

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTIONE THOMAS,

Defendant and Appellant.

A132523

(Solano County  
Super. Ct. Nos. FCR241350  
& FCR271880)

In re ANTIONE THOMAS,

on Habeas Corpus.

A134344

**I.**

**INTRODUCTION**

Antione Thomas (defendant) appeals from the single judgment entered following jury trials in two separate unrelated cases. In the first case, a jury convicted defendant of one count of possession for sale of cocaine base (Health & Saf. Code, § 11351.5). In the second case, a jury convicted defendant of one count of second degree robbery (Pen. Code, § 211) with a further finding that he had personally used a handgun in the commission of the offense (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). In each case, following a bifurcated trial, the jury found defendant had at least four prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Defendant was sentenced for both cases in a single proceeding, and was given a total state prison term of 60 years to life.

On appeal, defendant contends: (1) the court abused its discretion in denying his request to continue the trial so that he could conduct additional discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)<sup>1</sup>; (2) he was denied effective assistance of counsel due to counsel's failure to subpoena a percipient witness in the drug case; (3) the court improperly overruled hearsay objections to information allegedly contained on defendant's cell phone which the prosecution used as evidence of drug sales; (4) he was denied effective assistance of counsel due to counsel's failure to competently present a motion to dismiss his prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*); and (5) the court abused its discretion in denying two motions for substitute counsel made by defendant pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 123 (*Marsden*).

Defendant has also filed a petition for writ of habeas corpus, in which he alleges that his trial counsel rendered ineffective assistance on numerous grounds. Many of the claims made in defendant's petition for writ of habeas corpus relate to and overlap with his contentions on appeal. Therefore, on our own motion, we order the petition consolidated with the appeal for purposes of resolution by a single opinion. We reject his contentions on appeal and affirm the judgment. We also deny the petition because defendant has failed to make a prima facie case that he is entitled to relief.

## II.

### FACTS AND PROCEDURAL HISTORY

#### A. Drug Case—(Trial Court Case No. FCR241350)

On April 6, 2007, at approximately 9:00 p.m., Fairfield police officers Justin Gutierrez and Detective Apley were on patrol walking around an apartment complex where there had been numerous complaints of narcotics activity. While hiding behind a

---

<sup>1</sup> In *Pitchess, supra*, 11 Cal.3d 531, the Supreme Court recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge. (*Id.* at pp. 537-538.)

bush, they observed a car parked in a carport with people inside of it. The officers saw several people walk up to the car, stay for about three minutes, and then leave.

The officers approached the car and knocked on the front passenger window. Warren Ingram, who was sitting in the front passenger seat, opened the door. The officers smelled a strong odor of marijuana coming from the inside the car. Nakeyia Washington was sitting in the driver's seat. Defendant was sitting in the back seat.

Several other officers arrived at the scene. Officer Gutierrez asked defendant, who was sitting in the back seat, to step out of the vehicle. Police found a Mervyn's bag in the back seat of the car close to where defendant was sitting. Inside the bag, police found a large sandwich baggie containing chopped up pieces of suspected cocaine base, a baggie containing suspected marijuana, and some female clothing. The larger rocks from the large baggie were tested and confirmed to be cocaine base. They were worth approximately \$400 to \$500.

Defendant was arrested and searched. The officers found a large sandwich baggie containing 26 individually wrapped rocks in the pocket of defendant's pants. This packaging was consistent with the manner in which narcotics are commonly packaged for sale. Several of the rocks were tested and confirmed to be cocaine. Each rock was worth approximately \$20. Police also found a pill bottle with 27 pills of suspected Ecstasy, \$414 in cash, and a cell phone in defendant's possession. Defendant's cell phone contained a list of names with dollar amounts next to them. Pay-owe sheets are commonly kept on cell phones so that drug dealers can keep track of who has already paid and who owes them money.

Detective Frank Piro, an expert on possession of cocaine base for sale, opined that someone who possessed 26 individually wrapped rocks of cocaine, several larger rocks, \$414 in cash, and a cell phone with pay-owe sheets on it, possessed the cocaine for the purpose of selling it.

## **B. Robbery Case—(Trial Court Case No. FCR271880)**

On October 28, 2009, at approximately 11:00 a.m., defendant and another man robbed the Chuck E. Cheese restaurant in Fairfield, California. The robbery was captured on a surveillance video, which was played for the jury.

Walter Garrett, who was working just inside the front door, saw the robbers enter the restaurant. One of the men pulled out a gun. They directed Mr. Garrett to the back register where Cecilia Pizano was working as a cashier, and made Mr. Garrett lay face down on the ground.

Ms. Pizano saw the robbers enter the restaurant. One of the men pointed a gun at Ms. Pizano. They told her to open the cash register. Ms. Pizano told the men the register did not yet have any cash in it. They told her to get on the ground and threatened to kill her if she moved. Ms. Pizano lay face down on the ground as directed.

Lo Thao, the restaurant manager, was in the kitchen in the back of the restaurant, when one of the robbers came in and told her to get down. While the man was pushing one of the other workers to the floor, Ms. Thao used the opportunity to move toward the front of the restaurant. A second man, whom she later identified as defendant, was in the front. Defendant had a gun and told her to stop and get down. Defendant asked her where the money was. Ms. Thao, at gunpoint, went with defendant into the back of the restaurant to the safe to retrieve the money. He told her to put the money in a cream-colored pillowcase that he had with him. Ms. Thao complied, putting approximately \$1,300 in the pillowcase. She gave the pillowcase back to defendant, who ran to the front of the restaurant and then out of the restaurant with the other man.

Officer Gene Carter was in the area at the time of the robbery and, in response to a dispatch call, went to where the Chuck E. Cheese restaurant backs up to a residential area. He received information that a pillowcase had been used in the robbery. Officer Carter found a pillowcase in some bushes behind the Chuck E. Cheese. The pillowcase looked like the one used in the robbery.

Detective Steven Trojanowski investigated the robbery. Within 30-40 minutes of the robbery, he watched the surveillance video of the robbery. He talked to a “reluctant”

witness who gave him defendant's name as a possible suspect. From the name, Detective Trojanowski got defendant's photograph. He believed the photo matched one of the robbers in the surveillance video. Detective Trojanowski then went to the Extended Stay America motel, which was next door to the Chuck E. Cheese. He showed the receptionist at the motel defendant's photograph and asked whether she had seen anyone matching his description. The receptionist identified defendant, who was staying in one of the rooms at the motel.

Detective Trojanowski searched the motel room and found indicia with defendant's name in the room. He noticed there were two pillows on the bed—one had a pillowcase on it, the other did not. There were three additional pillowcases in the room, but they were freshly laundered and folded and appeared to have just come off a maid's cart. The motel used a variety of pillowcases. Some of the pillowcases found in defendant's room were similar to the one found behind the Chuck E. Cheese, but they were of varying colors and shapes.

Detective Trojanowski showed Ms. Thao a photo lineup with six photos less than two hours after the robbery. Ms. Thao identified defendant as the man with the gun and pillowcase, who had directed her to the safe. She also identified him at trial.

A few days after the robbery, Officer Trojanowski brought Ms. Thao a second photo lineup. That lineup had a picture of another suspect believed to have committed the robbery with defendant. Ms. Thao was "positive" that no one from that photo lineup had participated in the robbery.

The defense introduced testimony from Donna Zimmerman, an employee, who began working at the Extended Stay America motel two months after the robbery and who had done laundry for the motel. She testified that the pillowcase found behind the motel would not be put into a motel room in the condition it was in because it was dirty and stained.

Dr. Robert Shomer, an expert on eyewitness identification, testified for the defense. Dr. Shomer testified regarding the factors involved in eyewitness identifications. He described the various factors that can reduce the accuracy of an

identification, including stress, weapons focus, cross-racial identification, and multiple individuals dividing attention. He testified that “[i]t’s well known that eyewitness identification is . . . the least reliable means of identification we have.”

Dr. Shomer also testified regarding the problems inherent in identification from photo lineups. He testified that physical lineups are more reliable than photo lineups because “many people look more similar in pictures than they do in real life.”

Defendant was found guilty in both the drug case and the robbery case. On May 23, 2011, defendant was sentenced to a total term of 60 years to life—25 years to life in the drug case, with a consecutive term of 25 years to life in the robbery case and an additional 10 years for the gun use enhancement. The sentence on the gun enhancement was stayed. Defendant filed timely notices of appeal in both cases.

### III.

#### ARGUMENTS ON APPEAL

##### **A. The Trial Court Did Not Abuse Its Discretion in Denying Defendant’s Request for a Continuance to Conduct Pitchess Discovery (Drug Case)**

Defendant asserts that the trial court abused its discretion when it denied his motion for a continuance so that he could obtain *Pitchess* information regarding Officer Gutierrez, one of the arresting officers in his drug case. (*Pitchess, supra*, 11 Cal.3d 531.) We analyze this argument after setting forth the pertinent background information.

On June 26, 2007, the trial court granted defendant’s *Pitchess* motion for the confidential personnel records of several officers involved in the investigation of the drug case, including Officer Gutierrez. After numerous continuances, the trial was set for December 13, 2010, which was approximately three and a half years after defendant’s original *Pitchess* motion was granted.

On December 13, 2010, the day trial was set to commence, defense counsel, Edward Cohen, filed a supplemental *Pitchess* motion, seeking additional information from Officer Gutierrez’s personnel file. Attached to the motion was a declaration by defense counsel, which stated that the defense expected to show that Officer Gutierrez “engaged in fabricating evidence and falsifying reports.” The declaration further stated

that defense counsel was “informed and believe[d] that Officer Gutierrez engaged in these practices in Solano County case FCR277088, resulting in a dismissal of that action and a successful parole violation defense.” Finally, the declaration stated that defense counsel had just recently learned of this allegation on Friday, December 10, 2010, at approximately 4:00 p.m.

Defendant also filed a motion to continue the trial to allow time to conduct additional discovery under *Pitchess*. Attached to the motion was another declaration by defense counsel stating that he was able to contact John Coffey, who acted as defense counsel in Solano County Superior Court Case No. FCR277088, on the preceding Friday before the Monday trial. Coffey had told him that “deliberate inaccuracies were revealed in the reports written by Officer Gutierrez, leading to a dismissal of that action and a subsequent parole violation defense.” Defense counsel further stated that the information provided by Coffey was unknown to him before late afternoon on December 20, 2010; that impeaching Officer Gutierrez in the drug case would be essential to defendant’s defense; and that defendant was potentially facing a third strike and a lengthy prison sentence, and it was imperative that all reasonable efforts be made to prepare a thorough defense. The prosecutor, Terry Ray, opposed any continuance, stating that the prosecution was “ready to go” and that the witnesses were there and “ready to go.”

The court asked defense counsel whether he had pulled the court file in Solano County Superior Court Case No. FCR277088 to see whether anything in the case file indicated that the case had been dismissed because Officer Gutierrez falsified evidence. Defense counsel stated he had not. The prosecutor then stated she had spoken to Officer Gutierrez, who had no idea what defense counsel was talking about. The trial court passed on the matter so the court file from Solano County case number FCR277088 could be pulled and reviewed.

When the case was reconvened, the court stated that it appeared from the file that the information defense counsel had received from Mr. Coffey was “without a factual basis.” The court further stated that Mr. Kuo, the prosecutor who had handled the Solano County case, happened to be in court that day and disputed Mr. Coffey’s representations.

Mr. Kuo informed the court that the reason the case was dismissed was because he could not prove the catalytic converter that was allegedly tampered with was valued at over \$400 in order to make the charge a felony. The prosecutor in the instant case, Ms. Ray, was also the attorney of record for the catalytic converter case. She consulted her notes and confirmed Mr. Kuo's version of events.

In rebuttal, defense counsel asserted that although his conversation with Mr. Coffey had been "brief," his understanding was that Mr. Coffey had reviewed a DVD which pointed out inconsistencies between what was depicted on the DVD and the report made by Officer Gutierrez. Mr. Coffey had also told defense counsel that when the case went to the parole board on a parole violation, no violation was filed due to "the weaknesses and inconsistencies in the report."

The trial court denied the motion to continue the trial as untimely and without factual support. Specifically, the court found as follows: "The motion to continue is denied. It's untimely. There's no factual support for—at this late a date to engage in some *Pitchess* process when it's based upon pure speculative information that was provided to [defense counsel]. [¶] I understand why you brought it, Mr. Cohen, and you're certainly doing a fine job, but the true facts of that case are, for whatever reason, not as Mr. Coffey related to you. I have an officer of the court telling me—two officers of the court telling me it was because it wasn't \$400 and he was on parole. . . . [¶] I would note that the preliminary hearing in this matter—I'm kind of embarrassed to say this, but luckily it hasn't been in front of this Court for this long, but August 14th of 2007 was the preliminary hearing date. . . . And, you know, we—in the United States, we have a due process right to a speedy trial, and that applies in California certainly also to the defendant, but also to complaining witnesses or whatnot, so we need to get this taken care of. [¶] The motion to continue is denied."

Defendant argues that the trial court abused its discretion when it denied his request for a continuance in order to conduct additional discovery under *Pitchess*. We disagree.

In criminal cases, continuances are granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (e); *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) The trial court has broad discretion to determine whether good cause exists. (*Ibid.*) Such discretion, however, “may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare. [Citations.]” (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) “To effectuate the constitutional rights to counsel and to due process of law, an accused must . . . have a reasonable opportunity to prepare a defense and respond to the charges. [Citations.]” (*People v. Bishop* (1996) 44 Cal.App.4th 220, 231.) Although a defendant may be entitled to a continuance to conduct an investigation to uncover exculpatory evidence, the speculative nature of what is to be gained by a continuance may justify its denial. (See, e.g., *People v. Gatlin* (1989) 209 Cal.App.3d 31, 40-41.) The “[d]efendant bears the burden of establishing that denial of a continuance request was an abuse of discretion. [Citation.]” (*People v. Panah* (2005) 35 Cal.4th 395, 423.)

Under *Pitchess, supra*, 11 Cal.3d at pp. 537-538, a defendant is entitled to discovery of a police officer’s confidential personnel records if those files contain information that is potentially relevant to the defense. (See also Evid. Code, §§ 1043-1045.) To exercise this right, a defendant must file a motion demonstrating good cause for the discovery which, if granted, results first in an in camera court review of the records and subsequent disclosure to the defendant of information “relevant to the subject matter involved in the pending litigation.” (Evid. Code, § 1045, subd. (a).)

There is a “ ‘relatively low threshold’ ” for establishing the good cause necessary to compel in camera review by the court. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*)). Nevertheless, a defendant is not entitled even to an in camera review of police personnel files unless he or she first “ ‘establish[es] a plausible factual foundation’ ” for the defense asserted. (*Id.* at p. 1025.) The defendant “must present . . . a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. [Citations.]” (*Ibid.*) A scenario sufficient to establish a plausible factual foundation “is one that might or could have occurred. Such a scenario is plausible

because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Id.* at p. 1026.)

“Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. [Citations.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992 [reviewing trial court’s ruling that no in camera review necessary under *Pitchess* for abuse of discretion].) Consequently we may reverse on this ground only if the defendant demonstrates that the court abused its discretion.

Reviewing the court’s ruling based upon the record and argument presented at the time the motion to continue the trial was made,<sup>2</sup> we conclude that defendant has failed to carry his burden of showing the trial court abused its discretion when it refused to grant a continuance. While demonstrating good cause requires a low threshold (*Warrick, supra*, 35 Cal.4th at p. 1019), defendant’s motion failed to meet even that minimal level in presenting a “specific factual scenario of officer misconduct. . . .” (*Id.* at p. 1025; see, e.g., *People v. Collins* (2004) 115 Cal.App.4th 137, 151 [affirming denial of *Pitchess* motion without in camera review where “defendant’s declaration merely made general allegations of misconduct against [the officers] without alleging any facts that provided reason to believe the misconduct had occurred”].) There was nothing whatsoever before the trial court indicating the existence of a plausible factual foundation for counsel’s allegation that Officer Gutierrez had made false statements in investigating another case. In fact, the facts before the court uniformly pointed to the opposite conclusion.

Specifically, the trial court obtained the court file from Solano County Superior Court Case No. FCR277088, which was allegedly dismissed because Officer Gutierrez had fabricated evidence. The file, however, contained nothing to support these

---

<sup>2</sup> In briefing this issue on appeal, defendant attempts to introduce facts that were developed posttrial in support of his petition for habeas corpus. However, as recognized by our Supreme Court in *People v. Waidla* (2000) 22 Cal.4th 690, “ ‘Appellate jurisdiction is limited to the four corners of the record on appeal . . . .’ [Citation.]” (*Id.* at p. 743.) Therefore, defendant’s claims on appeal are analyzed exclusively using the record developed at trial.

allegations. Moreover, the prosecutor who handled the case told the court that the case had been dismissed not because of any allegedly false statements by Officer Gutierrez, but because the prosecution could not prove the \$400 value of the catalytic converter in order to make the felony count.

Importantly, in deciding a continuance motion, the court should consider “ ‘not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by granting of the motion.’ ” (*People v. Zapien* (1993) 4 Cal.4th 929, 972.) Based on representations made to the court by counsel who were involved in the case and the court’s independent review of the case file, the court could reasonably conclude that any potential benefit to defendant in re-opening the *Pitchess* inquiry was both speculative and lacking in factual support. (See *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318-1319 [courts should “apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations”].)

Additionally, in denying defendant’s motion to continue the trial, the court was clearly mindful of the fact that the drug case had been pending against defendant for over three years, and that defendant had the benefit of counsel during that time to pursue discovery and prepare his defense diligently—including receiving information from Officer Gutierrez’s personnel file under *Pitchess* three years earlier. Defendant’s request for a continuance was made on the eve of trial, and granting it would have caused a significant disruption to the witnesses and attorneys who had appeared, as scheduled, and were ready to proceed. The court was keenly aware of the statutory mandate to expedite proceedings to the “greatest degree that is consistent with the ends of justice.” (Pen. Code, § 1050, subd. (a).) The record here reflects the trial court resolved defendant’s request for a continuance consistent with the realization that not only defendant, but the witnesses and the prosecution have a statutory right to an “expeditious disposition.” (*Ibid.*) For all the foregoing reasons, no abuse of discretion has been demonstrated.

**B. Defense Counsel did not Render Ineffective Assistance of Counsel by Failing to Subpoena Nakeyia Washington (Drug Case)**

Defendant next argues his counsel was ineffective for failing to subpoena Nakeyia Washington, who was also in the car when defendant was arrested on the drug charge. Defendant characterizes Ms Washington as “a credible and percipient witness” whose testimony, if it had been properly secured by issuing a subpoena, would have contradicted Officer Gutierrez’s testimony “on several significant points.”

After the first defense witness had finished testifying, defense counsel told the court that he wanted to call Ms. Washington, but that she was nine months pregnant and in the hospital at the time “having contractions.” The court asked whether Ms. Washington was under subpoena. Defense counsel responded that she was not. He explained that the defense had been trying to reach her and was unsuccessful until the previous weekend.

The court asked for an offer of proof from the defense, and defense counsel recited the anticipated testimony of Ms. Washington.<sup>3</sup> Ms. Washington’s purported testimony, along with the manner in which it contradicts Officer Gutierrez’s testimony, is summarized as follows: According to Ms. Washington, she and the other occupants were in the car for less than two minutes before the police approached the vehicle, and during that time, no one approached it. This contradicts Officer Gutierrez, who testified that before he approached the vehicle, he observed several people walk up to both sides of the vehicle, stay for several minutes, and then leave. According to Ms. Washington, four

---

<sup>3</sup> Defendant’s offer of proof was essentially in conformance with Ms. Washington’s preliminary hearing testimony. However, the defense did not offer her preliminary hearing testimony into evidence at trial under the hearsay exception of Evidence Code section 1291 presumably because she was not an unavailable witness as described by Evidence Code section 240. A witness is “unavailable” if he or she is not present at the hearing and the party offering the former testimony has exercised due diligence but has nevertheless been unable to subpoena the witness. (Evid. Code, § 240, subd. (a)(5).) Defendant argues “[a]s a result of the fact that [Ms. Washington] was not subpoenaed, [he] was unable to present either her testimony at trial, or her preliminary hearing testimony.”

officers originally approached the vehicle, which contradicted Officer Gutierrez that only two officers approached the vehicle. According to Ms. Washington, there was no odor of marijuana in the vehicle, which contradicted Officer Gutierrez's testimony that there was a strong odor of marijuana inside it. Finally, according to Ms. Washington, when defendant was searched, his pants and underwear were removed, which would contradict Officer Gutierrez's testimony that none of defendant's clothes were removed when he was searched.

Based on this offer of proof, the trial court found the defense had not demonstrated good cause to continue the trial, noting, among other things, that the anticipated areas of impeachment were, at best, on collateral issues and that the trial had already been set and continued numerous times.

To prevail on an ineffective assistance of counsel claim, defendant must show that his counsel's performance fell below professional standards of reasonableness, and that there is a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*)). A judgment will be reversed "on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 980, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "To prevail, defendant must overcome the strong presumption that counsel's actions were sound trial strategy under the circumstances prevailing at trial. [Citations.]" (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) The " 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' [Citation.]" (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335-1336 (*Brodit*)).

While defense counsel clearly wished to use Ms. Washington's testimony at trial, as demonstrated by his request for a continuance in order to secure her attendance, the record nevertheless provides a tactical reason for defense counsel's failure to subpoena her. On March 22, 2011, after defendant had been convicted in the drug case, he complained in a *Marsden* hearing that defense counsel had failed to subpoena

Ms. Washington. When called upon to respond, defense counsel explained that he decided not to subpoena Ms. Washington based on the advice of the defense investigator. The investigator thought that if Ms. Washington were subpoenaed, she might feel like she was an adversary witness. The investigator thought that it would be better if Ms. Washington felt like she was there “on her own volition.”

Thus, based on the investigator’s assessment of the situation, defense counsel made a reasonable tactical decision not to subpoena Ms. Washington that should not be second-guessed on appeal. (*Brodit, supra*, 61 Cal.App.4th at pp. 1335-1336.) Based on the information he was given, defense counsel may have reasonably decided that securing Ms. Washington’s attendance at trial by serving her with a subpoena carried serious risks for the defense, including Ms. Washington’s apparent reluctance to testify in court if she believed her testimony was being compelled. Defense counsel could have reasonably believed that his best chance of eliciting favorable and material testimony for the defense would be to allow Ms. Washington to appear at trial of her own volition.

Although in hindsight counsel’s tactical decision may appear risky, not every tactical failure amounts to ineffective assistance of counsel. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1213 [“Although counsel’s tactics were unusual . . . given the limited options he faced, we cannot say on direct appeal they were unreasonable”].) Because counsel had a rational tactical purpose, we conclude his failure to subpoena Ms. Washington was within the range of reasonable competence. Therefore, defendant’s claim of ineffective assistance of counsel on this ground fails on its merits. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581 [on appeal, a conviction will be reversed on the ground of ineffective assistance of counsel “only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission”].)

Additionally, a defendant claiming ineffective assistance of counsel has the burden of showing both deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217 (*Ledesma*); *People v. Mendoza* (2000) 78 Cal.App.4th 918, 924.) Prejudice must be affirmatively proved. “ ‘It is not enough for the defendant to show that [counsel’s] errors had some conceivable effect on the outcome of the proceeding. . . .

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

In this case, the missing evidence that Ms. Washington allegedly would have provided for the defense does not directly attack Officer Gutierrez's veracity on the critical evidence supporting the drug charge—that when defendant was arrested and searched, he was found to have 26 individually wrapped pieces of rock cocaine in his pants pocket along with \$414 in cash and a cell phone containing evidence of drug transactions. Given the strength of this evidence, defendant has not demonstrated a reasonable probability that he would have been acquitted of the charge of possession for sale of cocaine had Ms. Washington been subpoenaed and had she testified in conformance with the offer of proof. For all these reasons, appellant's claim of ineffective assistance of counsel is without merit.

**C. The Trial Court Did Not Abuse its Discretion in Admitting Evidence Regarding Drug Sales Found on Defendant's Cell Phone (Drug Case)**

Defendant claims the trial court improperly overruled defense counsel's hearsay objection to Officer Gutierrez's testimony about entries on defendant's cell phone which Officer Gutierrez deemed to be evidence that defendant was selling drugs.

Officer Gutierrez testified that a cell phone was found in defendant's front pocket with "pay-owes" in it. Defense counsel raised a lack of foundation objection. The trial court sustained the objection. After the prosecutor elicited testimony from Officer Gutierrez regarding his training and experience in looking for evidence on cell phones, the following exchange occurred:

"[Prosecution]: Okay. So you go into the cell phone, and what did you find?"

"A. I found individual names—"

"[Defense Counsel]: Objection. Hearsay."

"The Court: Overruled."

“[Officer Gutierrez]: Individual names, and next to it would be a dollar amount, like \$20, \$30.

“[Prosecution]: Did it have a dollar sign?

“A. Yes.

“Q. Okay. Now, that cell phone was booked into evidence?

“A. It’s currently in our evidence warehouse.

“Q. It’s not accessible?

“A. No.

“Q. Okay. Now, do you remember how many—approximately how many names with dollar amounts were next to it?

“A. No, ma’am, I don’t.

“Q. Okay. Was it more than one?

“A. Yes.

“Q. More than five?

“A. Absolutely.”

On cross-examination, defense counsel clarified that although the cell phone had not been brought to trial or entered into evidence, it could be requested and accessed from evidence storage.

On appeal, defendant claims “Officer Gutierrez’s testimony regarding the contents of the cell phone should have been excluded as hearsay, and as a violation of the secondary evidence rule.” A similar argument was considered and rejected by the court in *People v. Harvey* (1991) 233 Cal.App.3d 1206. In *Harvey*, the defendants were convicted of conspiracy to sell or transport cocaine, conspiracy to possess cocaine for sale, and possession for sale of cocaine. (*Id.* at p. 1209.) On appeal, the defendants argued the trial court erred in admitting into evidence pay-owe ledgers which they asserted were inadmissible hearsay. (*Id.* at pp. 1219-1220.) However, the trial court had indicated the evidence was not being admitted for the truth of the matters asserted but as circumstantial evidence of cocaine sales and a conspiracy. (*Id.* at p. 1220.)

The Court of Appeal found no hearsay violation, explaining: “If the testimony was received to prove these transactions occurred in the manner stated, it was hearsay. However, if the testimony was received, as the court indicated, as circumstantial evidence of sales of cocaine or a conspiracy to sell or distribute cocaine, it was not hearsay. [Citations.]” (*Harvey, supra*, 233 Cal.App.3d at p. 1220.)

In *Harvey*, the evidence was properly admitted for a non-hearsay purpose—namely, as circumstantial evidence of cocaine sales and possible conspiracies involving cocaine sales. Consequently, there was no error. (*Harvey, supra*, 233 Cal.App.3d at pp. 1222-1223.) Similarly, in the instant case, the evidence was not admitted to prove the truth of any particular transaction recorded on the cell phone. The evidence was admitted as circumstantial evidence that drug sales were taking place. The trial court properly concluded this evidence was not hearsay. (See also *People v. Fields* (1998) 61 Cal.App.4th 1063, 1070 [evidence of drug transaction on pager was not hearsay].)

It appears that in briefing this issue, defendant is adding an argument that was not made below. Defendant asserts for the first time on appeal that “the admission into evidence of Officer Gutierrez’s vague testimony as to what the cell phone contained, without the cell phone itself being offered into evidence, was so unfair as to deprive [him] of due process and a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 7 of the California Constitution.” Specifically, defendant argues Officer Gutierrez’s testimony about the contents of his cell phone should also have been excluded under the secondary evidence rule.

Defendant forfeited this claim by failing to raise it in the trial court. The failure to object to a claimed evidentiary error on the *same ground* asserted on appeal results in a forfeiture of the issue on appeal. (See, e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 756.)

#### **D. Defendant Was Not Denied the Effective Assistance of Counsel in Connection with the Romero Motion**

Defendant asserts he was denied effective assistance of counsel due to his defense counsel’s “failure to competently present a *Romero* motion.” Before the sentencing hearing, defense counsel filed a motion requesting the court to exercise its discretion

under Penal Code section 1385 to dismiss one of defendant's prior strikes in the interests of justice. (See *Romero, supra*, 13 Cal.4th 497.) Defendant claims that "due to the deficient manner in which his attorney presented the issue, he was denied a meaningful opportunity to have the court consider his *Romero* motion."

By way of background, after defendant was convicted in the drug case on December 14, 2010, the jury found defendant had seven prior strike convictions. After defendant was convicted in the robbery case on February 3, 2011, the jury found defendant had four prior strike convictions. All of defendant's prior strike convictions arose from the same 1995 Solano County case, in which defendant was convicted of one count of robbery with a gun enhancement and six counts of assault with a firearm. However, the record on appeal contains scant information about the 1995 offense, nor does the record establish the relationship between defendant's convictions, aside from the fact they were charged in a single action. A plea form initialed and signed by defendant sheds a little light on the facts underlying defendant's prior strike convictions. The record in that case includes a statement, apparently in defendant's own handwriting, as follows: "Me and another person robbed the Sanwa Bank and several employees were assaulted during it, on August 17, 1995."

On the morning of May 23, 2011, the date appellant's case was scheduled for sentencing, defense counsel filed a *Romero* motion asking the court to exercise its discretion to dismiss one of appellant's prior strike convictions in his drug case. Basically, the motion identified a circumstance—the closeness of the connection between the strike conviction offenses—that the court could consider when deciding whether to dismiss a strike prior. (*People v. Scott* (2009) 179 Cal.App.4th 920, 931; see *People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8.)

The deficiencies in the *Romero* motion filed by defense counsel are apparent and need not be belabored here. Obviously, defense counsel prepared the motion by cutting and pasting from another document prepared not by a defense attorney but by a prosecuting attorney. Therefore, defendant's *Romero* motion, at different points, argues that his prior convictions were *not* so closely connected as to warrant striking some of

those convictions. The motion also makes arguments using facts from another case, involving the robbery of a convenience store where the clerk was shot, that are completely unrelated to the facts of this case. At the hearing on the *Romero* motion, defense counsel stated that due to “sort of a typographical computer error,” one paragraph of the motion had accidentally been included, and requested the court to strike that paragraph. But, as defendant points out, once the court struck that paragraph, the motion “offered no evidence or information about the prior case, and did not provide any factual basis for the assertion that the prior convictions were inextricable or closely connected.”

In ruling on defendant’s *Romero* motion, the court noted that it was “well-aware of [defendant]’s entire situation here and all his priors.” The court stated: “I can’t make a finding that it would be deemed outside the three strikes, since that’s the entire scheme and spirit, in whole or in part.”

Once again, in claiming ineffective assistance of counsel, defendant has the burden of showing: (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland, supra*, 466 U.S. at p. 687; see also *People v. Williams* (1988) 44 Cal.3d 883, 937 (*Williams*) [recognizing it is the defendant’s burden to establish both deficiency and prejudice].)

Therefore, even though defendant has a legitimate complaint about the cobbled-together *Romero* motion counsel filed on his behalf, prejudice still must be shown. A showing of prejudice requires defendant to demonstrate “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) In establishing prejudice, the defendant “must carry his burden of proving prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]” (*Williams, supra*, 44 Cal.3d at p. 937.)

In order to grant a *Romero* motion and depart from the legislative determination of the appropriate punishment for repeat felons, the trial court “must consider whether, in

light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) This is a very "stringent" standard because the statutory scheme "carefully circumscribes the trial court's power to depart from [the three strikes law sentencing] norm[.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378.)

Defendant's claim for ineffective assistance of counsel fails because defendant has failed to show any likelihood he would have received a reduction in his sentence if his counsel had filed a different, more carefully prepared, *Romero* motion. He does not direct our attention to anything about "the particulars of his background, character, and prospects" that are favorable such that he should be deemed outside the spirit of the three strikes law and treated as though he had not previously been convicted of numerous serious and violent felonies. (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

We also emphasize that there is nothing in this record to indicate that the trial court was misled in any respect by the defective *Romero* motion. To the contrary, the law and the facts of appellant's case were known to and considered by the trial court before ruling on appellant's *Romero* motion. Before denying defendant's *Romero* motion, the court indicated it was "well-aware of [defendant]'s entire situation here and all his priors," and based on defendant's record, the court was unable to "make a finding that [he] would be deemed outside the three strikes . . . ." Given the number of crimes defendant committed, their seriousness, the manifest difference in character of the crimes, and all the other factors applicable to a *Romero* analysis, defendant does not argue that the trial court abused its discretion in determining that defendant did not fall outside the spirit of the three strikes law.

Consequently, we reject defendant's claim that the success of his *Romero* motion was doomed due to his trial counsel's omissions. Instead, the success of his *Romero* motion was doomed due to the nature of the current convictions, his prior violent

offenses, and other individualized factors. Because defendant has failed to show there is a reasonable probability that the court would have reached a different result on his *Romero* motion if defense counsel had advocated for defendant more effectively, we reject his claim of ineffective assistance of counsel.

**E. The Trial Court Did Not Abuse its Discretion in Denying Defendant’s *Marsden* Motions (Both Cases)**

Defendant next contends the court should have granted his two *Marsden* motions to remove his defense counsel and appoint another attorney. (See *Marsden*, *supra*, 2 Cal.3d at p. 123.) Both of defendant’s *Marsden* motions were made after he was tried and convicted in both cases but before he was sentenced. Defendant contends “the court abused its discretion in denying the *Marsden* motions because the record clearly showed that [defense counsel] ‘failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel’s failings.’ [Citation.]”

We begin with the well-settled rules for a *Marsden* motion as set out by our Supreme Court in *People v. Ortiz* (1990) 51 Cal.3d 975, 980, footnote 1. “In [*Marsden*], we held that a defendant is deprived of his constitutional right to the effective assistance of counsel when a trial court denies his motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. A defendant must make a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel [citation], whether because of his attorney’s incompetence or lack of diligence [citations], or because of an irreconcilable conflict [citations]. We require such proof because a defendant’s right to appointed counsel does not include the right to demand appointment of more than one counsel, and because the matter is generally within the discretion of the trial court. [Citation.]”

We clarify the standard of review because, at one point in defendant’s brief, he claims that “[r]eversal is required unless the record shows *beyond a reasonable doubt* that appellant was not prejudiced by the denial of his *Marsden* motions. [Citations.]”

(Italics added.) That is not the correct standard. On appeal, we review a trial court's decision denying a *Marsden* motion to relieve appointed counsel under the deferential abuse of discretion standard. (*People v. Taylor* (2010) 48 Cal.4th 574, 599; *People v. Earp* (1999) 20 Cal.4th 826, 876; *People v. Welch* (1999) 20 Cal.4th 701, 728.) Denial of such a motion is not an abuse of discretion unless the defendant has shown that the failure to replace counsel would substantially impair the defendant's right to assistance of counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

Defendant brought two *Marsden* motions. Defendant brought his first *Marsden* motion on March 22, 2011, when the case had been called to resolve various motions as well as for judgment and sentencing. Defense counsel sought a continuance, based in part on defendant's desire "to investigate I.A.C [ineffective assistance of counsel]." Defense counsel asked the court to appoint somebody to advise defendant in the matter or to relieve him as counsel if the court deemed it appropriate. In response, the court conducted a *Marsden* hearing.

At the hearing, defendant first complained that defense counsel had not subpoenaed Ms. Washington, who defendant described as "my main witness" in his drug case. As we noted earlier, in response, defense counsel told the court that he wanted to call Ms. Washington, but that he had not subpoenaed her because his investigator had advised him that it might make Ms. Washington feel like an "adversary" witness if a subpoena were issued and that it would be better for her to feel like she was there "on her own volition." The trial court found: "The speculation that an individual in a car in which the drugs were [found] somehow would, number one, even testify and, number two, would lead to a different outcome of the case, given all the evidence against you. That's not inadequate."

Defendant next complained that he had asked defense counsel to file a *Pitchess* motion in his drug case, but that defense counsel did not do so until the day of trial. Defense counsel told the court that defendant had spoken with an inmate who had told him about misleading police reports that had been filed by Officer Gutierrez in his case. Defendant gave defense counsel the name of the inmate, but defense counsel had been

unable to learn any information about the case because the name provided by defendant was incorrect. The Friday before the Monday trial, defense counsel investigated further, using “every different variant” of the name provided by defendant that he could think of, and finally identified the individual defendant had spoken with. Defense counsel contacted the defense attorney from the case, Mr. Coffey, that same day and then submitted the *Pitchess* motion the next court date. The trial court noted that it had heard and determined the *Pitchess* motion and that “[i]t wasn’t sufficient evidence then, and there’s still not sufficient evidence.”

As to his robbery case, defendant complained that defense counsel had not called three alibi witnesses. Defense counsel was clearly aware of defendant’s alibi that he was having his hair cut during the robbery, and counsel indicated he had investigated and interviewed potential alibi witnesses and had even secured their attendance at trial. However, based on defense counsel’s assessment of the witnesses’ credibility, he made a decision not to present the alibi defense at trial because he feared it might have the effect of substantially undermining defendant’s defense. Specifically, he questioned whether the jury would perceive the alibi witnesses as presenting “an honest defense.” Defense counsel then made a decision that putting on testimony that the jury might consider to be a false alibi would run the risk of introducing information that was more harmful than helpful to the defense. The trial court found that the decision not to call the alibi witnesses was a tactical decision based on defense counsel’s personal contact with the witnesses, and concluded that it saw nothing “untoward here.”

Finally, as to his robbery case, defendant also complained that defense counsel had not performed DNA analysis of the pillowcase that had been found. The trial court found that whether or not the pillowcase had defendant’s DNA on it would not be a defense.

The court denied defendant’s *Marsden* motion, concluding that “I don’t find sufficient information that’s been presented to cause me to think that [defense counsel] was in any way prejudicially inadequate.”

On May 23, 2011, during a discussion of the *Romero* motion presented by defense counsel and prior to sentencing, defendant brought his second *Marsden* motion. At the

hearing on that motion, the trial court asked defendant what it was about defense counsel's performance "today" that he anticipated was going to cause him problems that another lawyer could solve. Defendant replied: "Failure to investigate and failure to . . . perform diligently in my case. Like right now, I'm being affected by this [*Romero*] motion not being in on time." The following exchange occurred:

"THE COURT: All right. So is there anything else you want to tell me?"

"THE DEFENDANT: Just that he didn't investigate it or—or subpoena witnesses—

"THE COURT: All right.

"THE DEFENDANT:—that were available for my—for my case and probably could have made the decision different for the jurors.

"THE COURT: All right. Let's see. You said something last time we were here, that you wanted to represent yourself. Is that still something you want to do?"

"THE DEFENDANT: I mean, to the point where—I mean, if I can't—if I can't get somebody to do the things for me in a timely fashion, I have to do something to protect my own rights.

"THE COURT: Uh-huh. Well, everything, you know, that you've told us about is on the record here. So if there's some other—if the Appellate Court agrees with you, you know, your rights are going to be protected. It's not like it's not on the record, what's going on here. [¶] I mean, we're at this point now—so you want to go ahead and have Mr. Cohen finish up the representation and then take it from there? Is that what you want to do?"

"THE DEFENDANT: If I can't get my ineffective counsel claim investigated, I guess that—I don't think I have a choice to do.

"THE COURT: All right. Let's bring back the public then and go ahead and get this taken care of."

The trial court denied defendant's request for new counsel. The court then denied defendant's pending motion for a new trial, his *Romero* motion, and pronounced the sentence.

A judge abuses his or her discretion if the judge “denies a motion for substitution of attorneys solely on the basis of his [or her] courtroom observations, despite a defendant’s offer to relate specific instances of misconduct,” or makes a decision “without giving a party an opportunity to present argument or evidence . . . .” (*Marsden, supra*, 2 Cal.3d at p. 124.) Depending on the nature of the grievances related by the defendant, it may be necessary for the court also to question defense counsel. (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219.)

However, “[o]nce the defendant is afforded an opportunity to state the reasons for discharging an appointed attorney, the decision to allow a substitution of attorney is within the discretion of the trial judge unless defendant has made a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation. [Citations.]” (*People v. Crandell* (1988) 46 Cal.3d 833, 859, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) “A trial court should grant a defendant’s *Marsden* motion only when the defendant has made ‘a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation . . . .’ ” (*People v. Hines* (1997) 15 Cal.4th 997, 1025.)

In the first *Marsden* hearing, the record demonstrates the court allowed defendant to explain the reasons for his dissatisfaction with counsel and permitted counsel to respond. Counsel had adequate explanations for all of defendant’s complaints. The record reflects that defendant’s complaints focused primarily on the fact that he disagreed with defense counsel regarding the appropriate strategy for his defense, including whether to subpoena Ms. Washington, when to bring his *Pitchess* motion, whether to call alibi witnesses, and whether to conduct DNA analysis of the pillowcase. Such decisions are tactical and not subject to a finding of ineffectiveness. Because the record does not clearly show counsel’s performance was inadequate, the trial court did not abuse its discretion in refusing to relieve counsel. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 878-879; *People v. Abilez* (2007) 41 Cal.4th 472, 487-490.)

In the second *Marsden* hearing, the trial court again gave defendant an opportunity to state his complaints. Defendant complained that defense counsel had not timely filed

his *Romero* motion, and then referred to complaints raised at his first *Marsden* motion. Defendant complains on appeal that the trial court failed to elicit and fully consider the reasons for his second *Marsden* motion. However, it was apparent to the trial court that defendant's comments about his trial counsel at the time of the sentencing were merely repetitive of his complaints made at the earlier *Marsden* hearing. (*People v. Clark* (1992) 3 Cal.4th 41, 104 [the trial court is "not required to afford a hearing each time defendant made the same [*Marsden*] accusation"]; *People v. Vera* (2004) 122 Cal.App.4th 970, 980 ["a defendant is not entitled to keep repeating and renewing complaints that the court has already heard"].) Accordingly, the trial court did not abuse its discretion in denying defendant's *Marsden* motions.

#### IV.

### PETITION FOR WRIT OF HABEAS CORPUS

#### A. Overview

Defendant has also filed a petition for a writ of habeas corpus, which we have ordered consolidated with his appeal, in which he claims that defense counsel's errors and omissions deprived him of his constitutional rights to due process and effective representation of counsel. In defendant's petition for a writ of habeas corpus, he repeats many of the assertions made on appeal and during his *Marsden* motions. Specifically, defendant claims defense counsel failed to: (1) present the testimony of six available witnesses who would have established defendant's alibi defense in the robbery case; (2) object to a "booking photo" of defendant that was entered into evidence in the robbery case which had minimal probative value but was highly prejudicial because it suggested defendant had a prior criminal history; and (3) offer evidence which would have impeached Officer Gutierrez's credibility in the drug case by showing that Officer Gutierrez had made blatantly false statements in another criminal case. Defendant claims

it is reasonably probable, but for these errors, that the outcome of both of these trials would have been more favorable to him.<sup>4</sup>

“An appellate court receiving [a petition for a writ of habeas corpus] evaluates it by asking whether, assuming the petition’s factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC [order to show cause]. [Citations.] . . . Issuance of an OSC, therefore, indicates the issuing court’s *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved.” (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Pursuant to our request, the People have filed an informal response and reply to assist us in our determination of whether a prima facie case has been stated. (See Cal. Rules of Court, rule 8.385(b); *People v. Romero* (1994) 8 Cal.4th 728, 737.) (Order, Jan. 24, 2012, Reardon, Acting P. J.)

When, as here, “ ‘the basis of a challenge to the validity of a judgment is constitutionally ineffective assistance by trial counsel, the petitioner must establish either: (1) As a result of counsel’s performance, the prosecution’s case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors and/or omissions, the trial would have resulted in a more favorable

---

<sup>4</sup> The People argue defendant’s “claim of ineffective assistance of trial counsel should first be brought in the superior court which has the factual and procedural familiarity with this case to rule on it in the first instance. [Citation.]” “ ‘[B]oth trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court.’ [Citations.]” (*People v. Seijas* (2005) 36 Cal.4th 291, 307; *In re Steele* (2004) 32 Cal.4th 682, 692.) We reject the People’s suggestion that the petition should be considered by the superior court in the first instance because we have determined that the issues can be fairly resolved on the record before us.

outcome. [Citations.] In demonstrating prejudice, however, the petitioner must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. [Citation.]' ” (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

### **B. Defense Counsel's Failure to Call Alibi Witnesses**

Defendant first claims that due to his trial counsel's "omissions in this case, [he] was denied the opportunity to even litigate an alibi defense which clearly had the potential of prevailing." He claims the "[t]estimony from six separate witnesses . . . would have established that [he] was at the barbershop at or very near the time of the robbery [which] would have raised a reasonable doubt about whether [defendant] was in fact the robber."

In defendant's appeal, we have already held that defendant's trial counsel offered an adequate tactical explanation for his decision not to advance an alibi defense at the hearing on defendant's *Marsden* motion. (*Marsden, supra*, 2 Cal.3d 118.) We now set out a full examination of defense counsel's explanation for his decision not to present an alibi defense at trial, which sheds valuable light on what actions defense counsel took to prepare for and represent defendant at trial.

During the *Marsden* hearing, defendant expressed his dissatisfaction with counsel's failure to call alibi witnesses, claiming "we had an understanding before the trial started that these three people were going to testify on my behalf as alibi witnesses . . . and he didn't call them." Counsel then explained, "Your Honor, I had witnesses under subpoena. They were in the hallway." Defense counsel then met with defendant and told him "that I didn't believe at this point that it was to his benefit to present those witnesses. The defendant then "suggested to me all the reasons that he thought . . . they should be called. I told him the reasons that I thought they shouldn't."

The trial court then asked defense counsel for an explanation as to why the witnesses weren't called. Counsel explained, "[a]t that point in the trial I thought there were serious concerns about whether or not the People had, in fact, proven their case to the necessary standard. I thought that calling alibi witnesses who were . . . going to present a somewhat flawed story was only going to call into question whether

[defendant's] . . . case was, in fact, an honest defense. The witnesses had—some of them had criminal pasts.” And while these witnesses’ anticipated testimony “did appear on its face to put [defendant] in other places at the time of the incident, I thought the jury might start to question the defense.” Defense counsel continued, “I was concerned that either they would give a statement that was inconsistent to that at the preliminary hearing or that the statements would not, in fact, provide a seamless alibi which, as [defendant] reminded me, it wasn’t as though these people were making a record of every moment on that date several years ago; but I didn’t see it as being a strong enough alibi that it would have exonerated [defendant] and I was concerned that . . . the weaknesses of the defense would call the overall defense into question.”<sup>5</sup>

The court remarked that “[w]ell, you know, during the stress and strain of a jury trial, you have to make calls based upon your best judgment as to how the evidence is going to be perceived by the jury. That’s what attorneys do. You know, they have to make these calls.” “One of the toughest things for the defense is alibi and character, because once you start putting witnesses up there, the DA is going to love to talk to the jury in argument about the terrible witnesses that you brought in . . . you know, it can be extremely damaging to your case.” The court also observed, “You know, I think it’s unfair for people to second-guess, because . . . you had personal contact with these witnesses. . . .” In conclusion, the court stated, “Those are tactical decisions that attorneys make during the trial based on everything they know. You know, I don’t see anything untoward here.”

The obligation to investigate and present a defense does not mean counsel must blindly present all evidence and witnesses that are mentioned to them. Defense attorneys are expected to apply their professional training and judgment to the task of preparing a

---

<sup>5</sup> Defense counsel has submitted a declaration, under penalty of perjury, in support of defendant’s petition for habeas corpus. In his declaration, he reiterates that he made a decision not to have any of the potential alibi witnesses testify at trial because their testimony “would not have clearly established that [defendant] was in the barbershop at the time of the robbery, and that having them testify would misdirect the jury from considering the flaws in the prosecution case.”

defense. This includes making some choices about what witnesses and evidence to present. The tactical decision that was made by defense counsel in this case was obviously a deliberate decision made after a full investigation.

We also point out that when defense counsel made the decision not to advance an alibi defense, he had the benefit of his experience at the preliminary hearing, where defendant's alibi defense *was* presented, with less than favorable results. Chris Branch, the owner of the barbershop in Fairfield, California, testified at the preliminary hearing. At the core of an alibi defense is, of course, consistency between the time of the crime and that of the defendant's alibi. The robbery occurred at 11:00 a.m. At one point during his testimony, Mr. Branch testified that defendant had come into his barbershop for a haircut between 11:30 a.m. and noon on the day of the robbery. Defendant was in his barbershop for approximately 20 to 30 minutes before going to lunch with Mr. Branch and the other barber. The 11:30 a.m. to noon timeframe did not support defendant's alibi defense because it did not discount the possibility that defendant could have committed the robbery and then come to the barbershop. In attempting to rehabilitate the witness, defense counsel asked Mr. Branch whether he remembered telling the defense investigator that defendant had come in around 11:00 a.m. or earlier. Mr. Branch stated it could have been, but he was not really sure, because he worked off of scheduled appointments and defendant did not have an appointment.

On cross-examination, the prosecutor asked Mr. Branch, "you don't know exactly when it was that he came over to your barber shop without the appointment, do you?" Mr. Branch replied, "No. Not without an appointment, no." Mr. Branch also admitted he had a felony conviction for possession of narcotics as well as several other felony convictions he could not recall.

The legal principles governing the situation before us are well established. In general, reviewing courts are hesitant to second guess counsel's decisions concerning what witnesses to call, especially when counsel has investigated and knows who the potential witnesses are and what they would say, for decisions about witnesses are matters of trial tactics. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [decisions

“whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess”].)

Nevertheless, defendant claims defense counsel’s decision not to put on his alibi defense was based on an unreasonable determination of the facts in light of the documentary evidence he has produced in support of his petition for habeas corpus. Defendant has submitted documents that are the pretrial work product of defense counsel’s investigator, summarizing the investigator’s interviews with potential alibi witnesses.<sup>6</sup>

The defense investigator’s interview summaries indicate that Chris Ranch [*sic*], the owner of the barbershop, was interviewed. Ranch [*sic*] stated he was “not sure the exact time” defendant came to the barbershop on the day of the robbery, but he believes it was “around 11 a.m., possibly earlier.” Uriel Aguilera, another barber at the barbershop, told the investigator that defendant came into the barbershop “around 11 a.m.” on the day of the robbery, that Mr. Branch cut defendant’s hair; and that thereafter, they all went to lunch. Andrea Cramer, a friend of defendant’s, told the investigator that she met defendant outside the barbershop between 11:00 and 11:30 a.m. that day. Jaquan Mayes-Thomas, defendant’s son, said that his grandmother gave him a ride to the barbershop before noon on the day of the robbery, and that defendant had already gotten a haircut when Mayes-Thomas arrived at the barbershop. Mayes-Thomas’s grandmother, Marilyn Mayes, confirmed that she had given Mayes-Thomas a ride to the barbershop, and that when she pulled up to the barbershop, defendant came outside to greet them. Although she could not recall the exact date or time, it was the only time Mayes had ever taken Mayes-Thomas to that location.

---

<sup>6</sup> No affidavits or declarations have been submitted from any of these potential witnesses setting forth what evidence they would have provided had they been called at trial. (Compare *In re Sixto* (1989) 48 Cal.3d 1247, 1262-1263 [to support habeas corpus relief, declarations were submitted from potential witnesses who were willing to testify at trial but who had not been contacted by trial counsel].)

Carla Frazer told the investigator that defendant came over to her apartment at about 2:00 p.m. on the day of the robbery. He had a fresh haircut. One additional witness, Lanita Simmons, told the investigator that defendant was with her on the morning of the robbery from about 9:00 a.m. until 11:45 a.m. Simmons's potential testimony clearly conflicted with that of the other alibi witnesses who placed defendant in the barbershop during that timeframe.

We find that defendant has failed to make a prima facie showing of his entitlement to habeas relief. Defense counsel's pretrial knowledge of these witnesses has been established, and counsel has presented the court with a rational explanation for his failure to present their testimony during defendant's trial. While defendant attempts to establish the substance of the missing testimony from the defense investigator's factual recitations of her pretrial interviews, we refuse to indulge in the speculation that these witnesses would have testified in strict adherence to these interview summaries. After presumably interviewing at least some of these witnesses and preparing an alibi defense, defense counsel explained that he decided at the last minute not to present their testimony because he was fearful that when tested by cross-examination and challenges to these witnesses' credibility, these witnesses would end up doing the defense more harm than good. Defense counsel had a rational basis for this conclusion. As we have already discussed, at the preliminary hearing defense counsel attempted to establish an alibi defense through the testimony of Chris Branch, the owner of the barbershop. However, the alibi defense proved to be unsuccessful after Mr. Branch was unable to recall the exact time defendant entered the barbershop and thought it might be between 11:30 a.m. and noon—which was contrary to his statement to the defense investigator that it was around 11:00 a.m. or even earlier.

Given this earlier experience, counsel's decision not to call these witnesses in an attempt to establish an alibi was within "the wide range of professionally competent assistance" and defendant has failed to establish a prima facie case of ineffective assistance of counsel. (*Strickland, supra*, 466 U.S. at p. 690.) Moreover, there is simply no showing that the alibi testimony, which defense counsel believed was fraught with

problems, would have effectively countered: (1) the eyewitness identification of defendant made by the robbery victim shortly after the crime; (2) the surveillance video taken during the robbery depicting defendant as one of the robbers; and (3) evidence that defendant used a pillowcase from his motel room next door to the Chuck E. Cheese restaurant to carry the proceeds from the robbery. Thus, we conclude that defendant has not made a prima facie showing of ineffective assistance of counsel.

### **C. Defense Counsel's Failure to Object to Booking Photo**

Defendant next complains that defense counsel was ineffective in failing to object to admission of a "booking photo" that was entered into evidence in the robbery case.

By way of background, a criminal investigator for the District Attorney's Office testified that he used a portion of the surveillance videotape of the robbery to make a five-by-seven-inch photograph of the robber's face. A booking photo of defendant from the Department of Justice was entered into evidence so that the jury could determine whether the image of the robber captured on the surveillance videotape matched the defendant's image. The photo contains the caption "Cal-Photo Mugshot Record Details" and is dated January 28, 2011, which presumably is the date the photo was printed. The photo also contains identifying information, including defendant's date of birth, sex, race, weight, and hair and eye color. It also lists several aliases and describes several tattoos including "Money Over Bitches" and "Third World Hustler."

The entirety of the discussion of the admission of the photo at trial was as follows:

"Q. Okay. And showing you what's been marked People's Exhibit 5, can you tell the jury what it is?

"A. This is an image printed off the Department of Justice CalPhoto of a booking photo of [defendant].

"Q. Okay. And were you using that booking photo for comparison purposes with this frame that you froze off the video?

"A. I used that frame based on the surveillance footage that I had of the best photograph that I could get of . . . a facial image out of all the surveillance footage."

In a declaration supporting the defendant's habeas petition, defense counsel expressly admits he had no tactical reason for failing to object to the admission of the booking photo, instead calling his failure to object "an oversight." He goes on to say that "[n]o strategic purpose was served by allowing the booking photo into evidence. On the contrary, it suggested that [defendant] had committed prior crimes, and thus was highly prejudicial."

It is undeniable that evidence of a prior arrest, including evidence in the form of a booking photo or mug shot, can be prejudicial. (*People v. Cook* (1967) 252 Cal.App.2d 25, 27, 29-30 [court erred in admitting photograph "in the familiar and unmistakable format of a police mug shot"]; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 384, disapproved on other grounds in *People v. Carter* (2003) 30 Cal.4th 1166, 1197 ["booking photographs taken in prior years carry the inevitable implication that [defendant] suffered previous arrests and perhaps convictions and was error"].) Consequently, we agree with defendant that defense counsel should have objected to admission of the booking photo, or at a minimum requested that the photo be redacted to remove the phrase "Mugshot" and any description of defendant's tattoos, on the grounds that its prejudicial effect outweighed its probative value.<sup>7</sup>

However, we do not believe defendant has demonstrated that he was prejudiced as a result of counsel's failure to object to or otherwise move to redact the "booking photo." The references to the "booking photo" occurred only once during the trial and fleetingly so, during the relatively brief testimony regarding the creation of the photo from the surveillance videotape. Neither the prosecutor nor any other witness mentioned it again during the trial. Additionally, the existence of a booking photo does not warrant the

---

<sup>7</sup> We express no definitive opinion as to whether or not a properly lodged objection should have resulted in the total exclusion of a redacted version of this photo. We disagree with defendant's claim that "the booking photo had little or no probative value." Identity was the critical issue at defendant's robbery trial. The photo was used to establish defendant's appearance in a format that could be studied by the jury for comparison with the robber's image from the surveillance videotape. Therefore, the photo undoubtedly had probative value.

conclusion that defendant has been tried and convicted of another offense. It only shows that the police arrested and booked defendant; and there is nothing from the photograph itself that would preclude the possibility that it was taken when defendant was arrested for the Chuck E. Cheese robbery.<sup>8</sup> In this regard, the jury was admonished: “You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.” Thus, it is not reasonably probable that the admission of the booking photograph had any effect on the outcome of defendant’s robbery trial, given the strength of the evidence of his guilt. (*Strickland, supra*, 466 U.S. at p. 694.) Accordingly, defendant is not entitled to habeas relief on this claim of ineffective assistance of counsel.

**D. Defense Counsel’s Failure to Introduce Evidence to Impeach Officer Gutierrez**

Defendant’s last claim on habeas corpus is that his defense counsel “rendered deficient representation by failing to follow-up on information known to him regarding false statements which could be used to impeach Officer Gutierrez,” one of the arresting officers who was the primary witness in the drug case. Specifically, defendant claims that defense counsel should have offered evidence showing that “just a few months prior to the trial,” Officer Gutierrez “made deliberately false statements and had fabricated evidence” in another unrelated case.

The background to this claim has already been set out in defendant’s first claim on appeal arguing that the trial court erred in denying his motion for a continuance in order to conduct additional *Pitchess* discovery, made on the day trial was set to commence, so that defense counsel could explore an allegation that Officer Gutierrez had falsified a police report in an unrelated case. (*Pitchess, supra*, 11 Cal.3d 531.) In considering this issue on appeal, we found no abuse of discretion had been shown.

Submitted with defendant’s habeas corpus petition is an affidavit from defense counsel indicating that “[i]t did not occur to me that notwithstanding the denial of the

---

<sup>8</sup> Defendant admits that he does not know when the photograph was taken.

*Pitches* motion, I could have obtained . . . the names of witnesses who could have testified regarding Officer Gutierrez’s false statements.” He goes on to state that “[m]y failure to seek this information was not a tactical decision.”

In support of defendant’s claim that defense counsel was ineffective in failing to obtain and present evidence that would impeach Officer Gutierrez, defendant has submitted Officer Gutierrez’s police report in an unrelated case, *People v. David Lesnick*, Solano County Superior Court Case No. FCR277088, which involved attempting to steal a catalytic converter. The police report states that the suspect, David Lesnick, “was found tampering w/ a Honda Ridgeline muffler in a closed dealership lot” and that “[n]umerous burglary tools and shaved keys were discovered in his vehicle.”

Defendant claims that had his counsel done proper investigation and been properly prepared, he could have asked Officer Gutierrez about his report in the catalytic converter case. Officer Gutierrez would have to acknowledge that in that police report, he stated that he had looked under the vehicle and “noticed numerous scratch marks on the metal closest to the catalytic converter.” Further, Officer Gutierrez would have to acknowledge that in the police report in the catalytic converter case, he stated that he located numerous shaved car keys in the suspect’s vehicle, and that the suspect was holding a black crowbar with a yellow tip which he threw into the bushes when Officer Gutierrez stopped him.

Thereafter, defense counsel could have presented testimony from Rick Williams, an investigator working for the defense, that he went to Steve Hopkins Honda on July 2, 2010, determined which car Officer Gutierrez was referring to, looked under the car and looked at the catalytic converter, and determined that there were no scratch marks and no visible damage whatsoever on the catalytic converter. Pictures of the catalytic converter taken by Williams, which are exhibits to defendant’s petition for habeas corpus, could have been offered into evidence. The pictures would have refuted Gutierrez’s statement that the catalytic converter had numerous scratch marks.

Williams could also have testified that he inspected all the keys which had been booked into evidence in the catalytic converter case, that none of them were altered from

their original design in any way, and none were “shaved.” This testimony would have impeached Officer Gutierrez’s statement in the police report that the keys were shaved.

Finally, defendant claims that if his defense counsel had performed an adequate investigation, he could have obtained and offered into evidence the video surveillance tape of the alleged theft of the catalytic converter, which would have impeached Officer Gutierrez’s statement that the suspect in that case was holding a black crowbar with a yellow tip which he threw into the bushes when Officer Gutierrez contacted him. The surveillance tape showed the suspect did not appear to be carrying a crowbar or any other objects in his hands. Defendant claims that if his counsel had “presented this evidence, the jury would have learned that Officer Gutierrez had a tendency to make false statements and to falsify evidence.”

Although defendant supports his petition for writ of habeas corpus with copies of reports of investigative work performed by a defense investigator, there is nothing to indicate that this work resulted in a formal reprimand or investigation as to whether or not Officer Gutierrez falsified evidence. Furthermore, defendant admits that the reason given for the dismissal of the catalytic converter case was that “the catalytic converter was worth less than \$200.” Therefore, defendant’s claim that the catalytic converter case was dismissed “because of concerns about the misstatements made by Officer Gutierrez regarding the alleged scratches to the catalytic converter, the shaved keys, and the crowbar” is his opinion and would likely be disputed at trial. At most, the evidence proffered in support of defendant’s habeas corpus petition raises its own unique set of disputed facts and circumstances that would need to be resolved before any misconduct by Officer Gutierrez could be established or disproved.

Consequently, even if defense counsel had somehow sought and procured the information which defendant asserts he was deficient in failing to offer, it is not reasonably likely that the trial court would have allowed the defense to conduct a mini-trial within the trial in the drug case to determine whether Officer Gutierrez had deliberately falsified a police report in another, unrelated case. Therefore, we find little merit in defendant’s assumption that the additional information, even if it had been

investigated and discovered by defense counsel, would have produced something of potential probative value outweighing the undue consumption of time which necessarily would have been consumed in presenting the evidence at defendant's trial. (See Evid. Code, § 352.)

Furthermore, we conclude that defense counsel's failure to investigate and obtain the potentially impeaching evidence was not prejudicial within the meaning of *Strickland*—that is, there is not a reasonable probability that the outcome would have been more favorable to defendant in the absence of his counsel's purported errors and omissions. (*Strickland, supra*, 466 U.S. at p. 687.) Arrayed against this purported impeachment evidence was a tremendous amount of direct evidence inculcating the defendant in the drug case, including that when defendant was arrested and searched, he was found to have 26 individually wrapped pieces of rock cocaine in his pants pocket along with \$414 in cash and a cell phone containing evidence of drug transactions. There is nothing to indicate that this evidence came from a source other than defendant, which was the only evidence that would have significantly assisted his defense. Therefore, the impeachment evidence, even if it had been introduced, was not reasonably likely to have altered the jury's verdict of guilt. Accordingly, defendant has not established a prima facie case of ineffective assistance of counsel warranting the setting aside of the jury's verdict in the drug case. (*Strickland, supra*, 466 U.S. at p. 691.)

**V.**  
**DISPOSITION**

The judgment is affirmed and the petition for writ of habeas corpus is denied.

\_\_\_\_\_  
RUVOLO, P. J.

We concur:

\_\_\_\_\_  
REARDON, J.

\_\_\_\_\_  
RIVERA, J.