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

DONALD JONES,

Petitioner,

No. CIV S-03-1421 MCE GGH P

vs.

D.L. RUNNELS, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner, a state prisoner proceeding with appointed counsel, has filed this application pursuant to 28 U.S.C. § 2254. Petitioner was sentenced, in 2000, to a term of fifty years to life to be served consecutively to a sentence of ten years, having been convicted, in 1999, on count 1, murder in the first degree, and count 3, assault with a firearm and personal use of a firearm and great bodily injury allegations found true. Memorandum of Points and Authorities in Support of Petition (hereafter, Petition), p. 11,<sup>1</sup> citing CT 283, RT 377-78; Answer, p. 7, citing CT 164-66, 171-72, RT 373. Petitioner proceeds on one ground: “the trial court violated his right to counsel and due process when it denied counsel’s request to schedule the trial one year

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<sup>1</sup> The court’s electronic pagination is referenced.

1 from the date of the crime, and instead removed the entire public defender’s office from the case  
2 and replaced it with a ‘conflicts panel’ attorney.” Petition, p. 2.<sup>2</sup>

3 II. AEDPA

4 The statutory limitations of federal courts’ power to issue habeas corpus relief for  
5 persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and  
6 Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

7 An application for a writ of habeas corpus on behalf of a person in  
8 custody pursuant to the judgment of a State court shall not be  
9 granted with respect to any claim that was adjudicated on the  
merits in State court proceedings unless the adjudication of the  
claim-

10 (1) resulted in a decision that was contrary to, or  
11 involved an unreasonable application of, clearly  
12 established Federal law, as determined by the  
Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an  
14 unreasonable determination of the facts in light of  
the evidence presented in the State court  
proceeding.

15 As a preliminary matter, the Supreme Court has recently held and reconfirmed  
16 “that § 2254(d) does not require a state court to give reasons before its decision can be deemed to  
17 have been ‘adjudicated on the merits.’” Harrington v. Richter, 131 S.Ct. 770, 785 (2011).

18 Rather, “when a federal claim has been presented to a state court and the state court has denied  
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21 <sup>2</sup> This habeas matter, in which petitioner proceeded with appointed counsel, was stayed,  
22 pending exhaustion of petitioner’s ineffective assistance of counsel claim, for more than five  
23 years without the filing of an amended petition, notwithstanding that in the April 26, 2004,  
24 Order, staying this case, petitioner had been “directed to file an amended petition containing all  
25 of petitioner’s claims immediately upon exhaustion of state court remedies.” An order issued, on  
26 September 21, 2009, directing petitioner’s counsel to show cause why the stay in this matter  
should not be lifted. Evidently, the ineffective assistance of counsel claim was never exhausted  
in state court. The stay was ultimately lifted on November 19, 2009, and briefing on this matter  
was ordered. Petitioner filed a supporting Memorandum of Points and Authorities on January 4,  
2010; respondent filed an Answer on May 26, 2010 (following a 60-day extension of time).  
Finally, following two extensions of time (for 45 and then 14 more days), a Traverse was filed on  
August 26, 2010.

1 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence  
2 of any indication or state-law procedural principles to the contrary.” Id. at 784-785, citing Harris  
3 v. Reed, 489 U.S. 255, 265, 109 S.Ct. 1038 (1989) (presumption of a merits determination when  
4 it is unclear whether a decision appearing to rest on federal grounds was decided on another  
5 basis). “The presumption may be overcome when there is reason to think some other explanation  
6 for the state court's decision is more likely.” Id. at 785.

7           The Supreme Court has set forth the operative standard for federal habeas review  
8 of state court decisions under AEDPA as follows: “For purposes of § 2254(d)(1), ‘an  
9 *unreasonable* application of federal law is different from an *incorrect* application of federal  
10 law.’” Harrington, supra, 131 S.Ct. at 785, citing Williams v. Taylor, 529 U.S. 362, 410, 120  
11 S.Ct. 1495 (2000). “A state court’s determination that a claim lacks merit precludes federal  
12 habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s  
13 decision.” Id. at 786, citing Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140 (2004).  
14 Accordingly, “a habeas court must determine what arguments or theories supported or . . . could  
15 have supported[] the state court’s decision; and then it must ask whether it is possible fairminded  
16 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior  
17 decision of this Court.” Id. “Evaluating whether a rule application was unreasonable requires  
18 considering the rule’s specificity. The more general the rule, the more leeway courts have in  
19 reaching outcomes in case-by-case determinations.” Id. Emphasizing the stringency of this  
20 standard, which “stops short of imposing a complete bar of federal court relitigation of claims  
21 already rejected in state court proceedings[,]” the Supreme Court has cautioned that “even a  
22 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” Id.,  
23 citing Lockyer v. Andrade, 538 U.S. 63, 75, 123 S.Ct. 1166 (2003).

24           The undersigned also finds that the same deference is paid to the factual  
25 determinations of state courts. Under § 2254(d)(2), factual findings of the state courts are  
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1 presumed to be correct subject only to a review of the record which demonstrates that the factual  
2 finding(s) “resulted in a decision that was based on an unreasonable determination of the facts in  
3 light of the evidence presented in the state court proceeding.” It makes no sense to interpret  
4 “unreasonable” in § 2254(d)(2) in a manner different from that same word as it appears in  
5 § 2254(d)(1) – i.e., the factual error must be so apparent that “fairminded jurists” examining the  
6 same record could not abide by the state court factual determination. A petitioner must show  
7 clearly and convincingly that the factual determination is unreasonable. See Rice v. Collins, 546  
8 U.S. 333, 338, 126 S.Ct. 969, 974 (2006).

9           The habeas corpus petitioner bears the burden of demonstrating the objectively  
10 unreasonable nature of the state court decision in light of controlling Supreme Court authority.  
11 Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002). Specifically, the petitioner “must  
12 show that the state court’s ruling on the claim being presented in federal court was so lacking in  
13 justification that there was an error well understood and comprehended in existing law beyond  
14 any possibility for fairminded disagreement.” Harrington, supra, 131 S.Ct. at 786-787. “Clearly  
15 established” law is law that has been “squarely addressed” by the United States Supreme Court.  
16 Wright v. Van Patten, 552 U.S. 120, 125, 128 S.Ct. 743, 746 (2008). Thus, extrapolations of  
17 settled law to unique situations will not qualify as clearly established. See e.g., Carey v.  
18 Musladin, 549 U.S. 70, 76, 127 S.Ct. 649, 653-54 (2006) (established law not permitting state  
19 sponsored practices to inject bias into a criminal proceeding by compelling a defendant to wear  
20 prison clothing or by unnecessary showing of uniformed guards does not qualify as clearly  
21 established law when spectators’ conduct is the alleged cause of bias injection). The established  
22 Supreme Court authority reviewed must be a pronouncement on constitutional principles, or  
23 other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on  
24 federal courts. Early v. Packer, 537 U.S. 3, 9, 123 S. Ct. 362, 366 (2002).

25           The state courts need not have cited to federal authority, or even have indicated  
26 awareness of federal authority in arriving at their decision. Early, supra, 537 U.S. at 8, 123 S.Ct.

1 at 365. Where the state courts have not addressed the constitutional issue in dispute in any  
2 reasoned opinion, the federal court will independently review the record in adjudication of that  
3 issue. “Independent review of the record is not de novo review of the constitutional issue, but  
4 rather, the only method by which we can determine whether a silent state court decision is  
5 objectively unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

6 III. Background

7           Petitioner states that on January 26, 1999, a complaint was filed charging  
8           petitioner  
9 with the murder of Catherine Owens and the attempted murder of Duane Cummins on January  
10 20,<sup>3</sup> 1999, further alleging that petitioner had personally discharged a firearm in committing the  
11 crimes. Petition, p. 3, citing CT 12-13. Petitioner was arraigned on January 26, 1999, and the  
12 public defender’s office appointed to represent him. *Id.*, citing CT 1. Thereafter, on or about  
13 February 1, 1999, Assistant Public Defender Tommy Clinkenbeard was assigned to represent  
14 petitioner. *Id.*, citing CT 19. Mr. Clinkenbeard represented petitioner at the preliminary hearing  
15 on May 21, 1999. *Id.*, CT 21, 91-92.

16           At this point, the unpublished state court opinion accurately sets forth the  
17 background of petitioner’s claim:<sup>4</sup>

18 \_\_\_\_\_  
19 <sup>3</sup> Actually, petitioner states that the offenses were alleged to have occurred on January 21,  
1999, but the record cited identifies the date as January 20, 1999.

20 <sup>4</sup> The state court of appeals also sets forth the underlying facts of the commitment  
21 offense as follows (which facts were adopted in petitioner’s Petition for Review to the California  
22 Supreme Court—see respondent’s Lodged Document 2, Petition for Review, p. 3): “About 11  
23 p.m. on January 20, 1999, Duane Cummins, homeless and addicted to drugs and alcohol, arrived  
24 at his makeshift shelter with a tarp located behind a liquor store. Catherine Owens, Cummins’s  
25 girlfriend, met Cummins at the shelter and the two sat down to eat. At 11:15 p.m., Cummins  
26 heard someone kicking on the wood gate which led to the shelter. When the gate gave way,  
Owens asked, “Who is there?” Defendant threw back the tarp and the light from a streetlamp  
illuminated Owens while Cummins remained in the dark. Defendant pointed a gun at Owens and  
demanded, “Give me everything you’ve got.” As Cummins began to explain that they had  
nothing, defendant fired the gun a total of five times from two-to-six feet away from Owens.  
Owens was shot twice in the chest and died. Cummins was shot in the right hand which he raised  
when defendant began shooting. Defendant fled the scene. Cummins called 911 from a nearby

1 On May 21, 1999, at the conclusion of the preliminary hearing, the  
2 court inquired whether defendant requested counsel. He did and  
indicated he was indigent. The following discourse ensued:

3 “THE COURT: The public defender is appointed to represent Mr.  
4 Jones.

5 “MR. CLINKENBEARD: Accept the appointment and waive any  
further reading that Mr. Jones-

6 “THE COURT: Do you waive any further arraignment on the  
7 Information?

8 “MR. CLINKENBEARD: Yes, we do.

9 “THE COURT: Does Mr. Jones desire to plead not guilty and to  
deny the special allegations?

10 “MR. CLINKENBEARD: Yes, we do.

11 “THE COURT: Do you plead not guilty to each of the crimes  
12 charged against you, Mr. Jones?

13 “DEFENDANT: Yes, sir.

14 “THE COURT: And do you deny the two special allegations?

15 “DEFENDANT: Yes, sir.

16 “THE COURT: Pleas of not guilty are entered, and denials with the  
special allegations are entered.

17 “The 55th day will be July 15th. I would like to set the case on or  
18 before July 15th. What date do you request, Mr. Clinkenbeard?

19 “MR. CLINKENBEARD: Judge, I spoke with the D.A. about this;

20 telephone.

21 Defendant was interviewed and denied knowing anything about the shooting. He also  
22 denied having or owning a gun. Defendant changed his story and admitted going to Cummins’s  
23 shelter to steal. Defendant was surprised to find anyone there and when Cummins reached for  
something, defendant fired. Afterwards, defendant reloaded his gun with five bullets he had in  
his pocket. Defendant hid the gun in the bushes near his apartment where the officers found it.  
Bullets from the gun killed Owens.

24 Dr. Susan Garcia-Swain testified for the defense. She practiced addiction and holistic  
25 medicine. She interviewed defendant who claimed he had consumed eight beers and a half liter  
of liquor on the date of the offenses. He also claimed that he had been a chronic drinker from the  
26 age of 12 years. Based on her interview, Dr. Garcia Swain concluded defendant had a  
blood-alcohol level of .2 at the time of the offenses.” People v. Jones, 2002 WL 399478 \*1 (Cal.  
App. 3<sup>rd</sup> Dst. 2002).

1 I'm not going to be able to set a trial date in this case until  
2 sometime next spring. I am booked for the rest of this year with  
3 mostly co-D homicide trials. I am going to ask for a trial date  
4 sometime in March or April-

5 "THE COURT: You know what you should do then: I really think  
6 we ought to put a matter over for a couple of days, and I really  
7 think that, especially in this case, you ought to comply with Section  
8 1050 and file a written declaration. Doesn't matter if there's a  
9 stipulation; it's mandatory. You ought to take a look at Section  
10 987.[0] 5 of the Penal Code.

11 "MR. FRAWLEY: Your Honor, I'm not stipulating to anything. I  
12 do wish the trial to be set within a reasonable amount of time, and I  
13 think March of next year is unreasonable and that we ought to  
14 investigate the possibility that another lawyer should be assigned to  
15 this case.

16 "THE COURT: I think that you ought to take a look at Section  
17 1050 and Section 987[.]05. You ought to sign a declaration and let  
18 a judge make a decision based on a proper declaration.

19 \*3 "MR. CLINKENBEARD: Okay."

20 The matter was continued until May 25, 1999. At the hearing on  
21 May 25, 1999, an amended information was filed adding the  
22 special circumstance which alleged that defendant murdered  
23 Owens during an attempted robbery. Also on May 25, 1999,  
24 Clinkenbeard filed a declaration stating that investigation was not  
25 complete and that he had conflicts in his trial schedule which  
26 precluded his ability to proceed to trial within the statutory time  
period. He asked for a trial date in the "spring of 2000." In  
pertinent part, Clinkenbeard stated: "This case was assigned to me  
on or about February 1, 1999. Two other homicides were assigned  
to me within a month of this case. I was in a two month trial when  
these cases were assigned. I have a two defendant homicide  
starting in June. I have a three defendant homicide starting in  
August. I have another homicide set in November. Also, this  
week, I'll be setting a trial date on a four defendant homicide case  
that is already one year old." The matter was continued to June 8,  
1999. Arraignment on the amended information and further  
proceedings on the declaration concerning a trial date were  
deferred until then.

On June 7, 1999, Clinkenbeard filed a motion to dismiss the  
special circumstance allegation, added by the amended  
information, on the grounds of insufficient cause and lack of  
jurisdiction by the superior court. On June 8, 1999, the trial court  
chose to hear argument on the motion to dismiss prior to deciding  
the counsel and trial date issues, and continued the matter to June  
18, 1999.

1 On June 10, 1999, the prosecutor filed a brief asserting the  
2 prosecution's right to a speedy trial. He relied upon section 987.05,  
3 which allows the appointment of counsel who represents that he or  
4 she is ready to proceed with trial in a reasonable time. The  
5 prosecutor argued that the court had discretion to remove counsel  
6 who cannot try the case at the scheduled trial date, and asserted that  
7 a fall 1999 trial date provided ample time for preparation counsel.  
8 He noted Cummins's availability was a concern due to his  
9 homelessness and addiction to narcotics. The prosecutor also filed  
10 an opposition to the motion to dismiss the special circumstance  
11 allegation.

12 At the June 18, 1999, hearing, the court denied Clinkenbeard's  
13 motion to dismiss the special circumstance allegation.  
14 Clinkenbeard claimed he had no idea the appointment issue would  
15 be litigated on that date and obtained a continuance until June 25,  
16 1999.

17 On June 23, 1999, Clinkenbeard filed a response to the  
18 prosecution's assertion of speedy trial rights and other arguments,  
19 claiming a number of points. The case was not straightforward and  
20 simple but rather complex because the prosecutor was proceeding  
21 on a felony murder theory, a different theory than advanced at the  
22 preliminary hearing. A trial date one year from the date of  
23 defendant's arrest was the custom and practice in the county for the  
24 type of case. The prosecutor acted in bad faith based on the added  
25 special circumstance and on discussions prior to the preliminary  
26 hearing. The defendant's right to counsel outweighed any state  
right to a speedy trial and that counsel's removal without  
substantial justification would violate defendant's right to counsel.  
The prosecutor selectively cited section 987.05 but failed to show  
the defense requested trial date "in February or March" was  
unreasonable or disruptive. The public defender also claimed the  
prosecutor's concerns about Cummins's availability were  
illegitimate, that the court should refuse to follow Williams v.  
Superior Court (1996) 46 Cal.App.4th 320, 53 Cal.Rptr.2d 832,  
that section 987.05 was inapplicable because counsel had made no  
guarantee that he would be ready to proceed, and that section  
987.05 is unconstitutional because it denied equal protection.

\*4 At the hearing on June 25, 1999, Clinkenbeard added that it was  
the desire of defendant and his family that Clinkenbeard remain on  
the case. Clinkenbeard asserted that the prosecution had to show  
misconduct on Clinkenbeard's part to remove him as counsel. The  
prosecutor replied that Clinkenbeard's appointment was contingent  
upon a showing that he would be ready to proceed at a trial date  
set. The prosecutor represented that his office could try the case in  
two weeks, "It is that simple." Clinkenbeard disputed that the  
magistrate set the matter for evaluation under section 987.05.

At an in camera hearing the same day, Clinkenbeard informed the

1 court of his planned investigation and theories including: his plan  
2 to have the victim's blood retested; his plan to consult with a drug  
3 expert concerning the victim's blood alcohol content, as well as his  
4 client's; his plan to consult with an "interrogation" expert to review  
5 defendant's statement to determine whether it was voluntary; his  
6 plan to consult with a ballistics expert to examine the gun and  
7 random pattern of gunfire; his plan to consult with a crime scene  
8 expert to assist in demonstrating that defendant had no intent to  
9 commit a robbery; his plan to consult with a blood splatter expert  
10 to refute intent and support a self-defense theory; his plan to  
11 research a Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d  
694] issue as well as the lack of fingerprints on the gun; his plan to  
12 obtain a booking photograph of defendant and better quality  
13 autopsy photographs; his plan to reinterview witnesses who were  
14 with defendant the night of the shootings and who gave  
15 inconsistent statements concerning defendant's whereabouts; his  
16 plan to locate a third party, related to defendant or his girlfriend,  
17 and a person known to Cummins who allegedly admitted to the  
18 shootings; and his plan to reinterview Cummins who did not seem  
19 to be straightforward about his or Owens's condition the night of  
20 the shootings or the identity of the shooter.

21 After argument, the court said that Clinkenbeard's appointment as  
22 counsel for defendant was dependant [sic] upon his availability for  
23 trial. He concluded that Clinkenbeard had not shown he was  
24 available within a reasonable period of time, within the meaning of  
25 section 987.05, due to his trial schedule which included a current  
26 trial at the time of assignment to this case, a two-defendant trial in  
June, a three-defendant trial in August, a trial in November and a  
four-defendant trial to be scheduled which was over a year old.  
The court stated its opinion that the nature of the case was not  
complex despite counsel's claim he was surprised by the  
felony-murder theory. The court also noted the prosecution's  
speedy trial rights and concerns about its key witness's availability.  
Based on Clinkenbeard's representation that no one else in the  
public defender's office was available to take the case, the office  
was relieved and a panel attorney was appointed. Subsequently,  
trial was scheduled for October 12, 1999, but eventually the case  
was tried in November 1999.

21 People v. Jones, 2002 WL 399478 \*2-\*4 (Cal. App. 3<sup>rd</sup> Dst. 2002).

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1 IV. Was denial of petitioner’s counsel’s request to schedule the trial one year from the date of  
2 the crime and replacement of public defender’s office with a ‘conflicts panel’ attorney a denial by  
3 trial court of petitioner’s right to counsel and to due process?

3 In affirming the conviction, the state court of appeals set forth the following:

4 *Standard of Review*

5 \*5 The trial court is required to assign counsel to defend an  
6 indigent defendant who appears for arraignment without counsel  
and who desires the assistance of counsel. (§ 987, subd. (a).)

7 The trial court has a duty to appoint an attorney in compliance with  
8 section 987.05, “who represents, on the record, that he or she will  
9 be ready to proceed with the preliminary hearing or trial, as the  
10 case may be, within the time provisions prescribed in this code for  
11 preliminary hearings and trials, except in those unusual cases  
12 where the court finds that, due to the nature of the case, counsel  
13 cannot reasonably be expected to be ready within the prescribed  
14 period if he or she were to begin preparing the case forthwith and  
15 continue to make diligent and constant efforts to be ready. In the  
16 case where the time of preparation for preliminary hearing or trial  
17 is deemed greater than the statutory time, the court shall set a  
18 reasonable time period for preparation. In making this  
19 determination, the court shall not consider counsel's convenience,  
20 counsel's calendar conflicts, or counsel's other business. The court  
may allow counsel a reasonable time to become familiar with the  
case in order to determine whether he or she can be ready. In cases  
where counsel, after making representations that he or she will be  
ready for preliminary examination or trial, and without good cause  
is not ready on the date set, the court may relieve counsel from the  
case and may impose sanctions upon counsel, including, but not  
limited to, finding the assigned counsel in contempt of court,  
imposing a fine, or denying any public funds as compensation for  
counsel's services. Both the prosecuting attorney and defense  
counsel shall have a right to present evidence and argument as to a  
reasonable length of time for preparation and on any reasons why  
counsel could not be prepared in the set time.”

21 Section 1049.5 provides: “In felony cases, the court shall set a date  
22 for trial which is within 60 days of the defendant's arraignment in  
the superior court unless, upon a showing of good cause as  
23 prescribed in Section 1050, the court lengthens the time. If the  
24 court, after a hearing as prescribed in Section 1050, finds that there  
is good cause to set the date for trial beyond the 60 days, it shall  
state on the record the facts proved that justify its finding. A  
statement of facts proved shall be entered in the minutes.”

25 “Neither the convenience of the parties nor a stipulation of the  
26 parties is in and of itself good cause.” (§ 1050, subd. (e).) “When  
deciding whether or not good cause for a continuance has been

1 shown, the court shall consider the general convenience and prior  
2 commitments of all witnesses, including peace officers. Both the  
3 general convenience and prior commitments of each witness also  
4 shall be considered in selecting a continuance date if the motion is  
5 granted. The facts as to inconvenience or prior commitments may  
6 be offered by the witness or by a party to the case.” (§ 1050, subd.  
7 (g).)

8 \*6 The trial court's assignment of counsel for an indigent defendant  
9 pursuant to section 987 is reviewed for abuse of discretion. (*Harris*  
10 *v. Superior Court* (1977) 19 Cal.3d 786, 795-796, 140 Cal.Rptr.  
11 318, 567 P.2d 750; *Drumgo v. Superior Court* (1973) 8 Cal.3d 930,  
12 934-935, 106 Cal.Rptr. 631, 506 P.2d 1007; see also *People v.*  
13 *Daniels* (1991) 52 Cal.3d 815, 846-847, 277 Cal.Rptr. 122, 802  
14 P.2d 906.) No abuse of discretion is shown by the mere fact the  
15 trial court failed to appoint defendant's choice of counsel who is  
16 willing to accept appointment. (*Harris, supra*, at pp. 795-796, 140  
17 Cal.Rptr. 318, 567 P.2d 750.)

#### 18 *Analysis*

19 Defendant contends the trial court abused its discretion in refusing  
20 to schedule trial in February or March 2000, as requested by  
21 Clinkenbeard and erred in removing and replacing Clinkenbeard  
22 with a conflicts panel attorney. FN4 We disagree with defendant's  
23 interpretation of the record.

24 FN4. Although acknowledging that he is not  
25 entitled to counsel of his choice, he argues that “his  
26 right to counsel is not satisfied by mere physical  
presence of an attorney who did not participate on  
his behalf.” He claims this is “what [defendant]  
wound up with” as a result of the trial court's errors.  
Defendant's dissatisfaction with trial counsel's  
performance, however, has not been translated into  
a contention on appeal of ineffective assistance of  
counsel. He clarifies in his reply brief that trial  
counsel did “an admirable job by persuading the  
jury not to find the special-circumstance” to be true.  
He simply points to the differences between what  
Clinkenbeard intended to pursue and what actually  
was presented at trial in an attempt to demonstrate  
prejudice from the trial court's errors.

27 The facts reflect that counsel's appointment was contingent upon  
28 his showing that a trial date far beyond the statutory requirement  
29 was reasonable. At the conclusion of the preliminary hearing, the  
30 magistrate appointed “the public defender” to represent defendant  
31 and proceeded to set a trial date within the 60-day statutory  
32 requirement for trial. Clinkenbeard represented that he would be  
33 unavailable that soon due to conflicts in his schedule and requested

1 a date far beyond the statutory requirement. The prosecutor  
2 objected, stating that the date requested by defense counsel was not  
3 reasonable and that another attorney should be assigned. The  
4 magistrate sent the case back to home court for Clinkenbeard to  
5 demonstrate that the date he requested was reasonable, specifically  
6 referring to both sections 987.05 and 1050.

7  
8 Based on this record, reasonably interpreted, the appointment was  
9 subject to an evaluation of Clinkenbeard's request for a trial date  
10 far beyond the statutory requirement. As the trial court determined,  
11 the "appointment was impliedly continued on a representation that  
12 was consistent with [section] 987.05."

13  
14 Under the circumstances, the court had the authority to reconsider  
15 its appointment. "Removal" of counsel is not the issue. We thus  
16 consider whether the trial court abused its discretion in finding a  
17 reasonable period for preparation was far exceeded by  
18 Clinkenbeard's request for a trial date.

19  
20 Sections 987.05 and 1049.5 require the trial court to appoint only  
21 an attorney who represents on the record that he will be ready for  
22 trial within 60 days "except in those unusual cases" where more  
23 time is required for preparation. In such case, the court is required  
24 to set a reasonable time period for preparation which excludes from  
25 consideration "counsel's convenience, counsel's calendar conflicts,  
26 or counsel's other business." (§ 987.05.)

Initially, at the conclusion of the preliminary hearing, Clinkenbeard  
relied upon his scheduling conflicts in requesting a trial date  
beyond the statutory period stating that he was "booked for the rest  
of this year with mostly co-[defendant] homicide trials ." He  
subsequently filed a declaration stating that investigation on the  
case was not complete and fully explained his scheduling conflicts.  
He requested a trial date in the spring of 2000.

\*7 The prosecution opposed the date, arguing that a fall 1999 trial  
date should be ample time for preparation and asserted its speedy  
trial rights. The prosecution also stated its concern for its key  
witness, Cummins, based on his homelessness and addiction to  
narcotics.

In response, Clinkenbeard added numerous reasons in order to  
justify a lengthy period of time for preparation including  
defendant's desire that he remain on the case, the complexity of the  
case, the custom and practice of the county to go to trial one year  
from the date of arrest, the prosecutor's bad faith for adding a  
special circumstance, defendant's right to counsel, the prosecutor's  
selective use of section 987.05 which in any event was  
unconstitutional, and disputed the prosecutor's concerns about  
Cummins's availability. With respect to further investigation,  
Clinkenbeard listed numerous areas including consultation with

1 various experts, researching a suppression issue, retesting of the  
2 victim's blood, obtaining better quality photographs, reinterviewing  
3 witnesses, and locating a possible third party who was responsible  
4 for the shootings.

5 All of the foregoing information was considered by the trial court  
6 in making its determination that Clinkenbeard's request for a spring  
7 2000 trial date was not a reasonable request for time for  
8 preparation of the case. The court specifically cited Clinkenbeard's  
9 numerous scheduling conflicts, including a few multiple defendant  
10 trials, which suggested that Clinkenbeard would be in trial  
11 continuously and precluded time for preparation of the type he  
12 planned to do in the present case. The court disagreed that the case  
13 was complex and stated that the addition of the special  
14 circumstance allegation should have come as no surprise. The  
15 court noted that although defendant was willing to waive his right  
16 to a speedy trial, the prosecution was not primarily on the basis of  
17 its concern for its key witness, a homeless person. The entire  
18 public defender's office was relieved based on Clinkenbeard's  
19 representation that no one else in the office could prepare the case  
20 any sooner.

21 Defendant simply argues that the court abused its discretion in  
22 denying Clinkenbeard's continuance request based on the numerous  
23 areas of investigation outlined for the court which constituted good  
24 cause under section 1050. The court specifically found that due to  
25 counsel's scheduling conflicts, he could not complete investigation  
26 in the current matter in a timely manner for purposes of section 987  
27 .05 and section 1049.5.

28 Section 987.05 specifically provides that counsel's scheduling  
29 conflicts were not to be considered in determining a reasonable  
30 time period for preparation. Defendant has failed to demonstrate  
31 that the trial court abused its discretion in concluding that the  
32 public defender was unavailable for appointment under section  
33 987.05.

34 People v. Jones, 2002 WL 399478 \*4-\*7.

35 Defendant frames the issue as the denial of a continuance of trial and removal of  
36 appointed counsel. The Attorney General claims the issue concerns the  
37 appointment of counsel in the first instance.

38 The issue arose in the following way. Tommy Clinkenbeard,  
39 assistant public defender, appeared on defendant's behalf in  
40 proceedings subsequent to the preliminary hearing. The magistrate  
41 had appointed Clinkenbeard pending an independent review of his  
42 availability for trial. The court made the appointment contingent  
43 upon a showing that his request for a trial date far beyond the  
44 statutory time requirement was reasonable. The trial court  
45 concluded the trial date requested by Clinkenbeard was

1 unreasonable and deemed him unavailable for trial and therefore  
2 refused to appoint him.  
3 We shall conclude the trial court did not abuse its discretion in  
4 refusing to appoint Clinkenbeard who requested an unreasonable  
5 trial date.

6 People v. Jones, 2002 WL 399478 at \*2.<sup>5</sup>

7 Applicable Standard of Review - AEDPA

8 Petitioner first argues that § 2254(d) does not circumscribe this claim and that  
9 this court should review the claim de novo because the state courts did not adjudicate the merits  
10 of his federal constitutional claim, citing Pirtle v. Morgan, 313 F.3d 1160 (9<sup>th</sup> Cir. 2002).

11 Petition, p. 12. The court has set forth above the AEDPA standard of review under § 2254(d), as

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12 <sup>5</sup> The undersigned observes that the federal Speedy Trial Act “generally requires a  
13 trial to begin within 70 days of the filing of an information or indictment or the defendant’s  
14 initial appearance, 18 U.S.C. § 3161(c), but the Act recognizes that criminal cases vary widely  
15 and that there are valid reasons for greater delay in particular cases.” Zedner v. United States,  
16 547 U.S. 489, 497, 126 S. Ct. 1976 (2006). Among the factors for the judge to consider in  
17 determining whether a continuance should be granted are:

- 18 “(i) Whether the failure to grant such a continuance in the  
19 proceeding would be likely to make a continuation of such  
20 proceeding impossible, or result in a miscarriage of justice.
- 21 (ii) Whether the case is so unusual or so complex, due to the  
22 number of defendants, the nature of the prosecution, or the  
23 existence of novel questions of fact or law, that it is unreasonable  
24 to expect adequate preparation for pretrial proceedings or for the  
25 trial itself within the time limits established by this section.
- 26 (iii) Whether, in a case in which arrest precedes indictment, delay  
in the filing of the indictment is caused because the arrest occurs at  
a time such that it is unreasonable to expect return and filing of the  
indictment within the period specified in section 3161(b), or  
because the facts upon which the grand jury must base its  
determination are unusual or complex.
- (iv) Whether the failure to grant such a continuance in a case  
which, taken as a whole, is not so unusual or so complex as to fall  
within clause (ii), would deny the defendant reasonable time to  
obtain counsel, would unreasonably deny the defendant or the  
Government continuity of counsel, or would deny counsel for the  
defendant or the attorney for the Government the reasonable time  
necessary for effective preparation, taking into account the exercise  
of due diligence.”

18 U.S.C. § 3161(h)(7)(B)(i - iv).

1 well as the circumstance calling for an independent, but not de novo, review of the record. In  
2 Pirtle, the Ninth Circuit also identified the situation wherein de novo review is applicable; that is,  
3 where the state court decision does not reach the merits of the claim presented. 313 F.3d at 1167.  
4 In such a case, “concerns about comity and federalism that arise when a state court reaches the  
5 merits of a petition for post-conviction relief do not exist.” Id. Petitioner, citing a plethora of  
6 mostly out-of-circuit authority, contends that this is just such a circumstance. Petition, pp. 12-17,  
7 n. 9. One of the reasons for de novo review, which petitioner argues is applicable in the context  
8 of this claim, occurs when the state court decision addresses a claim only in terms of state law.  
9 Petition, p. 13, citing Lyell v. Renico, 470 F.3d 1177 (6<sup>th</sup> Cir. 2006). Petitioner contends that his  
10 case is similar to that of Lyell and Norde v. Keane, 294 F.3d 401 (2d Cir. 2002). Petition, p. 17.  
11 In Norde, the Second Circuit panel found that the more deferential AEDPA standard did not  
12 apply to Norde’s Sixth Amendment claims because the state court of appeal had not indicated “in  
13 any way that it had considered” the claims; thus, they were found not to have been adjudicated on  
14 the merits. Petition, pp. 15-17; Norde v. Keane, 294 F.3d at 410.

15           However, as noted above, the United States Supreme Court has determined that  
16 citation to controlling Supreme Court authority or even awareness of such authority is not  
17 required in a state court decision “so long as neither the reasoning nor the result of the state-court  
18 decision contradicts them.” Early v. Packer, 537 U.S. at 8, 123 S. Ct. at 365.

19           Respondent argues that the state court of appeals’ analysis, in addition to  
20 considering the prosecution’s main witness’ potential unavailability as a homeless person, also  
21 weighed factors such as the needs of the investigation set forth by defense counsel; defense  
22 counsel’s ability to complete the preparation claimed to be needed for trial; reasonableness of the  
23 time demands in light of the complexity of the case, as well as the trial court’s analysis. Answer,  
24 pp. 18-19. Respondent contends these are the same considerations that would be undertaken in  
25 the context of a constitutional analysis. Id., p. 19.

26 \\\

1 The Supreme Court has emphasized ... that the right to counsel of  
2 choice is “circumscribed in several important respects.” *Wheat v.*  
3 *United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140  
4 (1988). Indeed, there are four specific situations in which the Sixth  
5 Amendment does not entitle a defendant to preferred counsel: A  
6 defendant does not have the right to be represented by (1) an  
7 attorney he cannot afford; (2) an attorney who is not willing to  
8 represent the defendant; (3) an attorney with a conflict of interest;  
9 or (4) an advocate (other than himself) who is not a member of the  
10 bar. *Id.* In addition, the Court has established that a trial court  
11 requires “wide latitude in balancing the right to counsel of choice  
12 against the needs of fairness, and against the demands of its  
13 calendar.” *Gonzalez-Lopez*, 126 S.Ct. at 2565-66 (citation  
14 omitted). As such, trial courts retain the discretion to “make  
15 scheduling and other decisions that effectively exclude a  
16 defendant’s first choice of counsel.” *Id.* at 2566.

17 Miller v. Blacketter, 525 F.3d 890, 895 (9<sup>th</sup> Cir. 2008).

18 Petitioner counters in response that even if those same factors would have been  
19 considered had the state appellate court actually addressed the federal claims, AEDPA deference  
20 would not be appropriate because while the question was fairly presented to the state court it was  
21 based on state law not taking into account federal due process concerns. Traverse, p. 3, citing  
22 Matthews v. Ishee, 486 F.3d 883 (6<sup>th</sup> Cir. 2007) (in that case, the Sixth Circuit found that de novo  
23 review was applicable because the state appellate court had denied a Sixth Amendment Brady  
24 claim on the basis of a state court decision). Petitioner seeks to distinguish authority that  
25 respondent relied on for the principle that the state court’s adjudication is entitled to AEDPA  
26 deference. Traverse, pp. 2-4; Answer, p. 19. In Albrecht v. Horn, 485 F.3d 103, 116 (3<sup>d</sup> Cir.  
2007), the Third Circuit found that AEDPA deference and not de novo review applied in the  
context of a claim wherein the merits of the prejudice prong of an ineffective assistance of post-  
conviction counsel had been addressed by the state supreme court. Petitioner argues that this  
case is off-point because in Albrecht, the state’s highest court did identify and purport to apply  
“the correct governing legal principle.” Traverse, p. 3, citing *id.* In Cox v. Burger, 398 F.3d  
1025 (8<sup>th</sup> Cir. 2005), petitioner notes in another case where AEDPA deference was applied that it  
was a case wherein at the time the applicable standard for the confrontation clause issue raised

1 was precisely the same as that of the state rule of evidence. This court notes that the Eighth  
2 Circuit made the point that petitioner therein had not shown how the state court analysis “did not  
3 comport with established federal Confrontation Clause law.” Cox v. Burger, 398 F.3d at 1030.  
4 Petitioner also maintains that the issue he raises is not that he is entitled to his choice of counsel  
5 but rather that his Sixth and Fourteenth Amendment rights were violated by an unreasoning,  
6 arbitrary insistence on an expeditious trial date in the face of a justifiable request for a delay.

7           Petitioner also seeks to distinguish the Ninth Circuit’s ruling in Gonzalez v.  
8 Knowles, 515 F.3d 1006, 1012 (9<sup>th</sup> Cir. 2008), also cited by respondent, wherein it was found  
9 that petitioner’s federal habeas appointment of counsel claim not to be cognizable “unless the  
10 state court’s discretionary appointment ran afoul of settled constitutional principles.” Answer,  
11 pp. 19-20; Traverse, pp. 5-6. The Gonzalez Court determined that the appointment of a facially  
12 competent attorney for Gonzalez satisfied the Sixth Amendment’s requirements although the  
13 counsel appointed was not his first choice. Id. Nor did Gonzalez’s argument that he was denied  
14 due process argument succeed as there was no showing of an irreconcilable conflict with  
15 appointed counsel and due process would have been met by the court’s inquiry into the request.  
16 Id., at 1013. Petitioner in the instant case seeks to distinguish Gonzalez on the basis that there  
17 was no dispute in that re-sentencing matter about its straightforwardness or as to the prevailing  
18 county practice with regard to appointing a private defender to avoid any ineffective assistance  
19 issue. Traverse, p. 6.

20           Petitioner has not shown entitlement to de novo review. There is no dispute that  
21 petitioner presented the precise claim before this court (which would otherwise render the claim  
22 unexhausted) to the state Supreme Court, an alleged violation of petitioner’s Sixth and  
23 Fourteenth Amendment rights to counsel and due process by the trial court’s refusal of a public  
24 defender’s request to continue the trial date and by replacing the entire public defender’s office  
25 with a “conflicts panel” attorney. Respondent’s Lodged Document 2, Petition for Review, p. 2.  
26 While the petition for review received a postcard denial (Lodged Doc. 3), it can be presumed that

1 the state’s highest court adjudicated the claim on the merits. Harrington v. Richter, 131 S. Ct. at  
2 784-85 (“[w]hen a federal claim has been presented to a state court and the state court has denied  
3 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence  
4 of any indication or state-law procedural principles to the contrary.” The Supreme Court stated  
5 plainly that § 2254(d) does not require that the state court set forth a statement of reasons for its  
6 decision. Id., 131 S. Ct. at 784. The High Court did observe that the presumption that the state  
7 court adjudicated the claim on the merits “may be overcome when there is reason to think some  
8 other explanation for the state court’s decision is more likely,” citing Ylst v. Nunnemaker, 501  
9 U.S. 797, 803, 111 S. Ct. 2590 (1991). Id., 131 S. Ct. at 785. In Ylst, the Supreme Court applied  
10 the following presumption: “Where there has been one reasoned state judgment rejecting a  
11 federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest  
12 upon the same ground.” Ylst v. Nunnemaker, 501 U.S. at 803, 111 S. Ct. 2590. Assuming that  
13 the state appellate decision rested only on state grounds, and that these state grounds do not  
14 sufficiently correspond to the federal issue,<sup>6</sup> the undersigned does not believe that it was the  
15 intent of the Supreme Court in Harrington to permit evasion of the restrictions of § 2254(d) in the  
16 context of the less common instance, as the one here, where there was purely a state law analysis  
17 of a federal claim resulting in a denial in an intermediate state court and a later summary denial  
18 by a higher state court when that higher court has been presented with a purely federal claim.  
19 The present factual context indicates that all possible merits decision of the California Supreme  
20 Court, both state and federal, and that the federal court should not presume that the state supreme

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21  
22 <sup>6</sup> Although in at least one case cited by the state appellate court in its decision, e.g.,  
23 Drumgo v. Superior Court, 8 Cal.3d 930, 934, 106 Cal.Rptr. 631 (Cal. 1973), the state Supreme  
24 Court expressed the opinion that the rule of § 987 “conforms with those of the federal courts.”  
25 And in Harris v. Superior Court, 19 Cal.3d 786, 795-796 n. 8, 140 Cal. Rptr. 318 (1977), also  
26 relied on by the state Court of Appeals, the state Supreme Court found nothing in the Sixth and  
Fourteenth Amendments, citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975), which  
limited § 987’s provision that a court must assign counsel to represent an indigent defendant in a  
criminal case who desires counsel (i.e., he is not entitled to be represented by a particular  
attorney of his choosing).

1 court simply ignored the federal issue in its merits decision. This is not a situation where a claim  
2 was decided in the appellate court on state procedural grounds, not on the merits, where a silent  
3 denial in the higher court could probably be construed as based on the procedural determination.  
4 Moreover, the higher court could well have viewed the state issue and the federal issue as similar  
5 enough that a silent denial covered both bases.

6           Nevertheless, because the state Supreme Court’s denial was a summary one, this  
7 federal court in its application of AEDPA must independently review the record in adjudication  
8 of petitioner’s claim. As noted, “[i]ndependent review of the record is not de novo review of the  
9 constitutional issue, but rather, the only method by which we can determine whether a silent state  
10 court decision is objectively unreasonable.” Himes v. Thompson, 336 F.3d at 853.

11           The question for this court, therefore, is whether an independent review of the  
12 record demonstrates that the California Supreme Court’s decision was “contrary to” established  
13 principles of the United States Supreme Court. After careful consideration, the undersigned  
14 concludes that it does not.

15           Analysis

16           In pertinent part, the Sixth Amendment provides that “[i]n all criminal  
17 prosecutions, the accused shall enjoy the right ...to have the Assistance of Counsel for his  
18 defence.” U.S. Const. Amend. VI. “While the right to select and be represented by one’s  
19 preferred attorney is comprehended by the Sixth Amendment, the essential aim of the  
20 Amendment is to guarantee an effective advocate for each criminal defendant rather than to  
21 ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” Wheat v.  
22 United States, 486 U.S. 153, 159, 108 S. Ct. 1692 (1988)[citation omitted]. In “several  
23 important respects” the Sixth Amendment right to choose one’s counsel “is circumscribed,”  
24 among which is that “a defendant may not insist on representation by an attorney he cannot  
25 afford ....” Id.

26 \\\

1 The Supreme Court has also stated:

2 Not every restriction on counsel's time or opportunity to  
3 investigate or to consult with his client or otherwise to prepare for  
4 trial violates a defendant's Sixth Amendment right to counsel. See  
5 *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975,  
6 1982-1983, 26 L.Ed.2d 419 (1970). Trial judges necessarily  
7 require a great deal of latitude in scheduling trials. Not the least of  
8 their problems is that of assembling the witnesses, lawyers, and  
9 jurors at the same place at the same time, and this burden counsels  
10 against continuances except for compelling reasons. Consequently,  
11 broad discretion must be granted trial courts on matters of  
12 continuances; only an unreasoning and arbitrary "insistence upon  
13 expeditiousness in the face of a justifiable request for delay"  
14 violates the right to the assistance of counsel. *Ungar v. Sarafite*,  
15 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

16 *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616 (1983)(state court denial of  
17 continuance for originally assigned public defender to become available not a Sixth Amendment  
18 violation).

19 There are no mechanical tests for deciding when a denial of a  
20 continuance is so arbitrary as to violate due process. The answer  
21 must be found in the circumstances present in every case,  
22 particularly in the reasons presented to the trial judge at the time  
23 the request is denied. *Nilva v. United States*, 352 U.S. 385, 77  
24 S.Ct. 431, 1 L.Ed.2d 415; *Torres v. United States*, 270 F.2d 252  
25 (C.A.9th Cir.); cf. *United States v. Arlen*, 252 F.2d 491 (C.A.2d  
26 Cir.).

18 *Ungar v. Sarafite*, 376 U.S. 575, 589-90, 84 S. Ct. 841, 849-50 (1964) (finding denial of  
19 continuance for newly retained counsel to familiarize himself with case not unconstitutional in  
20 light of all the circumstances, including that the motion was made on the day of the scheduled  
21 hearing, Ungar himself was a lawyer familiar with court's practice regarding not granting  
22 adjournments, evidence and witnesses were readily available; nor, when counsel was permitted to  
23 withdraw, did the Constitution require the trial court to grant Ungar's own motion for  
24 continuance). On the other hand, while "[t]he matter of continuance is traditionally within the  
25 discretion of the trial judge, and ... not every denial of a request for more time ... violates due  
26 process ....., a myopic insistence upon expeditiousness in the face of a justifiable request for delay

1 can render the right to defend with counsel an empty formality. Chandler v. Freitag, 348 U.S. 3,  
2 75 S.Ct. 1, 99 L.Ed. 4.” Ungar, at 589, 84 S. Ct. at 849-50.

3 For petitioner to show a violation of his Sixth Amendment rights based  
4 on the trial court’s denial of his motion to continue, petitioner must therefore demonstrate “that  
5 the trial court abused its discretion through an ‘unreasoning and arbitrary “insistence upon  
6 expeditiousness in the face of a justifiable request for delay.’”” Houston v. Schomig, 533 F.3d  
7 1076, 1079 (9<sup>th</sup> Cir. 2008).

8 Thus, the question is whether or not the state Supreme Court’s denial was  
9 “contrary to” the established Supreme Court authority that, while trial courts have broad  
10 discretion in considering requests for continuance, this decision affirmed only an “unreasoning  
11 and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’” such  
12 that it constituted a violation of petitioner’s Sixth Amendment right to the assistance of counsel.  
13 The Ninth Circuit has said that absent “a showing of actual prejudice” to petitioner’s defense as a  
14 result of a “trial court’s refusal to grant a continuance, it cannot be said that the district court  
15 erred by denying relief on this ground.” Gallego v. McDaniel, 124 F.3d 1065, 1072 (9<sup>th</sup> Cir.  
16 1997).

17 The factors applied by the Ninth Circuit on direct appeal to determine whether the  
18 district court has abused its discretion in granting or denying a request to continue a hearing,  
19 particularly “[w]hen defendant’s Sixth Amendment right to counsel is implicated,” include:

20 whether the continuance would inconvenience witnesses, the court,  
21 counsel, or the parties; whether other continuances have been  
22 granted; whether legitimate reasons exist for the delay; whether the  
23 delay is the defendant’s fault; and whether a denial would  
24 prejudice the defendant.

25 United States v. Studley, 783 F.2d 934, 939 (9<sup>th</sup> Cir. 1986) (no abuse of discretion where  
26 defendant on day of trial, three months after arrest, was denied continuance to, inter alia, obtain  
27 counsel when the court found: the request not made in good faith, that Studley had been granted

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1 prior continuances, had known of need for counsel for several months,<sup>7</sup> the facts of the case were  
2 not complex and she would not obtain counsel even if continuance granted). In the context of a  
3 habeas petitioner's claim of a violation of his Sixth Amendment right to self-representation by a  
4 state trial court's denial of his motion for a continuance in order to prepare his defense, a Ninth  
5 Circuit panel identified four factors for consideration drawn from appellate courts:

6 First, we look to the degree of diligence by the appellant prior to  
7 the date beyond which a continuance is sought. [Citation omitted.]  
8 Second, we consider whether the continuance would have served a  
9 useful purpose if granted. [] Third, we weigh the inconvenience  
10 that granting the continuance would have caused the court or the  
11 government. [] Fourth, we look to the amount of prejudice suffered  
12 by the appellant. [] These factors must be considered together, and  
13 the weight given to any one may vary from case to case. [] At a  
14 minimum, however, in order to succeed the appellant must show  
15 some prejudice resulting from the court's denial. []

16 Arnant v. Marquez, 772 F.2d 552, 556-57 (9<sup>th</sup> Cir. 1985),<sup>8</sup> citing United States v. Flynt, 756 F.2d  
17 1352, 1359-61 (9<sup>th</sup> Cir. 1985).<sup>9</sup>

18 The essence of petitioner's claim is that he was denied his Sixth and Fourteenth  
19 Amendment rights by the trial judge by an arbitrary insistence on expeditiousness in the face of a  
20 justifiable request for delay until February or March of 2000 by Mr. Clinkenbeard. Petition, pp.  
21 17-27; Traverse, p. 6. The arbitrariness, petitioner asserts, is evidenced by the fact that the only  
22 reason the judge gave for removing Mr. Clinkenbeard, which arose from the prosecutor's  
23 concern that Mr. Cummins might not be available to testify at the time of the requested date for  
24 trial, was a concern which the record contradicted. Petition, pp. 10, 24-25, citing RTA<sup>10</sup> 58;

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25 <sup>7</sup> First, defendant Studley had asked in two court appearances to have someone represent  
26 her who was not a licensed attorney; she was told she could represent herself but representation  
in court by another required a licensed lawyer; the Federal Public Defender had determined that  
she did not qualify for appointed counsel. United States v. Studley, 783 F.2d at 938-39.

<sup>8</sup> Cert. denied, 475 U.S. 1099 (1986).

<sup>9</sup> Amended on other grounds, 764 F.2d 675 (9<sup>th</sup> Cir. 1985).

<sup>10</sup> Augmented Reporter's Transcript on Appeal.

1 Traverse, p. 7. For good measure, petitioner, also cites Ohio v. Roberts, 448 U.S. 56, 73, 100 S.  
2 Ct. 2531 (1980), for the proposition that preliminary hearing testimony may be admitted at a  
3 criminal trial should a witness have become unavailable and in light of sufficient indicia of its  
4 reliability.<sup>11</sup> Traverse, p. 7 n. 3. However, the court’s review of the record indicates that the  
5 trial judge was at least equally concerned with Mr. Clinkenbeard’s dense work schedule and how  
6 that would preclude, in her opinion, his ability, especially in light of the investigations he  
7 indicated he intended to undertake, to be ready for trial in a reasonable time. RTA 57, 59.

8 As to the prosecutor’s apparent concern about Cummins’ potential unavailability  
9 at trial if it was delayed, petitioner argues that Mr. Clinkenbeard had observed that in the  
10 People’s own motion for a speedy trial, it was asserted that Cummins had “been completely  
11 cooperative and reliable” since the case filing, that he “testified forthrightly and soberly at the  
12 preliminary hearing in this case,” and that the People had “confidence that he will continue to  
13 cooperate and be available to testify at the trial in this case.” Petition, p. 7, RTA 37, citing CT  
14 111. Mr. Clinkenbeard also stated that his office had spoken with him and that he had been  
15 living in Sacramento for about nine years and did not intend to go elsewhere:

16 There is no realistic fear or threat of Mr. Cummings [sic]  
17 disappearing or not being able to testify. Everything that Mr.  
18 Cummings has said is supported by Mr. Frawley’s motion that he  
19 will be available to testify the same as a police officer witness or  
20 any other percipient witness. [¶] I mean there has been no  
21 indication that there is a risk of losing Mr. Cummings prior to trial.  
22 In addition, his testimony has been preserved at the preliminary  
23 hearing.

24 Petition, p. 8, RTA 37.

25 The prosecution’s motion, however, nevertheless also referenced Cummins’ lack  
26 of a permanent residence and his status as a “self-admitted drug addict.” CT 111.

Petitioner emphasizes that after the May 21, 1999 preliminary hearing, following

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<sup>11</sup> Roberts was abrogated by Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374 (2004), to the extent that where testimonial statements are at issue, there can be any other “indiciu of reliability sufficient to satisfy” the Sixth Amendment’s demands but confrontation, i.e., cross-examination.

1 appointment of the public defender's office, when Mr. Clinkenbeard sought a trial date in the  
2 spring and the prosecution objected, that it was only at the hearing on May 25, 1999, that the  
3 prosecution filed an amended information adding special circumstances allegations claiming the  
4 crimes were committed during an attempted robbery, which subjected petitioner to the possibility  
5 of a life without parole term. Petition, p. 4, CT 17, RTA 1. Prior to that Mr. Clinkenbeard on  
6 May 25, 1999, had filed a declaration stating that he was representing defendants in multiple-  
7 defendant homicide cases and had not yet completed, and did not expect to complete, his  
8 investigation "for some time," asking for a trial date in the spring of 2000. Petition, p. 4, CT 19.  
9 At the June 8, 1999, trial date setting hearing, Mr. Clinkenbeard indicated that the special  
10 circumstance allegations changed the nature of the case and would require even more time to  
11 investigate and consult experts. Petition, p. 4, CT 4, RTA 4-5. In a June 23, 1999, response to  
12 the prosecution's speedy trial motion, Clinkenbeard pointed out circumstances in an effort to  
13 show the case was not simple and straightforward as the prosecution asserted, including  
14 questions about the voluntariness of petitioner's custodial statements; inconsistent statements by  
15 Cummins, one of the victims; a cross-racial identification issue; witnesses who could challenge  
16 or enhance the credibility of petitioner and Cummins; a cluttered crime scene; position of the  
17 Owens' body; the locations of Cummins and the spent ammunition; blood spatter pattern;  
18 dilapidated condition of gun. Petition, p. 5, CT 124-25. Petitioner states that Mr. Clinkenbeard  
19 told the trial court that he had essentially been sandbagged by the prosecutor's waiting for four  
20 months until after the preliminary hearing to amend to assert a felony murder theory, that the  
21 prosecutor, whose office had no clear policy, was acting in bad faith by making selective use of  
22 Cal. Penal Code § 987.05 to get the public defender's office off certain cases with its greater  
23 resources than a panel attorney would have, that petitioner and his family wanted him  
24 (Clinkenbeard) on the case. Petition, pp. 6-7, RTA 29-30, 35. Petitioner also recounts from the  
25 state appellate court opinion above, Mr. Clinkenbeard's representation to the judge in camera as  
26 to the detailed investigation he intended to conduct. Petition, pp. 8-9. In denying the

1 continuance, relieving the public defender's office from representation of petitioner and just prior  
2 to appointing a panel attorney, the trial judge stated:

3 My analyses is this: Technically the Public Defender's Office was  
4 appointed following the Court's holding Mr. Jones to answer at the  
time of preliminary hearing.

5 And as a standard, the public defender thereafter was immediately  
6 appointed, and you accepted the appointment, Mr. Clinkenbeard.  
7 Following that, almost immediately following that, was a colloquy  
between the Court and counsel regarding the concern of setting a  
trial date.

8 At that point, you indicated that you were not in a position to try  
9 the case within the 60 days, to which Judge Tochtermann made  
10 reference. Thereafter, Mr. Frawley indicated he was not stipulating  
to any delay and did indicate his concern about the trial proceeding  
a [sic] timely fashion.

11 A specific time frame is mentioned at that point, and there is  
12 specific discussion regarding 1050 and 987.50 at that point. I feel  
13 that essentially that discussion and the proceedings took place  
while the public defender was appointed in the case and clearly  
14 was representing Mr. Jones, that that appointment was impliedly  
continued on a representation that was consistent with 987.05.  
15 And it is quite clear based on the declaration that's been filed since  
that time and the information that's been presented in subsequent  
16 arguments that you cannot be prepared with what the Court  
considers a reasonable time frame.

17 And you are, in fact, as stated in your declaration - - not to take  
18 away from you at all, Mr. Clinkenbeard - - but that you are, in fact,  
a very busy man with a trial schedule which included a trial at the  
19 time you received this assignment, a two-defendant trial scheduled  
in June, a three-defendant trial in August, thereafter a trial  
20 scheduled in November, and a four-defendant case that at that  
point was over a year old and apparently had yet to be set.

21 In my view, quite honestly, you're too busy to try the case within a  
22 reasonable period of time. I understand the discussions we have  
had regarding the culture in this community. I understand that  
23 there are other cases that certainly take longer to get to trial than  
this. I've read the preliminary hearing transcript. I have  
considered what I consider to be the nature of this case.

24 Your areas of investigation that you raised confidentially before the  
25 Court and the time frame that would need to be taken to diligently  
pursue the investigation, and I don't think it would take that long  
26 or should take that long. The factual and legal issues presented in  
this case, while they certainly may warrant the investigation that

1 you have outlined in a very diligent approach for preparation for  
2 trial are not complex by any stretch in my view.

3 And the argument you had about the surprise robbery theory, I  
4 can't understand how or why that would be a surprise. It seems  
5 rather to jump out at one when you review this case.

6 The People have asserted their statutory and constitutional rights to  
7 a speedy trial. Clearly both sides have one. Your client is willing  
8 to waive it. The People are not. We have certain uncertainties, and  
9 the problems and potential prejudice and the undue delay in this  
10 case.

11 I don't believe that a homeless person is as reliable or predictable a  
12 witness as someone that you refer to as a police officer. There are  
13 uncertainties in all of our lives. But more certainly in the lives of  
14 someone who is homeless, who changes locations, who is not tied  
15 to a particular place and much more vulnerable to the community.  
16 Their health and conditions varies over a period of time.

17 None of us can predict what will happen over the next year, but I  
18 don't find Mr. Frawley's condition in wanting to try to have Mr.  
19 Cummings [sic] available and healthy at the time of trial to be  
20 unreasonable. And his concerns, I think, were somewhat justified  
21 under the circumstances. It is a key witness, an eyewitness to the  
22 shooting.

23 All right. At this point, therefore, for these reasons, the Court is  
24 finding that Mr. Clinkenbeard is unable to represent that he can try  
25 the case within a reasonable period of time, and that the basis - -  
26 the primary basis in the Court's view for that inability is that [sic] a  
quite full trial schedule, and that is not a justification for delay  
under 987.05.

Countered with the interests of the People and the Prosecution of  
the case which would have a greater chance of securing the  
presence of their necessary witness, I'm going to order the Public  
Defender's Office be relieved, that there is no attorney in that  
office that's in a position to take that case.

That would have been my other option had there been someone  
available to do so. Mr. Clinkenbeard, you simply stated that is not  
feasible.

RTA 56-59.

This court finds that petitioner has raised legitimate arguments, as did Mr.  
Clinkenbeard before the trial court, supporting the granting of a trial date continuance in this  
matter. However, what petitioner has not shown is how the denial violated clearly established

1 federal law in an AEDPA unreasonable fashion, and although petitioner does not believe it  
2 necessary, there is also no showing of prejudice.<sup>12</sup>

3 No Supreme Court authority sets forth the precise factors to be considered by a  
4 trial judge in weighing whether or not to grant a defense counsel's request for a trial continuance.  
5 The Ninth Circuit weighs the degree of diligence by the appellant before the continuance was  
6 sought; whether the continuance, if granted, would have served a useful purpose; the  
7 inconvenience to the court or the government in granting the continuance; the amount of  
8 prejudice suffered by the appellant, with appellant, at a minimum showing some prejudice from  
9 the court's denial. Arnant v. Marquez, 772 F.2d at 556-57 (9<sup>th</sup> Cir. 1985). In this case,  
10 petitioner's counsel request, made some four months after he was assigned to defend petitioner  
11 and promptly after the preliminary hearing before a trial date had been set does not show a lack  
12 of diligence. The trial court was not moved by petitioner's counsel's representation that the  
13 amended special circumstance charge could have set counsel back in light of the case factors.<sup>13</sup>  
14 The trial judge did not appear to have been persuaded that even the requested continuance could  
15 have been sufficient with Mr. Clinkenbeard's inarguably heavy caseload to which he was already  
16 committed in combination with the litany of investigative tasks in the instant case he anticipated  
17 would need to be completed and he also represented that other attorneys in the public defender's  
18 office could not have gone to trial earlier. The inconvenience to both the trial court and the  
19 prosecution of delaying trial on what both perceived to be, despite petitioner's counsel's  
20 representation, a case lacking in complexity is arguably palpable. Nor does petitioner make a  
21 showing of prejudice, although in the original pro se petition, petitioner attempts to contrast what  
22

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23 <sup>12</sup> In a case, unlike the one here, where a defendant who can afford his own counsel is  
24 erroneously deprived of his choice no additional prejudice need be shown to constitute a Sixth  
25 Amendment violation. United States v. Gonzalez-Lopez, 548 U.S. 140, 146-148, 126 S. Ct.  
26 2557 (2006).

<sup>13</sup> The special circumstances essentially added only a new theory, not new facts to those  
which were already known.

1 his counsel did at trial with what he states Mr. Clinkenbeard intended to do (i.e., that his counsel  
2 at trial did not move to exclude petitioner’s statement to police, used only one expert witness  
3 (instead of four), did not raise the specter of third-party culpability, and failed to object to an  
4 allegedly improper statement in the prosecution’s closing argument in rebuttal. Pro se Petition,  
5 pp. 30-31.

6           Moreover, even if this court or others might have made a different response to  
7 the application for a trial continuance in this context; that is, even if this court were to find the  
8 state Supreme Court’s decision to be erroneous, that is simply insufficient to warrant habeas  
9 relief. Petitioner has not demonstrated the objective unreasonableness of the state court’s  
10 decision in light of established Supreme Court authority, which as previously stated, grants broad  
11 discretion to trial courts in deciding whether to grant or deny continuances and prohibits “only an  
12 unreasoning and arbitrary “insistence upon expeditiousness in the face of a justifiable request for  
13 delay...” Morris v. Slappy, 461 U.S. at 11-12, 103 S. Ct. at 1616 (citations omitted). In other  
14 words, while it cannot be said that petitioner’s counsel’s request for a continuance was  
15 unjustifiable, neither is there an adequate showing that the denial was based only on an arbitrary  
16 and unreasoning insistence upon expediting the trial. The petition should be denied.

17           Accordingly, IT IS HEREBY RECOMMENDED that the petition be denied.

18           These findings and recommendations are submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
20 days after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
23 shall be served and filed within fourteen days after service of the objections. The parties are

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1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 05/04/2011

/s/ Gregory G. Hollows

4  
5 GREGORY G. HOLLOWS  
6 UNITED STATES MAGISTRATE JUDGE

GGH:009  
jones1421.fr

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