

SUPREME COURT OF THE UNITED STATES

MACK WEST, JR.,	)	
	)	NO. _____
Petitioner,	)	
	)	MOTION FOR LEAVE TO PROCEED
v.	)	IN FORMA PAUPERIS
	)	
RANDY GROUNDS, Warden,	)	
	)	
	)	
Respondent.	)	
_____	)	

The petitioner, Mack West, asks leave to file the attached Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeal, No. 16-16795, without prepayment of costs and to proceed in forma pauperis under Rules 12.2 and 39 of the U.S. Supreme Court Rules and 28 U.S.C. § 1915(a).

Petitioner has previously been granted leave to proceed in forma pauperis in the following courts: The United States District Court for the Eastern District of California, No.2:09-cv-03147 The United States Court of Appeals for the Ninth Circuit, No. 16-16795.

On December 5, 2013, petitioner's undersigned counsel was appointed to represent petitioner in those proceedings pursuant to The Criminal Justice Act, 18 U.S.C. 3006A.

Accordingly, no affidavit of the petitioner is attached. U.S. Sup. Ct. R. 39.

Dated:_____.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

MACK WEST, JR.,

Petitioner

v.

RANDY GROUNDS, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Mack West, Jr., was charged with murder, assault and robbery. He had a long history of paranoid schizophrenia, but had also been found to have exaggerated some of his symptoms during mental health evaluations. Prior to his no contest pleas, West's trial lawyer requested a fourth competency evaluation on grounds that his mental condition had deteriorated and he had attempted suicide. The question presented is:

Did the trial court violate West's due process right to a hearing to determine his competency to stand trial when it failed to conduct a fourth competency hearing?

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MACK WEST, JR.,

Petitioner,

v.

RANDY GROUNDS, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mack West, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief in an unpublished decision. App. 1.¹ The order and judgment of the district court denying petitioner's habeas petition are unreported. App. 7.

The California Court of Appeal affirmed West's conviction and sentence in an unpublished decision. App. 41. The California Supreme Court denied review in an unpublished

¹ "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript.

order. App. 41.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on January 10, 2018. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: “No state shall . . . deprive any person of life, liberty or property without due process of law.”

STATEMENT OF THE CASE

A. State Court Proceedings

On July 12, 2000, West was charged by information in Solano County Superior Court with one count of the murder of Kathleen O’Brien (Cal. Penal Code § 187), second degree robbery of a Shell Food Mart (Cal. Penal Code § 211), and assault with a deadly weapon of a clerk at the Food Mart (Cal. Penal Code § 245(a)(1)). As to the murder and robbery counts, the information alleged that West had been armed with a deadly weapon, a screwdriver (Cal. Penal Code § 12022(b)(1).) West was also charged with theft of an automobile (Cal. Veh. Code § 10851), which had occurred the day before the murder. I CT 62.¹

¹ West was initially charged with only the O’Brien murder by a felony complaint filed on August 5, 1999. CT 2. Criminal proceedings were suspended and he was admitted to Atascadero state hospital as incompetent to stand trial in October, 1999. II ER 126. After his competency was restored, the trial court conducted a preliminary hearing and the Information was filed. Lodged Record I.

West entered pleas of no contest to the murder and robbery counts and admitted that he had used a deadly weapon during both of the offenses. The remaining counts were dismissed pursuant to the plea agreement. CT 633; II ER 159-160.

On January 17, 2007, the trial court denied West's motion to withdraw his no contest pleas. On the same date, the court sentenced him to a prison term of sixteen years to life. RT 245.

On August 12, 2008, the California Court of Appeal affirmed the judgment and sentence on appeal and denied West's petition for a writ of habeas corpus.

I ER 36. West's petitions for review were denied by the California Supreme Court on November 19, 2008. I ER 35.

B. Federal Court Proceedings

West timely filed a petition for a writ of habeas corpus in the district court on November 12, 2009. CR 1. On August 2, 2011, respondent filed his answer. CR 61. On September 28, 2016, the district court judge issued a memorandum decision denying the petition and granting a certificate of appealability. 1 ER 2.

STATEMENT OF FACTS

A. The Murder and Robbery Charges

Because West entered pleas of no contest, the facts of the underlying charges are derived from the probation officer's pre-sentence report. Lodged Record G, CT 646-650.

1. The Shell Food Mart Robbery

On April 16, 1999, at about midnight, West went to a Shell Food Mart in Fairfield and asked the clerk for help retrieving his wallet from the locked restroom. When the clerk began to exit the cashier area, West pushed his way in and jabbed the clerk with a screwdriver, inflicting

wounds on his torso and arms. West demanded money and the clerk gave him \$550 from the cash register. West ran to a blue Volvo car parked outside.

2. The Murder of Kathleen O' Brien

On April 19, 1999, a farm worker discovered the body of Kathleen O'Brien in a field in Vacaville. She had died from stab wounds to her head, neck and chest, which had been inflicted within the last 6-8 hours.

3. Appellant's Arrest

On April 20, 1999, police traced the blue Volvo from the Shell Food Mart robbery to West's home. Although the car had been wiped clean, there were traces of blood in the vehicle and a screwdriver on the front passenger seat. Police investigators learned that West had been with O'Brien on the night of the Shell robbery and afterward. Both West and O'Brien had been observed using crack cocaine on the day of the robbery. O'Brien had also stolen a ring from her father that the two had intended to sell for drug money.

O'Brien and West were seen together at a gas station on the night of her death. According to observers, West was behaving strangely. When West returned home with the Volvo later that night, O'Brien was no longer with him.

West told the police that he had dropped O'Brien off and she had not returned to their agreed meeting place. When asked how he had sustained cuts on his hands, West said they were from playing with a glass pipe.

Police investigators discovered blood on West's shoes and under his fingernails. His fingerprints also matched those taken from the blue Volvo. West said he did not know anything about the blood stains found in the Volvo. Lodged Record G, CT 646-650.

B. The Trial Court Proceedings Concerning West's Mental Competency

1. The Trial Court's 1999 Order Finding West Incompetent to Stand Trial

West was charged by felony complaint with O'Brien's murder on August 5, 1999. CT 2. On August 13, 1999, the trial court suspended criminal proceedings due to a doubt as to West's trial competency. CT 5. Two doctors opined that West was incompetent to stand trial and he was found to be incompetent and admitted to the Atascadero State Hospital trial competency program. 2 ER 126. West was returned to court as restored to competency on December 28, 1999. I ER 3 247.²

2. The Trial Court's 2001 Order Finding West Incompetent to Stand Trial

The first report of an appointed expert concerning West's mental condition in the state court record is the July 25, 2001, report of Dr. O.S. Glover, Ph.D, a clinical and forensic psychologist. II ER 107. Dr. Glover conducted a three hour evaluation of West. He wanted to spend more time, but West was so "disorganized from a cognitive perspective" that further evaluation was not possible. II ER 107. Dr. Glover also reviewed numerous records concerning West's mental health history, a videotape of a "criminal investigation interview," and West's jail custody records and reports concerning the crimes with which he was charged. II ER 109.

West had been diagnosed with schizophrenia in 1994, when he was incarcerated at a jail in Martinez. II ER 111. West was currently "psychotic and delusional" and he probably suffered

² The state court record does not include the expert reports or reporter's transcripts related to the trial court's 1999 finding that West was incompetent to stand trial. However, the 1999 proceedings are referenced in the Court of Appeal Opinion (I ER 2, 3) and in the expert reports prepared for the competency proceedings in 2001 and 2004. 2 ER 123, 126.

from paranoid schizophrenia. II ER 110. Dr. Glover stated that West's records were "replete" with his psychotic history. II ER 111. He had been diagnosed with psychotic symptoms at the Martinez Detention Facility, the Richmond Mental Health Clinic, the 24th Street Crisis Clinic, the Solano Detention Facility, and the Santa Clara County Jail. II ER 111.

Dr. Glover's report included a description of West's social history. West was then 27 years old and the eldest of 11 children. West had been in special education classes in school until he dropped out in the 9th grade. II ER 108. West was first placed in juvenile hall at age 14 and had been incarcerated in various county jails. II ER 108. Dr. Glover thought it was "significant" that West had suffered a head injury as a child, when he rode his bike into a parked camper. West had also been knocked out when he was 20 after being hit in the head with an unknown object. II ER 108. West was treated at a hospital after both incidents. Id.

West had a long history of poly substance abuse including glue, gasoline, marijuana, PCP, methamphetamine and crack cocaine. II ER 111. West told Dr. Glover that he used "whatever drug he [could] to make the voices go away." Id.

West's psychiatric history began when he was about eighteen years old. II ER 111. West began experiencing visual and auditory hallucinations of "demons and devils" and voices telling him to kill himself or cut himself with a razor. II ER 108. Dr. Glover opined that West's psychotic symptoms may have been a result of his head injuries. II ER 108. Dr. Glover pointed out that previous evaluators had diagnosed West as suffering from organic brain syndrome even though West had not received a "P.E.T. scan or MRI to ascertain whether or not he is suffering from an organic brain disorder that could be an artifact of his head injury. . . ." II ER 111.

Dr. Glover stated that West's experiences with demons and voices "got out of control" when he attempted suicide at the Martinez detention facility in 1998. II ER 111. West had been taking psychotropic medications to control his psychotic symptoms since 1994. II ER 111. On "several occasions" he had "showed up at various clinics demanding medications" to control his hallucinations. II ER 111.

During West's interview with Dr. Glover, he complained that he was hearing voices telling him to hurt or kill himself. Dr. Glover recommended that West be placed on a suicide watch. Dr. Glover concluded that West could not assist his attorney with the pending criminal case due to his current psychotic state. Dr. Glover also recommended that West be sent to a psychiatric facility for restoration of his mental competency. II ER 111-112.

On October 23, 2001, the trial court found, for the second time, that West was mentally incompetent to stand trial. II ER 54-55. On November 21, 2001, the trial court committed West to the Department of Mental Health until he was "restored to competency." Id.

2. The Department of Mental Health Certificate of Competency

On July 18, 2002, the Department of Mental Health, Patton State Hospital, issued a Certificate of Competency asserting that West's mental competency had been restored. II ER 119. According to the report, West was paranoid upon admission to the state hospital. However he had "greatly improved" over the several months he had been in the hospital. West was currently interacting with staff and peers appropriately and had been attending therapy sessions to restore his competency. When the treatment team met with West to determine his competency, he cooperated with the interview and answered questions appropriately. West denied that he was charged with murder, but the treatment team concluded that he understood

the charges against him and that he was competent to stand trial. II ER 119-122. West was returned to the trial court for reinstatement of criminal proceedings. Id.

3. The 2002 Competency Evaluations

On August 27, 2002, the trial court again suspended criminal proceedings and appointed two experts to evaluate West's competency to stand trial. II ER 56.

The first evaluation was that of Dr. Stephen Pittavino, a psychologist. II ER 123. Dr. Pittavino reviewed West's social and legal history and concluded that he was possibly exaggerating his psychiatric dysfunction or cognitive disorganization. Dr. Pittavino referred to a 1999 report from a Dr. Riley, who concluded that West was exaggerating his symptoms in order to appear incompetent. II ER 123-124. Dr. Riley noted that West did not appear to suffer from the same symptoms when he was socializing with peers or playing games. II ER 124.

According to Dr. Pittavino, West was a "challenging subject" because he regularly requested that the doctor repeat simple comments and statements. II ER 124. Also, West's responses to a competency evaluation test indicated "the most profound level of cognitive disorganization." A person who suffered from such severe symptoms would not be able to engage in routine activities like personal care and eating. II ER 124. Moreover, in a simple forced choice test, West's performance was lower than the level expected using a random response style. II ER 125. Dr. Pittavino concluded that West "presented in a fashion" that prevented a valid evaluation of his mental competency. II ER 125.

The second report was that of Dr. Carlton Purviance, a psychologist. II ER 126. Dr. Purviance concluded that the evidence that West suffered from chronic paranoid schizophrenia was "accurate and credible." II ER 128. However, his answers to questions were "well

organized and focused in such a way so as to emphasize the symptoms of severe mental illness.” West asked to be returned to the state hospital, which is something that psychotic people “very rarely” do. II ER 128. West also did not appear to be responding to visual or auditory hallucinations. II ER 128.

Dr. Purviance pointed out that even if West was exaggerating his symptoms, he should not have been diagnosed with “malingering.” A diagnosis of malingering is “usually made when there is no evidence of real underlying illness.” II ER 128. Dr. Purviance concluded that West was purposely exaggerating symptoms that he had actually experienced in order to “try to postpone his day in court.” Dr. Purviance believed that West’s psychotic symptoms were currently in remission. That may have been the result of his agreement to take Haldol, an anti-psychotic drug. II ER 128. Ultimately, Dr. Purviance concluded that West was “adept at this stalling tactic because, as a chronically mentally ill person, he knows what some of the expected or defining symptoms of genuine mental illness actually are.” II ER 129.

Dr. Purviance admitted that “it is difficult to know for certain” what the level of West’s current disturbance actually was due to his tendency to embellish the symptoms of his bona fide chronic illness. II ER 128-129. However, Dr. Purviance concluded that West understood the nature of the proceedings and that he was capable of cooperating rationally with his counsel. II ER 129.

The third report was that of Dr. Murray Eiland, a psychiatrist. II ER 130. When Dr. Eiland first attempted to interview West, he refused to cooperate. II ER 130. Dr. Eiland was later able to complete an evaluation of West’s competency. Dr. Eiland described West’s psychotic symptoms, which included a “devil demon with horns” that was tampering with his psychiatric

medications. II ER 132-133. Dr. Eiland also described West's two previous detentions at state hospitals for restoration of his competency. II ER 133. West had been diagnosed with paranoid schizophrenia and antisocial personality disorder. However, hospital staff had repeatedly questioned whether he was "deliberately attempting to appear more mentally ill than he actually is." II ER 133. Dr. Eiland stated that during the present examination, he had the "strong impression" that West was deliberately exaggerating his psychiatric symptoms. Dr. Eiland thought it was "unusual" that West refused to take medications when he also complained about terrifying hallucinations that would be helped by medication. II ER 133.

Dr. Eiland found some of West's other statements not "credible." II ER 133. However, he pointed out that staff at Atascadero and Patton state hospitals "seemed unable to confirm that he was malingering, although this was suspected." Dr. Eiland suggested that West should be further evaluated in the state hospital system to "provide an opinion specifically addressing the issue of whether he is faking his symptoms. . ." II ER 133.

4. The 2003 Trial Court Order Finding West Competent to Stand Trial

On April 3, 2003, after considering the reports of the appointed experts, the trial court found that West was competent to stand trial. II ER 58-60. The trial court also ordered that West be evaluated concerning his sanity at the time of the offense. II ER 65.

5. Dr. Sternitzke's Opinion That West is Developmentally Disabled

On June 14, 2003, the trial court received the report of Dr. V.L. Sternitzke, a psychologist. Dr. Sternitzke administered an intelligence test to West, on which he earned a score consistent with moderate mental retardation. During Dr. Sternitzke's second visit with West, he

continued to present as mentally retarded but he displayed little to no psychotic behavior. II ER 134.

When Dr. Sternitzke attempted a third visit, he was turned away by jail staff who told him that West was too violent to receive a visitor. II ER 134. Dr. Sternitzke attempted a final visit, during which West refused to cooperate and stated that he did not want to see the doctor again. II ER 134-135. Dr. Sternitzke concluded that West's behavior was consistent with his diagnosis of severe paranoid schizophrenia. II ER 135. Dr. Sternitzke recommended that West be placed in a therapeutic environment like a state hospital. II ER 135.

On August 7, 2003, the trial court received the report of Dr. O.S. Glover. When Dr. Glover met with West in the jail, he was dirty and disheveled and was in an "agitated psychotic state." West's manner indicated he was not cognizant of his surroundings. II ER 136-137. He frequently stared into space or looked around the room for "demons." He also became "derailed" during conversation and suffered from a "flight of ideas." His thinking was also illogical and paranoid. II ER 138. Dr. Glover was not able to administer psychological tests due to West's active psychotic symptoms. II ER 138.

Dr. Glover also discussed West's history of head injuries and drug abuse. He concluded that West suffered from severe organic brain disease or symptoms of chronic paranoid schizophrenia arising from his abuse of "rock cocaine." II ER 138. Dr. Glover stated that it was likely that West's childhood head injury had played a significant role in his current condition. Dr. Glover concluded that he agreed with Dr. Sternitzke that West suffered from chronic, severe, paranoid schizophrenia, which had been "fueled" by his chronic use of crack cocaine. II ER 139.

Dr. Glover concluded that West was probably insane at the time of the charged offenses. He strongly urged that West receive a “PET scan/or MRI” to rule out the possibility of brain damage (i.e. “organic syndrome”). II ER 140-141.

6. The 2004 Competency Trial

On February 5, 2004, the trial court again suspended criminal proceedings and appointed two experts to evaluate West’s mental competency. II ER 67.

Dr. Murray Eiland prepared an evaluation of West’s competency on February 14, 2004. II ER 142. Dr. Eiland reported that he strongly believed that West was exaggerating or faking his symptoms. He explained that on each of the four occasions that he had evaluated West, he described his symptoms in a very different way. During the current interview, West did not answer any of the doctor’s questions appropriately. Dr. Eiland reported that all but a tiny minority of psychotic patients are able to answer at least some questions appropriately. Dr. Eiland stated that he “strongly believed” West was malingering. II ER 143.

However, Dr. Eiland also could not state with any certainty that West was competent to stand trial. Dr. Eiland said “there is always the possibility that he is both mentally ill and malingering.” II ER 143. A valid determination of competency requires “at least some cooperation from the subject.” As a result, Dr. Eiland did not express an opinion concerning West’s current competency. II ER 143.

On December 2, 2004, the trial court conducted a bench trial concerning West’s competency. II ER 69. Dr. Eiland testified that he had examined West on four occasions since 1999. II ER 75. After the first evaluation in 1999, he concluded that West was incompetent to stand trial, despite the fact that he was taking anti-psychotic medications. II ER 76. Dr. Eiland

again evaluated West in November, 2002. At that time, West was uncooperative and “wouldn’t deal with” the doctor’s questions. The evaluation was inconclusive. II ER 76.

Dr. Eiland interviewed West again, about a month later. II ER 77. At that time, Dr. Eiland wasn’t sure whether West could stand trial and “there was an issue of his faking.” II ER 77. The evaluation of a mentally ill patient who is also “faking” is complex because “you really can’t ever totally separate” the real mental illness from that which the patient was faking. II ER 77.

Dr. Eiland saw West again in 2004. He acknowledged that West had been sent back to jail from the state hospital and that many mental health patients regress in jail because it is a “stressful situation.” II ER 78. However, when Dr. Eiland saw West that year, he “strongly had the feeling that [West] was faking.” II ER 78. West answered every one of Dr. Eiland’s questions incorrectly, which was a “bad sign” because you have to know the answers to get them wrong every time. II ER 79. It suggests that the subject is “really putting you on.” II ER 79. That is how Dr. Eiland felt about his examination of West. “I thought he was really playing games with me.” II ER 79.

Dr. Eiland did not consider West’s history of head injury to be a “major factor.” II ER 80. Dr. Eiland concluded that there was insufficient reason to believe that West was incompetent to stand trial. II ER 82. He also thought that West was attempting to appear to be sicker than he had ever been. “I think he wants to avoid going to trial.” II ER 82.

If West had stopped taking his medication, he may or may not have decompensated. II ER 83. West’s current behavior also made Dr. Eiland question some of West’s past reports. II ER 84. Because West was trying to appear more disturbed than he really was, Dr. Eiland “called into question pretty much everything he told me from the beginning, from 1999.” II ER 85.

Defense counsel also called as a witness Dr. Purviance, who had also evaluated West four times. II ER 87. Dr. Purviance concluded that West did in fact suffer from a mental illness, but that he was “quite resourceful” and that he exaggerated his symptoms in order to “affect a certain outcome.” II ER 93. Dr. Purviance did not characterize West’s behavior as “malingering,” because that term is reserved for individuals who have “no illness whatsoever.” II ER 93. Dr. Purviance could not determine West’s current competency. II ER 93. In the past, he had concluded that West was competent but was attempting to exaggerate his symptoms in order to “stall going to court.” II ER 96.

Dr. Purviance explained that most paranoid schizophrenics will insist that there is nothing wrong with them. It is an “inherent element of the disease.” II ER 99. They will not ask to go to the hospital as West had done. II ER 99-100.

At the conclusion of the testimony, the trial court explained that West was presumed to be competent and that the defense had failed to provide sufficient evidence that he was incompetent. Accordingly, the court found that West was competent to stand trial. II ER 103.

7. The Trial Court’s Order Denying Defense Counsel’s Requests to Suspend Criminal Proceedings to Inquire Into Appellant’s Competency

On April 6, 2005, West’s defense counsel, Carl Spieckerman, filed with the trial court a declaration asking for an evaluation of West’s competency pursuant to California Penal Code Section 1368\ II ER 155-156. Spieckerman’s declaration stated that he had attempted to discuss West’s case with him on a number of occasions. However “during all but one visit,” Spieckerman was not able to obtain any information that would assist him in preparation of the case. Spieckerman had again attempted to interview West after the 2004 court trial on his

competency. Speickerman stated that West's "ability to maintain a thought process" limited Speickerman's ability to appreciate and understand what West was attempting to communicate. II ER 155.

Speickerman stated that he had represented other defendants who had attempted to feign mental illness in an apparent effort to avoid the consequences of their criminal conduct. Speickerman opined that "it is almost impossible to "pretend" 24 hours a day seven days a week." II ER 156.

Speickerman stated that his belief that West was presently incompetent was based on (1) his experience handling such cases; (2) his discussions with sheriffs who "observe Mr. West constantly" and express their lay opinion that he is insane at the present time"; and (3) his review and discussion with Dr. Glover, who had expressed his opinion that West was "legally insane" at the time of Speickerman's declaration. II ER 156. Speickerman argued that the doctors who testified at the 2004 competency trial (including Dr. Glover) had based their opinions on interviews and testing performed eight months prior to the trial. II ER 156. At a pre-trial hearing on March 21, 2005, Speickerman advised the court that Dr. Glover had concluded that West was "not only insane at the time the incident occurred, but unable to assist counsel now." Lodged Record O, 3/21/2005 RT at p. 7-8. The trial judge responded that he had not read Dr. Glover's report.

The Court: Unless there's something that has developed since the last hearing, this Court would not entertain another request to have [West] found incompetent." You need to make a showing that something has developed since the Court's last ruling on that issue, and I haven't read Dr. Grover, excuse me, Dr. Glover . . .

Defense Counsel: Yes, Glover

The Court: but I will deal with the issues as they come up.

Lodged Record O, 3/21/2005 RT at p. 8.

On February 3, 2006, there was a hearing on newly appointed defense counsel's motion to continue the trial date. I ER 42. On that date, West refused to come into the courtroom. The trial court judge could hear West "screaming profanities" through the holding cell door and courtroom walls. I ER 43.

Defense counsel William Pendergast told the court that West had attempted to kill himself by making a noose and by slitting his wrists. Pendergast said that correctional officers at the jail told him that West had "perhaps" attempted suicide when his cell was opened and he "ran out of his cell and fashioned a sheet into a noose." Jail staff got him back under control before he was able to use the noose. Pendergast also said that after the "noose" incident, he learned that West had attempted to slit his wrists. Pendergast had visited West that day, and attempted to discuss the incident with him. West was non responsive and Pendergast saw that West "was bandaged up the length of his arm" and there was blood on the bandages. I ER 45-46.

Pendergast said he was familiar with the history of competency issues in the case and that he was familiar with the previous evaluations. He had not previously requested a competency evaluation because he thought that West's other unusual behaviors were "more of the same and not a change in circumstances." I ER 46.

Pendergast said that none of the prior evaluations involved recent suicide attempts. Because of West's recent suicidal behavior and because West did not communicate with Pendergast, he had a "doubt" as to West's competency. I ER 46-47. Pendergast's declaration of a doubt as to West's competence triggered the court's duty to determine whether to suspend the

proceedings and evaluate West's competency pursuant to California Penal Code § 1368. 1 ER 47.

The trial court refused to suspend the proceedings or to order additional evaluations, on grounds that the court believed West was feigning mental illness for the purpose of delaying the proceedings. 1 ER 48. Despite West's recent suicide attempts, the court found that there was insufficient evidence of changed circumstances to merit an additional competency evaluation. Accordingly, the trial court refused to suspend the criminal proceedings in order to evaluate West's current competency. 1 ER 48.

On February 15, 2006, West was brought back to court for a hearing. He was removed after he again disrupted the proceedings. 2/15/06 RT 49. On November 27, 2006, West withdrew his pleas of not guilty by reason of insanity and entered no contest pleas to the robbery and second degree murder charges. II ER 157; 3 CT 633.

STANDARD OF REVIEW

This Court reviews a district court's denial of a petition for habeas corpus relief de novo. *Ali v. Hickman*, 571 F.3d 902, 909 (9th Cir. 2009). 28 U.S.C. § 2254(d) permits federal courts to grant habeas relief to a state prisoner if the state court's decision:

(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).

A state court's decision is "contrary to" federal law if it: "(1) 'applies a rule that contradicts the governing law' set forth in Supreme Court case authority, or (2) applies

controlling law to a set of facts that is ‘materially distinguishable’ from a Supreme Court decision but nevertheless reaches a different result,” whereas “[a] state court's decision is an ‘unreasonable application’ of federal law only if it is ‘objectively unreasonable.’ ” *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

An erroneous state court judgment is unreasonable when analysis by a federal court produces a “firm conviction” that the state court judgment is “infected by constitutional error.” *Williams v. Taylor*, 529 U.S. 362, 389 (2000). Moreover, if this Court should determine that “the state court's harmless error analysis is contrary to Supreme Court precedent or objectively unreasonable,” then this Court need not defer to the state court finding on that issue. *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).

The prejudicial effect of federal constitutional error is analyzed under the standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Inthavong*, 420 F.3d at 1059. Under *Brecht*, the question is not “whether there was sufficient evidence to support the conviction in the absence of the constitutional error,” but whether it “likely had a substantial and injurious impact on the verdict.” *Taylor v. Maddox*, 366 F.3d 992, 1016-17 (9th Cir. 2004); see also *Kotteakos v. United States*, 328 U.S. 750, 768 (1946).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT’S DECISION CONFLICTS WITH THIS COURT’S PRECEDENTS REQUIRING TRIAL COURTS TO CONDUCT AN INQUIRY WHEN THERE IS A BONA FIDE DOUBT AS TO A DEFENDANT’S TRIAL COMPETENCY

The Ninth Circuit Court of Appeals held that the trial court’s denial of a fourth competency hearing did not rest on a clearly unreasonable basis in light of the evidence. App. 1.

That holding misapplies both the AEDPA standard of review and this Court's decisions regarding the trial court's duty to conduct an inquiry as to trial competency under the Due Process Clause. The Circuit decision reasoned that West had been evaluated dozens of times over the course of five years. However, the fact that there had been prior evaluations did not absolve the trial court from its duty to conduct an additional competency evaluation when there was a bona fide doubt as to West's competency. Moreover, experts who had previously evaluated West had opined that he was seriously mentally ill and at times, he was incompetent to stand trial.

The Ninth Circuit decision also reasons that the trial court could have concluded that West was feigning incompetence to delay the proceedings. App. 4. Again, the experts who had evaluated West in the past had acknowledged his history of feigning or exaggerating his symptoms. However, they also acknowledged that he was seriously mentally ill and that his tendency to exaggerate did not amount to malingering. Finally, the opinion reasons that West's recent suicide attempts did not necessitate a bona fide doubt as to incompetency. App. 5. While there is no bright line test for a bona fide doubt, West's recent suicide attempts, combined with his long history of serious mental illness, triggered the trial court's duty to conduct an additional inquiry into his competency. As set forth in more detail below, because the Ninth Circuit's decision is contrary to this Court's precedents, this Court should accept certiorari and grant the writ.

A. The Clearly Established Right to a Competency Hearing When There is a Bona Fide Doubt as to a Defendant's Competency

The Due Process Clause of the Fourteenth Amendment requires procedures designed to protect defendants from being tried while they are mentally incompetent. *Pate v. Robinson*, 383

U.S. 375, 385 (1966); *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Moreover, it is the duty of the trial judge to be “alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” *Drope*, 420 U.S. at 181. A trial judge must suspend proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, which is evidence that raises a reasonable or bona fide doubt concerning the defendant’s current competency. *Pate* at p. 385-386.

The purpose of a competency hearing is to determine whether the defendant is able (1) to understand the nature of the present criminal proceedings, and (2) to assist counsel in a rational manner. *Godinez v. Moran*, 509 U.S. 389, 401 n. 12 (1993) (“The focus of a competency inquiry is the defendant’s mental capacity; the question is whether he has the ability to understand the proceedings.”)

California Penal Code §1368 governs litigation of competency issues in California criminal cases. §1368(a) provides in relevant part: “If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.”

§ 1368(b) provides: “If counsel informs the court that he believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant’s mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369.”

Under those sections, a defendant is entitled to a hearing on the issue of his mental competence if there is substantial evidence of a doubt as to the defendant's current competence.

People v. Townsel, 63 Cal.4th 25, 37-38 (2016).

This Circuit has held that for the purpose of habeas corpus review under the AEDPA, it is clearly established that a trial court must order a competency hearing sua sponte whenever there is a bona fide doubt about the defendant's mental competency. *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir.2010); *Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009) citing *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir. 1976)(en banc). A bona fide doubt exists where "a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced a doubt with respect to competency to stand trial." *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir.1976) (en banc); *Maxwell* at p. 568.

While the trial court must consider the defendant's history of mental illness, demeanor at trial, defense counsel's opinion, and available psychiatric evaluations, no single factor controls. *Pate*, 383 U.S. at 387. However, the state court findings that the evidence did not require a competency hearing under *Pate* are factual findings to which the federal courts must defer unless "they are 'unreasonable' within the meaning of 28 U.S.C. § 2254(d) (2)." *Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir.2003).

B. The California Court of Appeal Decision

The California Court of Appeal held:

Defendant contends that the trial court abused its discretion and violated his constitutional rights by refusing to suspend the proceedings a fourth time for another competency evaluation. Defendant argues that when his behavior began deteriorating in February, 2006, as evidenced by his outbursts in the courtroom and alleged suicide attempts, the court should have suspended the proceedings and ordered another competency evaluation. Based on the record, however, we cannot conclude that the trial judge, who presided over the prior evidentiary hearing on defendant's competency, abused his discretion in finding that the defendant's behavior was a calculated attempt to delay the proceedings.

I ER 38.

The Court of Appeal reasoned that it was “questionable” whether the behavior described by West’s second attorney, Pendergast, can be considered a “serious suicide attempt.” I ER 39. The Court held that “In any event, the trial court was entitled to measure the severity and authenticity of [West’s] suicide attempts and other courtroom behavior in light of his experience with West and West’s prior psychiatric evaluations. I ER 39.

As to West’s argument that the trial court failed to explore the evidence of mental retardation and brain injury, the Court of Appeal found that “West has failed to establish, however, that further exploration of these issues was necessary or even properly requested. I ER 39.

The Court of Appeal acknowledged the reports indicating that West was mentally retarded and that he had suffered a brain injury at age 10. I ER 39. It also recognized that the trial court had failed to appoint the director of the regional center for the developmentally disabled to evaluate the evidence of mental retardation as required by California Penal Code section 1369. However, the Court of Appeal held that no harm resulted from that deficiency, because West had received the individualized examination by an appropriate expert that is required under that statute. The court also held that West made “no showing” that additional testing would have affected the court’s conclusions concerning his competency to stand trial. I ER 39.

The Court of Appeal opinion unreasonably determined the facts, because Spieckerman’s declaration and the information from new counsel Pendergast concerning West’s suicide attempts created a bona fide doubt concerning West’s trial competency, triggering the trial court’s duty to suspend the criminal proceedings and conduct a competency hearing pursuant to California Penal Code section 1368. Moreover, as set forth in more detail below, West’s constitutional claim

should be reviewed de novo because the Court of Appeal failed to apply the *Pate* and *Drope* “bona fide doubt” standard to his claim.

C. This Court Should Apply a De Novo Standard of Review Because the California Court of Appeal Failed to Apply The Federal Constitutional Standard to West’s Claim That The Trial Court Violated His Right to Due Process When It Failed To Suspend Proceedings and Conduct An Additional Hearing Concerning His Competency

When a state court unreasonably applies clearly established constitutional law or applies a standard that is contrary to the Supreme Court’s constitutional decisions, the federal court must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." 28 U.S.C. § 2254 (d)(1); *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Deck v. Jenkins*, 768 F.3d 1015, 1024 (9th Cir. 2014).

Here, the state Court of Appeal decision fails to apply the federal constitutional standard to West’s claim that the trial court should have conducted an additional inquiry into his trial competency in 2006.

Under *Pate* and *Drope*, the trial court was required to inquire into West’s competency if there was a reasonable or “bona fide doubt” concerning his trial competency. *Pate* at p. 385; *Drope* at p. 172-173; *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). In this case, the Court of Appeal applied a California state standard, that requires a competency hearing only when the defendant “presents substantial evidence of incompetence.” I ER 38.

Pate and *Drope* do not place a “substantial evidence” burden of proof upon the defendant in order to trigger the trial court’s duty to suspend the criminal proceedings and conduct an inquiry into a defendant’s competency. *Id*; *See Maxwell*, at pp. 574 (trial court had sua sponte duty to conduct competency hearing under *Pate* and *Drope* even where defense counsel failed to

formally request a competency hearing.) *Pate* and *Drope* require only circumstances that create a reasonable or bona fide doubt concerning a defendant's competence. *Medina v. California*, 505 U.S. 437, 449-453 (1992)(affirming *Pate* standard requiring a hearing if a defendant's competence is "in doubt" and holding that California statute may assign burden of proving incompetency to defendant.)

The Court of Appeal's handling of the evidence of West's suicide attempts is illustrative. Pendergast told the court that West had attempted to make a noose out of a jail sheet. Pendergast also learned from jail staff that West had attempted to kill himself by slitting his wrists and that he (Pendergast) observed West's arms covered with bloody bandages. I ER 46. Those facts should have triggered a competency evaluation under *Pate* and *Drope* because they are sufficient to raise a bona fide doubt as to West's competency. However, the Court of Appeal, applying a substantial evidence test, found "it is questionable whether the behavior . . . can be considered a serious suicide attempt." I ER 39. *Pate* and *Drope* require an inquiry into competency under these circumstances.

The Court of Appeal's analysis presumes that a defendant must provide more evidence of suicidal depression than a report from jail staff that he slit his wrists and his attorney's observations of his bandaged and bloody arms. West's claim was denied because the Court of Appeal's substantial evidence test is more demanding than the test in *Pate* and *Drope*. Because the Court of Appeal applied a more demanding "substantial evidence" standard to West's *Pate* claim, this Court should review the claim de novo.

D. Under Any Standard of Review, This Court Should Grant the Writ Because The Trial Court Order Refusing To Conduct An Additional Competency Hearing Was Objectively Unreasonable

The due process issue under *Pate* is whether West was entitled to a fourth hearing to determine his competence. See *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000)(granting habeas corpus relief under the AEDPA where the trial court’s order denying a competency hearing based on stale expert report was objectively unreasonable given the defendant’s more recent psychotic symptoms). This case is comparable to *Torres* and to *Maxwell v. Roe, supra*, where this Court granted the writ because the trial court declined to conduct an additional competency hearing after the defendant, who had a history of mental illness, attempted suicide during trial and had been under a psychiatric “hold” in custody for more than two weeks. *Maxwell*, at p. 572. As in this case, the trial court in *Maxwell* erroneously relied on a stale finding that the defendant was competent and malingering. *Id* at pp. 574-576.

The core feature of trial competency is the present ability to consult with counsel “with a reasonable degree of rational understanding” and a “factual understanding” of the criminal proceedings. *Godinez*, at p. 401. In this case, defense counsels’ assertions that they were not able to communicate rationally with West concerning his case, West’s disruptive behavior in the courtroom, his suicide attempts or gestures, and counsel Spieckerman’s declaration that jail staff and a psychologist would attest to West’s current incompetency were more than sufficient to create a bona fide doubt.

Like the defendant in *Maxwell*, West’s behavior was irrational and had recently declined. This case is also comparable to *Maxwell* because, in both cases, the trial court relied upon the stale psychiatric reports to conclude that West was malingering. I ER pp. 48-49.

Moreover, as in *Maxwell*, the California Court of Appeal unreasonably determined the facts when it affirmed the trial court's reliance on stale medical opinions when there was substantial evidence that West's mental condition had significantly deteriorated while he had been in jail. *Maxwell*, at 571. Citing *Drope*, *Maxwell* emphasized that even when a defendant was previously found competent, the trial judge must be alert to circumstances suggesting his mental condition has worsened and he is no longer able to meaningfully participate in the trial. *Id.*

In this case, when the trial court denied counsel Pendergast's request for a re-evaluation of competency, the last formal evaluation of West was about five months old. II ER 152. Spieckerman and Pendergast's assertions that West's mental condition had deteriorated, that he had attempted suicide, and Spieckerman's offer to provide lay and expert witnesses were more than sufficient indicia that West's mental state had deteriorated and there was a current bona fide doubt as to his competency. As in *Maxwell*, the state Court unreasonably determined the facts because it relied on prior evaluations despite contradictory new facts.

This case is also comparable to *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001), where this Court granted the writ because the trial court had failed to conduct a competency hearing despite evidence that the defendant had suffered a brain injury due to a car accident and subsequent surgery and that he suffered from delusions and paranoia. *Odle* at pp. 1088-1090. This Court emphasized that the defendant's calm demeanor and the fact that defense counsel did not question Odle's competence were irrelevant, because a reasonable judge would have entertained a doubt concerning Odle's competency. *Id* at p. 1089.

Amaya-Ruiz v. Stewart, 121 F.3d 486, 488 (9th Cir. 1997) is distinguishable, because in that case, the trial court properly refused to hold a second mid-trial competency hearing based on previous evaluations suggesting that the defendant was malingering and had “chosen a strategy of non-cooperation.” at p. 491.

Here, the trial court’s finding that West was malingering was factually unreasonable, because a court appointed psychologist (Dr. Purviance) had explained to the court that the term malingering only applies to individuals who have no bona fide underlying mental illness. II ER 128. In this case, it was undisputable that West was actually mentally ill, as he had a long history of paranoid schizophrenia and had been previously adjudged to be incompetent in 1999 and 2001. II ER 54, 126. Moreover, defense counsel Speickerman’s April 6, 2005, declaration stated that the recent observations of jail staff and of Dr. Glover would support a finding of current incompetency. II ER 155.

Finally, West’s recent suicide attempts or gestures, where he attempted to hang himself and slashed his wrists, along with his in-court outbursts, called his competency into questions. See *Maxwell* at p. 576. Moreover, unlike *Amaya-Ruiz*, there was evidence that West suffered from both childhood brain trauma and that he was developmentally delayed. II ER 111. In the face of that evidence, the Court of Appeal’s holding that a further inquiry into West’s competency was unnecessary was objectively unreasonable.

E. If It Is Not Possible to Conduct An Adequate Retroactive Competency Hearing, This Court Should Issue A Writ of Habeas Corpus Requiring the State To Retry or Release West

When a state court erroneously fails to hold a competency hearing, “it often may be impossible to repair the damage retrospectively.” *McMurtrey v. Ryan*, 539 F.3d 1112, 1131 (9th

Cir. 2008); *Evans v. Raines*, 800 F.2d 884, 888 (9th Cir.1986). Retrospective competency hearings are disfavored, see *Drope*, 420 U.S. at 183; *Blazak v. Ricketts*, 1 F.3d 891, 894 n. 3 (9th Cir.1993). However, such a hearing is permissible if a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant. *Odle*, at p. 1089-1090. The Court should consider the passage of time (*Pate*, 383 U.S. at 387) and whether medical reports contemporaneous to the time of the initial hearing allow for an accurate retrospective evaluation of the defendant's competence. *Id.*

In this case, defense counsel Spieckerman referred to a 2006 report of Dr. Glover that does not appear to be part of the lodged record. II ER 155. On remand, the district court should be instructed to determine whether that report exists and whether there is sufficient other evidence to conduct a retrospective evaluation of West's competency. If not, this court should issue a writ of habeas corpus requiring the state to re-try or release West.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari and grant the writ.

Dated:

Respectfully submitted,

Stephanie M. Adraktas
CJA Appointed Attorney for Petitioner
Mack West, Jr.

No.

IN THE SUPREME COURT OF THE UNITED STATES

MACK WEST, JR.,

Petitioner

v.

RANDY GROUNDS, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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FILED

JAN 10 2018

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U.S. COURT OF APPEALS**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MACK A. WEST, Jr.,

Petitioner-Appellant,

v.

RANDY GROUNDS, Warden,

Respondent-Appellee.

No. 16-16795

D.C. No. 2:09-cv-03147-JKS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, District Judge, Presiding

Argued and Submitted December 7, 2017
San Francisco, California

Before: LUCERO,** RAWLINSON, and OWENS, Circuit Judges.

Mack A. West, Jr., a California state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. He contends

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

** The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

that his due process rights were violated when the trial court declined to conduct a fourth competency hearing after his mental health deteriorated and he attempted suicide. Exercising jurisdiction under 28 U.S.C. § 2253, we affirm.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), federal habeas relief is available only if a state court’s decision “(1) was ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,’ or (2) ‘was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” Torres v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000) (quoting § 2254(d)(1)-(2)). A state trial court’s determination that a competency hearing is not required is a finding of fact entitled to deference unless it is objectively unreasonable. Id. at 1105.

A defendant has the right under the Due Process Clause of the Fourteenth Amendment to not be tried or convicted while he is incompetent to stand trial. Pate v. Robinson, 383 U.S. 375, 378, 385 (1966). A competent defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a

rational as well as factual understanding of the proceedings against him.”

Dusky v. United States, 362 U.S. 402, 402 (1960).

A trial judge must conduct a competency hearing sua sponte “[o]nly when ‘the evidence raises a bona fide doubt’ about the defendant’s competence to stand trial.” Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004) (quoting Pate, 383 U.S. at 385). A bona fide doubt is raised when “a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” de Kaplany v. Enomoto, 540 F.2d 975, 983 (9th Cir. 1976) (en banc). The standard is one of substantial evidence. See Cacoperdo v. Demosthenes, 37 F.3d 504, 510 (9th Cir. 1994) (“A good faith doubt about a defendant’s competence arises if there is substantial evidence of incompetence.” (quoting United States v. Lewis, 991 F.2d 524, 527 (9th Cir. 1993))).

There is no “general standard with respect to the nature or quantum of evidence necessary” to trigger a competency hearing. Drope v. Missouri, 420 U.S. 162, 172 (1975). Rather, the assessment is one in which “the trial judge must evaluate all the evidence and evaluate the probative value of each piece of evidence in light of the others.” Chavez v. United States, 656

F.2d 512, 518 (9th Cir. 1981). “[E]vidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required,’ and ‘one of these factors standing alone may, in some circumstances, be sufficient.’” Maxwell v. Roe, 606 F.3d 561, 568 (9th Cir. 2010) (quoting Drope, 420 U.S. at 180). Although a suicide attempt can give rise to a bona fide doubt as to competence, it does not necessarily do so. See United States v. Loyola-Dominguez, 125 F.3d 1315, 1318-19 (9th Cir. 1997) (recognizing that not “every suicide attempt inevitably creates a doubt concerning the defendant’s competency”).

We hold that the trial court’s denial of a fourth competency hearing did not rest on a clearly unreasonable analysis of the facts in light of the evidence. West was evaluated dozens of times, by at least four psychologists, over the course of more than five years. Multiple evaluators documented strong suspicions that he was exaggerating his symptoms to delay trial. Based on the contents of his prior medical evaluations, a reasonable judge could have concluded that West was feigning incompetence to delay the proceedings.

It is certainly true that the suicide attempts that occurred shortly before West's request for a fourth competency hearing were appropriate to consider in determining whether an additional competency hearing was required. Maxwell, 606 F.3d at 571. The trial court judge did consider the attempts in his analysis. Suicide attempts do not, however, necessitate a bona fide doubt as to competence, and given the medical history in the record and West's behavior at trial, it was not clearly unreasonable for the trial court judge to find no such doubt in this case.

AFFIRMED.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

MACK A. WEST JR.,

CASE NO: 2:09-CV-03147-JKS

v.

RANDY GROUNDS,

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

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 9/28/2016**

Marianne Matherly
Clerk of Court

ENTERED: **September 28, 2016**

by: /s/ G. Michel
Deputy Clerk

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

MACK A. WEST, JR.,

Petitioner,

vs.

JOSIE GASTELO, Warden, California
Men's Colony State Prison,¹

Respondent.

No. 2:09-cv-03147-JKS

MEMORANDUM DECISION

Mack West, Jr., a state prisoner now represented by counsel, filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. West is in the custody of the California Department of Corrections and incarcerated at California Men's Colony State Prison. Respondent has answered, and West has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On November 27, 2006, West pleaded no contest in the Solano County Superior Court to second-degree murder and second-degree robbery and admitted the use of a deadly weapon in connection with those offenses. On direct appeal of his conviction, the California Court of Appeal laid out the following facts underlying this case:

In August 1999, [West] was charged with a single count of murder ([Cal.] Pen. Code, § 187, subd. (a)). Almost immediately thereafter the court suspended the criminal proceedings pursuant to section JO1368 and appointed two experts to evaluate [West's] competency to stand trial. Based on the expert opinions, the court found [West] incompetent and he was placed in the "Trial Competency Program" at Atascadero State

¹ Josie Gastelo, Warden, California Men's Colony State Prison, is substituted for Kathleen Dixon, former Warden, California Medical Facility. FED. R. CIV. P. 25(c).

Hospital (Atascadero). He was returned to the court as restored to competency in December 1999.

Following a preliminary hearing in February 2000, [West] was charged by amended information with murder (§ 187, subd. (a)), robbery (§ 211), vehicle theft (Veh. Code, § 10851, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)). The information also alleged that [West] personally used a deadly weapon, a screwdriver, during the commission of the murder and robbery. [West] entered a dual plea of not guilty and not guilty by reason of insanity.

In December 2000, following a hearing conducted pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, the court found that there had been a total breakdown in communication between [West] and his court-appointed attorney. The public defender was relieved and new counsel was appointed.

In May 2001, [West's] new attorney requested a second competency evaluation. The court again found that [West] was incompetent to stand trial and suspended the criminal proceedings. [West] was returned to Atascadero. In August 2002, [West] was returned to the court based on the opinion of hospital staff that [West] was competent to stand trial. In April 2003, the court found that [West] was competent to stand trial based on its review of "psychological reports prepared since [West's] return from [Atascadero] in August of 2002" and of a report prepared by the hospital. The court explained that "he does understand the nature and the significance of these proceedings. He's able to cooperate with counsel, if he chooses to do that, and it appears to the [c]ourt that Mr. West is purposely exaggerating symptoms to avoid going to trial in this matter."

In January 2004, [West's] attorney again requested that [West's] competency be evaluated after [West] refused to cooperate with the attorney or come out of a holding cell. The case was then before a new judge, who suspended the proceedings a third time and appointed experts to evaluate [West's] competency. The court expressly requested that the doctors "explore issues of malingering by [West]." Following his interview with [West], Dr. Murray Eiland informed the court that while he strongly believed that [West] was malingering, he could not make a competency determination because [West] was refusing to cooperate. He stated, "There are several reasons why I strongly believe that Mr. West is faking or exaggerating his symptoms. During the four times I have seen him, he has described his symptoms in a very different way and has acted in a very different manner each time. From the beginning there have also been questions about the degree to which he may have been exaggerating his symptoms. [¶] Throughout the time I spent with Mr. West in the latest interview, he never appropriately answered a single one of my direct question[s], which I take to be significant. I have interviewed several thousand people suffering from psychosis during the years of my psychiatric practice. In each case-no matter how severe the mental illness-all but a tiny minority of these people have been able to answer some questions appropriately. Only in cases where I have strongly suspected malingering have the people being interviewed seemed unable to give even one appropriate answer."

In December 2004, the court held a competency trial. Dr. Eiland confirmed his opinion that [West] was malingering. With regard to [West's] competency, he testified, "I have insufficient reason to think he is unable to stand trial. [¶] I do have a strong

reason to think he has been feigning mental illness at times [H]e may have some mental situation that is making it more difficult for him, but it's clear to me that there is a deliberate effort for him to appear sicker than he has ever been. I think he wants to avoid going to trial." Dr. Eiland thought that [West] was able to assist his attorney but was not sure that he would. Dr. Carlton Purviance, who was also appointed to evaluate [West], similarly testified that [West] "does suffer from a mental illness, but . . . he is quite resourceful and is able to describe symptoms that would be consistent with an illness and exaggerates those and amplifies those . . . in a way to affect a certain outcome." He explained that during the interview, "his presentation was one in which he was spontaneously offering material that was designed to convince me of a very serious mental illness and specifically that he wasn't competent to proceed." The trial court found that [West] was competent to stand trial.

In April 2005, [West's] attorney again expressed a doubt as to [West's] competency to stand trial after [West] continued to refuse to cooperate or enter the courtroom. He acknowledged, however, that the experts who examined [West] believed him to be malingering. The court considered the extensive reports that had previously been submitted regarding [West's] competency as well as a recent report submitted in conjunction with [West's] insanity plea. The court noted that [West] would not participate in the most recent evaluation and that the doctor believed [West] knows "how to play the mental illness role" and "wants to remain in control of the legal system." The court noted that there had been "three findings of competency already; one by the doctors at Atascadero; one by Judge Foor; and one by me" and found there was no substantial change of circumstances or new evidence casting serious doubt on the earlier findings of competency.

Between April 2005 and January 2006, [West] refused to come into the court room, opting to view the proceedings from a holding cell that had a window into the courtroom. As the date of the jury trial approached, [West's] conduct became more disruptive. On January 30, 2006, [West] entered the courtroom but almost immediately became disruptive. Among other things, he claimed to have seen the judge on television news talking about giving him the death penalty. [West] was first placed in the holding cell, but after he began "knocking on the window . . . screaming things" he was removed from the courtroom entirely.

On February 3, 2006, [West] continued to rant from inside the holding cell and was again removed. [West's] attorney then requested another competency evaluation. He explained, "I received information from the correctional officers at the jail that earlier this week Mr. West made a suicide-well, perhaps a suicide attempt. He was indicating to the jail staff he believed there was gas of some sort in his cell. When they opened his cell he ran out of his cell and fashioned a sheet into a noose and ran down and then back up and wasn't able to use the noose in any fashion before the jail staff were able to get him back under control and back into his cell. [¶] Subsequent to that I learned from additional jail staff that Mr. West attempted to slit his wrists. I saw him today and attempted to discuss this with him, and he did not discuss anything with me. He was nonresponsive to all the questions, but I was able to observe on him that he was bandaged up the length of his arm and I could see there was blood on the bandages and blood at the

margin of where the bandage covered.” The court rejected his argument that the suicide attempts constituted sufficient changed circumstances. The court explained, “This [c]ourt does have some historical knowledge of this case as it has progressed. I have been involved for about a year and a half now plus, and that includes evidentiary hearings on whether or not he was malingering when it was claimed he was incompetent to stand trial. [¶] The mental health professionals concluded he was malingering and I came to the same conclusion. It’s my opinion that his behavior over the last week is just more of the same feigning mental incompetency for purposes of delaying the proceedings.”

Due to calendaring conflicts, [West’s] jury trial was continued until June 12, 2006. On May 22, [West] retained a new attorney. The trial was continued until November due to the production of new discovery.

On November 27, 2006, [West] withdrew his plea and pled no contest to one count of second degree murder with the personal use of a deadly weapon enhancement and one count of second degree robbery. He was informed that the maximum punishment was 16 years to life in prison. [West] received that sentence for the murder and a concurrent three-year term for the robbery. He filed a timely notice of appeal but did not request a certificate of probable cause.

People v. West, Nos. A117123, A119296, 2008 WL 3414687, at *1-3 (Cal. Ct. App. Aug. 12, 2008).

After West filed a notice of appeal, the Court of Appeal appointed appellate counsel, who argued that the trial court abused its discretion in failing to suspend the proceedings prior to the entry of West’s plea to conduct a fourth competency hearing and that West received ineffective assistance of counsel in connection with the submission of the plea. The Court of Appeal’s decision also indicates that West filed an accompanying petition for a writ of habeas corpus, but the petition is not in the record. The Court of Appeal affirmed West’s judgment and denied the habeas petition in a reasoned, unpublished decision issued on August 12, 2008. *West*, 2008 WL 3414687, at *7. West sought review of the appellate court’s decision, which was summarily denied on November 19, 2008.

The record indicates that West then filed another *pro se* habeas petition in the Court of Appeal, which is also not in the record. That petition was denied without comment on September 3, 2009.

West then filed a *pro se* habeas petition in the California Supreme Court, arguing that appellate counsel was ineffective for failing to raise: 1) trial counsel's ineffectiveness with regard to his denied competency hearing; 2) trial counsel's misrepresentation of his plea agreement; 3) trial counsel's "p[er]jured testimony"; 4) prosecutorial misconduct; and 5) trial counsel's failure to recognize West's pre-sentence credits. The Court of Appeal denied the petition with citation to *In re Clark*, 855 P.2d 729 (Cal. 1993), which reflects that it was untimely, on March 24, 2010.

While that *pro se* state habeas petition was pending, West timely filed a *pro se* Petition for a Writ of Habeas Corpus to this Court dated November 1, 2009. *See* 28 U.S.C. § 2244(d)(1)(A); Docket No. 1. He subsequently filed first and second amended petitions. Docket Nos. 5, 25. Respondent moved to dismiss West's second amended petition for failure to exhaust state remedies. Docket No. 35. West filed a motion seeking a stay and abeyance pending exhaustion in state court. Docket No.

West then filed an additional *pro se* habeas petition in the California Supreme Court, in which he alleged that appellate counsel was ineffective for failing to raise trial counsel's misrepresentation of his request to withdraw his plea. On May 18, 2011, the Supreme Court denied the petition with citations to *In re Robbins*, 959 P.2d 311 (Cal. 1998), and *Clark* for

untimeliness, as well as citations to *People v. Duvall*, 886 P.2d 1252 (Cal. 1995),² *In re Swain*, 209 P.2d 793, 796 (Cal. 1949),³ and *In re Miller*, 112 P.2d 10 (Cal. 1941).⁴

On June 15, 2011, the Court denied as moot both the motion to dismiss and the motion for a stay, and ordered Respondent to answer the second amended petition. Docket No. 58. West then moved for leave to file a third amended petition. Docket No. 83. The Court granted the request and ordered Respondent to answer the third amended petition. Docket No. 88 (“Petition”). After Respondent answered, a previously-assigned magistrate judge appointed counsel for West in the interests of justice. Docket No. 124. Assigned counsel filed notice that West would rely on the third amended petition and also filed a counseled Traverse. Briefing is now complete and the matter has been transferred to the undersigned judge for adjudication.

II. GROUNDS RAISED

In his *pro se* Petition before this Court, West argues that: 1) his plea was involuntarily induced by an illusory plea bargain; 2) the trial court failed to conduct an inquiry to determine whether there was a factual basis for his no contest plea; 3) the trial court abused its discretion and violated West’s due process by not ordering a fourth competency evaluation; 4) structural error resulted from “the manner[] in which the trial court induced [him] to waive his right to a

² *Duvall* asserts the requirement that documentary evidence must be provided and stands for the additional proposition that facts be stated fully and with particularity. 886 P.2d at 1258 (stating that habeas petitions “should both (i) state fully and with particularity the facts on which relief is sought as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations” (citations omitted)).

³ *In re Swain* stands for the rule that a California habeas petition must state “with particularity the facts” upon which relief is sought. 209 P.2d at 796.

⁴ A citation to *Miller* “signals that the Court is denying the petition for the same reasons that it denied the previous one.” *Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986).

jury trial;” 5) trial counsel was ineffective with regard to the entry of his no contest plea; 6) the trial court failed to record the entirety of the trial proceedings; 7) the prosecutor committed misconduct by suppressing material evidence of his lack of capacity and that a conservator had been appointed; 8) trial counsel was ineffective at sentencing for “misrepresentations” regarding West’s request to withdraw his plea; 9) the trial court abused its discretion by denying his request for good time custody credits; and 10) trial counsel was ineffective for failing to seek a certificate of probable cause.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or “if the state court confronts a set of facts that are materially indistinguishable from a decision” of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The Supreme Court has explained that “clearly established Federal law” in § 2254(d)(1) “refers to the holdings, as opposed to the dicta, of [the Supreme Court] as of the time of the relevant state-court decision.” *Id.* at 412. The holding must also be intended to be binding upon the states; that is, the decision must be based upon constitutional grounds, not on the supervisory power of the Supreme Court over federal courts. *Early v. Packer*, 537 U.S. 3, 10 (2002). Where

holdings of the Supreme Court regarding the issue presented on habeas review are lacking, “it cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal law.’”

Carey v. Musladin, 549 U.S. 70, 77 (2006) (citation omitted).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court’s interpretation and application of state law); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

In applying these standards on habeas review, this Court reviews the “last reasoned decision” by the state court. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004) (citing *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002)). A summary denial is an adjudication on the merits and entitled to deference. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Under the AEDPA, the state court’s findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. DISCUSSION

A. Procedural Bar

Respondent argues that the vast majority of claims raised in West's Petition are procedurally barred because the California Supreme Court, considering these claims on state habeas review, found the claims barred under two separate state procedural theories:

(1) untimeliness (*Robbins/Clark*); 2) failure to state with reasonable particularity or support with reasonably available documentary evidence (*Swain/Duvall*).

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This Court may not reach the merits of procedurally defaulted claims, that is, claims "in which the petitioner failed to follow applicable state procedural rules in raising the claims." *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992). "The state-law claim may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits." *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011). Procedural default does not preclude federal habeas review unless the last state court rendering judgment in a case "clearly and expressly" states that its judgment rests on a state procedural bar. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989) (quoting *Harris v. Reed*, 489 U.S. 255, 262-63 (1989)). "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well established at the time of the petitioner's purported default." *Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996) (internal quotation marks and citation omitted).

Respondent claims that all of West's claims, with the exception of Ground 3 (denial of

fourth competency hearing), are procedurally barred due to the California Supreme Court's state habeas decision. This Court therefore must address whether the procedural grounds relied upon by the California Supreme Court on habeas review constituted adequate and independent grounds precluding federal habeas review of those claims here.

If a petition is dismissed for failure to state the facts with particularity—that is, with a cite to *Swain*—the petitioner may file a new petition curing the defect. See *Gaston v. Palmer*, 417 F.3d 1030, 1037 (9th Cir. 2005); see *Kim*, 799 F.2d at 1319. There is no reason the result should be any different when the defect in the state petition is the failure to attach documentary evidence. Neither the failure to attach documentary evidence nor the failure to plead with particularity are irreparable errors. It therefore appears that the California courts would have allowed West to file a new state petition remedying these defects. Accordingly, the *Swain/Duvall* bar did not cause these claims to be procedurally defaulted in state court and thus this bar does not cause them to be procedurally defaulted in federal court either. See *Cross v. Sisto*, 676 F.3d 1172, 1177 (9th Cir. 2012) (California state court's denial of petitioner's habeas petition with citation to *Swain* constituted dismissal without prejudice and with leave to amend to plead required facts with particularity and thus did not signify that petitioner's claims were procedurally barred as a matter of state law).

However, the Supreme Court also denied West's state habeas petition with citations to *Robbins*, 959 P.2d at 311, and *Clark*, 855 P.2d at 729, which reflects that West's state habeas petition was denied because it was deemed untimely, *Walker*, 131 S. Ct. at 1126. The Ninth Circuit has held that California's "substantial delay" timeliness standard satisfies the "independent and adequate" requirement. See *Bennett*, 322 F.3d at 582-83; see also *Walker*, 131

S. Ct. at 1131 (finding that California’s timeliness standard is adequate). The Ninth Circuit has further stated:

If a petitioner has procedurally defaulted on a claim, a federal court may nonetheless consider the claim if he shows: (1) good cause for his failure to exhaust the claim; and (2) prejudice from the purported constitutional violation; or (3) demonstrates that not hearing the claim would result in a “fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640; *Sawyer v. Whitley*, 505 U.S. 333, 339-40, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). An objective factor outside of a petitioner’s control (*e.g.*, ineffective assistance of counsel or a basis for the claim that was previously unavailable) could constitute cause. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). The petitioner can meet the prejudice prong if he demonstrates “that the errors . . . worked to his *actual* and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir.1989) (citing *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)). A petitioner can demonstrate a fundamental miscarriage of justice by “establish[ing] that under the probative evidence he has a colorable claim of factual innocence.” *Sawyer*, 505 U.S. at 339, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (quotation marks omitted).

Cooper v. Neven, 641 F.3d 322, 327 (9th Cir. 2011).

In his Traverse, West argues that the claims are not procedurally defaulted because that procedural bar was “imposed when petitioner attempted to *re-adjudicate* the claims.” But because not all of West’s state habeas petitions are included in the record, it appears difficult to fully consider West’s argument in response. Moreover, as discussed below, the allegedly-barred claims may be more easily resolved on the merits. Accordingly, the Court declines to decide those claims on procedural grounds and will address the merits of all West’s claims, as discussed below. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (in the interest of judicial economy, the court may address a petition’s merits without reaching procedural issues); *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1083 (9th Cir. 2001) (declining “to reach the complex questions lurking

in the time bar of the AEDPA” where the district court “decided the case on the merits, and on the merits it was right as a matter of law”).

B. Merits

Grounds 1, 4. *Involuntary Plea/Structural Error*

West first argues that his plea was involuntarily made because it was based on an “illusory and meaningless ‘benefit.’” He relatedly claims in Ground 4 that the trial court’s acceptance of his involuntary plea constituted structural error.

It is a settled principle of federal constitutional law that a guilty plea violates due process and is therefore invalid if not entered voluntarily and intelligently. *Brady v. United States*, 397 U.S. 742, 747 (1970). A plea of guilty is considered voluntary and intelligent if the defendant enters the plea with full awareness of its “direct consequences.” *Id.* at 755. A plea may be not knowing and voluntary if it is, for instance, the product of “ignorance, incomprehension, coercion, terror, inducements, or subtle or blatant threats[.]” *Custis v. United States*, 511 U.S. 485, 508 (1994) (internal quotation marks, citation and brackets omitted). However, “a plea’s validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal.” *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005).

The Court of Appeal considered and rejected West’s claim on direct appeal as follows:

[West] pled no contest to second degree murder and admitted that he used a deadly weapon during the commission of the crime. Prior to taking his plea, the court confirmed that his lawyer “went over [the] waiver of rights form” with him and that he understood the rights he was waiving. [West] stated that he understood his rights and also understood that he was giving up those rights by pleading no contest. The waiver form states with regard to his postconviction placement, “Being fully aware that placement in CDC will be up to CDC alone, the court and DA suggests that due to mental condition Atascadero considered.” Following the entry of his plea, the court advised that it would “refer this matter to [p]robation for their report and recommendation with the understanding that they’re going to look into placement in either a mental health setting

or [Atascadero]” The prosecutor added, “That’s Department of Corrections’ decision. What I will do, and I told [defense counsel] that, . . . in the statement of [views] that I will write, which will detail the facts of the case, et cetera, I think it’s appropriate, given the mental health history in this case, that he be evaluated, and we’d have Department of Corrections determine whether it’s appropriate to house him at Atascadero, Department of Corrections with mental health treatment or somewhere else.”

[West] contends that the promises made by the prosecutor and the court to “recommend” or “investigate” placement at Atascadero were illusory and that his attorney was ineffective in failing to so advise him. He argues that under section 2684 and California Code of Regulations, title 15, section 3360, the decision to place an inmate at a state mental hospital is vested in the sole discretion of the Department of Corrections and that a recommendation by the prosecutor or judge “carrie[s] no weight.” He also argues that the bargain was illusory because any placement at a state mental hospital is temporary at best.

Section 2684 provides “(a) If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections . . . shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he or she would benefit from care and treatment in a state hospital. If the director of the appropriate department so determines, the superintendent of the hospital shall receive the prisoner and keep him or her until in the opinion of the superintendent the person has been treated to the extent that he or she will not benefit from further care and treatment in the state hospital. [¶] (b) Whenever the Director of Corrections receives a recommendation from the court that a defendant convicted of a violation of Section 646.9 [Stalking] and sentenced to confinement in the state prison would benefit from treatment in a state hospital pursuant to subdivision (a), the director shall consider the recommendation. If appropriate, the director shall certify that the rehabilitation of the defendant may be expedited by treatment in a state hospital and subdivision (a) shall apply.” California Code of Regulations, title 15, section 3360, subdivision (b) provides, “When an inmate is found to require mental health care not available within the[] resources [of the Department of Corrections], but which is available in the Department of Mental Health, the case will be referred to the director for consideration of temporary transfer to that department pursuant to . . . section 2684.”

[West] is correct that the final decision regarding placement rests with the Department of Corrections. However, [West] was fully advised of this fact prior to entering his plea. Contrary to [West’s] argument, the court and the prosecutor did not promise to recommend placement at Atascadero. Rather, they promised to recommend to the Department of Corrections that it consider such a placement. The prosecutor fulfilled this promise by including in his statement of views that “it is the position of the People that the Department of Corrections and Rehabilitation should conduct a thorough and careful examination of Mr. West in order to determine the proper housing and treatment, if any, for [West]. It is the position of the People that all options for housing, including

but not limited to [Atascadero] . . . and various other prison facilities be explored, taking into account all appropriate security concerns.”^{FN3} Nothing in the provisions cited by [West] suggest that the prosecutor’s recommendation for evaluation carries no weight with the Department of Corrections. Finally, the fact that placement is only “temporary,” in that it can last only “until . . . the person has been treated to the extent that he or she will not benefit from further care and treatment in the state hospital,” does not render the plea bargain illusory. That [West] would not receive a permanent placement in a state mental hospital irrespective of his continued need for mental health treatment does not remove meaningful content from a promise to recommend consideration for hospitalization for so long as [West] would benefit from treatment.^{FN4}

FN3. Section 1203.01 authorizes the district attorney to file “a brief statement of [his or her] views respecting the person convicted or sentenced and the crime committed,” which is delivered to the Department of Corrections at the prison or other institution to which the person convicted is delivered.

FN4. [West] suggests that he “was rushed to make a decision without the usual benefit of a discussion with his conservator/father.” His declaration, however, does not support this claim. [West] writes that prior to the hearing, “I asked to see my father/conservator but Mr. Spieckerman told me he was not present.” Later he adds, “When I got into court, I was surprised to see my conservator/father sitting in the back because I was told he was not present.” There is no suggestion in the declaration that [West] renewed his request to confer with his father or that such a request would have been futile.

West, 2008 WL 3414687, at *5-6.

The Court of Appeal’s determination is both reasonable and fully supported by the record. A review of the record demonstrates that West’s plea was both knowing and voluntary.⁵ Apart from his bald statement that his plea was involuntarily made in exchange for an illusory benefit, West provides no facts indicating that his plea was the result of any threats, improper

⁵ West does not argue in his Petition that his plea was involuntary due to mental impairment. In any event, his change of plea form, executed under penalty of perjury, indicates that he was “of sound mind” and “underst[oo]d the nature of the[] proceedings.” “Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (citing *Machibroda v. United States*, 368 U.S. 487, 495-96 (1962)).

promises, or any type of coercion. As the Court of Appeal explained, West's no contest plea did not include a guarantee that he would be placed in the mental facility of his choice.

Moreover, West fails to acknowledge the meaningful consideration he received for his plea. The plea agreement called for him to plead no contest to second degree murder with the personal use of a deadly weapon enhancement and one count of second degree robbery, in exchange for a sentence of 16 years to life imprisonment. If West had gone to trial and was convicted of first degree premeditated deliberate murder, he would have been exposed to a potential sentence of life without the possibility of parole, or even death. CAL. PENAL CODE § 190(a) ("Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.).

West was faced with the choice of going to trial with strong evidence against him, as described in greater detail with respect to Ground 2, *infra*, or pleading guilty in the hope of receiving a reduced sentence. Based on these facts, it was reasonable to conclude that the plea was a voluntary and intelligent choice among the alternatives available to him. Nothing in the record suggests that the plea was the result of any improper promises. West cannot now challenge the validity of his plea because he was not granted a spot in a mental health facility within the state prison system. And because it was not error to accept the no contest plea, there necessarily was no structural error either. Under these circumstances, the state court's decision neither contravened nor unreasonably applied federal law, and federal habeas relief is not warranted on either of these grounds.

Ground 2. *Failure to Present a Factual Basis for Plea*

West next contends that the trial court erred in accepting in his no contest plea because it was unsupported by a factual basis. The Court of Appeal considered and rejected this claim on direct appeal as follows:

[West] also contends the trial court failed to conduct the required inquiry to determine whether there was a factual basis for his plea. He acknowledges that the waiver form he signed states that “[t]he facts upon which this change of plea are based are: [¶] those contained in the preliminary transcript” but suggests that this conclusory statement did not establish a factual basis for the plea. Notably, [West] does not suggest that the facts contained in the preliminary hearing transcript do not support the plea.

“Pursuant to section 1192.5, the trial court is obligated to determine whether there is a factual basis for a plea of guilty or no contest when that plea arises from a negotiated resolution of the charges.” (*People v. Marlin* (2004) 124 Cal. App. 4th 559, 571.) “Although section 1192.5 requires the trial court to satisfy itself there is a factual basis for the plea, this can be done by having the defendant describe the conduct or answer questions, by detailing a factual basis, or by having defense counsel stipulate to a particular document such as the transcript of a preliminary hearing as providing a factual basis for a plea. [Citation.] The trial court need not obtain an element-by-element factual basis but need only obtain a prima facie factual basis for the plea. [Citations.] ‘[A] trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea. The trial court’s acceptance of the guilty plea, after pursuing an inquiry to satisfy itself that there is a factual basis for the plea, will be reversed only for abuse of discretion.’” (*Id.* at pp. 571-572, quoting *People v. Holmes* (2004) 32 Cal. 4th 432, 443.)

In *People v. Wilkerson* (1992) 6 Cal. App. 4th 1571, 1577, the court rejected an argument similar to [West’s] in holding that the court’s reliance on a stipulation that the factual basis was contained in the police reports, without further inquiry, was sufficient. The court explained, “The stipulation entered by the parties below was not generalized but referred the municipal court, and us, to a particular source of information, namely, police reports. In this respect this case resembles *People v. Enright* (1982) 132 Cal. App. 3d 631 The *Enright* court found no error when the parties stipulated the police reports could be considered as the factual basis for a guilty plea, even though the record did not affirmatively show that the reports were specifically considered by the court. [Citation.] Although we would prefer that the court expressly refer to the specific facts which it finds sufficiently support the plea, we will not find error simply from the failure to do so, as long as adequate information was before the court and is reflected in the record.” (*People v. Wilkerson, supra*, 6 Cal. App. 4th at p. 1577.) Likewise, in this case the trial court did not abuse its discretion by relying on the stipulation that the preliminary hearing transcript provided a factual basis for [West’s] plea.

West, 2008 WL 3414687, at *6-7.

As the appellate court noted, under California law, a state court that accepts a guilty plea must satisfy itself that there is a factual basis for the plea.⁶ CAL. PENAL CODE § 1192.5; *People v. Holmes*, 84 P.3d 366, 368 (Cal. 2004). This state law requirement, however, is not a federal constitutional requirement. The due process clause does not impose on a state court the duty to establish a factual basis for a guilty plea absent special circumstances, such as “a defendant’s specific protestation of innocence.” *Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985); *see also Loftis v. Almager*, 704 F.3d 645, 648 (9th Cir. 2012) (plurality opinion) (“habeas courts have held that, unless a plea is accompanied by protestations of innocence or other ‘special circumstances,’ the Constitution does not require state judges to find a factual basis”). Thus, a state trial court’s “failure to find a factual basis for [a] no contest plea—unaccompanied by protestations of innocence—does not present a constitutional issue cognizable under 28 U.S.C. § 2254.” *Loftis*, 704 F.3d at 648.

Here, however, West’s no contest plea was not “unaccompanied by protestations of innocence.” *Loftis*, 704 F.3d at 648. Although West pleaded no contest to second-degree murder and robbery and admitted the enhancement for the use of a screwdriver in the murder count, defense counsel specifically declared the plea to be an Alford plea,⁷ with citation to *People v. West*.⁸ An Alford plea is “shorthand for a guilty plea accompanied by a protestation of innocence.” *United States v. Mancinas-Flores*, 588 F.3d 677, 681 (9th Cir. 2009). In *Alford*, the

⁶ A *nolo contendere* (no contest) plea is equivalent to a guilty plea under California law. CAL. PENAL CODE § 1016(3).

⁷ *No. Carolina v. Alford*, 400 U.S. 25 (1970).

⁸ 477 P.2d 409 (Cal. 1970) (the California equivalent to *Alford*).

Supreme Court held that the trial court did not commit constitutional error by accepting a guilty plea by a defendant who professed his innocence “in view of the strong factual basis for the plea.” *Alford*, 400 U.S. at 38.

It is unnecessary to determine whether, under the specific factual circumstances of this case, a factual basis for West’s no contest plea was constitutionally required. *See Loftis*, 704 F.3d at 650-52 (when defendant did not claim innocence, his no contest plea was not an *Alford* plea and a factual basis for the plea was not required). Assuming that a factual basis was required, the Court finds that the Court of Appeal reasonably determined that the requirement was met. In West’s case, the prosecutor and defense counsel stipulated that the evidence adduced at the preliminary hearing stated a factual basis for the charges if the judge read the transcript of that hearing. Such a stipulation satisfies the California state law requirement, embodied in California Penal Code § 1192.5, that a trial judge accepting a guilty plea garner information regarding the factual basis of the plea. *See Holmes*, 9 Cal. Rptr. 3d at 368 (noting that the requirement is satisfied if defense counsel points to a particular document that provides an adequate factual basis for the plea, such as the preliminary hearing transcript).

The preliminary hearing transcript, which was unquestionably part of the record and is included in its entirety in the record before this Court, established a sufficient factual basis for West’s pleas. The evidence at the hearing, as summarized by the probation officer in preparing West’s pre-sentence report, established that:

Through investigation, police were able to link [West] to two separate incidents that occurred in the cities of Fairfield and Vacaville within several days from April 16, 1999 to April 19, 1999. The incidents entailed the robbery and stabbing of victim T.A. (count 2) at the Shell Food Mart in Fairfield and the murder of K.O. (count 1).

On April 16, 1999 at about 11:52 p.m. police were dispatched to the report of a robbery that had just occurred. Upon arrival at the scene, police spoke with victim T.A.

who reported that a subject, later identified as [West], came to the night service window and requested the key to the bathroom. When [West] returned to the window, he told the victim that he had locked the bathroom key and his wallet in the bathroom. When the victim opened the door with the intention of going out to the bathroom to unlock the door, [West] yanked the door open and entered the store. The victim reported that [West] had a sharpened screwdriver in his right hand and began making underhand jabbing movements at him, stabbing him in the left rib cage area and left triceps with the tip of the screwdriver. [West] began shouting and demanding to know where the money was and mentioned something to the effect that he not press any buttons. The victim then went to the register and took \$550 dollars in cash. He then ran out of the store towards the Green Valley Ford dealership, where he got into a blue 80's model Volvo that fled northbound on Oliver Road.

Police noted that the victim T.A. appeared to be very shaken and that his hands were shaking. He told police that he had been afraid for his life when he realized that he had been stabbed. Regarding the weapon, the victim described it as a screwdriver with a Phillips head that had been ground to a fine point with a metal portion of about four to five inches in length.

Subsequently, on April 19, 1999 at about 10:30 a.m. police responded to the area of Cherry Glenn road in Vacaville on the report of a dead body being found by a farm worker. The female victim was later identified as K.O. According to the autopsy report, the victim died of multiple stab injuries to her head, neck, and chest. Injuries included a broken mandible, multiple stab wounds (30+) and abrasions to her arms and legs consistent with defensive type injuries. It was reported that the stab wounds were from an instrument that was not consistent with a knife, but rather some type of pointed instrument. Additionally, it was believed that the victim had been killed 6 to 8 hours prior to being found.

On April 20, 1999, police found the blue Volvo in the parking lot of an apartment complex near [West's] family's residence. Although it appeared that the Volvo had been wiped clean, police were able to find large amounts of blood in the rear seat, front seat headliner and rear door panel. Additionally, the windows were smeared with some white residue, possibly from some type of cleaner. Police located a Phillips screwdriver with the point sharpened stuffed in the passenger's front seat, and it appeared to have blood on the handle.

Subsequently, a female friend of victim K.O., told police that she, K.O. and [West] had been together the night of the robbery, and that she and K.O. had been present at the Shell station when [West] robbed it. She related that K.O. and [West] had smoked crack cocaine earlier that evening at Rockville Park. On their way back they stopped at the gas station since [West] told them that he wanted to use the bathroom. Subsequently, he came running back to the car, got in and laid down in the back and told them to take off. He later pulled out a wad of money and showed it to them.

During investigation, and after talking with family members and acquaintances of [West] and victim who saw them together, police were able to piece together the events of that weekend that led to the victim's murder. It appears that the victim had at some point stolen a ring from her father and she had given it to [West] so he could sell it for

money and cocaine. Apparently, when she didn't get any money or drugs from [West], she tried to get it back from [West], but wasn't able to. According to reports, she then called [West's] mother and talked badly about him to her. [West] then learned about the phone call and got upset. Additionally, a witness came forward and told police that when he saw the picture of [West] in the newspaper, he recognized him as the person he had seen at a gas station on the intersection of East Travis and Sunset in Fairfield on the evening of April 17, 1999 at about 10:30 p.m. He reported that he saw a blue Volvo pull up to the pumps, and he recognized [West] in the car. Although he didn't know [West's] name, he had seen him several times around the Stoneybrook apartments and at the park across the street. He advised that he also saw two other people in the car. [West] had then walked up to him and had asked him for .35 cents. He told police that [West] was twitching and acting weird. [West] told him that he was going to kill the girl in the Volvo because she had his mother set up. They thought [West] was drugged up and for that reason was making those kinds of statements. He didn't think more of it, until he saw [West's] picture in the paper.

Another witness told police that he had seen [West], the victim and another black male the night before [West's] arrest sometime between 10 p.m. and 1:00 a.m. [West] and the black male had sold a ring to a "Moe" and [West] had asked if his girlfriend could come up since she was in the car. A short time later, all three left the apartment. Subsequently, [West] returned by himself driving the Volvo. He then got a ride from [West] and went to pick up a female friend. He told police that when his friend tried to get into the back seat, [West] went crazy, yelling at him to sit in the back and to have his female friend sit in front. He told police that the back seat was full of clothes and that upon getting into the back seat, he felt like he was sitting on something other than clothes, but couldn't describe it. However, during the ride he then noticed blood on the passenger's side windows and the ceiling of the car. He then shouted to [West] that he wanted to get out of the car, and soon thereafter, he and his female friend got out of the car.

On April 20, 1999 at about 8:15 p.m. police received information that [West] had returned to his family's residence on Mallard Court. [West] was arrested and taken to the Sheriff's Department. In a statement to police, [West] reported that he couldn't remember the times that he had been with the victim that evening. He advised that he had dropped her off on Tabor Avenue, and when he went back to pick her up, she wasn't there so he kept the car and drove around for awhile. When he was confronted with the blood that was found in the car, he denied seeing any blood in the car. He reported that he lent the car to some guy that gave him some crack cocaine and some money to use the car. While speaking with [West], investigators noticed that he had some cuts on his right hand. When asked about it, [West] reported that he had gotten the cuts from playing with a glass pipe. [West] then refused to answer any more questions and requested a lawyer.

Police noted that the pathologist that had conducted the autopsy of the victim looked at [West's] injuries and concluded that they were no more than a week old. Also, police took fingernail clippings from [West] and his clothing was collected. A short time later, police were advised that blood had been found underneath his fingernails, on his

clothing, his shirt, pants, and shoes. Additionally, a print that had been lifted from the Volvo was found to match [West's] prints.

Witnesses testified at the preliminary hearing and were subject to cross-examination. The evidence they provided was more than sufficient to provide a factual basis for West's no contest plea. Accordingly, the state court's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law, nor did it rest on an unreasonable determination of the facts in light of the evidence. Ground Three does not warrant federal habeas relief.

Ground 3. *Denial of Fourth Competency Hearing*

West additionally claims that the trial court violated his constitutional rights by failing to suspend the criminal proceedings and conduct a fourth competency hearing prior to accepting his no contest plea. The Court of Appeal rejected this claim on direct appeal:

[West] contends the trial court abused its discretion and violated his constitutional rights by refusing to suspend the proceedings a fourth time for another competency evaluation.^{FN2} [West] argues that when his behavior began deteriorating in February 2006, as evidenced by his outbursts in the courtroom and alleged suicide attempts, the court should have suspended the proceedings and ordered another competency evaluation. Based on the record, however, we cannot conclude that the trial judge, who presided over the prior evidentiary hearing on [West] competency, abused his discretion in finding that [West] behavior was a calculated attempt to delay the proceedings.

FN2. The Attorney General contends that this argument is not cognizable on appeal because [West] pled no contest to the charges and did not obtain a certificate of probable cause. [West's] petition for habeas corpus, however, alleges that he received ineffective assistance of counsel in part because his attorney failed to request a certificate of probable cause. We deem it most expedient to consider [West's] arguments on the merits.

Relying on *United States v. Loyola-Domingues* (9th Cir. 1997) 125 F.3d 1315, [West] argues that his suicide attempts "constituted changed circumstances warranting additional judicial reflection." In that case, the court observed that "[a]n attempted suicide is an extremely serious action" and found that under the circumstances of that case, the suicide attempt gave rise to a doubt as to the [West's] sanity. (*Id.* at pp.

1318-1319.) The court noted, however, “we do not believe that every suicide attempt inevitably creates a doubt concerning defendant’s competency.” (*Ibid.*; see also *People v. Ramos*, *supra*, 34 Cal. 4th at p. 509 [“defendant’s preference for the death penalty and overall death wish does not alone amount to substantial evidence of incompetence or evidence requiring the court to order an independent psychiatric evaluation”].) Here, it is questionable whether the behavior described by [West’s] attorney can be considered a serious suicide attempt. In any event, the trial court was entitled to measure the severity and authenticity of [West’s] suicide attempts and other courtroom behavior in light of his experience with [West] and [West’s] prior psychiatric evaluations.

[West] also contends that the court abused its discretion by failing to explore previously unassessed psychological features involving an organic brain injury and mental retardation. [West] has failed to establish, however, that further exploration of these issues was necessary or even properly requested. The psychiatric evidence dating back to 2001 repeatedly references a diagnosis of schizophrenia, a potential organic brain injury stemming from an accident when [West] was 10 years old, and the likelihood that [West] is moderately mentally retarded. V.L. Sternitzke, one of the psychologists appointed to examine [West] in 2001, indicated that he had conducted a full range picture vocabulary test to assess [West’s] intellectual functioning and concluded on the basis of those test results that [West] had the mental age of 5.75 years, putting him below the “use of reason” level. The experts who subsequently examined [West] testified that they considered Sternitzke’s findings in evaluating [West’s] competency and concluded that he nonetheless was competent to stand trial. The court agreed. Although the trial court did not appoint the director of the regional center for the developmentally disabled to examine defendant following Sternitzke’s 2001 report that [West] was mentally retarded, as it was required to do by section 1369, subdivision (a), no harm resulted. [West’s] mental retardation was tested and evaluated by Sternitzke and considered by the other experts and by the court in determining his competence to stand trial. He received a “comprehensive, individualized examination” performed by an appropriate expert consistent with the purpose of section 1369. (*See People v. Leonard* (2007) 40 Cal. 4th 1370, 1389-1390 [failure to appoint regional director to evaluate defendant was harmless where “the trial court’s competency determination was based on evidence from experts who were familiar with defendant’s developmental disability and who considered it in evaluating his competence”].) Putting aside [West’s] failure to request further tests for a possible brain injury or mental retardation, he has made no showing that additional evaluation was either necessary or could reasonably have been expected to affect the conclusions that were reached concerning his competency to stand trial.

West, 2008 WL 3414687, at *3-4.

It is undisputed that “the conviction of an accused person while he is legally incompetent violates due process.” *Pate v. Robinson*, 383 U.S. 375, 378 (1966). “To be competent to stand trial, a defendant must have the ‘capacity to understand the nature and object of the proceedings

against him, to consult with counsel, and to assist in preparing his defense.”⁹ *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)).

Where there is a “bona fide doubt” as to a defendant’s competence to stand trial, a court has a duty to hold a *sua sponte* competency hearing.¹⁰ *Pate*, 383 U.S. at 385-86. The test for a bona fide doubt is “whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Maxwell*, 606 F.3d at 568 (citation omitted). “Evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on

⁹ While at one time the Ninth Circuit adhered to the view that the competency standard for pleading guilty is higher than the competency standard for standing trial, the Supreme Court overruled the Ninth Circuit’s heightened standard and held that the competency standard for pleading guilty is the same as the competency standard for standing trial. *Godinez v. Moran*, 509 U.S. 389, 397 (1993).

¹⁰ There are two types of competency claims: (i) procedural due process claims, which arise where a state court failed to hold a competency hearing when there was a “bona fide doubt” about the petitioner’s competence, and (ii) substantive due process claims, where a petitioner was tried and convicted or sentenced while he or she was actually incompetent. See, e.g., *Boyde v. Brown*, 404 F.3d 1159, 1165 n.6 (9th Cir. 2005), amended on other grounds, 421 F.3d 1154 (9th Cir. 2005) (distinguishing petitioner’s “substantive” due process claim from a “procedural” due process claim); *Williams v. Woodford*, 384 F.3d 567, 603-10 (9th Cir. 2004); *Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir. 2003).

The importance of distinguishing between procedural and substantive due process competency claims pertains to the evidence that a habeas court may consider in reviewing the claim. When reviewing a procedural due process competency claim, a habeas court may only review the evidence that was before the trial judge. *United States v. Lewis*, 991 F.2d 524, 527 (9th Cir. 1993); see also *Williams*, 384 F.3d at 604. In contrast, when reviewing a substantive due process competency claim, a federal habeas court may consider new evidence, although retrospective competency determinations are discouraged. *Williams*, 384 F.3d at 608 (explaining that, while the court may consider facts and evidence not available to the state trial court in reviewing a substantive due process competency claim, retrospective determinations of incompetence are disfavored and considerable weight is given to lack of contemporaneous evidence of a petitioner’s incompetence to stand trial); see also *Boag v. Raines*, 769 F.2d 1341, 1343 (9th Cir. 1985). Because West solely asserts a procedural due process claim here, this Court may consider only the evidence that was before the trial judge.

competence to stand trial are all relevant in determining whether further inquiry is required, and one of these factors standing alone may, in some circumstances, be sufficient.” *Id.* (quoting *Drope*, 420 U.S. at 180 (internal quotation marks and brackets omitted)). A state court’s finding that no competency hearing is required is a factual determination entitled to deference unless it is objectively unreasonable. *See Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009); *Davis*, 384 F.3d at 644.

The record reflects that defense counsel made the following statements regarding his doubts about West’s competence:

I received information from the correctional officers at the jail that earlier this week Mr. West made a suicide—well, perhaps a suicide attempt. He was indicating to the jail staff he believed there was gas of some sort in his cell. When they opened his cell he ran out of his cell and fashioned a sheet into a noose and ran down and then back up and wasn’t able to use the noose in any fashion before the jail staff were able to get him back under control and back into his cell.

Subsequent to that I learned from additional jail staff that Mr. West attempted to slit his wrists. I saw him today and attempted to discuss this with him, and he did not discuss anything with me. He was nonresponsive to all the questions, but I was able to observe on him that he was bandaged up the length of his arm and I could see there was blood on the bandages and blood at the margin of where the bandage was covered.

Obviously, Your Honor, there has been a history of 1368 requests by the defense in this case, and this will be the first such one raised by me[.] . . . Mr. West has exhibited behavior . . . in the past[] while I have been his attorney that in many other cases might be cause for me to request a 1368 motion, but based on my review of past such motions and doctor’s evaluations I felt it was essentially more of the same and not a change in circumstances warranting additional evaluations[.] [B]ut my review of those prior evaluations indicate that none of them addressed suicide attempts. And now this week it appears we have two suicide attempts, although, both were ineffectual and Mr. West, although—well, although Mr. West’s demeanor towards me is that in fact he will not communicate with me at all, that is something new that has just occurred today, and based upon those two—those factors I have elicited here, Your Honor, I would express a doubt as to his competence.

The trial court declined to suspend the criminal proceedings, finding as follows:

This Court does have some historical knowledge of this case as it has progressed. I have been involved for about a year and a half now plus, and that includes evidentiary

hearings on whether or not he was malingering when it was claimed he was incompetent to stand trial.

The mental health professionals concluded he was malingering and I came to the same conclusion. It's my opinion that his behavior over the last week is just more of the same feigning mental incompetency for purposes of delaying the proceedings.

I do not find anything of substance has changed, other than implementing Plan B and C to try and delay his trial. So I conclude that, notwithstanding counsel's good-faith statement that you have a doubt as to his competency, given all things, there is an insufficient change of circumstances from when this Court last concluded he was competent to stand trial to justify suspending criminal proceedings.

So the request to have the criminal proceedings suspended pursuant to Penal Code Section 1368 is denied for the reasons stated.

While it certainly gives this Court pause that the trial court relied solely on defense counsel's description of the suicide attempts and West's recent behavior to determine that no competency hearing was required, under the circumstances of this case, the Court cannot find that determination unreasonable. The record reflects that the trial judge, who was well aware of the case and had previously determined that the petitioner was competent and attempting to delay trial, considered trial counsel's argument and determined that the attempted suicides were insufficient to warrant a fourth competency evaluation. The trial court was in a far better position to assess the petitioner's competency, credibility, honesty, and motivation. *Cf. Ornelas v. United States*, 517 U.S. 690, 701 (1996) (noting that an appellate court never has the benefit of the trial court's familiarity with the details of the case, nor the benefit of hearing live testimony). As the Court of Appeal reasonably concluded, "the trial court was entitled to measure the severity and authenticity of [West's] suicide attempts and other courtroom behavior in light of his experience with [West] and [West's] prior psychiatric evaluations." *West*, 2008 WL 3414687, at *3.

Moreover, the record is well-developed regarding West's mental history. The record indicates that he was first diagnosed with schizophrenia while he was incarcerated at the

Martinez Detention Facility in 1994. The record likewise includes psychological evaluations both from mental health professionals who opined that West was mentally incompetent as well as those who opined that he was competent. Importantly, the record also includes a transcript of the 2004 competency evidentiary hearing where two mental health professionals, who had each met with West a number of times since 1999, testified under oath and subject to cross-examination that West was competent and was exaggerating his symptoms in a deliberate effort to mislead the court. Both experts were asked about any head injuries or possible brain damage and both indicated that they had sufficient information to discount any impact of such injuries in concluding that West was competent. The record regarding West's mental history thus supports the state court's factual determination.

West is therefore not entitled to relief on this ground.

Grounds 5, 8, 10. *Ineffective Assistance of Counsel*

West also argues that his retained counsel was ineffective for a number of reasons. To demonstrate ineffective assistance of counsel under *Strickland v. Washington*, a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. 466 U.S. 668, 687 (1984). A deficient performance is one in which "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.*

The Supreme Court has explained that, if there is a reasonable probability that the outcome might have been different as a result of a legal error, the defendant has established prejudice and is entitled to relief. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385-86 (2012); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Williams*, 529 U.S. at 393-95. Where a habeas

petition governed by AEDPA alleges ineffective assistance of counsel, the *Strickland* prejudice standard is applied and federal courts do not engage in a separate analysis applying the *Brecht* harmlessness standard. *Avila v. Galaza*, 297 F.3d 911, 918, n.7 (9th Cir. 2002); *see also Musalin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009). Under this rubric, in reviewing ineffective assistance of counsel claims in a federal habeas proceeding:

The question “is not whether a federal court believes the state court’s determination” under the *Strickland* standard “was incorrect but whether that determination was unreasonable—a substantially higher threshold.” And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.

Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (citations omitted); *see also Runningeagle v. Ryan*, 686 F.3d 758, 775 (9th Cir. 2012).

Thus, West must show that defense counsel’s representation was not within the range of competence demanded of attorneys in criminal cases, and there is a reasonable probability that, but for counsel’s ineffectiveness, the result would have been different. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985). An ineffective assistance of counsel claim should be denied if the petitioner fails to make a sufficient showing under either of the *Strickland* prongs. *See Strickland*, 466 U.S. at 697 (courts may consider either prong of the test first and need not address both prongs if the defendant fails on one).

West first argues that counsel was ineffective with regard to the change of plea hearing. But as discussed more fully with regard to Ground 1, West cannot show that his plea was involuntary or unknowing. Nor does West show that retained counsel unlawfully induced West to accept the deal, or that he would have otherwise rejected it.

West also contends that counsel was ineffective at sentencing because he submitted a “perjured” statement that West wished to withdraw his plea to avoid “the harsh time he was facing” rather than his actual reason—that West was unaware that he was not guaranteed a spot in a mental health facility. But the record does not indicate that counsel made any such statement. Indeed, the only reference to a withdrawal motion was the trial judge’s sole statement, “I should indicate that I have reviewed the file carefully. I find no reason or grounds to withdraw the plea.” West therefore fails to demonstrate that counsel was ineffective.

Finally, West faults counsel for not filing a certificate of probable cause.¹¹ Although West does not indicate in his Petition that he either instructed his counsel to file a certificate of probable cause or that his counsel failed to consult with him regarding an appeal, the record arguably reflects that he “reasonably demonstrated to counsel that he was interested in appealing,” *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000), because counsel filed a notice of appeal. In *Flores-Ortega*, the petitioner argued that counsel’s deficient performance deprived him of “a notice of appeal and hence, an appeal altogether.” *Id.* at 483. The Supreme Court held that prejudice will be presumed where the defendant could show that his counsel’s deficient

¹¹ California Penal Code § 1237.5 provides:

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

- (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
- (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

performance “actually cause[d] the forfeiture of the defendant’s appeal,” *i.e.*, “a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” *Id.* at 483-84.

But here, West was not deprived of an “appellate proceeding altogether.” *Id.* at 483. Because counsel failed to file a notice of appeal in *Flores-Ortega*, the petitioner’s claims were never formulated in the first instance and thus, there was no basis upon which to make a finding with respect to actual prejudice. *See Stewart v. Runnels*, No. CIV S–03–2670, 2008 WL 590471, at *8 (E.D. Cal. Feb. 29, 2008), Report and Recommendation adopted by 2008 WL 598118 (E.D.Cal. Mar. 4, 2008). Here, counsel filed a timely notice of appeal, and West was appointed counsel who submitted an appellate brief. Thus, counsel’s failure to file the certificate of probable cause did not lead to a forfeiture of the proceeding itself. As such, the presumption of prejudice articulated in *Flores-Ortega* does not apply to West’s ineffective assistance of counsel claim. *See Stewart*, 2008 WL 590471, at *11 (concluding that the presumption of prejudice did not apply where trial counsel filed a timely notice of appeal, but failed to request a certificate of probable cause). Rather, West must demonstrate that there is a reasonable probability that, but for counsel’s error, he would have prevailed on appeal. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989); *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000).

West fails to show the requisite prejudice here. West does not show that the California state courts would have granted his request for a certificate of probable cause had counsel filed the request, or otherwise demonstrate that he would have prevailed on appeal. Because the appellate briefs are not included in the record before this Court, it is not clear whether West even attempted to raise on direct appeal claims that the Court of Appeal declined to consider for lack

of probable cause.¹² Even if he had raised to that court on direct appeal the other claims raised in this Petition, this Court has considered and rejected all of these claims on the merits, and West has not shown the result would have been different if considered by the state court on direct appeal. West therefore cannot show ineffective assistance of counsel, and he is not entitled to relief on any of these grounds.

Ground 6. *Failure to Record*

West next alleges that the trial court failed to record the sentencing proceedings held on January 17, 2007. But the state record includes a certified copy of the Reporter's Transcript of those proceedings. There is no indication in the record that the reporter did not record the entirety of the proceedings, and West provides no evidence to establish any such lack of recording. West's claim therefore must be denied.

Ground 7. *Prosecutorial Misconduct*

West additionally argues that the prosecutor committed misconduct by suppressing material evidence of his lack of capacity and the fact that a conservator had been appointed. *Brady v. Maryland*, 373 U.S. 83 (1962), and its progeny require the prosecution to disclose material information that is "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A *Brady* violation occurs only where there is a "reasonable probability" that a different verdict would have resulted from disclosure of the information that the defendant claims was suppressed. *Id.* at 281. That is, "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material

¹² The Court of Appeal's decision does not refer to other claims or suggest that any claims were not considered because no certificate of probable cause had been obtained.

in the sense that its suppression undermines confidence in the outcome of the trial.” *United States v. Bagley*, 473 U.S. 667, 678 (1985).

But West has not provided any evidence to support his conclusory allegations that the prosecutor suppressed material evidence showing West’s lack of capacity or the fact that a conservator had been appointed. Rather, the issue had been extensively litigated in court, and all parties were aware of the past incompetency findings that triggered state mental hospital placement. The record also reflects that all parties were aware that West’s stepfather had been appointed as his conservator. In his petition for review to the California Supreme Court, West stated that his “step-father/conservator had always been informed in advance of court dates.” West fails to show that the prosecutor committed misconduct by withholding material evidence, and he is not entitled to relief on this ground.

Ground 9. *Custody Credits*

Finally, West contends that the trial court failed to give him credit for the 2,830 days that he spent in prison prior to his conviction. Under California law, inmates may receive “custody” credit for pre-sentence jail time. CAL. PENAL CODE § 2900.5; *see also People v. Taylor*, 14 Cal. Rptr. 3d 550, 562-64 (Cal. Ct. App. 2004) (summarizing types of credit available to California prisoners). “[T]he purpose of section 2900.5 is to ensure that one held in pretrial custody on the basis of unproven criminal charges will not serve a longer overall period of confinement upon a subsequent conviction than another person who received an identical sentence but did not suffer preconviction custody.” *People v. Bruner*, 892 P.2d 1277, 1280 (Cal. 1995). Thus, the erroneous denial of pre-sentence credit under § 2900.5 may constitute denial of a state-created

liberty interest that is protected by the Due Process Clause. *Robinson v. Marshall*, 66 F.3d 249, 250 (9th Cir. 1995).

However, the record belies West's claim that he did not receive the 2,830 days of pre-sentence custody credit. The sentencing transcript notes that "[West] is entitled to credits of 2830 days," and the abstract of judgment lists "2830" under "credit for time served." West provides no evidence to the contrary. West therefore fails to show that he was denied any pre-sentence credit, and this claim must fail.

V. CONCLUSION AND ORDER

West is not entitled to relief on any ground raised in his Third Amended Petition.

IT IS THEREFORE ORDERED THAT the Third Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED THAT the Court grants a Certificate of Appealability solely with respect to his claim that the trial court abused its discretion in denying a fourth competency hearing. See 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'")

(quoting *Miller-El*, 537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Ninth Circuit Court of Appeals. See FED. R. APP. P. 22(b); 9TH CIR. R. 22-1.

The Clerk of the Court is to enter judgment accordingly.

Dated: September 28, 2016.

/s/James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge

IN THE SUPREME COURT OF CALIFORNIA

En Banc

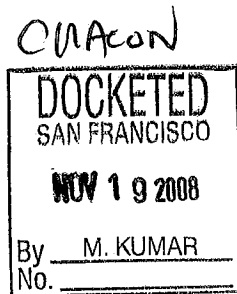
THE PEOPLE, Plaintiff and Respondent,

v.

MACK ARTHUR WEST, JR., Defendant and Appellant.

In re MACK ARTHUR WEST JR., on Habeas Corpus

The petitions for review are denied.



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SUPREME COURT
FILED

NOV 19 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

 KeyCite Red Flag - Severe Negative Treatment
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Court of Appeal, First District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,

v.

Mack Arthur WEST, Jr., Defendant and Appellant.

In re Mack Arthur West, Jr., on Habeas Corpus.

Nos.

A117123

, A119296.

|

(Solano County Super. Ct. No. FC 177201).

|

Aug. 12, 2008.

Attorneys and Law Firms

Office of the Attorney General, San Francisco, CA, for
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First District Appellate Project, San Francisco, CA,
[Rodney Richard Jones](#), Mendocino, CA, for Defendant
and Appellant.

Opinion

[POLLAK](#), Acting P.J.

*1 Defendant Mack Arthur West, Jr., appeals from a judgment entered after a no contest plea to second degree murder and robbery. He has also filed a petition for a writ of habeas corpus, which has been consolidated with this appeal. Defendant argues that the trial court abused its discretion in failing to suspend the proceedings prior to the entry of his plea to conduct a fourth competency hearing, and that he received ineffective assistance of counsel in connection with the submission of his plea. We affirm the judgment and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1999, defendant was charged with a single count of murder ([Pen.Code](#),¹ § 187, subd. (a)). Almost immediately thereafter the court suspended the criminal proceedings pursuant to section 1368 and appointed two experts to evaluate defendant's competency to stand trial. Based on the expert opinions, the court found defendant incompetent and he was placed in the "Trial Competency Program" at Atascadero State Hospital (Atascadero). He was returned to the court as restored to competency in December 1999.

Following a preliminary hearing in February 2000, defendant was charged by amended information with murder (§ 187, subd. (a)), robbery (§ 211), vehicle theft ([Veh.Code](#), § 10851, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)). The information also alleged that defendant personally used a deadly weapon, a screwdriver, during the commission of the murder and robbery. Defendant entered a dual plea of not guilty and not guilty by reason of insanity.

In December 2000, following a hearing conducted pursuant to [People v. Marsden](#) (1970) 2 Cal.3d 118, the court found that there had been a total breakdown in communication between defendant and his court-appointed attorney. The public defender was relieved and new counsel was appointed.

In May 2001, defendant's new attorney requested a second competency evaluation. The court again found that defendant was incompetent to stand trial and suspended the criminal proceedings. Defendant was returned to Atascadero. In August 2002, defendant was returned to the court based on the opinion of hospital staff that defendant was competent to stand trial. In April 2003, the court found that defendant was competent to stand trial based on its review of "psychological reports prepared since the defendant's return from [Atascadero] in August of 2002" and of a report prepared by the hospital. The court explained that "he does understand the nature and the significance of these proceedings. He's able to cooperate with counsel, if he chooses to do that, and it appears to the [c]ourt that Mr. West is purposely exaggerating symptoms to avoid going to trial in this matter."

In January 2004, defendant's attorney again requested that defendant's competency be evaluated after defendant refused to cooperate with the attorney or come out of a holding cell. The case was then before a new judge, who suspended the proceedings a third time and appointed experts to evaluate defendant's competency. The court expressly requested that the doctors "explore issues of malingering by defendant." Following his interview with defendant, Dr. Murray Eiland informed the court that while he strongly believed that defendant was malingering, he could not make a competency determination because defendant was refusing to cooperate. He stated, "There are several reasons why I strongly believe that Mr. West is faking or exaggerating his symptoms. During the four times I have seen him, he has described his symptoms in a very different way and has acted in a very different manner each time. From the beginning there have also been questions about the degree to which he may have been exaggerating his symptoms. [¶] Throughout the time I spent with Mr. West in the latest interview, he never appropriately answered a single one of my direct question[s], which I take to be significant. I have interviewed several thousand people suffering from [psychosis](#) during the years of my psychiatric practice. In each case-no matter how severe the mental illness-all but a tiny minority of these people have been able to answer some questions appropriately. Only in cases where I have strongly suspected malingering have the people being interviewed seemed unable to give even one appropriate answer."

*2 In December 2004, the court held a competency trial. Dr. Eiland confirmed his opinion that defendant was malingering. With regard to defendant's competency, he testified, "I have insufficient reason to think he is unable to stand trial. [¶] I do have a strong reason to think he has been feigning mental illness at times.... [H]e may have some mental situation that is making it more difficult for him, but it's clear to me that there is a deliberate effort for him to appear sicker than he has ever been. I think he wants to avoid going to trial." Dr. Eiland thought that defendant was able to assist his attorney but was not sure that he would. Dr. Carlton Purviance, who was also appointed to evaluate defendant, similarly testified that defendant "does suffer from a mental illness, but ... he is quite resourceful and is able to describe symptoms that would be consistent with an illness and exaggerates those and amplifies those ... in a way to affect a certain outcome." He explained that during the interview, "his

presentation was one in which he was spontaneously offering material that was designed to convince me of a very serious mental illness and specifically that he wasn't competent to proceed." The trial court found that defendant was competent to stand trial.

In April 2005, defendant's attorney again expressed a doubt as to defendant's competency to stand trial after defendant continued to refuse to cooperate or enter the courtroom. He acknowledged, however, that the experts who examined defendant believed him to be malingering. The court considered the extensive reports that had previously been submitted regarding defendant's competency as well as a recent report submitted in conjunction with defendant's insanity plea. The court noted that defendant would not participate in the most recent evaluation and that the doctor believed defendant knows " 'how to play the mental illness role' " and "wants to remain in control of the legal system." The court noted that there had been "three findings of competency already; one by the doctors at Atascadero; one by Judge Foor; and one by me" and found there was no substantial change of circumstances or new evidence casting serious doubt on the earlier findings of competency.

Between April 2005 and January 2006, defendant refused to come into the court room, opting to view the proceedings from a holding cell that had a window into the courtroom. As the date of the jury trial approached, defendant's conduct became more disruptive. On January 30, 2006, defendant entered the courtroom but almost immediately became disruptive. Among other things, he claimed to have seen the judge on television news talking about giving him the death penalty. Defendant was first placed in the holding cell, but after he began "knocking on the window ... screaming things" he was removed from the courtroom entirely.

On February 3, 2006, defendant continued to rant from inside the holding cell and was again removed. Defendant's attorney then requested another competency evaluation. He explained, "I received information from the correctional officers at the jail that earlier this week Mr. West made a suicide-well, perhaps a suicide attempt. He was indicating to the jail staff he believed there was gas of some sort in his cell. When they opened his cell he ran out of his cell and fashioned a sheet into a noose and ran down and then back up and wasn't able to use the noose in any fashion before the jail staff were able

to get him back under control and back into his cell .[¶] Subsequent to that I learned from additional jail staff that Mr. West attempted to slit his wrists. I saw him today and attempted to discuss this with him, and he did not discuss anything with me. He was nonresponsive to all the questions, but I was able to observe on him that he was bandaged up the length of his arm and I could see there was blood on the bandages and blood at the margin of where the bandage covered.” The court rejected his argument that the suicide attempts constituted sufficient changed circumstances. The court explained, “This [c]ourt does have some historical knowledge of this case as it has progressed. I have been involved for about a year and a half now plus, and that includes evidentiary hearings on whether or not he was malingering when it was claimed he was incompetent to stand trial. [¶] The mental health professionals concluded he was malingering and I came to the same conclusion. It's my opinion that his behavior over the last week is just more of the same feigning mental incompetency for purposes of delaying the proceedings.”

*3 Due to calendaring conflicts, defendant's jury trial was continued until June 12, 2006. On May 22, defendant retained a new attorney. The trial was continued until November due to the production of new discovery.

On November 27, 2006, defendant withdrew his plea and pled no contest to one count of second degree murder with the personal use of a deadly weapon enhancement and one count of second degree robbery. He was informed that the maximum punishment was 16 years to life in prison. Defendant received that sentence for the murder and a concurrent three-year term for the robbery. He filed a timely notice of appeal but did not request a certificate of probable cause.

DISCUSSION

1. *The trial court did not abuse its discretion in declining to conduct another competency hearing.*

Under both the federal and California Constitutions, as well as under California statutory law, a defendant may not be “tried or sentenced while mentally incompetent.” (*People v. Dunkle* (2005) 36 Cal.4th 861, 885, citing § 1367, subd. (a).) A defendant is mentally incompetent “if ‘as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or

to assist counsel in the conduct of a defense in a rational manner.’ “ (*People v. Marks* (2003) 31 Cal.4th 197, 215, quoting § 1367, subd. (a).) Whenever the defendant “presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing.” (*People v. Jones* (1991) 53 Cal.3d 1115, 1152; § 1368, subd. (a).) Once a defendant has been found competent to stand trial, however, “a [subsequent] competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence.” (*People v. Medina* (1995) 11 Cal.4th 694, 734.) “The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard.” (*People v. Ramos* (2004) 34 Cal.4th 494, 507; *People v. Huggins* (2006) 38 Cal.4th 175, 220 [“We apply a deferential standard of review to a trial court's ruling concerning whether another competency hearing must be held”] .) Neither a defense counsel's generic statements that the defendant is unable to assist with his defense nor “bizarre statements and actions” by the defendant are necessarily sufficient evidence to require a renewed competency hearing. (*People v. Marks, supra*, 31 Cal.4th at p. 220; *People v. Jones, supra*, 53 Cal.3d at p. 1153.)

Defendant contends the trial court abused its discretion and violated his constitutional rights by refusing to suspend the proceedings a fourth time for another competency evaluation.² Defendant argues that when his behavior began deteriorating in February 2006, as evidenced by his outbursts in the courtroom and alleged suicide attempts, the court should have suspended the proceedings and ordered another competency evaluation. Based on the record, however, we cannot conclude that the trial judge, who presided over the prior evidentiary hearing on defendant's competency, abused his discretion in finding that defendant's behavior was a calculated attempt to delay the proceedings.

*4 Relying on *United States v. Loyola-Domingues* (9th Cir.1997) 125 F.3d 1315, defendant argues that his suicide attempts “constituted changed circumstances warranting additional judicial reflection.” In that case, the court observed that “[a]n attempted suicide is an extremely serious action” and found that under the circumstances of that case, the suicide attempt gave rise to a doubt as to the defendant's sanity. (*Id.* at pp. 1318-1319.) The

court noted, however, “we do not believe that every suicide attempt inevitably creates a doubt concerning defendant's competency.” (*Ibid.*; see also *People v. Ramos*, *supra*, 34 Cal.4th at p. 509 [“defendant's preference for the death penalty and overall death wish does not alone amount to substantial evidence of incompetence or evidence requiring the court to order an independent psychiatric evaluation”].) Here, it is questionable whether the behavior described by defendant's attorney can be considered a serious suicide attempt. In any event, the trial court was entitled to measure the severity and authenticity of defendant's suicide attempts and other courtroom behavior in light of his experience with the defendant and defendant's prior psychiatric evaluations.

Defendant also contends that the court abused its discretion by failing to explore previously unassessed psychological features involving an organic *brain injury* and *mental retardation*. Defendant has failed to establish, however, that further exploration of these issues was necessary or even properly requested. The psychiatric evidence dating back to 2001 repeatedly references a diagnosis of *schizophrenia*, a potential organic *brain injury* stemming from an accident when defendant was 10 years old, and the likelihood that defendant is moderately mentally retarded. V.L. Sternitzke, one of the psychologists appointed to examine defendant in 2001, indicated that he had conducted a full range picture vocabulary test to assess defendant's intellectual functioning and concluded on the basis of those test results that defendant had the mental age of 5.75 years, putting him below the “use of reason” level. The experts who subsequently examined defendant testified that they considered Sternitzke's findings in evaluating defendant's competency and concluded that he nonetheless was competent to stand trial. The court agreed. Although the trial court did not appoint the director of the regional center for the developmentally disabled to examine defendant following Sternitzke's 2001 report that defendant was mentally retarded, as it was required to do by section 1369, subdivision (a), no harm resulted. Defendant's mental retardation was tested and evaluated by Sternitzke and considered by the other experts and by the court in determining his competence to stand trial. He received a “comprehensive, individualized examination” performed by an appropriate expert consistent with the purpose of section 1369. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1389-1390 [failure to appoint regional director to evaluate defendant was harmless where “the

trial court's competency determination was based on evidence from experts who were familiar with defendant's developmental disability and who considered it in evaluating his competence”].) Putting aside defendant's failure to request further tests for a possible *brain injury* or mental retardation, he has made no showing that additional evaluation was either necessary or could reasonably have been expected to affect the conclusions that were reached concerning his competency to stand trial.

2. Defendant did not receive ineffective assistance of counsel with regard to the entry of his no contest plea.

*5 Defendant pled no contest to second degree murder and admitted that he used a deadly weapon during the commission of the crime. Prior to taking his plea, the court confirmed that his lawyer “went over [the] waiver of rights form” with him and that he understood the rights he was waiving. Defendant stated that he understood his rights and also understood that he was giving up those rights by pleading no contest. The waiver form states with regard to his postconviction placement, “Being fully aware that placement in CDC will be up to CDC alone, the court and DA suggests that due to mental condition Atascadero considered.” Following the entry of his plea, the court advised that it would “refer this matter to [p]robation for their report and recommendation with the understanding that they're going to look into placement in either a mental health setting or [Atascadero]” The prosecutor added, “That's Department of Corrections' decision. What I will do, and I told [defendant's attorney] that, ... in the statement of [views] that I will write, which will detail the facts of the case, et cetera, I think it's appropriate, given the mental health history in this case, that he be evaluated, and we'd have Department of Corrections determine whether it's appropriate to house him at Atascadero, Department of Corrections with mental health treatment or somewhere else.”

Defendant contends that the promises made by the prosecutor and the court to “recommend” or “investigate” placement at Atascadero were illusory and that his attorney was ineffective in failing to so advise him. He argues that under section 2684 and *California Code of Regulations*, title 15, section 3360, the decision to place an inmate at a state mental hospital is vested in the sole discretion of the Department of Corrections and that a recommendation by the prosecutor or judge “carrie[s] no weight.” He also argues that the bargain was illusory

because any placement at a state mental hospital is temporary at best.

Section 2684 provides “(a) If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections ... shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he or she would benefit from care and treatment in a state hospital. If the director of the appropriate department so determines, the superintendent of the hospital shall receive the prisoner and keep him or her until in the opinion of the superintendent the person has been treated to the extent that he or she will not benefit from further care and treatment in the state hospital. [¶] (b) Whenever the Director of Corrections receives a recommendation from the court that a defendant convicted of a violation of Section 646.9 [Stalking] and sentenced to confinement in the state prison would benefit from treatment in a state hospital pursuant to subdivision (a), the director shall consider the recommendation. If appropriate, the director shall certify that the rehabilitation of the defendant may be expedited by treatment in a state hospital and subdivision (a) shall apply.” [California Code of Regulations, title 15, section 3360, subdivision \(b\)](#) provides, “When an inmate is found to require mental health care not available within the[] resources [of the Department of Corrections], but which is available in the Department of Mental Health, the case will be referred to the director for consideration of temporary transfer to that department pursuant to ... section 2684.”

*6 Defendant is correct that the final decision regarding placement rests with the Department of Corrections. However, defendant was fully advised of this fact prior to entering his plea. Contrary to defendant's argument, the court and the prosecutor did not promise to recommend placement at Atascadero. Rather, they promised to recommend to the Department of Corrections that it consider such a placement. The prosecutor fulfilled this promise by including in his statement of views that “it is the position of the People that the Department of Corrections and Rehabilitation should conduct a thorough and careful examination of Mr. West in order to determine the proper housing and treatment,

if any, for the defendant. It is the position of the People that all options for housing, including but not limited to [Atascadero] ... and various other prison facilities be explored, taking into account all appropriate security concerns.”³ Nothing in the provisions cited by defendant suggest that the prosecutor's recommendation for evaluation carries no weight with the Department of Corrections. Finally, the fact that placement is only “temporary,” in that it can last only “until ... the person has been treated to the extent that he or she will not benefit from further care and treatment in the state hospital,” does not render the plea bargain illusory. That defendant would not receive a permanent placement in a state mental hospital irrespective of his continued need for mental health treatment does not remove meaningful content from a promise to recommend consideration for hospitalization for so long as defendant would benefit from treatment.⁴

Defendant also contends the trial court failed to conduct the required inquiry to determine whether there was a factual basis for his plea. He acknowledges that the waiver form he signed states that “[t]he facts upon which this change of plea are based are: [¶] those contained in the preliminary transcript” but suggests that this conclusory statement did not establish a factual basis for the plea. Notably, defendant does not suggest that the facts contained in the preliminary hearing transcript do not support the plea.

“Pursuant to section 1192.5, the trial court is obligated to determine whether there is a factual basis for a plea of guilty or no contest when that plea arises from a negotiated resolution of the charges.” (*People v. Marlin* (2004) 124 Cal.App.4th 559, 571.) “Although section 1192.5 requires the trial court to satisfy itself there is a factual basis for the plea, this can be done by having the defendant describe the conduct or answer questions, by detailing a factual basis, or by having defense counsel stipulate to a particular document such as the transcript of a preliminary hearing as providing a factual basis for a plea. [Citation.] The trial court need not obtain an element-by-element factual basis but need only obtain a prima facie factual basis for the plea. [Citations.] ‘[A] trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea. The trial court's acceptance of the guilty plea, after pursuing an inquiry to satisfy itself that there is a factual basis for the plea, will be reversed only for abuse of discretion.’ “ (*Id.* at

pp. 571-572, quoting *People v. Holmes* (2004) 32 Cal.4th 432, 443.)

*7 In *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1577, the court rejected an argument similar to defendant's in holding that the court's reliance on a stipulation that the factual basis was contained in the police reports, without further inquiry, was sufficient. The court explained, "The stipulation entered by the parties below was not generalized but referred the municipal court, and us, to a particular source of information, namely, police reports. In this respect this case resembles *People v. Enright* (1982) 132 Cal.App.3d 631.... The *Enright* court found no error when the parties stipulated the police reports could be considered as the factual basis for a guilty plea, even though the record did not affirmatively show that the reports were specifically considered by the court. [Citation.] Although we would prefer that the court expressly refer to the specific facts which it finds

sufficiently support the plea, we will not find error simply from the failure to do so, as long as adequate information was before the court and is reflected in the record." (*People v. Wilkerson, supra*, 6 Cal.App.4th at p. 1577.) Likewise, in this case the trial court did not abuse its discretion by relying on the stipulation that the preliminary hearing transcript provided a factual basis for defendant's plea.

DISPOSITION

The judgment is affirmed. The petition is denied.

We concur: **SIGGINS** and **JENKINS**, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2008 WL 3414687

Footnotes

- 1 All statutory references are to the Penal Code unless otherwise indicated.
- 2 The Attorney General contends that this argument is not cognizable on appeal because defendant pled no contest to the charges and did not obtain a certificate of probable cause. Defendant's petition for habeas corpus, however, alleges that he received ineffective assistance of counsel in part because his attorney failed to request a certificate of probable cause. We deem it most expedient to consider defendant's arguments on the merits.
- 3 Section 1203.01 authorizes the district attorney to file "a brief statement of [his or her] views respecting the person convicted or sentenced and the crime committed," which is delivered to the Department of Corrections at the prison or other institution to which the person convicted is delivered.
- 4 Defendant suggests that he "was rushed to make a decision without the usual benefit of a discussion with his conservator/father." His declaration, however, does not support this claim. Defendant writes that prior to the hearing, "I asked to see my father/conservator but Mr. Spieckerman told me he was not present." Later he adds, "When I got into court, I was surprised to see my conservator/father sitting in the back because I was told he was not present." There is no suggestion in the declaration that defendant renewed his request to confer with his father or that such a request would have been futile.

FEBRUARY 3, 2006

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The above-mentioned matter came on regularly this day for FURTHER PROCEEDINGS before Honorable R. MICHAEL SMITH, Judge Presiding of the Superior Court.

THE PEOPLE OF THE STATE OF CALIFORNIA versus
MACK A. WEST.

CHRIS PEDERSEN, Esq., Deputy District Attorney,
675 Texas Street, 4th Floor, Suite 4500, Fairfield,
California, 94533, appeared as counsel for and on behalf
of the People.

WILLIAM PENDERGAST, Esq., Law Office of William Pendergast, 922 Tennessee Street, Vallejo, California, 94590, appeared as counsel for and on behalf of the Defendant, MACK A WEST.

CHRISTINE ANN WARDEN, CSR, Official Court Reporter,
was present and acting.

The following proceedings were had and taken, to wit:

— — o o — —

P R O C E E D I N G S

— 00 —

THE COURT: Okay, I will call the case of People
versus West.

Mr. West is not in the courtroom, but I sure can hear him.

THE DEFENDANT: Motherfucker.

THE COURT: Have you had a chance to talk to him

1 any further?

2 MR. PENDERGAST: Your Honor, I had a chance to let
3 him know that he was invited into the courtroom if he
4 wished to. He did not respond to me in any way, so I
5 don't have any indication from him.

6 I also told him if he did not abide by the court
7 rules and remain quiet and stay in his seat he would be
8 removed. He had no response to me.

9 THE COURT: Right now he is in the holding cell
10 area adjacent to the courtroom so he can readily be heard
11 here in the courtroom, despite the security door and
12 walls, screaming profanities. So I am going to come to
13 the conclusion that if we were to bring him in the
14 courtroom there would be a physical confrontation, or at
15 the very least, further outbursts which he has manifested
16 even though he is not in the courtroom, and from where he
17 is right now his rantings are interrupting the court
18 process.

19 I will order that he be taken away from the
20 courtroom vicinity so we can't hear him. If at any time
21 today, Mr. Pendergast, you feel the need to confer with
22 him let me know.

23 THE DEFENDANT: Go to hell. You go to hell. You
24 going to hell. You going to hell, motherfucker. I seen
25 you on Channel 3. You going to hell motherfucker. I seen
26 you and your kids on Channel 3. You all go to hell.
27 Yeah, yeah. Yeah, I know. Yeah, motherfucker.

28 LUTIENTANT HEADLY: Sir, I'm sorry. I don't see you

1 often enough.

2 THE COURT: With respect to this matter, then, if
3 we are set to commence jury selection on Monday. It is my
4 understanding after a brief conversation with counsel
5 there may be a problem going forward on Monday and in fact
6 Mr. Pendergast has filed a motion to continue, correct?

7 MR. PENDERGAST: That's correct, Your Honor.

8 THE COURT: And that is based upon some discovery
9 of a new witness and some new evidence that might be
10 critical to one side or the other?

11 MR. PENDERGAST: That's correct, Your Honor. And
12 based on that I would like the opportunity to have
13 additional time to review that material, check whether or
14 not that will need additional investigation, and I need
15 additional time to review that and confer with my client
16 as well.

17 THE COURT: Any comment, Mr. Pedersen?

18 MR. PEDERSEN: No, Your Honor. We have discussed
19 this informally and I understand the nature of the request
20 and concur.

21 THE COURT: Okay. Based upon the agreement that
22 this new evidence is significant, there will be a granting
23 of the motion to continue. I will vacate Monday's trial
24 commencement date, and I will put the matter over -- I
25 think in our informal discussion it was suggested
26 somewhere around 10 days to two weeks would be good?

27 MR. PENDERGAST: Yes, thank you.

28 MR. PETERSEN: That would be helpful, Your Honor,

1 but my only concern is looking at the trial schedule and
2 the court's schedule I would be hopeful that if it can be
3 done we can start before the Court leaves some time in
4 March, and because I do have out-of-state witnesses, I may
5 need a little more time. Is it possible we can go over a
6 week from today and if Mr. Pendergast needs more time he
7 can let us know and we can put it over?

8 MR. PENDGERGAST: I think this Friday the 10th I
9 should be available, and if that ought not to be the case,
10 I will notify the Court and counsel as soon as I can.

11 THE COURT: We will put the matter over to the 10th
12 of February. Do you want to do it in the afternoon?

13 MR. PENDERGAST: Morning or afternoon, that's fine.

14 THE COURT: I am just thinking that I have a
15 morning calendar. Judge Harrison has a morning calendar.

16 Okay, why don't I schedule it for 1:30 and that way
17 we will be sure to have a courtroom available to you so we
18 can provide sufficient security to deal with the
19 situation.

20 MR. PENDERGAST: That's fine.

21 MR. PETERSEN: Would that be in this courtroom?

22 THE COURT: Unless you hear differently it will be
23 in this courtroom. Hopefully Judge Harrison can make it
24 available on the 10th of February, 1:30, in this
25 department, in this courtroom, for setting of trial.

26 MR. PENDERGAST: I have one other motion that I
27 would like to make if the Court will allow me to address
28 it now?

1 THE COURT: Sure.

2 MR. PENDERGAST: I received information from the
3 correctional officers at the jail that earlier this week
4 Mr. West made a suicide -- well, perhaps a suicide
5 attempt. He was indicating to the jail staff he believed
6 there was gas of some sort in his cell. When they opened
7 his cell he ran out of his cell and fashioned a sheet into
8 a noose and ran down and then back up and wasn't able to
9 use the noose in any fashion before the jail staff were
10 able to get him back under control and back into his cell.

11 Subsequent to that I learned from additional jail
12 staff that Mr. West attempted to slit his wrists. I saw
13 him today and attempted to discuss this with him, and he
14 did not discuss anything with me. He was nonresponsive to
15 all the questions, but I was able to observe on him that
16 he was bandaged up the length of his arm and I could see
17 there was blood on the bandages and blood at the margin of
18 where the bandage covered.

19 Obviously, Your Honor, there has been a history of
20 1368 requests by the defense in this case, and this will
21 be the first such one raised by me, but Mr. West has
22 exhibited behavior that in the past, while I have been his
23 attorney that in many other cases might be cause for me to
24 request a 1368 motion, but based on my review of past such
25 motions and doctor's evaluations I felt it was essentially
26 more of the same and not a change in circumstances
27 warranting additional evaluations, but my review of those
28 prior evaluations indicate that none of them addressed

1 suicide attempts. And now this week it appears we have
2 two suicide attempts, although, both were ineffectual and
3 Mr. West, although -- well, although Mr. West's demeanor
4 towards me is that in fact he will not communicate with me
5 at all, that is something new that has just occurred
6 today, and based upon those two -- those factors I have
7 elicited here, Your Honor, I would express a doubt as to
8 his competence.

9 THE COURT: Any comments from the People?

10 MR. PETERSEN: Briefly, Your Honor. This is, I
11 would suggest, more of the same. I think we know from the
12 history of Mr. West his primary concern has been delaying
13 the trial.

14 His comment on January -- or January 6th when he
15 was in the booth was he was compliant and quiet for some
16 time. I believe it with almost half an hour, and he
17 finally began to immediately outburst when the Court
18 confirmed the trial date, and it's been pretty consistent
19 all along. The information we have is he is certainly
20 trying to delay the trial as the week comes -- before the
21 trial comes, so it is no surprise that he would do this.

22 In addition it would be, I believe, ineffectual to
23 refer him to have a psychiatrist or psychologist interview
24 him because he has made it clear he is not going to talk
25 to anyone. So I don't see that there would be any point
26 in doing that, and it is just suspect in this criminal
27 proceeding. My suggestion is we put the consideration --
28 if Mr. West -- Pendergast believes there is further

1 evidence that the Court needs to review until next week,
2 unless the Court wishes to rule now, and if the Court
3 wishes to rule on it now, I just think it's pretty clear
4 this is just more of the same.

5 THE COURT: Submitted?

6 MR. PENDERGAST: Submitted, Your Honor.

7 THE COURT: This Court does have some historical
8 knowledge of this case as it has progressed. I have been
9 involved for about a year and a half now plus, and that
10 includes evidentiary hearings on whether or not he was
11 malingering when it was claimed he was incompetent to
12 stand trial.

13 The mental health professionals concluded he was
14 malingering and I came to the same conclusion. It's my
15 opinion that his behavior over the last week is just more
16 of the same feigning mental incompetency for purposes of
17 delaying the proceedings.

18 I do not find anything of substance has changed,
19 other than implementing Plan B and C to try and delay this
20 trial. So I would conclude that, notwithstanding
21 counsel's good-faith statement that you have a doubt as to
22 his competency, given all things, there is an insufficient
23 change of circumstances from when this Court last
24 concluded he was competent to stand trial to justify
25 suspending criminal proceedings.

26 So the request to have the criminal proceedings
27 suspended pursuant to Penal Code Section 1368 is denied
28 for the reasons stated.

1 We will confirm, then, next Friday at 1:30 and in
2 this department, February 10th, okay?

3 MR. PETERSEN: Thank you, Your Honor.

4 MR. PENDERGAST: Thank you, Your Honor.

5 THE COURT: Okay.

6 (Whereupon, the proceedings were adjourned).
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SUPREME COURT OF THE UNITED STATES

MACK WEST, JR.	)	
	)	NO. _____
Petitioner,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
RANDY GROUNDS,	)	
Warden	)	
	)	
Respondent.	)	
_____	)	

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Berkeley, California and addressed to:

Mr. Mack West, Jr.,
F-60029
CSP - Los Angeles County
PO BOX 8457
Lancaster, CA 93539-8457
PETITIONER

Attn: Mr. Rene Chacon
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
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RESPONDENT

Dated: _____, 2018.

Stephanie M. Adraktas
Attorney for Petitioner