

1 and possession of a controlled substance with intent to sell (ex. 50). Petitioner was sentenced to twenty-
2 four to sixty months; thirty-two to seventy-two months; and nineteen to forty-eight months, all three to
3 run concurrently (*id.*).

4 Petitioner filed a direct appeal, asserting, among other claims, that (1) he did not receive
5 a speedy trial in violation of his Sixth Amendment rights; and (2) due to prosecutorial misconduct,
6 petitioner was presented to the jury in prison-issued clothing and shackles (ex. 65). On April 8, 2009,
7 the Nevada Supreme Court affirmed the conviction (ex. 72), and remittitur issued on May 5, 2009 (ex.
8 75). Petitioner did not file a state petition for a writ of habeas corpus.

9 Petitioner submitted this federal petition for writ of habeas corpus (ECF #1). He signed
10 the petition under the penalty of perjury on July 10, 2009, and it was filed by the court on August 5,
11 2009. The petitioner sets forth three grounds for relief. The court granted respondents' motion to
12 dismiss ground one for failure to state a federal claim for which relief may be granted (ECF #23).²
13 Respondents have now answered grounds two and three of the federal petition (ECF #24). They argue
14 that the Nevada Supreme Court's affirmance of the denial of the portions of petitioner's direct appeal
15 that correspond to federal grounds two and three did not result in a decision that was contrary to, or
16 involved an unreasonable application of, clearly established federal law, or result in a decision that was
17 based on an unreasonable determination of the facts in light of the evidence presented in the state court
18 proceeding (*id.*).

19 The court notes that while petitioner was incarcerated at the time he submitted his federal
20 petition, he apparently is no longer incarcerated (*see* ECF #39). Federal habeas corpus law permits
21 prisoners to challenge the validity of convictions for which they are "in custody." *See* 28 U.S.C. §
22 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490, 109 S.ct. 1923 (1989) (*per curiam*); *Feldman v. Perrill*,
23 902 F.2d 1445, 1446 (9th Cir.1990). In order to satisfy the custody requirement, a petitioner must be in

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25 ² In ground one, petitioner alleged that the court failed to appoint standby counsel in violation
26 of his Fifth, Sixth and Fourteenth Amendment rights, failed to appoint an investigator in violation of his
Fourteenth Amendment rights, and set excessive bail in violation of his Fifth Amendment rights (ECF
#1).

1 custody at the time the petition is filed in federal court. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).
2 Petitioner’s release does not render his petition moot, however. He challenges a criminal conviction,
3 and a wrongful criminal conviction is presumed to have continuing “collateral consequences” (*id.*).³ See
4 also *Carafas v. LaVallee*, 391 U.S. 234, 237-238 (1968).

5 **II. Discussion**

6 **A. Legal Standard**

7 **Antiterrorism and Effective Death Penalty Act**

8 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act
9 (AEDPA), provides the legal standards for this court’s consideration of the petition in this case:

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

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

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

20 28 U.S.C. § 2254(d).

21 These standards of review “reflect the ... general requirement that federal courts not
22 disturb state court determinations unless the state court has failed to follow the law as explicated by the
23 Supreme Court.” *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999). Therefore, this court’s ability
24 to grant a writ is limited to cases where “there is no possibility fair-minded jurists could disagree that
25 the state court’s decision conflicts with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S.
26 ___, ___, 131 S.Ct. 770, 786 (2011).

A state court decision is contrary to clearly established Supreme Court precedent, within
the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set

³ It is unclear whether petitioner has been released from custody altogether, or whether petitioner is on parole. If petitioner is on parole, he is still in custody for the purposes of habeas corpus review.

1 forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially
2 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different
3 from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63 (2003) (quoting *Williams v.*
4 *Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002).

5 A state court decision is an unreasonable application of clearly established Supreme Court
6 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct governing
7 legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts
8 of the prisoner’s case.” *Andrade*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The
9 “unreasonable application” clause requires the state court decision to be more than incorrect or
10 erroneous; the state court’s application of clearly established law must be objectively unreasonable. *Id.*
11 (quoting *Williams*, 529 U.S. at 409).

12 In determining whether a state court decision is contrary to federal law, this court looks
13 to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);
14 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Further, “a determination of a factual
15 issue made by a State court shall be presumed to be correct,” and the petitioner “shall have the burden
16 of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

17 **B. Ground 2**

18 Petitioner alleges the following: he invoked his right to be brought to trial within sixty
19 days, but he was not tried within sixty days due to court overcrowding. His trial did not commence until
20 five months after the information was filed, in violation of his Sixth Amendment rights (ECF #1 at 5).⁴
21 Respondents argue that the Nevada Supreme Court reasonably applied clearly established federal law
22 when it concluded that petitioner had failed to demonstrate any prejudice from the delay (ECF #24 at
23 8).

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26 ⁴ The court notes that the record actually reflects that petitioner’s trial began about five months
after he was indicted and about seven months after the information was filed (*see ex.’s 2, 5, 6, 40*).

1 Whether petitioner’s Sixth Amendment right to a speedy trial was violated is governed
2 by *Barker v. Wingo*, 407 U.S. 514, 530 (1972). In *Barker*, the United States Supreme Court set forth
3 a four-part test to evaluate post-indictment delay: (1) the length of the delay; (2) the reasons for the
4 delay; (3) the accused’s assertion of the right to a speedy trial; and (4) the prejudice caused by the delay.
5 *Id.* The timely assertion of the right to a speedy trial itself does not warrant relief without considering
6 other factors. *U.S. v. Turner*, 926 F.2d 883, 889 (9th Cir. 1991).

7 Subsequently, in *Doggett*, the U.S. Supreme Court emphasized that the first *Barker* factor
8 involves a two-step analysis. *Doggett v. U.S.*, 505 U.S. 647, 651-652 (1992). In order to trigger a
9 speedy trial inquiry at all, an accused must show that the period between indictment and trial passes a
10 threshold point of “presumptively prejudicial” delay. *Id.* If this threshold is not met, the court does not
11 proceed with the *Barker* factors. *Id.* If, however, the threshold showing is made, the court considers the
12 extent to which the delay exceeds the threshold point in light of the degree of diligence by the
13 government and acquiescence by the defendant to determine whether sufficient prejudice exists to
14 warrant relief. *Id.*; *U.S. v. Beamon*, 992 F.2d 1009, 1012 (9th Cir. 1993). While there is not an
15 established time period that automatically constitutes undue delay (*Barker*, 407 U.S. at 530), in *Doggett*
16 *v. U.S.*, the Supreme Court determined that such delay has been found “presumptively prejudicial [as
17 it] approaches one year.” *Doggett*, 505 U.S. at 652 n.1.; *see also Beamon*, 992 F.2d at 1014 (noting that
18 the seventeen and twenty-month delays in that case were only five to eight months longer than the one-
19 year benchmark that triggers the speedy trial inquiry under *Barker v. Wingo*); *U.S. v. Vassell*, 970 F.2d
20 1162, 1164 (2d Cir. 1992) (finding a general consensus that around eight months is presumptively
21 prejudicial).

22 Here, petitioner initially appeared in court on March 28, 2007 (ex. 2). He was indicted
23 on June 8, 2007 (ex.’s 5, 6). His trial commenced on October 29, 2007 (ex. 40). Just over seven months
24 passed between petitioner’s initial appearance and the start of his trial. Less than five months passed
25 between the date of petitioner’s indictment and the start of trial. The delay of less than five months
26 between the date of petitioner’s indictment and the commencement of trial is not presumptively

1 prejudicial. Absent presumptive prejudice, this court need not consider the other *Barker* factors.
2 *Doggett*, 505 U.S. at 651-652.

3 The court further notes that even if it considered the remaining *Barker* factors, ground
4 2 still fails. The record reflects the following: petitioner was indicted on June 8, 2007 (ex. 6). His trial
5 was set for July 30, 2007 in accordance with his assertion of his speedy trial rights. On July 26, 2007,
6 the July 30 trial date was vacated and trial was re-set for August 27, 2007 because stand-by counsel had
7 been confirmed that day and could not be ready to effectively assist petitioner with less than four days'
8 notice (*see* ex. 20). The state and petitioner (defendant) were ready to proceed to trial on August 23,
9 2007, the calendar call date for the August 27 trial. However, the court's calendar was congested with
10 older or more serious matters, and the court determined that the case was not overflow eligible. The
11 soonest date the court could find to accommodate the trial was October 22, 2007 (ex. 23).

12 Petitioner claims that prejudice must be presumed and alleges that he suffered prejudice
13 because "it is no doubt much too late to recover the mini mart videotape which should have been
14 obtained by the police," and "employees of the mini mart who might have testified [have] no doubt gone
15 on to other employments [sic] and would be difficult if not impossible to find, and then would probably
16 not remember what the two men in the mini mart in March of 2007 looked like."

17 With respect to the corresponding claim on direct appeal, the Nevada Supreme Court concluded:

18 [Petitioner] has failed to demonstrate that he was prejudiced by the
19 approximately three-month delay to the start of his trial . Further,
20 stand-by counsel, Langford, was appointed with only four days' notice
21 and required additional time to familiarize himself with the case.
22 Therefore, we conclude that [petitioner's] constitutional right to a
23 speedy trial was not violated

24 *ex. 72* at 4-5.

25 The court agrees that even if it considered the remaining *Barker* factors the record
26 demonstrates that the Nevada Supreme Court reasonably determined that petitioner did not demonstrate
that he suffered prejudice from the delayed trial. Petitioner declined appointed counsel (*see, e.g., ex.*
23 at 3, 8). He never sought to obtain any mini mart videotape or to have any employees called as
witnesses. At trial, petitioner questioned officers and detectives as to why they had not obtained the

1 videotape or interviewed any witnesses at the scene, which allowed him to challenge their credibility
2 (*see, e.g., ex. 40 at 47-48; ex. 41 at 25*). Court overcrowding was one reason for the delay of the start
3 of trial, and the court's accommodation of petitioner's request for stand-by counsel was another. The
4 Nevada Supreme Court reasonably affirmed the state court's denial of this ground for relief on the basis
5 that petitioner failed to show he suffered prejudice from the delay of his trial. Accordingly, ground 2
6 is denied.

7 **C. Ground 3**

8 Petitioner claims the following: the prosecutor's misconduct in presenting petitioner to
9 the grand jury in shackles and getting him to waive his privilege against self-incrimination under false
10 pretenses that he was only appearing as a witness violated petitioner's Fifth and Fourteenth Amendment
11 rights (ECF #1 at 7).

12 Respondents argue that the Nevada Supreme Court reasonably concluded that any alleged
13 errors with respect to the grand jury were rendered non-prejudicial once petitioner was convicted by a
14 jury (ECF #24 at 8-9).

15 The U.S. Supreme Court has held that even if a petitioner demonstrates error during grand
16 jury proceedings, such error does not warrant automatic reversal of a conviction. *U.S. v. Mechanik*, 475
17 U.S. 66, 73 (1986). Rather, such errors are rendered non-prejudicial once a trial jury has reached a
18 verdict of guilt. *Id.* at 70-71. A grand jury is convened in order to determine whether probable cause
19 exists to force a criminal defendant to suffer the hardship of a criminal trial. Because a trial jury is
20 tasked with determining actual guilt, once a trial jury has found guilt beyond a reasonable doubt, it is
21 presumed that any error during the grand jury proceedings was harmless beyond a reasonable doubt. *Id.*
22 The Ninth Circuit Court of Appeals recently reiterated that errors in grand jury proceeding are typically
23 harmless once a guilty verdict is rendered. *U.S. v. Navarro*, 608 F.3d 529, 538-539 (9th Cir. 2010).

24 The Nevada Supreme Court affirmed the district court's denial of this claim, reasoning
25 that

26 This court has stated that '[a]ny irregularities which may have occurred
in the . . . grand jury proceeding were cured when [the defendant] . . .

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was tried and his guilt determined under the higher criminal burden of proof.’ *Echavarría v. State*, 839 P.2d 589, 596 (Nev. 1992); *see also United States v. Mechanik*, 475 U.S. 66, 71-73 (1986); *Dettloff v. State*, 97 P.3d 586 (2004) (concluding that “the jury convicted Dettloff under a higher burden of proof[, which] cured any irregularities that may have occurred during the grand jury proceedings”).

In this case, any irregularities which may have occurred during the grand jury proceeding were cured when [petitioner] was ultimately found guilty beyond a reasonable doubt of the charges listed in the indictment. Further, the State claims that [petitioner] was not asked to testify at the grand jury proceeding and, accordingly, was not subpoenaed; instead, more than two weeks before the grand jury convened, [petitioner] wrote to the Clark County District Attorney’s Office and stated, “I Michael Edward Clark would like to testify before the Grand Jury on the scheduled proceeding of the Grand Jury.” At the grand jury proceeding, [petitioner] testified that he signed a written waiver of constitutional privilege against self-incrimination, pursuant to NRS 172.241(1), which he stated he had read and understood. Therefore, we conclude that the prosecutor did not commit misconduct in this regard

ex. 72 at 5-6.

The record further reflects that upon entering the grand jury room, the foreperson advised petitioner that he was at the grand jury “to give testimony in an investigation pertaining to the offenses of conspiracy to violate the controlled substance act, sales of a controlled substance, possession of a controlled substance with intent to sell involving Michael Edward Clark and Franklin West” (ex. 5 at 9). Prior to testifying, petitioner signed a written waiver of his constitutional privilege against self-incrimination (*id.* at 10). During his testimony, petitioner never indicated he thought that the grand jury had been called only to review allegations against his co-defendant, nor at any point did he object to appearing in shackles.

Moreover, even assuming, *arguendo*, that any error occurred during the grand jury proceeding, any such error was rendered harmless by the subsequent guilty verdict. The grand jury concluded that probable cause existed to indict petitioner. Once the trial jury found guilt beyond a reasonable doubt—a higher burden of proof—it is presumed that any error during the grand jury proceedings was not prejudicial. This court agrees that the Nevada Supreme Court applied the appropriate federal constitutional standard and reasonably affirmed the denial of the state claims that correspond to federal ground 3. Accordingly, ground 3 is denied.

1 Thus, both of the remaining grounds of the petition, grounds 2 and 3 are denied. As such,
2 the petition is denied in its entirety.

3 **III. Certificate of Appealability**

4 In order to proceed with an appeal, petitioner must receive a certificate of appealability.
5 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-51
6 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
7 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
8 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
9 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s
10 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In
11 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
12 debatable among jurists of reason; that a court could resolve the issues differently; or that the questions
13 are adequate to deserve encouragement to proceed further. *Id.* This court has considered the issues
14 raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of
15 appealability, and determines that none meet that standard. The court will therefore deny petitioner a
16 certificate of appealability.

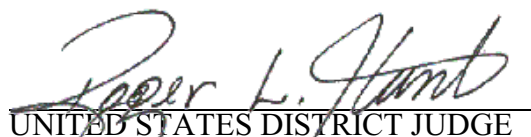
17 **IV. Conclusion**

18 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus (ECF #1)
19 is **DENIED IN ITS ENTIRETY**.

20 **IT IS FURTHER ORDERED** that the clerk **SHALL ENTER JUDGMENT**
21 accordingly and close this case.

22 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
23 **APPEALABILITY**.

24 Dated this _____ 19th day of February, 2013.

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26 
UNITED STATES DISTRICT JUDGE