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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

WILLIE E. BENNETT,	)	Civil No. 08-1877-LAB(LSP)
	)	
Petitioner,	)	REPORT AND RECOMMENDATION
	)	DENYING PETITION FOR WRIT
v.	)	OF HABEAS CORPUS
	)	
MICHAEL A. SMELOSKY, Warden,	)	
	)	
Respondent.	)	

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On October 4, 2008, Petitioner Willie E. Bennett ("Petitioner") filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Respondent Michael A. Smelosky ("Respondent") filed an Answer to the Petition. Petitioner did not file a Traverse to Respondent's Answer.

The Court, having reviewed the Petition, Answer, and the documents lodged therewith, finds that Petitioner is not entitled to the relief requested and RECOMMENDS that the Petition for Writ of Habeas Corpus be DENIED.

1. Factual and Procedural Background

Petitioner was charged in three separate cases for various narcotics and other offenses. The California Court of Appeal found

1 the following facts:

2 a. San Diego Superior Court Case No. SCD 195533

3 On December 11, 2005, the police stopped Petitioner for a  
4 seatbelt violation. The police found several pieces of cocaine in  
5 the driver's seat of Petitioner's car, over \$1,000 mainly in one  
6 dollar bills in Petitioner's pocket and 2.64 grams of cocaine in his  
7 shoe.

8 b. San Diego Superior Court Case No. 195273<sup>1</sup>

9 On November 24, 2005, the police received an anonymous tip  
10 that Petitioner was armed and selling drugs near 11<sup>th</sup> and G Streets  
11 in the east village area of downtown San Diego. The tipster  
12 provided the police with a physical description of Petitioner and of  
13 his vehicle, including its license plate. Department of Motor  
14 Vehicles records indicated that the vehicle, a gold four-door Nissan  
15 Maxima, was registered to Petitioner.

16 Officer Matthew Botkin ("Botkin") spoke to two drug users who  
17 told him that they had recently purchased drugs from a person named  
18 "Blue" in the east village area. Both gave a physical description  
19 of the seller, which matched Petitioner's description. One drug user  
20 stated that the seller drove a gold four-door car.

21 On November 29, 2005, Botkin saw Petitioner in his car parked  
22 westbound on a street in the east village area. There was another  
23 person in the car. Botkin drove by and then turned around to watch  
24 Petitioner. Botkin saw the passenger walking away from the car in  
25 an eastbound direction, while Petitioner started to drive away.  
26 Botkin suspected Petitioner had just sold drugs to the passenger,  
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<sup>1</sup> The Court of Appeal noted that some of the facts for this case were taken from Petitioner's Motion to Suppress Evidence.

1 although it was possible that Petitioner was just dropping off the  
2 passenger.

3 Botkin stopped Petitioner's car and asked for Petitioner's  
4 license and registration. Petitioner's hands were shaking and he  
5 seemed nervous as he handed the license and registration to Botkin.  
6 Botkin asked Petitioner to step out of the car. He wanted to  
7 evaluate Petitioner to see if Petitioner was under the influence and  
8 to conduct a pat down search for weapons. At that time, Botkin knew  
9 that drug dealers are often armed, Petitioner had been convicted of  
10 violent crimes, and he had information that Petitioner was armed.

11 When Botkin attempted to conduct a pat down search, Peti-  
12 tioner resisted. After Petitioner was subdued, the police found a  
13 small piece of rock cocaine in plain view inside the car and another  
14 small piece of rock cocaine where Petitioner had been standing  
15 outside the car. Petitioner had several more pieces of rock cocaine  
16 on his person and a large amount of currency in his wallet. The  
17 police recovered about 2.53 grams of rock cocaine from the vehicle.

18 San Diego Superior Court Case No. SCD198289

19 On April 13, 2006, the police stopped Petitioner because his  
20 vehicle had an inoperable brake light. He was arrested for driving  
21 with a suspended license. The police found .05 gram of rock cocaine  
22 in the vehicle. Petitioner admitted to the police that he was out of  
23 jail on bail on another drug offense.

24 On April 17, 2006, the police detained Petitioner because it  
25 appeared he was selling drugs. When police attempted to handcuff  
26 him, he fled. He dropped a baggie containing 4.46 grams of cocaine.  
27 When the police caught Petitioner, they found .28 gram of cocaine in  
28 his pocket and a loaded gun in the trunk (of his car).

1 (Respondent's Lodgment No. 5 at 2-4)

2 On September 13, 2006, Petitioner entered consolidated guilty  
3 pleas in the above-noted cases. He plead guilty to the following  
4 crimes: three counts of possession of cocaine base for purposes of  
5 sale, sale and transportation of cocaine base, resisting an officer,  
6 and possession of a firearm by a felon. (Respondent's Lodgment No.  
7 1, Vol. 2 at 312, 391) Petitioner also admitted several sentence  
8 enhancements including being on bail while committing some of the  
9 offenses, prior narcotics crimes and two prior convictions for  
10 serious or violent felonies, within the meaning of the Three Strikes  
11 Law. (Respondent's Lodgment No. 5 at 1-2)

12 Prior to entering the consolidated guilty pleas, Petitioner  
13 filed a Motion to Suppress the Evidence seized in his November 2005  
14 arrest. (Respondent's Lodgment No. 1 at 196) After a hearing was  
15 held on the Motion, the Motion was denied. (Respondent's Lodgment  
16 No. 2 at 1,8, 49)

17 When Petitioner plead guilty to the above-noted charges, he  
18 waived his right to appeal the denial of his Motion to Suppress.  
19 (Respondent's Lodgment No. 5 at 4)

20 The Court imposed an aggregate determinate sentence of twelve  
21 years imprisonment. (Respondent's Lodgment No. 1, Vol. 1 at 129)

22 Petitioner appealed the judgment, but his appointed counsel  
23 filed a no-issue brief pursuant to People v. Wende 25 Cal. 3d 436  
24 (1979) and Anders v. California 386 U.S. 738 (1967) (Respondent's  
25 Lodgment No. 3) The Court of Appeal invited Petitioner to file a  
26 personal supplemental brief, which he did. (Respondent's Lodgment  
27 No. 4) The supplemental brief argued that the trial court erred in  
28 denying his Motion to Suppress. On April 4, 2008, the Court of

1 Appeal denied Petitioner's appeal. (Respondent's Lodgment No. 5) The  
2 Court of Appeal noted that Petitioner's plea agreement specifically  
3 waived any right to appeal the denial of the Motion to Suppress.  
4 The Court also found that the Motion to Suppress was correctly  
5 decided and that Petitioner's Fourth Amendments rights were not  
6 violated.

7 Petitioner filed a Petition for Review with the California  
8 Supreme Court. On June 18, 2008, the Petition was denied without  
9 comment. (Respondent's Lodgment No. 6)

10 On October 14, 2008, Petitioner filed the Petition for Writ  
11 of Habeas Corpus that is now pending before this Court. The  
12 Petition raises the following claims: The police's stop, search and  
13 seizure in his November 2005 arrest was in violation of his Fourth  
14 Amendment rights. Therefore the court should have suppressed any  
15 evidence found during that arrest. These claims are the same as  
16 those presented in the Motion to Suppress and to the Court of  
17 Appeal.

18 2. Petitioner's Fourth Amendment Claims Are Not Cognizable on  
19 Federal Habeas Corpus Review

20 Petitioner claims that the Superior and Appellate courts  
21 erred in denying his Motion to Suppress and his appeal of that  
22 denial. Respondent argues that Petitioner's claims are not  
23 cognizable in federal habeas corpus review because Petitioner had  
24 the opportunity to litigate his Fourth Amendment claims pursuant to  
25 Cal Penal Code §1538.5.

26 "[W]here the state has provided an opportunity for full and  
27 fair litigation of a Fourth Amendment claim, a state prisoner may  
28 not be granted federal habeas corpus relief on the ground that

1 evidence obtained in an unconstitutional search or seizure was  
2 introduced at his trial." Stone v. Powell, 428 U.S. 465, 494  
3 (1976); Woolery v. Arave, 8 F.3d 1325, 1326 (9th Cir. 1993), cert.  
4 denied, 114 S. Ct. 1623 (1994); Terrovona v. Kincheloe, 912 F.2d  
5 1176, 1177-78 (9th Cir. 1990), cert. denied, 499 U.S. 979 (1991).

6 The relevant inquiry is whether the petitioner had the  
7 opportunity to litigate his claim, not whether the petitioner did in  
8 fact do so, or even whether the claim was correctly decided. Ortiz-  
9 Sandoval v. Gomez 81 F.3d 891, 899 (9<sup>th</sup> Cir. 1996), Stephens v.  
10 Attorney General of California 23 F.3d 248, 249 (9<sup>th</sup> Cir. 1994),  
11 Gordon v. Duran 895 F.2d 610-613-14 (9<sup>th</sup> Cir. 1990) (emphasis added)

12 Under California law, a criminal defendant can litigate his  
13 Fourth Amendment claim under California Penal Code § 1538.5.  
14 California's § 1538.5 procedure provides a full and fair opportunity  
15 for a defendant to litigate his Fourth Amendment claims. Gordon 895  
16 F.2d at 613. Since Petitioner had an opportunity to litigate his  
17 Fourth Amendment claims under §1538.5, he is not entitled to federal  
18 habeas corpus relief.

19 Moreover, the record presented in this case demonstrates that  
20 Petitioner availed himself of the opportunity to litigate his Fourth  
21 Amendment claims. Petitioner filed a Motion to Suppress Evidence,  
22 pursuant to Cal. Penal Code § 1538.5. (Respondent's Lodgment No. 1  
23 at 196) On March 8, 2006, a hearing was held on Petitioner's Motion.  
24 Petitioner's Motion was denied. (Respondent's Lodgment No. 2 at 1,  
25 8, 49) Since Petitioner was not only provided and fair opportunity  
26 to litigate his Fourth Amendment claim, and in fact availed himself  
27 of that opportunity, he is not entitled to habeas corpus relief.  
28 Therefore, the Court RECOMMENDS that Petitioner's claim be DENIED.

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CONCLUSION AND RECOMMENDATION

After a review of the record in this matter, the undersigned Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be DENIED with prejudice.

This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than May 4, 2009, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than May 18, 2009. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 3, 2009

  
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Hon. Leo S. Papas  
U.S. Magistrate Judge