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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD CHARLES BUCHANAN,)	Civil No. 10cv423 BTM (NLS)
)	
Petitioner,	)	ORDER DENYING MOTION FOR
v.	)	DISCOVERY [Docket No. 53]; GRANTING
	)	IN PART AND DENYING IN PART
MATTHEW CATE, Secretary; and	)	MOTION FOR JUDICIAL NOTICE
EDMUND G. BROWN, JR., the Attorney	)	[Docket No. 60]; DENYING MOTION
General of the State of California,	)	FOR SANCTIONS [Docket No. 61];
	)	DENYING MOTION TO COMPEL
Respondents.	)	RESPONDENT TO COMPLY WITH
	)	ORDER [Docket No. 63]; GRANTING
	)	MOTION FOR JUDICIAL NOTICE
	)	[Docket No. 64.] AND REQUIRING
	)	SUPPLEMENTAL LODGMENTS

I. INTRODUCTION

A. Procedural Background

On February 22, 2010, Petitioner Richard Charles Buchanan ("Petitioner"), a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is a California prisoner serving a term of forty-five years to life plus ten years who is challenging his convictions for kidnapping for extortion, assault with a semi-automatic firearm, making a criminal threat, being a felon in possession of a firearm, transportation of a controlled substance, possession of a controlled substance for sale, and possession of a controlled substance. (Lodgmt 7 at 1-2.)

On February 22, 2010, Petitioner filed a Petition for Writ of Habeas Corpus. [Docket No. 1.] On December 9, 2010, Petitioner filed the First Amended Petition ("FAP"), the active pleading in this case. [Docket No. 40.] On the same day, Petitioner moved to have exhibits from his original Petition

1 attached to the FAP and that motion was granted on December 14, 2010. [Docket No. 43.] On March 9,
2 2011, Respondent filed an Answer to the FAP.¹ [Docket No. 51.] On March 24, 2011, Petitioner filed a
3 Motion for Discovery [Docket No. 53.] On or about April 28, 2011, Petitioner filed a motion for
4 Judicial Notice [Docket No. 60], a Motion for Sanctions [Docket No. 61], and a Motion to Compel
5 Respondent to Comply with Order [Docket No. 63.] On May 9, 2011, Petitioner filed a Second Motion
6 for Judicial Notice. The Court will address each of these motions in turn.

7 **B. Grounds Asserted in the FAP**

8 Petitioner asserts 11 claims in his petition: (1) the prosecutor used perjured testimony to obtain
9 the conviction, in violation of Petitioner's rights to a fair trial and due process; (2) there was no probable
10 cause or reasonable suspicion of criminal activity to support the detention of Petitioner's vehicle, in
11 violation of Petitioner's right to be free of unreasonable searches and seizures; (3) the conviction was
12 based on false wiretap evidence; (4) the state failed to disclose "Brady" evidence that it had in its
13 possession; (5) judicial bias contributed to Petitioner's conviction, denying him of his due process and
14 fair trial rights; (6) the excessive security imposed on Petitioner at trial was not reasonably necessary;
15 (7) the conviction was obtained based on prosecutorial misconduct; (8) the scope of the expert gang
16 evidence and expert opinion admitted was prejudicially erroneous, and/or defense counsel was
17 ineffective in failing to object to the scope of the expert testimony; (9) counsel was ineffective based on
18 a number of acts and omissions that deprived Petitioner of his sixth amendment right to counsel and
19 right to a fair trial; (10) Appellate Counsel was ineffective for failing to raise Grounds 1-7 and 11 on
20 direct appeal; and (11) the sentencing court exceeded its authority in imposing \$10,000 fine of
21 restitution. First Amended Pet'n at 6-9.²

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25 ¹Petitioner named Edmund G Brown, Jr, former Attorney General of the State of California and
26 Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, as
27 Respondents. In the Answer, submitted on behalf of Mr. Cate, Respondent claims that Mr. Brown is not
28 a proper Respondent because he is the former Attorney General and because the Attorney General is
only a proper respondent if the petitioner is not yet in custody, and may be subject to future custody.
Even though Mr. Brown remains a Respondent at this time, for convenience the Court will use the term
"Respondent."

²The First Amended Petition contains eight pages numbered "9 (1 of 8)", "9 (2 of 8)" etc.

1 **C. Factual Background**

2 In July of 2004, a cooperating witness with the FBI gave Petitioner, a validated member or "Big
3 Homie" of the Mexican Mafia, a cell phone with a wiretap in it. (California Court of Appeals Order
4 Denial of Habeas Petition, Lodgement 7 at 3.) Rodney Brooks, an associate of the Mexican Mafia
5 incarcerated at Donovan, was also given a cell phone with a wiretap in it. (*Id.*) Jessica Chavez was a
6 correctional officer at Donovan State Prison ("Donovan") (*Id.* at 4.) Ernesto "Triste" Torres was an
7 inmate at Donovan. (*Id.*) After Torres was released in May of 2004, he began a sexual relationship
8 with Jessica Chavez. (*Id.*) After the relationship soured, Petitioner and Brooks were recorded on phone
9 conversations directing Torres to stop contacting Chavez because she was the connection to doing
10 business at Donovan. (*Id.* at 5.) Because of the threats recorded against Torres, the police set up
11 surveillance of Chavez's residence and were aware that Torres was in a car with Petitioner and another
12 associate, Parraz. (Lodgement 27 at 74-77.) Officer McGivor of the San Diego County Violent Crimes
13 Task Force contacted Officer Javier Nunez, who was in a marked patrol unit, and asked him to stop the
14 vehicle because they were afraid that Petitioner would kill Torres. (Lodgment 7 at 7, Lodgment 27 at
15 34-36). Officer Nunez stopped the car. In order to avoid revealing the existence of the wiretap to
16 Petitioner, Officer Nunez told Petitioner that the car had been stopped due to their belief that a parolee at
17 large was in the vehicle. (Lodgment 27 at 35.)

18 At the original criminal trial, Petitioner moved to suppress all evidence arising out of the traffic
19 stop, arguing that the police had no reasonable suspicion to stop the car. (Lodgment 27 at 124-25.)
20 Officers Nunez and McGivor testified at the hearing. (Lodgement 27 at 32-122.) The Court found that
21 the evidence collected from the wiretaps provided sufficient probable cause to stop the car and denied
22 the Motion to Suppress. (*Id.* at 128-130.)

23 **II. DISCUSSION**

24 **A. First Motion For Judicial Notice**

25 On April 28, 2011, Petitioner filed a Motion for Judicial Notice asking the Court to take judicial
26 notice of three facts: 1) two differently paginated sets of Official Court Reporter's Transcript exist for
27 his trial, Case Number SCS187166 (the "Transcript"); 2) Petitioner had previously raised the
28 possibility of multiple versions of the Transcript; and 3) Respondent did not notify the Court of the

1 existence of the discrepancy.

2 Federal Rule of Evidence 201 allows a court to take judicial notice of a fact “not subject to
3 reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial
4 court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
5 reasonably be questioned.” Fed. R. Evid. 201(b). Additionally, a “ court shall take judicial notice if
6 requested by a party and supplied with the necessary information. Fed. R. Evid. 201(c). Judicial notice,
7 however, is inappropriate where the facts to be noticed are irrelevant. *Ruiz v. City of Santa Maria*, 160
8 F.3d 543, 548 n. 13 (9th Cir.1998); *Turnacliff v. Westly*, 546 F.3d 1113, 1120 n. 4 (9th Cir. 2008.)

9 Petitioner asks the Court to take judicial notice of the fact that he has in his possession an
10 Official Court Reporter's Transcript in Case Number 187166 that is paginated differently from the
11 Official Court Reporter's Transcript found at Lodgement Numbers 25-36. Petitioner explains that he
12 received his copy of the Transcript "piecemeal" from Rodney Brooks, a co-defendant who was severed
13 from the case prior to trial. (Decl. ISO Mtn for Judicial Notice at ¶ 4.) On March 30, 2011, Petitioner
14 filed a Motion for Order to Provide Petitioner Copy of Respondents' Lodgment Items 21-36. [Docket
15 No. 54.] On April 5, 2011, the Court granted Petitioner's motion and ordered Respondent to serve the
16 lodgement items and file a proof of service. [Docket No. 55.] On April 8, 2011, Respondent filed a
17 proof of service confirming the delivery of the lodgment items to Petitioner. [Docket No. 56.]
18 Petitioner admits receiving the Lodgment items on April 5, 2011. (Decl. ISO Mtn for Judicial Notice ¶
19 14.)

20 A review of the evidence verifies that Petitioner does possess a copy of the Transcript that is
21 paginated differently from Lodgments 25-36. The Court has compared Exhibit 4 of the FAP with
22 Lodgment 27 and finds that the pagination is indeed different despite the fact that both documents are
23 entitled "Reporter's Transcript" for February 28, 2006. There are, however, some differences.
24 Lodgement 27 has an additional cover page entitled "Reporter's Transcript on Appeal; February 28,
25 2006; Volume 3 Pages 30-195 (196-211 Sealed.)" The next page in Lodgment 27, also a cover page,
26 contains the notation "Volume 3" and the testimony starts on page 30. In Exhibit 4, there is no reference

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1 to a volume 3 and the testimony begins on page 1."³ The reason for this difference appears to be that
2 the copy that Petitioner obtained from Mr. Brooks contains only those transcripts which concern Mr.
3 Brooks whereas Lodgments 25-36 contain all transcripts relating to Petitioner. For example, Lodgments
4 25 and 26 (transcript pages 1-29) did not involve Mr. Brooks and may have been excluded in the
5 Official Reporter's Transcript prepared for Mr. Brooks. This would explain why the Brooks version of
6 the transcript starts at page 1 on February 28, 2006 whereas Lodgement 27 is volume 3 and starts at
7 page 30. Thus, the fact that the Brooks set of the Reporter's Transcript is paginated differently than the
8 Lodgments 25-36 in this case is capable of accurate and ready determination by resort to the official
9 documents on file in this case. Similarly, a review of the FAP reveals that Petitioner did raise the
10 possibility of conflicting transcripts at page 9 (6 of 8) in relation to Ground 9. Petitioner asserted that
11 his appellate counsel cited to the wrong pages of the Transcript. Moreover, this fact may be relevant to
12 explain why Petitioner's citations to evidence have been inaccurate prior to his receiving the correct
13 Reporters Transcript for his case.

14 Accordingly, the Court Grants in Part Petitioner's Motion to take judicial notice as to the fact
15 that two transcripts exist (one for Mr. Brooks and one for Petitioner) and the fact that Petitioner had
16 raised this possibility previously in this case. The Court Denies the motion as to the fact that
17 Respondent failed to notify the court as of the discrepancy. The Court is aware of no duty on the part of
18 Respondent to investigate the reasons for Petitioner's incorrect citation of evidence and finds this fact is
19 not relevant to any issue in the Petition.

20 **B. Second Motion For Judicial Notice**

21 On May 9, 2011, Petitioner filed a Motion for Judicial Notice of Written Error. [Docket No. 64.]
22 On April 29, 2011, Petitioner filed a Motion to Compel [Docket No. 63.] On page 14 of the Motion to
23 Compel, Petitioner wrote on the first line "NOTED AT #2 of Page Two of Motion." Petitioner intended
24 to write "NOTED AT # 2 of Page Three of the Motion. The fact that Petitioner wrote the wrong number
25 in his motion is not suitable for Judicial Notice because it is neither generally known nor capable of
26 accurate and ready determination. Accordingly, the Motion for Judicial Notice is DENIED. The Court,
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28 ³The copy lodged with the court actually starts on page 2, which corresponds to page 31 of
Lodgment 27.

1 however, has no reason to doubt that an error in writing occurred and hereby Orders the Clerk of Court
2 to substitute corrected page 14 as attached to Docket Number 64 for the original page 14 in the Motion
3 to Compel [Docket No. 63.]

4 **C. Motion to Compel Respondent to Comply with Order**

5 On April 29, 2011, Petitioner filed a Motion to Compel Respondent to Comply with Order to
6 Provide All Records. [Docket No. 63.] Petitioner claims that Respondent has failed to comply with this
7 Court's Order dated September 15, 2010 entitled "Order Requiring Response to Petition" [Docket No.
8 29.] The Order required: "At the time the answer is filed, Respondent shall lodge with the Court all
9 records bearing on the merits of Petitioner's claims." Petitioner asserts that Respondent did not comply
10 with this directive because it did not lodge: 1) wiretap or other evidence that supports Detective
11 McGivor's testimony at the original criminal trial (which Petitioner claims was false); 2) Records
12 relating to the two Marsden⁴ motion hearings on February 28, 2006 and March 24, 2006; and 3) The
13 Clerk's transcript in the prosecution of severed co-defendant Rodney Brooks.

14 1. Requirement to Lodge Records is Limited

15 The Court ordered Respondent to respond to the Habeas Petition and to "lodge with the Court all
16 records bearing on the merits of Petitioner's claims." This requirement is based on Rule 5 of the Rules
17 Governing Habeas Petitions, which states: "The respondent must attach to the answer parts of the
18 transcript that the respondent considers relevant." Rules Governing § 2254 Cases, Rule 5(c), 28
19 U.S.C.A. foll. § 2254. Rule 5(d) requires the respondent to lodge briefs and orders of the appellate
20 courts relating to the conviction or sentence. Accordingly, "Records" in this context means official
21 transcripts which the **Respondent** considers relevant as well as briefs, and opinions filed with the court
22 as part of Petitioner's trial and appeals. "Records" does not mean any evidence that Petitioner believes
23 may be relevant to his case. Accordingly, evidence supporting testimony given at the original trial does
24 not fall within the Court's Order. Similarly, the transcript of another criminal proceeding does not fall
25 within the court's order.

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27 ⁴A Marsden hearing is a state court proceeding in which a criminal defendant with appointed
28 counsel argues that the attorney appointed not providing adequate representation and requests the
appointment of new counsel. *People v. Marsden*, 2 Cal.3d 118 (1970).

1 While the Marsden transcripts may be relevant, Respondent cannot be faulted for failing to lodge
2 the transcripts because a Marsden hearing transcript "must be kept confidential." Rule 8.328(b)(1) of
3 the California Rules of Court. The state must have a court order to obtain a copy. Rule 8.328 (b)(6). At
4 this time, the Court is aware of no evidence that indicates Respondent is in possession of the sealed
5 Marsden Transcripts. Accordingly, Respondent in no way failed to comply with the court's order to
6 lodge records.

7 2. Marsden Hearing Transcripts Should Be Lodged

8 In light of Petitioner's *pro se* status, the court will construe this part of the motion to be a request
9 for Discovery. Petitioner raises as Ground 9 in his Petition Ineffective Assistance of his trial counsel.
10 Accordingly, the Marsden transcripts might be relevant to the Petition. Under Rule 5(c) "The judge may
11 order that the respondent furnish other parts of existing transcripts or that parts of untranscribed
12 recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a
13 narrative summary of the evidence."

14 Having considered Petitioner's request for additional transcripts, the Court finds that the Marsden
15 hearing transcripts may be relevant and orders Respondent to Lodge the transcripts with the court no
16 later than 2 weeks after the filing date of this Order. If the transcripts cannot be lodged, Respondent
17 shall file a declaration under penalty of perjury explaining the efforts made to locate the transcripts and
18 that the efforts were unsuccessful.

19 3. Respondent's Answer Is Sufficient

20 Petitioner asks this Court to Order the Respondent to refer to the exhibits attached to the FAP.
21 On December 13, 2010, the Court granted Petitioner's motion to attach exhibits filed with his prior
22 Petition to the FAP. [Docket No. 43.] Petitioner contends that Respondent has failed to consider the
23 exhibits ordered attached by the Court. The only example cited, however, is that Respondent asserts
24 that there is no Exhibit 6, which Petitioner calls "TAC 3." (Answer at 9 n.3.) In the Answer,
25 Respondent points out that the transcript of TAC 3 is attached as Exhibit 3 to Lodgment 19, Petitioner's
26 Reply to Respondent's answer in the State Appellate Court Habeas Petition. Respondent then argues
27 that the TAC 3 does not support Petitioner's case. Accordingly, Petitioner has pointed to no examples
28 where Respondent has failed to address relevant exhibits and the Court declines to Order the

1 Respondent to respond to unidentified exhibits in the FAP.

2 4. The Lodgment May Need Supplementation

3 In the Answer, Respondent asserts that Petitioner failed to include Exhibit 6. Petitioner is
4 referring to Exhibit 6 to Attachment F from Lodgment 12, Petitioner's State Appellate Habeas Petition,
5 which the Court ordered attached to the FAP. The index to Attachment F indicates there are 24 exhibits
6 and that exhibit 6 is the "TAC 3" transcript. The copy lodged with the Court only contains 5
7 attachments and appears to contain only part of Exhibit 5. Thus, it appears that the record from the
8 State Appellate Habeas Petition may be incomplete. As it is Respondent's duty to lodge complete
9 Transcripts and Exhibits from the state habeas proceedings, Respondent is ORDERED to lodge a
10 complete copy of Lodgment Number 12 or submit a declaration explaining why it is not possible to
11 obtain and lodge a complete copy.

12 5. Miscellaneous Requests in the Motion

13 Petitioner also asks this Court to require Respondent to acquire the Reporter's Transcript that he
14 has mistakenly used in preparing his habeas petition; to provide this Court and the Petitioner with a
15 copy; and to require Respondent and the Court to use this wrong copy in all further proceedings. The
16 Court declines to order everyone to use the wrong transcript. Respondent has lodged the correct
17 Reporter's Transcript with this court and served the correct Reporter's Transcript on Petitioner.
18 Petitioner is entitled to no more.

19 Petitioner also asks this court to force Respondent to lodge a copy of the transcript of Petitioner's
20 Preliminary Examination Hearing. The transcript of the Preliminary Examination Hearing is already
21 attached to the FAP as Exhibit 3 and contained within Lodgment 12. Accordingly, Petitioner's Request
22 is Denied.

23 Petitioner also asks the Court to have Respondent recognize various statements in the FAP as
24 being signed under penalty of perjury. As Petitioner points out, the FAP is signed under penalty of
25 perjury. The Court is not aware of Respondent issuing any challenge to the declaration that the FAP is
26 signed under penalty of perjury. Accordingly, the request is DENIED.

27 Finally, Petitioner asks the Court to require Respondent to acquire a copy of any existing audio
28 records of any proceeding in this case. Petitioner is seeking an audiotape of the suppression hearing on

1 February 28, 2006. The transcript of this hearing is Lodgement 27. Petitioner claims to need the
2 audiotapes to prove that the trial judge, before going on the record after a lunch break, stated: "Well, it's
3 obvious to me that no kidnapping occurred." Petitioner claims to need the tapes because this alleged
4 statement is not part of the transcript. As described above, the Order requiring lodging of records did
5 not include hypothetical audio tapes. Even construing this request as a request for discovery, the court
6 can perceive no relevance to the alleged statement. Even assuming that the statement was made, it is not
7 probative of any issue in this case and the request is Denied.

8 **D. Motion for Sanctions**

9 On April 28, 2011, Petitioner filed a Motion for Sanctions [Docket No. 61.] Petitioner asks the
10 Court to sanction Respondent for failing to comply with the Order Requiring Response to Habeas
11 Petition. [Docket No. 29.] Petitioner seeks sanctions under Civil Local Rule 83.1, which provides:

12 Failure of counsel or of any party to comply with these rules, with the Federal Rules of
13 Civil or Criminal Procedure, or with any order of the court may be ground for imposition
14 by the court of any and all sanctions authorized by statute or rule or within the inherent
15 power of the court, including, without limitation, dismissal of any actions, entry of
16 default, finding of contempt, imposition of monetary sanctions or attorneys' fees and
17 costs, and other lesser sanctions.

18 Civ. L.R. 83.1(a). As discussed above, Respondent did not fail to comply with any court order.
19 Accordingly, no sanctions can be imposed under Civil Local Rule 83.1.

20 Petitioner also seeks sanctions under Rule 11 of the Federal Rules of Civil Procedure. "Rule 11
21 imposes a duty on attorneys to certify by their signature that (1) they have read the pleadings or motions
22 they file and (2) the pleading or motion is 'well-grounded in fact,' has a colorable basis in law, and is
23 not filed for an improper purpose." *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir.1994). "Rule 11 is
24 governed by an objective standard of reasonableness. *See, e.g., Conn v. CSO Borjorquez*, 967 F.2d
25 1418, 1420 (9th Cir.1992); *see also Schutts v. Bently Nevada Corp.*, 966 F. Supp. 1549, 1562 (D.
26 Nev.1997) ("[t]he issue in determining whether to impose sanctions under Rule 11 is whether a
27 reasonable attorney, having conducted an objectively reasonable inquiry into the facts and law, would
28 have concluded that the offending paper was well-founded."), *citing In re Keegan Management Co. Sec.*
Litig., 78 F.3d 431, 434 (9th Cir.1996).

Moreover, Rule 11 requires a "safe-harbor" period and a motion for sanctions may not be filed

1 with the court until after it has been served on the opposing party who must then be given 21 days from
2 service of the motion within which to correct the defect. Fed R. Civ. P. 11(c)(2). The safe-harbor
3 period is mandatory. *Truesdell v. Southern California Permanente Medical Group*, 293 F.3d 1146,
4 1152 (9th Cir. 2002). In this case, there is no evidence that Petitioner complied with this mandatory
5 requirement.

6 Moreover, even if this requirement were met, Petitioner has not made any showing that sanctions
7 are warranted. Petitioner asks this Court to sanction Respondent for lodging the correct Reporter's
8 Transcript instead of the Reporter's Transcript that was prepared for Mr. Brooks. There can be no
9 sanction for filing the correct transcript. Petitioner also appears to be asserting that Respondent should
10 be sanctioned for failing to inform the Court and the Petitioner that it filed the correct transcript instead
11 of the incorrect transcript that had been used by Petitioner. Respondent is under no duty to investigate
12 Petitioner's failure to cite correct page numbers of the transcript and there is no evidence to suggest that
13 Respondent had knowledge that Petitioner had an incorrectly paginated version of the Reporter's
14 Transcript. Moreover, even if Respondent knew that Petitioner had an incorrect copy of the Reporter's
15 Transcript, it cannot be sanctioned for failing to inform the Petitioner or the Court of Petitioner's mistake
16 because there is no false pleading or pleading filed for an improper purpose.

17 Similarly, Petitioner seeks Rule 11 sanctions for Respondent's failure to file the transcripts from
18 the suppression hearing, the two Marsden hearings, Transcripts from the proceedings involving only Mr.
19 Brooks, and other, undefined, records. Petitioner appears to be aggrieved that Respondent lodged only
20 the Clerk's and Reporter's Transcripts of his own case. In fact, Respondent also lodged all briefs and
21 opinions from the direct and collateral appeals that preceded this federal habeas case, including the
22 transcript of the suppression hearing (Lodgement 27). As discussed above, the Respondent was only
23 responsible for filing official records that it believed were relevant. Respondent has done so and no
24 sanctions are appropriate.

25 Finally, Petitioner asserts that Rule 11 sanctions are warranted for Respondent's failure to
26 address the evidence in the exhibits to the FAP. As discussed above, Petitioner provides no examples
27 other than footnote 3 at page 9 of the Answer where Respondent does address the exhibit cited by
28 Petitioner. Accordingly, no sanctions are warranted.

1 **E. Motion for Preliminary Discovery**

2 Petitioner moves for the following discovery related to Mr. Torres, the victim in the kidnaping
3 charge for which Petitioner was convicted: 1) information about the existence of a wiretap on Ernesto
4 Torres; 2) a copy of an up to date "Parolee Detail Record" for Mr. Torres; and 3) a copy of the records
5 of the Parole Agent assigned to Mr. Torres. (Mtn at 1-3.) Petitioner explains that he is seeking this
6 discovery in order to show that the police had knowledge of the identity and location of Mr. Torres prior
7 to the allegedly illegal stop of Petitioner's vehicle that led to Petitioner's conviction.

8 1. Legal Standard

9 There is no right to discovery in habeas cases. *Bracy v. Bramley*, 520 U.S. 899, 904 (1997);
10 *Bittaker v. Woodford*, 331 F.3d 715., 728 (9th Cir. 2003). In a habeas case, discovery is available “if,
11 and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave
12 to do so, but not otherwise.” Rules Governing Section 2254 Cases in the United States District Courts,
13 Rule 6(a). Petitioner must present specific factual allegations that demonstrate that there is good reason
14 to believe that the Petitioner may, through discovery, be able to gather sufficient evidence to entitle him
15 to relief. *Bracy*, 520 U.S. 908-09. “Before addressing whether petitioner is entitled to discovery under
16 [Rule 6] to support his . . . claim, we must first identify the ‘essential elements’ of that claim.” *Bracy*,
17 520 U.S. at 904, *citing United States v. Armstrong*, 517 U.S. 456, 468 (1996)). However, “[u]nless the
18 petition itself passes scrutiny, there would be no basis to require the state to respond to discovery
19 requests.” *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987).

20 Moreover, “any right to federal discovery presupposes the presentation of an unexhausted
21 federal claim, because a federal habeas petitioner is required to exhaust available state remedies as to
22 each of the grounds raised in the petition.” *Calderon v. U.S. District Court*, 98 F.3d 1102, 1106 (9th
23 Cir. 1996). Additionally, discovery is not available for claims that are procedurally barred. *Sherman v.*
24 *McDaniel*, 333 F.Supp.2d 960, 969-70 (D.Nev. Aug 30, 2004); *see also Rucker v. Norris*, 563 F.3d 766,
25 771 (8th Cir. 2009) (Petitioner denied discovery because no procedurally barred claim can demonstrate
26 good reason to believe entitlement to relief.) Similarly, if a claim is not cognizable under federal habeas
27 law, no discovery is appropriate. *Rahtbun v. Prosper*, 2010 WL 796977 at * 14 (E.D. Cal. March 5,
28 2010); *See also Perez v. Ercole*, 2010 WL 5475649 (E.D.N.Y. Dec. 30, 2010)(finding discovery

1 inappropriate for fourth amendment claim because it is not cognizable on federal habeas)

2 Petitioner does not identify the grounds in his Petition to which he believes the discovery sought
3 is relevant. The Court has reviewed the Petition and concludes that evidence relating to knowledge of
4 the location of Torres prior to the investigatory stop of Petitioner's car is potentially relevant to Ground
5 2, that the traffic stop violated his Fourth Amendment rights. It is also possibly relevant to Ground 4,
6 the alleged failure to turn over exculpatory evidence.

7 2. Ground 2, Violation of Fourth Amendment Rights

8 a. Claim Is Not Cognizable

9 Petitioner's claim for violation of his Fourth Amendment rights "is not cognizable in federal
10 habeas proceedings if a petitioner has had a full and fair opportunity to litigate the claim in state court."
11 *Ortiz-Sandoval v. Gomez*, 81 F.3d 891 (9th Cir. 1996), *citing Stone v. Powell*, 428 U.S. 465, 481-82
12 (1976). Here, it appears that Petitioner had a full and fair opportunity to litigate this claim in state court.
13 Petitioner brought a motion to suppress the evidence and a judge held an evidentiary hearing on the
14 motion. [Lodgement 27 at33- 138.] Thus, there can be no good reason to believe that Petitioner may
15 gather evidence through discovery sufficient to entitle him to relief.

16 b. Claim is Barred by Failure to Raise Claim on Direct Appeal

17 Respondent also opposes the request for discovery on the basis that Ground 2 is procedurally
18 barred because Petitioner failed to raise the issues on direct appeal. *In re Dixon*, 41 Cal.2d 756 (1953).
19 A review of Petitioner's opening brief on direct appeal shows that Petitioner raised issues as to the
20 admittance of expert gang evidence, the admittance of lay testimony on gang involvement, and
21 ineffective assistance of counsel. [Lodgment 1.] The brief contains no allegations that the traffic stop
22 was illegal. Additionally, the FAP shows that Petitioner did not raise these issues on direct appeal. FAP
23 at 7 (stating that grounds were raised in "Petition for Review, Case Number S183603, the case number
24 for the habeas petition to the California Supreme Court.)

25 Because this claim appears to be procedurally barred, Petitioner has failed to demonstrate good
26 reason to believe the discovery is likely to result in evidence showing Petitioner is entitled to relief.

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1 c. Traffic Stop Supported by Independent Ground

2 Even if the Fourth Amendment claim were cognizable, discovery would still be unwarranted.
3 Even assuming Petitioner could prove that the police knew the location of Torres, it would not render
4 the traffic stop illegal. As the trial court found, the evidence from the wiretapped phones led the police
5 to believe that Torres' life was in danger and this belief formed the probable cause necessary to stop the
6 car. [Lodgment 27 at 128-132.] Accordingly, evidence related to whether the asserted justification of
7 looking for a parolee at large was false is not relevant.

8 3. Ground 4 Failure to Turn Over Exculpatory Evidence

9 As discussed above, no good cause can be shown for discovery related to claims that are barred.
10 Also as discussed above, Petitioner did not raise this claim in his direct appeal. (Lodgment 1); *see also*
11 FAP at 9. Accordingly, this claim is barred under *In re Dixon*, 41 Cal.2d 756 (1953) and there can be no
12 good cause for discovery on this ground.

13 Based on a review of the issues raised in the Petition and the answer, as well as the applicable
14 standards of review, there is nothing to indicate that it is necessary for petitioner to obtain the discovery
15 he seeks from Respondent in order to present his case to this Court for review. Therefore, this Court
16 finds that Petitioner's Application must be DENIED because petitioner has not established good cause
17 "to invoke the processes of discovery available under the Federal Rules of Civil Procedure." Rules
18 Governing § 2254 Cases, Rule 6, 28 U.S.C.A. foll. § 2254 (West 2004).

19 **III. CONCLUSION**

20 For the foregoing reasons, It Is hereby Ordered that:

- 21 1. Petitioner's First Motion for Judicial Notice [Docket No. 60] is Granted in Part as
22 to the existence of two differently paginated Official Court Reporter's Transcripts
23 and as to the fact that Petitioner had previously referenced the discrepancy
24 between the page numbers in his transcript and Lodgment Numbers 25-36;
- 25 2. Petitioner's First Motion for Judicial Notice is Denied in Part as to the fact that
26 Respondent did not bring the possibility of Petitioner's using the wrong transcript
27 to the attention of the court;
- 28 3. Petitioner's second Motion for Judicial Notice [Docket No. 64] is Denied and the

1 Clerk is Ordered to replace page 14 of Motion to Compel [Docket No. 63] with
2 the corrected page 14 found attached to the second Motion for Judicial Notice;

3 4. Petitioner's Motion to Compel Compliance with Court Order [Docket No. 63] is
4 construed as a request for additional transcripts to be lodged and Respondent is
5 Ordered, within 2 weeks of the date of this Order, to either Lodge the transcripts
6 of the Marsden hearings and a complete version of Lodgment Number 12 or a
7 declaration under penalty of perjury explaining why it is not possible to lodge
8 such documents.

9 5. The Motion to Compel Compliance with Court Order is or Denied in all other
10 respects.


11 6. Petitioner's Motion for Sanctions [Docket No. 61] is DENIED.

12 7. Petitioner's Motion for Discovery [Docket No. 53.] is DENIED; and

13 8. In light of the additional evidence the Court has ordered Lodged, the Petitioner's
14 deadline for filing a Traverse is extended to July 1, 2011.

15 IT IS SO ORDERED.

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17 DATED: May 24, 2011

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19 Hon. Nita L. Stormes
20 U.S. Magistrate Judge
21 United States District Court
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