IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT BENNETT,

Petitioner, No. CIV S-09-1992 GEB CHS

vs.

MATHEW CATES,

Respondent. FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner Bennett, a state prisoner, proceeds pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Bennett stands convicted of numerous offenses in the Shasta County Superior Court, case number 05F1924, for which he is currently serving an aggregate sentence of 15 years and 4 months.

II. BACKGROUND[1]

Pursuant to a warrant,[2] police officers conducted a search of a residence shortly after Bennett left the residence in a car. Behind a false ceiling in the garage, an officer located

[1] *See People v. Bennett*, No. C052515, 2008 WL 217494, at 1-2 (Cal. App. Third Dist., 2008).

[2] The circumstances of the warrant will be discussed in greater detail *infra*.

two snack food containers holding nearly 240 grams of cocaine base and more than 7 grams of cocaine salt, a sawed-off shotgun with a 14-inch barrel wrapped in duct tape, and what appeared to be "pay/owe" sheets. Located in the same bag as the cocaine was a receipt for a money order made out to Bennett and a shipping label bearing his name. In the kitchen, officers located ammunition, scales (including an electronic gram scale), and four boxes of baking soda (which can be used to turn cocaine salt into cocaine base).

The master bedroom appeared as if someone was using it, and contained male hygiene products and clothing that appeared to be Bennett's size. A loaded nine-millimeter handgun and a loaded .38 caliber revolver were discovered in the room in a location that was readily accessible from the bed. Also located in the master bedroom was a large sum of money, two baggies containing white powder (one of which tested positive for cocaine base), a bag containing over 100 small plastic baggies, and paperwork that was consistent with pay-owe notations. An insurance card, receipts for the repair of one of Bennett's vehicles, a fax cover sheet, "slips" from a copy store, numerous receipts from a local veterinary office, and legal paperwork- all bearing Bennett's name- were located in the closet of the master bedroom. Bennett's fingerprints were found on two of the empty baggies found in the master bedroom.

A second bedroom containing similarly sized clothing appeared to be used as a weight room, and a third bedroom containing female clothing did not appear to have been recently occupied. A photo album containing pictures of Bennett was found in the living room area. A car in the garage and a van parked at the house were registered to Bennett, as was the car he was driving when he was stopped by the police. Officers later located $10,000 in cash under the kitchen sink after listening to a tape of a telephone call from Bennett to another individual.

An officer who was an expert on the possession of narcotics for sale testified that, based on his experience, the cocaine located in the residence was possessed for the purpose of sale.

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The police stopped Bennett's car shortly after he was observed leaving the residence. After law enforcement officers gave him *Miranda* warnings, Bennett admitted he had been "in and out of the residence for several months" and that he had handled several of the firearms there, although not the sawed-off shotgun. Bennett also said several other people lived at the residence.

Two neighbors picked Bennett out of a line-up as the individual who was living at the residence at the time of the search. One of these neighbors also identified him in court.

Bennett's friend testified she had visited him in Los Angeles between six and 10 times and, to the best of her knowledge, he lived there.

Bennett's former girlfriend testified that her brother and his acquaintance lived in the residence searched by the officers and that Bennett had stayed there overnight on two occasions. According to the former girlfriend, she and Bennett owned dogs which her brother allowed them to keep at the residence for a period of time.

A jury convicted Bennett of possession for sale of cocaine; possession for sale of cocaine base; possession of cocaine while armed with a firearm; four counts of possession of a firearm by a felon; possession of a deadly weapon; and illegal possession of ammunition. The jury also found true personal arming enhancements. In a bench trial, the court found true prior narcotics conviction enhancements and an enhancement for possession of cocaine while armed. The trial court imposed an aggregate determinate sentence of 15 years four months.

Bennett appealed to the California Court of Appeal, Third District, where the judgment was affirmed in an unpublished decision. The California Supreme Court denied a petition for review and further denied Bennett's state petition for writ of habeas corpus.

III. GROUNDS FOR RELIEF

The petition sets forth eight grounds for relief. Each will be separately set forth and discussed herein, except that grounds two and three will be addressed together in one subsection. Bennett claims:

Ground One: The trial court erred in admitting his statements given prior to *Miranda* warnings;

Ground Two: Trial counsel rendered ineffective assistance by failing to request the transcript of the preliminary hearing in order to raise a Fourth Amendment challenge to the search and seizure;

Ground Three: Appellate counsel rendered ineffective assistance by failing to raise on appeal trial counsel's alleged ineffective assistance;

Ground Four: The superior court denied him his right to effectively appeal his convictions by failing to provide a copy of the transcript of his preliminary hearing;

Ground Five: The trial court made an instructional error in relation to the sawed-off shotgun count;

Ground Six: An upper term sentence was imposed in violation of the rule set forth in *Blakely v. Washington*, 542 U.S. 296 (2004);

Ground Seven: Trial counsel rendered ineffective assistance at sentencing; and

Ground Eight: The trial court's decision not to stay sentencing on counts two, nine, and ten violated section 654 of the California Penal Code and federal due process.

IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

An application for writ of habeas corpus by a person in custody under judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)). This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under the AEDPA, federal habeas corpus relief is also precluded for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

This court looks to the last reasoned state court decision to determine whether the law applied to a particular claim by the state courts was contrary to the law set forth in the cases of the United States Supreme Court or whether an unreasonable application of such law has occurred. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919. The state court's factual findings are presumed correct if not rebutted with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Taylor v. Maddox*, 336 F.3d 992, 1000 (9th Cir. 2004). It is the habeas corpus petitioner's burden to show the state court's decision was either contrary to or an unreasonable application of federal law. *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

V. DISCUSSION

A. Ground One: Admission of the un-*Mirandized* Statements

After Bennett left the residence in his car, he was stopped and arrested on an unrelated warrant. Another officer arrived and, prior to the time Bennett was given his *Miranda* rights, asked him if anyone else was at his residence. Bennett told the officer there was no one else at the house. The officer asked Bennett if he had any animals at his residence, and Bennett said he had dogs in the backyard. The officer asked Bennett if he had keys to the residence. Bennett said he did, and gave the officer the keys. The officer gained access to the residence with the keys provided by Bennett.

Bennett moved to suppress these statements based on the officer's failure to read him his *Miranda* rights before questioning him. The trial court ruled that the statements were admissible because the officer's questions were not designed to elicit an incriminating response

within the meaning of *Miranda*. On appeal, the state court rejected Bennett's claim of error, holding that he was not prejudiced by admission of the statements.

When a person in custody is subjected to interrogation, *Miranda* rights must be first given in order for the information obtained to be admissible in court. *See Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966). "Statements elicited in noncompliance with this rule may not be admitted for certain purposes in a criminal trial." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam).

For *Miranda* purposes, custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. Two discrete inquiries are essential to the custody determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). The second inquiry is objective; the relevant question is whether there was "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010) (citing *New York v. Quarles*, 467 U.S. 649, 655 (1984)).

Miranda error is subject to harmless error analysis. *Ghent v. Woodford*, 279 F.3d 1121, 1126 (9th Cir. 2002). On habeas corpus review, a federal court assesses the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Fry v. Pliler*, 551 U.S. 112 (2007). The relevant question is whether the *Miranda* violation "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (internal quotation marks and citation omitted).

Here, Bennett told the officer that was that no one else was at the residence and that he did not expect anyone to arrive soon. According to the questioning officer, Bennett answered in the affirmative when asked whether he had locked the doors to "his" house.

(Reporter's Transcript ("RT") at 281-82.) Both his awareness of who was at the residence and the fact that he locked the residence upon leaving were explained by the fact that he had just left there. The state court reasonably concluded on appeal that Bennett's responses in this regard did not implicate him as a resident of the home to any greater degree than the officer's observation of his departure from the home. *See People v. Bennett*, *supra*, at 3.

Bennett said that his dogs were in the backyard of the residence. (RT at 282.) This statement was cumulative to other evidence on the subject. A neighbor testified that she had spoken to Bennett about his dogs before (RT at 296-97), and his former girlfriend testified that they kept their dogs at the residence (RT at 362-63). Numerous veterinary bills with Bennett's name on them were found in the master bedroom. As the state court held, ample evidence established that his dogs were at the residence, independent of his statement to that effect. *See People v. Bennett*, *supra*, at 3.

Bennett also told the officer that he had a key to the house. The discovery of the key did not implicate *Miranda*. *See United States v. Patane*, 542 U.S. 630, 636-37 (2004) (plurality opinion) (noting there is "no justification" for extending *Miranda* to the context of the physical fruit of a voluntary statement); *New York v. Quarles*, 467 U.S. 649, 657-58 (1984) (physical evidence obtained through an uncoerced but non-*Mirandized* statement is admissible). Bennett's admission that he had the key was merely cumulative of the physical evidence.

Finally, substantial other evidence tied Bennett to the residence:

> Neighbors identified [Bennett] as the person living there. [Bennett] admitted himself he had been "in and out of the residence for several months." Legal paperwork, and insurance card, receipts and bills, all bearing [Bennett]'s name, were located in the residence, as was a photo album containing pictures of him. Two vehicles at the residence, as well as the car [Bennett] was driving when he left the residence, were registered to him. And it was [Bennett]'s statements during a monitored telephone call that led to the discovery of a large sum of money hidden in the residence.

People v. Bennett, *supra*, at 3.

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That no one of Bennett's un-*Mirandized* statements was mentioned during either party's closing statement underscores the minimal significance the evidence had in establishing his guilt on the counts of conviction. Regardless of whether the statements were admitted in error, reversal is not required because the state court's finding of no prejudice was reasonable. *See Brecht*, 507 U.S. at 637.

B. Grounds Two and Three: The Preliminary Hearing Transcript and Ineffective Assistance of Counsel

1. Additional Background

On March 23, 2005, Investigator Cogle of the Redding Police Department prepared an affidavit supporting a search warrant application for the premises at 3638 Sacramento Drive in Redding, California. (*See* Search Warrant and Affidavit dated March 23, 2005, attached to the petition as Exhibit G.) The affidavit indicated that Cogle had been trained in the appearance of cocaine and other narcotics, had spoken with drug users and dealers concerning the common methods of using and selling cocaine and other narcotics, and had investigated approximately 100 narcotics possession and possession for sales cases. Cogle received most of his information from a confidential reliable informant (CRI), who had previously provided him with "precise, timely and accurate" information. CRI, a drug addict, had charges pending but was not receiving consideration for the information provided.

According to the affidavit, between March 7, 2005 and March 11, 2005, Cogle received information from CRI that a black male adult between thirty-five and forty years of age had been selling rock cocaine and marijuana at his residence on Sacramento Drive in Redding. CRI knew the man as "Bobo" and believed his first name was "Robert." CRI said Robert was a "big guy" who had been in the area for a few months; CRI believed Robert had come to Redding from the Los Angeles area. CRI described a maroon van often parked in the driveway of the residence and multiple other vehicles, including a Chevy Suburban, sometimes driven by Robert. CRI thought Robert was a "high level" dealer. CRI had purchased rock cocaine from Robert at

the house on Sacramento Drive "countless" times, most recently about three weeks or one month prior to his conversation with Cogle.

On March 22, 2005, Cogle followed up on the information provided by CRI. Cogle drove to 3638 Sacramento Drive and saw a maroon van and a Chevy Suburban parked in the driveway of a residence matching the description of the residence given by CRI. Records checks revealed that the Suburban was registered to Robert Bennett of Los Angeles, a black male adult standing 6'2" tall and weighing 265 pounds. Bennett had been arrested in Redding in 2003 and had an outstanding felony arrest warrant in West Covina.

Later that same day, CRI directed Cogle to the residence at 3638 Sacramento Drive. CRI also identified the driver's license photo of Robert Bennett as "Bobo" who lived there.

The next day, on March 23, 2005, Cogle interviewed another confidential informant (CI). CI, another drug addict, had also purchased rock cocaine from Bobo, who lived on Sacramento Drive. CI thought Bobo's real name was Robert. According to CI, Robert drove a black Suburban and several other vehicles. CI had been purchasing rock cocaine from Robert for months and had done so within the last seven days. CI did not receive any consideration for his information. Cogle did not know whether CI had any criminal charges pending.

Thereafter, investigators from the Redding Police Department conducted surveillance on the residence at 3638 Sacramento Drive. Bennett was observed leaving the residence in a Chevrolet Caprice that was registered to him with a Los Angeles address. Investigators conducted an enforcement stop, and arrested Robert Bennett on the outstanding warrant. Investigators searched Bennett and his vehicle and found two cellular phones and $578.00 cash. The money was mostly in small denominations which, from training and experience, Cogle knew was common for drug dealers. A drug detection K9 alerted on the front driver's door, center console, back seat, and on cash found in the vehicle, although no drugs were found. An investigator found what appeared to be pay/owe sheets in the vehicle.

Investigators arrived at 3638 Sacramento Drive to secure the residence and prevent anyone from entering pending the issuance of a search warrant. During a protective sweep of the residence police saw marijuana and a rifle case in plain view.

Based on the information in Cogle's affidavit, a magistrate found probable cause and issued the search warrant that same day. Investigators executed the search warrant and seized the various items of evidence that were later admitted at Bennett's trial.

2. Analysis of the Ineffective Assistance Claims

Bennett alleges that trial counsel rendered ineffective assistance by failing to obtain a copy of the transcript of the April 7, 2005 preliminary hearing to support a motion to suppress evidence of the items found in the residence at 3638 Sacramento Drive as illegally seized in violation of the Fourth Amendment, pursuant to section 1538.5 of the California Penal Code. Had the evidence been suppressed on this ground, Bennett contends, a motion to dismiss would have been granted pursuant to section 995 of the California Penal Code. Bennett additionally claims that appellate counsel deficiently failed to raise the issue of trial counsel's ineffectiveness in this regard. Bennett presented these grounds to the California Supreme Court where they were rejected without comment on habeas corpus review.

To demonstrate a denial of the Sixth Amendment right to the effective assistance of counsel, a petitioner must establish that counsel's performance fell below an objective standard of reasonableness, and that he suffered prejudice from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Deficient performance requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." *Id*. at 687 & 697. Prejudice is found where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. The *Strickland* test for ineffective assistance of counsel applies to trial counsel's performance as well as appellate counsel's performance. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Smith v. Murray*, 477 U.S. 527, 535-36 (1986).

"Surmounting *Strickland's* high bar is never an easy task," and review under the AEDPA is doubly deferential. *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)). The relevant question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. *Harrington*, 131 S. Ct. at 788.

Trial counsel's failure to obtain the preliminary hearing transcript, standing alone, did not constitute deficient performance. Bennett fails to explain how the transcript of the preliminary hearing was necessary to challenge the statement of probable cause upon which the warrant was based. Counsel could have raised the Fourth Amendment issue using the search warrant itself and the Cogle affidavit, both of which are attached to the pending petition. It is not apparent what additional value the preliminary hearing transcript would have offered and Bennett fails to demonstrate that counsel performed deficiently merely by failing to obtain a copy.

Moreover, because Cogle's affidavit contained sufficient probable case for the issuance of a warrant, a suppression motion would have been without merit. To prevail on a claim of ineffective assistance of counsel for failing to file a motion to suppress evidence seized in an unlawful search, a petitioner must prove that his Fourth Amendment claim was meritorious and show a reasonable probability that the result of the proceeding would have been different absent the excludable evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

The basic standard for probable cause to issue a search warrant is "whether, given all the circumstances set forth in the affidavit... including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The Fourth Amendment requires only that a substantial basis exist for concluding that a search would uncover evidence of wrongdoing. *Id*. at 236.

Affidavits supporting a search warrant are presumptively valid. *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *see also Gates*, 462 U.S. at 237 n.10 ("the resolution of

doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants"). Where an affidavit is based, in part, on hearsay information from confidential informants,

> [the] informant's "veracity," "reliability," and "basis of knowledge" are all highly relevant in determining the value of his report.... [T]hese elements... should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

Gates, 462 U.S. at 230.

In California, "information from an untested or unreliable informant does not establish probable cause unless it is corroborated in essential respects by other facts, sources or circumstances." *People v. Maestas*, 204 Cal. App. 3d 1208, 1220 (1988) (internal quotation omitted). On the other hand, an informant who provides a large amount of detailed, firsthand information is entitled to some credit of reliability. *See generally People v. Foster*, 201 Cal. App. 3d 20, 24 (1988). Additionally, where an informant has provided accurate information on past occasions, he or she may be presumed trustworthy on subsequent occasions. *See*, *e.g.*, *People v. Hansborough*, 199 Cal. App. 3d 579, 584 (1988); *People v. Dumas*, 9 Cal. 3d 871, 876 (1973).

Here, probable cause for issuance of the search warrant existed under the totality of the circumstances test stated in *Gates*. The affidavit recited Cogle's background and training in the use and sales of controlled substances. The CRI had established reliability by previously providing Cogle with useful and accurate information. The CRI, who was familiar with rock cocaine from personal use, had purchased rock cocaine from Bennett on "countless" occasions. Under these circumstances, there was no requirement for strict corroboration of CRI's information. In any event, much of the information provided by CRI was corroborated by CI and by Cogle's observations and records checks. Because the issuance of the warrant was supported by probable cause, the search of the residence was lawful.

Because search of the residence at 3638 Sacramento Drive was lawful, a motion by trial counsel to suppress the seized evidence pursuant to section 1538.5 of the California Penal Code would have been unsuccessful. Because evidence of the items seized, in addition to witness testimony, provided probable cause to indict Bennett, a motion to set aside the indictment pursuant to section 995 of the California Penal Code would likewise have been without merit. Accordingly, neither trial nor appellate counsel performed deficiently. For the same reasons, Bennett also fails to demonstrate prejudice. No relief is available for either counsel's alleged ineffective assistance in relation to the Fourth Amendment search and seizure issue.

C. Ground Four: Preliminary Transcript and the Right to Appeal

In a related claim, Bennett contends that the clerk of the Shasta County Superior Court failed to provide a copy of the April 7, 2005 preliminary hearing transcript to his appellate counsel and to the state court to which his direct appeal was taken. Bennett contends that this omission denied him the opportunity to meaningfully and effectively appeal his conviction in violation of his constitutional rights and section 1237 of the California Penal Code. Bennett presented this claim on state habeas corpus to the California Supreme Court where it was rejected without written explanation.

To the extent this claim challenges the state court's failure to comply with section 1237 of the California Penal Code, it fails. Federal habeas corpus relief is not available to correct an error of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

As a matter of constitutional law, "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). "[T]wo factors [ ] are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Id*.; *but see also United States v. Devlin*, 13 F.3d 1361,

1364 (9th Cir. 1994) (explaining that because denying transcripts can lead to lengthy appeals and reversals, it is preferable that courts "routinely grant indigent defendants' timely requests for free transcripts of significant prior proceedings, unless a substantially equivalent alternative device is available").

In this case, Bennett filed a "petition for writ of mandate" with the Shasta County Superior Court requesting the preliminary hearing transcript more than three years after the hearing was held and after all proceedings in that court were concluded. (*See* Petition, Exhibit I.) The request was denied; the superior court noted it had no jurisdiction to entertain the motion because there was no pending legal proceeding. Bennett fails to specifically allege that he or either of his attorneys made a *timely* request for a copy of the preliminary hearing transcript for use at trial or on appeal. Even if such a request was made and denied, however, the claim fails for lack of prejudice.

Under some circumstances, the complete denial of a transcript for trial or appeal purposes constitutes structural error. *See Kennedy v. Lockyer*, 379 F.3d 1041, 1053 (9th Cir. 2004) (naming as potential examples circumstances (1) where the state completely fails to provide a defendant with a transcript of a mistrial for use in connection with a second trial, (2) where "significant and crucial portions" of the proceedings are omitted, or (3) where a preliminary hearing transcript with key witness testimony is denied for use at trial). Harmless error analysis applies, however, to the alleged denial of the preliminary hearing transcript for appeal purposes in this case. *See Id*. (harmless error analysis applies where the state fails to provide only a portion of the transcript); *Id*. at n.14 ("[W]e would be unlikely to find that a failure to provide insignificant and inconsequential portions of the proceedings would result in reversible error."); *United States v. Devlin*, 13 F.3d 1361, 1364-65 (9th Cir. 1994) (applying harmless error where the trial court failed to provide the defendant with a transcript of a suppression hearing conducted prior to trial).

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Of importance here is that neither issue Bennett claims to have been denied the ability to raise (namely, a suppression issue and a motion to dismiss or set aside the information) were available to him on appeal. A motion to suppress must be brought before trial or, under limited circumstances, during the trial; otherwise, it is considered untimely. *See* Cal. Pen. Code §1538.5; *see also People v. Frazier*, 128 Cal. App.4th 807, 828-29 (3rd Dist. 2005). Likewise, a motion to dismiss or set aside an information is moot after a jury has found the defendant guilty beyond a reasonable doubt. *See generally United States v. Mechanik*, 475 U.S. 66, 70 (1986); *People v. Crittenden*, 9 Cal.4th 83, 136-37 (1994) ("Where the evidence produced at trial amply supports the jury's finding, any question whether the evidence produced at the preliminary hearing supported the finding of probable cause is rendered moot.")

Because neither issue was cognizable on appeal, the preliminary hearing transcript was not essential and the superior court's alleged denial of the transcript did not have substantial and injurious effect or influence on the outcome of Bennett's case. *See Brecht*, 507 U.S. at 624. The state court's unexplained rejection of this claim was not contrary to, or an unreasonable application of clearly established federal law.

D. Ground Five: Instructional Error

Bennett challenges the trial court's jury instructions on count nine. On count nine, the jury was initially instructed:

> Every person who possesses any undetectable firearm is guilty of a violation of Penal Code Section 12020, a crime. It is not necessary that the weapon be concealed upon the defendant's person or be capable of such concealment, or that it be carried upon his person.
>
> There are two kinds of possession: actual possession and constructive possession. Actual possession requires that a person knowingly exercise direct physical control over a thing. Constructive possession does not require actual possession but does require that a person knowingly exercise control over [ ] the right to control a thing either directly or through another person or persons.
>
> One person may have possession alone, or two or more persons may share actual or constructive possession.

> In order to prove this crime, each of the following elements must be proved: One, a person possessed an undetectable firearm; and two, the instrument or weapon was of the kind commonly known as a sawed-off shotgun.

(RT at 457.) After a few more instructions were given, the jury was dismissed for lunch. Outside the jury's presence, the prosecutor brought to the court's attention that the jury had been mis-instructed and the court agreed. Upon the jury's return, the court stated:

> Counsel pointed out to me right after you left that I inadvertently misread a little bit of the instructions, so I'm just going to go over it real briefly....
>
> ....
>
> [A]s to Count 9, which is having possession of an instrument, in violation of Penal Code Section 12020, it should read:
>
> Every person who has any instrument or weapon of the kind commonly known as a sawed-off shotgun is guilty of a violation of Penal code section 12020. And in order to prove this crime, each of the following elements must be proved: One, a person possessed a shotgun; and two, the instrument or weapon was the kind commonly known as a sawed-off shotgun.
>
> So those are the corrected versions – or the written versions that you'll have with you in the jury room.

(RT at 467.)

Bennett contends the instruction as given erroneously omitted the definition of "sawed-off shotgun" and the required mental state that its possessor have knowledge of its illegal characteristics (i.e., that it is unusually short). On appeal, the state court recognized California rules of law that trial courts must define technical terms in jury instructions and that in order to be convicted of this crime the weapon's possessor must have knowledge of the weapon's illegal characteristics. *People v. Bennett*, *supra*, at 4. Nevertheless, the state court denied Bennett's claim for relief because it found no prejudice. *Id*. at 4-5.

A claim of instructional error does not raise a cognizable federal claim unless the error, considered in context of all the instructions and the trial record as a whole, "so infected the

entire trial that the resulting conviction violates due process." *McGuire*, 502 U.S. at 71-72 ; *see also Henderson v. Kibbe,* 431 U.S. 145, 152-55, n.10 (1977); *Cupp v. Nauhten,* 414 U.S. 141, 146-47 (1973). In addition, on federal habeas corpus review, no relief can be granted without a showing that the instructional error had a "substantial and injurious effect or influence in determining the jury's verdict." *Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (citing *Brecht*, 507 U.S. at 637). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (*Kibbe*, 431 U.S. at 154), as the case is here. *See also Boyd v. United States*, 271 U.S. 104, 108 (1925) ("after permitting [the instruction] to pass as satisfactory then, the defendant is not now in a position to object to it"). Finally, an omitted instruction is less likely to be prejudicial than a misstatement of the law. *Id*. at 155.

Under this demanding standard, relief is not warranted. Omission of the definition of "sawed-off shotgun" and the required mental state from the jury instructions did not implicate the fairness of Bennett's trial:

> [T]he evidence was uncontroverted that the firearm in question... was of the type proscribed by the statute... [¶]...[¶]...[¶] The weapon at issue here was a sawed-off shotgun with a 14-inch barrel (a barrel a full 4 inches shorter than the minimum) wrapped in duct tape, hidden in the same location as a bag containing a substantial amount of cocaine base and a money order receipt made out to defendant. The jury's verdicts reflect a determination that [Bennett] possessed the sawed-off shotgun and the cocaine base hidden in the same location. There is no evidence in the record on which the jurors, had they been instructed on the requisite mental state, might have concluded that [Bennett] possessed the sawed-off shotgun without ever having observed it. And, having observed the weapon, [Bennett] was necessarily aware of its shortness... [T]he error here must be deemed harmless.

People v. Bennett, *supra*, at 4-5. For these reasons, any error of state law in the instruction on the sawed-off shotgun count did not render Bennett's trial fundamentally unfair. Likewise, if there was error, it did not have substantial and injurious effect or influence in determining the jury's verdict. *See Brecht*, 507 U.S. at 637. The state court's finding of no prejudice is not contrary to,

or an unreasonable application of clearly established federal law.

E. Ground Six: Upper Term Sentence

On count three (possession of cocaine base for sale) and its accompanying firearm enhancement, Bennett was sentenced to two upper terms of five years. (RT at 515-16.) He claims the court's selection of these upper terms violated his right to due process, trial by jury, and the rule of *Blakely v. Washington*, 542 U.S. 296 (2004).

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi\ v. New Jersey*, 530 U.S. 466, 490 (2000). In *Blakely v. Washington*, the Supreme Court clarified "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. 296, 303-304 (2004) (emphasis in original).

Under California's determinate sentencing scheme, the relevant statutory maximum is the middle term rather than the upper term. *Cunningham v. California*, 549 U.S. 270, 293 (2007). The existence of a single lawfully found aggravating factor is sufficient to authorize an upper term sentence. *People v. Black*, 41 Cal.4th 799, 805-06, 816 (2007) ("*Black II*"); *see also Butler v. Curry*, 528 F.3d 624, 643-44 (9th Cir. 2008).

Contrary to Bennett's argument that the trial court did not indicate its reasons for imposing upper terms, the trial judge specifically stated that its reasons for doing so appeared within the body of the probation report. Specifically, the trial court stated it was "going to follow the [recommendation in the probation] report, and most of the reasoning is in the body of the report...." (RT at 515.) The body of the report included, among other things, a list of Bennett's prior convictions, which included three felony and two misdemeanor convictions. (Clerk's Transcript at 281.)

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One aggravating factor that supports imposition of an upper term in California is that the defendant's prior convictions are "numerous or of increasing seriousness." Cal. R. Ct. 4.421(b)(2). Bennett's three prior felony convictions and two prior misdemeanor convictions are "numerous" within the meaning of Rule 4.421. *See Black II*, 41 Cal.4th at 818 (two prior felony convictions and three prior misdemeanor convictions were "numerous"); *People v. Searle*, 213 Cal.App.3d 1091, 1098 (1989) (three prior convictions were "numerous" in context of the predecessor to Rule 4.421).

The trial court properly relied on Bennett's prior convictions without a jury finding in imposing upper terms on count three and its accompanying firearm enhancement. Supreme Court precedent does not preclude imposition of an upper term based on the fact of a prior conviction. *See Blakely*, 542 U.S. at 301 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)); *Apprendi*, 530 U.S. at 490; *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

To the extent the trial judge relied on any factors in the body of the probation report other than Bennett's prior convictions, those factors were relevant only to the selection of a sentence within the authorized statutory term, which included the upper term. *See Butler*, 528 F.3d 624 (9th Cir. 2008) (the Sixth Amendment does not prevent judges from "exercis[ing] discretion-taking into consideration various factors relating both to offense and offender- in imposing a judgment *within the range* prescribed by statute." *Id*. (emphasis in original) (quoting *Apprendi*, 530 U.S. at 481). Bennett's upper term sentences were within the statutory maximums allowable by virtue of his prior convictions.

F. Ground Seven: Ineffective Assistance of Trial Counsel at Sentencing

In a related claim, Bennett contends that trial counsel rendered ineffective assistance by failing to object at sentencing to the trial court's imposition of the upper term sentences discussed in the previous ground. Because the upper term sentences were lawfully

imposed based on prior convictions, trial counsel's failure to object was not deficient performance, and no prejudice ensued. *See Strickland*, 466 U.S. at 690.

G. Ground Eight: Application of Section 654 at Sentencing

After conviction, the trial court sentenced Bennett to state prison for an aggregate term of fifteen years and four months, computed as follows: the upper term of five years on count three (possession of cocaine base for sale); a consecutive one year term as one-third the middle term on count two (possession of cocaine for sale); a consecutive eight-month term as one third the middle base term on count nine (possession of a deadly or dangerous weapon); a consecutive eight-month term for count ten (illegal possession of ammunition); a consecutive five-year term for personal use of a firearm; and a consecutive three-year term for the prior narcotics conviction enhancement. Sentences on the remaining counts and enhancements were stayed pursuant to section 654 of the California Penal Code, which prohibits multiple punishments for a single act or omission that is punishable by different provisions of law. For his final ground, Bennett claims his sentence violated section 654 and federal due process because he was punished twice for the same conduct. Although the trial court stayed sentencing on counts four, five, six, seven, and eight, Bennett contends punishment should also have been stayed on counts two, nine, and ten because his conduct during commission of all those offenses was incident to a single objective.

To the extent this claim challenges the application of a section 654, a state sentencing law, it fails. Absent fundamental unfairness, federal habeas corpus relief is not available for a state court's misapplication of its own sentencing laws. *McGuire*, 502 U.S. at 67; *see also Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (the misapplication of state sentencing law results in a due process or Eighth Amendment violation only if the sentence is arbitrary and capricious); *Watts v. Bonneville*, 879 F.2d 685, 687 (9th Cir. 1989) (alleged violation of section 654 is not cognizable on federal habeas corpus review).

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To the extent Bennett premises his claim on the due process clause, it still fails. A petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). Contrary to Bennett's argument, he was not punished multiple times for the same conduct simply because he had a single objective for all of his conduct.[3] No fundamental unfairness appears in the manner of sentencing and habeas corpus relief is not available.

VI. CONCLUSION

For all the foregoing reasons, IT IS HEREBY RECOMMENDED that the application for writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 22, 2011

Charlene H. Sorrentino

CHARLENE H. SORRENTINO
UNITED STATES MAGISTRATE JUDGE

[3] The "single objective" test relates to the application of section 654. If various offenses constituting a single course of conduct were incident to one objective, under section 654 the defendant shall be punished only once. *See People v. Perez*, 23 Cal.3d 545, 551 (1979) (citing Cal. Pen. Code § 654).