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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL E. SPENCER,

Petitioner,

No. C 05-4338 PJH (PR)

vs.

RICHARD KIRKLAND, Warden,

Respondent.

**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS**

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has responded with a traverse. For the reasons set out below, the petition will be denied.

BACKGROUND

Petitioner was convicted by an Alameda County jury of three counts of second degree robbery, see Cal. Penal Code § 211, and one count of being a felon in possession of a firearm, see *id.* § 12021(a). He was sentenced to prison for 121 years to life. He unsuccessfully appealed his conviction to the California Court of Appeal and the Supreme Court of California denied review. Petitioner reports that he did not file any state habeas petitions.

He does not dispute the following facts, which are excerpted from the opinion of the California Court of Appeal:

The charges arose from three commercial robberies committed during 1999. The first was a robbery of a 7-Eleven store on Piedmont Avenue in Oakland on May 31, 1999. The clerk, Anthony Stapert, saw a heavyset African-American

1 male enter the store, followed by [petitioner]. [Petitioner] was wearing a red
2 "beanie" cap and dark clothing. He asked Stapert about milk and bread,
3 retrieved some milk from the refrigerator, and returned to the checkout counter
4 where Stapert was standing. He pointed a gun at Stapert and demanded
5 money, stating, "Give me the money now motherfucker and I'm not playing." As
6 Stapert opened a cash register and handed [petitioner] money, [petitioner]
moved to the side. When Stapert opened the other register and reached for the
money in it, [petitioner] put the gun to Stapert's head and reached into the
register himself. He told Stapert to lie on the ground and count to 10. Stapert
looked up and saw [petitioner] heading toward MacArthur Avenue. A store
security camera videotaped the robbery.

7 Stapert indicated that he made a point of looking at the robber and described
8 him (in his call to 911) as an African-American male in his 40's. When
9 interviewed by police, Stapert further described the robber as five feet eight
10 inches tall and weighing 130 pounds, wearing a red beanie. Stapert viewed a
11 live lineup on August 9, 1999, and indicated that [petitioner] looked like the
12 robber and he felt strongly that he was, but he did not want to rule out the
13 possibility that the robber had a twin brother. At the first preliminary hearing he
14 told the court the same thing; other than that, he indicated he was strongly
15 convinced that [petitioner] was the robber. At the second preliminary hearing,
16 [F/n 5. As the case was dismissed after the first information was filed, and a new
17 complaint filed, two preliminary hearings were held.] Stapert testified that he
18 was 65 to 70 percent sure that [petitioner] was the person who robbed him
19 before he viewed the videotape. After viewing it, he was 100 percent certain.
20 He indicated that had he watched the videotape before attending the physical
21 lineup, he would have placed an "X" by [petitioner's] name. He was merely
22 being "prudent" when he placed a question mark by it.

23 The second robbery occurred at the Global Exchange in Berkeley on June 21,
24 1999. The store manager, Carolyn Gravely, was working alone when [petitioner]
25 entered. He was wearing a green baseball cap and sunglasses. He was very
26 nervous and looked around the store. Even though it was the day after Father's
27 Day, [petitioner] indicated that he was looking for a Father's Day card. He picked
out a card and Gravely rang up the purchase. Gravely noticed a green object
that [petitioner] was holding under his jacket; she believed it was a gun.
[Petitioner] told Gravely to empty the register; she complied and gave him \$120
from the register and an additional \$25 to \$30 from her wallet. [Petitioner] said
he was desperate and had nothing to lose. He told Gravely to lie down on the
floor. She complied. About two minutes later she got up and called the police.
She described the robber as a clean shaven African-American man, 35 to 40
years old, with a small build, wearing dark clothes, a green baseball cap, and
sunglasses. She did not recall the robber having freckles or marks on his skin
and was unable to see his skin tone. She could not see his eyes behind the
sunglasses he was wearing.

28 Gravely told the police that she felt she could identify the robber and was shown
a photo lineup, which did not include [petitioner]. She indicated that one person
in the lineup resembled or bore a good resemblance to the robber, but she was
not sure. During a live lineup on August 9, 1999, she positively identified
[petitioner] as the robber. She indicated in one court appearance that when she
identified [petitioner] in court and at the physical lineup, she thought he was the
same individual depicted in the photo lineup.

1 The third robbery occurred on July 7, 1999, at the Talisman Antiques store on
2 College Avenue in Oakland. [Petitioner] entered the store and asked store
3 owner Cheryl Ireland-Hooper if she had jewelry, even though he was standing
4 next to the jewelry counter. [Petitioner] was standing two to three feet away from
5 Ireland-Hooper, wearing a baseball cap, dark navy blue or gray light plaid jacket,
6 and sunglasses. At trial she testified that the cap was green and indicated that
7 the baseball cap seized when [petitioner] was arrested was in fact the hat the
8 robber had been wearing. [F/n 6. In her statements to the police, she indicated
9 the cap was "dark" and described the shirt as cream colored.]

10 At that point, [petitioner] was within a foot of Ireland-Hooper. He told her to open
11 the cash register; she explained that the store did not have a cash register and
12 opened the jewelry case. [Petitioner] told Ireland-Hooper to move to the back
13 of the store and that he would blow her "fucking brains out" if she did not. He put
14 an object in her back, grabbed her hair, and pushed her into the back room.
15 Ireland-Hooper handed [petitioner] a wallet containing \$30. [Petitioner] was
16 screaming and Ireland-Hooper retrieved another wallet from her purse and gave
17 it to him as well. [Petitioner] pushed Ireland-Hooper out of the back door of the
18 store and threw a folded metal chair at her.

19 About a minute later, Ireland-Hooper turned around and [petitioner] was gone.
20 The police arrived about 10 minutes later. Ireland-Hooper described the robber
21 as a clean-shaven African-American man, 30 to 35 years of age, medium build,
22 between five feet seven inches and five feet nine inches tall, weighing 150
23 pounds, having a mottled complexion, and wearing dark gray pants, a plaid
24 button-down shirt, and a green baseball cap. Sometime after the robbery,
25 Ireland-Hooper read two articles in the newspaper about the robberies, which
26 included a description of the robber. The police showed Ireland-Hooper a
27 composite sketch of a suspect in the robberies, which Ireland-Hooper said was
a reasonable likeness of the perpetrator. On August 9, 1999, Ireland-Hooper
attended a live lineup and identified [petitioner] as the robber. She immediately
recognized him as the person who robbed her.

28 The house where [petitioner] was arrested was searched and two knit caps (one
29 black and one red), a green baseball cap, and two green plaid shirts were
30 recovered. Indicia indicated that [petitioner] resided at the residence.

31 [Petitioner] called several witnesses at trial. Duane Drew, a friend of [petitioner],
32 indicated that during the summer of 1999 he saw [petitioner] without a beard, but
33 never without a mustache. Although he was with [petitioner] on May 29 and 30,
34 1999, he dropped [petitioner] off at 6 p.m. on May 31 and was not with him when
35 the 7-Eleven robbery occurred the following day. [Petitioner] also introduced
36 evidence that he was employed during the summer of 1999 and that his net pay
37 was about \$1,280. Beth Lorey testified that she saw a person who resembled
38 [petitioner] on the afternoon of July 7, 1999. He ran quickly in front of her car.
39 She gave a statement to the police shortly after the Talisman Antiques robbery.
40 Finally, the defense called an eyewitness identification expert who described
41 problems with eyewitness identifications and issues impacting their accuracy.

42 In rebuttal, the prosecution called Thomas Brobst, who testified that he saw
43 [petitioner] four or five times between March and August of 1999. [Petitioner]
44 had no mustache and was clean-shaven. Brobst remembered that [petitioner]
45 shaved off his mustache on April 18, 1999.

46 Ex. 3 (Unpublished Opinion of the California Court of Appeal, First Appellate District,

1 *People v. Spencer*, No. A098944 (June 29, 2004)) at 3-6.¹

2 STANDARD OF REVIEW

3 A district court may not grant a petition challenging a state conviction or sentence on
4 the basis of a claim that was reviewed on the merits in state court unless the state court's
5 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
6 unreasonable application of, clearly established Federal law, as determined by the
7 Supreme Court of the United States; or (2) resulted in a decision that was based on an
8 unreasonable determination of the facts in light of the evidence presented in the State court
9 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
10 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),
11 while the second prong applies to decisions based on factual determinations, *Miller-El v.*
12 *Cockrell*, 537 U.S. 322, 340 (2003).

13 A state court decision is "contrary to" Supreme Court authority, that is, falls under the
14 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that
15 reached by [the Supreme] Court on a question of law or if the state court decides a case
16 differently than [the Supreme] Court has on a set of materially indistinguishable facts."
17 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application
18 of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly
19 identifies the governing legal principle from the Supreme Court's decisions but
20 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The
21 federal court on habeas review may not issue the writ "simply because that court concludes
22 in its independent judgment that the relevant state-court decision applied clearly
23 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must
24 be "objectively unreasonable" to support granting the writ. *Id.* at 409.

25 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual
26 determination will not be overturned on factual grounds unless objectively unreasonable in
27

28 ¹ Citations to "Ex." hereafter are to the record lodged by respondent.

1 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322 at
2 340; see also *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

3 When there is no reasoned opinion from the highest state court to consider the
4 petitioner’s claims, the court looks to the last reasoned opinion. See *Ylst v. Nunnemaker*,
5 501 U.S. 797, 801-06 (1991); *Shackelford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th
6 Cir.2000).

7 DISCUSSION

8 As grounds for habeas relief petitioner asserts that: (1) The trial court’s imposition of
9 a sentence enhancement for use of a firearm duplicated the sentence for being a felon in
10 possession of a firearm, a violation of section 654 of the California Penal Code and of
11 petitioner’s right to due process as set out in *Blakely v. Washington*, 124 S. Ct. 2531, 2537
12 (2004); (2) his due process rights and right to effective assistance of counsel were violated
13 by the trial court’s refusal to substitute new counsel, and the refusal rendered his
14 subsequent waiver of counsel involuntary; (3) his due process and confrontation rights
15 were violated by the magistrate’s comments at a preliminary hearing; (4) his due process
16 rights were violated when the court refused to sever the counts; (5) his due process rights
17 were violated by denial of his request to appear in court unshackled or with less obtrusive
18 alternative shackles; and (6) the trial court “erred” when it reconsidered another judge’s
19 earlier ruling suppressing evidence.

20 I. Sentencing

21 Petitioner claims that the trial court violated his Sixth Amendment right to a trial by
22 jury when it improperly sentenced him to both a firearm enhancement in the 7-Eleven
23 robbery count and a consecutive term for being a felon in possession of a firearm.

24 Petitioner claims that the imposition of consecutive sentences violates section 654 of the
25 California Penal Code, *Apprendi v. New Jersey*, 530 U.S. 446 (2000), and *Blakely v.*
26 *Washington*, 524 U.S. 296 (2004).

27 At sentencing, the court found that petitioner was convicted by a jury of three
28 robbery counts (counts one, three, and four) and one count of being a felon in possession

1 of a firearm (count two). Ex. 2 at 2211. He was also found to have five prior felony
2 convictions. *Id.* The court sentenced him under California Penal Code sections
3 667(e)(2)(A) and 1170.12 (c)(2)(A) ("Three Strikes Law") to twenty-five years to life for
4 each count, to be served consecutively. *Id.* at 2219. He was also sentenced to a ten year
5 enhancement for using a firearm in the 7-Eleven robbery count (count one), under
6 California Penal Code section 12022(b). *Id.* at 2219. Including all priors and
7 enhancements, petitioner was sentenced to 121 years to life. *Id.* at 2221. Defense counsel
8 argued that under section 654 of the California Penal Code, petitioner's ten-year
9 enhancement for count one should bar the consecutive sentence for count two because
10 both counts stemmed from the same facts. *Id.* at 2222. The court rejected the argument,
11 holding that the sentence should be consecutive because of "the dangerousness of
12 [petitioner] in using a firearm, not only in the commission of the offense but also possession
13 as an ex-felon." *Id.*

14 The California Court of Appeal rejected petitioner's claim, holding that the sentence
15 did not implicate *Apprendi* or *Blakely*. Ex. 4 (Order Modifying Op.) at 1-2. The court held
16 that the jury had found all the facts that were essential to the punishment selected. *Id.* It is
17 not entirely clear what the court meant by this statement, but because petitioner's argument
18 was recently rejected by the United States Supreme Court in *Oregon v. Ice*, 129 S.Ct. 711
19 (2009), it does not matter. The Supreme Court held: "[I]n light of historical practice and
20 the authority of States over administration of their criminal justice systems, [] the Sixth
21 Amendment does not exclude Oregon's choice [to have judges rather than juries decide
22 facts leading to imposition of consecutive rather than concurrent sentences]." *Id.* at 714-15.
23 Because the California courts' results on this issue are entirely consistent with Supreme
24 Court law on the matter, the decisions of the California appellate courts were not contrary
25 to, or an unreasonable application of, clearly-established United States Supreme Court
26 authority.

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1 **II. Substitution of Counsel and Self-Representation**

2 Petitioner claims that the trial court improperly denied his requests for substitution of
3 counsel because, among other reasons, counsel "repeatedly expressed doubt about
4 whether he could diligently or effectively represent petitioner due to the hostility and conflict
5 in their relationship." Trav. at 5. He also claims that, due to the court's failure to allow
6 substitution of counsel and his belief that representation by his counsel was like not having
7 an attorney, his decision to represent himself was not voluntary.

8 The California Court of Appeal summarized the hearings petitioner received under
9 *People v. Marsden*, 2 Cal. 3d 118 (1970) and *Faretta v. California*, 422 U.S. 806 (1975):

10 On September 4, 2001, William Daley was substituted in as [petitioner's]
11 appointed counsel. On November 14, 2001, [petitioner] made a [*Faretta*] motion
to represent himself, which the court denied as untimely and equivocal.

12 On December 26, 2001, the court conducted a *Marsden* hearing on [petitioner's]
13 request to discharge Daley and substitute appointed counsel. Daley also filed a
motion to withdraw as counsel. At that hearing, Daley indicated that he intended
14 to declare a conflict. The court inquired about the basis of [petitioner's] *Marsden*
motion. [Petitioner] told the court the basis of his motion was inadequate
15 representation because Daley had not "done anything" on the case since his
appointment in September 2001. The court asked Daley about his discussion
16 with [petitioner] concerning his readiness for trial. Daley indicated that his
preparation in the case had been delayed due to the demands of another trial
17 and that he asked [petitioner] to waive time for trial because he would be more
comfortable if he had additional time to prepare. Daley also told [petitioner] that
18 he would ask for a limited continuance if he felt that he was substantially
unprepared for trial.

19 The court also asked Daley about his conflict with [petitioner]. Daley informed
20 the court that his relationship with [petitioner] had deteriorated to the point that
[petitioner] refused to talk to Daley and told Daley not to bother visiting him at the
21 jail. In Daley's opinion, [petitioner] needed a new attorney because the strained
attorney-client relationship was going to interfere with Daley's ability to provide
22 a fair and vigorous defense. Daley had the impression that [petitioner] wanted
him to provide ineffective representation so that he would have an issue on
23 appeal. Daley reiterated that he did not think he could do a "fair job" for
[petitioner]. He indicated that if his motion to withdraw were denied and
[petitioner] refused to waive time, he would do his best but had "grave concerns"
24 if his conflicts with [petitioner] could be overcome.

25 The trial court reviewed the history of the case, and saw a distinct pattern of
[petitioner] making it difficult for defense counsel to represent him in order to get
26 a different attorney. [Petitioner] had previously made multiple *Marsden* and
Faretta motions and generally made it so difficult for counsel to represent him
27 that the attorneys ultimately would move to withdraw from the case. The court
noted that the attorney replaced by Daley had asked to withdraw from the case
28 for reasons "very similar" to those expressed by Daley. The court found that

1 while [petitioner] was entitled to effective, conflict-free representation, he was not
2 entitled to sabotage his relationships with his attorneys in order to force them to
3 withdraw, which, in essence, allowed [petitioner] to control who represented him
4 based on his conduct. The court found that Daley's motion to withdraw was the
5 result of [petitioner's] efforts to sabotage his relationship with Daley in order to
6 get a new attorney.

7 In the court's opinion, Daley was a highly qualified, competent, and "darn good"
8 attorney, and that [petitioner] would have good representation if Daley
9 represented him at trial. The court was also of the opinion that Daley would do
10 his best for [petitioner] regardless of his personal feelings. The court denied the
11 *Marsden* motion and the motion to withdraw.

12 On January 7, 2002, the court heard another *Marsden* motion by [petitioner] and
13 another motion to withdraw by Daley. At this hearing, [petitioner] informed the
14 court that Daley was not properly representing him. [Petitioner] complained that
15 his attorney (1) had not conferred with him concerning the preparation of his
16 defense; (2) had not communicated with him about his case; (3) had not
17 performed any work on the case, including failing to pursue a suppression
18 motion or a bail motion; (4) refused to secure and present an eyewitness expert
19 for the trial; (5) had not filed any motions, including a motion concerning a
20 bifurcated trial on his priors, a supplemental suppression motion concerning an
21 unreliable confidential informant, and a severance motion; (6) had a conflict with
22 [petitioner], no longer wanted the case, and would not represent [petitioner] to
23 the best of his ability; (7) had waived time without [petitioner's] consent; and (8)
24 was not prepared for trial.

25 At the court's request, Daley summarized his experience in criminal practice. He
26 had been practicing law since 1972 and had built up his criminal practice over
27 the years. Criminal law had been the predominant focus of his practice for the
28 last 10 to 15 years, including 45 criminal jury trials. He had conducted
// approximately 200 preliminary examinations. He was qualified to try death
penalty cases, and had tried one death penalty case and a dozen homicide
cases. He had the equivalent experience of a certified criminal specialist.

Daley also provided explanations regarding his tactical decisions concerning
various motions and also explained that he thought eyewitness experts were no
longer required in light of the changes to CALJIC instructions. Daley informed
the court that his conflict with [petitioner] stemmed from the fact that [petitioner]
was a very difficult client. Daley stated that [petitioner's] conduct made it difficult
for him to provide [petitioner] with a "full-hearted defense." However, Daley
intended to give [petitioner] a full, professional, and ethically-required defense
if he remained in the case.

The court found that Daley did not have an actual conflict of interest, but was
only expressing normal concerns in a difficult attorney-client relationship. The
court further found that Daley could perform his professional and ethical
responsibilities. The court ruled that Daley had properly represented [petitioner]
up to that point, and would continue to do so. Although the relationship was not
pleasant on a personal level, the relationship had not deteriorated to the point
that Daley could not adequately represent [petitioner]. Also, while [petitioner]
and Daley had not discussed the case as often as [petitioner] wanted, Daley had
been working on the case and appreciated the legal and factual issues in it.

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1 On Monday, January 14, 2002, the court asked Daley about his relationship with
2 [petitioner]. Daley responded that he had a "good conversation" with [petitioner]
3 on the previous Friday, that the investigation was proceeding, and that he and
4 his client had a working relationship at the moment. Daley believed he could
5 conduct a thoroughly ethical defense for [petitioner]. [Petitioner] disagreed, and
6 told the court that Daley was providing ineffective assistance of counsel.
7 [Petitioner] made yet another *Marsden* motion to replace Daley as counsel,
8 which the court heard and denied.
9

10 At the *Marsden* hearing, [petitioner] again told the court he wanted to fire Daley.
11 The court asked [petitioner] if anything had changed since the last *Marsden*
12 motion. [Petitioner] again complained that he had not conferred enough with
13 counsel, he had not seen any new motions, and he did not believe counsel was
14 any more prepared for trial than he was the previous week. Daley informed the
15 court that in the last week he had met with [petitioner] twice, once with an
16 investigator, and had worked on in limine motions. He had also researched
17 issues and had read the record. Daley acknowledged that there were things left
18 to do, but felt he was making good progress.

19 The court concluded that Daley had made great progress in his preparation for
20 trial, both factually and legally. Daley had properly represented [petitioner] up
21 to that point, and would continue to do so. The court found that there had not
22 been an actual breakdown in the professional relationship between attorney and
23 client that prevented Daley from properly representing [petitioner] at trial.
24

25 On January 17, 2002, after defense counsel made several motions in limine,
26 [petitioner] made a *Faretta* motion to represent himself. After admonishing
27 [petitioner] about self-representation, the court granted [petitioner]'s motion.
28 [Petitioner] represented himself throughout jury selection, until he requested and
29 was granted reappointment of counsel on January 31, 2002.

30 Ex. 3 at 20-23 (citations omitted).

31 **a. Substitution of Counsel**

32 The denial of a motion to substitute counsel implicates a defendant's Sixth
33 Amendment right to counsel and is properly considered in federal habeas. *Bland v.*
34 *California Dep't of Corrections*, 20 F.3d 1469, 1475 (9th Cir. 1994), *overruled on other*
35 *grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) (en banc). The inquiry for a
36 federal habeas court is whether the trial court's denial of or failure to rule on the motion
37 "actually violated [petitioner's] constitutional rights in that the conflict between [petitioner]
38 and his attorney had become so great that it resulted in a total lack of communication or
39 other significant impediment that resulted in turn in an attorney-client relationship that fell
40 short of that required by the Sixth Amendment." *Schell*, 218 F.3d at 1026.

41 ///

1 Although petitioner claimed that counsel failed to communicate with him, the record
2 shows that counsel made efforts to communicate with him, despite personal differences
3 and other professional commitments. He discussed the case with petitioner on
4 approximately four to five occasions since taking over the case from another attorney. Ex.
5 2 at 17, 31, 40. When counsel tried to see him after counsel's prior trial was over,
6 petitioner told him not to come back. *Id.* at 17. Petitioner told counsel he never wanted to
7 see him again and not to bother with him. *Id.* at 31.

8 Counsel conceded that he didn't have time to discuss the case with petitioner as
9 much as he would have liked while he worked on his prior trial, but stated that he was as
10 prepared as he could be within the time constraints. *Id.* at 32. Although counsel didn't
11 discuss the case with petitioner, he continued to work on the case. He filed a bail motion.
12 *Id.* at 40. He thought about requesting a severance and investigating expert witnesses. *Id.*
13 at 42. He made tactical choices about how to best spend time preparing for the case. *Id.*
14 After the earlier trial concluded, he discussed motions with petitioner, wrote and filed a
15 severance motion, and sent an investigator to find witnesses. *Id.* at 85-87.

16 The California Court of Appeal rejected petitioner's claim and found that the trial
17 court properly denied the *Marsden* motions because the record did not indicate that he and
18 counsel had become "embroiled in such an irreconcilable conflict that ineffective assistance
19 was likely to result" and because petitioner "cannot simply refuse to cooperate with his
20 appointed counsel and thereby compel the court to remove that attorney." Ex. 3 at 25.

21 Counsel made the necessary efforts to represent petitioner -- he communicated with
22 petitioner on several occasions, considered important issues in the case, reviewed and
23 prepared motions, and had an investigator talk to potential witnesses. The trial court
24 stated: "I have confidence in the fact that, although the relationship is – on a personal level
25 may not be a pleasant one, professionally I have confidence that [counsel] will continue to
26 represent [petitioner] professionally and ethically." Ex. 2 at 50-51.

27 ///

28 The Sixth Amendment guarantees effective assistance of counsel, not a "meaningful

1 relationship" between an accused and his counsel. *Morris v. Slappy*, 461 U.S. 1, 14
2 (1983). On one occasion, petitioner and counsel engaged in "volatile conversation" and
3 counsel stormed out. Ex. 2 at 17. Petitioner told counsel not to "bother" seeing him. *Id.* at
4 9. Counsel expressed concern that his best professional effort would not be enough to
5 overcome the difficulties with petitioner and thought petitioner's behavior would interfere
6 with fair representation. *Id.* at 8-9. But he also stated he could give a "fullhearted"
7 defense. *Id.* at 37. Here, the trial court found only that petitioner and his lawyer were not
8 getting along, and a pattern of petitioner's trying to sabotage relationships with his
9 appointed counsel to get a different attorney. Ex. 2 at 14. "No Supreme Court case has
10 held that "the Sixth Amendment is violated when a defendant is represented by a lawyer
11 free of actual conflicts of interest, but with whom the defendant refuses to cooperate
12 because of dislike or distrust." *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008)
13 (no relief under AEDPA for defendant who did not argue counsel had either an actual or
14 apparent conflict of interest, and instead complained only about lack of communication with
15 counsel and counsel's strategic decisions, including not making motions defendant
16 requested, contacting witnesses without defendant's consent, and not providing defendant
17 with a defense witness list for his approval) (*quoting Plumlee v. Masto*, 512 F.3d 1204,
18 1211 (9th Cir.) (finding no 6th Amendment violation when defendant is represented by
19 lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate
20 because of dislike or distrust), *cert. denied*, 76 U.S.L.W. 3636 (2008)).

21 The personal conflict here, caused as it was by petitioner's actions and without
22 evidence of a total lack of communication, did not effectively deprive petitioner of counsel.
23 See *Schell*, 218 F.3rd at 1026. Because petitioner's Sixth Amendment rights were not
24 violated, the state courts' rejections of this claim could not have been contrary to, or an
25 unreasonable application of, clearly-established Supreme Court authority.

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27 ///

28 **b. Self-Representation**

1 A criminal defendant has a Sixth Amendment right to self-representation. *Faretta*,
2 422 U.S. at 832. But defendant's decision to represent himself and waive the right to
3 counsel must be unequivocal, knowing and intelligent, timely, and not for purposes of
4 securing delay. *Id.* at 835; *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994); *Adams v.*
5 *Carroll*, 875 F.2d 1441, 1444 & n.3 (9th Cir. 1989). Before a trial court may allow an
6 accused to exercise the right of self-representation, it must conclude that the accused has
7 "knowingly and intelligently" waived his underlying right to counsel. *Faretta*, 422 U.S. at
8 835. Consequently, the Sixth Amendment requires that a state trial court, before letting an
9 accused proceed pro se, be assured that he "is made aware of the dangers and
10 disadvantages of self-representation so the record will establish that 'he knows what he is
11 doing and his choice is made with eyes open.'" *Snook v. Wood*, 89 F.3d 605, 613 (9th Cir.
12 1996) (quoting *Faretta*, 422 U.S. at 835).

13 Petitioner claims that his waiver of rights in his request to represent himself was
14 involuntary because it was forced upon him by the trial court's failure to grant his *Marsden*
15 motions. The predicate for this argument has not been established, however, because
16 here the state courts concluded that denial of the *Marsden* motions did not violate state
17 law, and this court has concluded above that the denial of the motions to replace counsel
18 was not unconstitutional. "A voluntary decision to waive counsel is not necessarily one
19 that is entirely unconstrained. A criminal defendant may be asked to choose between
20 waiver and another course of action so long as the choice presented to him is not
21 constitutionally offensive." *United States v. Robinson*, 913 F.2d 712, (9th Cir. 1990)
22 (quoting *United States v. Moya-Gomez*, 860 F.2d 706, 739 (7th Cir.1988)). Because in this
23 case the choice was not constitutionally offense, this claim is without merit.

24 Because the state courts' rejections of petitioner's claim were not contrary to, or an
25 unreasonable application of, clearly established Supreme Court law, petitioner is not
26 entitled to federal habeas relief on this claim.

27 ///

28 **III. Magistrate Bias**

1 Petitioner claims that comments by the court during his cross-examination of
2 eyewitness Stapert at the preliminary hearing violated his Confrontation Clause and due
3 process rights.

4 The California Court of Appeal summarized the facts leading to the claim:

5 [Petitioner] represented himself at the preliminary hearing held in February
6 2001 [F/n 17. This was the second preliminary hearing, held after the original
7 information was dismissed and the case was filed anew in lower court.] and
8 made a section 1538.5 motion to suppress the identification made at the
physical lineup. The court agreed with the prosecution that [petitioner's]
motion "opened the door" on the issue of the lineup identification. The court
allowed the prosecution to introduce the lineup identification so that it could
rule on the suppression motion.

9 At the preliminary hearing, Stapert testified that he identified [petitioner] at the
10 lineup because he recognized him as the man at the 7-Eleven. He testified
11 that he "got a good enough look" at the robber to point him out at the lineup
12 and to identify him in court. On cross-examination, [petitioner] asked Stapert
13 several questions about his identification of [petitioner] at the lineup. The
14 magistrate interrupted [petitioner] to say, "Mr. Spencer, I think I should share
15 something with you, . . . you had a motion to suppress the testimony on a
16 lineup and you're introducing all the lineup testimony. The D.A. hasn't offered
17 any lineup testimony. Do you realize by your offering it, you blow your 1538
18 [as to this witness]?" When [petitioner] complained that the magistrate had
19 made a prejudgment without hearing the motion, the court responded, "I'm
20 just telling you what you accomplished with your cross-examination. . . .
Making you aware of it so you don't make the same mistake, Mr. Spencer . . .
It was meant to help you. Forget it." When [petitioner] began to respond, the
magistrate interrupted, telling [petitioner], "I want you to think about this for a
moment. I could identify you at that robbery by one look at the tape."
[Petitioner] again complained that the court had made a prejudgment, to
which the court responded, "I didn't prejudge it. I saw the tape and saw you
in it, man." [Petitioner] then complained that the court had stated on the
record that he was guilty and that the court could identify him. The court
responded, "Justice is blind. I wear glasses and I could see you on that tape,
Mr. Spencer."

21 At the end of Stapert's cross-examination, [petitioner] tried to get the witness
22 to admit that he was not sure of his identification. Stapert responded, "Well,
23 what saves my case is that, like the judge said, you're on the tape and I
believe that I chose you from the lineup. I recognized you here today. I
recognized you six or seven months ago."

24 Ex 3 at 14-15.

25 The California Court of Appeal emphasized that the court's comments occurred at a
26 preliminary hearing and not before a jury, and that the witness had identified petitioner in
27 the lineup and in court before the court's comments. Ex. 3 at 16. It rejected petitioner's
28 claim, stating that the court was merely commenting on the evidence and not pronouncing

1 petitioner's guilt. *Id.*

2 It is not clear that there is a viable confrontation claim here at all, but from
3 petitioner's arguments it appears his objection is to the court's interference with his pro-se
4 conduct of cross-examination. The court's comments were not made in front of the jury,
5 nor did the magistrate preside at the trial. See Ex. 3 at 105. Stapert's testimony reflects
6 that the video tape, and not the court's comments, influenced his confidence in the
7 identification. *Id.* at 109. Assuming for purposes of this ruling that the Confrontation
8 Clause applies at a preliminary hearing, it guarantees an opportunity for effective cross-
9 examination, not cross-examination that is effective in whatever way, and to whatever
10 extent, the defense might wish. See *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per
11 curiam). The court here did not prevent petitioner from conducting effective cross-
12 examination; if it was ineffective, it was for reasons other than the court's involvement.
13 There was no violation of the Confrontation Clause. See *Stincer*, 482 U.S. at 739.

14 Further, assuming a violation of the Confrontation Clause, the violation could not
15 have had an actual and prejudicial effect upon the jury. See *Hernandez v. Small*, 282 F.3d
16 1132, 1144 (9th Cir. 2002) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).
17 Irrespective of any influence the court's comments may have had on Stapert's testimony,
18 the jury was shown the tape of the robbery to make their own independent determination of
19 whether petitioner was the person who robbed the store. Petitioner fails to show that the
20 magistrate's comments had any effect on the jury and therefore was not prejudiced. See
21 *Hernandez*, 282 F.3d at 1144.

22 Petitioner also contends that the magistrate's comments violated his due process
23 rights, presumably his right to an unbiased judge. The Due Process Clause guarantees a
24 criminal defendant the right to a fair and impartial judge. See *In re Murchison*, 349 U.S.
25 133, 136 (1955). The magistrate here was commenting on the evidence he had seen, with
26 no jury present and no decision-maker to be influenced by his comments; there is no
27 evidence that he was not impartial. There was no due process violation.

28 The state court's decision was not contrary to, or an unreasonable application of,

1 clearly established Supreme Court precedent, or was based on an unreasonable
2 determination of the facts. See 28 U.S.C. § 2254(d).

3 **IV. Severance**

4 Petitioner claims that the trial court's denial of his motion to sever the count of
5 second-degree robbery relating to the 7-Eleven store from the other two robbery counts
6 violated his due process right to a fair trial. He claims, specifically, that the denial of the
7 motion to sever was prejudicial because the evidence was not cross-admissible -- the only
8 thing the robberies had in common was the purchasing of an item in the store before the
9 robbery occurred. He also claims that the evidence of the first charge was much stronger,
10 which led to a "spillover" of evidence to convict him of the other counts.

11 The question presented in federal habeas review of a trial court's denial of
12 severance is whether the state proceedings satisfied due process. *Grimsby v. Blodgett*,
13 130 F.3d 365, 370 (9th Cir. 1997). To prevail, therefore, the petitioner must demonstrate
14 that the state court's denial of severance resulted in prejudice great enough to render his
15 trial fundamentally unfair. *Id.* In addition, the impermissible joinder must have had a
16 substantial and injurious effect or influence in determining the jury's verdict. *Sandoval v.*
17 *Calderon*, 241 F.3d 765, 772 (9th Cir. 2000). In evaluating prejudice, the court focuses
18 particularly on cross-admissibility of evidence and the danger of "spillover" from one charge
19 to another, especially where one charge or set of charges is weaker than another. *Davis v.*
20 *Woodford*, 333 F.3d 982 (9th Cir. 2003).

21 The California Court of Appeal rejected petitioner's claim, finding that "evidence of
22 the 7-Eleven robbery would likely have been cross-admissible in a separate trial of the
23 other robbery counts, under the common design or plan theory of admissibility . . . the trial
24 court relied upon the similarity of the crimes as the basis for its ruling that severance would
25 be denied." Ex. 3 at 18. The court also rejected the claim that substantial prejudice
26 resulted from the denial of severance, finding that all the charges "appear to be strong." *Id.*
27 at 19.

28 The trial court's denial of the severance motion did not deny petitioner his due

1 process right to a fair trial. First, the evidence of each crime was cross-admissible under a
2 common plan theory of admissibility. In each of the three robberies, petitioner asked the
3 clerk about a specific item before robbing the store. In the 7-Eleven robbery, he used a
4 firearm and in the other robberies, he simulated using a firearm. In the Talisman Antiques
5 robbery, he simulated a firearm and threatened to shoot the clerk. Because the common
6 features help support the inference of a common plan, the evidence in the three robberies
7 were cross-admissible. See *People v. Kraft*, 5 P.3d 68, 99 (Cal. 2000) ("To establish the
8 existence of a common design or plan, the common features must indicate the existence of
9 a plan rather than a series of similar spontaneous acts . . . the plan need not be unusual or
10 distinctive; it need only exist to support the inference that defendant employed that plan in
11 committing the charged offense") (quoting *People v. Ewoldt*, 867 P.2d 757 (Cal. 1994)).

12 Second, evidence of each count was strong. The 7-Eleven robbery was recorded on
13 a videotape that clearly showed petitioner's face, bolstering a relatively weak identification
14 by Stapert. While there was no videotape of the two other robberies, the victims of the
15 robberies positively identified petitioner. There does not appear to be one stronger count or
16 a weaker count being influenced by the other counts. The weight of the evidence of each
17 count appears to be roughly equal. Because the evidence was cross-admissible and the
18 weight of the evidence was roughly equal, petitioner fails to demonstrate prejudice and
19 there was no violation of due process in the trial court's denial of severance. See *Davis*,
20 384 F.3d at 638-39 (denial of motion to sever trial of charges based on separate incidents
21 not a violation of due process because evidence was cross-admissible, the weight of
22 evidence with respect to each incident was roughly equal, the evidence as to each incident
23 was distinct, and the jury was properly instructed); *Sandoval v. Calderon*, 241 F.3d 765,
24 773 (9th Cir. 2000) (given the strength of the State's case against petitioner on both sets of
25 murders and the cross-admissibility of the evidence on each set, petitioner's trial was not
26 actually prejudiced by the joinder).

27 ///

28 The state court's decision was not contrary to, or an unreasonable application of,

1 clearly established Supreme Court precedent; and it was not based on an unreasonable
2 determination of the facts. See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal
3 habeas relief on this claim.

4 **V. Alternative restraints**

5 Petitioner claims that his due process rights were violated by the trial court's denial
6 of his request to wear a less-visible "stun belt" as an alternative to handcuffs and leg
7 shackles.

8 The California Court of Appeal summarized petitioner's motions for alternative
9 restraints:

10 After his *Faretta* request for self-representation had been granted and prior to
11 the commencement of jury selection, [petitioner] moved to appear without
12 physical restraints. At the January 22, 2002 hearing on the motion, [petitioner]
13 argued that the shackles impaired his ability to represent himself, limited his
14 freedom of movement, and were being employed based on disciplinary matters
in jail and not because of any misconduct in court. The prosecutor objected,
contending that [petitioner's] disciplinary history in jail was relevant and that there
were also incidents in the courtroom, both of which created a manifest need to
keep [petitioner] shackled.

15 The court reviewed [petitioner's] previous threats against defense counsel, the
court, jail deputies, and even prospective jurors. The court also reviewed
16 [petitioner's] threats against other inmates, and examined an ink pen that
17 [petitioner] had brought into the courtroom. The pen had been altered to be
used as a stabbing instrument. The court denied [petitioner's] motion, finding
18 [petitioner] was "clearly a danger" to everyone in the courtroom. [Petitioner]
denied making any explicit threats to defense counsel, claiming that he had only
told defense counsel "you will be seen." [Petitioner] similarly denied the
19 allegations in the jail reports.

20 On January 24, 2002, [petitioner] made an oral motion to be restrained with
something other than handcuffs. [Petitioner] complained that the restraints
21 hindered his efforts in his defense because the jury was able to see the
restraints, and the restraints had limited his ability to write and pick up papers.
The court indicated that [petitioner's] only alternative was "the electronic vest,"
22 which "throws about 10,000 volts to your body." The court preferred not to use
the electronic vest because of the possibility of accidents. [Petitioner] then
23 suggested a "boot" as an alternate means of restraint. He had heard about the
"boot," a restraint that is placed on a [petitioner's] leg, from a deputy, but did not
know exactly how it worked. The court was unfamiliar with that type of restraint
24 but stated it would look into it. When [petitioner] again complained that the
restraints made it difficult to reach things with his hands, the court inquired
25 whether there was anything at counsel's table that [petitioner] was unable to
reach, and noted that there is a difference between having to strain to reach an
object and being unable to reach it. The court denied the motion for alternative
26 restraints.

1 Following the court's denial of the motion, [petitioner] told the court "this is
 2 bullshit." [Petitioner] loudly and angrily yelled at the court in a profanity-laced
 3 diatribe, which resulted in his exclusion from the courtroom. That same day, the
 4 court received a report that [petitioner] had threatened to spit on the person who
 5 made the cell assignments at the courthouse. The court found that this threat
 6 showed a "manifest need" to maintain restraints.
 7

8 On January 31, 2002, the court received a report that [petitioner] had threatened
 9 to crush a deputy's windpipe. [Petitioner] denied making any threats, claiming
 10 that the deputy had actually threatened him. The court also reviewed reports
 11 from the California Department of Corrections, which noted that in 1997
 12 [petitioner] was found in possession of a "plastic inmate-manufactured weapon,"
 13 and that in 1991 he physically assaulted a prison guard.
 14

15 The court then ordered the continuing use of the existing restraints, stating that
 16 "given your conduct, given your outburst in court, given your most recent threats
 17 against the Sheriff's Deputy . . . and the reports in the '80s from California
 18 Department of Corrections, now I have these from the '90s and your exposure.
 19 How can I not consider you to be *really dangerous in court?* You will be
 20 endangering Sheriff's deputies, [the prosecutor], my staff, and myself . . . We
 21 found a makeshift weapon on you." (Italics added.)
 22

23 [Petitioner] claimed that he had been carrying the pen in his shirt pocket and
 24 would never have done so if he intended to use it as a weapon, and that he had
 25 wrapped some tape around the pen to provide stability. The court acknowledged
 26 that "if it was just by itself, I would understand possibly that as an innocent
 27 situation." However, the court indicated that in light of disciplinary reports, prior
 28 threats, and prior weapon use, there was "far more than a manifest need that I
 1 have to consider; just on a street common sense, I have to consider you to be
 2 very *dangerous in court . . .*" (Italics added.) The court ordered that [petitioner]
 3 not only be restrained but that the restraints be bolted to the floor to restrict his
 4 movements. The court also noted its intention to advise and instruct the jury
 5 concerning the restraints.
 6

7 [Petitioner] again asked for an alternate type of restraint that would allow him to
 8 get his paperwork and write comfortably. The court noted for the record that
 9 [petitioner] had "sufficient movement at [counsel's] table to reach everything that
 10 you have in front of you." He was able to reach his papers, his files, and his
 11 stack of juror questionnaires. When the court asked [petitioner] what type of
 12 alternate restraint he wanted, [petitioner] asked for an electronic vest or belt.
 13 The court informed [petitioner] that it had used the electronic belt in the past and
 14 was not comfortable with it for two reasons. [F/n 23. Previously the court
 15 referred to an electronic vest. It appears that the court interchangeably referred
 16 to an electronic vest and an electronic belt.] First, there is a delay before the
 17 electronic charge reaches the person wearing the vest. Second, there is a risk
 18 of an accidental pressing of the button. Since there was a danger to [petitioner]
 19 and a continuing danger to the court staff, the court refused [petitioner's] request
 20 to wear an electronic belt. The court invited other suggestions from [petitioner],
 21 and repeated its intention to admonish the jury about [petitioner's] restraints.
 22

23 During voir dire, a prospective juror noted that [petitioner] was chained to the
 24 floor and compared him to Hannibal Lector. The prospective juror indicated that
 25 the shackling made it "very difficult" to "impossible" for him to presume
 26 [petitioner] innocent. Near the conclusion of jury selection the prospective jurors
 27 were polled on the issue; no juror indicated that he or she would be prejudiced
 28

1 against [petitioner] because of his restraints.

2 After the jury was selected and counsel reappointed, the defense moved for a
3 mistrial based on the use of shackles during voir dire. Defense counsel noted
4 that [petitioner] had requested alternative restraints and contended that the stun
5 belt or a "boot" would be suitable alternatives. The court reiterated that there
6 was a "manifest need" for the restraints, while acknowledging that it was
7 "obvious" to the jury that [petitioner] was restrained and that the restraints could
8 not be hidden from the jury. The court noted that it had admonished the jury
9 about [petitioner's] restraints and would continue to do so. The court also
10 indicated that it had ordered the construction of a partition underneath counsel's
11 table that would limit the visibility of the shackles. The court disputed defense
12 counsel's claim that [petitioner] had "volunteered" to wear a stun belt, stating that
13 [petitioner] had only requested alternative restraints. The court further noted that
14 [petitioner's] limited range of motion did not affect the jury selection process,
15 remarking that there was no need to present evidence or move around.
[Petitioner] was able to ask his questions directly to the jury panel without any
limitations.

10
11 The court denied the motion, again noting the problems with the stun belt.
12 Defense counsel then repeated [petitioner's] request for an alternative restraint,
13 such as the electronic belt or the "boot," that would allow [petitioner] to stand up
14 and have one or both arms free. [F/n 24. Counsel did not know how the "boot"
15 worked or even if it was available in Alameda County.] The prosecutor reminded
the court that [petitioner] had brought a weapon into the courtroom, and argued
that allowing [petitioner] a free arm would put courtroom staff and counsel in
danger. The court concluded there was a "manifest need" to have [petitioner's]
arms restrained, and that it would be "completely irresponsible" to lessen
[petitioner's] restraints.

16 Ex. 3 at 33-37.

17 In the presence of the jury, a criminal defendant is ordinarily entitled to be free of
18 shackles or other restraints. *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999)
19 ("*Rhoden II*"); *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989). Before a court may
20 order the use of physical restraints on a defendant at trial, the court must be persuaded by
21 compelling circumstances that some measure is needed to maintain the security of the
22 courtroom, and the court must pursue less restrictive alternatives before imposing physical
23 restraints. *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995); *Jones v. Meyers*, 899
24 F.2d 883, 885 (9th Cir. 1990); *Spain*, 883 F.2d at 720-21. In all cases in which shackling
25 has been approved, there has been evidence of disruptive courtroom behavior, attempts to
26 escape from custody, assaults or attempted assaults while in custody, or a pattern of
27 defiant behavior. *Duckett*, 67 F.3d at 749.

28 The trial court conducted several inquiries into whether petitioner needed to be

1 restrained and found compelling reasons for restraints. It reviewed a possible inmate-
2 manufactured weapon he brought into court. Ex. 2 at 377-78. It reviewed threats petitioner
3 made in court against his counsel, the court, and the jury. *Id.* at 375-77, 389. It reviewed
4 his history of threats against deputies while in custody. *Id.* at 379-84. It received
5 information about threats petitioner continued to make, including a threat to spit on the
6 courthouse staff member who made cell assignments, *id.* at 500, and a threat to crush a
7 deputy's windpipe, *id.* at 1025-26. It witnessed petitioner's angry outburst after it denied
8 petitioner's motion to wear the electronic vest. *Id.* at 506-509. The court found many
9 reasons to consider petitioner dangerous to those in the courtroom and conclude that there
10 was a "manifest need" to restrain petitioner. The court also attempted to ameliorate the
11 impact of the shackles by having general services construct a partition under the table that
12 restricted the visibility of the shackles. *Id.* at 1230.

13 There was abundant evidence here of the need for shackling, so to whatever extent
14 petitioner may be trying to argue that he should not have been restrained at all, that
15 argument is clearly without merit. His principal argument, however, is that less obtrusive
16 restraints should have been used.

17 The court also conducted a inquiry into the need for alternative restraints. It found
18 that in his current restraints petitioner was able to reach his papers and write. *Id.* at 504-
19 505. It found that he was able to reach everything in front of him, including stacks of juror
20 questionnaires and his files. *Id.* at 1035.

21 The court also had reason to find the electronic vest dangerous to both petitioner
22 and those present in the courtroom. It expressed concern about the high voltage
23 discharged by the vest and the possibility for accidents, and gave an example of an
24 accidental discharge in another case. *Id.* at 502, 1036. It also stated concern for those in
25 the courtroom due to the three to seven-second delay between the pressing of the button
26 and the charge reaching the petitioner, and what physical harm he could inflict in that time.
27 *Id.* at 1231.

28 A trial court is not required to use an alternative restraint unless it is both "less

1 onerous" and "no less beneficial." *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir.
2 1997) (quoting *Spain v. Rushen*, 883 F.2d 712, 728 (9th Cir.1989)). The California Court of
3 Appeal found that the trial court properly denied petitioner's motion because of the risk
4 presented by use of the electronic belt. Ex. 3 at 38. Because of the risk of delay or
5 accidental discharge, the belt would not secure safety in the courtroom as effectively as the
6 arm and leg restraints. *Id.* at 38. It thus was not "no less beneficial" than the restraints
7 used, and failure to use it was not a constitutional violation.

8 Furthermore, petitioner has not shown prejudice from use of the restraints. The
9 court repeatedly and extensively admonished the jury not to consider petitioner's restraints
10 in any way. *Id.* at 1229. Given that juries are presumed to follow their instructions, *Weeks*
11 *v. Angelone*, 528 U.S. 225, 234 (2000), petitioner has not shown that there was a
12 substantial or injurious effect or influence on the jury. See *Brecht v. Abrahamson*, 507 U.S.
13 619, 623 (1993) (prejudice standard for federal habeas cases).

14 Petitioner is not entitled to federal habeas relief on this claim.

15 VI. **Suppression Hearing**

16 Petitioner claims that the trial court erred in permitting the prosecution to relitigate
17 the suppression of the lineup identification.

18 The law requires that a defendant who is arrested without a warrant be afforded
19 a judicial review of probable cause to continue detaining him, within a reasonable
20 period of time. (*Gerstein v. Pugh* (1975) 420 U.S. 103) In *County of Riverside*
21 *v. McLaughlin* (1991) 500 U.S. 44, the court determined that such judicial
22 reviews would generally be found to be sufficiently prompt if held within 48 hours
23 of arrest. Defendant was arrested on August 6, 1999. Within 48 hours, a judge
24 reviewed the case and determined there was probable cause to detain him. A
25 live lineup, which included defendant, was held on August 9, 1999. A complaint
26 in the original case was filed against defendant on August 18, 1999, charging
27 him with five robberies, various weapon enhancements, and prior conviction
28 allegations. The forms documenting the judicial determination of probable
cause were misfiled in the clerk's office and were not included in the court file of
the original case. At the conclusion of the preliminary hearing in the original
case, defendant argued that the case should be dismissed because of the
apparent failure to provide a prompt review of probable cause. The magistrate
denied this motion, but suppressed the positive identifications that occurred
during the lineup as a remedy for the violation of the so-called "48 hour rule." [FN7. Defendant was not released from custody as he had a parole hold.]
On March 17, 2000, an information was filed in superior court. Defendant was
arraigned on these charges on March 20, 2000. On July 5, 2000, the misfiled
paperwork relating to the probable cause determination was located by the

1 district attorney's office. A new complaint was filed on July 25, 2000, charging
2 the same offenses as the original information, along with additional charges of
3 three counts of a felon in possession of a firearm (Pen.Code, § 12021, subd.
4 (a)(1)). [FN8. As victims Ireland-Hooper and Gravely could not positively say
5 that defendant possessed a firearm, only the felon in possession charge relating
6 to the 7-Eleven robbery remained by the time the case went to trial.] The original
7 case was dismissed upon motion of the prosecution. [FN9. The second case is
8 the subject of this appeal.]

9
10 The defense sought to bind the prosecution to the earlier ruling suppressing
11 evidence of the lineup, arguing that since the suppression was essentially a
12 ruling that defendant's prolonged detention without a judicial review of probable
13 cause was illegal, it fell within the ambit of section 1538.5, which sets forth
14 certain requirements in order to seek review of a suppression order. The court
15 agreed and ruled that the prosecution was bound by the earlier suppression
16 order, but only as to the charges that had been filed in the original case (not as
17 to the felon in possession of a firearm charges). During the subsequent
18 preliminary hearing in the new case, defendant made a motion to suppress the
19 identifications made at the lineup, under section 1538.5. The court ultimately
20 found that, although it did not agree with the earlier ruling by another judge, it
21 was bound by his determination that the prosecution was bound by the
22 suppression order in the original case. The court also ruled that defendant did
23 not waive the earlier suppression order by filing the new motion. However, the
24 court denied the suppression motion as to the new section 12021 charges.

25 The issue of the binding effect of the first suppression order arose twice more in
26 the trial court. When defendant filed a motion to dismiss pursuant to section
27 995, the ruling judge opined that while suppression of the lineup identifications
28 was not a proper remedy for a violation of the 48-hour rule, the decision had
been made and he declined to rule on whether it could be relitigated in the trial
court. He did find that the identifications made by the victims were sufficient
standing alone, and were independent of the physical lineup. Then, on January
14, 2002, prior to the commencement of trial, the prosecution requested to
reopen the suppression issue and defendant responded by moving to bind them
to the earlier suppression. The court ruled that it was not bound by the
suppression order in the original case and granted the prosecution motion. After
receiving evidence, the court found the lineups were not unduly suggestive and
ruled that the lineup identification evidence was admissible at trial.

29 Ex. 3 at 6-8.

30 Petitioner contends that the state courts "erred" by permitting the suppression order
31 to be relitigated when the prosecution failed to follow a procedure for obtaining review of
32 certain suppression orders set out in section 1538.5(j) of the California Penal Code. This is
33 solely a state law claim and thus cannot be the basis for federal habeas relief. See *Estelle*
34 *v. McGuire*, 502 U.S. 62, 67-68 (1991) (federal habeas unavailable for violations of state
35 law or for alleged error in the interpretation or application of state law).

36 CONCLUSION

1 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The
2 clerk shall close the file.

3 **IT IS SO ORDERED.**

4 Dated: March 30, 2009.



5 PHYLLIS J. HAMILTON
6 United States District Judge