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See Concurring and Dissenting Opinion

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JORGE DELGADILLO, Defendant and Appellant.	E034767 (Super.Ct.No. FVA015338) OPINION
In re JORGE DELGADILLO, on Habeas Corpus.	E037122 (Super.Ct.No. FVA015338)

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. Affirmed.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Barry L. Plotkin, Judge. Petition denied.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of section Nos. 1, 2, 4, 5 and 6.

Jill D. Lansing, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, Angela M. Borzachillo and Lynn McGuinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jorge Delgadillo appeals from the judgment entered following jury convictions for manufacturing methamphetamine (count 1), possessing analogs with the intent to manufacture methamphetamine (count 2), and possessing methamphetamine for sale (count 3). (Health & Saf. Code, §§ 11379.6, subd. (a), 11383, subd. (c)(1), 11378.) The jury further found true the allegation in connection with count 1 that defendant was personally armed with a firearm. (Pen. Code, § 12022, subd. (c).)[1] As to count 3, the jury found true the allegation that defendant possessed over one kilogram of methamphetamine. (Health & Saf. Code, § 11370.4, subd. (b)(1).)

Defendant raises various claims of error in this appeal. In the published portion of this opinion, we address and reject defendant's challenge to the sufficiency of the evidence in support of the jury's true finding on the section 12022, subdivision (c) enhancement for being personally armed with a firearm. In the unpublished portion, we address defendant's remaining claims of error, all of which we conclude are meritless. In

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

a related habeas corpus petition, which we also address in the unpublished part of the opinion, defendant alleges he was denied effective assistance of counsel. We conclude defendant has failed to make the required prima facie showing. Therefore, we will affirm the judgment and deny the petition for writ of habeas corpus.

FACTS

During the morning of June 19, 2001, Detectives Parsons and Duarte of the San Bernardino County Sheriff's Department conducted surveillance of defendant's Los Cedros Avenue residence after receiving a tip of drug activity at that location. At 11:20 a.m. the detectives watched as Jorge Arias parked a green Pontiac in front of defendant's house. Arias then went inside the house, and after about 30 minutes, drove away in defendant's Chrysler Sebring. The deputies then observed defendant enter the Pontiac, remove a small package, and go back inside his house.

Detective Duarte saw defendant drive away from the house in a truck at around 5:00 p.m. Duarte followed and stopped defendant on the freeway and advised him that he had search warrants for the truck and defendant's house. In attempting to search the truck, Detective Duarte discovered that the cover over the truck bed was locked. When he asked defendant for the key, defendant said he did not have one. Despite defendant's claim, Duarte found the key in the glove box and unlocked the cover. In the truck bed, under the cover, the detective found a new 22-liter glass flask and a new heating mantle. Duarte then returned with defendant to his house on Los Cedros.

The search of that house netted two handguns, which were found in the headboard of defendant's bed, a shotgun found in the bedroom closet, approximately $40,000 in cash, two electronic scales, a small amount of methamphetamine, an Edison bill for the Los Cedros address in Arias's name, and a collection agency bill in the name of defendant's wife but with the mailing address of Arias's house on Pacific Street. The deputies also recovered a security surveillance camera from the master bedroom. The camera had been focused on defendant's driveway. From the trunk of the Pontiac that Arias had parked in front of defendant's house, deputies recovered 129 bottles of 1,000-count pseudoephedrine pills.

Meanwhile, Officer Beebee had followed Arias as he drove in defendant's Sebring from defendant's house on Los Cedros Avenue to Arias's house on Pacific Street. In a search of Arias's house, deputies found, among other things, a press that is used to manufacture methamphetamine, two bottles of pseudoephedrine and four bags of methamphetamine, two of which were found in the freezer and were finished product. The other two were buried in the backyard under a doghouse and contained methamphetamine that was still wet. In the backyard deputies also found a new metal pot and propane burners, equipment commonly used in the manufacture of methamphetamine. Detective Beebee also found a telephone number that led them to Edgar Mercado's residence on Norman Road.

Deputies arrived at the Norman Road residence at 11:30 p.m. on June 19th. In a search of that location, which Detective Hilfer videotaped, deputies found numerous

items including a burner connected to a five-gallon propane pump with a metal basin, three five-gallon buckets, five or six cases of empty pseudoephedrine bottles, 11 empty one-gallon containers of denatured alcohol, plastic tubing, scales, a coffee grinder that contained white residue, and a cutting agent. The deputies also found "lab trash" -- old bed sheets that had been used to strain the liquid that contains ephedrine from the binder. According to an expert witness, separating the ephedrine from the binder in pseudoephedrine pills is the first step in the process of manufacturing methamphetamine.

DISCUSSION

1.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT DRUG MANUFACTURING CONVICTION

Defendant contends the evidence was insufficient to support the jury's verdict finding him guilty of manufacturing methamphetamine in violation of Health and Safety Code section 11379.6, as alleged in count 1. Specifically, he claims there was no evidence to connect him with the residence on Norman Road where the methamphetamine lab was located because the only evidence on that point was improperly admitted. In a separate but related claim, defendant contends his attorney should have objected to that improperly admitted evidence and that counsel's failure to do so resulted in ineffective representation. More particularly, defendant contends trial counsel should have objected on the basis of hearsay to the testimony of Deputy Beebee that information from Arias and a phone number found in Arias's home led the deputies

to the house on Norman Road. Defendant also claims that counsel should have asserted relevance objections to evidence explaining why the officers went to the house on Norman Road and to Detective Hilfer's narration on the videotape of the search of that residence. Defendant also complains that defense counsel should have objected when the criminalist, Dennis Key, testified about the items seized at the Pacific Street and Norman Road locations. That evidence, defendant argues, is the evidence that links him to the lab at Norman Road and therefore defense counsel's failure to object to it constituted ineffective assistance of counsel. We conclude, for reasons we now explain, that even absent the evidence defendant contends was inadmissible, there was sufficient evidence connecting him to the lab and to the manufacture of methamphetamine.

We begin our discussion with the well-settled principle that, "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Hill* (1998) 17 Cal.4th 800, 848-849.) In applying this standard of review to a conviction based primarily on circumstantial evidence, we uphold the jury's verdict if reasonably justified by the circumstances, even if a contrary finding might also

reasonably be reconciled with the circumstances. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

There was significant evidence in this case connecting defendant and Arias, including an Edison bill addressed to Arias at defendant's address, and a collection agency bill addressed to defendant's wife at Arias's address. As set out above, Arias parked his Pontiac in front of defendant's house, entered defendant's home, and about 30 minutes later drove off in defendant's car. Defendant, also as set out above, removed a package from the Pontiac after Arias drove off in defendant's car. The Pontiac contained 129 bottles of 1000-count pseudoephedrine. Identical bottles of pseudoephedrine were found at the Norman Road address. According to expert testimony, that quantity of pseudoephedrine would produce as much as 16 pounds of methamphetamine and methamphetamine sells for $4,000 to $10,000 per pound.

The evidence also connected Arias to the Norman Road methamphetamine lab in that finished product was found in Arias's freezer and buried in his backyard. Items of equipment used to manufacture methamphetamine were also found in Arias's backyard and in his garage were two bottles of pseudoephedrine identical to those found in Arias's Pontiac and at the Norman Road lab. The police discovered the Norman Road lab by finding Mercado's phone number on a cell phone at Arias's house and among other items in Arias's home.

The evidence also connected the activities of defendant, Arias and Mercado to the manufacture, possession and sale of methamphetamine. In particular, Detective Parsons

explained, "Generally the person that facilitates, organizes, finances, does the accounting portion of it, that is usually a separate location. They don't want any of the drug connected because it keeps the money safe. That's where you'll find one house generally with the money, one house with the drug, one house with the lab, because they don't want the lab connected with the finished product. Because if the finished product gets busted, they still have the lab. If the lab gets busted, they still have the finished product. They don't want anything connected with the money house because they don't want to lose their money."

From the above-noted evidence, a jury could reasonably infer that the $40,000 found in defendant's home were the proceeds of the drug manufacturing operation conducted at Mercado's house on Norman Road and that the glass flask and heating mantle found in the truck defendant was driving were to be used in the manufacturing operation. In short, the evidence connects defendant, Arias and Mercado to each other and also connects their activities to the manufacture, possession and sale of methamphetamine. Consequently, we must reject defendant's challenge to the sufficiency of the evidence to support his conviction on count 1.

Because the evidence about which defendant complains would not have compelled a different result, we must also reject defendant's ineffective assistance of counsel claim. Assuming without actually deciding that defense counsel should have objected to the evidence, as defendant claims, counsel's oversight was not prejudicial because other properly admitted evidence supports defendant's conviction for manufacturing

methamphetamine. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Majors* (1998) 18 Cal.4th 385, 403.)

2.

INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to the complaints recounted above, defendant contends that he was denied the effective assistance of counsel because his attorney did not object when Detective Duarte testified that defendant had purchased the guns found in his bedroom on the street and therefore it was obvious the guns were stolen. Defendant contends this testimony was inadmissible character evidence under Evidence Code section 1101, subdivision (a), since it referred to instances of uncharged misconduct that were irrelevant and prejudicial. Defendant asserts the testimony was prejudicial because the prosecutor used the evidence to show that defendant had a propensity for violating the law by knowingly purchasing stolen guns.

To establish constitutionally ineffective representation, defendant must show not only counsel's deficient performance, but also prejudice--i.e., a reasonable probability that a more favorable outcome would have resulted absent counsel's failings. (*People v. Lucero* (2000) 23 Cal.4th 692, 728; *Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) We need not determine the performance component--although "a mere failure to object to evidence or argument seldom establishes counsel's incompetence" (*People v. Ghent* (1987) 43 Cal.3d 739, 772)--because it is easier to dispose of defendant's claim on the ground of lack of sufficient prejudice. (See *Strickland v. Washington*, *supra*, 466 U.S. at

p. 697 [“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed”].)

Here, even if defense counsel had objected to the evidence, a more favorable outcome would not have resulted. There is overwhelming evidence that defendant violated the law in other ways, including possessing methamphetamine, transporting methamphetamine manufacturing equipment, and facilitating the manufacture and sale of methamphetamine. It is not likely that exclusion of Officer Duarte’s testimony indicating defendant knowingly purchased stolen guns would have made any difference in the trial outcome.

3.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT SECTION 12022, SUBDIVISION (C) ENHANCEMENT

Defendant contends there was insufficient evidence to support the section 12022, subdivision (c) enhancement alleging that he was personally armed with a firearm during the commission of the crime of manufacturing methamphetamine because he was not in possession of the guns when he was detained and there was no evidence he was ever armed while at the Norman Road methamphetamine lab. We disagree.

Resolution of this issue is controlled by *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), which holds, in pertinent part, that the crime of drug possession is “a ‘continuing’ offense, one that extends through time. Thus, throughout the entire time the defendant asserts dominion and control over illegal drugs, the defendant is criminally

liable for the drug possession. [Citations.] And when, at any time during the commission of the felony drug possession, the defendant can resort to a firearm to further that offense, the defendant satisfies the statutory language of being 'armed with a firearm in the commission . . . of a felony.' [Citation.]" (*Id.* at p. 999.)

Bland involved the general enhancement under subdivision (a) of section 12022, which applies when a defendant is armed with a firearm during the commission of a felony, whereas this case involves the subdivision (c) enhancement that applies when the defendant is personally armed with a firearm during the commission of specified drug crimes, including the crime of manufacturing methamphetamine in violation of Health and Safety Code section 11379.6. (See § 12022, subd. (c).) The difference, however, is irrelevant. The issue here as in *Bland* is what constitutes being armed during the commission of a crime. The term "armed" has been interpreted identically under both subdivision (a) and subdivision (c) of section 12022. According to the Supreme Court "to be 'armed' for purposes of section 12022's additional penalties, the defendant need only have a weapon available for use to further the commission of the underlying felony." (*Bland*, *supra*, 10 Cal.4th at p. 999.)

In this case, application of the section 12022 armed enhancement depends not only on when but also on where the crime occurred, and therefore turns on what constitutes manufacturing methamphetamine. Is the crime limited to the specific event of cooking the drug or does it extend to the entire process by which the drug is manufactured? As Detective Parsons testified at trial, in sophisticated operations, the crime of

manufacturing methamphetamine is a process that occurs in phases and extends to more than one location in order to reduce the potential for being detected and to protect the various components from being seized by the police or stolen by others. Consequently, in such an operation the cash is kept at one location, the lab is set up at another, and the finished product is stored at yet a third site. This case illustrates that process. According to the evidence presented at trial, raw material (129 bottles of 1,000-count pseudoephedrine pills) and items of lab equipment were kept in the trunks of vehicles parked in front of defendant's house. The lab itself was at the Mercado residence. More equipment along with finished product were stored in the freezer and buried in the backyard at Arias's home. The cash proceeds, along with firearms, were kept at defendant's home, which brings the methamphetamine manufacturing operation full circle, thereby connecting not only the participants, but also the locations.

Like the crime of drug possession at issue in *Bland*, we are of the view that the crime of manufacturing methamphetamine is a continuing crime in that it extends through time and is not limited to a discrete event. Methamphetamine manufacturing in this case occurred both over time and at various locations. Because the firearms were in defendant's bedroom along with a significant sum of money, and in close proximity to cars in which defendant and his colleagues stored lab equipment and raw material, those firearms were available to defendant to use offensively or defensively at any time during the manufacturing process. Thus, the evidence was sufficient to support the jury's true finding on the section 12022, subdivision (c) armed enhancement.

4.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT CONVICTIONS FOR POSSESSING ANALOGS AND POSSESSING METHAMPHETAMINE FOR SALE

Defendant contends there was insufficient evidence to support his convictions for possession of analogs with intent to manufacture methamphetamine (count 2) and possession of methamphetamine for sale (count 3). Defendant argues there was no evidence he had either actual or constructive possession of the drugs found in the freezer and buried in the backyard at Arias's home. Nor was there evidence to connect him with the 129 bottles of pseudoephedrine found in the trunk of Arias's car. He claims there was no evidence to show defendant had access to Arias's home or the trunk of Arias's car. We disagree.

According to the testimony presented at trial and recounted above, defendant entered Arias's car when that vehicle was parked in front of defendant's house. The evidence also showed that the car had an opening from the passenger compartment into the trunk of the vehicle and that when defendant left the car, he had a small package in his hands. Defendant also admitted to one of the deputies that he knew the bottles of pseudoephedrine were in the trunk of Arias's Pontiac. That evidence, combined with the quantity of pseudoephedrine in the trunk of the Pontiac support a reasonable inference that defendant possessed the pseudoephedrine with the intent to manufacture methamphetamine and thereby committed the crime alleged in count 2.

Similarly, there is sufficient evidence to show defendant constructively possessed the methamphetamine found at Arias's home and thereby committed the crime alleged in count 3. The evidence recounted above shows that defendant, Arias, and Mercado were connected with each other and were each involved in an aspect of manufacturing and selling methamphetamine. From the previously recounted expert testimony tying the money found at defendant's house with the drug manufacturing operation at Mercado's house, the jury could reasonably infer that the methamphetamine found at Arias's home was the product of that operation and as such was in the actual or constructive possession of each of the participants in the operation. Accordingly, we conclude the evidence was sufficient to support defendant's conviction for possessing methamphetamine for sale as alleged in count 3.

5.

SENTENCING CLAIMS

The trial court sentenced defendant to a total term of 12 years in prison comprised of the upper term of seven years on count 1 and a consecutive upper term of five years on the related section 12022, subdivision (c) enhancement for being personally armed with a firearm during the commission of that crime. The trial court cited section 654 and stayed execution of the four-year midterm sentence imposed on count 2. On count 3, the trial court imposed a concurrent two-year midterm sentence and a three-year quantity enhancement.

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), defendant

contends that by imposing upper-term sentences on count 1 and on the related firearm enhancement, the trial court violated his right under the Sixth Amendment of the United States Constitution to have a jury decide all questions of fact. Our state Supreme Court held recently in *People v. Black* (2005) 35 Cal.4th 1238 that California's determinate sentencing scheme does not run afoul of *Blakely*. Therefore, we reject defendant's claims in this appeal.

Defendant also contends, citing section 654, that the trial court should have stayed execution of the sentence imposed on count 3, his conviction for possession of methamphetamine for sale. We disagree.

Section 654 prohibits multiple punishment for a single criminal act or an indivisible course of criminal conduct. (*People v. Deloza* (1998) 18 Cal.4th 585; *People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.) Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) On the other hand, "'"[i]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." [Citation.]' [Citations.]" (*People v. Centers* (1999) 73 Cal.App.4th 84, 98; see also *In re Adams* (1975) 14 Cal.3d 629, 634.)

We apply the substantial evidence standard of review: "Whether appellants maintained multiple criminal objectives is determined under all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." (*People v. Goodall* (1982) 131 Cal.App.3d 129, 148 (*Goodall*); see also *People v. Monarrez, supra,* 66 Cal.App.4th at p. 713.)

In sentencing defendant on count 2, and citing section 654 to support the decision to stay execution of that sentence, the trial court stated that the "offense is necessarily instrumental to the intent to commit the offense of manufacturing." In imposing the concurrent sentence on count 3, defendant's conviction for manufacturing methamphetamine for sale, the court stated "it was apparently one continuing ongoing manufacturing process that resulted in the finished product being produced."

Defendant argues that execution of the sentence imposed on count 3 should have been stayed under section 654 because defendant's actions and thus his criminal conduct occurred in the course of a single indivisible course of conduct and with the single intent to manufacture methamphetamine for sale.

Giving deference to the sentence and construing the trial court's stated findings most favorably to upholding the sentence, we conclude there was no sentencing error. Since the court imposed but did not stay the concurrent sentence on count 3, it must be assumed, absent an express contrary finding, the trial court found that defendant and his cohorts had separate criminal objectives when they manufactured the methamphetamine

and when they possessed the drug for sale. Therefore, we must consider whether the court's statement to support the concurrent sentencing choice on count 3 also required the trial court to stay execution of that sentence. We conclude it did not. First, the trial court stayed the sentence on count 2 based on the finding that the "offense is necessarily instrumental to the intent to commit the offense of manufacturing and, therefore, a consecutive sentence is barred by the [*sic*] section 654." The trial court made no such finding as to count 3 and therefore we must assume the court found the crimes of manufacturing methamphetamine (count 1) and of possessing methamphetamine for sale (count 3) were not subject to section 654 in that they were not part of an indivisible course of conduct or committed pursuant to a single criminal objective.

Second, the court's finding that the crime of possessing methamphetamine for sale was incidental to the crime of manufacturing that drug for sale was made in the context of deciding whether to impose a consecutive or concurrent sentence under California Rules of Court, rule 4.425. Such a finding is not inconsistent with a finding that, although the offenses arose from a single operation, the defendant held separate objectives in manufacturing and possessing methamphetamine for sale. Both offenses were part of a single illicit enterprise for purposes of imposing a concurrent sentence, but involved separate objectives for purposes of section 654.

This is consistent with *Goodall*, *supra*, 131 Cal.App.3d 129, in which the defendants were sentenced separately for possession for sale of PCP, possession of analogs, and manufacture of PCP for sale. In *Goodall*, the defendants were convicted of

(1) possessing certain chemicals with intent to manufacture PCP, (2) manufacturing the drug, and (3) possessing PCP for sale. Officers caught the defendants manufacturing PCP at an apartment where chemicals used to manufacture PCP were also found. The officers also found large quantities of PCP.

The *Goodall* court held that section 654 did not bar punishment on all three counts. The court explained: "The manufacturing and selling elements in this process clearly involve separate objectives. It would not be proper to subsume the manufacturing into the selling as merely incidental to a single objective of selling the ultimate product for profit. [Citation.] The two counts involving manufacturing PCP and possessing piperidine and cyclohexanone may also be separately punished by analogy to the drug seller cases, in circumstances where the court could reasonably conclude that the remaining inventory of chemicals is possessed with intent to manufacture more PCP. . . . Had the trial court found that the manufacturing and possession counts were part of an indivisible course of conduct with a single objective, that determination could likewise be upheld. But we cannot say there is no substantial evidence to support the trial court's contrary finding here." (*Goodall*, *supra*, 131 Cal.App.3d at pp. 147-148; see also *People v. Monarrez*, *supra*, 66 Cal.App.4th at p. 713.)

In the instant case, the large sums of cash found in defendant's home indicated defendant had previously sold methamphetamine. The pseudoephedrine in Arias's car and the laboratory at Mercado's house support an inference that defendant and his associates were currently manufacturing methamphetamine to sell. And the large

quantities of methamphetamine found at the Pacific Street residence established defendant intended to continue to sell methamphetamine. This evidence supports the trial court's implied finding that defendant's intent in manufacturing methamphetamine was separate from his intent to possess that drug for sale.

Relying on *Goodall*, the People argue that the trial court erred in staying the sentence on count 2, possession of analogs with intent to manufacture methamphetamine. The trial court stayed that sentence based on the finding that the possession of analogs was incidental to the manufacture of methamphetamine and that the two crimes had a single objective and were part of an indivisible course of conduct. We conclude there is sufficient evidence to support this finding as well. Ephedrine, which is extracted from pseudoephedrine, is an essential component in methamphetamine. The quantity of pseudoephedrine found in the trunk of the Pontiac, and thus in defendant's possession, had no obvious use apart from its function in the production of methamphetamine. Therefore the evidence supports a reasonable inference that defendant possessed 129,000 tablets of pseudoephedrine with the intent to manufacture methamphetamine and with that single objective.

Because the trial court's findings are supported by substantial evidence, we must defer to those findings. Accordingly we reject the challenges asserted by defendant and the People under section 654 and hold that the trial court properly stayed execution of defendant's sentence on count 2 and properly imposed a concurrent sentence on count 3.

6.

HABEAS CORPUS PETIION

When a defendant files a habeas corpus petition in a reviewing court, “a court must first determine whether the petition states a prima facie case for relief--that is, whether it states facts that, if true, entitle the petitioner to relief--and also whether the stated claims are for any reason procedurally barred.” (*People v. Romero* (1994) 8 Cal.4th 728, 737.)

Defendant alleges in his petition that his trial attorney provided ineffective assistance of counsel because counsel did not object (1) to hearsay testimony by Deputy Duarte connecting defendant to the methamphetamine lab, and (2) to irrelevant hearsay evidence that defendant knew the guns in his possession were stolen. Defendant further alleges that his attorney should have requested curative instructions or admonitions concerning the inadmissible evidence and failed to object to the prosecutor’s closing argument exploiting the improper evidence.

In support of defendant’s petition are letters from his attorney stating that he did not object to the gun evidence for tactical reasons. Counsel believed the evidence was not harmful because defendant was not charged with possession of stolen guns and it bolstered defendant’s credibility by showing that, when he spoke to Deputy Duarte, he was honest. As to the other evidence tying defendant to the methamphetamine lab, defense counsel stated he could not recall the testimony or his thoughts concerning it.

As previously discussed, to prevail on a claim of ineffective assistance of counsel, defendant must "demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington*, *supra*, 466 U.S. 668.)

A reviewing court generally defers to the tactical decisions of trial counsel. Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) "'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1243, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 689.)

Defense counsel provided a reasonable tactical explanation for not objecting to the gun evidence. "Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to

object seldom establishes counsel's incompetence." (*People v. Hayes* (1990) 52 Cal.3d 577, 621.)

In addition, as we concluded in addressing the same issue raised in defendant's appeal, admission of Deputy Duarte's testimony regarding the guns was not prejudicial. Even if defense counsel had objected to the evidence, it is not reasonably probable the trial outcome would have been any different due to the overwhelming evidence of defendant's involvement in the methamphetamine manufacturing operation. (*People v. Lucero*, *supra*, 23 Cal.4th at p. 728; *People v. Williams* (1997) 16 Cal.4th 153, 215.)

Although trial counsel could not recall the testimony and therefore could not offer a tactical explanation for not objecting to the hearsay evidence linking defendant to the methamphetamine lab, that oversight, even if error, was not prejudicial. Assuming that counsel's representation fell below an objective standard of reasonableness, there was ample evidence, apart from the hearsay evidence, linking defendant to the methamphetamine lab. As a consequence, it is not reasonably probable that, had the evidence been excluded, defendant would have received a more favorable result. (*People v. Lucero*, *supra*, 23 Cal.4th at p. 728; *People v. Williams*, *supra*, 16 Cal.4th at p. 215.)

Accordingly, defendant has failed to establish a prima facie basis for relief and therefore we must deny his habeas corpus petition.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

CERTIFIED FOR PARTIAL PUBLICATION

/s/ McKinster
Acting P.J.

I concur:

/s/ Richli
J.

[People v. Delgadillo – E034767]

GAUT, J., Concurring and Dissenting:

I concur in the majority's opinion on all of the issues raised with the exception of its conclusion there was sufficient evidence to support the section 12022, subdivision (c) enhancement alleging defendant was personally armed with a firearm during the commission of the crime of manufacturing methamphetamine.

Defendant was convicted of manufacturing methamphetamine, possessing analogs with the intent to manufacture methamphetamine, and possessing methamphetamine for sale. He was also found guilty of being personally armed with a firearm in connection with manufacturing methamphetamine. (§ 12022, subd. (c).) It is this latter conclusion with which I disagree.

The evidence to support the personal armed allegation in connection with the manufacture of a controlled substance, in this case methamphetamine, was based upon the sheriff's office search of defendant's bedroom where it found two handguns located in the headboard of defendant's bed and a shotgun in his bedroom closet. During that search the sheriff's officer also found $40,000 in cash, electronic scales, some methamphetamine, and pseudoephedrine pills in a car parked in the front of defendant's house. There was no evidence defendant had ever been to the Norman Road methamphetamine lab or had personally participated in the actual manufacture of methamphetamine.

The majority relies exclusively on *People v. Bland* (1995) 10 Cal.4th 991 to support its position. *Bland* simply does not apply. In *Bland,* the California Supreme Court affirmed defendant's conviction for possession of cocaine in his house with an enhancement under section 12022, subdivision (a)(2) for possessing an assault weapon in the house, even though the gun was unloaded and even though defendant was in a police car outside his home when the drugs and weapon were found. The court concluded the firearm must be "available to the defendant to use in furtherance of the underlying felony." (*Id.* at p. 998.)

The *Bland* court found that section 12022, subdivision (a) was violated when the defendant could resort to use of a firearm to further the felony drug possession; it was immaterial that defendant was not present when the police seized his assault rifle as long as it was ". . . available for use in furtherance of the drug offense at any time during his possession of the drugs." (*Id.* at p. 1000.) The court concluded that ". . . contemporaneous possession of illegal drugs and a firearm will satisfy the statutory requirement of being 'armed with a firearm in the commission' of felony drug possession only if the evidence shows a nexus or link between the firearm and the drugs." (*Id.* at p. 1002.)

The *Bland* court found that keeping the illegal drugs with a firearm in close proximity created a risk of injury or death if used to protect against theft of the drugs. That conclusion has no applicability to the case here. There is no evidence that the defendant's guns were available to further the manufacture of

methamphetamine or that there was any nexus between the firearms and the manufacture of methamphetamine. The guns may well have been available to preclude the theft of the methamphetamine or money defendant possessed in his house, but there is no evidence of a nexus between the guns and the manufacture of methamphetamine.

The majority relies upon the contention that the "manufacture" of methamphetamine is a continuing crime unlimited by a discrete event or location. Hence the availability of firearms at defendant's house could be available at any time during the manufacturing process. Following that line of reasoning the manufacturing could occur in Chicago and a firearm located in Southern California would satisfy section 12022, subdivision (c) so long as the Southern California defendant periodically sent money to Chicago to be used to further the manufacturing process.

In this case the People have not established defendant was ever at the lab or that he was at the lab with the guns and thus they have therefore not satisfied the ". . . underlying intent of the Legislature . . . to deter persons from creating *a potential for death or injury resulting from the very presence of a firearm at the scene of the crime.*" (*People v. Garcia* (1986) 183 Cal.App.3d 335, 350 (emphasis original).) The purpose of section 12022, subdivision (c) is to require "proof the defendant personally had a firearm 'at the ready.'" (*People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1663).

In *People v. Jackson* (1995) 32 Cal.App.4th 411, 421, the defendant's gun was in a car a substantial distance away from where the defendant committed various sexual offenses. The court concluded: "Evidence a gun was in a car two blocks away from where the crimes occurred is insufficient evidence of the presence of a firearm 'at the scene of the crime' (*Reaves*). Nor from this distance of two blocks was the gun 'available for use' as that phrase is defined where he could not reach it or have 'ready access' to the gun (*Mendival*)."

The Jackson court explained that "the purpose behind the sentence enhancement provisions for crimes where firearms are involved is to 'deter persons from creating the potential for death or injury resulting from the very presence of a firearm at the scene of the crime.' (*People v. Reaves, supra,* 42 Cal.App.3d at p. 856). However, this threat is appreciably diminished, if not removed, where access to a firearm is only a theoretical possibility. For this reason, as the foregoing authorities point out, to warrant the increased punishment for being armed with a firearm there must be some evidence the presence of the gun at the scene of the crime created an increased risk because it was within reach, handy or accessible to the defendant." (*People v. Jackson, supra*, 32 Cal.App.4th at p. 422.)

The People argue there was sufficient evidence to infer that defendant was at the methamphetamine lab at some point and that, while there, he was carrying a gun or his gun was readily accessible. The People's argument is pure speculation.

When defendant was detained, he was transporting methamphetamine manufacturing equipment in his truck but the guns were not in his possession or nearby. They were at home, a substantial distance from the arrest and apparently even farther from the situs of the lab. There is no evidence tying the guns to the methamphetamine manufacturing offense: the guns were not readily available at the methamphetamine lab or at the time defendant was stopped while transporting drug manufacturing equipment.

The arming enhancement under section 12022, subdivision (c) attaching to defendant's conviction for manufacture of methamphetamine was not justified by the evidence and should be reversed.

s/Gaut
J.