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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOUGLAS HAROLD DOYLE,
Petitioner,
v.
RONALD RACKLEY,
Respondent.

No. 2:15-cv-2069 WBS DB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction entered against him on December 13, 2010 in the Placer County Superior Court on one count of driving under the influence. He seeks federal habeas relief on the grounds that his three strikes sentence of 25 years to life violates his rights to due process, equal protection of the laws, to be free of cruel and unusual punishment, and to be free of double jeopardy. Upon careful consideration of the record and the applicable law, the undersigned will recommend denial of petitioner’s application for habeas corpus relief.

BACKGROUND

In its unpublished memorandum and opinion affirming petitioner’s judgment of conviction on appeal, the California Court of Appeal for the Third Appellate District provided the following factual and procedural summary:

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FACTS

Under the influence of valium, cocaine, and alcohol, defendant nonetheless got behind the wheel of his van in December 1987. Going southbound on Highway 89, defendant sped around a blind curve in the oncoming lane to pass cars in his own lane. He hit an oncoming car head-on, killing the driver of the oncoming car. As a result, in 1988, he pleaded guilty to DUI manslaughter. (Pen. Code, § 191.5, subd. (a).)

The 1988 DUI manslaughter conviction was not defendant's first brush with the law, and it would not be his last. Most seriously, defendant was convicted of spousal abuse in 1996 and assault with a deadly weapon in 2007.

In August 2008, defendant again drove drunk on Highway 89, this time northbound, and again he passed on a blind curve. Fortunately, defendant did not cause another collision, and, again fortunately, a sheriff's deputy saw the unsafe driving and stopped defendant. After observing that defendant was drunk, the deputy arrested defendant for DUI.

PROCEDURE

The district attorney charged defendant by information with felony DUI, with a prior DUI manslaughter. (Veh. Code, §§ 23152, subds. (a) & (b), 23550.5, subd. (b).) The district attorney also alleged that defendant had two prior strike convictions (the 1988 DUI manslaughter conviction (Pen. Code, § 191.5) and the 2007 assault with a deadly weapon conviction (Pen. Code, § 245)) and had four prior prison terms (Pen. Code, § 667.5, subd. (b)).

Defendant pleaded guilty to felony DUI, with a prior DUI manslaughter. He also admitted the prior serious felony convictions and prison terms. He did so with the understanding that this exposed him to a potential sentence of 29 years to life under the Three Strikes law.

The trial court considered and denied a *Romero*[fn] motion to strike one or both of the prior serious felony convictions. The court sentenced defendant under the Three Strikes law to state prison for an indeterminate term of 25 years to life. It stayed the prior prison term enhancements.

[fn] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (*Romero*).

People v. Doyle, 220 Cal. App. 4th 1251, 1256-57 (2013) (one footnote omitted).

STANDARDS OF REVIEW APPLICABLE TO HABEAS CORPUS CLAIMS

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28

1 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
2 application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502
3 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000).

4 Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas
5 corpus relief:

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

10 (1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as
12 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.

13 For purposes of applying § 2254(d)(1), “clearly established federal law” consists of
14 holdings of the United States Supreme Court at the time of the last reasoned state court decision.
15 Greene v. Fisher, 565 U.S. 34, 37 (2011); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011)
16 (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). Circuit court precedent ““may be
17 persuasive in determining what law is clearly established and whether a state court applied that
18 law unreasonably.”” Stanley, 633 F.3d at 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th
19 Cir. 2010)). However, circuit precedent may not be “used to refine or sharpen a general principle
20 of Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has not
21 announced.” Marshall v. Rodgers, 133 S. Ct. 1446, 1450 (2013) (citing Parker v. Matthews, 567
22 U.S. 37 (2012)). Nor may it be used to “determine whether a particular rule of law is so widely
23 accepted among the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be
24 accepted as correct.” Id. at 1451. Further, where courts of appeals have diverged in their
25 treatment of an issue, it cannot be said that there is “clearly established Federal law” governing
26 that issue. Carey v. Musladin, 549 U.S. 70, 76-77 (2006).

27 A state court decision is “contrary to” clearly established federal law if it applies a rule
28 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court

1 precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634, 640 (2003)
2 (quoting Williams, 529 U.S. at 405-06). “Under the ‘unreasonable application’ clause of §
3 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct
4 governing legal principle from th[e] [Supreme] Court's decisions, but unreasonably applies that
5 principle to the facts of the prisoner's case.” Lockyer v. Andrade, 538 U.S. 63, 75 (2003)
6 (quoting Williams, 529 U.S. at 413); Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir. 2004). “[A]
7 federal habeas court may not issue the writ simply because that court concludes in its independent
8 judgment that the relevant state-court decision applied clearly established federal law erroneously
9 or incorrectly. Rather, that application must also be unreasonable.” Williams, 529 U.S. at 411;
10 see also Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (“It is not
11 enough that a federal habeas court, in its independent review of the legal question, is left with a
12 firm conviction that the state court was erroneous.” (Internal citations and quotation marks
13 omitted.)). “A state court's determination that a claim lacks merit precludes federal habeas relief
14 so long as ‘fairminded jurists could disagree’ on the correctness of the state court's decision.”
15 Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652,
16 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a
17 state prisoner must show that the state court's ruling on the claim being presented in federal court
18 was so lacking in justification that there was an error well understood and comprehended in
19 existing law beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103.

20 There are two ways a petitioner may satisfy subsection (d)(2). Hibbler v. Benedetti, 693
21 F.3d 1140, 1146 (9th Cir. 2012). He may show the state court’s findings of fact “were not
22 supported by substantial evidence in the state court record” or he may “challenge the fact-finding
23 process itself on the ground it was deficient in some material way.” Id. (citing Taylor v. Maddox,
24 366 F.3d 992, 999-1001 (9th Cir. 2004)); see also Hurles v. Ryan, 752 F.3d 768, 790-91 (9th Cir.
25 2014) (If a state court makes factual findings without an opportunity for the petitioner to present
26 evidence, the fact-finding process may be deficient and the state court opinion may not be entitled
27 to deference.). Under the “substantial evidence” test, the court asks whether “an appellate panel,

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1 applying the normal standards of appellate review,” could reasonably conclude that the finding is
2 supported by the record. Hibbler, 693 F.3d at 1146 (9th Cir. 2012).

3 The second test, whether the state court’s fact-finding process is insufficient, requires the
4 federal court to “be satisfied that any appellate court to whom the defect [in the state court’s fact-
5 finding process] is pointed out would be unreasonable in holding that the state court’s fact-finding
6 process was adequate.” Hibbler, 693 F.3d at 1146-47 (quoting Lambert v. Blodgett, 393 F.3d
7 943, 972 (9th Cir. 2004)). The state court’s failure to hold an evidentiary hearing does not
8 automatically render its fact finding process unreasonable. Id. at 1147. Further, a state court may
9 make factual findings without an evidentiary hearing if “the record conclusively establishes a fact
10 or where petitioner’s factual allegations are entirely without credibility.” Perez v. Rosario, 459
11 F.3d 943, 951 (9th Cir. 2006) (citing Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003)).

12 If a petitioner overcomes one of the hurdles posed by section 2254(d), this court reviews
13 the merits of the claim de novo. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008); see
14 also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (“[I]t is now clear both that we
15 may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error,
16 we must decide the habeas petition by considering de novo the constitutional issues raised.”). For
17 the claims upon which petitioner seeks to present evidence, petitioner must meet the standards of
18 28 U.S.C. § 2254(e)(2) by showing that he has not “failed to develop the factual basis of [the]
19 claim in State court proceedings” and by meeting the federal case law standards for the
20 presentation of evidence in a federal habeas proceeding. See Cullen v. Pinholster, 563 U.S. 170,
21 186 (2011).

22 The court looks to the last reasoned state court decision as the basis for the state court
23 judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).
24 “[I]f the last reasoned state court decision adopts or substantially incorporates the reasoning from
25 a previous state court decision, [this court] may consider both decisions to ‘fully ascertain the
26 reasoning of the last decision.’” Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en
27 banc) (quoting Barker v. Fleming, 423 F.3d 1085, 1093 (9th Cir. 2005)). “When a federal claim
28 has been presented to a state court and the state court has denied relief, it may be presumed that

1 the state court adjudicated the claim on the merits in the absence of any indication or state-law
2 procedural principles to the contrary.” Richter, 562 U.S. at 99. This presumption may be
3 overcome by showing “there is reason to think some other explanation for the state court's
4 decision is more likely.” Id. at 99-100 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).
5 Similarly, when a state court decision on a petitioner's claims rejects some claims but does not
6 expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that
7 the federal claim was adjudicated on the merits. Johnson v. Williams, 568 U.S. 289, 292 (2013).

8 A summary denial is presumed to be a denial on the merits of the petitioner's claims.
9 Stancle v. Clay, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). Where the state court reaches a
10 decision on the merits but provides no reasoning to support its conclusion, a federal habeas court
11 independently reviews the record to determine whether habeas corpus relief is available under §
12 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).
13 “Independent review of the record is not de novo review of the constitutional issue, but rather, the
14 only method by which we can determine whether a silent state court decision is objectively
15 unreasonable.” Himes, 336 F.3d at 853 (citing Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir.
16 2000)). This court “must determine what arguments or theories . . . could have supported, the
17 state court's decision; and then it must ask whether it is possible fairminded jurists could disagree
18 that those arguments or theories are inconsistent with the holding in a prior decision of th[e]
19 [Supreme] Court.” Richter, 562 U.S. at 102. The petitioner bears “the burden to demonstrate that
20 ‘there was no reasonable basis for the state court to deny relief.’” Walker v. Martel, 709 F.3d
21 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98).

22 When it is clear, however, that a state court has not reached the merits of a petitioner's
23 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal
24 habeas court must review the claim de novo. Stanley, 633 F.3d at 860; Reynoso v. Giurbino, 462
25 F.3d 1099, 1109 (9th Cir. 2006); Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

26 **PETITIONER'S CLAIMS**

27 Petitioner’s claims are directed at his sentence. He states five claims for relief: (1) the
28 dual use of sentencing factors violates the Fifth and Fourteenth Amendments; (2) the trial court

1 abused its discretion when it refused to strike the prior conviction; (3) the imposition of a 25
2 years-to-life sentence on a misdemeanor DUI is a violation of the Equal Protection Clause; (4) the
3 imposition of a 25 years-to-life sentence on a misdemeanor violates the Eighth Amendment; and
4 (5) double-counting the prior DUI violates the Double Jeopardy Clause.

5 Respondent argues that petitioner’s first two claims are unexhausted because petitioner
6 made arguments based only on state law before the California Supreme Court. In addition,
7 respondent argues the state court’s decision denying the remaining claims, was not contrary to or
8 an unreasonable application of federal law. Finally, respondent argues that petitioner’s claims are
9 barred as untimely.

10 The statute of limitations issue is not jurisdictional and courts may consider the merits of a
11 habeas petition despite a timeliness issue if the merits may be more easily resolved. Day v.
12 McDonough, 547 U.S. 198, 205, 210 (2006) (a district court has discretion to decide whether the
13 administration of justice is better served by dismissing the case on statute of limitations grounds
14 or by reaching the merits of the petition); Bruno v. Director, CDCR, No. CIV S-02-2339 LKK
15 EFB P, 2010 WL 367538, at *2 (E.D. Cal. Jan. 26, 2010) (“[T]he court elects to deny petitioner's
16 habeas petition on the merits rather than reach the equitable tolling issues.”). In the present case,
17 the court finds it can resolve the merits of petitioner’s claims without reaching the statute of
18 limitations and potential tolling issues.

19 **I. Claims One and Two – Dual Use of Prior Conviction Violates Due Process**

20 Petitioner argues that “prior judicial authorities” prohibit using the same prior conviction
21 both to elevate the crime and as a strike. Therefore, he argues, the trial court abused its discretion
22 in refusing to strike the prior conviction from sentencing consideration. Respondent contends
23 petitioner failed to exhaust federal law bases for these claims.

24 **A. Exhaustion**

25 **1. Legal Standards**

26 The exhaustion of state court remedies is a prerequisite to granting a petition for writ of
27 habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by
28 providing the highest state court with a full and fair opportunity to consider all claims before

1 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
2 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985).

3 The state court has had an opportunity to rule on the merits when the petitioner has fairly
4 presented the claim to that court. The fair presentation requirement is met where the petitioner
5 has described the operative facts and legal theory on which his claim is based. Picard, 404 U.S. at
6 277-78. Generally, it is “not enough that all the facts necessary to support the federal claim were
7 before the state courts...or that a somewhat similar state-law claim was made.” Anderson v.
8 Harless, 459 U.S. 4, 6 (1982). Instead,

9 [i]f state courts are to be given the opportunity to correct alleged
10 violations of prisoners' federal rights, they must surely be alerted to the
11 fact that the prisoners are asserting claims under the United States
12 Constitution. If a habeas petitioner wishes to claim that an evidentiary
ruling at a state court trial denied him the due process of law
guaranteed by the Fourteenth Amendment, he must say so, not only in
federal court, but in state court.

13 Duncan v. Henry, 513 U.S. 364, 365 (1995). Accordingly, “a claim for relief in habeas corpus
14 must include reference to a specific federal constitutional guarantee, as well as a statement of the
15 facts that entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152, 162-63 (1996). The
16 United States Supreme Court has held that a federal district court may not entertain a petition for
17 habeas corpus unless the petitioner has exhausted state remedies with respect to each of the
18 claims raised. Rose v. Lundy, 455 U.S. 509, 522 (1982). A mixed petition containing both
19 exhausted and unexhausted claims must be dismissed. Id.

20 **2. Did Petitioner Exhaust Claims One and Two?**

21 In order to exhaust his claims, petitioner must have raised them before the California
22 Supreme Court. In his petition for review, petitioner described claim one as follows: “Do prior
23 authorities of this Court that have construed sentence augmentation statutes to prohibit double use
24 of the same sentencing factor . . . prohibit using the same prior conviction to elevate a
25 misdemeanor to a felony to re-elevate the misdemeanor-turned-felony to ‘strikes’ status . . . ?”
26 (LD 5 at 1.¹) He described claim two as trial court error based on the success of claim one. (Id.)

27 ¹ On January 25, 2016, respondent lodged relevant portions of the state court record. (See ECF
28 No. 15.) Documents are cited herein by their Lodged Document or “LD” number.

1 While the focus of petitioner’s argument in his petition for review was the construction of
2 state law, as he had before the state Court of Appeal, petitioner did briefly argue that his Fifth and
3 Fourteenth Amendment rights were violated by the “imposition of a criminal punishment greater
4 than that permitted by state law . . . and under the Fifth Amendment, due to multiple punishments
5 contravening state law.” (LD 5 at 19; LD 1 at 31.) These arguments were sufficient to have put
6 the state courts on notice that petitioner was raising federal constitutional claims. See Jones v.
7 Smith, 231 F.3d 1227, 1231 (9th Cir. 2000) (An explicit invocation of a federal constitutional
8 right exhausts the federal claim even if the state court briefs relied predominantly on state court
9 cases.) The fact that the state court did not explicitly address the federal constitutional issues
10 does not compel the conclusion that petitioner did not fairly present them. See Dye v. Hofbauer,
11 546 U.S. 1, 3 (2005) (per curiam) (Once the petitioner fairly presents the claim to the state courts,
12 exhaustion is satisfied even if the state court’s decision is silent on the particular claim.)

13 Accordingly, petitioner adequately raised the federal constitutional aspects of claims one
14 and two before the California Supreme Court and those arguments have been exhausted.

15 **B. Merits of Claims One and Two**

16 The California Court of Appeal denied these claims on state law grounds. After
17 considering both legislative intent and prior state case law, the court found that state law permits
18 the use of a prior DUI manslaughter conviction to both increase a new DUI to a felony and to
19 count as a strike for purposes of Three Strikes sentencing. Doyle, 220 Cal. App. 4th at 1257-64.
20 When a state court decision rejects some of a petitioner’s claims but does not expressly address a
21 federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was
22 adjudicated on the merits. Johnson, 568 U.S. at 292. For unexplained state court decisions, this
23 court “must determine what arguments or theories . . . could have supported, the state court’s”
24 rejection of the claim “and then it must ask whether it is possible fairminded jurists could
25 disagree that those arguments or theories are inconsistent with the holding in a prior decision of
26 th[e] [Supreme] Court.” Richter, 562 U.S. at 102.

27 In his petition, petitioner does not explain the basis for his Fifth and Fourteenth
28 Amendment claims here. In his brief before the state Court of Appeal, petitioner argued that the

1 Fifth and Fourteenth Amendments were violated by the imposition of a sentence “greater than
2 that permitted by state law” and the Fifth Amendment was violated “due to multiple punishments
3 contravening state law.” (LD 1 at 31.) That state court brief cites four federal cases for these
4 propositions. None support petitioner’s arguments.

5 In the first, Wasko v. Vasquez, 820 F.2d 1090 (9th Cir. 1987), the Court of Appeals
6 considered a habeas petitioner’s due process claim that his state-court imposed sentence of eight
7 months had been “corrected” by the state Department of Corrections to two years. The court held
8 the imposition of a sentence beyond that permitted by state law violated due process. 820 F.2d at
9 1091 n.2. In the present case, the state courts have interpreted state law to permit the double-
10 counting of the prior DUI manslaughter conviction. This court is bound by the state court’s
11 determination of its own laws. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (“[A] state
12 court’s interpretation of state law, including one announced on direct appeal of the challenged
13 conviction, binds a federal court sitting in habeas corpus.”); see also Mullaney v. Wilbur, 421
14 U.S. 684, 691 (1975) (“state courts are the ultimate expositors of state law”).

15 The only exception to that rule is the “highly unusual case in which the ‘interpretation is
16 clearly untenable and amounts to a subterfuge to avoid federal review’ of a constitutional
17 violation.” Butler v. Curry, 528 F.3d 624, 642 (9th Cir. 2008). The California Court of Appeal’s
18 determination that double-counting was appropriate appears to be consistent with prior case law
19 and with the statutes themselves. In fact, at least one other California Court of Appeal has so held
20 since then. See People v. Lee, No. E062961, 2015 WL 4554627, at *3 (Cal. Ct. App. 4th Dist.
21 July 28, 2015). Nothing suggests its determination was merely a subterfuge.

22 In the second case cited by petitioner, a civil rights action brought under 42 U.S.C. §
23 1983, the Supreme Court considered whether a state prisoner has a liberty interest in parole
24 release that is protected by the Due Process Clause. Board of Pardons v. Allen, 482 U.S. 369
25 (1987). The Court held that state statutory law created a presumption that parole release would be
26 granted in certain situations. Id. at 377-78. Petitioner does not allege any aspect of state law
27 created a “liberty interest” which the state courts violated. Therefore, the court does not find
28 Allen to be controlling.

1 Petitioner then cites two cases for his argument that he suffered multiple punishments in
2 violation of state law – Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 769 n.1
3 (1994) and Jones v. Thomas, 491 U.S. 376, 381 (1989). To the extent petitioner complains of a
4 state law violation, as discussed above this court is bound by the state court’s determinations of
5 its laws. The cited portions of Kurth Ranch and Jones address double jeopardy issues. To the
6 extent petitioner is making a double jeopardy argument, that issue is addressed below in the
7 discussion of claim five.

8 Because he fails to demonstrate that his federal constitutional claims are supported by any
9 federal authority, petitioner should not succeed on his Fifth and Fourteenth Amendment
10 arguments in claims one and two.

11 **II. Claim Three – Equal Protection²**

12 Petitioner argues here that a person with a misdemeanor DUI and a prior offense more
13 serious than DUI manslaughter, which would not have elevated his misdemeanor DUI to a felony,
14 may get a lesser sentence. He contends that disparity violates the Equal Protection Clause. The
15 California Court of Appeal rejected this claim on the grounds that petitioner is not similarly
16 situated to a person with a more serious prior offense. Respondent argues that there is no clearly
17 established federal law requiring application of equal protection principles where the persons at
18 issue are not similarly situated. For the reasons set forth below, this court agrees.

19 **A. Decision of the State Court**

20 Defendant contends that the Three Strikes sentence violates his
21 equal protection rights under the federal and state Constitutions. He
22 argues that the Legislature's scheme for elevating DUI offenses to
23 felonies with potential Three Strikes sentencing because of the
24 offender's prior DUI manslaughter conviction fails constitutional
25 scrutiny because other DUI offenders with more egregious prior
26 crimes (such as murder) are convicted only of misdemeanors for
their current DUI offenses and are not subject to Three Strikes
sentencing. The contention is without merit because DUI offenders
with prior DUI manslaughter convictions are not similarly situated
with DUI offenders who have prior convictions other than for DUI
manslaughter. Based on this equal protection argument, defendant

27 ² In his petition, petitioner also argues a violation of the Eighth Amendment in this claim.
28 However, petitioner’s Eighth Amendment arguments appear to all be raised in his claim four and
will be addressed by the court in the discussion of that claim.

1 also claims the different treatment violates his due process rights
2 and right not to be subjected to cruel and unusual punishment.
These separate claims are both without merit.

3 A. Not Similarly Situated

4 Equal protection under the state and federal Constitutions requires
5 that persons similarly situated must receive like treatment under the
6 law. (*In re Eric J.* (1979) 25 Cal.3d 522, 531, 159 Cal.Rptr. 317,
7 601 P.2d 549.) Therefore, “[t]he first prerequisite to a meritorious
8 claim under the equal protection clause is a showing that the state
9 has adopted a classification that affects two or more similarly
10 situated groups in an unequal manner.” (*Id.* at p. 530, 159 Cal.Rptr.
11 317, 601 P.2d 549, italics omitted.)

12 While defendant mentions several hypothetical prior convictions for
13 unrelated crimes (such as rape, child molestation, and robbery), he
14 focuses on comparing punishment when a defendant has a prior
15 conviction for a drunk driving second degree murder and, as here,
16 another defendant has a prior conviction for a DUI manslaughter.
17 Following his lead, we focus on that comparison.

18 A DUI manslaughter is committed when a drunk driver, without
19 malice, kills someone. (Pen.Code, § 191.5, subd. (a).) The
20 punishment for the offense is four, six, or 10 years in state prison.
21 (Pen.Code, § 191.5, subd. (c)(1).) If the intoxicated killer drove
22 while aware of the risk to life and consciously disregarded that risk,
23 then the killer committed second degree murder (*see People v.*
24 *Watson* (1981) 30 Cal.3d 290, 179 Cal.Rptr. 43, 637 P.2d 279
25 (*Watson*)), a *Watson* murder. Punishment for second degree murder
26 is 15 years to life in state prison. (Pen.Code, § 190, subd. (a).) DUI
27 manslaughter is not a lesser included offense of a *Watson* murder.
28 (*People v. Sanchez* (2001) 24 Cal.4th 983, 990–992, 103
Cal.Rptr.2d 698, 16 P.3d 118.)

Defendant ignores this significant difference in sentencing between
a determinate term for DUI manslaughter and an indeterminate
term—a life sentence—for a *Watson* murder. Instead, he cites only
the differences in how prior convictions for these crimes are treated.
He notes that, because he has a prior DUI manslaughter conviction,
his current DUI is elevated to a felony DUI and subjects him to
Three Strikes sentencing. In comparison, a DUI offender with a
prior *Watson* murder is guilty of a misdemeanor only.

We recognize that the two schemes are very different. A *Watson*
murder is punished much more severely upon conviction, but does
not result in felony status or a longer sentence if the offender
commits a later DUI. On the other hand, a DUI manslaughter is
punished with a shorter determinate sentence, but can be used to
impose much longer incarceration if the offender later commits a
DUI. As we explain, this different treatment is the result of rational
legislative choices rather than being unconstitutional disparate
treatment because DUI offenders with a prior DUI manslaughter
conviction are not similarly situated with DUI offenders with a
prior *Watson* murder conviction.[fn 4]

1 Generally, offenders who commit different crimes are not similarly
2 situated. (*People v. Macias* (1982) 137 Cal.App.3d 465, 472–473,
3 187 Cal.Rptr. 100.) In *People v. Dillon* (1983) 34 Cal.3d 441, 194
4 Cal.Rptr. 390, 668 P.2d 697, the Supreme Court rejected an equal
5 protection challenge to the felony-murder rule simply by observing
6 that premeditated first degree murder and felony murder are “not
7 the ‘same’ crime[]....” (*Id.* at p. 476, 194 Cal.Rptr. 390, 668 P.2d
8 697, fn. 23; *see also People v. Jacobs* (1984) 157 Cal.App.3d 797,
9 803–804, 204 Cal.Rptr. 234.) Therefore, a DUI offender with a
10 prior DUI manslaughter conviction is not similarly situated with a
11 DUI offender with a prior *Watson* murder conviction.

12 But there may be times when the general rule does not apply, when
13 offenders who commit different crimes are similarly situated.³
14 (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199–1200, 39
15 Cal.Rptr.3d 821, 129 P.3d 29 (*Hofsheier*.) The *Hofsheier* court
16 held that offenders who commit different crimes are similarly
17 situated for equal protection analysis when the crimes are not
18 sufficiently different to justify different treatment. (*Id.* at p. 1200,
19 39 Cal.Rptr.3d 821, 129 P.3d 29.)

20 In *Hofsheier*, the court considered mandatory sex offender
21 registration. State law required adults convicted of voluntary oral
22 copulation with a minor 16 years or older to register for life as a sex
23 offender; however, state law did not require adults convicted of
24 voluntary sexual intercourse with a minor 16 years or older to
25 register unless the trial court exercised its discretion to require
26 registration. (*Hofsheier, supra*, 37 Cal.4th at p. 1198, 39
27 Cal.Rptr.3d 821, 129 P.3d 29.)

28 The *Hofsheier* court held that the general rule (offenders who
commit different crimes are not similarly situated) cannot be an
absolute rule “because the decision of the Legislature to distinguish
between similar criminal acts is itself a decision subject to equal
protection scrutiny.” (*Hofsheier, supra*, 37 Cal.4th at p. 1199, 39
Cal.Rptr.3d 821, 129 P.3d 29, fn. omitted.) The equal protection
clause “ ‘imposes a requirement of some rationality in the nature of
the class singled out.’ [Citations.] Otherwise, the state could
arbitrarily discriminate between similarly situated persons simply
by classifying their conduct under different criminal statutes.
[Citation.]” (*Ibid.*)

Turning to its own facts, the *Hofsheier* court declared: “The only
difference between the two offenses is the nature of the sexual act.
Thus, persons convicted of oral copulation with minors and persons
convicted of sexual intercourse with minors ‘are sufficiently similar

³ Petitioner relied heavily on *Hofsheier* in his state court briefing. It should be noted that in 2015 the California Supreme Court reversed *Hofsheier* in *Johnson v. Dep’t of Justice*, 60 Cal. 4th 871 (2015). The California Supreme Court held that persons convicted of oral copulation, and other sex crimes, with minors and persons convicted of sexual intercourse with minors were not similarly situated, based primarily on the possibility of pregnancy resulting from sexual intercourse, and therefore the state law’s differentiation of those crimes for purposes of sex offender registration requirements was not so irrational as to violate the Equal Protection Clause.

1 to merit application of some level of scrutiny to determine whether
2 distinctions between the two groups justify the unequal treatment.’
3 [Citation.]” (*Hofsheier, supra*, 37 Cal.4th at p. 1200, 39 Cal.Rptr.3d
4 821, 129 P.3d 29.)

5 While the Supreme Court has not provided a bright-line rule for
6 when those committing different crimes must be treated similarly,
7 there can be no doubt that those who are convicted of a
8 manslaughter can be treated differently from murderers.
9 Specifically, DUI manslaughter and a *Watson* murder are not
10 sufficiently similar to require similar treatment. A DUI
11 manslaughter is committed by causing a death, without malice,
12 while driving under the influence. (Pen.Code, § 191.5, subd. (a).) A
13 *Watson* murder, on the other hand, requires implied malice.
14 (*Watson, supra*, 30 Cal.3d 290, 179 Cal.Rptr. 43, 637 P.2d 279.)
15 Implied malice has both physical and mental components, “the
16 physical component being ‘the performance of ‘an act, the natural
17 consequences of which are dangerous to life,’ ” and the mental
18 component being ‘the requirement that the defendant ‘knows that
19 his conduct endangers the life of another and ... acts with a
20 conscious disregard for life.’ ” [Citation.]” (*People v. Cravens*
21 (2012) 53 Cal.4th 500, 508, 136 Cal.Rptr.3d 40, 267 P.3d 1113.)
22 The critical difference between a DUI manslaughter and a *Watson*
23 murder is the mental component: malice or conscious disregard for
24 the life of another. A *Watson* murder, therefore, is more morally
25 blameworthy than DUI manslaughter.

26 “The appropriate measure for punishment is individual culpability.
27 [Citation.] It is the prerogative of the Legislature, and the electorate
28 by initiative, to recognize degrees of culpability and penalize
accordingly. [Citations.]” (*People v. Jacobs, supra*, 157 Cal.App.3d
at p. 804, 204 Cal.Rptr. 234, fn. omitted.) And “[t]he fact that the
Legislature has not included a small class of almost similarly
situated persons in the disfavored class does not invalidate the
legislation as to the disfavored class. There is no requirement that
the Legislature penalize all culpable conduct or precisely structure
penal sanctions so that all degrees of culpability are omnisciently
placed in their proper place in some continuum of penalties.” (*In re*
Sims (1981) 117 Cal.App.3d 309, 314, fn. 1, 172 Cal.Rptr. 608.)

Therefore, because a DUI manslaughter and a *Watson* murder are
so different as to culpability, the Legislature's different treatment of
DUI offenders with prior convictions for DUI manslaughter or a
Watson murder is permissible under the equal protection clause.

Defendant argues that the disparate treatment does not pass
constitutional muster because, in his view, a person convicted of
DUI manslaughter is treated more harshly than a person convicted
of a *Watson* murder, even though the *Watson* murder is more
blameworthy morally. He bases his view completely on the later
effect of convictions for DUI manslaughter and a *Watson* murder
when the offender commits a new DUI. However, this view can be
sustained only if one ignores the difference in original sentencing
for offenders convicted of DUI manslaughter (a determinate term of
no more than 10 years (Pen.Code, § 191.5, subd. (c)(1)), plus up to

1 three years of parole (Pen.Code, § 3000, subd. (b)(2)) and a *Watson*
2 murder (an indeterminate term of up to life (Pen.Code, 190, subd.
3 (a)), plus parole for life after release (Pen.Code, § 3000.1, subd.
4 (a)(1)). This difference can be attributed simply to the Legislature's
5 determination to punish murderers more harshly up front and to be
6 more lenient with those convicted of manslaughter, while providing
7 for harsher punishment for those convicted of manslaughter if they
8 later commit a crime that shows they have not reformed. There is “
9 ‘some rationality’ ” in this distinction. (*Hofsheier, supra*, 37 Cal.4th
10 at p. 1199, 39 Cal.Rptr.3d 821, 129 P.3d 29.) Therefore, for equal
11 protection analysis, DUI offenders with a prior DUI manslaughter
12 conviction are not similarly situated with DUI offenders with a
13 prior *Watson* murder conviction.

8 Having determined that defendant's argument is unpersuasive as to
9 the first prong of equal protection analysis, we need not consider
10 the second prong—whether governmental interests justify disparate
11 treatment—because there is no requirement that persons in different
12 circumstances must be treated as if their situations were similar.
13 (*See Hofsheier, supra*, 37 Cal.4th at p. 1200, 39 Cal.Rptr.3d 821,
14 129 P.3d 29.)

12 [fn 4] We recognize that a *Watson* murder is not a specific
13 crime enacted by the Legislature, but instead is a judicially
14 created theory for prosecuting vehicular homicide as second
15 degree murder in cases involving implied malice. (But see
16 Pen.Code, §§ 191.5, subd. (e), 192, subd. (c)(3)
17 [recognizing the *Watson* murder theory].) Nonetheless, we
18 see no reason not to apply an equal protection analysis to the
19 disparate treatment noted by defendant in this case.

17 Doyle, 220 Cal. App. 4th at 1264-68.

18 **B. Legal Standards**

19 The Equal Protection Clause requires, generally, that similarly situated persons be treated
20 similarly. See City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985).
21 Equal protection is violated by intentional discrimination against a person based on his or her
22 membership in a protected class, Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001),
23 or by intentional treatment of a member of an identifiable class differently from other similarly
24 situated individuals without a rational basis for the difference in treatment (i.e., a rational
25 relationship to a legitimate state purpose), Village of Willowbrook v. Olech, 528 U.S. 562, 564
26 (2000). A state is not, however, precluded from placing persons in different classifications so
27 long as the disparate classifications have a rational basis and are not based on traditional suspect
28 classes:

1 “The Constitution does not require things which are different in fact
2 . . . to be treated in law as though they were the same.” *Tigner v.*
3 *Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124. Hence,
4 legislation may impose special burdens upon defined classes in
5 order to achieve permissible ends. But the Equal Protection Clause
6 does require that, in defining a class subject to legislation, the
7 distinctions that are drawn have “some relevance to the purpose for
8 which the classification is made.”

9 *Estelle v. Dorrough*, 420 U.S. 534, 538-39 (1975) (internal quotations and string citation
10 omitted); see also *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (“a classification neither
11 involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption
12 of validity”). “For statutory challenges made on Equal Protection grounds, ‘the general rule is
13 that legislation is presumed to be valid and will be sustained if the classification drawn by the
14 statute is rationally related to a legitimate governmental interest.’” *United States v. Harding*, 971
15 F.2d 410, 412 (9th Cir. 1992) (quoting *City of Cleburne*, 473 U.S. at 440). Further, “the rational
16 basis standard does not require that the state choose the fairest or best means of advancing its
17 goals.” *Robinson v. Marshall*, 66 F.3d 249 (9th Cir. 1995) (rejecting equal protection challenge
18 to Cal. Penal Code § 2900.5).

19 Federal courts should not “overturn [a statute that does not burden a suspect class or a
20 fundamental interest] unless the varying treatment of different groups or persons is so unrelated to
21 the achievement of any combination of legitimate purposes that we can only conclude that the
22 legislature's actions were irrational.” *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (quoting
23 *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). “The law may be overinclusive, underinclusive,
24 illogical, and unscientific and yet pass constitutional muster. In addition, under rational basis
25 review, the government ‘has no obligation to produce evidence to sustain the rationality of a
26 statutory classification.’” *United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015)
27 (quoting *Heller*, 509 U.S. at 320).

28 This lowest level of review does not look to the actual purposes of the law. Instead it
considers whether there is some conceivable rational purpose that legislators could have had in
mind when they enacted the law. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471,
481 (9th Cir. 2014). “When conducting an equal protection analysis, we first identify the groups

1 being compared. “The groups must be comprised of similarly situated persons so that the factor
2 motivating the alleged discrimination can be identified” Taylor v. San Diego County, 800
3 F.3d 1164, 1169 (9th Cir. 2015) (citing Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1064
4 (9th Cir. 2014)). “While the group members may differ in some respects, they must be similar in
5 the respects pertinent to the State’s policy.” Id.; Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).
6 “[U]nless a classification warrants some form of heightened review because it jeopardizes
7 exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic,
8 the Equal Protection Clause requires only that the classification rationally further a legitimate
9 state interest.” Nordlinger, 505 U.S. at 10 (citations omitted).

10 **C. Analysis**

11 In the present case, petitioner has failed to demonstrate the use of his prior DUI
12 manslaughter as an enhancement and as a prior felony strike under the Three Strikes sentencing
13 law violates the Equal Protection Clause. No protected class is implicated by petitioner's claim
14 that the statute unreasonably discriminates between those in his situation and one charged with a
15 DUI with a more serious prior felony. Further, and as discussed by the state Court of Appeal,
16 petitioner is not similarly situated to defendants with more serious prior felonies.

17 Petitioner identifies two classes: those with a DUI conviction and a prior DUI
18 manslaughter and those with a DUI conviction and a prior more serious felony. As the state court
19 notes, petitioner particularly focuses on defendants in the latter category with a prior crime of
20 DUI second degree murder. The California legislature has distinguished these two categories of
21 prior criminal behavior. As described above by the state court, the important difference between
22 the two crimes is the mental state. Second degree murder requires proof of malice or conscious
23 disregard for the life of another. Cal. Penal Code §§ 189, 191.5(e). DUI manslaughter lacks the
24 mental state requirement. It is defined as causing death while intoxicated without malice. Cal.
25 Penal Code § 191.5(a). The sentences possible for each crime reflect the state’s recognition that
26 second degree murder is more serious than DUI manslaughter. A defendant convicted of DUI
27 second degree murder faces an indeterminate sentence of up to life in prison, plus required parole
28 after release. Cal. Penal Code §§ 190(a), 3000.1(a)(1). A defendant convicted of DUI

1 manslaughter faces a maximum of ten years in prison and a maximum of three years of parole.
2 Cal. Penal Code §§ 191.5(c)(1), 3000(b)(2). These distinctions demonstrate the state’s intention
3 to punish those charged with murder much more seriously than those charged with DUI
4 manslaughter.

5 Petitioner’s misdemeanor DUI was charged as a felony pursuant to California Penal Code
6 § 23550.5(b). The California legislature’s enactment of this section reflects an apparent policy of
7 punishing recidivism. To this extent, the legislature’s failure to include DUI second degree
8 murder in the list of prior DUI offenses that may enhance a misdemeanor DUI does not
9 particularly make sense. However, considering the section in this light ignores the larger
10 statutory scheme. The legislature could have determined that punishing DUI second degree
11 murder as a murder offense, with its more severe sentencing than DUI manslaughter, removed the
12 need to also consider the DUI second degree murder as an enhancement to a later DUI. As the
13 state Court of Appeal pointed out, the legislature could have considered that murder should be
14 punished more severely up front while DUI recidivism could be punished with a collection of
15 lesser crimes at a later time. This rationale is sufficient, given the extreme liberality with which
16 this court must consider the distinctions created by state law, to justify the distinction made
17 between a DUI charge with a prior DUI manslaughter and a DUI charge with a prior DUI second
18 degree murder.

19 Petitioner’s argument focuses on the seriousness of the prior crimes without considering
20 these penalties imposed on each. The Equal Protection Clause “permits qualitative differences in
21 meting out punishment and there is no requirement that two persons convicted of the same
22 offense receive identical sentences.” Williams v. Illinois, 399 U.S. 235, 243 (1970). Further, the
23 statutory scheme may consider “past life and habits of a particular offender” in sentencing. Id.
24 (citing Williams v. New York, 337 U.S. 241, 247 (1949)). The state court’s holding that
25 petitioner was not similarly situated to those with prior more serious crimes is supported by these
26 general principles. Petitioner has not presented, and this court cannot find, any clearly established
27 federal law to the contrary.

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1 **III. Claim Four – Eighth Amendment**

2 In his fourth claim, petitioner argues his Three Strikes sentence for a misdemeanor DUI
3 violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

4 **A. Legal Standards**

5 The Eighth Amendment forbids “cruel and unusual punishments.” Petitioner appears to
6 be relying on the Eighth Amendment’s “narrow proportionality principle” that applies to
7 noncapital sentences. Ewing v. California, 538 U.S. 11, 20 (2003) (internal quotations and
8 citations omitted). The Eighth Amendment “prohibits . . . sentences that are disproportionate to
9 the crime committed.” Id. at 22 (quoting Solem v. Helm, 463 U.S. 277, 284 (1983)). The
10 Supreme Court set out three factors that “may be relevant” to a determination that a sentence is
11 unconstitutionally disproportionate: “(i) the gravity of the offense and the harshness of the
12 penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the
13 sentences imposed for commission of the same crime in other jurisdictions.” Id. (quoting Solem,
14 463 U.S. at 292.) The Supreme Court has cautioned that “federal courts should be ‘reluctan[t] to
15 review legislatively mandated terms of imprisonment,’ and that ‘successful challenges to the
16 proportionality of particular sentences’ should be ‘exceedingly rare.’” Hutto v. Davis, 454 U.S.
17 370, 374 (1982) (quoting Rummel v. Estelle, 445 U.S. 263, 274, 272 (1980)).

18 **B. State Court Decision**

19 Punishing a lesser included offense more severely than the greater
20 offense is unusual punishment under the state Constitution. (People
21 v. Schueren (1973) 10 Cal.3d 553, 560–561, 111 Cal.Rptr. 129, 516
22 P.2d 833.) This principle, however, does not help defendant for two
23 reasons: (1) DUI manslaughter is not a lesser included offense of a
Watson murder (People v. Sanchez, supra, 24 Cal.4th at pp. 990–
992, 103 Cal.Rptr.2d 698, 16 P.3d 118) and (2) a Watson murder
carries a more severe sentence, along with lifetime parole, which
could be violated for committing a misdemeanor DUI.

24 Doyle, 220 Cal. App. 4th at 1268.

25 **C. Analysis**

26 In state court, petitioner focused on the state law argument. The California constitution
27 bars a punishment that is cruel or unusual. (See Pet. for Rev. (LD 5) at 33-35.) The state court
28 expressly addressed only the state constitutional ground for this claim. As discussed above,

1 where the state court decision does not explicitly address the federal claim, this court “must
2 determine what arguments or theories . . . could have supported, the state court's” rejection of the
3 claim “and then it must ask whether it is possible fairminded jurists could disagree that those
4 arguments or theories are inconsistent with the holding in a prior decision of th[e] [Supreme]
5 Court.” Richter, 562 U.S. at 102.

6 Under federal law, petitioner’s bears a heavy burden to show his sentence is
7 disproportionate. Plaintiff’s limited argument about the length of his sentence for a misdemeanor
8 ignores both the fact that he plead to a felony DUI and his criminal history. This court is required
9 to compare the harshness of his penalty with the gravity of not only his triggering offense but of
10 his criminal history. Ewing, 538 U.S. at 28-29; Norris v. Morgan, 622 F.3d 1276, 1290 (9th Cir.
11 2010).

12 Petitioner was convicted of a felony and sentenced to a legislatively mandated term of
13 imprisonment. Petitioner has failed to demonstrate that his sentence constitutes an extraordinary
14 case for which the disproportionality principle reserves a constitutional violation. See Rummel,
15 445 U.S. at 274 (“[O]ne could argue without fear of contradiction by any decision of this Court
16 that for crimes concededly classified and classifiable as felonies, that is, as punishable by
17 significant terms of imprisonment in a state penitentiary, the length of the sentence actually
18 imposed is purely a matter of legislative prerogative.”).

19 In fact, the United States Supreme Court has upheld challenges to Three Strikes sentences for
20 convictions less serious than the DUI conviction petitioner faced. In both Lockyer v. Andrade,
21 538 U.S. 63, 75 (2003) and Ewing v. California, 538 U.S. 11, 29 (2003), the Court considered
22 Three Strikes sentences for wobbler convictions like petitioner’s – misdemeanor crimes that
23 could be charged as a felony based on a prior crime. In Andrade, the Court held that it was not an
24 unreasonable application of clearly established federal law for the California Court of Appeal to
25 affirm Three Strikes sentences of two consecutive 25 years-to-life imprisonment terms for two
26 convictions for petty theft of less than \$200 worth of videotapes each, with prior conviction. In
27 Ewing, the Court held that a Three Strikes sentence of 25 years to life in prison imposed on a
28 conviction for theft of three golf clubs with a prior conviction was not grossly disproportionate

1 and did not violate the Eighth Amendment. See also Nunes v. Ramirez–Palmer, 485 F.3d 432,
2 439 (9th Cir. 2007) (sentence of 25 years to life for crime of petty theft with a prior did not offend
3 the Constitution where petitioner had extensive and serious felony record); Taylor v. Lewis, 460
4 F.3d 1093, 1101–02 (9th Cir. 2006) (no Eighth Amendment violation where petitioner with prior
5 offenses involving violence was sentenced to 25 years to life for possession of. 036 grams of
6 cocaine base); Rios v. Garcia, 390 F.3d 1082, 1086 (9th Cir. 2004) (sentence of 25 years to life
7 for offense of petty theft with a prior imposed on petitioner with two prior robbery convictions
8 was not objectively unreasonable).

9 By comparison, petitioner’s Three Strikes sentence for a second DUI after DUI manslaughter,
10 with prior crimes of spousal abuse and assault with a deadly weapon, does not lead to an
11 inference of gross disproportionality and therefore does not amount to cruel and unusual
12 punishment under the Eighth Amendment.

13 **IV. Claim Five – Double Jeopardy**

14 In his final claim, petitioner argues that the use of his prior DUI manslaughter conviction
15 both to elevate his DUI to a felony and to count for sentencing purposes violates the Double
16 Jeopardy Clause by punishing him a second time for his DUI manslaughter conviction. This
17 claim is unsupported by any clearly established federal law.

18 The United States Supreme Court has “repeatedly upheld recidivism statutes ‘against
19 contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto
20 laws, cruel and unusual punishment, due process, equal protection, and privileges and
21 immunities.’” Parke v. Raley, 506 U.S. 20, 27 (1992) (quoting Spencer v. Texas, 385 U.S. 554,
22 560 (1967)). “Enhancement statutes, whether in the nature of criminal history provisions such as
23 those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in
24 state criminal laws, do not change the penalty imposed for the earlier conviction.” Nichols v.
25 United States, 511 U.S. 738, 747 (1994).

26 In repeatedly upholding such recidivism statutes, [the Supreme
27 Court has] rejected double jeopardy challenges because the
28 enhanced punishment imposed for the later offense “is not to be
viewed as either a new jeopardy or additional penalty for the earlier
crimes,” but instead as “a stiffened penalty for the latest crime,

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which is considered to be an aggravated offense because a repetitive one.”

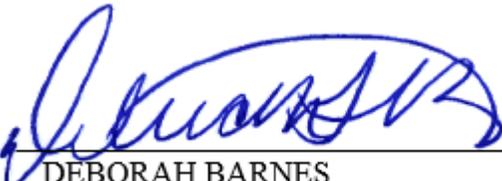
Witte v. United States, 515 U.S. 389, 400 (1995) (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)). Petitioner’s Double Jeopardy claim should be denied.

CONCLUSION

For the reasons set forth above, IT IS HEREBY RECOMMENDED that petitioner’s application for a writ of habeas corpus under 28 U.S.C. § 2254 be denied.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen 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. The document should be captioned “Objections to Magistrate Judge's Findings and Recommendations.” Any response to the objections shall be filed and served within seven days after service of the objections. The parties are advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In the objections, the party may address whether a certificate of appealability should issue in the event an appeal of the judgment in this case is filed. See Rule 11, Rules Governing § 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

Dated: March 30, 2018


DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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