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

MARK ANTHONY,

Petitioner,

No. CIV S-05-0482 FCD EFB P

vs.

JOHN MARSHALL,

Respondent.

FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding *in propria persona* with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges a 2003 judgment of conviction entered against him in Sacramento County Superior Court on charges of failing to stop at an accident resulting in property damage (Cal. Veh. Code § 20002(a)), driving with a suspended license (Cal. Veh. Code § 14601.2(a)), two counts of driving under the influence (DUI) (Cal. Veh. Code § 23152(a)), and two counts of driving with .08 percent or greater blood-alcohol content (Cal. Veh. Code § 23152(b)), with findings that petitioner committed two of the felony offenses while released from custody on the other felony charges (Cal. Pen. Code § 12022.1), that petitioner was previously convicted of a strike under California’s Three Strikes Law (Cal. Pen. Code §§ 667(b) - (I), 1170.12), and that petitioner had two prior DUI convictions for which he had also served prison terms within the meaning of Cal. Pen. Code § 667.5(b)). Petitioner

1 seeks relief on the grounds that: (1) he received ineffective assistance of appellate counsel; (2)  
2 his right to due process was violated when he was not allowed to attend the trial or sentencing  
3 proceedings; and (3) his right to due process was violated when he was not allowed to testify at  
4 trial. Upon careful consideration of the record and the applicable law, the undersigned  
5 recommends that petitioner's application for habeas corpus relief be denied.

## 6 **I. Background**

7 In its unpublished memorandum and opinion affirming petitioner's judgment of  
8 conviction on appeal<sup>1</sup>, the California Court of Appeal for the Third Appellate District provided  
9 the following factual summary:

10 A jury convicted defendant Mark Anthony of failing to stop at an  
11 accident resulting in property damage (Veh.Code, § 20002, subd.  
12 (a)), driving with a suspended license (Veh.Code, § 14601.2, subd.  
13 (a)), two counts of driving under the influence (DUI) (Veh.Code, §  
14 23152, subd. (a)), and two counts of driving with .08 percent or  
15 greater blood-alcohol content (Veh.Code, § 23152, subd. (b)). In a  
16 bifurcated proceeding, the jury further found he committed two of  
17 the felony offenses while released from custody on the other  
18 felony charges (Pen.Code, § 12022.1), he was previously  
19 convicted of a strike under the Three Strikes law (Pen.Code, §§  
20 667, subds.(b)-(I), 1170.12), and he had two prior DUI convictions  
21 for which he had also served prison terms within the meaning of  
22 Penal Code section 667.5, subdivision (b). The trial court  
23 sentenced defendant to state prison for an aggregate term of 11  
24 years four months.

18 \* \* \*

## 19 **Facts**

### 20 **A. First Incident**

21 On September 29, 2001, at approximately 9:00 p.m., Sergeant  
22 David Yenne of the Grant School District Police Department  
23 noticed defendant driving and apparently slowing for a turn.  
24 Defendant subsequently "corrected the turn" and continued on  
25 before swerving into a parking lot, back into the road, and then  
26 back into the parking lot. Defendant stopped so his car was  
positioned partly in the road and partly in the parking lot, and

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<sup>1</sup> Notice of Lodging Documents on July 8, 2005 (Dckt. No. 9), Resp.'s Lodg. Doc. C (hereinafter Opinion).

1 Sergeant Yenne stopped behind him and activated his emergency  
2 lights.

3 Sergeant Yenne noticed defendant's eyes were bloodshot and  
4 glassy, his speech was slightly slurred, and he smelled of alcohol.  
5 Defendant said he had just left his girlfriend's house and admitted  
6 he had been drinking there. He did not have a driver's license.  
7 Yenne called his dispatcher and asked for a California Highway  
8 Patrol (CHP) officer to meet him at the scene to conduct a DUI  
9 evaluation.

10 CHP Officer Ragnar Schubert arrived at approximately 9:23 p.m.  
11 Officer Schubert also noticed that defendant exhibited signs of  
12 intoxication, including the strong odor of alcohol, red and watery  
13 eyes, and somewhat slow and slurred speech. Defendant said he  
14 had last eaten at approximately 5:00 p.m. and had drank half a can  
15 of Budweiser beer 45 minutes prior, and had finished drinking  
16 within the last five to 10 minutes. Schubert had defendant do five  
17 field sobriety tests, which he did not perform satisfactorily. After a  
18 preliminary alcohol screening test indicated the presence of  
19 alcohol, Schubert arrested defendant. Defendant subsequently  
20 became upset and angry. After defendant was arrested, Sergeant  
21 Yenne searched the car. He found a large, open beer can in a  
22 paper bag in the front passenger side of defendant's car.

23 A blood sample taken from defendant at approximately 11:15 p.m.  
24 had a blood-alcohol level of .20 percent. It appeared to Schubert  
25 that defendant's level of intoxication might have increased slightly  
26 after their initial encounter.

## 27 **B. Second Incident**

28 On May 20, 2002, at approximately 11:00 p.m., Zakayaiah Smith  
29 was walking toward her car when defendant drove rapidly down  
30 the street, without using his headlights, and swerved and hit her  
31 car. Defendant appeared to be seriously injured when his head hit  
32 the front windshield, and Smith went to investigate. As she  
33 approached, defendant got out of the car and she noticed his face  
34 was bloody. It appeared defendant had been drinking; he  
35 staggered and "could barely stand up straight." He said he was  
36 going to leave, and Smith told him he could not leave and she was  
37 going to call the police. When defendant tried to leave, another  
38 person struggled with him and knocked him unconscious.  
39 However, he got up several minutes later and left without giving  
40 his name.

41 CHP officers found defendant walking near the scene of the  
42 accident. He was bleeding from the left side of his head, there was  
43 blood on his face, and he said he had hit a car that was parked in  
44 the middle of the road and was looking for a phone to call someone  
45 to come and get him. He did not have a driver's license. He

1 exhibited signs of intoxication, including red and watery eyes,  
2 difficulty keeping his balance, an odor of alcohol from his breath,  
3 and slurred speech. However, he said he had not had anything to  
4 drink.

5 Because of his injuries, defendant was taken to the hospital, and no  
6 field sobriety tests were given. Defendant told a paramedic that he  
7 took insulin, and the paramedic noted defendant could have  
8 sustained a concussion. Lack of insulin or a concussion can cause  
9 slurred speech, difficulty balancing, or irrational behavior.  
10 Defendant became combative and made threatening statements to  
11 the paramedic. A blood sample taken from defendant at  
12 approximately 1:40 a.m. had a blood-alcohol level of .26 percent.

### 13 **Procedural Background**

14 Defendant was charged for his conduct in the first incident by an  
15 amended information (case No. 01F08222) with DUI, driving with  
16 a .08 percent or more blood-alcohol level, driving with a  
17 suspended license, and related enhancements. He pleaded guilty to  
18 the misdemeanor charge of driving with a suspended license, and  
19 he went to trial on the alcohol-related charges. The jury reached a  
20 deadlock, and the trial court declared a mistrial.<sup>2</sup>

21 Over defendant's opposition, the People subsequently filed a  
22 consolidated information including the charges in case No.  
23 01F08222 with the charges in case No. 02F05503, which were  
24 based on the second incident. Defendant requested a severance of  
25 the charges before trial, but the trial court denied relief.

26 Petitioner appealed his conviction to the California Court of Appeal for the Third  
Appellate District, claiming that the trial court erred by denying his motion to sever and that the  
evidence was insufficient to sustain the strike enhancement. Resp.'s Lodg. Doc. A. On  
November 5, 2004, petitioner's judgment of conviction was affirmed. Lodg. Doc. C.

On December 17, 2004, petitioner filed a petition for review in the California Supreme  
Court. Lodg. Doc. D. Although the claims contained in that petition are difficult to decipher, it  
appears that petitioner raised all of the claims that are contained in the habeas petition filed in  
this court on March 10, 2005. *Id.* The petition for review was summarily denied by order dated  
January 19, 2005. Lodg. Doc. E.

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<sup>2</sup> Defendant testified at the first trial but not at the second, which resulted in his conviction.

1           On March 10, 2005, petitioner filed his federal habeas petition in this court. Dckt. No. 1.  
2 Respondent filed an answer on July 8, 2005. Dckt. No. 8. Petitioner filed a traverse on January  
3 18, 2006, and a supplemental traverse on December 7, 2006. Dckt. Nos. 24, 29.

4           On February 28, 2008, petitioner filed a motion to file a supplemental petition, along  
5 with a supplemental petition containing the sole claim that his rights under the Sixth And  
6 Fourteenth Amendments were violated during sentencing, in violation of the rule set forth in  
7 *Cunningham v. California*, 549 U.S. 270 (2007). Dckt. Nos. 32, 33. By order dated March 30,  
8 2009, this court construed petitioner's filings as a motion to file an amended petition, and denied  
9 the motion without prejudice on the grounds that the supplemental petition did not include the  
10 claims raised in petitioner's original habeas petition and was therefore not complete in itself, in  
11 violation of Local Rule 220. Dckt. No. 36. On April 22, 2009, petitioner filed a motion for  
12 reconsideration of the March 30, 2009 order. Dckt. No. 37. On July 15, 2009, the motion for  
13 reconsideration was denied by the district judge assigned to this action. Dckt. No. 38.

14           On August 26, 2009, petitioner filed a motion to stay and abey these proceedings so that  
15 he could exhaust in state court the claims raised in the habeas petition filed in this court on  
16 March 10, 2005, and possibly his *Cunningham* claim as well. Dckt. Nos. 39, 42. On October 8,  
17 2009, petitioner filed an amended petition for writ of habeas corpus, which included the claims  
18 contained in his March 10, 2005 habeas petition and also a *Cunningham* claim. Dckt. No. 41.  
19 Previously, on approximately August 22, 2009, petitioner filed a petition for writ of habeas  
20 corpus in the California Supreme Court, in which he raised the claims contained in the March 10,  
21 2005 petition filed in this court, but did not raise a *Cunningham* claim. Ex. to Dckt. No. 39. On  
22 October 14, 2009, the California Supreme Court summarily denied that petition. Dckt. No. 42.  
23 On October 30, 2009, petitioner notified this court that the California Supreme Court had denied  
24 his habeas petition, and requested that this court rule on the merits of all of the claims contained  
25 in his October 8, 2009 amended petition. By order dated February 2, 2010, this court denied

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1 petitioner's August 26, 2009 motion for stay and abeyance on the ground that it was moot in  
2 light of the decision of the California Supreme Court. Dckt. No. 43.

3 In light of the circumstances described above, the habeas petition filed in this court on  
4 March 10, 2005 is the operative petition in this matter. The "first amended petition" filed on  
5 October 8, 2009 was not properly filed; therefore, the allegations contained therein will not be  
6 considered by this court. Petitioner's claim based on the *Cunningham* decision has not been  
7 raised in any operative petition filed in this court and appears to be unexhausted. Accordingly,  
8 this court will not address petitioner's *Cunningham* claim.

## 9 **II. Analysis**

### 10 **A. Standards for a Writ of Habeas Corpus**

11 Federal habeas corpus relief is not available for any claim decided on the merits in state  
12 court proceedings unless the state court's adjudication of the claim:

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

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

17 28 U.S.C. § 2254(d).

18 Under section 2254(d)(1), a state court decision is "contrary to" clearly established  
19 United States Supreme Court precedents "if it 'applies a rule that contradicts the governing law  
20 set forth in [Supreme Court] cases', or if it 'confronts a set of facts that are materially  
21 indistinguishable from a decision'" of the Supreme Court and nevertheless arrives at a different  
22 result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406  
23 (2000)).

24 Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas  
25 court may grant the writ if the state court identifies the correct governing legal principle from the  
26 Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's

1 case. *Williams*, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because  
2 that court concludes in its independent judgment that the relevant state-court decision applied  
3 clearly established federal law erroneously or incorrectly. Rather, that application must also be  
4 unreasonable.” *Id.* at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (it is “not  
5 enough that a federal habeas court, in its independent review of the legal question, is left with a  
6 ‘firm conviction’ that the state court was ‘erroneous.’”)

7 The court looks to the last reasoned state court decision as the basis for the state court  
8 judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a  
9 decision on the merits but provides no reasoning to support its conclusion, a federal habeas court  
10 independently reviews the record to determine whether habeas corpus relief is available under  
11 section 2254(d). *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

## 12 **B. Petitioner’s Claims**

13 All of the exhausted claims presented to this court are related to the trial court’s grant and  
14 then revocation of petitioner’s request to represent himself at trial, and petitioner’s subsequent  
15 absence from the courtroom during the trial and sentencing proceedings. These claims were  
16 summarily denied on the merits by the California Supreme Court. Therefore, this court must  
17 independently review the record to determine whether habeas corpus relief is available under  
18 section 2254(d). *Delgado*, 223 F.3d at 982. After summarizing the relevant facts from the state  
19 court record, the court will analyze petitioner’s claims in turn below.

### 20 **1. Background**

21 The state court record reflects that on February 27, 2003, at a pretrial motions hearing,  
22 petitioner made an oral request pursuant to *Faretta v. California*, 422 U.S. 806 (1975) (*Faretta*)  
23 to represent himself at trial, after his motion for substitute counsel was denied. Reporter’s  
24 Transcript on Appeal (RT) at 172-90. Petitioner’s *Faretta* request was granted by Judge  
25 Bakarich. Suppl. Traverse, Ex. B3; RT at 190-93. Judge Bakarich advised petitioner that if he  
26 was disruptive he would be removed from the courtroom and an attorney would be brought in to

1 finish his case. RT at 192. He also informed petitioner that his case was “not going to get  
2 continued,” even if he later hired an attorney. *Id.* Petitioner signed a document which informed  
3 him of the dangers of representing himself at trial and the penalty he faced if found guilty.  
4 Suppl. Traverse, Ex. B3. The court found that petitioner had made the decision to represent  
5 himself “knowingly, intelligently and voluntarily” and “with full knowledge of the risks and  
6 dangers of doing so.” *Id.* Petitioner was informed he would continue with the investigator  
7 already assigned to his case. RT at 194. He was advised that the trial would begin after the  
8 upcoming weekend. *Id.* at 195.

9 On March 4, 2003, despite Judge Bakarich’s advice that a trial continuance would not be  
10 granted, petitioner’s trial was continued to April 2, 2003, at petitioner’s request. *Id.* at 203-05.  
11 On March 27, 2003, petitioner made an oral motion to continue the trial date again, which was  
12 denied by Judge Ransom. *Id.* at 198. On April 2, 2003, petitioner appeared before Judge Virga.  
13 *Id.* at 196. Petitioner advised Judge Virga that he was not ready to proceed with the trial and he  
14 requested another continuance of the trial date. *Id.* at 198-203. Petitioner stated that he was  
15 “totally not prepared” and that he still intended to file motions and conduct further investigation.  
16 *Id.* at 209-211. Judge Virga denied petitioner’s request for another trial continuance. *Id.* at 217.  
17 The judge noted that petitioner had brought at least seven motions for substitute counsel, one of  
18 which was successful, and five motions to represent himself, and reminded petitioner that he was  
19 “expected to proceed as an attorney would in the case.” *Id.*

20 At that point, petitioner asked for the appointment of counsel. *Id.* at 219. Petitioner  
21 complained that he “would like to be pro per, but you wouldn’t continue [the trial].” *Id.* He  
22 stated that he would try to have an attorney ready to represent him “within 24 hours.” *Id.* at 219-  
23 20. Petitioner repeated that he was not ready for trial because he had not had time to prepare his  
24 defense. *Id.* at 222. Judge Virga informed petitioner that he had not stated sufficient grounds to  
25 continue the trial and that he could either proceed pro se or the court would appoint David  
26 Muller, petitioner’s former attorney, to represent him. *Id.* at 223. Petitioner declined to accept



1 Mr. Muller and asked for new counsel. *Id.* The court informed petitioner that he was not  
2 allowed to choose his court appointed attorney. *Id.* at 224. The trial court gave petitioner until  
3 the next day to prepare and file any motions he thought were necessary. *Id.* at 226. Petitioner  
4 was informed that, at that point, the trial would proceed. *Id.*

5 At the next court hearing on April 3, 2003, petitioner refused to respond to the court's  
6 questions or to participate in the proceedings. *Id.* at 229, 230, 231, 232, 234, 235, 236. The  
7 court noted for the record that petitioner was

8 fully aware of the limitations an in-custody pro per faces. If anything the  
9 defendant is an experienced pro per knowing his limitations. He still insists on  
10 representing himself. He then tries to use his pro per status to continually delay  
11 those proceedings. This pattern is clear from a review of the proceedings in this  
12 case. . . . He once again claims as he did yesterday that it is his pro per status that  
13 necessitates a further continuance of the case. A pro per defendant is held to the  
14 same standards as a licensed attorney. The pro per is to be afforded no special  
15 treatment. He's to be prepared just as an attorney who would be prepared. On  
16 the record before me this defendant has had adequate time to prepare for trial.  
17 Because he has not so prepared himself, it is not good cause to postpone the trial.  
18 If the standard was is this defendant prepared for trial, in my opinion this case  
19 would probably never go to trial. Any time he wished he could claim he was not  
20 prepared and the case would have to be continued.

21 *Id.* at 242-43. The judge did, however, agree to postpone jury selection for several more days in  
22 order to give petitioner and his investigator more time to prepare. *Id.* at 245.

23 At the next court hearing on April 8, 2003, petitioner told the court that because he was  
24 unable to obtain a continuance of the trial in order to prepare his defense, he intended to "turn  
25 my back on the Court and not acknowledge this Court or the Judge." *Id.* at 253, 254. While he  
26 was making these statements, petitioner was turned away from the bench, facing the spectator  
section. *Id.* at 255, 294. The trial judge admonished petitioner that he would not allowed to  
attend the trial if he intended to sit in such a way as to face the audience and that he would have  
to "sit forward in your seat." *Id.* at 255. The judge stated that he would remove petitioner from  
the courtroom and the trial would proceed in his absence if he refused to sit facing the court. *Id.*  
at 255-57. When the court asked petitioner whether he intended to sit properly in his seat,  
petitioner refused to answer. Petitioner was then removed from the courtroom. *Id.* at 258. *See*

1 *also id.* at 293-95.

2 Later that day, the trial judge explained that he had caused the following memorandum to  
3 be read to petitioner in his holding cell:

4 Mr. Anthony, your trial was ordered recessed until 11:00 a.m. this  
5 morning. I was informed by the Sheriff's Department that you  
6 refused to return to Court at that time. Your trial will proceed at  
7 1:30 p.m. this afternoon. At this time, you are still proceeding  
8 with pro per status.

9 I have appointed attorney David Muller as stand-by counsel. If  
10 you choose to return to court this afternoon and do not act in a  
11 disruptive fashion, you will be allowed to proceed in pro per. If  
12 you choose to return to court and I allow you to proceed in the trial  
13 as pro per and you later act in a disruptive fashion during the trial,  
14 you will be removed from the courtroom, and Mr. Muller will be  
15 appointed as your attorney, and he will then represent you until the  
16 completion of the trial.

17 If you refuse to return to court at 1:30 p.m., I intend to appoint Mr.  
18 Muller as your attorney of record, and your trial will proceed  
19 immediately until its completion, with Mr. Muller representing you  
20 in your absence. If this occurs, you may still elect to return to the  
21 courtroom at any time during the trial, upon assurance to the Court  
22 that you will not act in a disruptive fashion.

23 If Mr. Muller is substituted as your attorney of record, you will not  
24 be able to return to pro per status during the trial.

25 *Id.* at 263-64. Petitioner concedes that he received this memorandum on April 8, 2000. Suppl.  
26 Traverse, Exs. A2, B1. At 1:30 p.m., the escort officer informed the judge that petitioner refused  
to return to court, stating that he didn't recognize the court and did not wish to be "a part of [the]  
judge's courtroom." RT at 266.<sup>3</sup> According to the officer, petitioner also declined to return to  
court to have the above-described memorandum explained to him, stating that "he did not wish  
to return and didn't need the memorandum explained to him," that the memorandum was  
"probably invalid" because it wasn't signed and didn't contain a seal, and that "he felt that if he  
were to return, [the judge] would revoke his pro per status and assign the lawyer he didn't wish

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<sup>3</sup> The officer was not placed under oath; the judge simply asked him what had occurred.

*Id.*

1 to be assigned.” *Id.* at 267. The trial judge found that petitioner had refused to return to court;  
2 therefore, he revoked petitioner’s pro per status and appointed Mr. Muller to represent him at  
3 trial. *Id.* at 268.<sup>4</sup>

4 At that point, petitioner’s defense counsel moved to dismiss the jury panel on the ground  
5 that the jurors may have been prejudiced against petitioner because of the delay involved in  
6 beginning the trial process. *Id.* at 269-70. The trial judge granted this request and the jury panel  
7 was excused. *Id.* at 270. At the start of the proceedings on the next trial date, April 9, 2003, the  
8 trial judge was advised by the bailiff that petitioner had been asked by the “tank officer” whether  
9 he wished to be present at the proceedings and had declined. *Id.* at 292-93.<sup>5</sup> The trial judge  
10 informed the jury panel that petitioner was “absent from the courtroom,” but that they were “not  
11 to speculate as to the reasons for his absence,” and that petitioner’s absence “must not in any  
12 way affect your verdict or be considered by you in the course of your deliberations.” *Id.* at 300.  
13 A deputy sheriff asked petitioner at the start of the next trial date whether he wished to be  
14 present. *Id.* at 439-40. Petitioner declined to do so and the trial court found that petitioner had  
15 voluntarily absented himself from the trial. *Id.*

16 On April 16, 2003, petitioner was asked by a deputy sheriff whether he wanted to testify  
17 and he responded that he did not. *Id.* at 554. Petitioner informed the deputy that “since [the trial  
18 judge] ordered me out of the courtroom, he can court order me back into the courtroom.” *Id.*

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21 <sup>4</sup> Later that same day, the judge reaffirmed that petitioner had “intentionally absented  
22 himself from these court proceedings,” had indicated by his conduct that he did not wish to  
23 participate in the proceedings, and had chosen not to attend the trial. *Id.* at 288. He ordered that  
24 petitioner be brought to a holding cell in the courthouse every court day and asked whether he  
25 wished to attend the proceedings. *Id.* at 289. The court also granted the request of petitioner’s  
26 trial counsel that petitioner be asked by a sheriff’s deputy whether he wished to testify at the  
trial. *Id.* The court undertook these measures after considering, but rejecting, the option of  
having petitioner forcibly brought to the courtroom to make an express waiver of his right to be  
present. *Id.* at 295. The court ultimately concluded, after considering the “totality of the  
circumstances,” that petitioner had chosen “to be absent voluntarily.” *Id.*

<sup>5</sup> Petitioner’s exact words were: “Fuck no; fuck you.” *Id.* at 293.

1 The bailiff informed the trial court that “he’ll come back, but he wants to see the court order.”

2 *Id.* The trial judge stated that petitioner’s remarks indicated he may have had a change of heart.

3 *Id.* He interpreted petitioner’s statements to mean the following: “he believes that if he’s ordered  
4 by the court to be present during the court proceedings then in that circumstance he is willing to  
5 be present.” *Id.* Accordingly, the trial court issued an order for petitioner to be “physically  
6 present” in the courtroom. *Id.* at 555-56.<sup>6</sup>

7 Petitioner returned to the courtroom. *Id.* at 557. Petitioner was notified that his “pro per  
8 privileges” had been revoked and that Mr. Muller was acting as his trial counsel. *Id.* Petitioner  
9 argued that he had been denied the opportunity to prepare his defense, that he did not wish to  
10 proceed with appointed counsel, and that he wished to “have [his] pro per status returned.” *Id.* at  
11 558. The trial court denied this request. *Id.*

12 Shortly thereafter, the question arose whether petitioner wished to testify. *Id.* at 571.  
13 Petitioner asked whether he could testify regarding only one of the cases against him, but not  
14 both. *Id.* Petitioner stated that he hadn’t made a decision yet whether to testify and that he  
15 needed to talk to his counsel to ascertain what had occurred so far in the trial. *Id.* at 572. When  
16 the judge asked whether he was asking for time to confer with his counsel before he made his  
17 decision, petitioner answered, “Yes.” *Id.* At that point, petitioner was allowed to confer with his  
18 counsel outside of the courtroom to discuss this issue. *Id.* at 574-76.

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20 \_\_\_\_\_  
21 <sup>6</sup> The trial judge made clear that he did not intend to order a “physical extraction” against  
petitioner’s will. *Id.* He explained that his order was

22 consistent with what the defendant’s requesting. He’s essentially  
23 putting his condition on his return to court. I’m prepared to meet  
24 that condition in that appears [sic] to be some willingness to be  
25 present during the court proceedings and the court deems one’s  
right to be physically present an important right, and if there is any  
indication that this defendant wishes to exercise that right I intend  
to give him the opportunity to exercise that right.

26 *Id.* at 555.

1           When the parties returned to court, petitioner’s counsel declared a “legal conflict” and  
2 asked to be removed from the case because of hostility directed towards him by petitioner. *Id.* at  
3 577, 592; Clerk’s Transcript on Appeal (CT) at 294. The court immediately held an unreported  
4 in camera hearing. RT at 577. Petitioner states that he did not participate in that hearing. Suppl.  
5 Traverse, Ex. A4. After the in camera hearing, the trial court denied counsel’s request to be  
6 removed but ordered that petitioner be physically restrained in the courtroom for reasons of  
7 security. RT at 592. At that point, petitioner became verbally abusive and asked to “go back to  
8 where I was.” *Id.* at 594. The trial judge ordered petitioner removed from the courtroom. *Id.*  
9 The court then made the following announcement:

10           The defendant was given an opportunity to remain in the  
11 courtroom. He was warned per the specific provisions of Penal  
12 Code section 1043 B1 that he could sit in his chair, that he would  
13 have to be restrained as I indicated based upon the results of the  
14 security hearing, and I’ll indicate that I found the information  
15 provided from Mr. Muller to be credible. And was based upon  
16 those representations that I felt the restraints were necessary. I was  
17 prepared to even allow the defendant to, well, I ordered that his  
18 hands be restrained. They were positioned in such a way that the  
19 jury could not see them in that the hands were placed underneath  
20 the table, so they would see no evidence of shackling. I asked the  
21 sheriff’s department to remove his leg chains because I had a  
22 concern about the jury viewing the leg chains with the defendant  
23 being present. I specifically warned the defendant pursuant to  
24 Penal Code Section 1043 B1 that he could remain in the  
25 courtroom. He would have to remain in the courtroom restricted  
26 as I indicated, and that he would be removed from the courtroom if  
he continued with disruptive behavior, disorderly behavior, or  
disrespectful behavior with him in the courtroom. And if he  
continued with that type of behavior that he would be removed  
from the courtroom. The defendant’s outburst’s at this time was  
[sic], to say the least, quite disruptive. It was disorderly. It was  
disrespectful. His voice continued to rise. He interrupted the  
court, and I am satisfied would continue to interrupt the court.  
Therefore he has been removed from the courtroom pursuant to  
Penal Code section 1043 B1.

24 *Id.* at 594-95.

25           With respect to whether petitioner would testify at trial, the trial court concluded that  
26 petitioner had deliberately caused a situation where he was unable to participate in the

1 proceedings and that he had “given up his right to further participate in the trial.” *Id.* at 595-96.

2 The court summarized the situation as follows:

3 I want to make the record clear regarding the defendant’s presence  
4 yesterday in court proceedings. I ruled that it was necessary to  
5 restrict the defendant, as I indicated, after conducting a security  
6 hearing where I heard evidence from Mr. Muller and the  
7 defendant. The defendant was informed he could remain present  
8 in the courtroom with the restrictions imposed. The defendant then  
9 steadily requested of the court to be removed from the courtroom  
10 indicating that he did not wish to be present. In that we had  
11 conducted proceedings during the day with the defendant present I  
12 felt it appropriate to make an effort to provide the defendant his  
13 right to be present during court proceedings. In spite of my effort  
14 the defendant insisted on not being present. The defendant  
15 directed a profanity laced outburst at the court that was disruptive,  
16 disorderly and disrespectful. Efforts to end the tirade by court  
17 direction was futile. Thus, the court was left with no option but to  
18 remove the defendant from the courtroom and proceed in his  
19 absence. I find that the defendant is, I find that the defendant, by  
20 his tactics yesterday voluntarily absented himself from the trial  
21 within the meaning of Penal Code section 1043, subdivision B,  
22 subdivision 2. He did not wish to be present and he purposely  
23 engaged in conduct in order to force the court to remove him  
24 from the courtroom. Conduct also justified the defendant being  
25 removed from the courtroom per the provisions of Penal Code  
26 section 1043 B1. I ordered the sheriff’s department today to  
inquire of the defendant if he wished to be present during court  
proceedings today because of my finding that he voluntarily  
absented himself from yesterday’s proceedings. The sheriff’s  
department informed me that the defendant replied he did not wish  
to be present today. I find that the defendant has voluntarily  
absented himself from today’s court proceedings within the  
meaning of Penal Code section 1043 B2. The Court also ruled  
yesterday that it denied counsel’s request to be relieved as counsel  
for defendant in this case. The defendant began this trial  
representing himself. His pro per privilege was revoked because  
of his disruptive, disorderly and disrespectful conduct. Standby  
Mr. Muller was then appointed to represent the defendant. In my  
opinion Mr. Muller’s request to be relieved would have amounted  
to a forfeiture of this defendant’s right to counsel. No other  
counsel could be appointed at this stage of trial and be prepared to  
represent the defendant. The Court logically and legally could not  
reconfer pro per status on a defendant who has promised then and  
then [sic] carried out the promise to behave in a disorderly,  
disruptive and disrespectful manner. If the Court relieved Mr.  
Muller, the trial would have had to proceed with a criminal  
defendant being totally devoid of any representation. Existing case  
law requires that the, before the court takes the drastic case of  
forfeiting [sic] the defendant’s right to counsel, the court must

1 conduct a hearing to determine if such forfeiture is appropriate.  
2 After conducting the hearing yesterday I denied counsel's right to  
3 be relieved. I could not find clear and convincing evidence to  
4 justify such forfeiture. Existing case law suggests that forfeiture of  
5 counsel is rarely the most appropriate response to a defendant's  
6 misconduct directed at his counsel. The court in *Gilcrist versus*  
7 *O'Keefe* 260 F third at page 100 suggests taking intermediate steps  
8 to protect counsel before a complete denial of the right to counsel  
9 is imposed. I took one such intermediate step in this case by  
10 imposing physical restraints on the defendant in the least  
11 restrictive means possible which provided necessary security to  
12 defense counsel. I felt this step necessary where defendant's  
13 fundamental right to counsel was at stake. By the defendant's  
14 conduct in north he did not wish to be physically present in the  
15 courtroom under the physical restraints imposed by the court and  
16 voluntarily absented himself. I believe a more appropriate remedy  
17 at this time in response to defendant's misconduct is to remove the  
18 defendant and have counsel remain rather than removing counsel  
19 and leaving the misbehaving defendant present. Even the *Faretta*  
20 decision recognition [sic] that a violent, threatening and disruptive  
21 defendant is hardly the ideal candidate for pro per representation.  
22 As I noted earlier the defendant has voluntarily absented himself  
23 from the courtroom. I believe the remedies I have chosen and the  
24 defendant's request to absent himself from the courtroom insures  
25 the defendant his fundamental right to counsel, and at the same  
26 time protects counsel from the conduct that the defendant stated he  
would take in continued court proceedings in order to impose the  
drastic step of counsel forfeiture. Existing case law I believe  
requires a showing of more than what Mr. Muller described  
yesterday. Combination of the defendant being physically  
restricted and his voluntary absence from the courtroom provides  
sufficient control of his conduct to allow his attorney to continue  
to represent him.

18 *Id.* at 617-20.

19 After the trial court made this statement, petitioner's counsel informed the court that,  
20 while the jurors were not in the courtroom during petitioner's outburst, they may have heard the  
21 outburst in the hallway and may also have observed petitioner "being led out of the courtroom  
22 from the side when he was still in chains." *Id.* at 621. The trial judge responded that petitioner  
23 had caused "the necessity for removal from the courtroom" and that he had "nobody to blame  
24 but himself for his conduct." *Id.*

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26 ///

1 Petitioner was asked but declined to be present at any further court proceedings,  
2 including the reading of the verdict, the jury trial on the prior conviction allegations, and the  
3 sentencing proceedings. *Id.* at 667-69, 765-67.

## 4 **2. Right to be Present during the Proceedings**

5 Petitioner claims that his right to due process was violated when he was “not presen[t] at  
6 trial, jury selection, opening arguments, examination of witness or evidences and sentencing.”  
7 Pet. at 5. He complains that he was “not afforded the opportunity to be presen[t]” at these  
8 proceedings, and that he “did not attend trial until eight days later after the prosecution rested  
9 petitioner was denied due process.” *Id.*

10 Every person charged with a felony has a fundamental right to be present at every stage  
11 of the trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). “A defendant is guaranteed the right to  
12 be present at any stage of the criminal proceeding that is critical to its outcome if his presence  
13 would contribute to the fairness of the procedure.” *Kentucky v. Stincer*, 482 U.S. 730, 745  
14 (1987). This right is guaranteed by the Confrontation Clause of the Sixth Amendment and the  
15 Due Process Clauses of the Fifth and Fourteenth Amendments. *United States v. Gagnon*, 470  
16 U.S. 522, 526 (1985) (per curiam). The right to be present, like many other constitutional rights,  
17 may be waived, provided such waiver is voluntary, knowing, and intelligent. *See Gagnon*, 470  
18 U.S. at 529; *Taylor v. United States*, 414 U.S. 17, 19-20 (1973).

19 A defendant may also lose the right to be present at trial by misconduct. *Allen*, 397 U.S.  
20 at 342-43; *Campbell v. Wood*, 18 F.3d 662, 671 (9th Cir. 1994). “A defendant can lose his right  
21 to be present at trial if, after he has been warned by the judge that he will be removed if he  
22 continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so  
23 disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him  
24 in the courtroom.” *Allen*, 397 U.S. at 343. Once lost, “the right to be present can be reclaimed as  
25 soon as the defendant is willing to conduct himself consistently with the decorum and respect  
26 inherent in the concept of courts and judicial proceedings.” *Id.* The right to be present during all



1 critical stages of the proceedings is subject to harmless error analysis. *Rushen v. Spain*, 464 U.S.  
2 114, 117 n.2 (1983) (per curiam); *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005).

3 As described above, the trial court concluded that petitioner voluntarily waived his right  
4 to be present at trial and also lost the right to be present by his misconduct. Petitioner disagrees  
5 that he voluntarily waived his right to be present. He states that he “was NOT ALLOWED to be  
6 present not that the petitioner refused to go the Court officers only had to come to the holding  
7 cell and bring to court but they did not.” Traverse at 5. Petitioner also states that he was “just  
8 waiting in the holding cell to be brought into the trial,” *id.* at 6, and that he was “awaiting  
9 patiently in the County Jail for the Sheriff to transport him to court for his right to be present at  
10 his trial proceedings and the Sheriff did not bring him to court.” Suppl. Traverse at 3.<sup>7</sup> In short,  
11 petitioner denies that he was afforded the opportunity to attend the trial but refused to do so, as  
12 described above and as reflected in the state court record.

13 Assuming *arguendo* that petitioner did not voluntarily waive his right to attend trial but  
14 was “awaiting patiently” to be brought to the courtroom each day, this court nevertheless  
15 concludes that petitioner lost the right to be present at trial by his misconduct. *Allen*, 397 U.S. at  
16 342-43; *Campbell*, 18 F.3d at 671. The record reflects that petitioner was removed from the  
17 courtroom after he refused to respond to the trial judge or to participate in the proceedings  
18 because he was angry at the court for refusing to grant another trial continuance. Petitioner  
19 refused to face the bench and stated that he would not acknowledge the court or the judge. The  
20 trial judge warned petitioner that he would not be allowed to attend the trial if he refused to face  
21 the court, and asked petitioner whether he intended to seated properly. Petitioner refused to  
22 answer and was removed. Several court days later, when petitioner was brought into the  
23 courtroom, he apparently threatened his trial counsel and swore at the court after being  
24 physically restrained. Petitioner was again removed from the proceedings. At no time did  
25

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26 <sup>7</sup> Both the initial and the supplemental traverse have been filed under penalty of perjury.

1 petitioner act in such a way as to justify a return to the courtroom or to pro per status. Quite  
2 clearly, he did not show that he was “willing to conduct himself consistently with the decorum  
3 and respect inherent in the concept of courts and judicial proceedings.” *Allen*, 397 U.S. at 343.  
4 Nor did petitioner make an affirmative request to return to the proceedings.<sup>8</sup>

5         Because of this behavior, petitioner lost the right to be present at the trial. He was not  
6 entitled to control and manipulate the proceedings by the use of threatening and aggressive  
7 behavior which threatened the integrity of the courtroom and the safety of his attorney. *See id.*  
8 (“Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on  
9 the charges brought against him. It would degrade our country and our judicial system to permit  
10 our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and  
11 obstructed by defendants brought before them charged with crimes.”) The trial court did not  
12 abuse its discretion in ejecting petitioner from the courtroom because of his disorderly and  
13 disrespectful behavior and his stated intention to continue to engage in the same behavior. It is  
14 also obvious from the state court record that the trial judge went to great lengths to accommodate  
15 petitioner’s constitutional rights while also maintaining the dignity of the courtroom.

16         This court also notes that there is no evidence in the record that petitioner’s presence  
17 would have contributed to the fairness or reliability of the proceedings, or that his absence  
18 contributed to any unfairness. On the contrary, petitioner’s continued outbursts, confrontational  
19 attitude, and angry demeanor would in all likelihood have prejudiced the jury against him. There  
20 is no evidence to indicate that petitioner’s continuing presence in the courtroom was necessary to  
21 ensure a fair trial. Nor is there any evidence that petitioner’s presence at the court trial on the  
22 prior conviction allegations or the sentencing proceedings would have contributed to the fairness  
23 of these procedures. Nothing before the court raises any question as to the accuracy of the  
24 documentation related to the prior conviction allegations. Further, there is no indication that

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25         <sup>8</sup> As described above, the one time petitioner indicated he might be willing to return, he  
26 was brought into the courtroom but his behavior resulted in his removal again.

1 petitioner would have received a lesser sentence had he been present at the sentencing  
2 proceedings.

3 Finally, the Supreme Court has made clear that criminal defendants have a right to  
4 counsel at all “critical stages” of criminal proceedings. *United States v. Wade*, 388 U.S. 218,  
5 224 (1967). The trial judge was careful to ensure that petitioner’s right to counsel was protected  
6 at all times during trial and sentencing. He appointed counsel for petitioner after petitioner’s  
7 behavior necessitated his removal from the courtroom. Although petitioner did not wish to  
8 proceed with the appointed attorney, the trial court had previously found, apparently after several  
9 hearings, that there was no reason to remove this attorney and appoint substitute counsel. There  
10 is no evidence before the court that any of petitioner’s requests for substitute counsel were  
11 improperly denied. Further, while the Sixth Amendment guarantees criminal defendants the  
12 right to effective representation, indigent defendants do not have a constitutional right to be  
13 represented by the counsel of their choice. *Caplin & Drysdale, Chartered v. United States*, 491  
14 U.S. 617, 624 (1989); *Gonzalez v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008). Petitioner was  
15 free to hire counsel that he found acceptable, and he informed the court that he intended to do so,  
16 but he never did. Under these circumstances, there was no violation of petitioner’s right to  
17 counsel.

18 For all of the reasons discussed above, petitioner is not entitled to relief on his claim that  
19 he was denied the right to be present at his trial and sentencing proceedings.

### 20 **3. Right to Testify**

21 Petitioner’s next claim is that his right to due process was violated when he was “denied  
22 the opportunity to testify at trial.” Pet. at 6. Petitioner explains:

23 On 4/16/03 defendant was at trial, an [sic] ask by the presiding  
24 trial judge if the defendant would be taking the stand in his  
25 defense, petitioner stated yes, but was excluded from the  
26 proceedings, the petitioner was never afforded the opportunity to  
testify, a denial of due process.

*Id.* See also Suppl. Traverse, Ex. A4 (“Defendant was asked by Judge Virga would defendant

1 like to take stand in his defense (I stated ‘yes.’”)

2           The right of a criminal defendant to testify in his own defense is well established and is a  
3 “constitutional right of fundamental dimension.” *United States v. Pino-Noriega*, 189 F.3d  
4 1089, 1094 (9th Cir. 1999) (quoting *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993)).  
5 *See also Rock v. Arkansas*, 483 U.S. 44, 51 (1987). A criminal defendant can waive his right to  
6 testify at trial, so long as the waiver is knowing and voluntary. *Pino-Noriega*, 189 F.3d at 1094.  
7 However, “while waiver of the right to testify must be knowing and voluntary, it need not be  
8 explicit.” *Id.* at 1094. A trial court “has no duty to affirmatively inform defendants of their right  
9 to testify, or to inquire whether they wish to exercise that right.” *Id.* at 1094-95 (citing *United*  
10 *States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1990). “[W]aiver of the right to testify may be  
11 inferred from the defendant’s conduct and is presumed from the defendant’s failure to testify or  
12 notify the court of his desire to do so.” *Joelson*, 7 F.3d at 177. Although the right to testify at a  
13 criminal trial is well-established, the right is not without limitation and “may, in appropriate  
14 cases, bow to accommodate other legitimate interests in the criminal trial process .” *Rock*, 483  
15 U.S. at 55 (internal quotation marks omitted).

16           The state court’s decision rejecting petitioner’s claim that the trial court violated his right  
17 to testify is neither contrary to nor an unreasonable application of federal law, nor is it based on  
18 an unreasonable determination of the facts of this case. Petitioner’s allegation that he told the  
19 trial court on April 16, 2003 he wanted to testify is flatly contradicted by the record of the  
20 proceedings. As described above, the record reflects that on the morning of April 16, petitioner  
21 specifically told the deputy sheriff that he did not want to testify. After he was brought to court,  
22 petitioner told the trial judge he had not yet decided whether to testify. He stated that he needed  
23 to ascertain from his counsel what had occurred at the trial before making his decision. After  
24 consulting with his counsel and returning to the courtroom, petitioner became angry at being  
25 restrained and demanded to leave the courtroom. He also directed a profanity-laced speech at  
26 the court. In short, petitioner knew he had a right to testify at his trial but failed to exercise it

1 and, indeed, acted in a manner that prevented his opportunity to testify. Accordingly, he waived  
2 his right to testify because of his behavior on April 16, 2003 and throughout the proceedings.  
3 *See Allen*, 397 U.S. at 352-43; *United States v. Johnson*, 820 F.2d 1065, 1074 (9th Cir. 1987)  
4 (noting that a defendant can waive the right to testify through contumacious conduct); *United*  
5 *States v. Panza*, 612 F.2d 432, 438 (9th Cir. 1979) (“A defendant may waive the right (to testify)  
6 either intentionally or by his conduct”); *United States v. Ives*, 504 F.2d 935, 941 (9th Cir.1974),  
7 *vacated*, 421 U.S. 944 (1975); *reinstated in relevant part and vacated in part*, 547 F.2d 1100  
8 (9th Cir. 1976) (same). Under the circumstances presented here, there was no violation of  
9 petitioner’s right to testify.

#### 10 **4. Ineffective Assistance of Appellate Counsel**

11 Petitioner claims that his appellate counsel rendered ineffective assistance by failing to  
12 raise a claim based on “the facts associated with self representation (Faretta).” Pet. at 5.

13 Petitioner explains:

14 Petitioner was granted pro per status on 2/27/03 in dept. 4 by  
15 Judge Bakarich, on State Appeal the procedural history of  
16 petitioner’s Faretta status was not briefed to the reviewing  
appellate court which denied petitioner due process, appointed  
appellate counsel was responsible.

17 *Id.* In the traverse, petitioner complains that his appellate counsel “clearly failed in her duties  
18 not getting the transcripts or even briefing the petitioner on the issues.” Traverse at 5. He also  
19 argues that he was denied the right to counsel of his choice and that “there was a conflict with  
20 petitioners counsel.” *Id.* In his supplemental traverse, petitioner argues that he was “denied his  
21 right to represent himself” and that appellate counsel’s failure to raise this issue on appeal  
22 constituted ineffective assistance. Petitioner also claims that appellate counsel was ineffective in  
23 failing to raise issues regarding petitioner’s absence from the trial proceedings. *Id.* at 2.

24 Petitioner states that he asked his appellate counsel to raise these issues but she declined to do  
25 so. *Id.*

26 ///

1 Petitioner's claims, as described above, were summarily denied on the merits by the  
2 California Supreme Court. Therefore, this court must independently review the record to  
3 determine whether habeas corpus relief is available under section 2254(d). *Delgado*, 223 F.3d at  
4 982.

5 **a. Legal Standards**

6 **I. Ineffective Assistance of Counsel**

7 The Sixth Amendment guarantees the effective assistance of counsel. The United States  
8 Supreme Court set forth the test for demonstrating ineffective assistance of counsel in *Strickland*  
9 *v. Washington*, 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a  
10 petitioner must first show that, considering all the circumstances, counsel's performance fell  
11 below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. After a  
12 petitioner identifies the acts or omissions that are alleged not to have been the result of  
13 reasonable professional judgment, the court must determine whether, in light of all the  
14 circumstances, the identified acts or omissions were outside the wide range of professionally  
15 competent assistance. *Id.* at 690; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Second, a  
16 petitioner must establish that he was prejudiced by counsel's deficient performance. *Strickland*,  
17 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for  
18 counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at  
19 694. A reasonable probability is "a probability sufficient to undermine confidence in the  
20 outcome." *Id.* *See also Williams*, 529 U.S. at 391-92; *Laboa v. Calderon*, 224 F.3d 972, 981  
21 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was  
22 deficient before examining the prejudice suffered by the defendant as a result of the alleged  
23 deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of  
24 sufficient prejudice . . . that course should be followed." *Pizzuto v. Arave*, 280 F.3d 949, 955  
25 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 697).

26 ///



1 . . . the trial judge may terminate self-representation by a defendant  
2 who deliberately engages in serious and obstructionist misconduct.  
3 *See Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353  
4 [1970]. Of course, a State may – even over objection by the  
5 accused – appoint a “standby counsel” to aid the accused if and  
6 when the accused requests help, and to be available to represent  
7 the

8 accused in the event that termination of the defendant’s  
9 self-representation is necessary. [Citation omitted.]

10 The right of self-representation is not a license to abuse the dignity  
11 of the courtroom.

12 *Id.* A criminal defendant may be removed from the courtroom during his own trial when he  
13 “engages in speech and conduct which is so noisy, disorderly, and disruptive that it is  
14 exceedingly difficult or wholly impossible to carry on the trial.” *Allen*, 397 U.S. at 338. This is  
15 because “[i]t is essential to the proper administration of criminal justice that dignity, order, and  
16 decorum be the hallmarks of all court proceedings in our country.” *Id.* at 343. To this end,  
17 “[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not  
18 and cannot be tolerated.” *Id.*

### 19 **b. Analysis**

20 Petitioner argues that his trial counsel rendered ineffective assistance in failing to raise  
21 claims based on the circumstances surrounding his request for self-representation and subsequent  
22 loss of that right. The record reflects that appellate counsel considered these issues but rejected  
23 them because, in her view, they lacked merit. As appellate counsel explained to petitioner in a  
24 letter, she “considered many other issues, including your request for continuance and your non-  
25 presence in the courtroom for almost all of your trial.” Suppl. Traverse, Ex. C2. However,  
26 “[a]ccording to the record, the court made it clear to you on 2/27/03 that if you went pro per you  
would NOT get a continuance, but then the court granted you nearly a month’s continuance  
anyway.” *Id.* Counsel further noted that petitioner had been provided discovery and was  
advised he would be held to the same standard as a lawyer. *Id.* She noted that petitioner had  
chosen to “turn [his] back on the judge and the jury” and had “refused to come to court, although



1 you were asked if you wanted to come to court before each and every session.” *Id.* Counsel  
2 further noted that the record reflected after petitioner was physically brought to the courtroom  
3 after indicating he might come if ordered to appear, he “appeared, got angry, screamed and  
4 yelled.” *Id.* In another letter, petitioner was advised by his appellate counsel’s supervisor that  
5 “[o]ne of the many reasons [appellate counsel] has decided not to raise this issue is the fact that  
6 the court repeatedly found that you had voluntarily absented yourself from the trial” and that  
7 “you were repeatedly offered the opportunity to return to court and that you declined the  
8 invitation.” *Id.*, Ex. C4. It is apparent from this record that appellate counsel’s decision to press  
9 claims with arguably more merit than the claims suggested by petitioner was “within the range of  
10 competence demanded of attorneys in criminal cases.” *McMann v. Richardson*, 397 U.S. 759,  
11 771 (1970).

12         Petitioner has also failed to demonstrate that he probably would have prevailed if his  
13 appellate counsel had raised claims related to his status as a pro per defendant. Petitioner  
14 requested the right to represent himself and his request was granted. He then lost that right  
15 because of his obstreperous behavior and counsel was appointed to represent him during the  
16 remainder of the trial. Petitioner consistently refused to attend the trial or to proceed with proper  
17 decorum while he was in the courtroom. His request to “have his pro per status returned”  
18 because he was angry with the judge’s decision to appoint Mr. Muller as his trial counsel was  
19 appropriately denied. He had not demonstrated that he was willing to behave appropriately in  
20 the courtroom. Therefore, any appellate claim based on a violation of petitioner’s right to self-  
21 representation was meritless.

### 22 **III. Conclusion**

23         For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner’s  
24 application for a writ of habeas corpus be denied.

25         These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written  
2 objections with the court and serve a copy on all parties. Such a document should be captioned  
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
4 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
5 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
6 his objections petitioner may address whether a certificate of appealability should issue in the  
7 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing  
8 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it  
9 enters a final order adverse to the applicant).

10 DATED: September 13, 2010.

11   
12 EDMUND F. BRENNAN  
13 UNITED STATES MAGISTRATE JUDGE  
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