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

BERNARD LUJEAN WILDEE

Petitioner,

No. CIV S-07-0163 GEB DAD P

vs.

WARDEN FELKER, et al.,

Respondents.

FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction entered against him on June 16, 2005 in the Sacramento County Superior Court on charges of felon in possession of a firearm, unlawfully possessing a concealed firearm, and unlawfully possessing a loaded firearm. He seeks relief on the grounds that: (1) the trial court erred in denying his suppression motion, (2) there was insufficient evidence to support his conviction, (3) his trial counsel rendered ineffective assistance, (4) the arresting officers made false reports, (5) a prior conviction of his is invalid, (6) the trial court erred in refusing to dismiss a prior strike, (7) the trial court failed to award him appropriate presentence conduct credits, and (8) petitioner's

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1 sentence violates the Eighth Amendment. Upon careful consideration of the record¹ and the
2 applicable law, the undersigned will recommend that petitioner's application for habeas corpus
3 relief be denied.

4 PROCEDURAL BACKGROUND

5 On June 16, 2005, a jury convicted petitioner of being a felon in possession of a
6 firearm in violation of California Penal Code §12021(a)(1), unlawful possession of a concealed
7 firearm in violation of California Penal Code §12025(b)(6), and unlawful possession of a loaded
8 firearm in violation of California Penal Code §12031(a)(2)(F). (CT 218-223; Resp'ts' Lodged
9 Doc. No. 4 at 2.) The jury also found petitioner to have suffered two prior serious felony
10 convictions for violations of California Penal Code §§667(b)-(i), 1170.12, and 1192.7(c) and to
11 have served a prior prison term. (Id.) On August 31, 2005, the trial court sentenced petitioner to
12 state prison for three terms of twenty-five years to life plus one year for the prior prison term
13 enhancement. (CT 252-253; Resp'ts' Lodged Doc. No. 4 at 2.) It stayed the sentences in counts
14 two and three pursuant to California Penal Code §654. (Id.) The superior court awarded
15 petitioner 56 days of presentence conduct credit. (Id.)

16 Petitioner appealed his judgment of conviction and on December 14, 2006, the
17 California Court of Appeal for the Third Appellate District modified the judgment to award
18 defendant 140 days of presentence conduct credit and affirmed the judgment as modified.
19 (Resp'ts' Lodged Doc. No. 4 at 25.) On March 28, 2007, the California Supreme Court denied
20 petitioner's petition for review. (Resp'ts' Lodged Doc. No. 6).

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23 ¹ On August 8, 2007, respondents' counsel lodged the briefs and decisions from
24 petitioner's appeal and from the habeas corpus proceedings in the state superior, appellate, and
25 supreme courts. Each of those documents is identified herein with the document number
26 assigned it by respondents as "Resp'ts' Lodged Doc. No. #." At the court's request, on
September 10, 2009, respondents' counsel lodged the Clerk's Transcript on Appeal, the Clerk's
Supplemental Transcript on Appeal, the Reporters' Transcript on Appeal, and the Reporters'
Supplemental Transcript on Appeal. Those records are identified herein as the "CT," "CT
Supp.," "RT," and "RT Supp.," respectively. Page references to documents created by petitioner
refer to consecutive pagination of the document.

1 On February 23, 2006, petitioner filed a habeas petition with the Sacramento
2 County Superior Court (case number 06F01908) claiming: (1) the trial court erred in denying his
3 motion to suppress evidence, (2) the trial court erred in failing to instruct the jury on “corpus
4 delicti” and “mere presence,” (3) the prosecutor engaged in misconduct during trial, (4) the trial
5 court erroneously read the allegations of petitioner’s prior strike convictions to the jury, (5) there
6 was insufficient evidence admitted to support the conviction, and (6) counsel was ineffective.
7 (Resp’ts’ Lodged Doc. Nos. 7 and 8.) On April 26, 2006 the Sacramento County Superior Court
8 dismissed petitioner’s first five claims for lack of jurisdiction since “these claims may have been
9 raised in the pending appeal.” (Resp’ts’ Lodged Doc. No. 8 at 1.) The court rejected petitioner’s
10 claims of ineffective assistance of counsel on the merits . (Id. at 2-5.) On May 2, 2006, the
11 Superior Court denied petitioner’s motion for reconsideration. (Resp’ts’ Lodged Doc. No. 9.)

12 On May 11, 2006, petitioner filed a habeas petition with the California Court of
13 Appeal for the Third Appellate District (case number CO52598) claiming: (1) the trial court
14 abused its discretion by failing to grant his suppression motion, (2) trial counsel was ineffective
15 by failing to separate the strike findings from trial and failed to object to introduction of evidence
16 of the strikes before petitioner testified at trial, (3) the evidence was insufficient to support the
17 conviction, (4) the trial judge was biased, and (5) his counsel in a prior strike case provided
18 ineffective assistance. (Resp’ts’ Lodged Doc. No. 10 at 3.) On May 18, 2006, the Court of
19 Appeal summarily denied the petition. (Resp’ts’ Lodged Doc. No. 11.)

20 On June 12, 2006, petitioner filed a petition for writ of habeas corpus in the
21 California Supreme Court (case number S144202) claiming: (1) the trial court abused its
22 discretion when it denied his suppression motion, (2) counsel was ineffective, (3) the trial court
23 erred in failing to dismiss a prior strike conviction, (4) his sentence was cruel and unusual, (5)
24 the trial court erred in failing to instruct the jury at his trial on “corpus delicti” and “mere
25 presence,” (6) the trial prosecutor committed misconduct, and (7) his counsel in a prior strike
26 case was ineffective. (Resp’ts’ Lodged Doc. No. 12.) On January 17, 2007, the California

1 Supreme Court summarily denied the petition. (Resp'ts' Lodged Doc. No. 13.)

2 On January 25, 2007, petitioner filed a federal habeas petition with this court. On
3 May 15, 2007, the Court dismissed the petition, with leave granted to file an amended petition.
4 On June 11, 2007, petitioner filed an amended petition, upon which this action is proceeding. On
5 August 8, 2007, respondents filed an answer. On August 16, 2007 petitioner filed a "Reply
6 Motion" or traverse (hereafter "Reply")² and on August 17, 2007 filed a "Supplement Response"
7 ("Pet'r's Supp. Resp."). In addition to these filings, the court has considered petitioner's exhibits
8 filed on May 3, 2007 ("Pet'r's Exs.") and a document filed by petitioner on March 24, 2008
9 entitled "Consideration." See Nov. 5, 2008 Order (Doc. No. 60).

10 FACTUAL BACKGROUND³

11 In the early morning hours of November 25, 2004,
12 Sacramento police detained defendant Bernard Wildee and his
13 cousin LeAndrew Smith. The officers observed the two men sitting
14 in a maroon Mustang on G Parkway. The car was parked about a
15 quarter of a mile from where a residential burglary had taken place
16 a few minutes before. Defendant initially gave the officers his
17 Swahili name and denied he was on probation or parole. When
18 questioned further by the police, defendant stated he had a "baby
19 gun" in the car, provided his true name, and admitted he was on
20 parole. The officers found a loaded .38-caliber revolver under the
21 front passenger seat.

22 The arresting officers also testified at trial that petitioner told them he found the
23 gun, the gun did not belong to Smith, and the gun was under the front passenger seat, where

24 ² The bulk of petitioner's "Reply" or traverse is a re-submission of the thirty-five exhibits
25 that petitioner filed with the court in May 2007.

26 ³ The following summary is drawn from the Dec. 14, 2006 opinion by the California
Court of Appeal for the Third Appellate District. (Resp'ts' Lodged Doc. No. 4 at 1-3.) This
court presumes that the state court's findings of fact are correct unless petitioner rebuts that
presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Davis v. Woodford,
384 F.3d 628, 638 (9th Cir. 2004). "Clear and convincing evidence" within the meaning of
§2254(e) "requires greater proof than preponderance of the evidence" and must produce "an
abiding conviction" that the factual contentions being advanced are "highly probable." Cooper v.
Brown, 510 F.3d 870, 919 (9th Cir. 2007) (quoting Sophanthavong v. Palmateer, 378 F.3d 859,
866 (9th Cir. 2004)), cert. denied, 130 S. Ct. 749 (2009). Petitioner has not overcome the
presumption with respect to the underlying events. This court will therefore rely on the state
court's recitation of the facts.

1 officers then found it. The defense attempted to show that petitioner did not possess the gun. In
2 this regard, petitioner testified he did not know the gun was in the car and never told the arresting
3 officers that he did. (2 RT 991-992.) Smith's girlfriend, the owner of the car, testified that she
4 placed the gun under the seat. (2 RT 1024:23-1025:20.) Petitioner's wife testified he did not
5 own a gun. (2 RT 1060:19-25.) A woman petitioner had sex with earlier that day testified that
6 she did not see him with a gun. (2 RT 1056-1057.) The defense also attempted to show
7 petitioner had reformed from his criminal past and would not have put himself at risk of
8 returning to jail by possessing a gun.

9 ANALYSIS

10 I. Standards of Review Applicable to Habeas Corpus Claims

11 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
12 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
13 861 (9th Cir. 1994); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
14 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
15 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
16 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
17 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
18 (1972).

19 This action is governed by the Antiterrorism and Effective Death Penalty Act of
20 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d
21 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting
22 habeas corpus relief:

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

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

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

5 28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v.
6 Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the
7 state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing court must
8 conduct a de novo review of a habeas petitioner’s claims. Delgadillo v. Woodford, 527 F.3d
9 919, 925 (9th Cir. 2008). See also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc)
10 (“[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error
11 and that, if there is such error, we must decide the habeas petition by considering de novo the
12 constitutional issues raised.”).

13 The court looks to the last reasoned state court decision as the basis for the state
14 court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned
15 state court decision adopts or substantially incorporates the reasoning from a previous state court
16 decision, this court may consider both decisions to ascertain the reasoning of the last decision.
17 Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court
18 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal
19 habeas court independently reviews the record to determine whether habeas corpus relief is
20 available under section 2254(d), but still defers to the state court’s ultimate decision. Himes v.
21 Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir.
22 2002). When it is clear that a state court has not reached the merits of a petitioner’s claim, or has
23 denied the claim on procedural grounds, the AEDPA’s deferential standard does not apply and a
24 federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th
25 Cir. 2003).

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1 II. Petitioner's Claims

2 A. Denial of Suppression Motion

3 Petitioner challenges the trial court's denial of his motion to suppress evidence
4 seized in the search of the maroon Mustang. He alleges his initial detention was unlawful
5 because police lacked an articulable suspicion that he was involved in criminal activity. The
6 state appellate court fairly described the testimony presented at petitioner's suppression hearing
7 as follows:

8 At 1:16 a.m. on November 25, 2004, Sacramento Police
9 Officers David Eagleton and Clay Quint responded to a call via
10 dispatch that a residential burglary was in progress on Meadowgate
11 Drive. Officers Eagleton and Quint arrived near the burglary scene
12 at approximately 1:30 a.m., and waited briefly for a canine unit to
13 join them.

14 Officer Eagleton saw three Black males outside the house
15 where the burglary was reported to be taking place. One of the
16 suspects ran eastbound and Officer Quint gave chase. The two
17 Black males closest to Officer Eagleton's patrol car ran north on
18 Meadowgate. Officer Eagleton followed them and apprehended a
19 suspect named Moore. The other suspect got away. Officer
20 Eagleton broadcast a description of the two Black men he was
21 chasing. One suspect was wearing a black sweatshirt or sweater
22 and blue jeans, and the other wore a black sweatshirt and black
23 pants. He said the suspects were running north. A few minutes
24 later, Officer Eagleton saw a silver four-door car speed down
25 Meadowgate with a Black male inside. Officer Eagleton put out a
26 description of the vehicle.

Officers Ryan Bullard and Joseph Bailey heard a dispatch
about the foot pursuit of burglary suspects a little after 1:30 a.m.,
and drove to the scene. They contacted Officer Eagleton on
Meadowgate Drive about 1:40 a.m. Officer Eagleton advised
Officers Bullard and Bailey that one of the suspects had run
southbound on Mandy Drive from Meadowgate wearing a black
hooded sweatshirt and jeans.

Officers Bullard and Bailey drove to G Parkway where they
"saw a red parked Mustang" on the street. There were two Black
males in the car. The man in the front passenger seat was wearing
what appeared to be a hooded, black jacket. The Mustang was
legally parked with its lights off approximately one-quarter mile
from the scene of the burglary. Officer Bullard thought the two
men might be involved in the burglary because of the time of night,
how the passenger was dressed, and the proximity to the crime

1 scene.

2 The two officers stopped their patrol car in front of the
3 Mustang and turned on their spotlights. With Officer Bailey
4 providing cover, Officer Bullard approached the driver's side of the
5 Mustang with his firearm drawn but at his side. He told the
6 occupants to show him their hands, and they complied. When
7 asked, the driver identified himself as LeAndrew Smith, gave his
8 date of birth and said he was on probation. Defendant provided no
9 identification, but told Officer Bullard his name was Zuri Askarie,
10 gave his date of birth as August 28, 1974, and said he was not on
11 probation or parole.

12 When Officer Bullard returned to the patrol car, he
13 identified Smith in his automated system and learned he was on
14 formal, searchable probation. Officer Bullard became suspicious
15 when he was unable to locate anyone named Zuri Askarie in the
16 computer system.

17 Officer Bullard asked Smith to step out of the Mustang,
18 conducted a probation search, and put him in the back of the patrol
19 car. Bullard asked defendant to step out of the car and conducted a
20 patdown search for weapons. When asked if he had any weapons
21 on him, defendant replied that he had a "baby gun." He told
22 Bullard the gun was under the front passenger seat but it did not
23 belong to him. Officer Bullard conducted a full search of
24 defendant, placed him in handcuffs, and set him on the sidewalk.
25 At that point, defendant admitted his real name was Bernard
26 Wildee and he was on parole. Officer Bailey searched the Mustang
and found a handgun that was fully loaded.

Defendant testified at the suppression hearing. He explained he gave Officer Bullard his Swahili name, Zuri Askarie, which he had used since he was 18 years old. Defendant admitted he lied to police about not having identification because he was on parole. However, defendant denied saying he had a "baby gun" in the car.

The court denied defendant's motion to suppress. It found Officers Bullard and Bailey were justified in detaining defendant whom they observed with Smith at 1:30 in the morning, in a car with headlights off, away from any residences, parked on a dead-end street in close proximity to the burglary scene. The court also found there was probable cause to conduct the search once defendant gave the officers false information about his name and indicated there was a "baby gun" in the car.

(Resp'ts' Lodged Doc. No. 4 at 4-7.)

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1 The California Court of Appeal rejected petitioner’s argument that the trial court
2 had erred in denying his motion to suppress evidence with the following analysis:

3 Under our federal and state Constitutions, a detention
4 occurs if, in view of all the surrounding circumstances, a
5 reasonable person would believe he was not free to leave or
6 otherwise disregard a show of police authority. (California v.
7 Hodari D. (1991) 499 U.S. 621, 627-628 [113 L.Ed.2d 690,
8 697-699]; People v. Souza (1994) 9 Cal.4th 224, 229 (Souza.)
9 “[A] police officer can detain a person when the officer is aware of
10 ‘specific and articulable facts’ suggesting ‘that (1) some activity
11 relating to crime has taken place or is occurring or about to occur,
12 and (2) the person he [or she] intends to stop or detain is involved
13 in that activity.’ [Citation.]” (People v. Limon (1993) 17
14 Cal.App.4th 524, 531-532 (Limon.) When viewed alone, the fact a
15 suspect was observed at night or in a high crime area is not enough
16 to justify a detention. However, such facts may establish the
17 required articulable suspicion when considered in combination
18 with one or more other suspicious facts. (Souza, supra, at pp.
19 240-241.)

20 The trial court’s task on a motion to suppress evidence “is
21 to find historical facts, select the appropriate rule of law, and apply
22 the latter to the former to determine whether the rule so applied
23 was or was not violated . . . [A]s the reviewing court, [we] must
24 uphold the trial court’s findings of fact if they are supported by
25 substantial evidence.” (People v. Kraft (2000) 23 Cal.4th 978,
26 1036.) We independently review the question whether the
detention was reasonable. (Ibid.)

...

27 The parties agree defendant was detained within the
28 meaning of the Fourth Amendment when Officer Bullard
29 approached the Mustang with his weapon drawn. The question is
30 whether that detention was justified by an articulable suspicion that
31 defendant had committed a crime. (Florida v. Royer (1983) 460
32 U.S. 491, 498 [75 L.Ed.2d 229, 236]; Limon, supra, 17
33 Cal.App.4th at pp. 531-532.)

34 The record supports the conclusion the detention was
35 lawful. Around 1:40 a.m., Officers Bullard and Bailey responded to
36 a dispatch concerning the foot pursuit of at least two suspects in a
residential burglary on Meadowgate Drive. They spoke with
Officer Eagleton at the scene. There is disagreement on whether
Officer Eagleton told Officers Bullard and Bailey the suspects ran
north or south. However, at 1:40 a.m. Officers Bullard and Bailey
understood that at least two Black male suspects were still on the
run. One of the suspects was wearing a black hooded sweatshirt
and jeans. Two or three minutes later, Officers Bullard and Bailey

1 observed Smith and defendant, a Black male wearing a dark jacket,
2 sitting in a car facing out of a dead-end street about a quarter of a
3 mile from where police were investigating the burglary. Given the
4 totality of the circumstances, we conclude Officers Bullard and
5 Bailey acted reasonably and lawfully when they detained and
6 questioned defendant.

7 (Resp'ts' Lodged Doc. No. 4 at 3-4, 7-8.)

8 Petitioner claims his conviction is unlawful because it was obtained by the
9 admission into evidence of a firearm and ammunition seized in violation of the Fourth
10 Amendment. (Am. Pet. (Doc. No. 31-1) at 4, 19-23, 68-84; (Doc. No. 31-2) at 67-73, 97-99,
11 112-115, 129-136; Pet'r's Exs. 1-9, 20-21, 24-25, 30-35; Reply (Doc. No. 39) at 24-27; Pet'r's
12 Supp. Resp. (Doc. No. 41); Consideration (Doc. No 55).⁴ Specifically, as described above,
13 petitioner alleges that the police lacked legal grounds to detain him when they approached the
14 legally parked Mustang vehicle in which he was a passenger. This claim is not cognizable in this
15 federal habeas corpus petition.

16 The United States Supreme Court has held that "where the State has provided an
17 opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be
18 granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional
19 search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494 (1976). Thus,
20 a Fourth Amendment claim can only be litigated on federal habeas where petitioner demonstrates

21 ⁴ The Amended Petition was so large that it was divided into two subsections of docket
22 entry no. 31 when it was scanned into the CM/ECF system by the Clerk of the Court. The
23 citations to the Amended Petition herein refer either to Doc. No. 31-1, the first half of
24 petitioner's Amended Petition, or Doc. No. 31-2, the second half. Each entry is separately
25 paginated in the court's CM/ECF system. Citations to page numbers herein refer to the
26 consecutive pagination of each subsection of Doc. No. 31 created by CM/ECF. On May 3, 2007
petitioner filed with the court a packet of thirty-five exhibits. They are referred to herein as
"Pet'r's Ex." Petitioner's Reply filed on August 16, 2007 was also quite large. It was scanned
by the Clerk of the Court in three parts. The first 199 pages are identified as Doc. No. 39; the
second 199 pages are Doc. No. 39-1; and the third set of 78 pages is Doc. No. 39-2. Like the
Amended Petition, each entry for the Reply is separately paginated in the CM/ECF system.
Citations to page numbers herein refer to the consecutive pagination of each subsection of Doc.
No. 39 created by the court's CM/ECF system.

1 that the state did not provide an opportunity for full and fair litigation of the claim; it is
2 immaterial whether the petitioner actually litigated the Fourth Amendment claim, whether the
3 state courts correctly disposed of the Fourth Amendment issues tendered to them, or even
4 whether the state courts correctly understood the claim. Ortiz-Sandoval v. Gomez, 81 F.3d 891,
5 899 (9th Cir. 1996); Siripongs v. Calderon, 35 F.3d 1308, 1321 (9th Cir. 1994); Gordan v.
6 Duran, 895 F.2d 610, 613 (9th Cir. 1990).

7 The record before this court establishes that petitioner had a full and fair hearing
8 in state court on his Fourth Amendment claim. As explained above, petitioner filed a motion to
9 suppress the evidence seized during the search of the Mustang and the trial court held an
10 evidentiary hearing on that motion. (CT 84-96; RT 4-184.) Petitioner also challenged the
11 validity of his detention in his appeal, in his petition for review, and in his state habeas petitions.
12 (Resp'ts' Lodged Doc. Nos. 1 at 17-33; 3 at 2-5; 5 at 7-13; 7 at 3; 10 at 3; 12 at 3.) In addition
13 to the California Court of Appeal's rejection of petitioner's argument on appeal described above,
14 the California Court of Appeal and the California Supreme Court reviewed and rejected
15 petitioner's arguments in his habeas corpus petitions that his rights under the Fourth Amendment
16 were violated by the search.⁵ (Resp'ts' Lodged Doc. Nos. 11, 13.) Petitioner has not shown that
17 the state failed to provide him a full and fair opportunity to litigate his Fourth Amendment claim.

18 For the foregoing reasons, this court may not consider petitioner's claim that his
19 Fourth Amendment rights were violated and he is not entitled to federal habeas relief with
20 respect to that claim. Stone v. Powell, 428 U.S. at 494.⁶

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22 ⁵ The Sacramento County Superior Court dismissed petitioner's habeas claim regarding
23 the suppression motion for lack of jurisdiction due to the pendency of petitioner's appeal.
(Resp'ts' Lodged Doc. No. 8 at 1.)

24 ⁶ Petitioner makes references to "racial profiling" by the officers who detained him and
25 to "bias" by the trial judge. (Am. Pet. (Doc. No. 31-2 at 102.) To the extent petitioner is
26 attempting to raise new claims for relief, his allegations of racial profiling and bias are too vague
and conclusory to state cognizable habeas claims. See Jones v. Gomez, 66 F.3d 199, 204 (9th
Cir. 1995) ("[c]onclusory allegations which are not supported by a statement of specific facts do
not warrant habeas relief") (quoting James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994)). To the

1 B. Insufficient Evidence of Possession of a Firearm

2 The jury convicted petitioner of being a felon in possession of a firearm in
3 violation of California Penal Code §12021(a)(1), unlawful possession of a concealed firearm in
4 violation of California Penal Code §12025(b)(6), and unlawful possession of a loaded firearm in
5 violation of California Penal Code §12031(a)(2)(F). Petitioner claims the evidence introduced at
6 his trial was insufficient to support his conviction for possession of a firearm. (Am. Pet. (Doc.
7 No. 31-1) at 4, 27-28.) He argues that the evidence introduced at his trial showed he did not own
8 a gun and that the gun found by officers was placed there, without his knowledge, by the owner
9 of the car. (Id.)

10 Petitioner did not raise this claim on appeal. However, respondents also argue
11 that petitioner failed to raise this claim in his state habeas corpus petitions and that it is therefore
12 unexhausted. Respondents' argument is unpersuasive. Petitioner did raise this insufficiency of
13 the evidence claim in each of his state habeas petitions, including the petition he filed with the
14 California Supreme Court. (Resp'ts' Lodged Doc. Nos. 7 at 3, 10 at 3, and 12 at 17-18.) The
15 Sacramento County Superior Court dismissed petitioner's insufficiency of the evidence claim for
16 lack of jurisdiction, stating as follows: "During the pendency of an appeal, a trial court is without
17 authority to proceed on a habeas corpus proceeding for any error which was or might have been
18 legally presented to the appellate court." (Resp'ts' Lodged Doc. No. 8 at 1.) The California
19 Court of Appeal and California Supreme Court denied petitioner's habeas petitions without
20 opinion. (Resp'ts' Lodged Doc. Nos. 11 and 13.) Typically, this court would analyze the
21 Superior Court's decision as the relevant state court determination because it would be the "last
22 reasoned decision" by a state court. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002) (the
23 habeas court must review the "last reasoned decision" by a state court); Shackleford v. Hubbard,

24 _____
25 extent petitioner makes these references in support of his Fourth Amendment claim, he had every
26 opportunity to raise them during the state court proceedings in connection with his motion to
suppress. In any event, these references do not change this court's conclusion that Stone v.
Powell bars consideration of petitioner's Fourth Amendment claim.

1 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). However, since petitioner’s appeal had concluded by
2 the time the California Supreme Court denied his state habeas petition, the Superior Court’s
3 reasoning was not necessarily still applicable. As discussed above, for purposes of reviewing
4 the state court’s decision under 28 U.S.C. § 2254(d), if this court considers the Superior Court’s
5 procedural ruling on petitioner’s claim, then the deferential standard of review set out in section
6 2254(d) does not apply and this court must review the claim de novo. Nulph v. Cook, 333 F.3d
7 1052, 1056 (9th Cir. 2003). However, if this court considers the California Supreme Court’s
8 summary denial of petitioner’s claim, then it must independently review the record to determine
9 whether habeas corpus relief is available under section 2254(d), but still defer to the state court’s
10 ultimate decision. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313
11 F.3d 1160, 1167 (9th Cir. 2002). Under either standard of review, this court finds petitioner’s
12 claim of insufficiency of the evidence should nonetheless be rejected.

13 The Due Process Clause of the Fourteenth Amendment “protects the accused
14 against conviction except upon proof beyond a reasonable doubt of every fact necessary to
15 constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). There
16 is sufficient evidence to support a conviction if, “after viewing the evidence in the light most
17 favorable to the prosecution, any rational trier of fact could have found the essential elements of
18 the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). “[T]he
19 dispositive question under Jackson is ‘whether the record evidence could reasonably support a
20 finding of guilt beyond a reasonable doubt.’” Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir.
21 2004) (quoting Jackson, 443 U.S. at 318). “A petitioner for a federal writ of habeas corpus faces
22 a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction
23 on federal due process grounds.” Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In
24 order to grant the writ, the federal habeas court must find that the decision of the state court
25 reflected an objectively unreasonable application of Jackson and Winship to the facts of the case.
26 Id. at 1275 & n.13.

1 The court must review the entire record when the sufficiency of the evidence is
2 challenged in habeas proceedings. Adamson v. Ricketts, 758 F.2d 441, 448 n.11 (9th Cir. 1985),
3 vacated on other grounds, 789 F.2d 722 (9th Cir. 1986) (en banc), rev'd, 483 U.S. 1 (1987). It is
4 the province of the jury to “resolve conflicts in the testimony, to weigh the evidence, and to draw
5 reasonable inferences from basic facts to ultimate facts.” Jackson, 443 U.S. at 319. If the trier of
6 fact could draw conflicting inferences from the evidence, the court in its review will assign the
7 inference that favors conviction. McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994). The
8 relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether
9 the jury could reasonably arrive at its verdict. United States v. Mares, 940 F.2d 455, 458 (9th
10 Cir. 1991). Thus, “[t]he question is not whether we are personally convinced beyond a
11 reasonable doubt” but rather “whether rational jurors could reach the conclusion that these jurors
12 reached.” Roehler v. Borg, 945 F.2d 303, 306 (9th Cir. 1991). The federal habeas court
13 determines sufficiency of the evidence in reference to the substantive elements of the criminal
14 offense as defined by state law. Jackson, 443 U.S. at 324 n.16; Chein, 373 F.3d at 983.

15 Viewing the evidence in the light most favorable to the verdict, this court
16 concludes that there was sufficient evidence from which a rational trier of fact could have found
17 beyond a reasonable doubt that petitioner was guilty of possession of a firearm. Each of the
18 charges upon which petitioner was convicted required proof of possession of a firearm. First,
19 California Penal Code §12021(a)(1) states: “Any person who has been convicted of a felony . . .
20 who owns, or has in his or her possession or under his or her custody or control, any firearm is
21 guilty of a felony.” Second, § 12025 states in relevant part:

22 (a) A person is guilty of carrying a concealed firearm when he or
23 she does any of the following:

24

25 (3) Causes to be carried concealed within any
26 vehicle in which he or she is an occupant any pistol,
revolver, or other firearm capable of being
concealed upon the person.

1 (b) Carrying a concealed firearm in violation of this section is
2 punishable, as follows:

3

4 (6) By imprisonment in the state prison, or by
5 imprisonment in a county jail not to exceed one
6 year, by a fine not to exceed one thousand dollars
7 (\$1,000), or by both that fine and imprisonment if
8 both of the following conditions are met:

9 (A) Both the pistol, revolver, or other
10 firearm capable of being concealed upon the person
11 and the unexpended ammunition capable of being
12 discharged from that firearm are either in the
13 immediate possession of the person or readily
14 accessible to that person, or the pistol, revolver, or
15 other firearm capable of being concealed upon the
16 person is loaded as defined in subdivision (g) of
17 Section 12031.

18 (B) The person is not listed with the
19 Department of Justice pursuant to paragraph (1) of
20 subdivision (c) of Section 11106, as the registered
21 owner of that pistol, revolver, or other firearm
22 capable of being concealed upon the person.

23 Pursuant to § 12031(g), a firearm is loaded when “there is an unexpended cartridge or shell,
24 consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any
25 manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip
26 thereof attached to the firearm.”

The final charge against petitioner was brought under Penal Code
§12031(a)(2)(F), which states as follows:

(a)(1) A person is guilty of carrying a loaded firearm when he or
she carries a loaded firearm on his or her person or in a vehicle
while in any public place or on any public street in an incorporated
city or in any public place or on any public street in a prohibited
area of unincorporated territory.

(2) Carrying a loaded firearm in violation of this section is
punishable, as follows:

. . . .

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1 (F) Where the person is not listed with the
2 Department of Justice pursuant to Section 11106, as
3 the registered owner of the pistol, revolver, or other
4 firearm capable of being concealed upon the person,
5 by imprisonment in the state prison, or by
6 imprisonment in a county jail not to exceed one
7 year, or by a fine not to exceed one thousand dollars
8 (\$1,000), or both that fine and imprisonment.

9 With respect to the first charge against petitioner noted above, the trial court
10 instructed the jury that possession of a firearm was satisfied by a finding of either actual or
11 constructive possession. Constructive possession was defined for the jury as follows:

12 Constructive possession does not require actual possession
13 but does require that a person knowingly exercise control over or
14 the right to control a thing, either directly or through another
15 person or persons.

16 (RT 1196:13-16; 1204:7-10.)

17 Officers Bullard and Bailey both testified at that, when asked whether he had any
18 weapons, petitioner told them, "I got a baby gun." (1 RT 760:20-22 (Officer Bullard testimony);
19 2 RT 869:12-26 (Officer Bailey testimony).) The officers also testified that petitioner told them
20 the gun was under the front passenger seat of the car, where petitioner had been sitting. (1 RT
21 761:24-762:1; 2 RT 869:27-28, 870:18-28.) Officer Bullard testified that petitioner told him the
22 gun was not his and that he had found it. (1 RT 762:2-18.) Officer Bailey testified petitioner
23 told them that he had found the gun in a backyard and that it did not belong to Smith, the driver.
24 (2 RT 871:4-7, 874:2-7.) Officer Bailey also testified that he retrieved the gun from under the
25 front passenger seat and discovered that it was loaded. (2 RT 871:20-24, 872:19-873:1; 1 RT
26 767:26-28.)⁷

⁷ Petitioner also argues that the officers' testimony should not have been considered because their testimony was the product of the illegal search and seizure. (Am. Pet. (Doc. No. 31-1) at 27-28.) As discussed above with respect to petitioner's Fourth Amendment claim, petitioner's arguments regarding his detention and the search of the vehicle are not cognizable in this federal habeas proceeding.

1 Petitioner points to his testimony in which he denied saying these things to
2 officers and to the testimony of others that the gun did not belong to him. (E.g., Am. Pet. (Doc.
3 No. 31-2) at 94-95; Pet'r's Exs. 12, 13, 14, 15, 16, and 17.) In particular, he points to the
4 testimony of Tiffany Carmichael that the gun did not belong to petitioner and that she placed the
5 gun in the car. (Am. Pet. (Doc. No. 31-1 at 133 through Doc. No. 31-2) at 11 (ex. L - interviews
6 with Carmichael and transcript of her preliminary hearing testimony); Ex. 12 filed May 12, 2007
7 (transcripts of Carmichael preliminary hearing and trial testimony).)⁸ In determining whether the
8 evidence introduced at trial was sufficient to support the jury's verdict convicting petitioner,
9 however, this court must examine it in the light most favorable to the prosecution. A reasonable
10 jury could well have found the officers more credible than petitioner's witnesses in determining
11 that the prosecution had proved beyond a reasonable doubt that petitioner placed the gun in the
12 car and had control over it.

13 For these reasons, the state court's rejection of petitioner's insufficiency
14 argument is a reasonable construction of the evidence in this case and is not contrary to or an
15 objectively unreasonable application of federal law. See Woodford v. Visciotti, 537 U.S. 19, 25
16 (2002); see also 28 U.S.C. § 2254(d)(1). Accordingly, petitioner's claim that the evidence
17 introduced at his trial was insufficient to support his conviction for possession of a firearm
18 should be rejected.

19 C. Ineffective Assistance of Counsel

20 Petitioner claims that he received ineffective assistance of counsel in several
21 respects. It is worth noting at the outset that petitioner is unable to make the showing of
22 prejudice necessary to succeed on these claims. As described above, the officers' testimony was
23 clear: petitioner told them he had a gun, told them it was his gun because he found it, and told
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25 ⁸ Petitioner also refers to testimony that fingerprints on the gun were not clear enough to
26 be identified and that officers did not see him move as though he was attempting to hide the gun.
(Pet'r's Exs. 10 and 11.) Neither of these points, however, persuasively supports petitioner's
insufficiency of the evidence claim.

1 them the gun was under the front passenger seat of the car. The officers also testified that they
2 found the gun where petitioner said it would be and it was loaded. Besides petitioner, each of the
3 defense witnesses who testified at trial either did not contradict the officers' testimony directly,
4 had a motive, due to his or her relationship to petitioner, to lie, and/or was impeached on cross-
5 examination. Petitioner has not provided, either now or at trial, any material reason to disbelieve
6 the officers' testimony. In light of this record, even if the errors by counsel alleged by petitioner
7 in his ineffective assistance of counsel claims had occurred, there is no reasonable probability the
8 outcome of his trial would have been different. Nonetheless, below the court will address
9 petitioner's ineffective assistance of counsel claims in detail below.

10 Petitioner claims his trial counsel was constitutionally deficient for the following
11 reasons: (1) he failed in numerous ways to limit the jury's consideration of petitioner's prior
12 crimes; (2) he failed to inform petitioner of the risks of testifying in his own defense at trial; (3)
13 he failed to litigate the motion to suppress to evidence; (4) he failed to request a jury instruction
14 on "mere presence as corpus delicti;" and (5) he failed to present potentially meritorious
15 defenses.

16 The Sixth Amendment guarantees the effective assistance of counsel. The United
17 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in
18 Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of
19 counsel, a petitioner must first show that, considering all the circumstances, counsel's
20 performance fell below an objective standard of reasonableness. Id. at 687-88. After a petitioner
21 identifies the acts or omissions that are alleged not to have been the result of reasonable
22 professional judgment, the court must determine whether, in light of all the circumstances, the
23 identified acts or omissions were outside the wide range of professionally competent assistance.
24 Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003).

25 In assessing an ineffective assistance of counsel claim "[t]here is a strong
26 presumption that counsel's performance falls within the 'wide range of professional assistance.'"

1 Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland, 466 U.S. at 689). There
2 is in addition a strong presumption that counsel “exercised acceptable professional judgment in
3 all significant decisions made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing
4 Strickland, 466 U.S. at 689).

5 In light of “the variety of circumstances faced by defense counsel
6 [and] the range of legitimate decisions regarding how best to
7 represent a criminal defendant,” the performance inquiry
8 necessarily turns on “whether counsel’s assistance was reasonable
9 considering all the circumstances.” Strickland, 466 U.S. at
10 688–689. At all points, “[j]udicial scrutiny of counsel’s
11 performance must be highly deferential.” Id., at 689.

12 Wong v. Belmontes, ___ U.S. ___, 130 S. Ct. 383, 384-85 (2009).

13 Second, as noted above, a petitioner must establish that he was prejudiced by
14 counsel’s deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where
15 “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
16 proceeding would have been different.” Id. at 694. A reasonable probability is “a probability
17 sufficient to undermine confidence in the outcome.” Id. See also Williams, 529 U.S. at 391-92;
18 Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court “need not determine
19 whether counsel’s performance was deficient before examining the prejudice suffered by the
20 defendant as a result of the alleged deficiencies If it is easier to dispose of an
21 ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be
22 followed.” Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at
23 697).

24 1. Ineffective Assistance Re Introduction of Prior Convictions

25 Petitioner advances a number of claims relating to his trial counsel’s decision to
26 allow the admission of evidence of petitioner’s prior convictions and other bad acts. Petitioner
argues his counsel was ineffective for (a) failing to object to the prosecutor’s misconduct in
bringing the prior convictions to the jury’s attention before petitioner testified (Am. Pet., Doc.

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1 No. 31-1 at 29-30, 95-96, and Doc. No. 31-2 at 80; Pet'r's Ex. 18),⁹ (b) failing to seek a separate
2 trial on the prior convictions (Am. Pet., Doc. No. 31-1 at 29, 92, and Doc. No. 31-2 at 78;
3 Traverse (Doc. No. 39) at 10-11), (c) failing to object to the trial judge's mentioning of the prior
4 convictions (Am. Pet. (Doc. No. 31-1) at 29-30; Pet'r's Ex. 19), (d) bringing in prejudicial
5 evidence and opening the door to additional prejudicial evidence (Am. Pet., Doc. No. 31-1 at 85,
6 89-90, 94, 99-102, and Doc. No. 31-2 at 75-77, 79-80, 117-120; Reply (Doc. No. 39) at 8-10, 12-
7 13), (e) failing to move to sanitize petitioner's two prior convictions involving the use of firearms
8 (Am. Pet., Doc. No. 31-1 at 92, and Doc. No. 31-2 at 77-78; Reply (Doc. No. 39) at 10), (f)
9 failing to seek to limit the use of his priors for impeachment (Am. Pet., Doc. No. 31-1 at 93 and
10 Doc. No. 31-2 at 78-79; Reply (Doc. No. 39) at 11-14), (g) failing to object to the prosecutor's
11 improper closing argument (Am. Pet. (Doc. No. 31-1 at 96-97 and Doc. No. 31-2 at 80-81;
12 Pet'r's Ex. 23; Reply (Doc. No. 39 at 14-15), and (h) failing to request an instruction, such as
13 CALJIC 2.50, limiting the jury's consideration of evidence of petitioner's prior bad acts (Am.
14 Pet., Doc. No. 31-1 at 97-98 and Doc. No. 31-2 at 81; Reply (Doc. No. 39) at 15-17).

15 Respondents do not argue that petitioner's various ineffective assistance of
16 counsel claims are unexhausted. Rather, they acknowledge that the claims appear to have been
17 raised in petitioner's habeas petition before the California Supreme Court. (Ans. to Am. Pet. at
18 14:7-8; Resp'ts' Lodged Doc. No. 12.) Petitioner also raised these claims on appeal. (Resp'ts'
19 Lodged Doc. No. 1 at 37-47.) To determine whether "a state court decision is contrary to federal
20 law, we look to the state's last reasoned decision in this case . . . as the basis for its judgment."
21 Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002) (citing Ylst v. Nunnemaker, 501 U.S. 797,

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23
24 ⁹ Petitioner also argues that this prosecutorial misconduct violated his due process rights.
25 (Am. Pet., Doc. No. 31-1 at 36.) However, the prosecutor was properly permitted to bring up
26 petitioner's prior crimes not only to impeach petitioner but also to rebut the defense evidence of
petitioner's good character. Furthermore, for the same reasons petitioner cannot show prejudice
with respect to his ineffective assistance of counsel claim, he cannot show that any violation of
his due process rights had a "substantial and injurious effect or influence in determining the
jury's verdict." See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996).

1 803-04 (1991)). Since, as described above, the California Supreme Court and California Court
2 of Appeal summarily denied petitioner's habeas corpus petitions without comment, respondents
3 cite to the Sacramento County Superior Court's April 21, 2006 denial of the petition for writ of
4 habeas corpus filed by petitioner with that court as the basis for the state courts' decision.
5 (Resp'ts' Lodged Doc. No. 8.) However, as noted above, the California Court of Appeal
6 rendered its decision affirming petitioner's conviction on appeal later that year, so it must be
7 considered the "last reasoned decision" of the state court for purposes of this court's analysis of
8 these ineffective assistance claims. (Resp'ts' Lodged Doc. No. 4.)

9 The Court of Appeals analyzed petitioner's claims with respect to his trial
10 counsel's strategy and handling of his prior convictions as follows:

11 Defendant argues he is entitled to reversal because he was deprived
12 of his constitutional right to effective counsel at trial. Citing eight
13 separate grounds, defendant maintains his trial attorney "pursued a
14 fatally flawed strategy by placing [defendant's] character into
15 issue, which opened the door to an incredible amount of highly
16 prejudicial bad character and other crimes evidence being
17 admitted." Defendant insists, "[t]here was no valid, rational basis
18 for defense counsel's completely reckless strategy. . . ."

19 A. What Constitutes Ineffective Assistance:

20 The law regarding a defendant's constitutional right to effective
21 assistance of counsel is well-established. (See Strickland v.
22 Washington (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674,
23 691-692] (Strickland); People v. Ledesma (1987) 43 Cal.3d 171,
24 215-218.) "[T]he question whether counsel is constitutionally
25 ineffective comprises two inquiries: (1) Was counsel's
26 performance deficient? and (2) was there prejudice? [Citations.]
... [I]f a defendant has failed to show that the challenged actions
of counsel were prejudicial, a reviewing court may reject the claim
on that ground without determining whether counsel's performance
was deficient." (People v. Weaver (2001) 26 Cal.4th 876, 961
(Weaver), quoting People v. Kirkpatrick (1994) 7 Cal.4th 988,
1008.) To establish prejudice, "defendant must show that there is a
reasonable probability that, but for counsel's unprofessional errors,
the result of the proceeding would have been different."
(Strickland, supra, at p. 694 [80 L.Ed.2d 698].)

"Reviewing courts defer to counsel's reasonable tactical decisions
in examining a claim of ineffective assistance of counsel." (People
v. Lucas (1995) 12 Cal.4th 415, 436.) "It is all too tempting for a

1 defendant to second-guess counsel's assistance after conviction or
2 adverse sentence, and it is all too easy for a court, examining
3 counsel's defense after it has proved unsuccessful, to conclude that
4 a particular act or omission of counsel was unreasonable.
5 [Citation.] A fair assessment of attorney performance requires that
6 every effort be made to eliminate the distorting effects of hindsight,
7 to reconstruct the circumstances of counsel's challenged conduct,
8 and to evaluate the conduct from counsel's perspective at the time.
9 Because of the difficulties inherent in making the evaluation, a
10 court must indulge a strong presumption that counsel's conduct
11 falls within the wide range of reasonable professional assistance;
12 that is, the defendant must overcome the presumption that, under
13 the circumstances, the challenged action 'might be considered
14 sound trial strategy.' [Citation.]" (Strickland, supra, 466 U.S. 668
15 at p. 689 [80 L.Ed.2d at pp. 694-695], italics added.) At the same
16 time, the reasonableness of counsel's decisions on tactics and
17 strategy depends on whether those decisions were informed by
18 adequate investigation. (In re Jones (1996) 13 Cal.4th 552, 565; see
19 also Strickland, supra, at pp. 690-691.) Thus, "[e]ven if counsel has
20 legitimate tactical reasons for introducing no evidence, his
21 performance is still inadequate if evidence supporting a potentially
22 meritorious defense remains unexplored." (In re Cordero (1988) 46
23 Cal.3d 161, 181.)

13 B. Instances of Alleged Ineffective Assistance:

14 1. Defense Counsel's Trial Strategy:

15 Defense counsel explained his trial strategy to the court and
16 prosecutor before trial, stating, "basically, our defense is that
17 [defendant] didn't possess the gun. He had no knowledge there was
18 a gun in the car." The defense planned to produce: (1) the owner of
19 the car who said she put the gun in the car; (2) defendant's parole
20 agent who would testify he was doing everything he was supposed
21 to do; and (3) defendant's wife who would testify he was working
22 and had a positive attitude since getting out of prison. The broad
23 strategy was to place defendant's character in issue by arguing that
24 given defendant knew he had two strikes on his record, he would
25 not have chanced committing a third strike by unlawfully
26 possessing a gun.

On appeal, defendant maintains, "[t]rial counsel's basic trial
strategy was fundamentally flawed because he intentionally opened
the door to an incredible amount of highly prejudicial bad character
evidence and other crimes evidence . . ." Specifically, on direct
examination, defendant acknowledged he had been convicted of
murder, but the conviction was reversed by the Ninth Circuit Court
of Appeals. He also acknowledged his prior membership in the
Crips criminal street gang. Defendant testified that the prior felony
convictions included voluntary manslaughter, assault with a
firearm, and assault on a correctional officer in prison. On

1 cross-examination, the prosecutor elicited more detailed testimony
2 regarding defendant's crimes, his conduct while in prison and in
3 jail, and his use of alcohol on parole. Defendant also acknowledged
4 on cross-examination that the prior murder took place in the
5 neighborhood where he was arrested in this case, and that he had
6 two blue bandanas in his possession at the time of his arrest.
7 Defense counsel did not object on grounds of improper
8 impeachment.

9 2. The Failure to Sanitize the Priors in Count 1:

10 The court read the charges to the jury at the start of trial. In count
11 one, charging a violation of section 12021, subdivision (a)(1), felon
12 in possession of a firearm, the court specified the prior convictions
13 to include voluntary manslaughter, assault with a firearm and
14 assault on a peace officer.

15 On appeal, defendant argues defense counsel was ineffective
16 because he failed to move to sanitize the priors, pointing out that
17 although the prosecution is entitled to prove the existence of a
18 felony as an element of section 12021, subdivision (a), a defendant
19 may stipulate to his status as a convicted felon. (People v.
20 Valentine (1986) 42 Cal.3d 170, 173.) Defendant maintains there
21 was "no valid tactical reason for defense counsel not moving to
22 sanitize the priors charged in count 1 because at least one of those
23 was an assault with a firearm, which was similar to the charged
24 offenses here."

25 3. Failure to Bifurcate the Three Priors:

26 Defense counsel did not move to bifurcate the three prior serious
and violent felony convictions alleged in the information. Nor did
defense counsel object when the prosecution called, as its first
witness, a deputy clerk who testified in detail about defendant's
prior convictions.

On appeal, defendant argues there was no tactical reason for trial
counsel not to seek bifurcation of the priors pursuant to People v.
Calderon (1994) 9 Cal.4th 69, 77-78, or otherwise limit the jury's
exposure to "obviously prejudicial" testimony.

4. Failure to Limit Use of Priors for Impeachment:

Defense counsel did not move to exclude or limit the use of
defendant's three prior serious and violent felony convictions for
purposes of impeachment pursuant to Evidence Code section 352.
On appeal, defendant argues that, "[e]ven if those priors involved
moral turpitude, a reasonably competent defense attorney would
have moved to exclude them for impeachment purposes, or limit
their number because of their similarity to the three charged
offenses here that involved firearms." (See People v. Collins

1 (1986) 42 Cal.3d 378.) Defendant maintains defense counsel was
2 obligated to exclude or limit the prosecution's use of the priors
3 because it was "essential to his defense" that defendant testify he
4 did not knowingly possess the firearm found underneath the
5 passenger seat of the Mustang.

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5. Evidence Regarding Defendant's Gang Affiliation:

Defense counsel questioned defendant about his affiliation with the Crips during direct examination. The prosecutor repeatedly asked defendant about his gang membership and possession of two blue bandanas during cross-examination.

On appeal, defendant argues "[g]iven that [defendant] was arrested with two blue bandannas [sic] in this case, it was completely reckless for defense counsel to admit evidence regarding [defendant's] prior gang membership." He contends that defense counsel's failure to object to cross-examination resulted in the creation of "a motive" to convict defendant "because he was a Crip who was possibly in Blood gang territory."

6. Failure to Object to Evidence of Prior Bad Acts:

The prosecutor questioned defendant about his gang membership, his prior murder conviction which was reversed, his write-ups for bad conduct in prison and jail, and his use of alcohol on parole. Defendant asserts, "[a] reasonably competent attorney would have repeatedly objected to the prosecutor's improper cross-examination . . . with other crimes evidence that was nothing more than inadmissible criminal propensity evidence."

7. Failure To Object To Improper Closing Argument:

During closing argument, the prosecutor advanced the theme that defendant was a long-time "soldier" of the Crips. He argued, "Bernard Wildee has always been a soldier. From the time he was a 29th Street Crip to the time he was involved in prison gangs, to the moment he sat out on G-Parkway with a Snub Nose revolver, . . ., just down the street or up the street from where he had committed a murder 13 years earlier, again, with a Snub Nose revolver, and he sat there with two blue rags in his pocket."

On appeal, defendant maintains defense counsel was ineffective for failing to object to the closing argument as improper. He asserts the prosecutor's argument was "blatant intentional misconduct" because it appealed to the passion and prejudice of the jury and urged the jury to find defendant guilty because of his criminal propensity and bad character.

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1 8. Failure to Request a Limiting Instruction:

2 Defense counsel did not ask the court for an instruction to the jury
3 limiting its consideration of evidence of prior bad acts, bad
4 character and gang membership. On appeal, defendant argues
5 “[o]nce defense counsel made the mistake of opening the door to
6 the prosecutor's highly prejudicial cross-examination of
7 [defendant], defense counsel was obligated to limit the damage that
8 was already done to [defendant’s] credibility.”

9 C. Defense Counsel’s Trial Strategy Was Reasonable:

10 Unlike many cases in which defendant raises ineffective assistance
11 of counsel on appeal, the record in this case provides a clear
12 picture of defense counsel’s trial strategy. (See, e.g., People v.
13 Wilson (1992) 3 Cal.4th 926, 936-937, and People v. Pope (1979)
14 23 Cal.3d 412, 425-426.) Here, defense counsel placed
15 defendant’s serious and extensive criminal record in front of the
16 jury by acknowledging the prior convictions and prior bad acts and
17 then offered evidence of how defendant had changed since his
18 release from prison. The introduction of defendant’s serious
19 criminal record by the defense served two purposes. One, by
20 acknowledging his record first, it lessened its impact and two, it
21 provided the defense theory that given such a serious record,
22 defendant would not risk reoffense. The conduct raised by
23 defendant as proof of defense counsel’s recklessness and
24 incompetence was entirely consistent with defense counsel’s trial
25 strategy. That the jury rejected the defense theory does not mean
26 defendant was denied effective assistance of counsel. Given
defendant’s record and the necessity of defendant’s testimony
denying the “baby gun” statement, his trial attorney had little to
work with in this case.

In any event, we need not address the individual claims of
ineffective assistance recited by defendant on appeal because
defendant suffered no prejudice. (Weaver, supra, 26 Cal.4th at p.
961.) Defendant was lawfully detained and arrested in the early
morning hours, after lying to police officers about his name and
admitting there was “a baby gun” under his seat in the car. Given
this record, it is not reasonably probable the result would have been
different if defense counsel had employed another trial strategy.
(Strickland, supra, 466 U.S. at p. 687 [80 L.Ed.2d at p. 693].)

23 (Resp’ts’ Lodged Doc. No. 4 at 8-15.)

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1 The California Court of Appeal’s summary of petitioner’s arguments mirrors
2 many of those set out in his pending federal habeas corpus petition.¹⁰ In addition, as specified
3 above, petitioner argues here that his trial counsel erred by failing to object to the prosecutor’s
4 and trial judge’s mention of his prior crimes before he testified.

5 As the state appellate court explained, the only way for petitioner to attempt to
6 disprove the arresting officers’ testimony that he told them he had a gun was to testify himself.
7 Since petitioner’s prior convictions would then have been admissible to impeach his testimony, it
8 was, for defense counsel, only a question of when and how those prior convictions would come
9 to the jury’s attention. Cf. People v. Calderon, 9 Cal. 4th 69, 78 (1994) (denial of bifurcated
10 trial on priors not error where defendant will testify and be impeached with evidence of priors).
11 Petitioner argues that was not necessarily the case. He claims his trial counsel should have
12 sought to sanitize the priors for impeachment purposes. It is true that California courts have the
13 discretion to “sanitize” a prior used for impeachment by allowing its use without reference to the
14 nature of the underlying offense. People v. Sandoval, 4 Cal. 4th 155, 178 (1992), aff’d, Victor v.
15 Nebraska, 511 U.S. 1 (1994); People v. Massey, 192 Cal. App. 3d 819, 825 (1987). However,
16 evidence of past misconduct, including prior convictions, is admissible to impeach the credibility
17 of a witness if the conduct reflects moral turpitude. See People v. Wheeler, 4 Cal. 4th 284, 295
18 (1992); People v. Collins, 42 Cal. 3d 378, 389-90 (1986); People v. Castro, 38 Cal. 3d 301, 306
19 (1985).¹¹ The standards set out by the California courts for determining the admissibility of prior
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21 ¹⁰ Petitioner has attached a copy of portions of his opening brief on appeal to his federal
22 habeas petition.

23 ¹¹ Petitioner cites the decision in People v. Valentine, 42 Cal. 3d 170 (1986) in support of
24 this argument. However, the California Supreme Court in Valentine ruled only that when a
25 defendant’s ex-felon status is an element of the crime the jury must be advised that the defendant
26 is an ex-felon but “evidence of the nature of his prior convictions still may and should be
withheld from the jury.” 42 Cal. 3d at 173. Since petitioner testified, and his priors therefore
could be introduced as impeachment evidence, Valentine is not applicable. In any event, even if
petitioner had not testified and the jury had not been informed about his prior crimes, petitioner
has not shown a reasonable probability the result of the proceedings would have been different.

1 convictions for impeachment purposes are as follows:

2 Subject to the trial court’s discretion under [Evidence Code]
3 section 352 [article I, section 28, subdivision (f) of the California
4 Constitution] authorizes the use of any felony conviction which
5 necessarily involves moral turpitude, even if the immoral trait is
6 one other than dishonesty[, for impeachment purposes]. In
7 determining whether to admit the prior convictions, “[t]he trial
8 court should consider four factors outlined in [People v. Beagle [
9 (1972) 6 Cal.3d 441, 99 Cal.Rptr. 313, 492 P.2d 1]: (1) whether the
10 prior conviction reflects adversely on an individual’s honesty or
11 veracity; (2) the nearness or remoteness in time of a prior
12 conviction; (3) whether the prior conviction is for the same or
13 substantially similar conduct to the charged offense; and (4) what
14 the effect will be if the defendant does not testify out of fear of
15 being prejudiced because of impeachment by prior convictions.
16 The first factor goes to admissibility of the prior convictions,
17 which determination the trial court must first reach before
18 exercising its discretion based on the remaining factors.

11 People v. Green, 34 Cal. App. 4th 165, 182 (1995) (internal citations omitted).

12 Here, petitioner’s prior crimes were voluntary manslaughter, assault with a
13 firearm, and assault on a correctional officer in prison. (Resp’ts’ Lodged Doc. No. 1 at 38.)
14 There is no question that these crimes involve moral turpitude.¹² See People v. Foster, 201 Cal.
15 App. 3d 20, 25 (1988) (voluntary manslaughter is crime of moral turpitude and may be used as
16 impeachment); People v. Thomas, 206 Cal. App. 3d 689, 695-702 (1988) (same for assault with
17 a deadly weapon); People v. Lindsay, 209 Cal. App. 3d 849, 857 (1989) (same for crime
18 involving any use of force against a police officer). The only question then, is whether they
19 could have or should have been sanitized. Petitioner argues that the prior convictions were too
20 similar to the charged crime for admission because they involved the use of firearms. However,
21 the fact that petitioner’s prior crimes involved the use of a firearm does not mean they would
22 have been automatically excluded for impeachment purposes. Courts must weigh the Beagle

24 ¹² Petitioner does argue that his prior crimes “have little or no bearing on one’s honesty
25 or veracity.” (Am. Pet., Doc. No. 31-1 at 35(citing Beagle, 6 Cal. 3d at 453) and 36 (citing
26 People v. Barrick, 33 Cal. 3d 115, 123 (1982)). However, the California Supreme Court made
clear in Castro that a prior conviction that involved “moral turpitude” may be used to impeach
“even if the immoral trait is one other than dishonesty.” 38 Cal. 3d at 306.

1 factors, as well as any other relevant factors, to determine whether the prejudice of allowing the
2 use of a prior conviction for impeachment overrides the value of the prior for impeachment
3 purposes. In fact, California courts have permitted impeachment with identical priors in some
4 circumstances. See People v. Tamborrino, 215 Cal. App. 3d 575, 588-89 (1989) (holding that
5 the trial court did not abuse its discretion in allowing the impeachment of a defendant with two
6 prior robbery convictions in first degree robbery case). Here, petitioner has not shown a
7 reasonable probability that, had his defense counsel objected to use of the priors, they would
8 have been excluded.

9 As described by the California Court of Appeal, trial counsel's strategy was to
10 acknowledge petitioner's criminal past. All of petitioner's ineffective assistance of counsel
11 claims before this court allege that his trial counsel should have made every attempt to limit the
12 jury's access to evidence of petitioner's prior bad acts.¹³ (See Am. Pet., Doc. No. 31-1 at 99-
13 103.) The court does find petitioner's trial counsel's strategy of embracing petitioner's extensive
14 history of bad behavior somewhat troubling.¹⁴ However, whether or not this strategy was a
15 reasonable one, petitioner has not shown that he was prejudiced by the jury's knowledge of his
16 past criminal conduct. The gist of the case was a credibility contest between petitioner and his
17 friends, and the police officers. Either petitioner told the officers he had a gun, or he did not.

18
19 ¹³ Petitioner argues that had his trial counsel investigated petitioner's criminal history
20 more thoroughly, he would not have made petitioner's character an issue. (Am. Pet., Doc. No.
21 31-2 at 94-96.) However, the record reflects that petitioner's trial counsel was aware of
22 petitioner's past. See note 11, infra. As recognized by the California Court of Appeal, his
23 counsel's strategy was to bring out that evidence of bad character in the past to show that
24 petitioner had changed. Counsel's strategy also defeats petitioner's claim that the prosecutor
25 should not have been permitted to raise the subject of petitioner's prior convictions before
26 petitioner testified. (Am. Pet., Doc. No. 31-1 at 30.) In any event, even if trial counsel did err in
failing to object, and to the extent petitioner is raising a due process challenge to the prosecutor's
actions, petitioner has failed to show prejudice for the reasons described above.

¹⁴ During a sidebar discussion with the trial judge, petitioner's attorney informed the
court that the defense intended to show petitioner was trying to change and would not have done
anything to violate his parole. (RT Supp. 50-52, 61-67; Pet'r's Ex. 22.) Defense counsel even
told the trial judge he did not care if additional evidence of petitioner's bad character came into
evidence in light of this trial strategy. (RT Supp. 64:12-28.)

1 Petitioner and his friends had an obvious incentive to lie. In addition, Tiffany Carmichael, who
2 testified that she placed the gun in the car, was impeached by the prosecution on cross-
3 examination with the fact she had told different stories about how she acquired the gun. (RT
4 1031-1044; 1119-1120 (testimony of investigator who took statement from Carmichael).)
5 Petitioner has not pointed to any material evidence impeaching the officers' credibility.¹⁵ On this
6 record, it cannot be said that petitioner was prejudiced by the admission of the evidence of his
7 prior crimes. The court finds no reasonable probability the result of the proceedings would have
8 been different had petitioner's trial counsel done everything possible to limit the jury's
9 consideration of petitioner's past bad acts. The California Court of Appeals' holding that
10 petitioner did not suffer prejudice under Strickland is not contrary to or an objectively
11 unreasonable application of federal law.¹⁶

12 2. Ineffective Assistance for Failing to Inform Petitioner of Risks of Testifying

13 It does not appear petitioner raised this claim in his appeal. He raised it before the
14 Sacramento County Superior Court in his habeas corpus petition. The Superior Court's decision
15 on this claim is thus the "last reasoned decision of the state court." The Superior Court held that
16 "there is no evidence that counsel did not advise Petitioner of the dangers of testifying," there is

17
18 ¹⁵ In his Reply, petitioner does argue that the officers gave conflicting statements during
19 the suppression hearing about which way the officers who responded to the burglary told them
20 the suspects had fled. (Reply, docket no. 39 at 2-4.) Petitioner's trial attorney mentioned this
21 conflicting testimony in his closing argument to the jury. See n. 18, infra. Any impeachment
22 value that this conflict in the testimony may have had with respect to the officers' testimony that
23 petitioner admitted having a gun is minimal, at best.

24 ¹⁶ Petitioner cites the decision in United States v. Cronin, 466 U.S. 648 (1984) for the
25 proposition that his trial counsel acted so unreasonably that this court should presume prejudice.
26 (Am. Pet., Doc. No. 31-1 at 103-104, and Doc. No. 31-2 at 83; Reply (Doc. No. 39) at 19-20.) In
Cronin, the United States Supreme Court held that "if counsel entirely fails to subject the
prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth
Amendment rights that makes the adversary process itself presumptively unreliable." Id. at 659.
However, the Supreme Court in Cronin made clear that a presumption of prejudice is rare, "there
is generally no basis for finding a Sixth Amendment violation unless the accused can show how
specific errors of counsel undermined the reliability of the finding of guilt." Id. at 659 n.26.
Petitioner has not demonstrated that his counsel's conduct amounts to one of those extremely
rare cases in which prejudice is presumed.

1 “no showing Petitioner suffered any prejudice as a result of counsel’s alleged failure to advise,”
2 and “there is no evidence to support Petitioner’s contention that he was coerced to testify.”
3 (Resp’ts’ Lodged Doc. No. 8 at 3.)

4 Petitioner advances various arguments regarding the actions of his trial counsel
5 and the decision for petitioner to testify in his own defense at trial. In addition, petitioner
6 requests an evidentiary hearing with respect to this claim. Specifically, petitioner argues:

7 (a) Because his trial counsel refused to seek a separate trial on his prior crimes,
8 petitioner felt he had no choice but to testify. (Am. Pet., Doc. No. 31-1 at 29.)

9 (b) Counsel told petitioner that he “was not allowed to separate trial from strike
10 hearing.” (Am. Pet., Doc. No. 31-1 at 34.)

11 (c) No competent attorney would have allowed a client with a criminal history like
12 petitioner’s to testify. (Am. Pet., Doc. No. 31-1 at 30.)

13 (d) Counsel encouraged or coerced petitioner to testify without explaining that he
14 would be impeached with his prior crimes. (Am. Pet., Doc. No. 31-1 at 31, 34.)

15 (e) Counsel failed to discuss the risks of testifying with petitioner. (Am. Pet.,
16 Doc. No. 31-1 at 30.)

17 (f) Counsel erred by permitting the court and prosecutor to bring up petitioner’s
18 prior crimes before he testified. (Am. Pet., Doc. No. 31-1 at 31.)

19 As described above, petitioner’s trial attorney had little choice in planning a
20 defense. The only way to rebut the officers’ trial testimony that petitioner told them he had a gun
21 was for petitioner to testify that he did not. Petitioner makes much of the trial testimony of
22 Tiffany Carmichael, Brandy Patterson, LeAndrew Smith and petitioner’s wife Danielle Wildee.
23 Carmichael was the owner of the car who testified that she hid the gun under the seat. Patterson
24 testified that she spent time with petitioner shortly before his arrest and did not see or hear
25 petitioner with a gun. Smith was the driver of the vehicle and testified that he never saw
26 petitioner with a gun. Petitioner’s wife, Danielle, testified that when he left their house that night

1 he did not have a gun. (See Pet'r's Exs. 12, 14, 15, 16.) However, none of those witnesses
2 directly rebutted the officers' testimony that petitioner told them he had a "baby gun."
3 Furthermore, the defense did not otherwise impeach the officers' testimony.

4 Again, while the court may question trial counsel's decisions in putting on the
5 details of petitioner's prior bad acts and in opening the door to character evidence, the decision to
6 have petitioner testify was a certainly within the realm of reasonable decisions. In any event,
7 this court finds it is not reasonably likely the result would have been different had petitioner
8 stayed off the witness stand. The state court's decision that petitioner did not suffer prejudice as
9 a result of any error is not contrary to, or an unreasonable application of, clearly established
10 federal law. Accordingly, petitioner is not entitled to federal habeas relief with respect to this
11 aspect of his ineffective assistance of counsel claim.

12 3. Ineffective Assistance for Failing to Litigate Motion to Suppress

13 While it does not appear petitioner raised this claim before the state courts on
14 appeal or in his habeas petitions, respondents have not asserted that the claim is unexhausted.
15 Rather, respondents ask the court generally to reject petitioner's claims notwithstanding any
16 failure to exhaust under 28 U.S.C. § 2254(b)(2). (Answer at 2:17-20.) Since petitioner cannot
17 succeed on this claim, the court need not consider the exhaustion issue. See Cassett v. Stewart,
18 406 F.3d 614, 624 (9th Cir. 2005) (a federal court considering a habeas petition may deny an
19 unexhausted claim on the merits when it is perfectly clear that the claim is not "colorable").

20 Petitioner argues only that counsel was ineffective for failing to argue the
21 suppression motion "in more strong details," and for failing to seek further review by moving for
22 a writ of mandate or for reconsideration. (Am. Pet., Doc. No. 31-1 at 37, 42, and Doc. No. 31-2
23 at 15, 67-73, 101-103, 112; Reply (Doc. No. 39) at 17-18.) Petitioner reiterates his arguments
24 regarding the motion to suppress. He does not identify what his counsel failed to do in arguing
25 the motion. Further, these are the same arguments that were raised, and rejected, on appeal and
26 in petitioner's state habeas proceedings. (Compare Am. Pet., Doc. No. 31-1 at 38-39, with

1 Resp'ts' Lodged Doc. No. 1 at 17-33 (Appellant's Opening Brief), Resp'ts' Lodged Doc. No. 7
2 at 9-19 (Sacramento County Superior Court Habeas Petition), Resp'ts' Lodged Doc. No. 10 at
3 33-49 and 94-104 (California Court of Appeal Habeas Petition), and Resp'ts' Lodged Doc. No.
4 12 at 8-18 and 39-47 (California Supreme Court Habeas Petition.) Since petitioner has not
5 shown he would have been successful had counsel sought a writ of mandate or reconsideration,
6 petitioner has not shown he suffered any prejudice as a result of counsel's failure to act. See
7 Strickland, 466 U.S. at 693-94. Accordingly, he is not entitled to relief with respect to this aspect
8 of his claim.

9 4. Ineffective Assistance and Trial Court Error re Jury Instructions

10 Petitioner makes two claims that his trial counsel was ineffective by failing to
11 request jury instructions.¹⁷ First, petitioner argues that the jury should have been instructed to
12 find he possessed the gun based on evidence independent of his alleged admission and that the
13 jury should view evidence of his oral admission with caution. (Resp'ts' Lodged Doc. No. 12 at
14 22-23; Am. Pet., Doc. No. 31-1 at 32-33, and Doc. No. 31-2 at 105-106.) Respondents raise a
15 possible procedural default issue with respect to this claim. However, since this claim is
16 meritless, the court need not address whether or not it is procedurally barred. See Lambrix v.
17 Singletary, 520 U.S. 518, 525 (1997) (a district court may address the merits without reaching
18 procedural issues where the interests of judicial economy are best served by doing so); Franklin
19 v. Johnson, 290 F.3d 1223, 1232 (9th Cir.2002) ("Procedural bar issues are not infrequently more
20 complex than the merits issues presented by the appeal, so it may well make sense in some
21 instances to proceed to the merits if the result will be the same.").

22
23 ¹⁷ In an exhibit, petitioner seems to be making a third claim regarding the jury instruction
24 on the definition of a confession. (Pet'r's Ex. 29.) In his Reply, he cites some cases regarding
25 instructions that admissions of a party should be viewed with caution. (Reply, docket no. 39 at
26 22.) He states that it is "immaterial whether the admissions amount to confessions." (Id.) It
appears petitioner is arguing that the jury should have received a cautionary instruction about
their consideration of petitioner's admissions. As stated in the text, since the jury was instructed
that they must find proof of each element of the crime independent of any admission, there is no
prejudice from the absence of this instruction.

1 The trial court in fact gave the instructions petitioner claims that his trial counsel
2 should have requested. In this regard, the trial court instructed the jury as follows: (1) “Evidence
3 of an oral confession of an oral admission of the defendant not made in court should be viewed
4 with caution;” and (2) “No person may be convicted of a criminal offense unless there is some
5 proof of each element of the crime independent of any confession or admission made by him
6 outside of this trial.” (3 RT 1201:27-28; 1202:1-3.) Accordingly, petitioner cannot show either
7 trial court error or prejudice from any attorney error in failing to request these instructions.¹⁸

8 Petitioner next argues his counsel should have also requested that the following
9 instruction be given: “The mere fact that the defendant was present in a vehicle in which a
10 concealed firearm is found is insufficient by itself to convict [him] [her] of a violation of Penal
11 Code § 12025.” (Am. Pet., Doc. No. 31-2 at 55; Reply (Doc. No. 39) at 1-7, 23-24 .) As stated
12 above, petitioner has not shown prejudice. The trial court did instruct the jury that it was
13 required to find proof of each element of the crime independent of any confession or admission.
14 This is redundant of the jury instruction regarding “mere presence” or “corpus delicti” that
15 petitioner now claims his attorney was deficient in failing to request. There is no reasonable
16 probability that had the instruction in question been requested and given that the result of
17 petitioner’s trial would have been different.

18 Petitioner also claims the trial court erred by not instructing the jury sua sponte on
19 these points. For the same reasons petitioner cannot show prejudice with respect to his
20 ineffective assistance of counsel claim in this regard, he cannot show that any alleged trial court
21 error in failing to give the jury instructions in question sua sponte had a “substantial and injurious
22

23 ¹⁸ Petitioner also makes a brief argument of jury bias based on the jury being exposed to
24 the evidence of his bad character. (Am. Pet., Doc. No. 31-1 at 28.) The effect of such evidence
25 on the jury has already been considered above in connection with petitioner’s claim of ineffective
26 assistance of counsel for permitting the introduction of the bad character evidence. Petitioner
also argues that the jury should have been instructed in keeping with the decision in People v.
Jenkins, 207 Cal. App. 2d Supp. 904 (Cal. Super. App. 1962). (Id.) However, that case
addresses issues of municipal law and has no relevance here.

1 effect or influence in determining the jury’s verdict.” See Ortiz-Sandoval v. Gomez, 81 F.3d
2 891, 899 (9th Cir. 1996). This claim too fails.

3 5. Ineffective Assistance for Failing to Present Potentially Meritorious Defenses

4 Petitioner does not explain how this claim differs from his other claims of
5 attorney error. (E.g., Am. Pet., Doc. No. 31-1 at 33.) Petitioner simply contends that his trial
6 counsel should have investigated “a potentially meritorious defense” of “not placing petitioner
7 [sic] character in question.” (Am. Pet., Doc. No. 31-2 at 95 (emphasis in original).) Since such
8 claims have been addressed elsewhere herein, the court finds no basis to consider separately
9 petitioner’s bare contention that his attorney failed to present potentially meritorious defenses.

10 D. Officers Made False Reports

11 Petitioner argues the trial court erred in failing to consider that the police officers
12 who arrested him made inconsistent statements at the evidentiary hearing on the motion to
13 suppress evidence regarding the information they received about the direction in which the
14 burglary suspects fled. (Am. Pet., Doc. No. 31-1 at 40.) As described above in addressing
15 petitioner’s claim based on the denial of his suppression motion, petitioner received a full and fair
16 hearing in connection with that motion. This court is thus unable to consider petitioner’s claims
17 regarding the search of the car and seizure of the gun underneath his seat inside. Stone v. Powell,
18 428 U.S. at 494.¹⁹

19 E. Invalidity of Prior Conviction

20 Petitioner argues that his prior conviction for manslaughter is invalid because his
21 trial attorney in that case was provided him ineffective assistance. Specifically, petitioner claims
22

23 ¹⁹ Petitioner also raises this contention that the officers made a “false report” in the
24 context of other claims. He appears to argue that the allegedly false report should have been used
25 to impeach the officers’ credibility. (E.g., Am. Pet., Doc. No. 31-1 at 40.) However, the court
26 notes that in his closing argument, petitioner’s trial attorney did point out the officers’ discrepant
testimony regarding which way Officers Bailey and Bullard were told the burglary suspects had
fled. (3 RT 1171:13-20, 1172:26-1173:3.) Since his trial counsel did in fact make the argument,
petitioner has no factual basis for an ineffective assistance of counsel claim on this ground.

1 that his former counsel, Linda Parisi, misled him into pleading guilty to manslaughter and assault
2 with a firearm. The background for this claim is set out in a motion the defense in this case filed
3 to strike one of petitioner’s prior convictions. (CT 239-244.) Briefly, in 1992, petitioner was
4 charged with homicide and assault with a firearm on another individual stemming from a gang
5 fight. After the preliminary hearing, the “magistrate declined to hold the defendant to answer for
6 the assault allegation.” (CT 241:13.) In December 1992, a jury convicted petitioner of murder.
7 (CT 245:23.) This murder conviction was later overturned when petitioner obtained federal
8 habeas from the Ninth Circuit Court of Appeals for the. (CT 245:23-24.) Thereafter, petitioner
9 pled guilty to voluntary manslaughter and assault with a firearm. (CT 241:20-22; 245:24-26.)
10 Petitioner now claims that attorney Parisi told him she would have the “strike” for the assault
11 stricken from his record. (Am. Pet., Doc. No. 31-1 at 28, 130-132, and Doc. No. 31-2 at 28-31,
12 39-54.)

13 Petitioner’s claim that his prior plea of guilty to voluntary manslaughter and
14 assault with a firearm should be vacated because it was entered unknowingly and involuntarily is
15 barred by the decision in Lackawanna v. Coss, 532 U.S. 394 (2001). In Lackawanna the
16 Supreme Court held that where, as here, a petitioner’s state court conviction is later used to
17 enhance a criminal sentence, “the defendant generally may not challenge the enhanced sentence
18 through a petition under § 2254 on the ground that the prior conviction was unconstitutionally
19 obtained.” 532 U.S. at 403-04. See also Gill v. Ayer, 342 F.3d 911, 919 n.7 (9th Cir. 2003). The
20 Supreme Court has allowed a petitioner to challenge collaterally a prior conviction only “where
21 there was a failure to appoint counsel in violation of the Sixth Amendment.” Id. at 404. Because
22 it appears that petitioner was represented by counsel in connection with his prior guilty plea, the
23 “failure to appoint counsel” exception does not apply and he is precluded from collaterally
24 attacking that conviction through a § 2254 petition. Id. at 406.

25 ////

26 ////

1 F. Claims from Petitioner’s Appellate Brief

2 As noted above, petitioner has attached a copy of his opening brief on his appeal
3 to his petition, labeling it “Ground for Relief/Writ of Habeas Corpus.” Many of the issues raised
4 in that appellate brief mirror claims raised above and the court has considered the arguments
5 made on petitioner’s behalf in the appellate brief when considering those claims. However, the
6 appellate brief also contains some new and additional claims. Assuming petitioner intends to
7 raise these new issues as claims in this federal habeas proceeding, and out of an abundance of
8 caution, the court addresses each of these additional claims below.

9 1. State Law Claims

10 Petitioner’s brief submitted before the state appellate court contains a number of
11 claims based solely on state law. A state court’s interpretation of state law does not present a
12 constitutional question reviewable in a federal habeas corpus action. See Waddington v.
13 Sarausad, ___ U.S. ___, 129 S. Ct. 823, 832 n.5 (2009) (“we have repeatedly held that ‘it is not
14 the province of a federal habeas court to reexamine state-court determinations on state-law
15 questions’”); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (“a state court’s interpretation of state
16 law . . . binds a federal court sitting in federal habeas”). Accordingly, the following claims are
17 not appropriately raised in this action: (a) the trial court abused its discretion when it denied
18 petitioner’s pre-trial motion to dismiss one of his prior “strike” convictions (Am. Pet., Doc. No.
19 31-1 at 110-114, and Doc. No. 31-2 at 32-37, 121-122); (b) the trial court failed to award
20 petitioner the correct presentence conduct credits at the time of sentencing (Am. Pet., Doc. No.
21 31-1 at 126-127, and Doc. No. 31-2 at 125-126).²⁰

22 ////

23 ////

25 ²⁰ It also appears the California Court of Appeal ruled in petitioner’s favor on the claim
26 regarding the presentence conduct credits, thereby rendering any claim based on such an error
moot. (Resp’t’s Lodged Doc. No. 4 at 25.)

1 2. Petitioner’s Sentence Violates the Eighth Amendment

2 Petitioner argues that his indeterminate sentence of 25 years to life in prison
3 imposed under California’s Three Strikes Law violates the Eighth Amendment’s ban on cruel
4 and unusual punishment. (Am. Pet., Doc. No. 31-1 at 115-124, and Doc. No. 31-2 at 84-90, 123-
5 124.) The California Court of Appeal rejected petitioner’s argument in this regard, stating as
6 follows:

7 “The Eighth Amendment to the United States Constitution
8 proscribes ‘cruel and unusual punishment’ and ‘contains a “narrow
9 proportionality principle” that “applies to noncapital sentences.” ‘
10 (Ewing v. California (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108 . . .]
11 (lead opn. of O’Connor, J.), quoting Harmelin v. Michigan (1991)
12 501 U.S. 957, 996-997 [115 L.Ed.2d 836 ...] .) That principle
13 prohibits ‘ “imposition of a sentence that is grossly
14 disproportionate to the severity of the crime” ‘ (Ewing v.
15 California, supra, 538 U.S. at p. 21 [155 L.Ed.2d at p. 117] (lead
16 opn. of O’Connor, J.), quoting Rummel v. Estelle (1980) 445 U.S.
17 263, 271 [63 L.Ed.2d 382, 389, ...]), although in a noncapital
18 case, successful proportionality challenges are “ ‘exceedingly rare.’
19 “ (Ibid.)

20 “A proportionality analysis requires consideration of three
21 objective criteria, which include ‘(i) the gravity of the offense and
22 the harshness of the penalty; (ii) the sentence imposed on other
23 criminals in the same jurisdiction; and (iii) the sentences imposed
24 for commission of the same crime in other jurisdictions.’ (Solem v.
25 Helm (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 650 . . .].) But it
26 is only in the rare case where a comparison of the crime committed
and the sentence imposed leads to an inference of gross
disproportionality that the second and third criteria come into play.
(Harmelin v. Michigan, supra, 501 U.S. at p. 1005 [115 L.Ed.2d at
pp. 871-872] (conc. opn. of Kennedy, J.).)

“In Ewing v. California, supra, 538 U.S. 11 [155 L.Ed.2d
108], the United States Supreme Court’s most recent case
involving a claim of cruel and unusual punishment, the high court
upheld a three strikes prison term of 25 years to life after the
defendant committed grand theft by shoplifting three golf clubs,
having been convicted previously of four serious or violent
felonies. (Id. at pp. 17-20 [155 L.Ed.2d at pp. 115-117.])

“Justice O’Connor stated in her lead opinion that
‘[r]ecidivism has long been recognized as a legitimate basis for
increased punishment.’ (Ewing v. California, supra, 538 U.S. at p.
25 [155 L.Ed.2d at p. 120].) In considering the gravity of the
offense, the Supreme Court looked not only to Ewing’s current

1 felony, but also to his long criminal felony history, stating “[a]ny
2 other approach would fail to accord proper deference to the policy
3 that judgments find expression in the [L]egislature’s choice of
4 sanctions. In imposing a three strikes sentence, the State’s interest
5 is not merely punishing the offense of conviction ... “[i]t is in
6 addition the interest . . . in dealing in a harsher manner with those
7 who by repeated criminal acts have shown that they are simply
8 incapable of conforming to the norms of society as established by
9 its criminal law.” ‘ (Id. at p. 29 [155 L.Ed.2d at p. 122], quoting
10 Rummel v. Estelle, supra, 44 U.S. at p. 276 [63 L.Ed.2d at p.
11 392].)’ (Meeks, supra, 123 Cal.App.4th at pp. 707-708.)

7 Applying the proportionality test in light of Ewing, we
8 conclude defendant’s sentence of 25 years to life for being a felon
9 in possession of a firearm cannot be considered disproportionate to
10 the crime in light of defendant’s long history of committing serious
11 and violent criminal acts. Although section 12021, subdivision
12 (a)(1) is not listed as a violent felony under section 667.5,
13 subdivision (c), it is difficult to imagine a more serious nonviolent
14 felony-an individual previously convicted of voluntary
15 manslaughter, assault with a deadly weapon, and assault on a peace
16 officer found in possession of a loaded handgun in an area that has
17 a high crime rate, just three months after his release on parole.
18 Defendant’s sentence survives scrutiny under federal constitutional
19 law.

14 (Resp’ts’ Lodged Doc. No. 4 at 20-22.)

15 In Lockyer v. Andrade, 538 U.S. 63 (2003), the Supreme Court found that in
16 addressing an Eighth Amendment challenge to a prison sentence, the “only relevant clearly
17 established law amenable to the [AEDPA] framework is the gross disproportionality principle,
18 the precise contours of which are unclear and applicable only in the ‘exceedingly rare’ and
19 ‘extreme’ case.” Id. at 73 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991); Solem v.
20 Helm, 463 U.S. 277, 290 (1983); and Rummel v. Estelle, 445 U.S. 263, 272 (1980)). The
21 Supreme Court concluded in that case that two consecutive twenty-five years to life sentences
22 with the possibility of parole, imposed under California's Three Strikes Law following two petty
23 theft convictions with priors, did not amount to cruel and unusual punishment. Andrade, 538
24 U.S. at 77; see also Ewing v. California, 538 U.S. 11 (2003) (holding that a sentence of twenty-
25 five years to life imposed for felony grand theft under California’s Three Strikes law did not
26 violate the Eighth Amendment).

1 Following the decision in Andrade, the United States Court of Appeals for the
2 Ninth Circuit has held that a third strike sentence of twenty-five years to life in prison for a third
3 shoplifting offense, a “wobbler” under state law,²¹ constituted cruel and unusual punishment.
4 Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). In so holding, the court relied upon the limited
5 and non-violent nature of the petitioner’s prior criminal history and the fact that his only prior
6 period of incarceration had been a single one-year jail sentence. Id. at 768-69. Thereafter, in
7 Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004), the court distinguished the holding in Ramirez,
8 finding that the petitioner in Rios had a “lengthy criminal history,” had “been incarcerated
9 several times,” and that the prior strikes used to enhance his sentence had “involved the threat of
10 violence.” Id. at 1086.

11 In the present case, petitioner’s sentence does not fall within the type of
12 “exceedingly rare” circumstance that would support a finding that his sentence violates the
13 Eighth Amendment. Petitioner, with an extensive criminal record involving the use of firearms,
14 was convicted of possession of a firearm. In view of the decisions noted above, petitioner’s
15 sentence is not grossly disproportionate to those crimes. Cf. Harmelin, 501 U.S. at 1004-05 (life
16 imprisonment without possibility of parole for possession of 24 ounces of cocaine raises no
17 inference of gross disproportionality). Under these circumstances, the state courts’ rejection of
18 petitioner’s Eighth Amendment claim was neither contrary to, nor an unreasonable application of
19 clearly established federal law.

20 Petitioner also suggests that his trial counsel was ineffective for failing to object
21 to his sentence as cruel and unusual punishment. (Am. Pet., Doc. No. 31-1 at 124-125, and Doc.
22 No. 31-2 at 90.) However, petitioner has not suggested, let alone shown, any prejudice flowing
23 from this alleged error on the part of counsel. Even had defense counsel objected, that objection
24 would have failed under the Eighth Amendment for the reasons set forth above. Moreover, as

25
26 ²¹ A “wobbler” is an offense that can be punished as either a misdemeanor or a felony
under applicable law. See Ferreira v. Ashcroft, 382 F.3d 1045, 1051 (9th Cir. 2004).

1 demonstrated by the California Court of Appeal's rejection of this claim, any such objection
2 would have failed under state law as well. (See Resp'ts' Lodged Doc. No. 4 at 22-24.)

3 G. Inappropriate Settlement Considerations

4 In his request for "Consideration" filed March 24, 2008, petitioner raises for the
5 first time an argument that he was "sentence[d] for winning my appeal. Not for a crime I
6 committed." (Consideration (Doc. No. 55) at 2.) In support of this contention petitioner has
7 attached a declaration from his trial attorney, Robert Saria. Therein, attorney Saria describes
8 settlement discussions he had with the District Attorney's Office in an attempt to negotiate a
9 determinate sentence for petitioner. Mr. Saria stated that he was "informed that the fact that Mr.
10 Wildee had sustained a reversal of a prior conviction was a factor that supported the decision not
11 to make an [sic] determinate sentencing offer in the instant case." (Jan. 8, 2008 Decl. of Robert
12 Saria (Doc. No. 55) at 5, ¶ 7.)

13 This court cannot consider this new claim, raised long after the petition was filed.
14 See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (a reply is not the proper
15 pleading to raise additional grounds for relief). Even if the claim were raised properly, it is
16 meritless. It is well-established that criminal defendants have no constitutional right to a plea
17 bargain. Weatherford v. Bursey, 429 U.S. 545, 561 (1977); King v. Brown, 8 F.3d 1403, 1408
18 (9th Cir. 1993); United States v. Anderson, 993 F.2d 1435, 1439 (9th Cir. 1993). Accordingly,
19 any claim by petitioner of entitlement to federal habeas relief due to inappropriate settlement
20 negotiations should be rejected.

21 III. Request for Evidentiary Hearing

22 Petitioner also requests that the court conduct an evidentiary hearing on several of
23 his claims. Pursuant to 28 U.S.C. § 2254(e)(2), an evidentiary hearing is appropriate only under
24 the following circumstances:

25 (e)(2) If the applicant has failed to develop the factual basis of a
26 claim in State court proceedings, the court shall not hold an
evidentiary hearing on the claim unless the applicant shows that-

1 (A) the claim relies on-

2 (i) a new rule of constitutional law, made retroactive to cases on
3 collateral review by the Supreme Court, that was previously
4 unavailable; or

5 (ii) a factual predicate that could not have been previously
6 discovered through the exercise of due diligence; and

7 (B) the facts underlying the claim would be sufficient to establish
8 by clear and convincing evidence that but for constitutional error,
9 no reasonable fact finder would have found the applicant guilty of
10 the underlying offense[.]

11 Under this statutory scheme, a district court presented with a request for an
12 evidentiary hearing must first determine whether a factual basis exists in the record to support a
13 petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." Baja v.
14 Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). See also Earp v. Ornoski, 431 F.3d 1158, 1166
15 (9th Cir. 2005); Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005). A petitioner
16 requesting an evidentiary hearing must also demonstrate that he has presented a "colorable claim
17 for relief." Earp, 431 F.3d at 1167 (citing Insyxiengmay, 403 F.3d at 670, Stankewitz v.
18 Woodford, 365 F.3d 706, 708 (9th Cir. 2004) and Phillips v. Woodford, 267 F.3d 966, 973 (9th
19 Cir. 2001)). To show that a claim is "colorable," a petitioner is "required to allege specific facts
20 which, if true, would entitle him to relief." Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998)
21 (internal quotation marks and citation omitted).

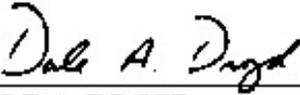
22 The court concludes that no additional factual supplementation is necessary in this
23 case and that an evidentiary hearing is not necessary or appropriate with respect to any of
24 petitioner's claims. The facts alleged in support of petitioner's claims, even if established at an
25 evidentiary hearing, would not entitle him to federal habeas relief for the reasons set forth above.
26 Therefore, petitioner's request for an evidentiary hearing should be denied.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for
a writ of habeas corpus be denied.

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
3 one days after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
6 shall be served and filed within seven days after service of the objections. The parties are
7 advised that failure to file objections within the specified time may waive the right to appeal the
8 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 DATED: November 2, 2010.

10
11 
12 _____
13 DALE A. DROZD
14 UNITED STATES MAGISTRATE JUDGE

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