UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH McGHEE, Petitioner, v. KEVIN CHAPPELL, Warden, Respondent.	NO. CV 12-3578-JAK(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

PROCEEDINGS

On April 25, 2012, Petitioner, who then was proceeding pro se with assistance from the California Appellate Project, filed a "Petition for Writ of Habeas Corpus By a Person in State Custody," accompanied by an attached memorandum ("Pet. Mem."). See Pet. Mem.,

p. 3, n.1. Petitioner concurrently filed a "Motion to Stay and Hold in Abeyance Federal Proceedings Pending Exhaustion of Federal Claims in State Court" ("Motion to Stay"). The Motion to Stay sought an order holding this action in abeyance because certain grounds for relief therein assertedly were unexhausted (Motion to Stay, p. 5).

On August 29, 2012, Respondent filed an "Answer to the Petition for Writ of Habeas Corpus and Response to Petitioner's Motion to Stay, etc." (the "Answer"). The Answer asserted that the Motion to Stay should be denied because all the claims then were exhausted, and that the Petition should be dismissed because the claims allegedly were untimely. See Answer, pp. 1, 4-11.[1] On March 4, 2013, Petitioner filed a reply to the Answer.

On March 15, 2013, the Court issued an order: (1) denying the Motion to Stay as moot; (2) denying without prejudice Respondent's request to dismiss the Petition as untimely; and (3) ordering Respondent to file a Supplemental Answer addressing the merits of the claims alleged in the Petition. See "Order Re Motion to Stay, Statute of Limitations Issues, and Further Briefing" (Docket. No. 31). On March 27, 2013, the Court appointed the Federal Public Defender's Office to represent Petitioner. See Minute Order (Docket No. 33).

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[1] Respondent concurrently lodged documents. Herein, the Court refers to these documents, as well as other documents lodged by Respondent on September 11, 2013, and March 21, 2017, as "Respondent's Lodgments."

On April 17, 2013, Petitioner filed a "Motion for Leave to File Amended Petition, etc." ("Motion to Amend"), unaccompanied by a proposed amended petition. See Motion to Amend (Docket No. 38). On April 19, 2013, the Magistrate Judge denied the Motion to Amend. On June 26, 2013, the District Judge denied Petitioner's "Motion for Review of the April 19, 2013 Order of United States Magistrate Judge re Leave to Amend." See Docket Nos. 41, 49.

On September 11, 2013, Respondent filed a Supplemental Answer addressing the merits of the claims alleged in the Petition.[2] On December 12, 2013, Petitioner filed a Supplemental Reply.

Meanwhile, on November 14, 2013, Petitioner filed a "Renewed Motion for Leave to File Amended Petition for Writ of Habeas Corpus" ("Renewed Motion to Amend"), and lodged a proposed amended petition containing new evidence and exhibits. Petitioner advised that he intended to move for a stay of this action pending exhaustion of his state court remedies if the Court granted leave to amend the Petition to add the new evidence. On December 12, 2013, Respondent filed an opposition to the Renewed Motion to Amend.

On January 9, 2014, the Court ordered the parties to address the propriety of a stay as it related to the Renewed Motion to Amend. See Docket No. 78. On January 30, 2014, in accordance with the Court's

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[2] Respondent concurrently lodged documents, including the Clerk's Transcript ("C.T.") and Reporter's Transcript ("R.T."). Respondent also lodged under seal the Reporter's Transcript of a July 21, 2008 hearing.

order, Petitioner filed a "Motion to Stay Federal Habeas Action, etc." ("Renewed Motion to Stay"). On March 7, 2014, Respondent filed a response in which Respondent indicated that he did not oppose a stay under Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied, 538 U.S. 1042 (2003). On March 11, 2014, Petitioner filed a "Report on the Status of the State Court Exhaustion Proceeding," advising that Petitioner had filed a habeas petition and supporting exhibits with the Los Angeles County Superior Court on February 6, 2014. On March 19, 2014, Petitioner filed a "Notice of New Case Law, etc." in support of the Renewed Motion to Stay.

On April 1, 2014, the Court issued an order: (1) denying without prejudice the Renewed Motion to Amend; and (2) granting the Renewed Motion to Stay the proceedings under Kelly v. Small, so that Petitioner could exhaust claims not presented in the Petition and later move to amend the Petition to include the newly-exhausted claims. See "Order Re Renewed Motion for Leave to Amend and [Renewed] Motion to Stay" (Docket No. 86). The Court declined to decide whether any future amendment to include newly-exhausted claims would be appropriate (id.).

On February 17, 2017, Petitioner filed an unopposed "Application to Lift Stay of Proceedings Imposed Pursuant to Kelly v. Small" ("Application to Lift Stay"). Petitioner also filed a "Notice of Motion and Motion for Leave to File Amended Petition for Writ of Habeas Corpus" ("Post-Stay Motion to Amend"), and lodged a proposed amended petition with supporting exhibits, some of which were filed under seal. See Docket Nos. 90-93. On February 23, 2017, the

Magistrate Judge granted the Application to Lift Stay.

On March 21, 2017, Respondent filed a response to the Post-Stay Motion to Amend, which indicated that Respondent did not oppose the motion. Respondent concurrently lodged multiple documents with the response. On March 22, 2017, the Magistrate Judge granted the Post-Stay Motion to Amend.

On March 22, 2017, Petitioner filed the operative "Amended Petition for Writ of Habeas Corpus" ("First Amended Petition" or "FAP"), which had been lodged with the Post-Stay Motion to Amend. The First Amended Petition references the exhibits Petitioner lodged with the Post-Stay Motion to Amend ("FAP Exh."). On April 19, 2017, Respondent filed an Answer ("FAP Answer"). On May 3, 2017, Petitioner filed a Reply.

BACKGROUND

A jury found Petitioner guilty of one count of conspiracy to commit assault, one count of conspiracy to commit vandalism, three counts of resisting executive officers in the performance of their duties, and two counts of assault by means likely to produce great bodily injury (FAP, p. 8; Respondent's Lodgment 1, p. 2; C.T. 288-92, 295-97).[3] These convictions arose out of Petitioner's participation in a jail riot in which multiple inmates threw multiple objects at their jailers. See Respondent's Lodgment 1, pp. 3-6. The trial court

[3] The jury found Petitioner not guilty of one count of assault on Deputy Gordon McMullen. See C.T. 293-94.

sentenced Petitioner to 75 years to life (Respondent's Lodgment 1, p. 2; C.T. 322-27; R.T. 3306-10).

On June 23, 2010, the California Court of Appeal affirmed in a reasoned decision (Respondent's Lodgment 1). On October 13, 2010, the California Supreme Court summarily denied review (Respondent's Lodgment 3).

On October 19, 2011, Petitioner constructively filed a habeas petition with the Los Angeles County Superior Court, alleging claims similar to those asserted herein. Compare FAP with Respondent's Lodgment 4.[4] On December 7, 2011, the Superior Court denied the petition in a reasoned decision (Respondent's Lodgment 5). The Superior Court indicated that many of Petitioner's claims had been raised and rejected on direct appeal. See Respondent's Lodgment 5, pp. 2-3 (citing, inter alia, In re Waltreus, 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9 (1965) ("Waltreus") (an issue raised and rejected on appeal may not be asserted in a subsequent state habeas petition) and In re Clark, 5 Cal. 4th 750, 765-66, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993) ("Clark") (absent justification, successive and/or untimely habeas petitions will be summarily denied)). The Superior Court observed that "[m]any of the arguments made . . . are nearly, word for word, the same arguments raised in the direct appeal"). See id. at 3. The Superior Court found that Petitioner had not shown prejudice with respect to the ineffective assistance of counsel claim. See id. at 3-

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[4] Petitioner's first round of state habeas petitions were filed without counsel and without the evidence that Petitioner's public defenders since have presented.

5 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

On March 21, 2012, Petitioner constructively filed a habeas petition with the California Court of Appeal, alleging claims similar to those asserted herein (Respondent's Lodgment 6). On April 12, 2012, the California Court of Appeal issued a brief but reasoned decision (Respondent's Lodgment 6). The Court of Appeal denied some claims with citations to Clark, Waltreus, and Hagan v. Superior Court, 57 Cal. 2d 767, 769-71, 22 Cal. Rptr. 206 (1962) (court may refuse to consider repetitious applications). The Court of Appeal denied Petitioner's ineffective assistance of counsel claim with citations to, inter alia, Strickland v. Washington, 466 U.S. 668 (1984) (Respondent's Lodgment 6).

On May 9, 2012, Petitioner constructively filed a habeas petition with the California Supreme Court, alleging claims similar to Grounds One, Five and the cumulative error claim raised herein (Respondent's Lodgment 8). On August 15, 2012, the California Supreme Court denied the petition without comment (Respondent's Lodgment 9).

On February 6, 2014, Petitioner filed a habeas petition with the Los Angeles County Superior Court, presenting his expanded claim of ineffective assistance of trial counsel (asserted as Ground One herein) and an updated cumulative error claim similar to Ground Six herein. See Respondent's Lodgment 20, pp. 466-509. On March 28, 2014, the Superior Court denied the petition in a reasoned decision. See id. at 511-27.

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On April 23, 2014, Petitioner filed a habeas petition and accompanying exhibits with the California Court of Appeal, presenting Grounds One and Six asserted herein (Respondent's Lodgments 15-17). On August 27, 2014, the Court of Appeal summarily denied the petition as procedurally barred. See Respondent's Lodgment 20, p. 549 (copy of order citing In re Reno, 55 Cal. 4th 428, 452, 460-61, 146 Cal. Rptr. 3d 297, 283 P.3d 1181 (2012) (habeas petitioner challenging final criminal judgment must prosecute case without unreasonable delay)).

On September 19, 2014, Petitioner filed a habeas petition and accompanying exhibits with the California Supreme Court, presenting Grounds One and Six asserted herein (Respondent's Lodgments 18-20). On January 18, 2017, after informal briefing, the California Supreme Court denied the petition "on the merits," citing Harrington v. Richter, 562 U.S. 86, 99-100 (2011), and Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (Respondent's Lodgments 21-23).

SUMMARY OF TRIAL EVIDENCE

In January of 2005, Petitioner was housed in the 3300 A-Row ("A-Row") of the Men's Central Jail (R.T. 647, 744). A-Row inmates are subject to high security measures, including being handcuffed before leaving their cells and being handcuffed when escorted to and from their cells (R.T. 640). Deputy Raul Ibarra had worked on A-Row for just under a year as of January of 2005 (R.T. 642-43). Ibarra testified that he had been trained to identify who stands out as a "ring leader" in a group (R.T. 643). Based on his training and contact with the inmates on A-Row (including Petitioner), Ibarra

opined that Petitioner was the ring leader, or "shot caller" (R.T. 644-46, 696). Inmates must ask the shot caller for permission to do such things as go on passes or use the phone (R.T. 644, 725). Ibarra had heard inmates on the row screaming out that they were going on a pass and Petitioner responding with a "yes" or a "no" (R.T. 645).

The Removal of Inmate Gonzalez from A-Row

Around 4:00 p.m. on January 7, 2005, Ibarra observed inmate Rodolfo Gonzalez intoxicated in Gonzalez' cell, and Ibarra spoke with his partners (Deputies Taylor, Orosco, and Argueta) regarding a plan to remove Gonzalez from the cell (R.T. 651-54, 684). As a ruse to cause Gonzalez to leave the row voluntarily, the deputies planned to tell Gonzalez he had an attorney pass (R.T. 654-55, 692). Ibarra announced over the loud speaker to the entire module that Gonzalez had an attorney pass and that he had five minutes to get ready (R.T. 655-56, 694). Ibarra and Argueta then went to Gonzalez' cell, with Taylor behind and Orosco manning the gates (R.T. 656-57, 699). Without offering any resistance, Gonzalez submitted to being handcuffed and he walked (staggered) out of his cell and toward the gate, escorted by the deputies (R.T. 657-59, 727). When Gonzalez reached Petitioner's cell, however, Petitioner said to Gonzalez, "Hey, I didn't give you permission to go on this pass, what are you doing?" (R.T. 659-60, 697, 699-700). Gonzalez replied, "I'm sorry," and started walking back to his cell (R.T. 660, 700). Ibarra yanked Gonzalez by the handcuffs to get Gonzalez off balance, and told Gonzalez he was going to walk off the row (R.T. 660, 701). Gonzalez struggled "a little bit," but Ibarra and Argueta each grabbed Gonzalez by an arm and started

dragging Gonzalez backward from the row (R.T. 660-61, 701-03).

Ibarra testified that, as the deputies removed Gonzalez, Petitioner screamed "Dale gas la juras," meaning, to assault the deputies with whatever liquids the inmates had at their disposal (R.T. 661-62, 703, 707). Inmates including Petitioner, Francisco Morales, and Gerardo Reyes, then pelted all four deputies on the row with oranges, apples, and liquids (such as urine or bleach) R.T. 662-64, 704, 707, 731-32). Gonzalez dropped to the floor and began kicking the deputies (R.T. 665, 704-05, 709). Ibarra sprayed Gonzalez in the face with "O.C. spray" to cause Gonzalez to comply, and removed him from the row (R.T. 665-66, 709-10).

Ibarra testified that he later went into "the pipe chase" behind Petitioner's cell, where Ibarra heard Petitioner telling Reyes that, if they jumped on the sinks in their cells, they could break the sinks and use the porcelain to throw at deputies (R.T. 668-72, 720-22, 734). Reyes reportedly "agreed" (R.T. 672, 734). Ibarra stayed in the pipe chase a few seconds, and then, as he started to walk off, he heard what sounded like glass or porcelain hitting the ground and breaking (R.T. 672-75, 722). Inmates then started throwing porcelain at the deputies (R.T. 675-79). Ibarra saw Petitioner, Francisco Morales and Reyes throwing porcelain (R.T. 679).

The Fire on A-Row

Deputy Joseph Morales (referred to herein as "Deputy Morales" to avoid any confusion with inmates Francisco Morales and Erick Morales)

testified that he and his partner, Deputy Gordon McMullen, came to the gate of A-Row around 10:00 p.m. that day. Deputy Morales testified that the inmates (including Petitioner, Reyes, Francisco Morales, Tafoya, Trujillo and Cortez) immediately began throwing objects, including porcelain from their sinks, at Deputy Morales and the other deputies (R.T. 737-45, 1210-11, 1220, 1227; see also R.T. 2139-45, 2183-86 (McMullen similarly testifying in rebuttal)).[5] Later, when Deputies Morales and McMullen used a water hose to put out a fire on A-Row from an adjacent row (C-Row), the inmates (including Petitioner) "constantly" "bombarded" the deputies with porcelain (R.T. 1212, 1215-16, 1226, 1228-31; see also R.T. 2146-57, 2160-62, 2187-95, 2205 (McMullen similarly testifying)). Deputy Morales saw Reyes throw a piece of porcelain that hit McMullen in the hand (R.T. 1214, 1217-18, 1230; see also R.T. 2157-58, 2195-96, 2202 (McMullen testifying that he was hit in the hand with porcelain).[6] Deputy Morales said that numerous pieces of porcelain were thrown at him and McMullen as they tried to put out a fire on A-Row, and that a piece of porcelain larger than a golf ball "whizzed" by him, coming within a half inch of hitting him in the eye (R.T. 765-69; see also R.T. 2158, 2163, 2204-05 (McMullen testifying regarding the piece of porcelain that almost hit Deputy Morales)). Neither Deputy Morales nor Deputy McMullen saw which of the inmates throwing porcelain threw that particular piece (R.T. 765-66, 2158-59). Deputy Morales and McMullen left the row when

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[5] Deputy Morales later clarified that Cortez was not in his regular cell but rather was in the shower during the incident (R.T. 1202-03, 1207, 1232; see also FAP Exh. 17 (diagram of row)). The showers did not have sinks (R.T. 1232).

[6] As noted above, the jury found Petitioner not guilty of assaulting Deputy McMullen (C.T. 293-94).

it became too dangerous to stay (R.T. 765).

The Extraction of Inmates from A-Row

Sergeant Thomas Wilson testified that he started his shift at 10 p.m. that day and, after briefing and preparation, led an approximately 15-person emergency response team and a four-person extraction team into A-Row to quell the riot (R.T. 932-34, 970-71). Both teams immediately were pummeled with pieces of porcelain (R.T. 934-35, 972). Some of the pieces "nearly struck" the cameraman, Deputy Alfredo Alvarez, while he was filming (R.T. 935; see also R.T. 921-23 (Deputy Alvarez testifying that he videotaped the "riot suppression")). Two or three inmates, including Petitioner and Reyes, were the main aggressors (R.T. 936-37).

Sergeant Wilson testified that, in an effort to suppress the resistance, two of the deputies involved in the extraction fired pepper ball guns into the cells from where the porcelain was being thrown (R.T. 938, 973-75; see also R.T. 1238-46 (Deputy John Coleman testifying regarding firing a pepper ball gun at cells where the inmates were not complying (including Petitioner's cell))). Another deputy or two were spraying from a large fire extinguisher-sized canister of pepper spray primarily at cells 6-8 (Reyes', Petitioner's and Trujillo's cells; see FAP Exh. 17) (R.T. 942-45, 973-74). Reyes eventually gave up and came out of his cell as commanded (R.T. 942-43). Petitioner did not give up despite being commanded to do so. More than 30 pepper balls were fired into Petitioner's cell, and five or more bursts from the canisters were also sent into his cell (R.T.

944, 975-76). Trujillo had to be taken from his cell because he was overcome by pepper spray and pepper ball powder (R.T. 946-47). Meanwhile, after slamming his mattress against the bars of his cell and yelling profanities, Petitioner went to the back of his cell, where he used his mattress as a shield (R.T. 947-48, 980-81). The team removed the rest of the inmates on A-Row and then returned to Petitioner's cell and extracted Petitioner (R.T. 948-49, 974; see also R.T. 1250-58 (Deputy Hector Beltran testifying Petitioner resisted until handcuffed forcibly)). A videotape of these events was played for the jury (R.T. 938-51, 976-77, 981-83).

The Defense

Gonzalez testified that he was housed on A-Row on January 7, 2005, and had been drinking that day (R.T. 1274-75). Gonzalez heard his name called out over the loud speaker for a visit or "pass," but he did not hear the type of pass (R.T. 1275-76). Gonzalez readied himself to leave his cell, and Deputy Ibarra supposedly came alone to the cell and cuffed Gonzalez from the front with handcuffs and a waist chain (R.T. 1276-77, 1297-98). Ibarra walked away from the cell and toward the gate (R.T. 1298-99). Gonzalez' cell door was opened and Gonzalez walked out onto A-Row where he saw Ibarra standing in front of Petitioner's cell talking to Petitioner (R.T. 1278, 1300-02, 1307-08). Gonzalez heard Ibarra say, "He's not refusing," but could not hear Petitioner (R.T. 1278, 1304, 1307).

Gonzalez walked toward Ibarra and asked what type of pass he had (R.T. 1277-78, 1302-04). Gonzalez stopped walking at or near

Petitioner's cell (R.T. 1284, 1302). When Ibarra said the visit was for an attorney, Gonzalez refused to go because Gonzalez was in jail for a parole or probation violation, had already been found in violation, and did not have an attorney (R.T. 1278-81, 1284, 1306-08, 1315-18, 1334-36, 1342). Gonzalez supposedly was afraid of what might happen because Gonzalez had been involved in a riot against officers at a different facility and he feared retaliation (R.T. 1279-80, 1312-14). Specifically, Gonzalez feared the deputies would take him outside and toss him around, slap him, "ruffle" him up, or talk down to him (R.T. 1281). Gonzalez denied asking Petitioner for permission to go on the pass (R.T. 1285-86).

Gonzalez turned to walk back to his cell and felt Deputy Ibarra grab him by the neck in a choke hold and take him to the ground (R.T. 1281-82, 1284-85, 1318-19). Gonzalez struggled, kicked, and fought to free himself, while Ibarra told Gonzalez to stop resisting and punched, kicked, and did "everything he could do" to regain control (R.T. 1285-86, 1320-21). Ibarra grabbed Gonzalez by the neck and single-handedly dragged Gonzalez from the row, where Ibarra and other deputies beat Gonzalez, hitting him 20 to 30 times and kicking him, as they tried to subdue him and as Gonzalez fought to defend himself (R.T. 1286-91, 1321, 1327-31, 1337-41). Gonzalez was maced until he passed out (R.T. 1291-93, 1327, 1337). Gonzalez claimed he had no bruises from the supposed beating because he has a dark complexion (R.T. 1340-41). Gonzalez agreed he had received no medical treatment,

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but denied having refused medical treatment (id.).[7] Gonzalez testified that, as he was being dragged from the row, he heard other inmates (including Petitioner) screaming (R.T. 1321-22, 1331-32, 1348).

The day after the incident, Gonzalez gave a statement saying he did not recall what had happened during the incident (R.T. 1344-45, 1349). Gonzalez admitted that the first time he came forward with a purported memory of details concerning what supposedly had happened during the incident was two days before Petitioner's trial (R.T. 1323-24, 1345-49). Gonzalez also admitted that an inmate's testimony that Petitioner had done something wrong could get the testifying inmate killed (R.T. 1333-34).

Petitioner testified that he had problems with his jailers from the first day he arrived on A-Row in 2003 (R.T. 1530–36). When he was being processed, a deputy reportedly threatened Petitioner and took Petitioner down a hallway where the deputy and others beat Petitioner (R.T. 1531-33). Petitioner also testified concerning other beatings (R.T. 1534, 1536). Petitioner agreed that he "always" was the victim in these run-ins with his jailers (R.T. 1592-93). Petitioner denied being a shot caller on his row, denied other inmates ever asked his

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[7] Deputy Richard Thompsen testified in rebuttal that he and a nurse addressed Gonzalez' medical needs after Gonzalez was removed from A-Row (R.T. 2252-55). Gonzalez had redness on his face, neck, and upper torso indicative of exposure to pepper spray (R.T. 2256). Thompsen observed no other injuries (e.g., bruises or cuts), but did not recall if he looked under Gonzalez' clothing for injuries (R.T. 2257, 2260). Gonzalez reported no problems other than exposure to pepper spray (R.T. 2257-58). Gonzalez refused any treatment (R.T. 2259).

permission to leave their cells, and denied he told Gonzalez that Gonzalez did not have Petitioner's permission to leave the row on the day of the riot (R.T. 1536-37, 1539, 1695).

Regarding the riot, Petitioner testified that he watched Deputy Ibarra handcuff Gonzalez and walk away from Gonzalez' cell (R.T. 1542-44). According to Petitioner, there were no other deputies then on the row (R.T. 1543). Petitioner could see that Gonzalez was drunk from how Gonzalez was walking (R.T. 1544-46). Petitioner called Ibarra to Petitioner's cell and told Ibarra that Gonzalez was in no condition to walk down the escalator, and that Ibarra would get himself in trouble if Ibarra walked a drunken inmate past the sergeant's office (R.T. 1546-49, 1691-96).

Petitioner described the events leading up to Gonzalez' removal from the row in a manner consistent with Gonzalez' testimony (i.e., Gonzalez refused to leave and turned to go back to his cell; Ibarra grabbed Gonzalez by the neck and pulled Gonzalez back; Ibarra and Gonzalez ended up on the floor; Ibarra hit and kicked Gonzalez and got Gonzalez back into a choke hold; Ibarra dragged Gonzalez from the row) (R.T. 1549-57, 1700, 1849-50).

Petitioner said that he and other inmates yelled at Ibarra and then at the deputies who were beating Gonzalez in the "sally port area" (R.T. 1552-53, 1557-58). Petitioner admitted that he told Ibarra to "get off" Gonzalez, and Petitioner admitted he threw a milk carton and an apple at Ibarra, but Petitioner denied telling others to throw things (R.T. 1553-55). Petitioner claimed the inmate response

had been a spontaneous reaction to seeing Gonzalez being beaten (R.T. 1555). Petitioner threw from his cell everything from within his cell that was capable of being thrown (R.T. 1558).

Petitioner testified that "shortly after" Gonzalez was removed from A-Row, Deputy Yzabal told the men on the row through the loud speaker that the deputies were going to drag the inmates out and "fuck [the inmates] up" (R.T. 1559). These threats continued over the loud speaker "for awhile" (R.T. 1561-62, 1825-26).[8] Another deputy (Argueta) sprayed the cells from the front with a "big ole" canister of mace saying, "How do you like that? That's just the beginning. There's more to come," while another deputy sprayed mace into the cells through the vents from the pipe chase behind the cells (R.T. 1560-62, 1567-68, 1707, 1716-17, 1805-07).[9] Petitioner and others then began to kick their sinks and break the porcelain (R.T. 1562-63, 1567, 1706, 1718-19). Petitioner denied telling others to break their sinks, and said his sink was not the first sink broken (R.T. 1564,

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[8] Deputy Mark Yzabal testified in rebuttal that he did not issue any threats over the loud speaker to the inmates and that, in fact, he did not even use the loud speaker that day (R.T. 2265-66, 2273-74). Deputy Yzabal went to the hallway outside A-Row and observed inmates (including Petitioner) throwing porcelain at the sally port and front door (R.T. 2267-69, 2270, 2275). Petitioner and Reyes were throwing porcelain in unison and yelling, "Fuck the jura, fuck the police" (R.T. 2269, 2275-76).

[9] Deputy McMullen testified in rebuttal that, when he came on his shift at 10 p.m. on the night of the riot, there had been no sergeant's authorization to activate emergency response measures (R.T. 2130). McMullen said that the deputies are not issued canister-sized pepper spray. Such canisters are locked up and brought in only when emergency response teams are deployed (R.T. 2133-35, 2177).

1705-10).

Petitioner admitted he threw porcelain (R.T. 1568, 1715-16, 1725-26). Other inmates threw porcelain too, but Petitioner claimed the throwing was chaotic and not coordinated (R.T. 1568-69, 1708, 1722-23). Petitioner denied throwing anything when deputies (Morales and McMullen) later tried to put out a fire on A-Row (R.T. 1567-69, 1723-26). Petitioner heard others throwing porcelain at that time (R.T. 1570). Petitioner claimed he did not throw porcelain in the direction of the deputies until he saw that an extraction team was going to come in and remove inmates from the row. Petitioner admitted he then was trying to prevent the team from coming in, supposedly because he was scared (R.T. 1573-75, 1596-97, 1715, 1725-28, 1735, 1738-39, 1813-23, 1855; see also R.T. 1696-97 (Petitioner admitting he threw approximately 10 pieces of porcelain at the deputies)). Petitioner claimed he stopped throwing porcelain when he knew the team was on the row because he supposedly did not want to hit one of the members of the team (R.T. 1575, 1739-40, 1753, 1757-61, 1818; but see R.T. 1745-50, 1758, 1761 (Petitioner admitting that the video of the incident showed him throwing porcelain directly at the deputies and hitting/clearing the shields the deputies were holding)).

Petitioner claimed he did not submit when the team reached his cell because he was being shot with pepper balls and sprayed with mace or pepper spray (R.T. 1576-77, 1742-57, 1762-66, 1808, 1824-28, 1837). Petitioner claimed he was afraid he would be beaten (R.T. 1673-74, 1803-04). Petitioner admitted that the video depicted 16 other inmates being led peacefully in handcuffs from their cells, but

Petitioner said he did not see any of them walking by because Petitioner was behind his mattress and blinded by mace (R.T. 1835-37).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. Petitioner's trial counsel assertedly rendered ineffective assistance by allegedly failing to investigate and present a defense (FAP, Ground One, pp. 18-41);

2. The trial court assertedly denied Petitioner his right to self-representation (FAP, Ground Two, pp. 41-47);

3. The trial court assertedly violated Petitioner's right to due process and right to a fair and speedy trial by denying his motion to dismiss based on the delay in charging Petitioner (FAP, Ground Three, pp. 47-52);

4. The prosecutor assertedly engaged in vindictive prosecution (FAP, Ground Five, pp. 55-60);

5. The trial court assertedly violated Petitioner's constitutional rights by using a juvenile adjudication as a "strike" under California's Three Strikes Law (FAP, Ground Four, pp. 52-55); and

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6. Cumulative error assertedly denied Petitioner due process and a fair trial (FAP, Ground Six, pp. 61-64).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 565 U.S. 34, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation

omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that

those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards to a particular claim, the Court usually looks to the last reasoned state court decision regarding that claim. See DeWeaver v. Runnels, 556 F.3d 995, 997 (9th Cir.), cert. denied, 558 U.S. 868 (2009); Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION[10]

I. Petitioner is Not Entitled to Federal Habeas Relief on His Claim of Ineffective Assistance of Counsel.

Petitioner contends that his trial counsel rendered ineffective assistance by allegedly failing to: (1) interview or present any inmate witnesses other than Petitioner and Rodolfo Gonzalez; or (2) investigate and present evidence regarding the general conditions in the Los Angeles County Men's Central Jail where Petitioner was housed (FAP, Ground One, pp. 23-41; Reply, pp. 4-19).

The Los Angeles County Superior Court issued the last reasoned decision denying Petitioner's ineffective assistance of counsel claim on the merits. The Superior Court considered the evidence submitted by Petitioner in detail and determined that Petitioner had not shown he was prejudiced by counsel's alleged omissions. See Respondent's

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[10] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein. Respondent contends Petitioner's claims are untimely. See FAP Answer, p. 1. The Court assumes, arguendo, the timeliness of Petitioner's claims. See Van Buskirk v. Baldwin, 265 F.3d 1080, 1083 (9th Cir. 2001), cert. denied, 535 U.S. 950 (2002) (court may deny on the merits an untimely claim that fails as a matter of law).

Lodgment 20, pp. 521-26. For the reasons discussed below, this determination was not unreasonable. See 28 U.S.C. § 2254(d).

A. Background

In February of 2003, Petitioner was arrested and charged with capital murder. Pending trial, Petitioner was housed in the Los Angeles County Men's Central Jail. There, On January 7, 2005, the riot occurred. Petitioner's capital trial began in September of 2007. See Respondent's Lodgment 1, p. 2.

On November 14, 2007, after the guilt phase of the capital murder trial had ended in a guilty verdict and the penalty phase had ended in a mistrial, the Los Angeles District Attorney filed a felony complaint charging Petitioner with crimes associated with the January 7, 2005 jail riot. In March of 2008, Petitioner was held to answer the riot charges. See Respondent's Lodgment 1, pp. 2-3; R.T. 6, 22; C.T. 123-24. Petitioner represented himself for the first few months of the proceedings (R.T. 22-24). On February 21, 2008, after representation for a brief time by another attorney, Petitioner's trial counsel in the capital case began representing Petitioner in the riot case (R.T. 22-24; see also FAP, p. 23).

The date originally set for trial in the riot case was June 30, 2008, but Petitioner's counsel sought and obtained two continuances until July 21, 2008 (FAP, p. 24; see also C.T. 138-43, 168). Counsel then requested a third continuance, claiming that counsel still needed more time to locate and interview 21 potential defense witnesses

before counsel could announce ready (see C.T. 176-77 (motion); R.T. A-5 - A-6). The presiding judge (who also presided over the capital case) denied the motion (R.T. A-6 - A-9). The judge reasoned, inter alia, that counsel had known about the jail riot for a long time (because the riot had been identified as one of the aggravating factors in the capital case), and the prosecutor had put counsel on notice of the prosecution's intent to file charges concerning the jail riot even before the guilt phase of the capital case began (id.).

On the same day, the presiding judge transferred the riot case to another judge for trial, and Petitioner's counsel renewed his motion for a continuance (R.T. A-7, A-9, 2-3). The trial judge denied the renewed motion, after confirming that nothing had changed during the brief time that had passed following the previous denial (R.T. 3-4, 28, 30).

Petitioner also then requested a Marsden hearing (R.T. 13).[11] At the Marsden hearing, Petitioner complained of counsel's performance representing Plaintiff in his capital case and suggested that communications had broken down (R.T. 15-16). Petitioner also argued that counsel should be replaced because counsel allegedly had "assumed a defeatist position" in the riot case – doing "nothing" to prepare a defense (R.T. 17-19).

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[11] See People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970) (establishing standards governing requests for substitution of counsel).

Petitioner's counsel reported that he had told Petitioner "there is no defense to what you see on the [video]tape [of the jail incident]," but had discussed with Petitioner "what would be a defense" (R.T. 21). Counsel said he had identified potential witnesses and provided a list of those witnesses to the defense investigator prior to trial (when Petitioner was proceeding pro se, and again in February of 2008 when counsel started representing Petitioner in the present case) (R.T. 20-22, 24-25).[12] The investigator reportedly made arrangements to see certain potential witnesses in prison, but "[t]hat was not done" (R.T. 25).

Counsel also said that in June of 2008 the investigator reported to counsel that he could not locate "other" potential witnesses because the investigator did not have the witnesses' dates of birth. See R.T. 24, 26-27; see also C.T. 177 (counsel stating in motion for continuance filed on July 17, 2008, that the information the defense was provided included the witnesses' jail booking numbers and housing locations, but not "any other personal information, such as date of birth"); C.T. 174 (declaration of prosecutor filed on July 14, 2008, stating that the defense had been provided in discovery with a computer printout listing the name, cell location, and booking number

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[12] The defense investigator reportedly had been looking for these witnesses since 2006. During a chambers conference in Petitioner's capital case on December 5, 2006, the defense investigator stated that he had been attempting to find other inmates involved in the jail riot based on identifying information Petitioner had provided. See FAP Exh. 11, pp. 43-44. The witnesses were relevant to the capital case because the prosecution presented evidence of Petitioner's participation in the riot during the penalty phase of the capital case. See R.T. 21.

of every inmate witness (discovery bates stamped 91-94) (filed as FAP Exh. 18)); but see FAP Exh. 6(A) (June 8, 2008, memorandum from the investigator to the California Department of Corrections ("CDC") which includes the dates of birth for each of 20 witnesses, a return fax stamp dated June 11, 2008, and the locations for 16 witnesses).[13] Counsel explained that he did not replace the investigator because counsel had faith in the investigator's ability to find witnesses based on previously having worked with the investigator (R.T. 25). The investigator supposedly just needed more time (R.T. 26).

The court asked what efforts the investigator had made since June and also asked whether counsel had told the investigator to report to counsel what the investigator was doing (R.T. 26-27). Counsel responded that he had given the investigator a list and had inquired of the investigator, but the investigator "threw [the list] back at [counsel] and said I don't have a date of birth" (R.T. 27). The court continued, "So what you're telling me is the investigator did make an attempt to find these people, he just couldn't find them?" and counsel answered, "That's correct." (id.).

The court denied Petitioner's request to substitute counsel and declined to overturn the denial of a continuance (R.T. 30). The court told Petitioner:

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[13] While the defense investigator evidently had located 16 of the 20 witnesses by June 11, 2008 (FAP Exh. 6(A)), when and how the investigator actually shared with counsel the information obtained from the CDC is uncertain. See FAP Exh. 6, ¶¶ 7-8; FAP Exh. 19, ¶ 7 (generally stating that copies of Exhibits 6(A) and 7 were found in counsel's trial file after trial, without indicating when those exhibits were given to counsel).

> [T]here was nothing to stop you or your attorney from asking for another investigator if you were unhappy with the job the investigator was doing during the five months since the preliminary hearing. But I can't fault [trial counsel] for that. And this is a Marsden motion, and I'm not going to revisit the motion to continue.

(R.T. 30).

Petitioner then asked, "Can I make a motion to represent myself pro per?" (R.T. 30). The court said that Petitioner could do so, but "without any further continuances" (id.). Petitioner immediately asked for a 30-day continuance (id.). The court responded, "I've got a jury outside the door here, so I won't let you go pro per on that basis. ¶ So if you're requesting pro per status because you want a 30-day continuance, that's not going to be granted. So that motion would be denied" (R.T. 31). Petitioner advised the court that he wanted time to subpoena information so that he could locate witnesses and thought he could obtain "at least . . . a couple [witness] statements" in 30 days (id.). The trial court expressed doubt that Petitioner would be able to subpoena witnesses, given counsel's representations during the Marsden hearing that the defense investigator had not been able to locate witnesses (R.T. 32 ("You assumed that [the witnesses are] in custody, but [the investigator] hasn't been able to find them. And [the investigator] would know if they were a custody status.")). Petitioner requested "some inquiry," and the court asked whether the investigator was there to support Petitioner's Marsden motion (R.T. 32). The investigator was not

present (see FAP Exh. 6, ¶ 9). The court concluded:

> [Counsel] has indicated to me that this investigator was sent out on the case and given a list. That's [counsel's] responsibility, he did that. Okay. You haven't given me another reason to remove [counsel] as the lawyer. You only requested pro per status so that you can get a continuance which I've denied. And the Marsden motion is denied.

(R.T. 33).

B. Additional Evidence Presented on Habeas Review

Petitioner presents the following additional evidence in connection with Grounds One and Six:

Declaration of Daniel Hines dated June 17, 2013 (FAP Exh. 1), which states in part:

> In January of 2005, Hines was housed a few cells away from Petitioner in the A-Row (¶ 1). Hines remembers seeing an inmate he knew as "Sleepy" being escorted to the attorney room by deputies and, when Sleepy refused to go, Hines saw one of the deputies push Sleepy into a wall, and deputies then dragged Sleepy down the tier (¶ 2). Hines and others yelled at the deputies to put Sleepy back into his cell (¶ 2). Someone threw something at the deputies and things escalated (¶ 2). "We just went crazy when we saw how Sleepy

was being treated" (¶ 2). What happened was "completely spontaneous." Hines never heard anyone "command" the inmates to break their sinks, and Petitioner was not a "shot caller" and did not order anybody to do anything (¶ 3).

The deputies left the tier and later came back to each cell on the tier and asked the inmates one by one if they were ready to come out and, if the inmate said no, he was shot with pepper balls (¶ 4). Hines was shot with pepper balls approximately 56 times before he was dragged from his cell (¶ 4). Hines saw Petitioner afterward, and Petitioner's face was red and swollen (¶ 5).

A day or so after the incident, each inmate was brought individually into a room with a sergeant and "about two other officers" (¶ 6).[14] When Hines was asked about what he saw, he "essentially" was told what he was supposed to say (i.e., "You didn't see nothing, right? You know what's going to happen if you say you did") (¶ 6). Hines agreed because he was afraid he would get beaten up if he disagreed (¶ 6).

Hines "thinks" he was out of prison in 2007 and 2008 (before and during Petitioner's trial), had regular contact with his parole officer through which he could have been contacted, and Hines would have testified on Petitioner's

[14] Hines does not state he was present when other inmates were brought to this room (¶ 6).

behalf (¶ 7).

Declaration of Erick Morales dated July 23, 2013 (FAP Exh. 2), which states in part:

> In 2005, Morales was in jail on the same tier as Petitioner (¶ 1). Morales had known Petitioner for the two years they were on the tier together (¶ 1). In January of 2005, Morales saw deputies bringing a prisoner to a visit with "a chokehold [sic] around the prisoners [sic] neck" (¶ 2). "The inmates became upset and started yelling and throwing things at the deputies. This was spontaneous. No one person started it. [Petitioner] didn't start it or tell anyone else what to do. Whatever we did, we did on our own. There wasn't a shot caller on our tier." (¶ 3).
>
> In 2007 and 2008, Morales was in prison and "it would have been easy to find [him]" (¶ 4). Morales would have testified on Petitioner's behalf (¶ 5).

Declaration of Gerardo Reyes dated July 7, 2013 (FAP Exh. 3), which states in part:

> In January of 2005, Reyes was housed in the cell next to Petitioner (¶ 1). Reyes remembered a time when deputies (including Deputy Orosco) came to the tier to bring Gonzalez out of his cell, one deputy telling Gonzalez he had an attorney visit (¶ 2). Reyes thought the deputies were lying

because of what Reyes had heard about Gonzalez' prior problems with deputies (i.e., Gonzalez was involved in a riot at another jail during which deputies may have been injured) (¶ 3). Reyes thought the deputies were trying to retaliate (¶ 3). Some other inmates and Reyes asked the deputies where they were really taking Gonzalez. (¶ 4). "We said we knew he wasn't going to an attorney visit." (¶ 4).

When Gonzalez tried to go back to his cell, the deputies grabbed Gonzalez and dragged him out of the tier, cuffed, and not resisting (¶ 4). Reyes was upset about how the deputies handled the situation because they "lied about where they were taking him, then they dragged him out," so Reyes threw an apple at the deputies (¶ 5). Other inmates started throwing things too (¶ 5). Reyes believes he was the first to break his sink, using a knob within a sock to break the sink (¶ 5). Petitioner did not make any agreement with Reyes to break their sinks; Reyes just decided to break his sink (¶ 5).

"[Petitioner] was not a shot caller. He didn't start the incident, lead it, or tell anyone what to do during it. [Petitioner] did not tell me to break my sink or to do anything else. In jail, if a deputy messes with any one of the inmates, the rest are going to jump in to help the inmate. That's just what we do." (¶ 6). The deputies seemed to dislike Petitioner (¶ 8).

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In 2007 and 2008, Reyes was incarcerated and "would have been easy to find" (¶ 9). Reyes would have testified in Petitioner's defense (¶ 9).

Declaration of Timothy Trujillo dated June 25, 2013 (FAP Exh. 4), stating in part:

In January of 2005, Trujillo was housed in the cell adjacent to Petitioner (¶ 1). Trujillo "participated in an incident (cell extraction) that occurred which stem [sic] from sheriffs deputies physically assaulting and using excessive force on a man whom [sic] at the time was unable to defend himself because he was handcuffed" (¶ 2). When he saw the "assault," Trujillo wanted the deputies to stop, so he began to throw personal property (bars of soap, a container of grease, food items) (¶ 3). "Out of anger and protest I even began breaking things in my cell such as my sink, desk, and light fixture" (¶ 4). "Not at any time ever did [Petitioner] or anyone . . . tell or order anyone on the row to participate in the incident[,] nor was anyone told to break and/or cause damage to anything in their cell. [Petitioner] was just a regular guy like everyone else on the row[,] he did not possess any leadership over anyone" (¶ 5). When the deputies came back to do the cell extraction, Trujillo was shot with pepper balls and was beaten (¶ 6).

Trujillo does not indicate where he was in 2007 and 2008, and does not state whether he would have testified in Petitioner's

defense.[15]

Declaration of Jay Reddix dated August 21, 2013 (FAP Exh. 5), which states in part:

> In January of 2005, Reddix was housed on the same row as Petitioner (¶ 1). Reddix recalls "a cell extraction" that occurred around that time (¶ 1). Reddix was lying on his bed when he heard a commotion, stood up and looked out to see two deputies dragging another inmate down the tier (¶ 2). The inmate was handcuffed and being poked with the deputies' sticks as they dragged him (¶ 2). Reddix watched the inmate fall and saw the deputies continue to drag the inmate off the tier, beating the inmate all the way out of the tier (¶ 2). Reddix heard other inmates yelling at the deputies to stop and inmates started throwing things (¶ 3).
>
> A few hours later, there was a cell extraction where the deputies first asked the inmates to volunteer to come out (¶ 4). The deputies were in full riot gear, wearing masks and holding shields, so Reddix did not want to come out (¶ 4). Based on his prior experience of being beaten by deputies in jail, Reddix felt certain if he did come out he would be beaten (¶ 4).

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[15] To establish prejudice caused by the failure to call a witness, Petitioner must provide evidence, inter alia, that the witness would have testified at trial if called upon. See, e.g., United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir.), cert. denied, 488 U.S. 910 (1988).

Nobody volunteered to leave their cells, so the deputies began shooting gas balls into each cell, including Reddix's cell, and Reddix then volunteered to leave his cell (¶ 5). Reddix crawled out of his cell backwards and was picked up and dragged off the tier (¶ 5).

Reddix did not hear any of the inmates tell anyone else to break their sinks or to throw things at the deputies (¶ 6). In Reddix's opinion, the deputies started the incident (¶ 6). Reddix was able to communicate with all of the other inmates on the tier (¶ 7). If there was a shot caller, Reddix would have known (¶ 7). There was no shot caller and Petitioner was not a shot caller (¶ 7).

In 2007 and 2008, Reddix was in prison and "would have been easy to find" (¶ 8). Reddix would have testified in Petitioner's defense (¶ 8).

Declaration of Robert Royce dated August 29, 2013 (FAP Exh. 6), which states in part:

Royce was appointed as the defense investigator in both Petitioner's capital case and in the case involving the jail incident (¶ 2). Petitioner gave Royce 7-10 names of inmates he thought had the best view of the incident at the jail (¶ 5). Royce was able to locate the names of other potential witnesses from reports of the incident that the sheriff's deputies wrote (¶ 5). Royce planned to locate as many

witnesses as possible, then go interview them (¶ 5). To visit witnesses still held in county jail, Royce needed Petitioner's attorney to obtain a court order (¶ 6). To visit witnesses who had been transferred to prison, Royce needed a written request from the attorney and a travel order if the prison was located outside of Los Angeles County (¶ 6). Royce told Petitioner's counsel "more than once" what he needed to visit witnesses, "but nothing ever came of it" (¶ 7).

Royce located many of the potential witnesses by contacting the California Department of Corrections in June of 2008 (¶ 7 & Exhibit A to the Declaration (copy of CDC correspondence wherein Royce provided the inmates' names and dates of birth, and the CDC provided locations and CDC numbers for 16 inmates)). Although Royce was busy with his practice, he had the time and was willing to travel and interview witnesses for Petitioner's case (¶ 8). The only reason why witnesses were not interviewed was because counsel never gave Royce the necessary authorizations (¶ 8). Royce told Petitioner's counsel about the witnesses Royce had located, and Royce does not know why counsel failed to authorize Royce to interview the witnesses (¶ 8).

Royce was not in court on the day Petitioner's trial commenced (¶ 9). Royce only interviewed one inmate (Gonzalez) for Petitioner's jail incident case, and did so shortly before Gonzalez testified (¶ 10).

Royce was "ready" to investigate "potential impeachment material" on the deputies involved in the incident, but counsel "did not pursue this avenue of investigation" (¶ 11).

"Memo" from Robert Royce to Clay Jacke dated June 8, 2008 (FAP Exh. 7) (which has not been authenticated) states:

The police reports from the incident listed 18 witnesses with "old addresses" that Royce had checked. Royce located "possible" addresses for 13 of the witnesses and would be following up to make contact at the addresses to interview those witnesses. Royce located five witnesses housed in the Los Angeles County Jail (for which he would need a letter from counsel to access).[16] Royce found civil rights cases filed against eight of the deputies alleged to have been involved in the incident. See id.

"Order for Additional Funds For Investigator, etc." filed June 9, 2008 (FAP Exh. 8), authorizing 50 additional investigative hours for Petitioner's case. Petitioner's counsel concurrently filed a declaration requesting those funds for "locating, interviewing and subpoenaing witnesses." See id.

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[16] Four of these five witnesses were identified as being in CDC custody as of June 11, 2008. Compare FAP Exs. 6(A) & 7.

"Declaration and Order Re Fees for All Court Appointments" dated September 9, 2008, by Petitioner's counsel (FAP Exh. 9), stating in part that counsel had studied "reports and video" and interviewed Petitioner prior to Petitioner's trial. See id.

"Incident Report" dated January 8, 2005 (FAP Exh. 10), listing 20 inmate "suspects" (other than Petitioner) including names, dates of birth, residential addresses, and booking numbers. See id.

Partial Transcripts from Petitioner's Capital Case dated December 5, 2006 and October 26, 2008 (FAP Exhs. 11 and 13) (filed under seal in this case).

Minute Order from Petitioner's Capital Case dated October 25, 2007 (FAP Exh. 12), containing the jury's guilty verdict. See id.

Minute Order from Petitioner's Capital Case dated November 9, 2007 (FAP Exh. 14), wherein the trial court declared a mistrial as to the penalty phase of trial proceedings. See id.

"Felony Complaint for Arrest Warrant" dated November 24, 2007 (FAP Exh. 15), for the charges arising from the jail riot. See id.

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"Notice to court of defendant renouncing pro-per status and request for counsel" filed on January 8, 2008 (FAP Exh. 16), filed in the riot case. See id.

"3300 A-Row diagram (FAP Exh. 17), identifying the inmates in cells as follows: A-3 Francisco Morales, A-4 Rudy Tafoya, A-5 Erick Morales, A-6 Gerardo Reyes, A-7 Petitioner, A-8 Timothy Trujillo, A-10 Daniel Hines, A-11 Daniel Valenzuela, and A-19 Walter Cortez. See id.

"Housing Location Inquiry" as of November 27, 2007 (FAP Exh. 18) (bates stamped 91-94), listing inmates for Module 3300, including their booking numbers and cell locations. See id.

Declaration of Rebecca Dobkin dated November 12, 2013 (FAP Exh. 19), wherein Petitioner's federal habeas counsel's investigator states that she reviewed the trial files from Petitioner's counsel and from Robert Royce, and that copies of FAP Exhibits 6(A), 7, 10, and 18, were found in the trial file of Petitioner's trial counsel, and copies of FAP Exhibits 6(A) and 7 were found in Royce's file. See id.

"Annual Report on Conditions Inside Los Angeles County Jail, 2008-2009, dated May 5, 2010 (FAP Exh. 20), which discusses "deputy abuse" and retaliation. See id.

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"Declaration of Tom Parker in Support of Plaintiffs' Motion for Class Certification" filed in *Rosas and Goodwin v. Baca*, C.D. Cal. Case No. CV 12-428-DDP, dated February 23, 2012 (FAP Exh. 21), concerning allegations of abuse and excessive force in the Los Angeles County jails. See id.

"Report of the Citizens' Commission on Jail Violence" dated September 2012 (FAP Exh. 22), concerning allegations of "unreasonable violence" by deputies in Los Angeles County jails. See id.

C. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

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Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have

been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 562 U.S. at 101. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 105.

D. The Superior Court Reasonably Determined that Petitioner's Claim of Ineffective Assistance Fails for Want of Prejudice.

Petitioner alleges that counsel's investigation was deficient because counsel assertedly: (1) failed to interview any potential inmate witnesses prior to trial (FAP, Ground One, pp. 24-25, 29-36); and (2) failed to investigate the general conditions of the Los Angeles County Men's Central Jail (FAP, Ground One, pp. 36-41).

Assuming, arguendo, that counsel's performance was unreasonable, Petitioner has failed to prove any Strickland prejudice resulting therefrom. See Strickland, 466 U.S. at 697. Petitioner was convicted of conspiracy to commit assault and vandalism, three counts of resisting an executive officer, and assault by means likely to produce great bodily injury on Deputy Morales and on Deputy Alvarez (C.T. 288-96). The trial evidence compellingly established Petitioner's guilt

as to all of these charges. Petitioner suggests that the verdicts might have been different if counsel had presented the other inmate witnesses' testimony and evidence of deputy-on-inmate abuse at the jail. However, as the Superior Court reasonably determined, and as discussed below, such evidence would not have produced a substantial likelihood of a different trial outcome.

For the conspiracy charges, the prosecution needed only to show that two or more persons agreed to commit vandalism or assault, and took one overt act to further the conspiracy. See C.T. 254-63 (jury instructions). "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." People v. Morante, 20 Cal. 4th 403, 416, 84 Cal. Rptr. 2d 665, 975 P.2d 1071 (1999) (citations omitted). "The elements of a conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.'" People v. Vu, 143 Cal. App. 4th 1009, 1024-25, 49 Cal. Rptr. 3d 765 (2006) (citations omitted). "To prove an agreement, it is not necessary to establish that the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." Id. at 1025 (citation omitted).

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At Petitioner's trial, the evidence included deputies' testimony regarding what Petitioner and others said and did, a videotape showing what Petitioner and others did, and Petitioner's own incriminating testimony. Petitioner admitted that more than one inmate (including Petitioner) intentionally broke their sinks and threw pieces of porcelain and other items at the deputies (constituting five of the alleged overt acts for conspiracy to commit assault and both of the alleged overt acts for conspiracy to commit vandalism) (R.T. 1567, 1573, 1706, 1715-16, 1718-19, 1722, 1725-28, 1747-50, 1758, 1838-39; see C.T. 262-63, 288-90 (conspiracy jury instructions and related verdicts)).

The inmate declarations Petitioner now submits allege that, contrary to prosecution evidence, Petitioner did not order anyone to throw anything, break sinks or take any other action during the riot, and each declaration denies that Petitioner was a "shot caller" for the row (FAP Exhs. 1-5). Hines and Erick Morales state that the inmates became upset and threw things at deputies as a spontaneous reaction to the manner in which Gonzalez was removed (FAP Exh. 1, ¶ 2-3; FAP Exh. 2, ¶ 3). Reyes states that he was the first to break his sink and that Petitioner did not make any agreement with him to break sinks (FAP Exh. 3, ¶ 5).

It was reasonable for the Superior Court to conclude that the inmates' potential testimony would not have produced a substantial likelihood of a different trial outcome. The inmate testimony would have supported the prosecution evidence that multiple inmates broke their sinks within a short time frame (see FAP Exh. 3, ¶ 5 (Reyes

admitting he broke his sink); FAP Exh. 4, ¶ 4 (Trujillo admitting that he broke his sink)). The inmate testimony also could have supported the logical inference that the inmates were acting in concert and by agreement during the riot. Moreover, Petitioner need not have specifically directed the other inmates to break their sinks or throw things at the deputies to be found guilty of conspiracy. In fact, while finding Petitioner guilty of conspiracy, the jury found "not true" the overt act allegation that Petitioner urged another inmate to break his sink. For the remainder of the charges (i.e., resisting executive officers and assault by means likely to produce great bodily injury), the inmates' testimony would have been largely if not entirely cumulative of the evidence adduced at trial concerning the officers' use of force.

Furthermore, in some respects, the inmates' testimony actually would have undercut Petitioner's defense and would have supported rather than impugned the jury's verdicts. For example, Petitioner was convicted of resisting executive officers (Deputies Ibarra, Argueta, Orosco, and Taylor), the deputies who removed Gonzalez from A-Row. See C.T. 291 (verdict); R.T. 656-57 (Deputy Ibarra testifying regarding who removed Gonzalez from the row); but see R.T. 1276-77, 1281-91, 1297-98, 1318-21, 1327-31, 1337-41, 1549-57, 1700, 1849-50 (Gonzalez and then Petitioner testifying that it was only Deputy Ibarra who removed Gonzalez from the row). A person may be found guilty of resisting executive officers in two separate ways: "The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her

duty." People v. Smith, 57 Cal. 4th 232, 240, 159 Cal. Rptr. 3d 57, 303 P.3d 368 (2013) (citation omitted). A defendant cannot be convicted of an offense against an officer engaged in the performance of his or her duties unless the officer was acting lawfully at the time the offense against the officer was committed. Id. at 241 (citations omitted). Here, Petitioner's admission that he intentionally threw things directly at Deputy Ibarra to "interfere" with Ibarra as Ibarra attempted to remove Gonzalez from the row supported this charge (R.T. 1839-40). The inmate declarations reinforce the fact that inmates threw things at the deputies to try to prevent the removal of Gonzalez from the row. See FAP Exh. 1, ¶ 2 (Hines stating that the inmates yelled to have Gonzalez put back in his cell and threw things at the deputies); FAP Exh. 2, ¶ 3 (Erick Morales stating that the inmates yelled and threw things); FAP Exh. 3, ¶¶ 4-5 (Reyes stating that inmates asked questions challenging Gonzalez' removal and threw things at the deputies); FAP Exh. 4, ¶ 3 (Trujillo stating that he threw things because he wanted the deputies to stop the "assault" on Gonzalez); FAP Exh. 5, ¶ 3 (Reddix stating that he heard inmates yelling at the deputies to stop what they were doing to Gonzalez and that inmates threw things).

The jury had before it ample evidence of the deputies' use of force in dealing with the inmates on A-Row during the riot. As noted above, Deputy Ibarra admitted that Gonzalez' removal involved dragging and pepper spraying Gonzalez (R.T. 665-66, 709-10). Gonzalez testified that he struggled and fought with Ibarra, who had him by the neck and dragged him from the row in front of the other inmates, and that he then was beaten by Ibarra and other deputies and maced into

submission (R.T. 1286-93, 1321, 1327-31, 1337-41). Petitioner testified that Gonzalez was beaten in the sally port area (R.T. 1552-53, 1557-58). When the extraction team later came onto A-Row, two deputies were firing pepper ball guns into the cells from where the porcelain was being thrown, and one or two deputies were spraying pepper spray near those cells (R.T. 938, 942-45, 973-75). The deputies admittedly fired more than 30 pepper balls into Petitioner's cell, and sprayed five or more bursts of pepper spray from the canister into his cell when Petitioner refused to comply with their commands (R.T. 944, 975-76). The videotape showed, and Deputy Morales confirmed, that the extraction team used "a lot" of pepper spray and pepper balls to remove inmates from their cells (R.T. 778, 786-87). However, the videotape also showed that 16 of the inmates on the row walked out peacefully in handcuffs during the extraction (R.T. 1836). The other inmates' testimony would not have added anything significantly material to all of this trial evidence regarding the deputies' use of force. None of the inmates were present when Petitioner was removed from his cell, so they could not have testified competently regarding the circumstances under which Petitioner purported to have acted in self-defense at that time.

The inmate testimony would have undermined Petitioner's defense at trial in several additional respects. Contrary to Petitioner's and Gonzalez' purportedly emphatic trial testimony that Deputy Ibarra was the only deputy to remove Gonzalez from the row, all of the other inmate witnesses now agree that more than one deputy removed Gonzalez from A-row. See FAP Exh. 1, ¶ 2 (Hines referring to "deputies" removing Gonzalez from the row); FAP Exh. 2, ¶ 2 (same for Erick

Morales); FAP Exh. 3, ¶ 2 (same for Reyes); FAP Exh. 4, ¶¶ 2-3 (same for Trujillo); FAP Exh. 5, ¶ 2 (same for Reddix). Contrary to Petitioner's trial testimony that the deputies threatened over the loud speaker to "fuck [the inmates] up" right after Gonzalez was removed from A-Row, none of the other inmate witnesses now state that the deputies ever threatened the inmates over the loud speaker. See FAP Exhs. 1-5.

Finally, as the Superior Court reasonably emphasized, the other inmates' testimony would have been vulnerable to effective impeachment for bias, given these inmates' own participation in the riot and the fact that the proffered testimony of each is "so similar in content and language" (despite the inmates' differing vantage points) as to raise "the specter of whether the statements offered by the inmates were specifically designed for achieving a certain outcome or result in the litigation" (Respondent's Lodgment 20, pp. 523-25). Each inmate's testimony also would have been impeached by Gonzalez' trial admission that an inmate's testimony that Petitioner had done something wrong could get the testifying inmate killed.

In sum, the Court finds no substantial, reasonable likelihood of a different verdict had the jury been presented with the inmates'

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testimony.[17] As discussed above, such testimony is largely cumulative of the trial evidence concerning the force used by the deputies during the riot, impeaches the defense witnesses' testimony in some respects, does not materially mitigate Petitioner's own incriminating admissions, and actually supports certain aspects of the prosecution's case. Additionally, as the Superior Court correctly observed, the inmate testimony would have been vulnerable to effective impeachment. See Respondent's Lodgment 20, pp. 523-25. Finally, the inmate testimony would not have undermined the compelling strength of the prosecution's evidence.

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[17] Nor does the Court find any prejudice from counsel's alleged failure to investigate the reported history of deputy-on-inmate abuse at the jail. Petitioner has provided reports post-dating Petitioner's conviction that generally concern allegations of physical abuse and excessive force in the Los Angeles County jails (FAP Exhs. 20-22). Petitioner claims these reports chronicle a long history of deputy-on-inmate violence based on "numerous publicly available reports," which counsel supposedly could have probed for leads on evidence to lend credibility to the defense that Petitioner feared physical abuse at the hands of his jailers (FAP, p. 37). Petitioner has not identified specific evidence within these reports existing at the time of Petitioner's trial that counsel could or should have unearthed. See FAP, p. 37 & n. 4. Petitioner's vague and speculative allegations that there existed unidentified evidence counsel should have presented do not establish Strickland prejudice. See Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (no Strickland prejudice where petitioner did "nothing more than speculate that if interviewed, [a potential witness] might have given information helpful to [petitioner]"); see also Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009), cert. denied, 559 U.S. 995 (2010) (speculation insufficient to show Strickland prejudice); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991) (petitioner cannot satisfy Strickland standard by "vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"). In any event, there is no substantial, reasonable likelihood that general evidence of deputy-on-inmate abuse in the county jail system would have altered the result of Petitioner's trial.

The Superior Court's rejection of Petitioner's ineffective assistance claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground One.

II. Petitioner is Not Entitled to Federal Habeas Relief on His Claim that the Trial Court Unconstitutionally Denied Petitioner's Request for Self-Representation.

Petitioner challenges the trial court's denial of Petitioner's request for self-representation, which Petitioner made immediately after the court denied Petitioner's Marsden motion on the eve of trial. See FAP, Ground Two, pp. 41-47; Reply, pp. 19-26. The California Court of Appeal issued the last reasoned decision rejecting this claim, ruling that the trial court did not abuse its discretion by denying Petitioner's request. See People v. McGhee, 2010 WL 2510095, at *6-7 (Cal. App. June 23, 2010).[18] The Court of Appeal stated, inter alia, that "[Petitioner's] request for self-representation brought on the eve of trial appears to be a ploy to obtain a continuance." Id. at *7 (citations omitted).

A. Governing Legal Standards

Under Faretta v. California, 422 U.S. 806, 820-21 (1975), a criminal defendant is constitutionally entitled to waive his or her

[18] Respondent's Lodgment 1, which purports to be this decision of the Court of Appeal, is missing several pages.

Sixth Amendment right to counsel and to represent himself or herself at trial. See also Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir.), cert. denied, 521 U.S. 1111 (1997) (Faretta rule is clearly established by United States Supreme Court for purposes of 28 U.S.C. section 2254(d)). Under Ninth Circuit law, a Faretta request must be: (1) knowing and intelligent; (2) unequivocal;[19] (3) timely; and (4) not asserted for purposes of delay. Hirschfield v. Payne, 420 F.3d 922, 926 (9th Cir. 2005); United States v. Schaff, 948 F.2d 501, 503 (9th Cir. 1991).

In Marshall v. Taylor, 395 F.3d 1058 (9th Cir.), cert. denied, 546 U.S. 860 (2005), the Ninth Circuit recognized that, although no United States Supreme Court case has directly addressed the timing of a request for self-representation, Faretta itself incorporated a timing element. Id. at 1060. The Ninth Circuit read Faretta to "require a court to grant a Faretta request when the request occurs 'weeks before trial.'" Id. at 1061. However, the Ninth Circuit ruled that, "[b]ecause the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." Id. (footnote omitted). The Marshall Court held that, because the petitioner's request for self-

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[19] This Court assumes, arguendo, that Petitioner made an unequivocal Faretta request. But see Jackson v. Ylst, 921 F.2d 882, 888-89 (9th Cir. 1990) (request for self-representation that was an "impulsive response to the trial court's denial of [defendant's] request for substitute counsel" deemed equivocal); Young v. Knipp, 2013 WL 2154158, at *8 (C.D. Cal. May 15, 2013) (Faretta request coupled with request for 30-day continuance deemed equivocal).

representation on the morning of trial "fell well inside the 'weeks before trial' standard for timeliness established by Faretta," the state court's finding of untimeliness "clearly comport[ed] with Supreme Court precedent." Id.

B. Analysis

Petitioner made his request for self-representation on July 21, 2008, the day the case was assigned for trial after two previous continuances of the trial date. Because Petitioner's request came well within the "weeks before trial" standard set forth in Faretta, the trial court's rejection of Petitioner's Faretta request was not an objectively unreasonable application of Faretta. See Marshall v. Taylor, 395 F.3d at 1061; see also Burton v. Davis, 816 F.3d 1132, 1141-42 (9th Cir. 2016) (where defendant made request three days before jury was empaneled, Faretta did not "clearly entitle" defendant to habeas relief for denial of request); Stenson v. Lambert, 504 F.3d 873, 884-85 (9th Cir. 2007), cert. denied, 555 U.S. 908 (2008) (because there was no Supreme Court holding that request for self-representation made on eve of trial was timely, denial of request did not violate Faretta and was not objectively unreasonable under AEDPA); Ake v. Biter, 2013 WL 1515859, *12 (C.D. Cal. Feb. 6, 2013), adopted, 2013 WL 1511745 (C.D. Cal. Apr. 11, 2013) (request on the day set for trial and the day before jury selection began untimely; denial comported with Faretta); see generally Williams v. Taylor, 529 U.S. 362, 412 (2000) ("[AEDPA] restricts the source of clearly established law to [the Supreme] Court's jurisprudence").

Furthermore, Petitioner made his request for self-representation after the presiding judge denied trial counsel's request for a continuance and after the trial judge denied Petitioner's Marsden motion. See FAP, pp. 45-46; R.T. A5-A7, A-11, 3-4, 13-31. With his request for self-representation, Petitioner concurrently made another request for a trial continuance (R.T. 30-31). On this record, it was not unreasonable for the Court of Appeal to find that Petitioner made the Faretta motion as a ploy for the purpose of delay. See Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982) (if a defendant accompanies a Faretta motion with a request for continuance, this may be considered evidence of purpose to delay); see also Hirschfield v. Payne, 420 F.3d at 927 (state court finding that Faretta request was made for the purpose of delay was not unreasonable where the request came the day before the start of trial, was accompanied by a request for continuance, and the defendant previously had made requests to substitute counsel).[20]

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[20] Petitioner argues that the trial court (and the Court of Appeal) denied the Faretta request in reliance on Petitioner's failure to give a sufficient "reason to remove Mr. Jacke as the lawyer" (Reply, p. 20 (quoting R.T. 33); Reply, p. 21 (quoting People v. McGhee, 2010 WL 2510095, at *7)). The record belies this argument. The trial court denied the Faretta request because Petitioner was requesting another continuance on the eve of trial. See R.T. 31 ("[I]f you're requesting pro per status because you want a 30-day continuance, that's not going to be granted. So that motion would be denied."); R.T. 33 ("You only requested pro per status so that you can get a continuance which I've denied."). The trial court's discussion of Petitioner's reasons for removing counsel concerned Petitioner's Marsden motion. See R.T. 33. Similarly, the Court of Appeal found no abuse of discretion in denying the Faretta request because, under the totality of circumstances, Petitioner's request appeared "to be a ploy to obtain a continuance." See People v. McGhee, 2010 WL 2510095, at *6-7.

Petitioner's citations of Buhl v. Cooksey, 233 F.3d 783, 794 (3d Cir. 2000) ("Buhl"), Moore v. Haviland, 531 F.3d 393 (6th Cir. 2008), cert. denied, 558 U.S. 933 (2009) ("Moore"), and Jones v. Norman, 633 F.3d 661, 664 (8th Cir. 2011) ("Jones") (see Reply, p. 20) do not alter the Court's conclusion. In Buhl, the Third Circuit found timely a Faretta request that was filed several weeks before trial was scheduled to begin. Because a timely request had been made, Third Circuit precedent required the trial court to inquire concerning the defendant's reasons for the request to aid the court in determining if the request was voluntary, knowing, and intelligent. Id. at 794-97. In Petitioner's case, there was no Faretta request made weeks before trial, and it is clear from the record that the trial court understood that Petitioner's supposed reason for making the Faretta request was to obtain a continuance to conduct discovery that had not been done – the same reason for which counsel had requested and been denied a continuance. See R.T. A-6 - A-8, 19-32; C.T. 176-77 (motion to continue). In Moore, the Sixth Circuit found a Faretta violation where the trial court did not rule on the Faretta request at all. Moore, 531 F.3d at 402-03. In Jones, the Eighth Circuit found a Faretta violation where the trial court had applied too high a standard in determining whether the Faretta request was knowing and voluntary. Jones, 633 F.3d at 666-67. None of these out of circuit decisions apply in Petitioner's circumstance.

Petitioner faults the trial court for not inquiring of the defense investigator concerning the status of discovery. See FAP, p. 45; R.T. 32. The defense had not made the investigator available for the hearing, and the trial court was entitled to rely on the

representations of Petitioner's counsel concerning the status of the investigation. Under the circumstances, Faretta does not clearly require the inquiry for which Petitioner argues. See Faretta, 422 U.S. at 835.

Petitioner also argues that he made his Faretta request at the first available opportunity after he realized his counsel had not prepared desired witnesses. No United States Supreme Court law clearly establishes that an eve of trial Faretta motion is timely under such circumstances. Moreover, contrary to Petitioner's argument, he actually did have prior opportunities to make a Faretta request in essentially the same factual circumstances. There were pretrial conferences on April 22, 2008, and June 4, 2008, and the case was called for trial on June 30, 2008 (C.T. 136-38, 142). On June 30, 2008, Petitioner was present with another attorney appearing on behalf of his trial counsel who was engaged in another trial (C.T. 142). The trial court then continued the trial date to July 14, 2008, because, inter alia, defense counsel supposedly needed time to locate and interview witnesses (C.T. 139-40, 142). Thus, on the June 30, 2008 trial date, Petitioner was on notice that desired witnesses had not been interviewed. Yet, Petitioner did not make any Faretta request at that time (C.T. 142-43).

Defense counsel then filed a motion to dismiss for want of prosecution and discriminatory prosecution on July 11, 2008, in which counsel declared, "The defendant has informed me and I believe him when he says witnesses are impossible to find. The defense investigator has been unable to locate several of the witnesses. . . .

The police reports did not record the residence addresses of the inmates. The reports merely indicate that they resided at the county jail. This makes it impossible to find witnesses" (C.T. 144-57). When the case returned for trial on July 14, 2008, Petitioner again was present with a substitute attorney appearing because trial counsel was still engaged in another trial (C.T. 168). Once again, Petitioner was on notice that desired witnesses had not been interviewed. Furthermore, Petitioner was on notice that counsel purportedly believed that it would be impossible to find the witnesses. Yet, Petitioner still did not make any Faretta request at the July 14, 2008 hearing (C.T. 168). Instead, he waited until after the Superior Court's July 21 denials of two 11th hour requests for a third continuance before invoking Faretta in the apparent (and ultimately vain) hope of reversing these continuance denials.

Petitioner has failed to demonstrate that the Court of Appeal's rejection of his Faretta claim was contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Therefore, Petitioner is not entitled to federal habeas relief on Ground Two.

III. Petitioner is Not Entitled to Federal Habeas Relief on His Claim that He Was Denied a Fair Trial By the Delay in Charging Him.

Petitioner claims that he was denied his due process right to a fair trial by the delay between the jail riot and the filing of the charges. See FAP, Ground Three, pp. 47-52 (erroneously referring to

this claim as a "speedy trial" claim); Reply, pp. 26-29.[21] The Court of Appeal issued the last reasoned decision denying this claim, finding that Petitioner had not shown prejudice from the delay. See People v. McGhee, 2010 WL 2510095 at *7-8. In reviewing this claim, the Court is limited to the record that was before the Court of Appeal at the time of its decision. See Ryan v. Gonzalez, 568 U.S. 57, 68 (2013) (review "is limited to the record that was before the state court that adjudicated the claim on the merits") (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)).[22]

A. Background

Three days before the scheduled trial date, Petitioner filed a motion to dismiss the charges for want of prosecution (pre-indictment delay) and for assertedly discriminatory prosecution (C.T. 144-57).

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[21] The Sixth Amendment right to a speedy trial attaches only at the time of arrest, indictment, or other official accusation. See United States v. Marion, 404 U.S. 307, 321 (1971) ("Marion") (holding that the Sixth Amendment speedy trial provision is not implicated until formal charges are filed or defendant suffers actual restraint on liberty); see also Doggett v. United States, 505 U.S. 647, 654 (1992); United States v. MacDonald, 456 U.S. 1, 6-7 (1982); United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Pre-charge delay (i.e., delay prior to arrest or the filing of formal charges) does not implicate the Sixth Amendment right to a speedy trial. United States v. Lovasco, 431 U.S. 783, 788-89 (1977); Marion, 404 U.S. at 321-23.

[22] Petitioner did not submit any additional evidence to the California Supreme Court before the Supreme Court summarily denied review in 2010 (Respondent's Lodgments 2 and 3). If Petitioner had done so, such additional evidence could be considered in reviewing this claim. See Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

Petitioner alleged that the prosecutor waited until November 13, 2007 to file any felony complaint for crimes arising from the January 5, 2005 incident, and then charged only Petitioner (C.T. 146). Petitioner argued that the prosecution sought to have the jail riot case precede the retrial on the penalty phase of Petitioner's capital case. Yet, as Petitioner conceded, the prosecution had announced before the beginning of the guilt phase of the capital trial that the state would file jail riot charges against Petitioner (C.T. 147). Petitioner also alleged that the prosecution had "tendered" an "unofficial/off the record settlement" in the capital case prior to the start of the penalty phase (C.T. 148). Petitioner alleged that the settlement assertedly discussed would have given him life without parole in the capital case, and "the riot case would be included in some way," in return for Petitioner's waiver of appeal (C.T. 148). Petitioner alleged that the delay in filing the charges in the jail riot case caused the loss of potential defense witnesses, the fading of memory, and the destruction of physical evidence (C.T. 147, 149, 151). Petitioner further alleged that the prosecution brought the jail riot charges in "bad faith" to try to "coerce" a plea in the capital case and to avoid a trial on the penalty phase of the capital case (C.T. 148). Petitioner argued that this conduct effectively deprived him of his due process right under the federal constitution (C.T. 149-50 (citing United States v. Ross, 123 F.3d 1181 (9th Cir. 1997)).

The prosecution opposed the motion, arguing that the decision to file the present charges preceded the murder trial and was unrelated to Petitioner's rejection of any alleged plea offers in the capital

case (C.T. 170-71; see also C.T. 173-74). The prosecutor stated that, in preparing for the capital case, he had discovered the videotape of the jail riot showing Petitioner throwing porcelain at the officers. The prosecutor claimed that, because he then was busy preparing for the murder trial and the statute of limitations on the potential riot charges was not yet close to expiring, the prosecutor had opted to wait to proceed on the riot charges (C.T. 170-71; R.T. A-4 - A-5). The prosecutor said that he had charged only Petitioner in the jail riot case because, as a "special unit" prosecutor, he did not have any responsibility or jurisdiction over the others who had been involved in the jail riot (R.T. A-4).

The presiding judge denied Petitioner's motion, characterizing the video evidence against Petitioner as "very compelling," and finding that there was no vindictiveness by the prosecution and no material prejudice as a result of the delay in filing (R.T. A-5). As previously indicated, the Court of Appeal later ruled that Petitioner had failed to show prejudice resulting from the pre-charge delay.

B. Governing Legal Standards

The Due Process Clause provides a criminal defendant with some protection against delay between the commission of an offense and the initiation of a prosecution. United States v. Lovasco, 431 U.S. at 788-89; Marion, 404 U.S. at 322. However, a claim that pre-charge delay denied a defendant due process requires, inter alia, proof of "actual, non-speculative prejudice [to the defense] from the delay, meaning proof that demonstrates exactly how the loss of evidence or

witnesses was prejudicial." United States v. Barken, 412 F.3d 1131, 1134 (9th Cir. 2005) (citations and internal quotations omitted). "Once prejudice is sufficiently proved, the court then undertakes the task of balancing the length of the delay against the reason for the delay." United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992); see also United States v. Lovasco, 431 U.S. at 789-90.

"A defendant claiming preindictment delay carries a 'heavy burden' of showing actual prejudice that is 'definite and not speculative.'" United States v. Ross, 123 F.3d 1181, 1185 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998) (citations omitted). "Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." United States v. Manning, 56 F.3d at 1194; see also United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007), cert. denied, 555 U.S. 865 (2008) (burden is one that is "rarely met"); see generally Marion, 404 U.S. at 325-26 (a defendant's reliance solely on the "real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost," is not in itself enough to demonstrate actual prejudice).

C. Analysis

The Court of Appeal reasonably determined that Petitioner failed to carry his burden to prove prejudice from the pre-charge delay. Petitioner asserts that he was prejudiced from the delay because he was unable to find and present any inmate witnesses other than Gonzalez. By the time he was charged, the witnesses reportedly had

either been released from jail or transferred to various state prisons. See FAP, pp. 50-51. Petitioner also asserts that one witness, Walter Cortez, had died by the time Petitioner was charged (FAP, p. 51). Petitioner suggests that these witnesses could have testified to events not captured on the videotape, and could have corroborated the defense testimony (FAP, pp. 51-52). Petitioner asserts that, by delaying bringing the charges, the prosecution intentionally gained a tactical advantage (FAP, p. 50).

However, Petitioner presented no competent evidence to the Court of Appeal regarding the identities of the other inmates who supposedly could have testified (other than the deceased Walter Cortez), the substance of their potential testimony, or when the other inmates were released or transferred from the jail. See Respondent's Lodgment 12, pp. 65-77; Respondent's Lodgment 14, pp. 17-20. Petitioner thus failed to furnish definite, nonspeculative proof that the charging delay actually impaired Petitioner's ability to defend himself. See United States v. Manning, 56 F.3d at 1194; see also United States v. Butz, 982 F.2d 1378, 1380 (9th Cir.), cert. denied, 510 U.S. 891 (1993) (assertions that a key witness had died, witnesses had dimmed memories, and that the defendant did not secure witnesses because of the belief no charges were forthcoming, were too speculative to demonstrate actual prejudice).

At trial, Petitioner testified at length and in detail concerning what he claimed transpired on the day of the jail riot (R.T. 1539-78, 1596-97, 1687-1841, 1846-55, 2104-2124). Petitioner's memory of the incident did not appear to have been impaired by the passage of time.

Petitioner said he was testifying based on his memory of how events actually happened rather than from the videotape (R.T. 2105-06).[23]

As for the potential witnesses never called by the trial defense, the Court of Appeal reasonably found from Petitioner's failure to identify the witnesses (other than the deceased Walter Cortez) and Petitioner's failure to delineate the substance of the witnesses' purported testimony that Petitioner had offered only speculation that these witnesses could have provided any evidence that would have been valuable to Petitioner.[24] People v. McGhee, 2010 WL 2510095 at *8. As the Court of Appeal reasonably concluded, Petitioner's speculation did not meet Petitioner's heavy burden to show prejudice from a pre-indictment delay. United States v. Butz, 982 F.2d at 1380; United States v. Huntley, 976 F.2d at 1290.[25]

Petitioner suggests that the Court of Appeal was required to evaluate prejudice in light of the applicable statute of limitations. See Reply, pp. 27-28 (quoting Marion, 404 U.S. at 326). Marion does

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[23] Gonzalez' purported memory appeared similarly unimpaired by the passage of time (R.T. 1279, 1281-82, 1285-86, 1292-93, 1320-21, 1327-28, 1337, 1340, 1343).

[24] Again, in reviewing the reasonableness of the Court of Appeal's denial of this claim, only the evidence that was then before the Court of Appeal may be considered. The inmate declarations submitted years later may not be considered in this review.

[25] Because the Court of Appeal reasonably determined that Petitioner failed to demonstrate prejudice to the Court of Appeal, this federal Court need not and does not balance "the length of the delay against the reason for the delay." See United States v. Huntley, 976 F.2d at 1290.

not so hold. To the contrary, Marion states that "in light of the applicable statute of limitations," "possibilities" of prejudice inherent in any extended delay do not demonstrate actual prejudice. See Marion, 404 U.S. at 326 (emphasis added). "There is [] no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitations already perform that function." Id. at 323 (quoting Toussie v. United States, 397 U.S. 112, 114 (1970). Here, the statute of limitations had not run, and Petitioner did not demonstrate actual prejudice.

The Court of Appeal's rejection of Petitioner's due process claim regarding pre-charging delay was not contrary to, or an unreasonable application of, any clearly established Federal law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground Three.

IV. Petitioner's Claim of Vindictive Prosecution Does Not Merit Federal Habeas Relief.

Petitioner contends that the prosecutor engaged in vindictive prosecution by bringing the charges in the jail riot case after Petitioner assertedly refused to accept a plea offer and waive his appellate rights in the capital case. See FAP, Ground Five, pp. 55-60; Reply, pp. 32-38. Petitioner alleges that the prosecution's decision violated due process and, by virtue of the pre-charge delay, his right to present a defense. Id.

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Petitioner raised this claim (among numerous other claims) in Petitioner's first round of habeas petitions filed in the state courts in 2011-12. See Respondent's Lodgment 4, pp. 54-57; Respondent's Lodgment 6, pp. 56-59; Respondent's Lodgment 8, pp. 26-30. The Superior Court and the Court of Appeal issued reasoned decisions denying the petitions, stating that the petitions reiterated issues raised on direct appeal and that Petitioner had failed to demonstrate ineffective assistance of counsel (Respondent's Lodgments 5 and 6).[26] Neither decision specifically mentioned Petitioner's vindictive prosecution claim (id.). The California Supreme Court denied Petitioner's habeas petition summarily (Respondent's Lodgment 9). Petitioner had not raised his vindictive prosecution claim on direct appeal, and the Court of Appeal's reasoned decision on direct appeal had not addressed such a claim. See Respondent's Lodgments 1-3, 12, 14. Therefore, there is no reasoned state court decision specifically discussing Petitioner's vindictive prosecution claim, Ground Five herein.

Petitioner argues that no state court ever reached the merits of Ground Five and this Court should review the claim de novo. See FAP, pp. 55-56; Reply, pp. 32-34. Respondent argues, inter alia, that the Court of Appeal's reasoned decision did not invoke any procedural bar as to Ground Five and this Court should review the denial of the claim under 28 U.S.C. section 2254(d). See FAP Answer, pp. 9-11, 34-35. Although the issue is not free from doubt, it appears that section 2254(d) should apply to the review of this claim.

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[26] Respondent's Lodgment 6 consists of several disparate documents.

"When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . ." Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 1096 (2013). This "strong" presumption may be rebutted only in "unusual circumstances." Id., 133 S. Ct. at 1096-99. Even so, where the state court failed to address a federal claim as a result of "sheer inadvertence," the claim has not been adjudicated on the merits. Id., 133 S. Ct. at 1097.

In seeking de novo review of Ground Five, Petitioner theorizes that the Court of Appeal erroneously believed that its own previous opinion on Petitioner's direct appeal had discussed and denied Ground Five, even though Petitioner never raised Ground Five on direct appeal. Petitioner further theorizes that the California Supreme Court then adopted as its own basis for denying Ground Five the manifestly erroneous belief Petitioner imputes to the Court of Appeal. And, according to Petitioner, the California Supreme Court made this egregious error even though Petitioner expressly had told the Supreme Court in the habeas petition filed therein that claims in that petition had not been made on direct appeal (Respondent's Lodged Document 8 at pp. 5-6).

Petitioner's arguments for de novo review of Ground Five should be rejected. Nothing (including possible factual error in the

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Superior Court's previous habeas decision[27]) sufficiently rebuts the "strong" presumption that the Court of Appeal adjudicated Ground Five on the merits, albeit without any specific discussion. See Smith v. Oregon Bd. of Parole and Post-Prison Supervision, 736 F.3d 857, 860-61 (9th Cir. 2013) (applying presumption to cursory state court order).

Moreover, assuming arguendo the Court of Appeal did not adjudicate Ground Five on the merits and instead based its denial on the theorized mischaracterization of its own ruling on direct appeal, this federal Court should not presume that the California Supreme Court embraced the Court of Appeal's manifestly erroneous reasoning. Although a federal habeas court usually "looks through" a California Supreme Court's summary denial to presume the Supreme Court adopted the rationale of the lower court, such presumption may be refuted by "strong evidence." See Kernan v. Hinojosa, 136 S. Ct. 1603 (2016) ("Kernan"). In Kernan, the United States Supreme Court deemed the "look through" presumption "amply refuted" in circumstances where it would have been absurd for the California Supreme Court to have adopted the rationale of the lower court. Id. at 1606. In the present case, the California Supreme Court's adoption of the rationale Petitioner theorizes would have been no less absurd. As in Kernan, the California Supreme Court's denial here "quite obviously rested upon some different ground. . . . Containing no statement to the

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[27] Of course, the Superior Court's decision is not the decision under review with respect to Ground Five. See Barker v. Fleming, 423 F.3d 1085, 1092-93 (9th Cir. 2005), cert. denied, 547 U.S. 1138 (2006) (federal habeas court ordinarily reviews only the most recent state court reasoned decision on a petitioner's claim).

contrary, the Supreme Court of California's summary denial of [the petitioner's] petition was therefore on the merits. Harrington v. Richter, 562 U.S. 86, 99 . . . (2011)." Id.; see, e.g., Ortega v. Cate, 2016 WL 3514118, at *7-8 (C.D. Cal. May 20, 2016), adopted, 2016 WL 3511540 (C.D. Cal. June 27, 2016) ("look through" presumption refuted where lower court's decision was obviously wrong).

More than negligible uncertainty attends the above analysis, however. In particular, it is exceedingly difficult under existing case law to determine the precise point at which the California Supreme Court's theoretical adoption of incorrect lower court reasoning transitions along an improbability continuum from mere error to error sufficiently absurd to refute the "look through" presumption. Therefore, notwithstanding the above analysis, and out of an abundance of caution, the Court will first discuss the merits of Ground Five as if this Court's review were de novo.

A. Background

Prior to trial, when Petitioner's counsel filed the motion to dismiss the charges for want of prosecution and discriminatory prosecution (discussed above), counsel also filed a motion to recuse the Los Angeles County District Attorney as the prosecuting agency (C.T. 158-66). Petitioner alleged that the prosecution initially decided not to file a case regarding the jail riot, and further alleged that:

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> This new case was filed because the prosecution suffered a hung jury in the special circumstances death case against Mr. McGhee and because of the perceived infirmities with the guilty verdicts. The [capital] trial took place well after the riot, and before the filing of the jailhouse riot complaint. Before the start of the penalty phase, the People entered into discussion with the defense that if [Mr. McGhee] were to accept the sentence of life without the possibility of parole in the death case and waive any appeal rights, the People would resolve the jail riot case (which had not been filed yet). The People indicated that if the proposal were to be turned down, the jailhouse case would be filed. The two cases were linked. One was being used as "leverage" for a disposition in the other.
>
> Mr. McGhee was charged in bad faith. ¶ The People seem upset because Mr. McGhee will not waive his rights to trial on the penalty phase and appeal of the guilty verdict. . . .

(C.T. 161).

At the hearing on the motions, Petitioner's counsel argued that Petitioner had been singled out for prosecution (R.T. A-1, A-3 - A-4). As summarized above, the prosecutor explained that Petitioner was the only inmate over which the prosecutor had jurisdiction, and reminded the Court that the prosecutor had said <u>before the murder trial began</u> that the prosecutor would be filing charges regarding the jail riot (R.T. A-4 - A-5). The presiding judge denied the motion to recuse the

prosecutor, finding no vindictiveness, and transferred the case to another department for trial (R.T. A-5, A-11).

As part of the later Marsden hearing before the trial court, Petitioner again discussed the prosecution's decision to charge him for the jail riot, claiming: "I was told I was offered life without parole on the condition that I waive all my rights to appeal. It was also communicated to me that if I did not accept this offer, I would be charged on a three strikes case stemming from the jailhouse incident that occurred two years and ten months before the offer. I refused to be bullied or blackmailed into a deal simply because I wished to exercise my right to appeal" (R.T. 17). Plaintiff claimed that, out of 20 or more alleged participants in the jail riot, he was the only person charged (R.T. 17). Petitioner also alleged that prejudice resulted from the prosecution for the jail riot, because a conviction for the jail riot assertedly would be used as an aggravating factor in the penalty phase of his death penalty case (R.T. 18-19).

Petitioner's trial counsel complained that the trial on the jail riot had been set in "a rush," claiming that, when counsel initially reported needing time to interview witnesses, the presiding judge had set the case for trial (R.T. 20-21). Petitioner's counsel conceded that the prosecution's alleged offer in the capital case of life without parole in exchange for a waiver of appeal had occurred before the beginning of the first penalty phase of the capital case, rather than after the first penalty phase jury hung (R.T. 21). Counsel also acknowledged that the prosecutor in the capital case had put on the

record before the start of the capital trial that the prosecution would be filing charges for the jail riot (R.T. 21).

B. Governing Legal Standards

A vindictive prosecution can violate a defendant's Fifth Amendment right to due process. United States v. Goodwin, 457 U.S. 368, 372 (1982). "For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his [or her] protected statutory or constitutional rights is 'patently unconstitutional.'" Id. at 372 n.4 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). "To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." Nunes v. Ramirez-Palmer, 485 F.3d 432, 441 (9th Cir.), cert. denied, 552 U.S. 962 (2007) (quotations and citations omitted). Otherwise, the decision whether to prosecute rests within the prosecution's discretion. See Bordenckircher v. Hayes, 434 U.S. at 364 ("so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion") (footnote omitted). "Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir.), cert. denied, 516 U.S. 814 (1995) (citations and internal quotations omitted).

C. Analysis

Petitioner has presented no direct evidence of actual vindictiveness, and the Court's review of the record had disclosed no such evidence.[28] In the absence of direct evidence of actual vindictiveness, a petitioner may establish a prima facie case only by submitting objective evidence of an appearance of vindictiveness. See United States v. Montoya, 45 F.3d at 1299. "[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir. 1982) (citation omitted).

The record also fails to demonstrate any appearance of vindictiveness. The record reflects that the prosecutor formed the intent to bring jail riot charges against Petitioner, and put Petitioner on notice of this intent, even before Petitioner's capital trial began. The fact, if it is a fact, that the state did not bring criminal charges against any other participant in the jail riot does not alter this conclusion. Apart from all other considerations, the state's reasonable belief that Petitioner's command to Gonzalez

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[28] The Court has reviewed all of the papers on file, including the October 26, 2008 transcript from Petitioner's capital case that has been filed under seal as FAP Exh. 13. This exhibit contains a sealed bench discussion regarding a possible plea offer that the prosecution ultimately decided not to extend to Petitioner. FAP, Exh. 13 at 58-59. The Court discerns no evidence of actual vindictiveness from any of the papers on file.

had precipitated the riot, as well as the state's reasonable, related belief that Petitioner had been the "shot caller," provided manifestly rational bases for singling out Petitioner for prosecution.

Moreover, the Ninth Circuit has "sanctioned the conditioning of plea agreements on acceptance of terms apart from pleading guilty, including waiving appeal." United States v. Kent, 649 F.3d 906, 914 (9th Cir.), cert. denied, 565 U.S. 924 (2011) ("Kent") (citations omitted). Even if the prosecutor in Petitioner's case had threatened Petitioner with filing the jail riot charges if Petitioner did not plead in the capital case, the prosecutor permissibly could make good on such a threat without giving rise to an appearance of vindictiveness. "As a matter of law, the filing of additional charges to make good on a plea bargaining threat . . . will not establish requisite the punitive motive." Id.; see also Bordenkircher v. Hayes, 434 U.S. at 364 ("While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights," doing so legitimately "encourages the negotiation of pleas") (citations and quotation marks omitted).

For the same reason, to the extent Petitioner suggests that the jail riot case was filed to impact negatively the penalty phase of his capital case on retrial, this suggestion fails to establish any appearance of vindictiveness. Evidence of the jail riot had been introduced during the first penalty phase trial. See R.T. A-8. The possibility the prosecution later might use a conviction in the jail riot case as additional aggravating evidence in the retrial on the

penalty phase of the capital case does not establish actual or apparent vindictiveness. See United States v. Johnson, 469 Fed. Appx. 632, 640-41 (9th Cir.), cert. denied, 133 S. Ct. 377 (2012) (rejecting under Kent defendant's claim that the prosecution's decision to file enhanced penalty information after the defendant rejected a plea constituted vindictive prosecution); United States v. Maciel, 461 Fed. Appx. 610, 617 (9th Cir. 2011) (rejecting similar claim based on prosecution's filing of evidence of prior conviction information after defendant rejected plea offer). Given the prosecution's announcement prior to start of Petitioner's capital trial of its intent to file the jail riot charges, Petitioner's circumstance was "not a situation . . . where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on not pleading guilty." Bordenkircher v. Hayes, 434 U.S. at 360 (emphasis added).[29]

In addition to arguing that the prosecution's alleged vindictiveness violated due process, Petitioner also argues that the

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[29] Petitioner's citation to Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) ("Blackledge") (see FAP, pp. 56, 58-59; Reply, p. 35-36), does not alter the Court's conclusion. In Blackledge, the Supreme Court found a constitutional violation from the prosecution's response to the defendant's invocation of the right to appeal a misdemeanor conviction, which in North Carolina carried with it the statutory right to a trial de novo. The prosecution's response had been to bring a more serious charge on the same conduct prior to the new trial. Id. at 25-29. Unlike in Blackledge, Petitioner had not exercised any appellate rights prior to the time he was charged regarding the jail riot, and the new charges were based on different conduct than the conduct alleged in the capital case.

prosecution's alleged vindictiveness violated Petitioner's right to present a defense. See FAP, pp. 59-60; Reply, pp. 37-38. As previously discussed, however, there was no vindictiveness. Therefore, Petitioner's derivative "right to present a defense" argument must be rejected. The mere fact that some potential evidence may become unavailable prior to the initiation of a charge does not establish any violation of a defendant's constitutional "right to present a defense." See, e.g., United States v. Roberts, 2005 WL 1560722 (E.D. Wisc. June 24, 2005), adopted, 2005 WL 182251 (E.D. Wisc. July 28, 2005).

For the foregoing reasons, Petitioner would not be entitled to federal habeas relief on Ground Five even under a de novo standard of review. It necessarily follows that the California Court of Appeal's presumed rejection of Ground Five on the merits and (alternatively) the California Supreme Court's summary denial of Ground Five on the merits were not unreasonable under 28 U.S.C. section 2254(d). See Harrington v. Richter, 562 U.S. 86 (2011).[30]

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[30] Petitioner requests leave to file briefing regarding section 2254(d) review of this claim. The request is denied. Petitioner has had ample time and opportunity to brief all issues, including issues concerning the standard(s) of review and the application of those standard(s) to Petitioner's claims.

V. Petitioner is Not Entitled to Federal Habeas Relief on his Claim that the Trial Court Improperly Used Petitioner's Prior Juvenile Adjudication as a Strike.

Petitioner alleges that the trial court improperly used his prior juvenile adjudication to impose a sentence beyond the statutory maximum. See FAP, Ground Four, pp. 52-55; Reply, pp. 29-31. Petitioner cites Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Apprendi"), which provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Petitioner argues that a juvenile adjudication in which a defendant does not have the right to a jury trial cannot qualify as a "prior conviction" within the meaning of Apprendi. FAP, pp. 53-54.

The California Court of Appeal issued the last reasoned decision on this claim, rejecting the claim on direct appeal. See People v. McGhee, 2010 WL 2510095, at *9.

A. Background

The prosecution alleged that Petitioner suffered a 1989 juvenile adjudication for assault with a firearm (Cal. Penal Code § 245(a)(2)) qualifying as a prior conviction (a "strike") under the Three Strikes Law (C.T. 131; see also R.T. 2882 (noting same)). In a bifurcated proceeding, the trial court found this allegation true, observing that Petitioner admitted the allegation when Petitioner testified (R.T.

3017-18; see also R.T. 1578, 1584-86 (Petitioner's admission)).[31]

Petitioner filed a motion to strike on the ground that he was not afforded a jury trial on the juvenile adjudication (C.T. 309-12). The trial court denied the motion. See R.T. 3302.

B. Governing Legal Standards

In Apprendi, the United States Supreme Court held that, regardless of its label as a "sentencing factor," any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum, among other things, must be "proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004) ("Blakely"), the Supreme Court held that the "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . ." Blakely, 542 U.S. at 303 (original emphasis). In Cunningham v. California, 549 U.S. 270, 293 (2007), the Supreme Court held that a

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[31] Under the Three Strikes Law, qualifying strikes are defined as the "serious" felonies listed in California Penal Code section 1192.7(c) and the "violent" felonies listed in California Penal Code section 667.5(c). See Cal. Penal Code §§ 667(d)(1), 1102.12(b)(1). California Penal Code section 667(d)(3) provides, in pertinent part, that a prior juvenile adjudication may constitute a strike if the prior offense is described as a serious felony or violent felony in California Penal Code sections 1192.7 or 667.5, or if the prior offense is listed in California Welfare and Institutions Code section 707(b). California Welfare and Institutions Code section 707(b) lists the offense of assault with a firearm. See Cal. Welf. & Inst. Code § 707(b)(13). Thus, Petitioner's juvenile assault conviction qualified as a strike.

California judge's imposition of an upper term sentence based on facts found by the judge rather than the jury violated the Constitution.

C. Analysis

It is clear that Apprendi and its progeny do not inhibit a sentencing court's use of prior adult convictions. See United States v. Delaney, 427 F.3d 1224, 1226 (9th Cir. 2005) ("The Supreme Court has made clear that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt or admitted by the defendant to satisfy the Sixth Amendment.") (citation omitted); United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2002) ("Apprendi expressly excludes recidivism from its scope. Defendant's criminal history need not be proved to a jury beyond a reasonable doubt. [citations].").

The Court of Appeal rejected Petitioner's contention that the use of his prior juvenile adjudication violated Apprendi. See People v. McGhee, 2010 WL 2510095, at *9. The Court of Appeal relied on People v. Nguyen, 46 Cal. 4th 1007, 1028, 95 Cal. Rptr. 3d 615, 209 P.3d 946, cert. denied, 559 U.S. 1067 (2009), a California Supreme Court decision holding that juvenile strike priors may enhance an adult sentence beyond the statutory maximum.

In United States v. Tighe, 266 F.3d 1187, 1194-95 (9th Cir. 2001) ("Tighe"), a federal criminal case, the Ninth Circuit held that the prior conviction exception to Apprendi did not extend to nonjury juvenile adjudications. However, in Boyd v. Newland, 467 F.3d 1139, 1152 (9th Cir. 2006), cert. denied, 550 U.S. 933 (2007) ("Boyd"), the

Ninth Circuit held that Tighe did "not represent clearly established federal law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. section 2254(d)(1). The Boyd Court noted that California courts and several other circuits had disagreed with Tighe. Boyd, 467 F.3d at 1152 (citing cases); see also People v. Nguyen, 46 Cal. 4th at 1021-28 (the "overwhelming majority of federal decisions and cases from other states" have held that nonjury juvenile adjudications may be used to enhance later adult sentences, and that the United States Supreme Court "has declined numerous opportunities to decide otherwise") (footnote omitted).

Consequently, under the standard of review set forth in 28 U.S.C. section 2254(d)(1), Petitioner is not entitled to federal habeas relief on this claim. See Boyd, 467 F.3d at 1152; John-Charles v. California, 646 F.3d 1243, 1252-53 (9th Cir.), cert. denied, 565 U.S. 1097 (2011) (Boyd is binding; use of the petitioner's prior nonjury juvenile adjudication to enhance the petitioner's sentence not contrary to, or an unreasonable application of, clearly established Supreme Court law); see also Wright v. Van Patten, 552 U.S. 120, 126 (2008) (where Supreme Court's cases "give no clear answer to the question presented," state court's rejection of the petitioner's claim did not constitute an unreasonable application of clearly established Federal law) (citation and internal quotations omitted); Kessee v. Mendoza-Powers, 574 F.3d 675, 678-79 (9th Cir. 2009) (state court's application of Apprendi's prior conviction exception not unreasonable under AEDPA standard of review, where United States Supreme Court had not "given explicit direction" on the issue and state court's decision was consistent with those of other courts).

Thus, Petitioner is not entitled to federal habeas relief on Ground Four. See 28 U.S.C. § 2254(d).

VI. Petitioner's Claim of Cumulative Error Does Not Merit Federal Habeas Relief.

Petitioner contends that cumulative error based on the claims discussed above violated his constitutional rights to due process, a fair trial, effective assistance of counsel, self-representation, and trial by jury (FAP, Ground Six, pp. 61-64; Reply, pp. 38-40). The Los Angeles County Superior Court issued the last reasoned decision rejecting this claim on the merits, finding that there was no cumulative error justifying another trial. See Respondent's Lodgment 20, p. 526.[32] The Superior Court's decision was not unreasonable, and this Court would reach the same conclusion even under a de novo standard of review.

"While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." Payton v. Cullen, 658 F.3d 890, 896-97 (9th Cir. 2011), cert. denied, 133 S. Ct. 426 (2012). Habeas relief on a theory of cumulative error is appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that

[32] The California Court of Appeal rejected the claim as procedurally barred (Respondent's Lodgment 20, p. 549), and the California Supreme Court summarily rejected Petitioner's claim "on the merits" (Respondent's Lodgment 23).

they amplify each other in relation to a key contested issue in the case." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012) (citation omitted).

No such symmetry of otherwise harmless errors exists in the present case. Accordingly, Petitioner is not entitled to federal habeas relief on Ground Six. See 28 U.S.C. § 2254(a) and (d).

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the First Amended Petition with prejudice.[33]

DATED: August 1, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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[33] Petitioner's request for an evidentiary hearing is denied. When evaluating the reasonableness of a state court's decision denying the merits of a petitioner's claim, the federal habeas court may not consider evidence unpresented to the state courts. See Cullen v. Pinholster, 563 U.S. 170, 185 (2011); Gulbrandson v. Ryan, 738 F.3d 976, 993 n.6 (9th Cir. 2013), cert. denied, 134 S. Ct. 2823 (2014). To the extent any of Petitioner's claims may be subject to de novo review, Petitioner has failed to demonstrate that an evidentiary hearing would reveal anything material to such claims. Finally, Petitioner previously has had ample opportunity to develop the record and to present evidence to the courts from which he has sought relief during the past nine years.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.