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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 EDWARD V. SHELL,

12 Petitioner,

13 v.

14 RONALD RACKLEY, Warden,

15 Respondent.  
16  
17  
18

Case No.: 16-cv-2320 LAB (JLB)

**REPORT AND RECOMMENDATION  
FOR ORDER:**

**(1) DENYING FIRST AMENDED  
PETITION FOR WRIT OF HABEAS  
CORPUS [ECF No. 5]; and**

**(2) DENYING MOTION FOR ORDER  
TO EXPAND RECORD [ECF No. 15]**

19  
20 **I. INTRODUCTION**

21 Before the Court is the first amended petition for writ of habeas corpus pursuant to  
22 28 U.S.C. § 2254 of Edward V. Shell. (ECF No. 5.) Also before the Court is Petitioner's  
23 motion for an order to expand the record. (ECF No. 15.)

24 This Report and Recommendation is submitted to United States District Judge Larry  
25 Alan Burns pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United  
26 States District Court for the Southern District of California. For the reasons discussed  
27 below, the Court recommends that Petitioner's first amended petition (ECF No. 5) and  
28 motion for an order to expand the record (ECF No. 15) be **DENIED**.

1 **II. BACKGROUND**

2 In 1997, a jury convicted Petitioner of three counts of robbery under California Penal  
3 Code § 211 and one count of attempted robbery under California Penal Code §§ 211, 213,  
4 and 664. (ECF No. 12-4 at 2.)<sup>1</sup> The trial court made true findings as to allegations that  
5 Petitioner had seven prior serious or violent felony convictions and one prior serious felony  
6 conviction for multiple robberies committed in 1991. (*Id.*) Pursuant to California’s three-  
7 strikes law, the court sentenced Petitioner to three consecutive terms of 25 years to life,  
8 plus a consecutive five-year enhancement, for an aggregate indeterminate term of 80 years  
9 to life. (*Id.*)

10 On November 4, 2014, California voters approved Proposition 47, which  
11 redesignated some non-serious, non-violent crimes as misdemeanors instead of felonies  
12 and permitted resentencing for prisoners currently serving a sentence for any of the  
13 offenses that the initiative reduced to misdemeanors. *See Turner v. Richardson*, 2:13-cv-  
14 00454 WBS AC P, 2016 WL 47445, at \*1 (E.D. Cal. Jan. 5, 2016). Proposition 47 was  
15 codified as California Penal Code § 1170.18, and it became effective on November 5, 2014.  
16 Cal. Penal Code § 1170.18 (West 2014). Section 1170.18 provides, in relevant part:

17 A person who, on November 5, 2014, was serving a sentence for a  
18 conviction, whether by trial or plea, of a felony or felonies who would have  
19 been guilty of a misdemeanor under the act that added this section (“this act”)  
20 had this act been in effect at the time of the offense may petition for a recall  
21 of sentence before the trial court that entered the judgment of conviction in  
22 his or her case to request resentencing in accordance with Sections 11350,  
23 11357, or 11377 of the Health and Safety Code, or Section [sic] 459.5, 473,  
24 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been  
25 amended or added by this act.

26 Cal. Penal Code § 1170.18(a).

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28 <sup>1</sup> Page numbers for docketed materials cited in this Report and Recommendation refer to those  
imprinted by the court’s electronic filing system.

1 On November 17, 2014, Petitioner filed a petition pursuant to Proposition 47 to  
2 recall the sentence he received in 1997. (ECF No. 5 at 23–52.) The San Diego County  
3 Superior Court denied the petition on February 5, 2015, on the basis that the crimes for  
4 which Petitioner was convicted, three counts of robbery under California Penal Code § 211  
5 and one count of attempted robbery under California Penal Code §§ 211, 213, and 664,  
6 were not eligible for resentencing under Proposition 47. (*Id.* at 53.)

7 On August 3, 2015, Petitioner, through his counsel John L. Dodd, filed an appeal of  
8 the San Diego County Superior Court’s denial of his petition for resentencing. (ECF No.  
9 12-2.) According to the California Court of Appeal’s opinion in *People v. Shell*, No.  
10 D067745 (Cal. Ct. App. Jan. 25, 2016):

11 Shell’s appointed counsel filed a brief pursuant to *People v. Wende*  
12 (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738,  
13 744 (*Anders*) raising one possible but not arguable appellate issue: whether  
14 the trial court erred in denying Shell’s motion for resentencing pursuant to  
Proposition 47.

15 (ECF No. 12-4 at 3.) The Court of Appeal invited Petitioner to file his own supplemental  
16 appellate brief and he did so on August 28, 2015. (ECF No. 12-3.) Petitioner argued that  
17 he received ineffective assistance of appellate counsel and was denied due process when  
18 his attorney erroneously filed a *Wende* brief that referenced California Penal Code  
19 § 1170.126 (Proposition 36) instead of California Penal Code § 1170.18 (Proposition 47).  
20 (ECF No. 12-3 at 7–11.)

21 The California Court of Appeal denied Petitioner’s appeal in a reasoned decision  
22 dated January 25, 2016. (ECF No. 12-4.) The court reasoned as follows:

23 A

24 In a *Wende* appeal, we must consider defendant’s supplemental  
25 contentions and state the reasons why they fail. (*People v. Kelly* (2006) 40  
26 Cal.4th 106, 120.) Shell contends he suffered prejudice and was denied due  
27 process and effective assistance of counsel because counsel filed a *Wende*  
28 brief relying on section 1170.126, which was codified as part of Proposition  
36, instead of section 1170.18, which was enacted as part of Proposition 47.

1 Shell was not prejudiced or denied due process by the mention of section  
2 1170.126 because counsel listed the denial of Shell’s Proposition 47 petition  
3 as an issue, which counsel considered. “[T]he constitutional right to  
4 assistance of counsel entitles an indigent defendant to independent review by  
5 the Court of Appeal when counsel is unable to identify any arguable issue on  
6 appeal. California’s procedure for securing this right requires counsel to file  
7 a brief summarizing the proceedings and the facts with citations to the record.”  
8 (*People v. Kelly, supra*, at p. 119.) Counsel did that and was not required to  
9 raise or argue specific issues in his *Wende* brief. (*Id.* at p. 118.)

## 10 B

11 Shell contends section 490.2, a provision added by Proposition 47,  
12 required resentencing because his robbery convictions were for petty thefts,  
13 “which were elevated to felony charges based on his 1991 priors.” (See § 667,  
14 subd. (b) [“[i]t is the intent of the Legislature . . . to ensure longer prison  
15 sentences and greater punishment for those who commit a felony”].)<sup>3</sup>

16 Section 490.2 states: “obtaining any property by theft where the value  
17 . . . does not exceed nine hundred fifty dollars (\$950) shall be considered petty  
18 theft and shall be punished as a misdemeanor.” The record shows Shell was  
19 not arrested or charged with theft or petty theft in the 1997 convictions.  
20 Rather, he was charged with and convicted of three counts of robbery (§ 211)  
21 and one count of attempted robbery (§§ 211, 213, 664) from separate victims  
22 at two restaurants and a convenience store, all with threats of violence. These  
23 felony offenses were crimes against a person and required proof the taking of  
24 property from the person or presence of another occurred by force or fear.  
25 (§ 211; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [“mere theft  
26 becomes robbery if the perpetrator . . . resorts to force or fear while carrying  
27 away the loot”].) “Although classified in the Penal Code as a crime against  
28 the person, robbery is actually a crime against both the person and property.  
[Citation.] ‘Robbery violates the social interest in the safety and security of  
the person as well as the social interest in the protection of property rights.’”  
(*People v. Gomez* (2008) 43 Cal.4th 249, 264.) Robbery is categorically  
different than simple theft of property. (See §§ 484, 490.2.) Therefore,  
section 490.2, which applies to theft cases, does not apply to the robbery and  
attempted robbery convictions in this case and no counts were eligible for  
resentencing under section 1170.18.

## C

Shell again attempts to challenge the validity of his prior strike  
convictions and contends they were suffered by someone else. Shell’s 1997

1 convictions and the true findings on the 1991 convictions are long since final.  
2 The validity of these earlier decisions were not properly before the trial court  
3 on the petition for resentencing under Proposition 47 and are not properly  
4 before us on an appeal from the order denying the petition for resentencing.

5 Even if these issues were properly before us, we would find no merit in  
6 Shell's contentions. We briefly address these issues because they are a  
7 consistent theme in Shell's appellate challenges. Shell contends his guilty  
8 plea in a single case in 1991 resulting in seven strike convictions should  
9 constitute only one strike prior. However, a prior qualifying conviction need  
10 not have been brought and tried separately from another qualifying conviction  
11 in order to be counted as a separate strike. (*People v. Fuhrman* (1997) 16  
12 Cal.4th 930, 938–40.)

13 Shell's contention he was sentenced under the three strikes law based  
14 on a probation report referring to an unrelated case involving other defendants  
15 is equally without merit. From the record Shell provided, it is clear the  
16 probation report contains a typographical error. The probation report  
17 summarizing the 1991 prior strike allegations, refers to superior court case  
18 number CR124967 for five counts of robbery pursuant to section 211 and  
19 superior court case number CR124969 for two additional counts of first  
20 degree robbery pursuant to sections 211 and 212.5, subdivision (a). However,  
21 the 1997 amended information charging Shell with the 1991 convictions as  
22 prior strike allegations refers to Shell's seven convictions in superior court  
23 case number CR124969. The court found these allegations true prior to the  
24 issuance of the probation report. Thus, there is no indication the court relied  
25 on an unrelated superior court case from 1991 for his sentencing in 1997.

#### 26 D

27 We have reviewed the entire record in accordance with *Wende, supra*,  
28 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, and have not found any  
arguable appellate issue. Competent counsel represented Shell on this appeal.

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29 <sup>3</sup> During a discussion regarding whether Shell wanted the jury to be instructed  
30 regarding lesser included offenses, the court explained lesser included offenses could  
31 include petty theft. However, the court explained petty theft by a felon is also a felony.  
32 Shell asked the court not to instruct the jury regarding the lesser included offense of petty  
33 theft because it was inconsistent with his defense theory of the case. Thereafter, the jury  
34 convicted Shell of three counts of robbery and one count of attempted robbery.

1 On January 28, 2016, Petitioner filed a petition for review with the California  
2 Supreme Court. (ECF No. 12-5.) Petitioner argued again that he received ineffective  
3 assistance of appellate counsel and was denied due process when his appellate counsel  
4 erroneously filed a *Wende* brief that referenced California Penal Code § 1170.126 instead  
5 of addressing California Penal Code § 1170.18. (*Id.* at 7–9.) The California Supreme  
6 Court denied the petition for review without comment on March 30, 2016. (ECF No. 12-  
7 6.)

8 On October 14, 2016, Petitioner filed a petition for writ of habeas corpus with the  
9 San Diego County Superior Court (ECF No. 12-7), which was denied on November 9,  
10 2016 (ECF No. 12-8). The record before this Court indicates that Petitioner did not present  
11 subsequent habeas corpus petitions to the California Court of Appeal or the California  
12 Supreme Court. (*See* ECF No. 5 at 15; ECF No. 12.)

13 On September 12, 2016, Petitioner filed a petition for writ of habeas corpus with this  
14 Court. (ECF No. 1.) Petitioner subsequently filed a first amended petition for writ of  
15 habeas corpus on October 6, 2016. (ECF No. 5.) Respondent filed an answer to the first  
16 amended petition on January 18, 2017. (ECF No. 11.) Petitioner filed a traverse on  
17 February 16, 2017. (ECF No. 13.)

18 Additionally, on February 21, 2017, Petitioner filed a motion for an order to expand  
19 the record in this case. (ECF No. 15.) Respondent did not file an opposition to Petitioner’s  
20 motion.

### 21 III. SCOPE OF REVIEW

22 Section 2254 of Title 28 of the United States Code provides the scope of review for  
23 federal habeas corpus claims:

24 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall  
25 entertain an application for a writ of habeas corpus in [sic] behalf of a person  
26 in custody pursuant to the judgment of a State court only on the ground that  
27 he is in custody in violation of the Constitution or laws or treaties of the United  
States.

28 28 U.S.C. § 2254(a).

1 In addition, federal habeas corpus claims are subject to the provisions of the  
2 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), codified at 28 U.S.C.  
3 § 2254(d). *See Lindh v. Murphy*, 521 U.S. 320, 326–27 (1997) (holding that federal courts  
4 reviewing any habeas petition filed in federal court after the April 24, 1996 enactment of  
5 AEDPA will apply its provisions). Under AEDPA, a petitioner must overcome a high  
6 threshold to obtain relief:

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

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

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

18 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

19 For purposes of federal habeas corpus review under § 2254(d)(1), “clearly  
20 established Federal law” means “the governing legal principle or principles set forth by the  
21 Supreme Court at the time the state court renders its decision.” *Lockyer v. Andrade*, 538  
22 U.S. 63, 71–72 (2003). The term refers to the holdings, as opposed to the dicta, of Supreme  
23 Court decisions. *Id.* at 71 (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

24 A federal habeas court may grant relief under the “contrary to” clause of  
25 § 2254(d)(1) if the state court applied a rule different from the governing law set forth in  
26 Supreme Court cases or if it decided a case differently than the Supreme Court on a set of  
27 materially indistinguishable facts. *Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may  
28 grant relief under the “unreasonable application” clause of § 2254(d)(1) if the state court  
correctly identified the governing legal principle from Supreme Court decisions but  
unreasonably applied those decisions to the facts of a particular case. *Id.* Habeas corpus

1 relief cannot be granted under § 2254(d)(1) “so long as ‘fairminded jurists could disagree’”  
2 on whether the state court decision is inconsistent with clearly established federal law.  
3 *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

4 To grant relief under § 2254(d)(2)’s “unreasonable determination of the facts”  
5 standard, a petitioner must demonstrate that the factual findings upon which the state  
6 court’s adjudication of his claims rest, assuming it rests upon a determination of the facts,  
7 are objectively reasonable. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

8 Where there is no reasoned decision from the state’s highest court, the federal habeas  
9 court “looks through” to the underlying appellate court decision and presumes it provides  
10 the basis for the higher court’s denial of a claim or claims. *See Ylst v. Nunnemaker*, 501  
11 U.S. 797, 804–06 (1991); *see also Harrington*, 562 U.S. at 99–100 (holding that an  
12 unexplained denial of a claim by the California Supreme Court is an adjudication on the  
13 merits of the claim and is entitled to deference unless “there is reason to think some other  
14 explanation for the state court’s decision is more likely”).

#### 15 IV. DISCUSSION

##### 16 A. Petition for Habeas Corpus

17 Petitioner claims that his constitutional rights were violated when the San Diego  
18 County Superior Court denied his petition to recall his current sentence pursuant to  
19 Proposition 47. Specifically, Petitioner alleges that he “has been denied due process and  
20 equal protection under the prerequisites of Proposition 47 for resentencing” and he “is  
21 being denied equal protection based on the voters[’] initiative under Proposition 47 and  
22 their intent as it relates to proposition 47.” (ECF No. 5 at 9–14.)

23 Respondent argues that the first amended petition is meritless because Petitioner’s  
24 claims involve a state court’s interpretation of state law and errors of state law do not  
25 warrant federal habeas relief. (ECF No. 11-1 at 9–12.) As set forth more fully below, the  
26 Court agrees and therefore recommends that the first amended petition be **DENIED**.

27 “In conducting habeas review, a federal court is limited to deciding whether a  
28 conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v.*

1 *McGuire*, 502 U.S. 62, 68 (1991) (citing 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19,  
2 21 (1975) (per curiam)). The U.S. Supreme Court has held repeatedly that “federal habeas  
3 corpus relief does not lie for errors of state law” and that “it is not the province of a federal  
4 habeas court to reexamine state-court determinations on state-law questions.” *Id.* at 67–68  
5 (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). Here, although Petitioner labels his  
6 claims as federal “due process” and “equal protection” claims, Petitioner has effectively  
7 asked this Court to find that a California state court erred in interpreting and applying  
8 California state law. Such a claim is not cognizable in federal habeas corpus. *See, e.g.*,  
9 *Myles v. Rackley*, 2:16-cv-0278 TLN CKD P, 2016 WL 6298408, at \*2 (E.D. Cal. Oct. 27,  
10 2016), *Report and Recommendation adopted at* 2016 WL 7212801 (E.D. Cal. Dec. 12,  
11 2016) (rejecting Proposition 47 claims on ground that “[f]ederal habeas corpus relief is  
12 unavailable for alleged errors in the interpretation or application of state sentencing laws  
13 by a state court”); *Adams v. Borders*, ED CV 16-00541-VBF (AS), 2016 WL 4523163, at  
14 \*3 (C.D. Cal. July 29, 2016), *Report and Recommendation adopted at* 2016 WL 4520906  
15 (C.D. Cal. Aug. 29, 2016) (“The fact that Petitioner may be attempting to characterize his  
16 claim concerning resentencing under Proposition 47 as a federal constitutional claim . . . is  
17 not sufficient to render it cognizable.”); *see also Langford v. Day*, 110 F.3d 1380, 1389  
18 (9th Cir. 1997) (“[A petitioner] may not . . . transform a state-law issue into a federal one  
19 merely by asserting a violation of due process.”) For this reason, the Court recommends  
20 that the first amended petition be **DENIED**.

21 Additionally, even if the Court were to liberally construe Petitioner’s claims as  
22 federal due process and equal protection claims, the claims should still be denied on the  
23 grounds that Petitioner’s due process claim is time barred and Petitioner’s equal protection  
24 claim is both unexhausted and meritless.

25 **i. Due Process**

26 Petitioner asserts in the first amended petition that he was denied due process on the  
27 following grounds:

28 ///

1 On July 15, 1997, under case number SCD126559, petitioner's waived  
2 his rights to a jury trial on his 1991 priors, at the discretion of his trial attorney  
3 Nantette Monson, which voided the jury of lesser included offense (LIO's),  
4 due to the fact that it went against the theory of his attorney's defense. (See  
5 C.T., pp. 7-9) The jury never had the opportunity of verifying the priors used  
6 to sentence petitioner under the three-strike-law resulted from a 1991  
7 contract/plea-agreement or was in fact true or even that they belonged to him.  
8 The Judge then (not the jury), determined the validity of petitioner's 1991  
9 priors as true, by only asking petitioner to state his name; CDCR number;  
10 offense; and length of time he spent incarcerated to see if they coincide with  
11 the 969(b) prison package that was used to establish his identity.

9 Thereafter, the judge stated "I'll accept that as a knowing waiver" (See  
10 E.R, pp. 42-43) and at no time was it even proven if the 1991 priors relied on  
11 in 1997 were indeed strikeable. The jury was never made aware of the fact  
12 that petitioner entered into a contract/plea-agreement on October 9, 1991,  
13 which left him with one (1) prior on his record if he were to re-offend. (See  
14 E.R, pp. 44-45 & C.T., pp. 2-6 @ p. 5 Ln 6-17)

14 The jury had no prior knowledge that counts 2, 4, and 5 were designated  
15 as nonviolent/nonserious which were to be ran consecutive, and counts 3, 6  
16 and 7 were to be ran concurrent – as agreed to in the petitioner's 1991  
17 contract/plea-agreement. Also, they were not aware that the two 1<sup>st</sup> degree  
18 robberies were consolidated, and not "brought and tried separately" as alleged  
19 by the court. (See E.R, pp.46-47)

19 In the instant case, the court has openly admitted that petitioner's  
20 current charges under case number SCD126559 were misdemeanors.  
21 However, it was because of his prior conviction under case number  
22 CR124969, that his misdemeanor charges were elevated to felony; and  
23 knowing that not all prior serious and violent felonies disqualify a person from  
24 the reduced penalties under Proposition 47. . . .

23 (ECF No. 5 at 12–13.)

24 In his traverse, Petitioner further asserts that his federal due process rights were  
25 violated when the trial court failed to instruct the jurors regarding lesser included offenses  
26 and "took the authority away from the jury and personally ordered that the jury find  
27 petitioner guilty of second degree robbery if a guilty verdict was to be rendered at all."

28 (See ECF No. 13 at 9–13.)

1 This Court concludes that Petitioner’s asserted due process claims are untimely.  
2 Under the AEDPA, a petitioner has one year from the date that his or her conviction is final  
3 to file a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254.  
4 *See* 28 U.S.C. § 2244(d). In the instant case, the due process claim that Petitioner raises  
5 challenges not the recent denial of his petition to recall his sentence under Proposition 47  
6 but his 1997 robbery and attempted robbery convictions. Although the AEDPA’s one-year  
7 statute of limitation is subject to both statutory and equitable tolling, *see Calderon v. United*  
8 *States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other*  
9 *grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir.  
10 1998), 20 years have passed since Petitioner’s 1997 convictions and the AEDPA’s statute  
11 of limitation has run with respect to these claims. Thus, Petitioner is time barred from  
12 raising any federal habeas claim that challenges the proceedings surrounding his 1997  
13 robbery and attempted robbery convictions. As Petitioner does not raise a single federal  
14 due process claim that relates to the San Diego County Superior Court’s February 5, 2015  
15 denial of his petition to recall his sentence pursuant to Proposition 47, the first amended  
16 petition contains no federal due process claim for this Court to address.

17 **ii. Equal Protection**

18 Petitioner asserts in the first amended complaint that he was “deprived initially, and  
19 now, to have the equal protection of proposition 47 to be applied to his individual  
20 circumstances.” (ECF No. 5 at 11–12.) The Court concludes that this claim is both  
21 unexhausted and meritless.

22 The Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment  
23 states that no state shall “deny to any person within its jurisdiction the equal protection of  
24 the laws.” U.S. Const. amend. XIV, § 1. The Fourteenth Amendment’s equal protection  
25 clause “is essentially a direction that all persons similarly situated should be treated alike.”  
26 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To assert a claim under  
27 the equal protection clause, a petitioner must show that he was similarly situated to other  
28 defendants who received preferential treatment. *See Fraley v. Bureau of Prisons*, 1 F.3d

1 924, 926 (9th Cir. 1993).

2 Petitioner presents his equal protection claim for the first time in his federal habeas  
3 petition. He did not present the claim to any state court prior to filing his habeas petition  
4 in federal court. Generally, a habeas petition brought under 28 U.S.C. § 2254 may “not be  
5 granted unless it appears that . . . the applicant has exhausted the remedies available in the  
6 courts of the State.” 28 U.S.C. § 2254(b)(1). To exhaust state judicial remedies, a federal  
7 habeas petitioner must present the highest state court available with a fair opportunity to  
8 rule on the merits of every issue raised in his federal habeas petition. *See* 28 U.S.C. §  
9 2254(b), (c); *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Thus, in California,  
10 petitioners are required to exhaust their habeas claims in a petition to the California  
11 Supreme Court. *See Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999) (applying  
12 *O’Sullivan* to California). Here, Petitioner did not present his equal protection claim to the  
13 California Supreme Court on direct review (*see* ECF No. 12-5) or in any subsequent  
14 collateral proceeding. Thus, for purposes of this Court’s review of Petitioner’s equal  
15 protection claim, the claim is not properly exhausted.<sup>2</sup>

16 Although an unexhausted federal habeas claim generally may not be granted, the  
17 AEDPA provides that “[a]n application for a writ of habeas corpus may be denied on the  
18 merits, notwithstanding the failure of the applicant to exhaust the remedies available in the  
19 courts of the State.” 28 U.S.C. § 2254(b)(2). Because the AEDPA’s exhaustion  
20 requirement exists as a matter of comity, assuring the state courts of the “initial  
21

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22  
23 <sup>2</sup> Respondent concedes in his answer that Petitioner “appears to have exhausted his state remedies  
24 by presenting the claim to the California Supreme Court in a petition for review.” (ECF No. 11 at 2). The  
25 Court does not agree. To fully exhaust one’s state court remedies, a petitioner must “fairly present” the  
26 “substance” of a federal habeas claim to the state courts. *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996)  
27 (quoting *Picard v. Connor*, 404 U.S. at 278). For purposes of exhaustion, the “substance” of a federal  
28 habeas claim includes a “reference to a specific federal constitutional guarantee, as well as a statement of  
the facts that entitle the petitioner to relief.” *Id.* (citing *Picard*, 404 U.S. at 277.) While the petition for  
review that Petitioner filed with the California Supreme Court references the phrase “equal protection,”  
(*see* ECF No. 12-5 at 4, 9), Petitioner failed to present to the California Supreme Court any facts that  
would entitle him to relief under an equal protection claim. Thus, the Court concludes that this claim was  
not fairly presented to the California Supreme Court and is therefore unexhausted.

1 ‘opportunity to pass upon and correct’ alleged violations of its prisoners’ federal rights,”  
2 *Picard v. Connor*, 404 U.S. 270, 275 (1971) (quoting *Wilwording v. Swenson*, 404 U.S.  
3 249, 250 (1971)), district courts have jurisdiction to deny an unexhausted claim on the  
4 merits only “when it is perfectly clear that the applicant does not raise even a colorable  
5 federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 623–24 (9th Cir. 2005). “A contrary rule  
6 would deprive state courts of the opportunity to address a colorable federal claim in the  
7 first instance and grant relief if they believe it is warranted.” *Id.* at 624. If there is any  
8 question as to whether the petitioner has stated a colorable federal claim, the district court  
9 may not consider the merits of the claim.

10 In this case, Petitioner fails to make even a threshold showing that his constitutional  
11 rights to equal protection were violated. In his first amended petition, Petitioner offers  
12 only the conclusory allegation that he was “deprived . . . to have the equal protection of  
13 proposition 47 to be applied to his individual circumstances.” (ECF No. 5 at 11–12.)  
14 Petitioner does not state that he was similarly situated to anyone who received preferential  
15 treatment by the San Diego County Superior Court. Nor does the Court’s own review of  
16 Petitioner’s first amended petition and all records bearing on the merits of Petitioner’s  
17 claims reveal any equal protection claims that Petitioner could bring. Thus, Petitioner does  
18 not state a valid claim under the equal protection clause. For this reason, the Court  
19 recommends that Petitioner’s equal protection claim be **DENIED**.

## 20 **B. Motion to Expand the Record**

21 Petitioner has filed a motion for an order to expand the record under Rule 7 of the  
22 Rules Governing Section 2254 Cases in the United States District Courts. (ECF No. 15.)  
23 Petitioner seeks to expand the record to include the following documents, which were filed  
24 with the California Court of Appeal in connection with Petitioner’s direct appeal of the  
25 denial of his petition for resentencing pursuant to Proposition 47: (1) his June 28, 2015  
26 motion for substitution of appellate counsel; (2) his June 28, 2015, declaration in support  
27 of his motion for substitution of appellate counsel; (3) his August 3, 2015 request for leave  
28 to file an opening brief due to his appellate counsel’s failure to process his appeal; (4) his

1 August 11, 2015 second motion for substitution of appellate counsel; (5) his August 11,  
2 2015 declaration in support of his second motion for substitution of appellate counsel; and  
3 (6) his August 11, 2015 request for judicial notice in support of his second motion for  
4 substitution of appellate counsel. (*Id.* at 1–2.) Petitioner argues that these documents will  
5 “assist the court with exculpatory evidence that would give the court more clarity of the  
6 claims that ha[ve] been presented within this case.” (*Id.* at 1.)

7 Rule 7 of the Rules Governing Section 2254 Cases allows district courts “to expand  
8 the record by submitting additional materials relating to the petition.” Rule 7(a). A record  
9 may be expanded without holding an evidentiary hearing.” *Cooper-Smith v. Palmateer*,  
10 397 F.3d 1236, 1241 (9th Cir. 2005), *overruled on other grounds by Daire v. Lattimore*,  
11 812 F.3d 766 (9th Cir. 2016). However, before the record may be supplemented with new  
12 materials, a petitioner must make a showing that he meets the conditions for obtaining an  
13 evidentiary hearing under 28 U.S.C. § 2254(e)(2). *Id.* (citing *Holland v. Jackson*, 542 U.S.  
14 649, 652–53 (2004)). The conditions of § 2254(e)(2) include demonstrating that:

15 (A) the claim relies on—

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

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

21 (B) the facts underlying the claim would be sufficient to establish by clear and  
22 convincing evidence that but for constitutional error, no reasonable factfinder  
23 would have found the applicant guilty of the underlying offense.

24 28 U.S.C. § 2254(e)(2). An exception to this general rule exists only if a Petitioner  
25 “exercised diligence in his efforts to develop the factual basis of his claims in state court  
26 proceedings.” *Cooper-Smith*, 397 F.3d at 1241.

27 A petitioner who requests an evidentiary hearing must also demonstrate that he has  
28 presented a “colorable claim for relief.” *See Earp v. Ornoski*, 431 F.3d 1158, 1166–67 (9th

1 Cir. 2005) (citing *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005), *Stankewitz*  
2 *v. Woodford*, 365 F.3d 706, 708 (9th Cir. 2004), and *Phillips v. Woodford*, 267 F.3d 966,  
3 973 (9th Cir. 2001)). The standard that this Court must apply to determine whether the  
4 facts alleged by Petitioner would entitle him to relief is the deferential standard of 28 U.S.C.  
5 § 2254(d). *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010); *see also Gonzalez v.*  
6 *Knowles*, 515 F.3d 1006, 1014 (9th Cir. 2008) (holding that even assuming the petitioner  
7 exercised sufficient diligence in seeking to develop the factual basis for his claims in state  
8 court, no evidentiary hearing is warranted where no claim gives rise to a colorable federal  
9 habeas claim).

10 Here, this Court has concluded that Petitioner is not entitled to federal habeas relief  
11 under 28 U.S.C. § 2254(d) because he fails to raise even a colorable federal habeas claim  
12 in his first amended petition. There are no specific facts alleged in the petition that, if true,  
13 would entitle him to the relief he seeks. Because federal habeas relief is not warranted  
14 under § 2254(d), Petitioner has not demonstrated that he meets the conditions for obtaining  
15 an evidentiary hearing under § 2254(e)(2). Thus, the Court recommends that Petitioner's  
16 request to expand the record be **DENIED**. *See Galloway v. Trimble*, 2:11-cv-1464 KJM  
17 DAD P, 2012 WL 6555013, at \*17 (Dec. 14, 2012) (denying motion to expand record when  
18 petitioner failed to demonstrate that federal habeas relief was warranted).

19 Further, even if Petitioner had raised colorable federal habeas claims in his petition,  
20 the motion to expand the record should still be denied because the additional documents  
21 that Petitioner seeks to introduce are not relevant to either of Petitioner's alleged habeas  
22 claims. Petitioner alleges in the first amended petition that his federal due process rights  
23 were violated when the San Diego County Superior Court committed judicial error during  
24 Petitioner's 1997 criminal trial and his right to equal protection was violated when the same  
25 court later denied his petition for resentencing pursuant to Proposition 47. (*See* ECF No.  
26 1 at 9–14.) The additional documents that Petitioner seeks to add to the record concern the  
27 performance of Petitioner's appellate counsel *after* the San Diego County Superior Court  
28 delivered its decisions with respect to the events giving rise to Petitioner's alleged due

1 process and equal protection claims. Thus, the additional documents are irrelevant to  
2 Petitioner's alleged federal habeas claims and need not be considered in connection with  
3 the petition. *See Delgadillo v. Gonzales*, 1:07-CV-00625 LJO GSA HC, 2008 WL  
4 2332227, at \*1 (E.D. Cal. June 4, 2008) (denying motion to expand record where the  
5 documents the petitioner sought to introduce had no logical relevance to the claims raised  
6 in the habeas petition).

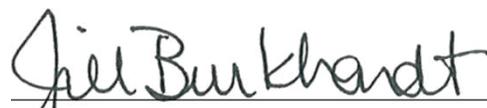
## 7 V. CONCLUSION

8 For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the Court  
9 issue an Order: (1) approving and adopting this Report and Recommendation; (2)  
10 **DENYING** Petitioner's motion to expand the record; and (3) directing that Judgment be  
11 entered **DENYING** the Petition.

12 **IT IS HEREBY ORDERED** that no later than **August 8, 2017**, any party to this  
13 action may file written objections with the Court and serve a copy on all parties. The  
14 document should be captioned "Objections to Report and Recommendation."

15 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with  
16 the Court and served on all parties no later than **August 15, 2017**. The parties are advised  
17 that failure to file objections with the specified time may waive the right to raise those  
18 objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th  
19 Cir. 1998); *Martinez v. Ylst*, F.2d 1153, 1156 (9th Cir. 1991).

20 Dated: July 17, 2017

21   
22 Hon. Jill L. Burkhardt  
23 United States Magistrate Judge  
24  
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