state court. See Stone, 428 U.S. at 494; see also Anderson v. Calderon, 232 F.3d 1053, 1068 (9th Cir. 2000) (noting that federal habeas claim alleging Fourth Amendment violation on ground of delayed arraignment would generally be barred by Stone), overruled on other grounds by Osband v. Woodford, 290 F.3d 1036, 1043 (9th Cir. 2002).

Here, petitioner makes no argument that he lacked a full and fair opportunity to bring his delayed probable cause determination claim in state court, and nothing in the record indicates that the state courts precluded such a claim. In fact, petitioner admits that he filed a motion to dismiss his case for "lack of personal jurisdiction" in the trial court and then "filed a writ of habeas corpus in the [California] Court of Appeal asserting a McLaughlin violation." (Traverse, Memo. at 7). Thus, this claim must be rejected under Stone. See, e.g., Jacobs v. Martinez, 2016 WL 8200945, at *3 (C.D. Cal. Sept. 29, 2016) (holding Fourth Amendment claim challenging a "purported delay

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in his arraignment" would not be cognizable under Stone because petitioner had the opportunity to raise claim in state court but "did not do so"); Sfera v. Herndon, 2012 WL 2361490, at *6 (C.D. Cal. April 18, 2012) (finding habeas claim asserting Fourth Amendment violation based on pre-arraignment delay barred by Stone). Accordingly, no habeas relief is warranted for petitioner's Fourth Amendment claim in Ground Three.

GROUNDS FOUR, FIVE, AND NINE: CLAIMS IN PRIOR ACTIONS

In Grounds Four, Five, and Nine, petitioner makes various claims of search and seizure violations and evidentiary error arising in a "prior conviction." (See Docket No. 37 at 6-8). Under 28 U.S.C. § 2254, the Court is authorized to "entertain an application for a writ of habeas corpus in 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 laws of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphases added). The "in custody" requirement is jurisdictional, and "therefore it is the first question [the Court] must consider." Bailey v. Hill, 599 F.3d 976, 978 (9th Cir. 2010) (internal quotation marks and citation omitted). A habeas petitioner is not "in custody" after the sentence imposed for the conviction is "fully expired." Maleng v. Cook, 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989).

Here, petitioner has not demonstrated that the is currently in custody on any of these prior offenses as to which he is challenging the search and seizure or the evidentiary errors. In Ground Four, he references a 2009 conviction in California state court for being a felon in possession of a firearm, transporting marijuana, possessing marijuana for sale, and resisting or obstructing a peace officer, that resulted in a sentence of three years probation. People v. Serrano, 2009 WL 3234716, at *1-2 (Cal. App. 2 Dist. 2009). Ground Five cites a federal habeas petition that was denied by this Court in December 1998, after which the Ninth Circuit Court of Appeals affirmed the judgment in March 2000. See Serrano v. Lindsey, 98-CV-00266-HLH (VAP). Ground Nine references only a 2008 civil filing that was rejected by this Court in November 2008. See Serrano v. State of California, 08-CV-06673-UA. Thus, each of these claims appears to involve convictions

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that have long been final and for which petitioner is no longer in custody. As such, this Court lacks subject matter jurisdiction on each of these claims.

Furthermore, to the extent petitioner is challenging his current sentence on the ground that it was enhanced by a prior conviction, it is barred by the Supreme Court's ruling in Lackawanna Cnty. Dist. Att'y v. Coss, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). In Lackawanna, the Supreme Court held that, absent certain exceptions that are not applicable here, a federal habeas petitioner cannot attack a prior conviction under § 2254.[3] Id. at 401-05. "[O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." Id. at 403-04 (citation omitted).

For these reasons, petitioner is not entitled to habeas relief for his claims in Grounds Four, Five, and Nine.

GROUND SIX: SUPPRESSION OF EXCULPATORY EVIDENCE

In Ground Six, petitioner contends that his due process rights were violated by the prosecutor's failure to disclose exculpatory evidence prior to the preliminary hearing. (Docket No. 37 at 7). He argues that the officer's testimony that petitioner was "wearing unusually baggy clothing" at the time he was searched and arrested was erroneous and not disclosed by the prosecutor prior to the probable cause determination at the preliminary hearing. (Id.).

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[3] The Supreme Court suggested three exceptions to this general rule: (1) where there was a failure, at the time of the prior conviction, to appoint counsel in violation of the Sixth Amendment and Gideon v. Wainright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); (2) where a state court had, without justification, refused to rule on a properly presented constitutional claim as to the prior conviction; or (3) after expiration of the time for direct or collateral review of the prior conviction, the defendant obtained compelling evidence that he was actually innocent of the crime underlying the prior conviction. See Lackawanna, 532 U.S. at 404. Petitioner has not demonstrated that any of those exceptions are applicable here.

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The Due Process Clause requires the prosecution to disclose to the defense all material evidence in its possession that is favorable to the accused. Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler, 527 U.S. at 281-82.

Even assuming the officer's description of petitioner's clothing at the preliminary hearing was not accurate, petitioner's claim of constitutional error fails for several reasons. First, the Supreme Court has never held that a late disclosure -- as opposed to a complete failure to disclose -- violates a defendant's constitutional rights under Brady. See United States v. Warren, 454 F.3d 752, 760 (7th Cir. 2006) ("Late disclosure does not itself constitute a Brady violation."); Dotson v. Scribner, 619 F. Supp. 2d 866, 876 (C.D. Cal. 2008) ("Brady does not hold that a late disclosure is a violation of due process."). In fact, courts have held that there is no violation as long as the disclosure happens in time for the defendant to use the evidence effectively at trial. See, e.g., United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("[W]e have never interpreted due process of law as requiring more than that Brady material must be disclosed in time for its effective use at trial."); United States v. Scarborough, 128 F.3d 1373, 1376 (10th Cir. 1997) ("As long as ultimate disclosure is made before it is too late for the defendant[ ] to make use of any benefits of the evidence, Due Process is satisfied." (internal quotation marks and citation omitted)); United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988) ("Brady does not necessarily require that the prosecution turn over exculpatory material *before* trial. To escape the Brady sanction, disclosure must be made at a time when disclosure would be of value to the accused." (internal quotation marks omitted)). Thus, there could not have been a constitutional violation for withholding evidence prior to the preliminary hearing.

Second, if in fact the officer's description of petitioner's clothing was inaccurate, petitioner would have known it was inaccurate since it was his clothing that he was wearing on the night of his arrest that was in dispute. "When, as here, a defendant has enough information to be able to

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ascertain the supposed Brady material on his own, there is no suppression by the government." United States v. Aichele, 941 F.2d 761, 764 (9th Cir.1991); see also United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) ("Since suppression by the Government is a necessary element of a Brady claim, . . . if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails.").

Third, any opinion testimony from the officer -- whether at the preliminary hearing or at trial -- describing petitioner's clothing as baggy was not material or prejudicial to the outcome of his trial. Regardless of whether the jury believed petitioner's clothing was unusually baggy or not, it would not have had any impact on the jury's determination that petitioner was a convicted felon found in possession of a gun and ammunition after having resisted or delayed the officer by running away from him.

For these reasons, the Court finds that the state court's rejection of petitioner's Brady claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on Ground Six.

GROUND SEVEN: DOUBLE JEOPARDY VIOLATION

In Ground Seven, petitioner claims that his due process rights were violated when he was convicted of California Penal Code section 148, misdemeanor resisting a peace officer, after being acquitted of Penal Code section 69, resisting an executive officer by means of force, in violation of the Double Jeopardy Clause. (Docket No. 37 at 7).

The essence of petitioner's claim is a challenge to California law. Alleged violations of state law are not cognizable in a federal habeas corpus petition. Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Here, petitioner argues that California Penal Code section 148 is not a lesser included offense of California Penal Code section 69 and, therefore, the trial court should not have instructed the jury on the misdemeanor offense since it was not charged in the information. (Docket No. 37 at 7). "The question of

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whether one crime is a lesser-included offense of another is generally a state law claim that is not cognizable on federal habeas review." Hernandez v. Walker, 2015 WL 7720811, at *3 n.5 (N.D. Cal. Nov. 30, 2015); see also Hudson v. Cal. Dept. of Corr., 2008 WL 2676943, at *6 (C.D. Cal. Jul. 7, 2008) (finding claim that petitioner was innocent of misdemeanor child molestation because it was "not a lesser included offense of [California Penal Code] section 288(a)" failed to "alleged a deprivation of federal rights" and was, "not cognizable on federal habeas review").[4]

As for petitioner's contention that his conviction was a violation of double jeopardy, it is equally unavailing. The Double Jeopardy Clause provides that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This means that the government is prohibited from prosecuting a defendant a second time after acquittal or conviction or imposing multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Nothing in the Double Jeopardy Clause prevents a defendant from being acquitted of one offense while being convicted of a lesser included offense to that crime in the same trial. See Ohio v. Johnson, 467 U.S. 493, 500, 104 S. Ct.2536, 81 L. Ed. 2d 425 (1984) (noting that a state is not prohibited by the Double Jeopardy Clause from charging a defendant with greater and lesser included offenses and prosecuting those offenses in a single trial); Humes v. Asuncion, 2018 WL 4381545, at *9 (C.D. Cal. Aug. 1, 2018) ("[T]here is no clearly established Supreme Court precedent establishing that a conviction on a lesser included offense at the same trial at which the trial court dismissed or acquitted the defendant of a greater offense violates the prohibition against double jeopardy."). For these reasons, petitioner's claim in Ground Seven is denied.

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[4] The Court notes that the California Supreme Court has held that a violation of California Penal Code section 148 can be a lesser included offense of a violation of California Penal Code section 69, when the accusatory pleading includes language that the defendant knowingly resisted the officer "by the use of force or violence." People v. Smith, 57 Cal. 4th 232, 240-41, 159 Cal. Rptr. 3d 57 (2013) (internal quotation marks omitted). Here, the information lodged against petitioner specifically charged him with a violation of California Penal Code section 69 for preventing the officer from performing his duties "by the use of force and violence." (CT at 149).

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GROUND EIGHT: SECOND AMENDMENT VIOLATION

In Ground Eight, petitioner contends that his right to bear arms for self-defense was violated by his conviction for unlawful possession of a weapon by a convicted felon. (Docket No. 37 at 7-8).

The Second Amendment protects an individual's right to bear arms. District of Columbia v. Heller, 554 US 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). However, the scope of the right is not without limits. Id. at 626 (noting that the Second Amendment does not give a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). The Supreme Court in Heller "identified three classes of lawful prohibitions: bans on possession by felons and the mentally ill; bans on possession in sensitive places; and regulations on the commercial sale of firearms." Young v. Hawaii, 992 F.3d 765, 782 (9th Cir. 2021) (citing Heller, 554 U.S. at 626-27). Prohibitions on the possession of firearms by felons are "presumptively lawful regulatory measures" because "felons are categorically different from the individuals who have a fundamental right to bear arms." United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (internal quotation marks and italics omitted).

Petitioner does not contest that he is a lawfully convicted felon. Instead, he suggests without legal support that the "Second Amendment does not apply" to California. (See Docket No. 37 at 7). On this point, he is clearly wrong. So, too, is his assertion that the Second Amendment guarantees felons the right to carry concealed weapons. (See Traverse, Memo. at 20-21). Accordingly, petitioner's constitutional right to bear arms for self-defense was not violated by his conviction for being a felon in possession a gun. Petitioner's claim in Ground Eight is without merit.

GROUND TEN: INSUFFICIENT EVIDENCE

In Ground Ten, petitioner asserts that there was insufficient evidence to convict him of resisting or delaying a peace officer in violation of California Penal Code section 148 because the officer was not acting lawfully at the time of the arrest.

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Sufficient evidence supports a conviction if, "[v]iewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); see also In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (holding that the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). In considering a claim of insufficient evidence on federal habeas review, a federal court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); see also Jackson, 443 U.S. at 319, 324, 326. "If confronted by a record that supports conflicting inferences, federal habeas courts must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. A jury's credibility determinations are therefore entitled to near-total deference under Jackson." Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam) (internal quotation marks and citations omitted).

Moreover, under AEDPA, the Jackson analysis is conducted "with an additional layer of deference" to the state court's decision. Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005). Consequently, a federal habeas petitioner "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Id. at 1274.

On habeas review, the federal court must refer to the substantive elements of the criminal offense as defined by state law and look to state law to determine what evidence is necessary to convict on the crime charged. Jackson, 443 U.S. at 324 n.16; Juan H., 408 F.3d at 1275. "For a [California Penal Code] § 148(a)(1) conviction to be valid, a criminal defendant must have resisted, delayed, or obstructed a police officer in the lawful exercise of his duties." Smith v. City of Hemet, 394 F.3d 689, 695 (9th Cir. 2005) (internal quotations omitted). Thus, "[i]n California, the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer." Id.

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Petitioner argues that the officer was acting unlawfully when he initially attempted to conduct a pat-down search of petitioner for "officer safety" reasons. (Docket No. 37 at 8). Therefore, he suggests that he could not be lawfully convicted of resisting or delaying the officer, despite ignoring the officer's many commands, fleeing on foot, and refusing to comply even after being tackled to the ground in a nearby parking lot. Despite petitioner's arguments to the contrary, the California Court of Appeal held that the officer was "justified in temporarily detaining [petitioner] for the purpose of investigating the loitering complaint" and attempting to conduct a pat-down search for weapons because the officer "reasonably believ[ed] [petitioner] might have been concealing a weapon in his jacket or pants." (Docket No. 10-1 at 12-13). Petitioner has presented no facts that undermine the state court's determination that the officer acted lawfully in this instance. Therefore, the uncontested evidence that petitioner fled from the officer, despite repeated commands to stop, was more than sufficient to establish a violation of resisting or delaying a peace officer under California Penal Code section 148. See People v. Lopez, 188 Cal. App. 3d 592, 601-602, 233 Cal. Rptr. 207 (Cal. App. 5 Dist. 1986) (fleeing after ignoring an officer's order to stop suggests a defendant knows an officer is attempting to detain him and provides sufficient evidence to support a conviction under section 148); People v. Allen, 109 Cal. App. 3d 981, 985-987, 167 Cal. Rptr. 502 (Cal. App. 5 Dist. 1980) (fleeing from an officer can constitute resisting arrest or delaying a police officer when the person knows the officer wishes to detain him).

Accordingly, this Court finds that the state court's rejection of petitioner's insufficient evidence claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Habeas relief is not warranted on Ground Ten.

EVIDENTIARY HEARING

Petitioner asks the Court to order an evidentiary hearing. (See Traverse at 8-9). Petitioner does not, however, identify which issues require a hearing or make any attempt to explain why a hearing is necessary or justified. Moreover, the Supreme Court has held that review of state court

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decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). Accordingly, the Court's finding that petitioner failed to meet his burden under 28 U.S.C. § 2254(d)(1) as to any of the claims raised herein is dispositive of his request for an evidentiary hearing. See Gulbrandson v. Ryan, 738 F.3d 976, 993-94 (9th Cir. 2013) (holding that Pinholster precludes "further factual development" of habeas claims rejected by a state court on their merits).

Furthermore, "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record." Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). Because the Court was able to determine that petitioner is not entitled to relief based on the record, no hearing is warranted in this instance. See Wood v. Ryan, 693 F.3d 1104, 1122 (9th Cir. 2012).

VI

RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the SAP and dismissing this action with prejudice.

Dated: July 7, 2022

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ONOFRE TOMMY SERRANO, Defendant and Appellant.	E071551 (Super.Ct.Nos. RIF1801863) OPINION

APPEAL from the Superior Court of Riverside County. Larrie R. Brainard, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Helios (Joe) Hernandez, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

Theresa Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

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I.

INTRODUCTION

A police officer responding to a loitering complaint in a high crime area, detained defendant and appellant, Onofre Tommy Serrano, for questioning and a safety pat-down search. When defendant ignored the officer's repeated requests to sit down and failed to respond, the officer told defendant he was going to search defendant for weapons. Upon the officer placing his hand on defendant's shoulder, defendant fled on foot. After being chased down, defendant was searched and arrested for possessing a concealed, loaded revolver.

Defendant appeals from the judgment entered following jury convictions for being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)[1]; count 1), being a felon in possession of ammunition (§ 30305, subd. (a); count 2), and misdemeanor resisting a peace officer (§ 148; count 3). The jury also found true a strike prior allegation based on a 1994 felony conviction for carjacking (§ 215). The trial court sentenced defendant to four years in prison. The court also ordered defendant to pay a $300 restitution fine (§ 1202.4), $300 stayed parole revocation fine (§ 1202.45), $40 per count court operations assessment (§ 1465.8), and $30 per count criminal conviction assessment (Gov. Code, § 70373).

[1] Unless otherwise noted, all statutory references are to the Penal Code.

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Defendant contends the trial court erred in denying his motion to suppress the gun and ammunition evidence. Defendant further contends the trial court violated his due process rights by failing to determine whether defendant has the ability to pay the imposed fines, fees, and assessments. We reject defendant's contentions and affirm the judgment.[2]

II.

FACTS

The following facts, which served as the basis for defendant's evidence suppression motion and renewed suppression motion, are taken from the preliminary hearing transcript of testimony by Police Officer Rardin and defendant. During the preliminary hearing, the parties stipulated that there was no warrant to search defendant.

Officer Rardin testified to the following facts. Around 10:45 p.m. on April 14, 2018, Police Officer Rardin was dispatched to a Chinese restaurant in a high crime area. The area was known for drug crimes and for vehicle and commercial burglaries. The dispatch call was in response to a complaint that four people were loitering outside the restaurant. When Officer Rardin arrived at the restaurant at 11:10 p.m., the restaurant was closed. Four men, including defendant, were in front of the restaurant. Defendant

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[2] Defendant has filed a habeas corpus petition alleging that the delay beyond 48 hours, in arraigning him after his arrest, was unreasonable. He also contends that California's statute, section 29800, prohibiting felons from possessing firearms, violates the Second Amendment and is unconstitutionally vague. (*In re the Matter of Onofre Tommy Serrano*, case No. E072287). We have addressed defendant's writ petition by separate order.

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stood next to a clearly displayed "'No Loitering'" sign, which was about 10 to 15 feet from the restaurant. Another man stood nearby, and two other men were sitting on the sidewalk.

Officer Rardin arrived in a marked patrol vehicle and was wearing his police uniform. Officer Rardin testified that his attention was drawn to the four men because it was nighttime and the men were near the closed Chinese restaurant, sitting under a "'No Loitering'" sign. Officer Rardin informed the four men that he was there in response to a radio dispatch call. The men said the call was not about them.

Officer Rardin told one of the two men who were standing to sit down, and the man complied. Officer Rardin wanted to control the situation by having all four individuals sit down, because he was alone against the four men. Officer Rardin then turned to defendant, who was standing, and told him to sit down. Defendant did not comply. Defendant stood and looked at Officer Rardin. Officer Rardin testified he was concerned because defendant was wearing a "bulky suit-like jacket that covered his waistband" and baggy jeans.

Officer Rardin further testified that it was "common for subjects that carry weapons to conceal them under baggie clothes, because it makes it harder for a police officer to see the outline of the weapon, and also makes it easier for them to hide it in their waistband." Officer Rardin said he had responded to around 50 calls in the area, during which numerous times he had encountered individuals carrying weapons.

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After defendant refused to sit down, Officer Rardin explained to the four men that he was there in response to a radio call. Officer Rardin again told defendant to sit down. Defendant continued to stand and stare at Officer Rardin. He did not appear angry but raised Officer Rardin's concern. Officer Rardin again explained he was there in response to a call and told defendant to sit down. After Officer Rardin told defendant a third time to sit down, and he refused, Officer Rardin took hold of defendant's left arm and told him he was going to conduct a pat search for weapons. Defendant silently stared at Officer Rardin and then began to sit down, but stopped half way and stood up when Officer Rardin said to stand up because he was going to search defendant for weapons. Officer Rardin put defendant's left hand behind his back, while maintaining a hold on defendant. When Officer Rardin attempted to grab defendant's other hand to put it behind his back, defendant broke Officer Rardin's grip by pulling his arm away from Officer Rardin and then fled. During this time, the other three men remained sitting on the ground.

Officer Rardin chased defendant on foot and yelled at him numerous times to stop as defendant ran through a nearby parking lot. After running about 200 yards, Officer Rardin caught up with defendant, wrapped his arms around defendant, and took him to the ground as defendant resisted. Defendant ignored Officer Rardin's commands to stop resisting. Within less than a minute after Officer Rardin forced defendant to the ground, backup officers arrived and assisted in taking defendant into custody. During a search of defendant incident to his arrest, the officers found a loaded revolver inside the front

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waistband of defendant's pants. Officer Rardin testified that he was wearing a body camera and there was a camera in his patrol car that recorded the incident.

Defendant testified during the preliminary hearing to the following facts. During the day of April 14, 2018, defendant played pool with a friend, A.J., in downtown Riverside. The two met up later that evening around 10:30 p.m., at the Tower Pizza parking lot, and planned to walk to A.J.'s house a few blocks away. Tower Pizza is near a Chinese donut shop. While defendant and A.J. were talking in the parking lot, and were about to leave, a police vehicle pulled up, an officer jumped out of the car, and the officer immediately grabbed defendant and told him and A.J. to sit down. Defendant had been at the location for only about 45 seconds before the officer arrived. The other two people at the scene were transients living in tents.

A.J. complied with the officer's order to sit down. Defendant did not sit down because he thought it was his choice whether to do so, since he was not under arrest and he did not consent to the encounter. Defendant later testified he could not sit down when A.J. sat down, because the officer was holding defendant's arm. Defendant believed the officer was asking defendant if he voluntarily wanted to sit down.

The officer yelled at defendant to sit down and immediately grabbed defendant's arm, twisting it and causing pain. Defendant pulled away to stop the pain. The next thing he knew, defendant was on the ground, handcuffed. Defendant denied he had resisted the officer, other than to prevent the officer from twisting his arm and use

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unwarranted force. Defendant denied the officer told him he was going to do a pat search for weapons. Defendant also denied loitering or hanging out in the parking lot.

Defendant claimed he broke free from the officer's grip and fled to avoid the officer twisting his arm. The officer ran after defendant across the parking lot and grabbed him. Defendant ended up on the ground. Defendant denied resisting the officer while on the ground.

III.

MOTION TO SUPPRESS EVIDENCE

Defendant contends the trial court erred in denying his motion to suppress the gun and ammunition evidence. He argues Officer Rardin did not have a reasonable suspicion to physically restrain and pat search him. Therefore, the gun and ammunition evidence, recovered after defendant's arrest, was "fruit of the poisonous tree," which must be suppressed. We disagree.

A. *Procedural Background*

Before defendant's preliminary hearing, defendant filed a section 1538.5 motion to suppress the gun and ammunition evidence. The hearing on the motion was heard concurrently with the preliminary hearing. The court denied defendant's motion to suppress, finding that Officer Rardin's testimony was credible and therefore there was a reasonable suspicion to detain defendant.

A month later, defendant renewed his motion to suppress. The trial court denied defendant's request for a hearing on the renewed motion, and also denied his renewed

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motion to suppress. About a month later, defendant filed supplemental points and authorities in support of renewing his motion to suppress. Defendant included with his supplemental brief, photographs and videos showing defendant at the time of Officer Rardin's encounter with defendant, including defendant's initial detention, Officer Rardin's attempt to pat search defendant, defendant fleeing, and Officer Rardin chasing after him. The videos were taken from a camera on Officer Rardin's patrol car and a body camera Officer Rardin was wearing during the incident.

After reviewing defendant's supplemental points and authorities, along with the additional supporting evidence, the trial court heard and denied defendant's renewed motion to suppress.

B. *Applicable Law*

The Fourth Amendment prohibits unreasonable searches and seizures by the government. (U.S. Const., 4th Amend.) Warrantless searches by law enforcement officers "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Katz v. United States* (1967) 389 U.S. 347, 357.) One such exception is the "stop and frisk" or pat search exception first stated in *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*). In *Terry*, the United States Supreme Court held that, "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman

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and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." (*Id.* at p. 30; accord *Florida v. J.L.* (2000) 529 U.S. 266, 270.)

In determining the reasonableness of the officer's conduct, the court looks to the totality of the circumstances to determine whether a reasonably prudent person in the circumstances would be warranted in believing his or her safety was in danger. (*United States v. Cortez* (1981) 449 U.S. 411, 417; *Terry, supra*, 392 U.S. at pp. 21-22, 27.) "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Terry, supra*, at p. 21.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [Citations.] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." (*Id.* at p. 27.)

At trial, the "prosecution has the burden of establishing the reasonableness of a warrantless search" (*People v. Jenkins* (2000) 22 Cal.4th 900, 972), and it is the prosecutor's burden to establish the officers' actions were justified by an exception to the

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warrant requirement (*People v. Williams* (2006) 145 Cal.App.4th 756, 761). On appeal, it is defendant's burden to demonstrate error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.)

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; see *People v. Lomax* (2010) 49 Cal.4th 530, 563.)

C. *Discussion*

1. *Defendant's Initial Detention Was Proper*

Defendant contends Officer Rardin did not have a reasonable suspicion justifying detaining and physically restraining him in an attempt to conduct a pat search. Defendant argues that, therefore, all subsequently acquired evidence was inadmissible as "fruit of the poisonous tree." We disagree.

Officer Rardin was justified in temporarily detaining defendant for the purpose of investigating the loitering complaint, based on specific and articulable facts, taken together with rational inferences from those facts. (*Terry, supra*, 392 U.S. at p. 21; *Santos v. Superior Court* (1984) 154 Cal.App.3d 1178, 1183-1184 (*Santos*).) A lawful detention of defendant did not require probable cause to arrest him for loitering. Officer Rardin only needed sufficient grounds to suspect a violation of the loitering statute,

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which entitled him to investigate. (*Santos*, *supra*, at p. 1183; *In re Tony C.* (1978) 21 Cal.3d 888, 893.)

Officer Rardin testified he detained defendant based on the following circumstances. Officer Rardin was dispatched around 10:45 p.m., to a Chinese restaurant in a high crime area. The area was known for drug crimes and for vehicle and commercial burglaries. The dispatch call was in response to a complaint that four people were loitering outside the restaurant. When Officer Rardin pulled up in front of the restaurant at about 11:10 p.m., the restaurant was closed. Consistent with the dispatch call, there was a group of four individuals, including defendant, near the restaurant. Defendant stood next to a clearly displayed "'No Loitering'" sign, which was about 10 to 15 feet from the restaurant. Another man stood nearby, and the two other men were sitting on the sidewalk. These facts and circumstances were sufficient for Officer Rardin to lawfully detain defendant and the other three individuals in furtherance of investigating the loitering complaint.

2. *Officer Rardin's Attempt to Pat Search Defendant Was Lawful*

The critical question in determining whether Officer Rardin acted reasonably when attempting to pat search defendant is, was the confrontation "'the kind of confrontation in which the officer can reasonably believe in the possibility that a weapon may be used against him?' [Citation.]" (*People v. Lawler* (1973) 9 Cal.3d 156, 161, quoting *People v. Superior Court* (1972) 7 Cal.3d 186; accord, *Santos*, *supra*, 154 Cal.App.3d at p. 1184.)

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We conclude based on the totality of the circumstances that Officer Rardin could have reasonably believed defendant possessed a weapon that might be used against Officer Rardin and therefore his safety was in danger. (*People v. Lawler, supra*, 9 Cal.3d at p. 161.) Such circumstances include Officer Rardin responding to the loitering complaint involving the four people loitering outside a Chinese restaurant. When Officer Rardin arrived, it was after 11:00 p.m., the restaurant was closed, and there were still four people outside the restaurant 25 minutes after the complaint was made. Officer Rardin thus had reason to investigate the matter and further had reason to be concerned about his safety during the investigation, because it was late at night, he was confronting a group of four individuals by himself, and he was in a high crime area. Officer Rardin also had personal knowledge that a high percentage of those whom he had detained in the past had been in possession of weapons.

In addition, when Officer Rardin attempted to minimize the risk of harm by asking the four individuals to sit down, everyone except defendant sat down. When Officer Rardin initially asked defendant to sit down, defendant gave Officer Rardin a blank stare and remained standing. Officer Rardin's body cam video shows Officer Rardin getting out of his patrol car. Two individuals are sitting and defendant is standing nearby. While Officer Rardin is standing next to defendant, twice, he tells defendant to have a seat. Defendant does not sit down. Officer Rardin states he received a call about the group and again says to sit down. After the second time Officer Rardin tells defendant to sit down, defendant says, "Who me?" Officer Rardin puts his hand on defendant's left shoulder

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and defendant starts to sit down. Officer Rardin tells him to stand because he is "going to make sure" defendant does not have any weapons on him. Defendant then runs away. Although the photos and video evidence of the incident show that defendant was not wearing unusually baggy clothing, under the totality of the circumstances, Officer Rardin could have reasonably believed defendant might have been concealing a weapon in his jacket or pants.

Relying on *Santos*, *supra*, 154 Cal.App.3d 1178, defendant argues that, even if the initial detention was lawful, Officer Rardin's attempt to conduct a more intrusive pat search by grabbing defendant's arm was unlawful. We disagree. *Santos* is distinguishable. In *Santos*, *supra*, 154 Cal.App.3d 1178, the defendant filed a petition for writ of mandate challenging the trial court's ruling denying his motion to suppress evidence. The *Santos* court held that the officer had sufficient grounds to detain the defendant based on observing his two companions passing objects in a closed-off parking lot at 10:00 p.m. in a high crime area. The court, however, held the pat search of the defendant was not justified by the circumstances. (*Id.* at pp. 1184, 1186.) The *Santos* court concluded there was no evidence that the defendant was engaged in any criminal activity or had any weapons. Therefore there were insufficient grounds for the pat search. (*Id.* at pp. 1185-1186.)

Here, unlike in *Santos*, the officer-to-suspect ratio was one to four, and defendant refused to cooperate when Officer Rardin attempted to improve his safety by telling defendant to sit down three times. Defendant ignored Officer Rardin by remaining

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standing until Officer Rardin said he was going to search defendant for weapons. Then defendant dropped half way, stood up and fled. These circumstances, and reasonable inferences drawn from them, were sufficient to warrant Officer Rardin reasonably believing defendant was armed and dangerous. We therefore conclude Officer Rardin lawfully detained and initiated a pat search of defendant.

IV.

IMPOSITION OF FINES, FEES, AND ASSESSMENTS

On October 19, 2018, the trial court sentenced defendant to four years in prison for being a felon in possession of a firearm and ammunition, for misdemeanor resisting a peace officer, and for having a strike prior for a 1994 carjacking conviction. The court further imposed a $300 restitution fine (§ 1202.4, subd. (b)), a stayed $300 parole revocation fine (§ 1202.45), a $40 per count court operations fee (§ 1465.8, subd. (a)), and a $30 per count criminal conviction assessment (Gov. Code, § 70373). During the sentencing hearing, there was no mention of defendant's ability to pay the court-ordered fines, fees, and assessments, and defendant did not object to them.

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant contends the trial court order imposing fines, fees, and assessments, without determining his ability to pay them, violated his constitutional right to due process. These fines, fees, and assessments were the statutory minimum amounts. The People argue defendant forfeited his objections to these fines, fees, and assessments by not objecting to them in the trial court. Regardless of whether defendant forfeited his due process objections, we

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will consider the matter on the merits. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7 ["The appellate courts typically have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantial right."].)

Defendant argues that under *Dueñas*, a stay of the restitution fine is necessary because "using the criminal process to collect a fine" a defendant cannot pay is unconstitutional. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1160.) Defendant argues that imposing fines, fees, and assessments, without a determination of ability to pay, violates his due process rights. *Dueñas* involved an unemployed, homeless mother with cerebral palsy, whose family, which included two young children, was unable to afford even basic necessities due to poverty and the inability to work. (*Id.* at pp. 1060-1161.) Dueñas's inability to pay several juvenile citations had resulted in suspension of her driver's license, which led to a series of misdemeanor convictions over the years for driving with a suspended license and additional court fees she was also unable to pay. (*Id.* at p. 1161.) Dueñas routinely served time in jail in lieu of paying the fines she owed and was sent to collections on other fees related to her court appearances. (*Ibid.*)

After pleading no contest to yet another misdemeanor charge of driving with a suspended license, the trial court imposed on Dueñas certain assessments and a $150 restitution fine, the minimum amount at the time, required under section 1202.4, subdivision (b). The trial court rejected Dueñas's argument that the imposition of the assessments and the fine without consideration of her ability to pay them violated her constitutional rights to due process and equal protection. (*Dueñas*, *supra*, 30 Cal.App.5th

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at p. 1163.) The Court of Appeal in *Dueñas* reversed, holding that "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair[, and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas*, *supra*, at p. 1168.) The *Dueñas* court also held that imposition of a minimum restitution fine without consideration of Dueñas's ability to pay violated due process. (*Id.* at pp. 1169-1172.) The *Dueñas* court reversed the order imposing the fines, fees, and assessments, and directed the trial court to stay the execution of the restitution fine "unless and until the People prove that Dueñas has the present ability to pay it." (*Id.* at pp. 1172-1173.)

Even assuming without deciding that the trial court erred under *Dueñas*, *supra*, 30 Cal.App.5th 1157, in not conducting a hearing on defendant's ability to pay the fines, fees, and assessments, any such error was harmless because the record demonstrates it is probable defendant would be able to pay the fines, fees, and assessments, and it is highly unlikely the trial court would find otherwise if this matter were remanded for a hearing on defendant's ability to pay the fines fees, and assessments. We reach this conclusion based on defendant's testimony during the trial, and based on the fact the court imposed the minimum statutory fines, fees, and assessments.

When asked during the trial what defendant did for a living, defendant testified he was chief executive officer of Legal Eagle Documents, located in Torrance, California.

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Defendant stated he registered his company with the County of Los Angeles in 2015. He described the company as "a document preparation company that files forms and documents for pro per litigants with courts in the County of Los Angeles." Defendant stated that his training for the business included working with attorneys, attending Long Beach City College, with a major in administration of justice, and attending Los Angeles Trade Tech College, majoring in paralegal studies. Defendant testified that when he was not in California conducting his document business Monday through Thursday, he was in Arizona.

In determining defendant's ability to pay the fines, fees, and assessments, the trial court could consider defendant's future earning capacity, including the ability to earn prison wages. (See *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505 [defendant sentenced to prison did not show absolute inability to pay $10,000 restitution fine even though prison wages would make it difficult for him to pay the fine, it would take a very long time, and the fine might never be paid]; *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377 [a trial court may consider the defendant's future ability to pay, including his ability to earn wages while in prison]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 ["defendant's ability to obtain prison wages and to earn money after his release from custody" are properly considered when determining whether a defendant has the ability to pay].)

The trial court could reasonably conclude defendant, not only had the ability to earn prison wages while incarcerated, but also was capable of post-incarceration

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employment, as demonstrated by defendant's trial testimony. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1487 [under section 1202.4, when "determining whether a defendant has the ability to pay a restitution fine, the court is not limited to considering a defendant's *present* ability but may consider a defendant's ability to pay in the future"]; *People v. Hennessey, supra*, 37 Cal.App.4th at pp. 1836-1837 [the record need only "contain evidence supporting an implied determination of ability to pay"].)

Defendant revealed during his testimony that he has been resourceful in developing his own document business, which he may be able to continue after his release. If not, it would be reasonable to conclude that, based on defendant's age, education, training, and experience, he will be able to find employment of some type, which will allow him to repay the court imposed fines, fees, and assessments. There is also no evidence defendant has any mental or physical disabilities. His initial self-representation, trial testimony, and video evidence indicate he is able-bodied and capable of performing work.

Defendant is currently 46 years old and was sentenced in October 2018, to 4 years, with 377 presentence credits. The record does not disclose whether defendant has any assets from which he can pay the fines, fees, and assessments. Nevertheless, even assuming he has no assets, the record demonstrates that defendant has the ability to pay them from income earned while incarcerated or thereafter. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140.)

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V.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.

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9.04.300 - Trespass on private property.

A. No person shall enter or be present upon any private property or portion of private property not open to the general public without the consent of the owner, the owner's agent, or the person in lawful possession, where signs forbidding entry are displayed as provided in subsection F.

B. No person shall enter upon any private property or portion of private property, not open to the general public, who within the immediately preceding six months was advised as follows: to leave and not return, and that if he or she returns to the property within six months of the advisement he or she will be subject to arrest. This advisement must be made by the owner, the owner's agent, the person in lawful possession or a peace officer at the request of the owner, owner's agent or person in lawful possession. The advisement shall be documented in writing by the individual making it and shall include the name of the person advised, the date, approximate time, address and type of property involved. Such documentation shall be retained for a minimum period of one year. This subsection is not violated if a person so advised enters the property within the designated six-month period, if he or she has been expressly authorized to do so by the owner, the owner's agent or a person in lawful possession.

C. *Entry requiring express consent of owner.*

1. No person shall enter or be present upon private property not open to the general public without the express consent of the owner or the owner's agent when that person:
   a. Has been convicted or any violation of the law involving narcotics, prostitution, vandalism, threat to commit a violent act, or a violent act, on that same private property not open to the general public, whether or not such property is posted in accordance with subsection F; and
   b. Has, subsequent to the conviction been told to leave and not return to that same property by the owner, the owner's agent or a peace officer at the request of the owner or the owner's agent.
2. The request to leave must be made within six months of the date of the conviction and shall be documented in writing by the individual making the request. The documentation of the request shall include the name of the person being requested to leave, the date, the approximate time, the address and the type of property involved.
3. This subsection applies even if the person has the consent of a person in lawful possession but does not apply to persons who have a right of lawful possession to the subject property. An individual who has the consent of the person in lawful possession may not be refused entry by the owner or the owner's agent for a period exceeding 12 months, computed from the date of the request.

D. No person shall enter or be present upon any private property or portion of private property open to the general public who within the immediately preceding 24 hours was advised to leave and not

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return, and that if he or she returns to the property within 24 hours of the advisement, he or she will be subject to arrest. This advisement must be made by the owner, the owner's agent, the person in lawful possession or a peace officer at the request of the owner, owner's agent or the person in lawful possession. A request to leave may be made only if it is rationally related to the services performed or the facilities provided.

E. The term "private property" shall mean any real property, including but not limited to, buildings, structures, yards, open spaces, walkways, courtyards, driveways, carports, parking areas and vacant lots, except land which is used exclusively for agricultural purposes, owned by any person or legal entity other than property owned or lawfully possessed by any governmental entity or agency.

F. For purposes of subsection A, one sign must be printed or posed in a conspicuous manner at every walkway and driveway entering any enclosed property or portion thereof and at a minimum of every 50 feet along the boundary of any unenclosed lot. This requirement is met if at least one sign is conspicuously printed or posted on the outside of every structure on such property, so as to be readable from each walkway and driveway entering such property. The sign shall State as follows:

THIS PROPERTY CLOSED TO THE PUBLIC
No Entry Without Permission
R.M.C. §9.04.300

The language "THIS PROPERTY CLOSED TO THE PUBLIC No Entry Without Permission" on said sign shall be at least two inches high.

G. When a peace officer's assistance in dealing with a trespass is requested, the owner, owner's agent, or the person in lawful possession shall make a separate request to the peace officer on each occasion. However, a single request for a peace officer's assistance may be made to cover a limited period of time not to exceed 12 months when such request is made in writing and provides the specific dates of the authorization period.

H. This section shall not apply in any of the following instances: (1) when its application results in, or is coupled with, any act prohibited by the Unruh Civil Rights Act, or any other provision of law relating to prohibited discrimination against any person; (2) when its application results in, or is coupled with, an act prohibited by Section 365 of the California Penal Code, or any other provision of law relating to the duties of innkeepers; (3) when public officers or employees are acting within the course and scope of their employment or in the performance of their official duties; or (4) when persons are engaging in activities protected by the United States Constitution or the California Constitution or when persons are engaging in acts which are expressly required or permitted by any provision of law.

I. Violation of any of the provisions of this section shall be a misdemeanor or an infraction.

J. If any part or provision of this section, or the application thereof to any person or circumstance, is held

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invalid, the remainder of the section, including the application of that part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this section are severable.

(Ord. 6178 § 3, 1995)

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ONOFRE TOMMY SERRANO, Defendant.	NO. RIF1801863 **PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION PURSUANT TO PENAL CODE SECTION 995** Date: July 6, 2018 Time: 8:30 a.m. Dept.: 61

TO THE HONORABLE JUDGE, and the defendant ONOFRE TOMMY SERRANO:

PLEASE TAKE NOTICE that on July 6, 2018, at 8:30 a.m. in Department 61 of the above entitled court, or as soon thereafter as may be heard, THE PEOPLE OF THE STATE OF CALIFORNIA will respectfully move for an order requesting that this Court deny the defendant's motion to set aside Counts 1, 2, and 3 of the information pursuant to Penal Code § 995.

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This motion is based on the points and authorities of this memorandum and upon the testimony contained in the preliminary hearing transcripts of May 22, 2018.

Dated: June 28, 2018

Respectfully submitted,
MICHAEL A. HESTRIN
District Attorney

Greg Boedi for Matthew Stong

MATTHEW STONG
Deputy District Attorney

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INTRODUCTION

On May 22, 2018, a preliminary hearing was held before the Honorable Samuel Diaz, Jr. and the defendant was held to answer for the following counts:

1. Count 1: PC 29800(a)(1) – Felon in possession of a firearm
2. Count 2: PC 30305(a) – Felon in possession of ammunition
3. Count 3: PC 69 – Attempting to prevent an executive officer from performing duty

On June 21, 2018, the defendant filed a motion pursuant to Penal Code Section 995, contesting all of the above counts charged in the Information. The People request this Court deny the defendant's motion to dismiss because the facts and testimony presented at the preliminary hearing demonstrate evidence to support the necessary elements of the charged offenses.

STATEMENT OF FACTS

On April 14, 2018, Officer Rardin was dispatched to 3948 University Avenue in Riverside, an area well known for drug sales and drug use. It is also a high crime area for vehicle and commercial burglaries. Officer Rardin was dispatched to that location in response to a call stating that four subjects were outside of a closed Chinese restaurant. After arriving, Officer Rardin noticed four subjects sitting by the Chinese restaurant under a "No Loitering" sign, a violation of RMC9.04.300. At the time, Officer Rardin was in a marked patrol vehicle wearing his uniform.

Officer Rardin contacted the four subjects as a whole; two subjects were standing on the sidewalk, one subject standing to the left of them, and one standing to the right of them. Officer Rardin, recognizing that there were four subjects and only one of him, informed the group that he was there because of a radio call. Officer Rardin then spoke with the subject standing to the left and asked him to sit down, for officer safety purposes. The subject complied with the officer's request and sat down. Next, Officer Rardin contacted the defendant, who was standing to the right, and asked him to sit down, multiple times. However, the defendant continuously refused to comply with the officer's requests, and instead remained standing.

During the time at which Officer Rardin contacted the defendant, the defendant was wearing a bulky suit-like jacket that covered his waistband, and baggie jeans. The defendant's attire concerned Officer Rardin because it is common for subjects carrying weapons to conceal them under baggie clothing. After Officer Rardin's first attempt to ask the defendant to sit down, the defendant began to walk away. Officer Rardin asked the defendant a second time to sit down; the defendant again refused but stopped walking away. After asking the defendant a third time to sit down, to which he again did not comply, Officer Rardin took a hold of the defendant's left arm and told the defendant that he would be conducting a pat-down search for weapons. At this time, the other three subjects were seated on the ground, and Officer Rardin was the only officer on scene.

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After explaining to the defendant that he would be conducting a pat-down search for weapons, Officer Rardin put the defendant's left hand in the small of his back. However, when Officer Rardin attempted to grab the defendant's right hand to bring it to the small of his back, the defendant broke Officer Rardin's grip and fled westbound through the parking lot. Officer Rardin began to chase after the defendant while simultaneously giving numerous verbal commands to stop; however, the defendant ignored the commands and continued to flee.

Once Officer Rardin caught the defendant, he wrapped both of his arms around the defendant's upper torso; however, the defendant again did not comply. Instead, the defendant grabbed onto shopping carts that were to the left of their location, at which point Officer Rardin pulled the defendant away from the shopping carts. In response, the defendant tensed his muscles up as if he was going to try to fight Officer Rardin or flee once again. After feeling the defendant tense up, Officer Rardin immediately took the defendant to the ground to prevent him from fleeing and to gain a better ability to take the defendant safely into custody.

After the defendant was on the ground, Officer Rardin positioned himself at the back of the defendant in order to take him into custody; the defendant responded by pushing up, causing Officer Rardin to fall over the defendant's shoulder, and head, in front of him. Once Officer Rardin realized that he was falling forward, he disengaged from the defendant so that he could get into a position of advantage. Officer Rardin wrapped his arms around the defendant's body to prevent him from fleeing and took him back to the ground. While on the ground the second time, the defendant's right hand was on the ground, as if he was trying to push himself up. The defendant's right leg was tucked underneath his right hip, his right knee on the ground, and his left leg was out, essentially holding himself up off the ground. Officer Rardin attempted to push the defendant down to the ground, but the defendant resisted and pushed the officer back up.

Throughout the struggle between Officer Rardin and the defendant, Officer Rardin was continuously giving commands to the defendant to stop resisting. However, Officer Rardin was unable to take the defendant into custody until other officers responded to assist, which was not until approximately 45 seconds after they went to the ground for the second time. As a result of the struggle, Officer Rardin suffered an abrasion on his right forearm, a tingling feeling in his right hand and a severe sprain to his right wrist. The defendant had an abrasion on his lip and on his knee.

Once other officers responded to assist, the defendant was arrested and taken into custody; he was also searched pursuant to the arrest. During the search incident to arrest, a loaded firearm was located to the middle right on the inside of the defendant's pants waistband. The firearm was inside a black bag/sock. Officer Rardin observed the gun was a revolver, with a six-round cylinder, and all six slots containing ammunition.

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ARGUMENT

The defendant's motion to set aside the Information based on insufficient evidence should be denied. During the preliminary hearing, Officer Rardin provided beyond sufficient testimony about the incident in question, and therefore appropriately met the probable cause standard that the defendant did in fact violate Penal Code §§ 29800(a)(1), 30305(a)(1), and 69. Based on the preliminary hearing transcript, it is evident that each of the required elements of all three CALCRIMS were met. Further, the defendant failed to allege any deficiency that would allow this Court to set aside any of the three counts that were held to answer without reweighing the evidence or substituting its judgment for that of the magistrate at the preliminary hearing.

I.

AN INFORMATION MAY NOT BE SET ASIDE IF THERE IS SOME EVIDENCE TO SUPPORT THE MAGISTRATE'S CONCLUSION.

In ruling on a motion brought pursuant to Penal Code section 995, neither the superior court nor the appellate court may reweigh the evidence or substitute its judgment for that of the committing magistrate as to the weight of the evidence or credibility of witnesses. (*People v. Block*, (1971) 6 Cal.3d 239, 245; *People v. Hall*, (1971) 3 Cal.3d 992, 996.) "And if there is some evidence in support of the information, the court will not inquire into the sufficiency thereof.'" (*People v. Block, supra*; *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.) Thus, an information should be set aside only when there is a total absence of evidence to support a necessary element of the offense charged. (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226; *Somers v. Superior Court* (1973) 32 Cal.App.3d 961, 963.)

"[A]lthough there must be *some* showing as to the existence of each element of the charged crime [citation] such a showing may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate." (Emphasis in original; *Williams v. Superior Court*. (1969) 71 Cal.2d 1144, 1148.) "Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information." (*Rideout v. Superior Court, supra*; *Caughlin v. Superior Court* (1971) 4 Cal.3d 461, 464-465, cert. den. 404 U.S. 990; *People v. Superior Court (Jurado), supra.*). If two reasonable inferences can be drawn from the evidence, the reviewing court is bound by the magistrate's conclusions and cannot grant a Penal Code section 995 motion merely because the evidence is also susceptible of another, equally reasonable, interpretation. (*People v. Superior Court (Bolden)* (1989) 209 CA3d 1109.)

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II.

THE PRELIMINARY HEARING PROVIDED SUFFICIENT EVIDENCE TO SUPPORT COUNTS 1, 2, AND 3 OF THE INFORMATION.

A. *Count 1 – Felon in Possession of a Firearm [PC 29800(a)(1)]*

According to CALCRIM 2510, in order to prove that the defendant is guilty of Penal Code §29800(a)(1), the People must prove:

1. The defendant owned, purchased, received, or possessed a firearm;
2. The defendant knew that he owned, purchased, received or possessed the firearm; and
3. The defendant had previously been convicted of a felony.

Defense argues that the prosecution failed to meet the elements for Penal Code §29800(a)(1) because "the [certified RAP sheet] admitted as exhibit 1 is not admissible pursuant to Evidence Code §452.5." (Defense at 37.) To this point, the defense is simply wrong. According to Evidence Code §1530(a)(2), a purported copy of a writing in the custody of a public entity, which is certified as a correct copy of the writing by a public employee, is prima facie evidence of the existence and content of the writing. Therefore, the certified RAP sheet admitted by the People at the preliminary hearing, which contains the name, date of birth, and driver's license number belonging to the defendant, is self-authenticating and is therefore admissible to prove that the defendant is in fact a convicted felon.

Additionally, Officer Rardin testified at the preliminary hearing that the search of the defendant incident to his arrest produced a revolver. The revolver was found inside of a black bag (or sock), located inside of the defendant's waistband of his pants. It is common sense that someone would know/feel a firearm that was stored inside of the waistband of their pants. Consequently, the testimony provided evidence that the defendant possessed a firearm, the defendant knew he possessed the firearm, and that the defendant was previously convicted of a felony; therefore, there was more than sufficient probable cause to believe that the defendant committed the crime of a felon in possession of a firearm.

B. Count 2 – Felon in Possession of Ammunition [PC 30305(a)(1)]

In order to prove the defendant is guilty of Penal Code Section 30305(a)(1), CALCRIM 2591 states that the People must prove:

1. The defendant owned, possessed, or had under his custody or control ammunition;
2. The defendant knew he owned, possessed, or had under his custody or control the ammunition; and
3. The defendant had previously been convicted of a felony.

Defendant again makes the argument that a certified RAP sheet is not admissible per Evid.

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Code §452.5, however, as stated above, this is simply not true. The RAP sheet is self-authenticating and is thus admissible to prove that the defendant was previously convicted of a felony. Further, the ammunition was found inside of the revolver, which was hidden inside of the defendant's waistband. Therefore, there is again more than sufficient probable cause to believe that the defendant possessed ammunition, knew of its presence inside the revolver, and was previously convicted of a felony. There is probable cause that the defendant is guilty of violating Penal Code §30305(a)(1).

C. Count 3 – Resisting an Executive Officer with Force [PC 69]

According to CALCRIM 2651, to prove that the defendant is guilty of a violation of Penal Code §69, the People must prove the following:

1. The defendant unlawfully used force or violence to resist an executive officer;
2. When the defendant acted, the officer was performing his lawful duty; and
3. When the defendant acted, he knew the executive officer was performing his duty.

The defense has pointed out that the "[d]efendant cannot be convicted of an offense against an officer engaged in the performance of official duties unless the officer was acting lawfully at the time." (Defense at 28.) However, the defense failed to provide a citation as to where this rule arose from. Nonetheless, this discussion is essentially pointless because it is quite clear that Officer Rardin was engaged in the performance of official duties at the time that he contacted the defendant.

The preliminary hearing testimony presents evidence that Officer Rardin responded to a Chinese restaurant regarding four subjects loitering outside. Upon arrival, Officer Rardin located four subjects sitting/standing underneath a sign that says, "No Loitering." Because Officer Rardin was looking for four subjects who were loitering, and then discovered four people underneath a "No Loitering" sign, he decided to attempt to speak to the subjects about why they were outside of the restaurant. He then explained to the subjects that he wished to speak with them, but rightfully requested that they sit down to maintain control of the situation. Officer Rardin additionally testified that he was especially concerned when the defendant refused to sit down despite multiple requests.

Instead of complying with Officer Rardin's simple request to sit down, as the three other subjects had, the defendant deliberately chose to disregard the officer's commands. Further, after Officer Rardin then explained that he would need to conduct a pat-down search of the defendant for weapons because he refused to sit down, the defendant broke Officer Rardin's grip and fled the scene. The defendant did not comply with Officer Rardin at any point, but instead ran from the officer, disregarding the officer's requests, only to be searched after he was arrested.

Additionally, Officer Rardin testified at the preliminary hearing that at the time he contacted the defendant, he announced himself as an officer and told the subjects that he was responding to a call regarding four subjects loitering. Further, preliminary hearing testimony shows that Officer Rardin was wearing his uniform and was travelling in his marked patrol vehicle at the time of the

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incident. Therefore, it is clear that there is sufficient probable cause to believe that the defendant committed a violation of Penal Code §69. The defendant unlawfully used force to resist Officer Rardin when he broke free of the officer's hold, pushed his body against Officer Rardin, and physically struggled with Officer Rardin until officers arrived on scene to assist. Because Officer Rardin was in uniform, driving a marked patrol vehicle, and told the subjects multiple times that he was responding to a call, it is also evident that the defendant knew Officer Rardin was an executive officer and that he was performing his duty. Therefore, there is sufficient probable cause that the defendant violated Penal Code §69.

CONCLUSION

For the foregoing reasons, the People respectfully ask this Court deny defendant's motion.

Dated: June 28, 2018

Respectfully submitted,
MICHAEL HESTRIN
District Attorney

[signature] for Matthew Stong

MATTHEW STONG
Deputy District Attorney

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April 23, 2019

Kevin J. Lane, Clerk/Administrator
Court of Appeal of the State of California
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

RE: *People v. Serrano*
Fourth Appellate District, Division Two, Case No. E071551
Riverside Superior Case No. RIF1801863

Dear Mr. Lane:

Pursuant to this Court's April 8, 2019 Order, respondent submits this informal letter response addressing only whether an order to show cause should issue. As set forth below, because petitioner has failed to state a prima facie case for relief as to any of his claims, the answer is no.

Because "a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) "An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." If so, the required prima facie showing has been made. (*Id.* at pp. 474-475.) If no prima facie case is made, the appellate court will summarily deny the petition. However, if the allegations of the petition, taken as true, establish a claim for relief, the court will issue an order to show cause why relief should not be granted. (*Id.* at p. 475.)

Here, in his pro se petition, petitioner contends that the 72 hours between his arrest and arraignment was unreasonable; and that California's prohibition on felons possessing firearms violates the Second Amendment and is unconstitutionally vague. As set forth below, petitioner has not established a prima facie case for relief as to any of these claims and this Court should summarily deny the petition.

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Petitioner was arrested on Saturday, April 14, 2018 and taken into custody. On Wednesday, April 18, 2018, he was arraigned and charged. During the period of time in which petitioner represented himself below, he filed numerous motions, including a demurrer to the complaint alleging an unreasonable delay prior to arraignment, and that the charges in the complaint violated his Second Amendment rights. (1 CT 20-24.)

On October 12, 2018, a jury convicted petitioner in count 1, for being a felon in possession of a firearm (Pen. Code[1] § 29800, subd. (a)(1)), in count 2, for being a prohibited person in possession of ammunition (§ 3030, subd. (a)); and in count 3, for resisting arrest (§ 69). (2 CT 571-577.)

Petitioner cannot demonstrate prejudice from any alleged delay in his arraignment

Here, petitioner again argues that he was denied his constitutional right to be brought promptly before a magistrate for a judicial determination of probable cause. (*See County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 52; *Gerstein v. Pugh* (1975) 420 U.S. 103, 125; see also § 825, subd. (a)(1) [a person arrested without a warrant must be brought before a magistrate within 48 hours after arrest, excluding Sundays and holidays].)

Petitioner was arrested on Saturday, April 14, 2018 and taken into custody. On Wednesday, April 18, 2018, he was arraigned. (1 CT 10-11.) Thus, excluding Sunday, petitioner was arraigned within 72 hours of his arrest. Over petitioner's objection, the trial court ruled that the 72-hour timeframe did not amount to an unreasonable pretrial delay here. (1 RT 17-18.)

The trial court reasonably concluded that 72 hours following petitioner's Saturday arrest was not an unreasonable delay. In any event, a violation of a defendant's right to be taken before a magistrate within the time specified by the law does not require a reversal unless he can demonstrate that he was deprived of a fair trial or otherwise suffered prejudice as a result. (*Stroble v. California* (1952) 343 U.S. 181, 197; *Rogers v. Superior Court* (1955) 46 Cal.2d 3, 9.) Petitioner does not allege that he suffered any prejudice as a result of being arraigned 72 hours after his arrest, and the record is devoid of any such evidence. Thus, petitioner has not established a prima facie case for relief.

Penal Code Section 29800 is not unconstitutional

Petitioner next appears to argue, as he did in the trial court, that section 29800, which restricts felons from possessing firearms, violates the Second Amendment, citing

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

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District of Columbia v. Heller (2008) 554 U.S. 570 (*Heller*). (1 RT 18-20.) The trial court correctly ruled that section 29800 is not an unconstitutional limitation on the Second Amendment rights of felons.

In *Heller*, the high court evaluated the meaning of the Second Amendment, and concluded the constitutional right to possess firearms was not limited to possession for military use and included an individual's right to possess firearms in the home for self-defense. (*Heller, supra*, 554 U.S. at pp. 571-574, 591, 634-636.) But the court stated, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." (*Id.* at p. 626 (maj. opn. of Scalia, J.).) The right does not extend to any sort of confrontation nor does it extend to any type of weapon. (*Id.* at pp. 595, 625-626.) Rather, it is a right to possess and carry weapons "typically possessed by law-abiding citizens for lawful purposes." (Id. at p. 625.) The Court specifically noted that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . ." (*Id.* at pp. 626-627.) The court further explicitly recognized "the problem of handgun violence in this country," and confirmed that the "Constitution leaves . . . a variety of tools for combating that problem . . . ." (*Id.* at p. 636.)

In *McDonald v. City of Chicago* (2010) 561 U.S. 742 (*McDonald*) the court held the Second Amendment right is applicable to the states through the due process clause of the Fourteenth Amendment, but "'repeat[ed] [its] assurances' that 'the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"'" and reiterated "that its holding 'did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill . . . ."' (*McDonald, supra*, at p. 786, quoting *Heller, supra*, 554 U.S. at p. 626.)" (*People v. Jason K.* (2010) 188 Cal.App.4th 1545, 1555.)

California cases have followed the same approach. In *People v. DeLacy* (2011) 192 Cal.App.4th 1481, the court upheld the defendant's convictions for unlawful firearm and ammunition possession where the firearms and ammunition were found during probation searches of the defendant's home. (*Id.* at p. 1486.) There, the defendant challenged the constitutionality of former section 12021, subdivision (c)(1), which prohibited the possession of firearms by persons convicted of specified misdemeanors. (*Id.* a p. 1488.) The court explained, "[T]here is a significant difference between the D.C. handgun ban and [former] section 12021. The D.C. statute was one of general application that did not fit within the traditional regulations described by *Heller* as 'presumptively lawful.' [Citation.] In contrast, as [*People v. Flores* (2008) 169 Cal.App.4th 568] held, [former] section 12021 is analogous to a prohibition on felon weapon possession, a type of restriction expressly listed by *Heller* as untouched by its holding. Relying on this

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reasoning, both California and federal decisions have upheld the type of 'presumptively lawful' regulations identified in *Heller*, including prohibitions on firearm possession by certain 'disqualified' persons, without applying constitutional scrutiny that balances the objectives of the statute against the means used to accomplish those ends." (*Delacy, supra*, at p. 1489.)

Thus, because petitioner's conduct falls within an established exception to the scope of the Second Amendment's protection, he has failed to state a prima facie case for relief on this claim.

Section 29800 is not unconstitutionally vague

Last, petitioner appears to contend that section 29800 is unconstitutionally vague because it fails to provide sufficient notice of the activities prohibited under the statute. (Pet. 46-60.) The void-for-vagueness doctrine is based on the due process clause, which "requires … some level of definiteness in criminal statutes. [Citation.]" (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269.) "The basic premise of the void-for-vagueness doctrine is that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.' [Citation.]" (*People v. McKay* (2002) 27 Cal.4th 601, 634.) Thus, "'a criminal statute must "'be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.'" [Citations.]' [Citation.]" (*People v. Morgan* (2007) 42 Cal.4th 593, 605.)

Respondent is not entirely clear as to what part of section 29800 petitioner believes to be vague. The statute very clearly prohibits possession of firearms by persons who have been convicted of a felony:

> Any person who has been convicted of, or has an outstanding warrant for, a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(Cal. Pen Code § 29800.) There is simply no basis for petitioner's claim that section 29800 is unconstitutionally vague.

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Accordingly, for the reasons set forth above, respondent respectfully requests this Court find petitioner has failed to set forth a prima facie case for relief on any of his claims and deny the petition.

Sincerely,

/s/ Tami F. Hennick
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Deputy Attorney General

For XAVIER BECERRA
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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

ONOFRE SERRANO, Petitioner, **v.** **ALEX VILLANUEVA,** Respondent.	5:21cv931-VBF-PLA **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS** The Honorable Paul L. Abrams

Pursuant to this Court's Order, and in accordance with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Court, Respondent submits this Answer to Petition for Writ of Habeas Corpus.

Respondent denies all allegations that Petitioner Onofre Serrano is unlawfully detained and makes the following assertions:

I

Serrano received a four-year state prison sentence for unlawful possession of a firearm.

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II

Five of the Ten claims are not cognizable. Grounds One and Two assert Fourth Amendment claims. *Stone v. Powell*, 428 U.S. 465, 482 (1976). Grounds Four, Five, and Nine seek to challenge prior convictions. *Lackawanna Cnty. Dist. Att'y v. Cross*, 532 U.S. 394, 403-04 (2001).

III

Grounds Three, Six, Seven, Eight, and Ten are subject to the relitigation bar of 28 U.S.C. § 2254(d). Relief is unavailable because the state court's rejection of the claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

IV

Respondent will lodge relevant state court records under a separate Notice of Lodgment.

V

Serrano is not entitled to an evidentiary hearing to resolve his claims. 28 U.S.C. § 2254(e)(2).

VI

The relevant facts and procedural history are set forth in the accompanying Memorandum of Points and Authorities, which is incorporated herein by this reference. Except as expressly admitted, Respondent denies that Serrano's constitutional rights have been violated.

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Dated: March 9, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
DANIEL ROGERS
Supervising Deputy Attorney General

/s/ Vincent P. LaPietra
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CERTIFICATE OF SERVICE

Case Name: **Serrano v. Villanueva** No. **5:21cv931-VBF-PLA**

I hereby certify that on March 9, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On March 9, 2022, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Onofre Serrano
Bk No. 6032688
441 Bauchet Street
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 9, 2022, at San Diego, California.

B. Romero
Declarant

B. Romero
Signature

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

ONOFRE SERRANO, Petitioner, v. **ALEX VILLANUEVA,** Respondent.	5:21cv931-VBF-PLA **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS** The Honorable Paul L. Abrams

INTRODUCTION

Petitioner Onofre Serrano received a four-year sentence for unlawfully possessing a firearm. Currently before the Court is his Second Amended Petition for Writ of Habeas Corpus, which asserts ten grounds for relief. This Court should deny relief and dismiss the Petition.

Grounds One and Two assert Fourth Amendment claims. These claims are not cognizable because Serrano had a full and fair opportunity to litigate them in state court.

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Ground Three asserts an untimely probable-cause hearing. The United States Supreme Court had held that such error does not warrant habeas relief.

Grounds Four, Five, and Nine assert impropriety in a prior conviction. These claims are not cognizable because petitioners may not challenge the constitutionality of prior convictions absent specific, inapplicable exceptions.

Ground Six asserts that the prosecution failed to disclose exculpatory evidence prior to his preliminary hearing. This claim fails because the state courts rejected it as meritless and the United States Supreme Court has never held that such evidence must be disclosed prior to a preliminary hearing rather than prior to trial.

Ground Seven challenges the propriety of Serrano's misdemeanor conviction for resisting, obstructing, or delaying a public officer. This claim fails because it rests upon an incorrect premise. Contrary to Serrano's assertion, the misdemeanor was a lesser included offense of the charged felony.

Ground Eight asserts a Second Amendment challenge to California's law prohibiting the possession of firearms by felons. The United States Supreme Court has recognized that states may properly enact and enforce such laws.

Lastly, Ground Ten challenges the propriety of Serrano's misdemeanor conviction for resisting, delaying, or obstructing a public officer on the ground that the police officer at issue was not acting lawfully when he attempted to detain Serrano. This claim fails because the state courts held that the officer had sufficient reasonable suspicion to affect a detention. Serrano resisted, delayed, and obstructed the officer from that official act by fleeing.

STATEMENT OF THE CASE AND FACTS

Serrano and three others were in the parking lot of a closed restaurant at approximately 10:30 p.m. (Lod. 12 at 137, 145-146, 151.) Someone from a nearby business called 911 to complain of people loitering. (Lod. 12 at 137.) A uniformed police officer arrived, contacted the group, and asked if anyone was on probation or parole. (Lod. 12 at 146, 148.) Someone admitted to being on probation. (Lod. 12 at

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148.) The officer asked Serrano to sit next to the others, who were already seated, so that he could conduct a records check of the person on probation. (Lod. 12 at 149.) Serrano did not respond. (Lod. 12 at 149.) The officer repeated his request to no avail. (Lod. 12 at 149.)

When the officer told Serrano he was going to search him for weapons, Serrano went to sit down. (Lod. 12 at 150.) The officer grasped one of Serrano's wrists and attempted to place Serrano's hands behind his back. (Lod. 12 at 151.) Serrano broke free and ran. (Lod. 12 at 151.) The officer gave chase and eventually caught up to Serrano. (Lod. 12 at 152.) Serrano resisted the officer's attempts to detain him. (Lod. 12 at 153.) He wrestled with the officer on the ground. (Lod. 12 at 154-155.) Additional officers arrived and subdued Serrano. (Lod. 12 at 159.) They searched him and found a loaded handgun in his waistband. (Lod. 12 at 159-60.)

A jury found Serrano guilty of unlawful possession of a firearm, unlawful possession of ammunition, and misdemeanor resisting a public officer. It further found that Serrano's criminal history includes a strike offence. The trial court sentenced Serrano to four years in state prison. (Lod. 1 at 2.)

Serrano unsuccessfully appealed. (Lod. 1.) The California Supreme Court denied review. (Lod. 4, 5.) Serrano filed a petition for writ of habeas corpus in both the court of appeal and state supreme court. (Lod. 2, 7.) Both courts summarily denied relief. (Lod. 3, 8.)

Currently before the Court is Serrano's Second Amended Petition. (Dkt. 37.)

ADJUDICATION OF THE PETITION IS GOVERNED BY 28 U.S.C. § 2254

A state prisoner may obtain federal habeas relief "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. § 2254(a). Relief may not be granted on any claim adjudicated on its merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a

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decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *see also Cullen v. Pinholster*, 563 U.S. 170, 182-83 (2011); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)("clearly established Federal law" consists of holdings, not dicta, of Supreme Court decisions "as of the time of the relevant state-court decision").

For claims denied on direct appeal, the relevant state-court decision is that of the California Court of Appeal. *Wilson v. Sellers*, __U.S. __. 138 S.Ct. 1188, 1192 (2018). For claims denied on habeas, the relevant decision is the last one with a relevant explanation for denying relief. *Id.* When the procedural history does not include a "reasoned" decision, the state courts are presumed to have denied the claim as meritless. *Id.* The petitioner must then establish the lack of reasonable basis for denying relief. *Harrington v. Richter*, 562 U.S. 86, 96 (2011).

ARGUMENT

I. SERRANO MAY NOT OBTAIN RELIEF FOR HIS FOURTH AMENDMENT CLAIMS

In Ground One, Serrano claims that the officer's initial attempt at a pat down was an unreasonable search and seizure. In Ground Two, he makes a similar challenge to the initial detention. To the extent he alleges an unlawful arrest, his claim lacks merit. An unlawful arrest "does not void a subsequent conviction." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). To the extent he argues that the trial court should have excluded from evidence the firearm recovered from his waistband, his claim is not cognizable.

Federal habeas relief is unavailable for Fourth Amendment claims made by state prisoners who had a "full and fair" opportunity to litigate their claim in state court. *Stone v. Powell*, 428 U.S. 465, 482 (1976). This rule is applicable under the current version of § 2254. *Newman v. Wengler*, 790 F.3d 876, 878 (9th Cir. 2015).

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The Ninth Circuit has recognized that California affords criminal defendants a full and fair opportunity to adjudicate Fourth Amendment claims. *Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1999).

In this case, Serrano not only had the opportunity to litigate his Fourth Amendment claim, he actually did so. The trial court denied his motion to suppress the evidence. The California Court of Appeal affirmed the trial court's judgment in this regard. (Lod. 1.) Serrano may not obtain relief for Grounds One and Two.

II. THE CONSTITUTION DOES NOT GUARANTEE A PROBABLE CAUSE HEARING

In Ground Three, Serrano alleges that the state failed to hold a probable cause hearing within 48 hours of his arrest. He presented this claim to the California Supreme Court on habeas. (Lod. 7 at 4 (ground 2).) The Court summarily denied relief. (Lod. 8.) This was neither contrary to, nor an unreasonable application of clearly established federal law.

The Supreme Court has affirmed that "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein*, 420 U.S. at 119. Serrano is not entitled to relief for Ground Three. *See Schwartz v. Uribe*, No. 11-cv-1174-MWF-KES, 2018 WL 7825799 at *10 (Oct. 19, 2018, C.D. Cal.) (Assuming petitioner not arraigned within 48 hours, "habeas relief is not warranted on this claim"), adopted by 2019 WL 1365107 (March 26, 2019).

III. SERRANO MAY NOT CHALLENGE PRIOR CONVICTIONS

Grounds Four, Five, and Nine assert constitutional error in prior convictions. Ground Four asserts an unlawful vehicle search. Ground Five alleges a confrontation clause violation. And Ground Nine seeks to challenge the validity of an arrest. Serrano may not obtain relief for these claims.

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A conviction that is no longer open to collateral attack is "conclusively valid." *Lackawanna Cnty. Dist. Att'y v. Cross*, 532 U.S. 394, 403-04 (2001). A petitioner serving a sentence enhanced by such a conviction "may not challenge the enhanced sentence through a petition under §2254 on the ground that the prior conviction was unconstitutionally obtained." *Id.* There are three exceptions to this prohibition: 1) the prior conviction involves a failure to appoint counsel, 2) the prior conviction was not reviewed through no fault of the petitioner, and 3) new evidence establishes that the petitioner is actually innocent of the prior conviction. *Id.* at 406.

Serrano does not allege that the prior conviction at issue falls within any of the exceptions. Furthermore, Grounds Four and Nine assert Fourth Amendment claims that would not be cognizable in their own right. *Stone*, 428 U.S. at 482. Ground Five is cursory and unsupported. Not only has Serrano failed to identify the alleged testimonial hearsay, he does not assert prejudice. *See James v. Borg*, 24 F.3d 20, 26 (1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."). Serrano may not obtain relief for Grounds Four, Five, and Nine.

IV. SERRANO HAS FAILED TO ESTABLISH THAT THE PROSECUTION SUPPRESSED EXCULPATORY EVIDENCE

In Ground Six, Serrano claims that the prosecutor suppressed exculpatory evidence. He presented this claim to the state courts on habeas. (Lod. 7 at 5 (ground 3).) The state courts summarily denied relief. (Lod. 8.) Serrano has failed to establish the lack of reasonable basis for such a decision.

The Constitution prohibits the government from suppressing exculpatory evidence, regardless of intent, that is material to a criminal prosecution in terms of either guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419 (1995), 433; *Brady v. Maryland*, 373 U.S. 83 (1963). In order to warrant relief for the suppression of evidence, "[t]he evidence at issue must be favorable to the accused, either because

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it is exculpatory, or because it is impeaching; that evidence must have suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Such evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result at trial would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). This probability exists when the suppression of evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

Here, Serrano complains of the officer's testimony at the preliminary hearing. He notes that the officer said Serrano was wearing baggy clothes, while the court of appeal found that Serrano was not wearing unusually baggy clothes in the pictures and video it reviewed.

To the extent Serrano asserts that the government suppressed the pictures and video, his claim must fail because the evidence appears to have been disclosed prior to trial. *See Jaffe v. Brown*, 473 Fed.Appx. 557, 559 (9th Cir. 2012) ("[E]xisting Supreme Court case law does not clearly establish that the prosecution was required to disclose [exculpatory evidence] before, rather than after, [the] preliminary hearing."). Furthermore, any assumed delay in disclosure cannot have been prejudicial. As the court of appeal found, the difference between the officer's testimony and the images does not change the outcome that the officer reasonably believed Serrano might have been concealing a weapon. (Lod. 1 at 13.) Serrano is not entitled to relief for Ground Six

V. SERRANO WAS PROPERLY CONVICTED OF RESISTING, OBSTRUCTING, OR DELAYING A PEACE OFFICER

In Ground Seven, Serrano challenges his conviction for misdemeanor resisting, delaying, or obstructing a public officer in violation of Cal. Penal Code § 148. He argues that the crime is not a lesser included offense of the felony charged

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as Count Three in the Information—resisting an executive officer by means of threats, force, or violence in violation of Cal. Penal Code § 69. He presented this claim to the state courts on habeas. (Lod. 7 at 8 (ground 6).) The state courts summarily denied relief. (Lod. 8.) Serrano has not established the lack of reasonable basis for the court's rejection of this claim as meritless.

To the extent Serrano alleges that the state court misapplied state law, his claim is not cognizable. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Moreover, contrary to Serrano's assertion, misdemeanor resisting a public officer in violation of § 148 can be a lesser included offense of resisting an executive officer through threats, force, or violence in violation of § 69. *People v. Smith*, 57 Cal.4th 232 (2012). This occurs when the charging document alleges that the defendant resisted a peace officer in the performance of duties by means of force or violence. *Id.* at 243-44. The state courts in the case found the misdemeanor offense to be a lesser included offense of the charged felony and instructed accordingly. (Lod. 10 at 540.) This court is bound the state court's decision in this regard. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Serrano is not entitled to relief for Ground Seven.

VI. States May Preclude Felons from Possessing Firearms

In Ground Eight, Serrano claims that California's prohibition on felons possessing firearm violates the Second Amendment. He presented this claim to the state courts on habeas. (Lod. 7 at , 9 (ground 1).) The state courts summarily denied relief. (Lod. 8.) Serrano has not established the lack of reasonable basis for the state court's rejection of this claim. The Second Amendment does not preclude states from outlawing the possession of firearms by felons. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *accord United States v. Vongxay*, 594 U.S. 1111, 1114-15 (2010) (rejecting Second Amendment challenge to federal law prohibition felons from possessing firearms). Serrano is not entitled to relief for Ground Eight.

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VII. SUBSTANTIAL EVIDENCE SUPPORTS SERRANO'S MISDEMEANOR CONVICTION

In Ground Ten, Serrano appears to challenge the sufficiency of evidence presented to establish his misdemeanor conviction for resisting, obstructing, or delaying a public officer. He presented this claim to the state court on habeas. (Lod. 7 at 7 (ground five).) The state court summarily denied relief. (Lod. 8.) Serrano has not established the lack of reasonable basis for denying this claim.

Due process requires the prosecution to present substantial evidence of each element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 313-24 (1979). In § 2254 proceedings, state law establishes the elements of the offense and the evidence necessary to convict. *Id.* at 324 n.16; *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005).

Anyone "who willfully resists, delays, or obstructs any…peace officer…in the discharge or attempt to discharge any duty of his or her office or employment" has committed a misdemeanor. Cal. Penal Code, § 148, sub. (a)(1). The elements of the offense are: " ' "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) When the officer was engaged in performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." ' " *Yount v. City of Sacramento*, 43 Cal. 4th 885, 894-895 (2008).

"The lawfulness of the officer's conduct is an *essential element* of the offense." *In re Chase C.*, 243 Cal.App.4th 107, 115 (2012). If an officer was acting lawfully at the time the defendant resisted, obstructed, or delayed, then the defendant has committed an offense "even if the officer uses excessive force subsequent to the completed violation." *People v. Williams*, 26 Cal.App.5th 71, 74 (2018). In cases where the officer was acting lawfully, "physical resistance, hiding, or running away from a police officer have been found to violate section 148." *In re Muhammed C.*, 95 Cal.App.4th 1325, 1329 (2002).

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Terry v Ohio

Here, Serrano claims that the officer was not lawfully performing his duties when he attempted to detain Serrano. On direct appeal, the California Court of Appeal held that the officer had sufficient reasonable suspicion to detain Serrano and conduct a pat down search for weapons. (Lod. 1.) It is well settled that fleeing from a lawful investigative stop constitutes a violation of Cal. Penal Code § 148. *In re Michael V.*, 10 Cal. 3d 676, 680-681 (1974); *In re Andre P.*, 226 Cal.App. 3d 1164, 1169 (1991). Because the evidence, when viewed a light most favorable to the judgment, establishes each element of the offense as defined by state law, the state court's rejection of this claim was neither contrary to, nor an unreasonable application of *Jackson*. Serrano is not entitled to relief for Ground Ten.

CONCLUSION

Respondent requests this Court deny relief and dismiss the Petition.

Dated: March 9, 2022

Respectfully submitted,

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/s/ Vincent P. LaPietra
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

EX002-CRM

PEOPLE OF THE STATE OF CALIFORNIA

VS

DEFENDANT, ONOFRE TOMMY SERRANO

FOR COURT USE ONLY
FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
OCT 11 2018
M. MARTINEZ

OCT 16 2018

EXHIBIT LIST - CRIMINAL

CASE NUMBER: RIF1801853

JUDGE	CLERK	REPORTER	DEPARTMENT
JUDGE LARRIE R BRAINARD	M. MARTINEZ	S DUYSINGS	65

DISTRICT ATTORNEY: JASON ARMAND
DEFENSE COUNSEL: DPD SCOTT KIRKENDALL

☐ COURT'S ☒ PEOPLE'S ☒ DEFENDANT'S

EXHIBIT NO	IDENT	ADMIT	DESCRIPTION	STATUS	TYPE	EXHIBIT LETTER	IDENT	ADMIT	DESCRIPTION	STATUS	TYPE
1	☒	☒	Audio CD of 911 call		cd	A	☒	☒	Photo of defendant at the jail		Doc
1A	☒	☒	Transcripts of audio cd of 911 call		Doc		☐	☐			
2	☒	☒	Video of Officer body cam		dvd		☐	☐			
2A	☒	☒	Transcript of body cam video		Doc		☐	☐			
3	☒	☒	Video of officer's dash cam		dvd		☐	☐			
3A	☒	☒	Transcript of dash cam video		Doc		☐	☐			
4	☒	☒	Photo of buildings		Doc		☐	☐			
5	☒	☒	Photo of "Fresh Wok"		Doc		☐	☐			
6	☒	☐	Photo of parking lot		Pho		☐	☐			
7	☒	☐	Photo of parking lot in the dark		Pho		☐	☐			
8	☒	☐	Photo of ambulance		Pho		☐	☐			
9	☒	☐	Photo of closer view of ambulance		Pho		☐	☐			
10	☒	☒	Photo of side view of firearm		Doc		☐	☐			
11	☒	☒	Photo of firearm with 6 bullets		Doc		☐	☐			

Legend	
Status	R- Returned, RWP- Replaced with Photo S- Sealed W- Withdrawn
Type	A - Ammunition, AC - Audio Cassette, AUTO – Auto Parts B – Blue Print, C - Chart, CLO – Clothing, CD – Compact Disc, CU – Currency, D – Diagram, DVD – Digital Video Disc, DOC – Document, EE – Electronic Exhibit, E – Equipment, F – Firearm HM – Hazardous Materials J – Jewelry MISC – Miscellaneous, N – Narcotics, PHOTO – Photograph TR - Transcript, V – Valuable, VC – Video Cassette, WNF – Weapon (Non –Firearm), X – X-ray

App-J

PEOPLE/PLAINTIFF/PETITIONER: STATE OF CALIFORNIA	CASE NUMBER	EX003
DEFENDANT/RESPONDENT ONOFRE TOMMY SERRANO	RIF1801863	

☐ COURT'S ☒ PEOPLE/PLAINTIFF/PETITIONER'S — DEFENDANT/RESPONDENT'S

EXHIBIT NO	IDENT	ADMIT	DESCRIPTION	STATUS	TYPE	EXHIBIT LETTER	IDENT	ADMIT	DESCRIPTION	STATUS	TYPE
12	☒	☒	Photo of Firearm		Doc		☐	☐			
13	☒	☒	Photo of bullets		Doc		☐	☐			
14	☒	☒	Photo of defendant		Pho		☐	☐			
15	☒	☒	Photo of defendant's upper lip		Pho		☐	☐			
16	☒	☒	Photo of defendant's left knee		Pho		☐	☐			
17	☒	☒	Photo of defendant's right knee		Pho		☐	☐			
18	☒	☐	Photo of Officer		Pho		☐	☐			
19	☒	☐	Photo of Officers arm		Pho		☐	☐			
20	☒	☐	Photo of scratch on arm		Pho		☐	☐			
21	☒	☐	Photo of scraped knee		Pho		☐	☐			
22	☒	☐	Firearms	RWP			☐	☐			
23	☒	☐	3 rounds 7.65 bullets	RWP	A		☐	☐			
24	☒	☐	3 Live ammunition	RWP	A		☐	☐			
25	☒	☒	9698 Prior Package		Doc		☐	☐			
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	☐	☐					☐	☐			
	☐	☐					☐	☐			

Legend	
Status	R- Returned, RWP- Replaced with Photo, S- Sealed, W- Withdrawn
Type	A - Ammunition, AC - Audio Cassette, AP – Auto Parts, B – Blue Print, C - Chart, CLO – Clothing, CD – Compact Disc, CU – Currency, D – Diagram, DVD – Digital Video Disc, DOC – Document, E – Equipment, F – Firearm, HM – Hazardous Materials, J – Jewelry, MIS – Miscellaneous, N – Narcotics, PHO – Photograph, TR – Transcript, V – Valuable, VC – Video Cassette, WNF – Weapon (Non –Firearm), X – X-ray

Adopted for Mandatory Use
Riverside Superior Court
EX003 [Rev. 08/2015]

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EXHIBIT LIST – ADDITIONAL PAGE

App. J

CALCRIM No. 252. UNION OF ACT AND INTENT: GENERAL AND SPECIFIC INTENT TOGETHER

The crimes charged in Counts One, Two, and Three require proof of the union, or joint operation, of act and wrongful intent.

The following crimes require general criminal intent: Count 1 a violation of Penal Code Section 29800(a)(1) a felon in possession of a gun, and Count 2 a violation of Penal Code Section 30305 (a) a felon in possession of ammunition. For you to find a person guilty of these crimes, that person must not only commit the prohibited act or fail to do the required act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act or fails to do a required act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime.

The following crime requires a specific intent or mental state: Count 3 a violation of Penal Code Section 69 resisting an officer in lawful performance of his duty and a violation of Penal Code Section 148 resisting or delaying an officer in the performance of his duty as a lesser included offense under Count 3. For you to find a person guilty of this crime, that person must not only intentionally commit the prohibited act or intentionally fail to do the required act, but must do so with a specific intent or mental state. The act and the specific intent or mental state required are explained in the instruction for that crime.

The specific intent or mental state required for the crime of resisting an executive officer in the lawful performance of his duty is the defendant knew the executive officer was acting in lawful performance of his duty when he acted.

App- K

CALCRIM No. 300. ALL AVAILABLE EVIDENCE

Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.

App-K

CALCRIM No. 372. DEFENDANT'S FLIGHT

If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.

App. K

CALCRIM No. 2511. POSSESSION OF FIREARM BY PERSON PROHIBITED DUE TO CONVICTION–STIPULATION TO CONVICTION (Pen. Code, §§ 29800)

The defendant is charged in Count One with unlawfully possessing a firearm in violation of Penal Code Section 29800.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant possessed a firearm;

2.The defendant knew that he possessed the firearm;

AND

3.

The defendant had previously been convicted of a felony.

A firearm is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. The frame or receiver of such a firearm is also a firearm for the purpose of this instruction.

A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.

A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

App-K

CALCRIM No. 2652. RESISTING AN EXECUTIVE OFFICER IN PERFORMANCE OF DUTY (Pen. Code, § 69)

The defendant is charged in Count Three with resisting an executive officer in the performance of that officer's duty in violation of Penal Code section 69.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant unlawfully used force or violence to resist an executive officer;

2. When the defendant acted, the officer was performing his lawful duty;

AND

3. When the defendant acted, he knew the executive officer was performing his duty.

An executive officer is a government official who may use his or her own discretion in performing his or her job duties. A Riverside Police Officer is an executive officer.

The duties of a Riverside Police Officer include responding to calls for service regarding loitering.

A peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties. Instruction 2670 explains when an arrest or detention is unlawful and when force is unreasonable or excessive.

App-K

CALCRIM No. 2656. RESISTING A PEACE OFFICER

A lesser included offense to Count 3 a is resisting, or obstructing, or delaying a peace officer in the performance or attempted performance of his duties in violation of Penal Code section 148(a).

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. MICHAEL RARDIN was a peace officer lawfully performing or attempting to perform his duties as a peace officer;
- 2.The defendant willfully resisted, or obstructed, or delayed MICHAEL RARDIN in the performance or attempted performance of those duties;

AND

- 3.When the defendant acted, he knew, or reasonably should have known, that MICHAEL RARDIN was a peace officer performing or attempting to perform his duties.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A person who is employed as a police officer by the Riverside Police Department is a *peace officer*.

The duties of a Riverside Police Officer include responding to calls for service regarding loitering.

App-K

CALCRIM No. 2656. RESISTING A PEACE OFFICER

A peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties. Instruction 2670 explains when an arrest or detention is unlawful and when force is unreasonable or excessive.

The People allege that the defendant resisted, or obstructed, or delayed MICHAEL RARDIN by doing the following: running away from him. You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of resisting, or obstructing, or delaying a peace officer who was lawfully performing his or her duties, and you all agree on which act he committed.

If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully resisted, or obstructed, or delayed the officer if all the other requirements are met.

App-K

CALCRIM No. 2670. LAWFUL PERFORMANCE: PEACE OFFICER

The People have the burden of proving beyond a reasonable doubt that MICHAEL RARDIN was lawfully performing his duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of a violation of Penal Code Section 69 and the lesser included offense of a violation of Penal Code Section 148.

A peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention.

A peace officer may legally detain someone if the person consents to the detention or if:

1. Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;

AND

2. A reasonable officer who knew the same facts would have the same suspicion.

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.

C. Use of Force

Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force. However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting

App-K

CALCRIM No. 2670. LAWFUL PERFORMANCE: PEACE OFFICER

him.

If a peace officer uses unreasonable or excessive force while arresting or attempting to arrest or detaining or attempting to detain a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.

App-K

CALCRIM No. 3515. MULTIPLE COUNTS: SEPARATE OFFENSES (Pen. Code, § 954)

Each of the counts charged in this case is a separate crime You must consider each count separately and return a separate verdict for each one except for Count 3 which has a lesser included offense and will be addressed in other instructions.

App-K