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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRADLEY STEWART WAGNER,

Defendant and Appellant.

In re BRADLEY STEWART WAGNER

on Habeas Corpus.

G044721

(Super. Ct. No. 05NF4559)

O P I N I O N

G046409

Appeal from a judgment of the Superior Court of Orange County, Walter P. Schwarm, Judge. Affirmed.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition denied.

Farah F. Azar and James M. Crawford for Defendant, Appellant, and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Bradley Stewart Wagner pleaded guilty to, among other offenses, using his authority as a peace officer to cause a female victim to orally copulate him without her consent. (Pen. Code, § 288a, subd. (k).) In accordance with the plea agreement reached between defendant and the prosecutor, the court sentenced defendant to four years in prison. Prior to sentencing, however, defendant moved to withdraw his guilty plea on the grounds: (1) he was not sufficiently advised of potential post-sentence civil commitment as a sexually violent predator (SVP) (Welf. & Inst. Code, § 6600 et seq. (SVP Act)); and (2) his guilty plea was not knowing and intelligent because he was under the influence of a prescription painkiller. The court denied defendant's motion. Having obtained a certificate of probable cause to challenge his guilty plea, defendant raises the same issues in his appeal. Defendant also petitions for a writ of habeas corpus, pursuing related arguments under the rubric of an ineffective assistance of counsel claim. We affirm the judgment and deny defendant's petition.

FACTS

Defendant offered the following factual basis for his guilty plea: On November 11, 2005, "I willfully and unlawfully commit[ted] an act of oral copulation with someone else, Jane Doe #1, without [her] consent accomplished by duress and fear and use of threat to use authority as a peace officer, and unlawfully violated the personal liberty of Jane Doe #1 by fear. On or about [October 31, 2005], I committed a sexual

battery by restraint of Jane Doe #2 for sexual arousal [and] falsely imprisoned Jane Doe #2. On or about [September 1, 2005 to November 10, 2005], I falsely imprisoned by fear Jane Doe #3.”

We must examine the procedural history of the case in detail to provide context for defendant’s contentions. We must also describe evidentiary materials related to defendant’s motion to withdraw his guilty plea and his petition for writ of habeas corpus.

Police Investigation

On or about November 12, 2005, an alleged victim complained to the Anaheim Police Department that one of its officers had compelled her to engage in oral copulation. Two detectives interviewed defendant in connection with this allegation. They informed defendant they were not conducting an administrative interview but instead investigating a criminal allegation. Defendant was told he did not have to talk to the detectives, unlike in an administrative setting. Defendant was told he could leave and was “free to go.”

Defendant initially denied that he stopped anyone the previous night. Defendant claimed he did not make any contact with a person in a vehicle the previous night. When specifically asked about making contact with an individual in a burgundy van, defendant denied such contact. Defendant denied stopping anyone in the area of Kraemer Avenue and La Palma Avenue in Anaheim. After being shown a color photograph of his accuser, defendant denied recognizing her or that he contacted her the previous night.

Eventually, after further questioning (including an explanation that an individual had accused him of improper sexual contact), defendant admitted he pulled over a female driving a van. The female spoke very little English and did not have a driver’s license. Defendant claimed he told her to go home and get a license. Defendant

claimed not to understand “this sexual contact stuff.” Defendant asserted he had no physical contact at all with his accuser.

The police interviewers asked defendant why he did not tell them about the stop before. Defendant had “no idea.” After initially denying he wrote anything down, defendant stated that he wrote down a phone number and gave it to the woman. Defendant continued to deny anything occurred after being informed of the precise act alleged by the female he stopped.

After additional questioning, defendant then admitted he engaged in consensual sexual activity with the female accuser. He asked his interrogators to “erase everything I said before and give me a chance to start over.” Defendant claimed his accuser touched his penis but did not orally copulate him. He claimed he could not recall whether he ejaculated, then later denied he ejaculated. Defendant admitted he rubbed his accuser’s breasts. He added, “I might have rubbed her on the outside of her pants” Defendant asked the woman to orally copulate him, but she declined because it would cause her to gag. Defendant claimed his accuser wanted to have sex in her van but he declined. After this occurred, defendant complied with his accuser’s request to provide her with a phone number, but he gave her a made up number. The encounter occurred at a different location from the initial stop because there was “a lot of light” at the stop site.

Defendant summarized the “whole thing from beginning to end” at the conclusion of the interview: “Okay. I made the car stop at . . . Kraemer and Mira Loma.” “From there she said . . . let’s go someplace else. And I said okay, let’s go, right over there, cause she asked me if I was married, I said no. Went to . . . a parking lot . . . west of . . . Kraemer. There was too much light there, so we went . . . and found another parking lot, which was a little bit darker.” “And then . . . we hugged. I kissed her. She said sex-o.” “[S]he pulled up her blouse. I touched her breasts. She started rubbing me. She took it out. Ah, started jacking me off. I asked her if she wanna just like a . . . head or something like that. And she goes no, I gag . . . okay. So I kept

rubbing her. She kept rubbing me and that was it.” Defendant continued to deny that he ejaculated.

Accusatory Pleadings

On November 22, 2005, a felony complaint was filed charging defendant with three counts: (1) forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); (2) oral copulation under color of authority (Pen. Code, § 288a, subd. (k)); and (3) false imprisonment by violence (Pen. Code, §§ 236, 237, subd. (a)). All three counts pertained to a single “Jane Doe” victim. Defendant pleaded not guilty to the charges at his arraignment the same day. Defendant posted a bond in the amount of \$150,000 and was released from custody.

On September 8, 2006, a first amended complaint was filed charging defendant with seven counts. The first three counts pertained to Jane Doe No. 1, counts 4 and 5 pertained to Jane Doe No. 2, and counts 6 and 7 pertained to Jane Doe No. 3. Defendant was charged with: (1) forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); (2) oral copulation under color of authority (Pen. Code, § 288a, subd. (k)); (3) false imprisonment by violence (Pen. Code, §§ 236, 237, subd. (a)); (4) sexual battery by restraint (Pen. Code, § 243.4, subd. (a)); (5) false imprisonment by violence (Pen. Code, §§ 236, 237, subd. (a)); (6) false imprisonment by violence (Pen. Code, §§ 236, 237, subd. (a)); and (7) officer acting without regular process (Pen. Code, § 146, subd. (a)). On November 22, 2006, defendant pleaded not guilty to all counts.

Defendant waived his right to a preliminary hearing on August 24, 2007.¹ The court held defendant to answer at that time. Prior to the August 24, 2007 hearing,

¹ In a declaration attached to the return to defendant’s petition for writ of habeas corpus, trial counsel for defendant, Kay Rackauckas, explained the reason for waiving preliminary hearing: “[The] claim [by defendant in his petition for writ of habeas corpus] that I waived preliminary hearing in his case on some sort of whim — and that I did so without any explanation — is utterly false. For some time *before* the

defendant had waived his right to a timely preliminary hearing each time a hearing occurred in the case. An information was immediately filed, accusing the defendant of the same seven counts included in the amended complaint. Defendant again pleaded not guilty to all counts.

Delay

On September 5, 2007, the case was assigned to Judge Richard W. Stanford, Jr., for trial. Defense counsel immediately filed an affidavit of prejudice pursuant to Code of Civil Procedure section 170.6. The case was then assigned for all purposes to Judge Kazuharu Makino. At the next hearing on September 13, 2007, however, the case was reassigned to Judge David A. Hoffer. Various pretrial hearings were continued on several occasions.

Judge Hoffer set the matter for a jury trial on February 25, 2008. But this date arrived and the trial was continued to May 12, 2008 at the request of defendant. Then the matter was transferred to Judge Thomas J. Borris. Judge Borris continued the trial to September 9, 2008 at the request of defendant. Judge Borris again continued the

preliminary hearing, Ms. [Jennifer] Keller and I explained to *both* Mr. and Mrs. Wagner why we believed waiving preliminary hearing (an unusual choice in our practice) was advisable. Mr. Wagner had originally been facing kidnapping for oral copulation charge that would have brought with it a mandatory life sentence. It was my understanding that Ms. Keller had talked Deputy District Attorney Kal Kaliban out of filing such charges in the original felony complaint. At the time of the preliminary hearing, however, the case was being transferred to another prosecutor. Ms. Keller and I were both extremely concerned that a new prosecutor would take a fresh look at it and might decide to go ahead and file the life count. [¶] Before and during the preliminary hearing, I told Mr. Wagner that a newly assigned prosecutor filing the information would not be bound by the existing felony complaint I further informed Mr. Wagner that no life count could be added to the information if we waived preliminary hearing, that a new prosecutor who wished to file a life count would have to dismiss the case and start over again, and that I did not believe the prosecution would want to do that given the age of the case. Mr. Wagner *and* Mrs. Wagner both expressed enthusiasm for the idea, and Mr. Wagner waived preliminary hearing.”

trial to December 3, 2008, and then February 4, 2009, at the request of defendant. Next, Judge Thomas Goethals granted continuances until setting the matter for trial on January 13, 2010. Judge Goethals granted an additional continuance at the request of defendant, then continued the jury trial to May 5, 2010 by stipulation of both parties.

Part of the delay related to defendant's health issues. Since a serious motorcycle accident in May 2009, defendant suffered from intense pain. His doctor "prescribed a significant dose of a strong narcotic, Norco, to keep his pain at a manageable level." As a result of his regular ingestion of Norco, defendant was in "a state of constant drowsiness and lightheadedness, and is occasionally incoherent and even incapacitated." In connection with motions for continuance of trial, two doctors expressed opinions (in Jan. 2010 and Mar. 2010, respectively) that defendant could not assist his attorney during trial as a result of his intense pain and heavily medicated state. The latter doctor opined that he expected defendant's cognitive abilities to recover sufficiently by May.

On January 13, 2010, Judge Goethals observed: "This case is way too old. How it got this old, I'm not sure, but it is what it is. [¶] I think I would be abusing my discretion in the face of [a doctor's] declaration if I forced you to go to trial today, but there is a time for everybody. The time for trial in this case has come. And unless something truly extraordinary happens between now and April 1st, if you agree to this continuance you're going to go to trial April 1st, 2010, or within 10 days thereafter." In response to questioning by Judge Goethals, defendant responded that he was medicated but he understood the proceedings that were occurring.

On April 1, 2010, Judge Goethals, in granting an additional continuance, observed: "You must live right, [defense counsel Jennifer Keller], because as you know the People had also filed a [motion to continue trial]. [¶] Mr. Wagner, I don't have any agenda as to what should happen to your case. I always hope that justice is produced by any trial, but I also hope that justice is timely and this is an old case. You know that

better than I do.” “Mr. Wagner, I think we had this conversation the last time I saw you, so you’re making a liar out of me. But with your consent we will continue this case to what I hope is one last time to May 5th, 2010. If you agree, unless something extraordinary happens, you’re going to trial [on] May 5th, or within ten days thereafter.”

Keller answered ready for trial on May 5, 2010, following an admonition by Judge Goethals that trial would not actually begin for at least several days if she answered ready.

The trial trailed until May 17, 2010, when the case was assigned to Judge Walter P. Schwarm. Defendant pleaded guilty on this date. Prior to pleading guilty, defendant’s attorney (at the time, Keller) filed a 33-page motion in limine to exclude evidence of defendant’s statements to the police. The motion claimed defendant had not been informed of his constitutional rights prior to the interview, as required by the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), and *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294. The motion also claimed the interview became coercive and should have resulted in an advisement pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436.

Plea Bargain

On May 17, 2010, defendant signed a form entitled “Advisement and Waiver of Rights for a Felony Guilty Plea” (*Tahl* form).² The *Tahl* form included the factual basis for the guilty plea set forth above. Defendant acknowledged the maximum punishment he faced were he convicted of the seven counts alleged against him was 11 years, six months in prison (including 8 years for count 2, oral copulation under color of authority). The plea bargain reflected in the form would result in four years imprisonment (the low term of three years for count 2, one year for count 4, a concurrent

² *In re Tahl* (1969) 1 Cal.3d 122.

16 month sentence for count 6, a suspended sentence on count 7, a Penal Code section 654 stay as to count 1, and the dismissal of counts 3 and 5).

In addition to his signature under penalty of perjury at the end of the form, defendant initialed next to a lengthy series of disclosures. We note several of the most pertinent disclosures he claimed, under penalty of perjury, to have “read, understood, and personally initialed” “I understand I have the right to a speedy and public trial by a jury. I waive and give up these rights.” “I understand the court will:” “(a) Sentence me to state prison for a period of 4 years and 0 months” “(d) Order me to pay restitution on counts 1-7, even if any of these counts have been dismissed . . . in an amount to be determined by the Probation Department.” “(h) Order me to register pursuant to the following:” “(4) [Penal Code, section] 290 (sex offense) I understand I will have to register for the rest of my life if I work, attend school, or reside in California.” “I offer my plea of guilty freely and voluntarily, and with full understanding of all matters set forth in the accusatory pleading and this advisement and waiver of rights form. No one has made any threats or used any force against me, my family, or anyone else I know, in order to convince me to plead guilty in this case. Further, all promises that have been made to me to convince me to plead guilty are on this advisement and waiver of rights form.”

The *Tahl* form *did not* specifically inquire as to whether defendant was under the influence of any substance. Nor did it provide any disclosures as to the SVP Act.

On the record, the court confirmed (by eliciting responses to yes or no questions) that defendant had decided to change his not guilty plea to a guilty plea. Defendant agreed he had read the form, reviewed the form with his attorney, and did not have any questions about the form. Defendant agreed he had signed and initialed the form. The court questioned defendant about the rights he was giving up by pleading guilty; defendant affirmed he understood the plea bargain. Defendant stated on the

record that he pleaded guilty to each of the remaining charges against him, which the court set forth individually. Counsel joined in the plea and waivers. The court *did not* specifically inquire into whether defendant was under the influence of any substance.

The court found defendant knowingly, intelligently, and voluntarily waived his constitutional rights, and further found a factual basis (set forth in the *Tahl* form) for the guilty plea. The court specifically advised defendant he would be required to register as a sex offender pursuant to Penal Code section 290 for the rest of his life. Defense counsel also specifically advised defendant he would “have to be evaluated by the Department of Mental Health before he’s released from state prison to determine whether or not he meets the criteria of SVP.” Defendant claimed to understand both advisements and asserted the information did not change his decision to plead guilty.

Motion to Withdraw Guilty Plea

On August 24, 2010, new counsel for defendant (Robert Corrado) filed a motion to withdraw the guilty plea. Defendant argued: (1) he was not fully advised of the consequences of his guilty plea, namely that he could be civilly committed under the SVP Act after serving his prison term; and (2) he was under the influence of the prescription drug Norco (a painkiller, similar to Vicodin, with the generic name hydrocodone acetaminophen) at the time of the plea hearing.³ Defendant declared under penalty of perjury that he “was under the influence of the prescribed drug generally known as Norco and I did not understand the nature of my plea, did not and could not knowingly, intelligently and voluntarily waive my constitutional rights.” The motion appended several exhibits: (1) an x-ray of defendant’s arm, which depicts the screws and plates inserted therein; (2) a letter from Kaiser Permanente describing defendant’s

³ The motion also mistakenly raised the argument that defendant was not informed of possible immigration consequences from his plea, but counsel retracted this argument at the hearing.

injuries as of October 2009; (3) a declaration from defendant's physician describing his injuries and painkiller use, which was utilized in January 2010 to assist defendant in obtaining a continuance of trial; (4) prescription information; (5) additional prescription and medical information; and (6) a copy of defendant's Norco prescription.

The court held an evidentiary hearing on September 24, November 17, December 3, and December 16, 2010. The court first addressed the SVP issue. After hearing argument from counsel, the court ruled that under applicable case law civil commitment as a SVP is a collateral consequence that a defendant need not be advised of before a guilty plea. The court denied defendant's motion to withdraw his guilty plea on the ground that defendant was not advised of potential consequences under the SVP Act. The bulk of the hearing featured testimony and argument pertaining to the issue of whether defendant's plea was not knowing, intelligent, or voluntary based on his alleged use of Norco.

A. Medical Testimony

The first witness called by defendant was Dr. Joe Alan Wohlmuth. Wohlmuth prescribed Norco in either September 2009 or January 2010 for defendant's pain suffered as a result of a motorcycle accident and ensuing surgery. Defendant suffered from pain described (by defendant) as nine out of 10. As of October 2009, defendant's cognitive abilities were severely impaired by his ingestion of Norco. Norco "can cause confusion and inability to focus and the slowing of mental capacities." Wohlmuth did not know whether defendant was still taking Norco on May 17, 2010 (the plea bargain hearing). But, hypothetically speaking, Wohlmuth opined that the ingestion of Norco could cause an individual to be unable to concentrate or understand important events such as the plea bargain and change of plea hearing.

Defendant also called Dr. Marvin Pietruszka to testify. Pietruszka first met defendant in October 2010; he had no personal knowledge of the facts at issue in this case

and testified solely as a paid expert witness. Based on the assumption that defendant took three Norco pills during the morning of May 17, 2010, and based on defendant's consumption of other medications ("Cinipril blood pressure medication, hydrochlorothiazide, the blood pressure medication, omeprazole medication for stomach acid"), defendant "was in the toxic range." Even though defendant was "tolerant to the medication, he's not necessarily tolerant to all of the effects. He may be tolerant to collapse and fainting, and he could be alert but his mentation may be cloudy. [¶] So an individual taking this medication would be very similar to someone who drank 15 beers and signed a contract essentially." In Pietruszka's opinion, defendant could not have analyzed or understood the *Tahl* form.

Dr. Steve Shin, defendant's orthopedic surgeon, also testified. Shin described the various surgeries performed on defendant as a result of his motorcycle accident. Shin also prescribed Norco to defendant. Shin reiterated the potential side effects of Norco on a patient's mental abilities. People under the influence of Norco may not display physical symptoms even when their cognitive abilities are impaired. Based on the assumption that defendant took three Norco pills on the morning of his guilty plea, Shin opined "there would be some type of difference or alteration in cognition"

B. Testimony of Deana Wagner

Defendant's wife, Deana, testified. Deana asserted that defendant suffered from a stroke in 2003 that caused him to have difficulties with memory, concentration, and following conversations. Defendant also had a serious motorcycle accident in May 2009; he spent nine days in a trauma center and then endured additional hospitalization. Defendant had multiple operations done on his arm (May 2009), clavicle (Oct. or Nov. 2009), shoulder (Feb. 2010), and ulna (June 2010). Defendant was first prescribed Norco in approximately June 2009. Since taking Norco, defendant "cannot seem to focus for any length of time at all. His memory is very, very short." Deana had to take over

communicating with defendant's civil and criminal attorneys because he was incapable of doing so. Deana drove defendant to the courthouse on May 17, 2010, because defendant was unable to do so under the influence of Norco. Defendant normally takes two to three Norco pills in the morning and at night. On the date of the guilty plea, defendant took two to three Norco pills in the parking structure prior to entering the courthouse at approximately 8:30 a.m. Defendant was confused, lethargic, and drowsy.

At approximately 11:30 a.m., defendant's case was assigned to Judge Schwarm's courtroom and a plea bargain form was presented to defendant's attorneys. Neither Deana nor defendant were provided with a copy of the plea bargain form to review during lunch hour. Defendant's attorney, Jennifer Keller, went over the form with defendant. It only took 10 to 15 minutes for Keller to go over the plea form with defendant. Deana did not think defendant understood what he was being told. Deana was pounding on the bar to get the attention of Keller and defendant because Deana knew defendant did not understand what was being said to him.

On cross-examination, Deana admitted she did not want defendant to plead guilty. Deana was asked by Keller to walk to the other end of the hallway while the plea deal was being discussed. Deana did not tell Keller on the date of the plea bargain that defendant was not able to make a competent decision based on his ingestion of Norco. She told Keller at the end of April 2010 that defendant could not face trial because of his continued Norco use.

C. Defendant's Testimony

Defendant was a policeman for 34 years before he retired, which was 15 days before he was arrested in this case. Defendant's motorcycle accident occurred when a horse ran into his motorcycle while he was riding it at night in Riverside County. Defendant suffered 10 broken ribs, a broken clavicle, a broken arm (in two places), a

shoulder injury, and pneumonia as a result of his injuries. Defendant received a morphine drip for his pain while he was in the hospital.

Defendant was taking Norco the day he entered his guilty plea. Defendant took two pills in the morning. In the 30 days preceding his guilty plea, he was taking Norco (which he sometimes “double[d] up on”), drugs for hypertension, cholesterol drugs, and aspirin. Defendant needed another surgery on his arm because the first surgery on his arm had failed to permanently fuse the bone together.

Defendant admitted the signature and initials on the *Tahl* form appeared to be his, but denied that the rest of the handwriting on the form was his. Defendant remembers little about the hearing on May 17, 2010. He remembers “hardly anything” about Keller meeting with him to discuss the *Tahl* form. Defendant did not intend to give up his rights to a jury trial and his right not to confess to the crimes specified in his guilty plea. Defendant realized he had pleaded guilty the next day when Deana told him he had done so.

D. Testimony of Defendant’s Attorneys

Farah Azar, defendant’s civil attorney (and the attorney currently handling this appeal and habeas petition), testified on behalf of defendant. After defendant’s motorcycle accident, “[i]t became more difficult to try to have an effective meeting with him. He was unable to focus. He was unable to retain information.” Around July 2009, Azar began communicating primarily with Deana rather than defendant with regard to the civil action.

The prosecutor called Kay Rackauckas, Keller’s law partner, to testify. The court allowed defendant’s attorneys to be questioned pursuant to Evidence Code section 958, on the theory that defendant had placed into issue the performance of counsel by his motion. Rackauckas testified that her firm had represented defendant from the initiation of the case through the guilty plea on May 17, 2010. Rackauckas was present in the

courtroom on May 17, 2010. Defendant said to Rackaukas, ““Go see what you can get.”” She informed the prosecutor after her arrival (approximately 9:00 a.m.) that defendant might be interested in a plea bargain. The prosecutor made her an offer of four years in prison and Rackaukas informed defendant. After her firm had obtained three trial continuances in 2010 based on defendant’s medical condition and ingestion of Norco, Rackaukas believed defendant had weaned himself off Norco in order to be ready for trial in May 2010. Defendant “seemed fine” on May 17, 2010. Defendant’s answers to questions were responsive. Neither defendant nor Deana informed Rackaukas of any problem with defendant’s mental state.

According to Rackaukas, as soon as the idea of a plea bargain came up, Deana “became hysterical and literally started crying and falling on the bench and became such a distraction that we asked her to step aside.” Rackaukas was not present during Keller’s conference with defendant regarding the *Tahl* form or during defendant’s guilty plea.

The prosecutor also called Keller to testify. As to defendant’s medical condition prior to scheduled hearings, Keller’s associate May Trinh was tasked with talking to defendant and his physician. Keller did not file a motion to continue the trial in May 2010 because her “understanding was that Mr. Wagner was now capable of proceeding and was no longer under the influence to a degree that would impact his ability to be assisting me in his own defense.” Neither defendant nor Deana informed Keller that defendant was under the influence of medication on May 17, 2010.

Keller had a tremendous amount of contact with defendant in the days prior to the scheduled trial: “We talked about almost every aspect of the evidence. We went to the crime scene. We drove around for probably a couple hours discussing what had happened and where in the case of two of the alleged victims. We talked about his potential testimony. We discussed the problems about the fact that he had made a statement to the Anaheim Police Department. We talked about how to deal with that.

We talked about the potential merits of a *Miranda* motion that I had filed based upon the denial of his peace officer bill of rights. [¶] He asked me a lot of questions about that, chances of succeeding. He wanted to know what I thought his chances were of winning outright and why.” Defendant appeared to be lucid in pretrial conferences with Keller. Defendant never told Keller he would not be able to proceed or that he was still under the influence of Norco.

Defendant questioned Keller on May 17, 2010, about Judge Schwarm and the likelihood of favorable rulings with regard to his police interview admissions. Ultimately, Keller advised defendant that in her opinion, Judge Schwarm would deny their motion. Keller also advised defendant that, in her opinion, defendant would “make a bad witness . . . because he had given me so many conflicting stories about what had happened. To that day I don’t think he had settled in his own mind on a version that he wanted to give. [¶] I was a little concerned myself about putting him on the stand knowing the different versions he had told me, which were extraordinarily different. [¶] I explained to him that given the statements coming in that he almost had to be a witness because in the statement he had first lied and denied any contact, then had admitted sexual contact. He replied, “Well, yeah, that was because I was trying to save my retirement benefits.” Defendant’s story varied “depending upon whether his wife was there.” Throughout the day of his guilty plea, defendant was asking questions and Keller was answering the questions. “He asked me a lot of questions, and he asked me good, intelligent questions” about, for instance, the alleged victims’ motivations to lie (to obtain immigration visas) and the possibility of a better plea deal.

Keller and Rackauckas were of the opinion that defendant was likely to be convicted and “maxed out” by Judge Schwarm. Deana was “really in control of” defendant. If defendant “started to say anything she didn’t like, she would interrupt him and cut him off and say, ‘Here is what happened.’” Deana reacted to defendant’s decision to plead guilty by “crying, screaming, lying on the bench outside the courtroom,

throwing herself to the linoleum There was never any mention of his being under the influence of anything, there was never any mention of his not being able to understand anything. And my personal observations were such that he appeared to be fine.” Deana was “emotionally distraught and more out of control than I have seen any spouse of any client in my career.” Defendant explained to Keller “that the problem wasn’t that he didn’t want to plead guilty. It was Deana, and it was her reaction. That . . . he didn’t know how to deal with that, and he was more concerned with her reaction than he was with . . . entering the plea.”

Keller spent at least an hour reviewing the *Tahl* form with defendant. Defendant specifically argued for removing any mention of “force” in the factual basis for his plea. This amendment is reflected in the copy of the *Tahl* form in the record. Keller advised defendant about the SVP issue: “I said, ‘Yeah, they could [commit you indefinitely]. In my opinion yours is not the kind of case where they are going to find you to be a sexually violent predator given your whole history, but the one thing we could do is get a letter from a forensic psychiatrist now saying that and make sure that that is in every file’”⁴ Keller’s office attempted to follow up on this issue but did not succeed.⁵

⁴ Keller’s testimony is ambiguous with regard to whether she advised Defendant about the SVP Act before his guilty plea or after his guilty plea (the same day). It is clear she talked about hiring a particular psychiatrist after the guilty plea, but it is unclear whether any of her advice was provided before the guilty plea. In her declaration submitted to this court as part of the Attorney General’s return to the petition for writ of habeas corpus, Keller states she “discussed the possibility of sexually violent predator civil commitment proceedings with Mr. Wagner *before* he entered the plea.”

⁵ Apparently, appellate counsel arranged for an assessment to be completed as a copy of a psychological assessment of defendant, dated April 3, 2011, is appended to the habeas petition.

E. Documentary Evidence

Several exhibits were also entered into evidence. Of particular note is an April 29, 2010 e-mail purportedly sent by Deana to an associate, May Trinh, at Keller Rackauckas LLP, which stated in relevant part: “I told you I would do my best to give you an update [regarding] Brad, his surgeries and his use of Norco. He has been trying very hard to combat his pain with non prescription Tylenol, but he is not able to yet. It is still too soon since the last surgery. It has only been 10+ months since his accident and [his] multiple surgeries as you know. For some reason he is still in unbearable pain. May, based on my observations, Brad is not ready for trial yet, and he will be of little assistance to Jennifer and is still heavily medicated. You said the judge will not allow any more time, and medicated or not he must push forward. Brad is taking Norco daily and you will have to keep me posted so I know what days he will be needed to be as focused as possible”⁶

F. Court’s Ruling

The court framed the issue as “whether or not [defendant] was under the influence of Norco or anything else to the extent that he was incapable of understanding the nature and consequences of his guilty plea.” Based on the totality of evidence, “the

⁶ The authenticity of this e-mail was not explored at the trial court. But the Attorney General claims that the e-mail is fraudulent. This conclusion was reached based on the following information: (1) Keller, Rackauckas, and Trinh do not recall ever seeing such an e-mail; (2) Trinh’s search of her client e-mail records, which she never deletes, did not disclose the existence of this e-mail; and (3) a document examiner (who reviewed the e-mail at the request of Keller after her receipt of defendant’s habeas petition) opined “that the E-mail is probably the result of pasting together components from multiple documents and then copying.” Trinh’s declaration indicates: “I thus have absolutely no recollection of any such e-mail from Mrs. Wagner, and it appears nowhere in my archive of stored e-mails. Had Mrs. Wagner *ever* sent me any such e-mail, I would immediately have forwarded it to Ms. Keller or otherwise apprised her of the information. Further, I would have begun immediately preparing a motion to continue trial pursuant to Penal Code section 1050.”

court does not feel that Mr. Wagner has carried his burden of proof by clear and convincing evidence to withdraw his plea.” The court generally referred to the testimony of Rackauckas and Keller in support of its ruling. The court specifically cited the amendments to the factual basis in the plea agreement as evidencing defendant’s intelligent participation in the plea bargain. “This is a piece of objective evidence that the court has to show that Mr. Wagner was meaningfully participating in the events that day because it was important to him to have the word ‘force’ deleted from the factual basis.” The court also referenced the clear language of the *Tahl* form and defendant’s appropriate responses to the court’s inquiries when defendant pleaded guilty. “[W]hen I saw Mr. Wagner in court, I did not see that he was nodding off. He did not appear drowsy to me. He did not appear lethargic to me. He did not appear to be intoxicated on anything. His answers to my questions were direct and responsive as shown by the plea transcript. He did not appear to be confused.” The court did not believe the testimony of defendant and Deana with regard to defendant’s mental state on May 17, 2010.

The court proceeded to sentence defendant to four years in prison in conformity with the plea agreement. The court dismissed counts 3 and 5 in accordance with the plea agreement.

Motion for Reconsideration

Farah Azar filed a motion for reconsideration of the court’s decision on February 25, 2011. The motion attacked the testimony of Keller and Rackauckas as supposedly inconsistent with other evidence. This motion raised additional grounds for withdrawal of defendant’s plea, such as information calling into question the identification of defendant by Jane Doe No. 2 and Jane Doe No. 3. The court ruled it had no jurisdiction to consider this motion.

Additional Factual Material in Habeas Petition

Defendant appends to his petition for writ of habeas corpus factual materials not presented to the trial court (in addition to transcripts of testimony and documents that were available to the trial court). We summarize the new material as necessary for the resolution of the petition (this material cannot be considered as part of the appeal).

Much of the material is tailored toward establishing the truth and extent of defendant's injuries as a result of his motorcycle accident (e.g., police report regarding the accident, x-rays, hospital records, photographs). This point was not contested in the trial court or at this court. At no time did the trial court find that defendant did not have legitimate health issues. We need not, therefore, describe in detail this material. The extent of defendant's physical injuries does not answer the question of whether he was able to voluntarily plead guilty on a particular date, May 17, 2010. That defendant was suffering from severe pain did not mean he was entitled to further delay in a case that had been pending for nearly five years.

Nor need we consider material pertaining to other irrelevant issues. Declarations by defendant and his current attorney take issue with his prison conditions (medical treatment and a lack of placement in protective custody). It is possible defendant has a remedy for his concerns. But we are not squarely presented with the question in the appeal and habeas petition that are before us.

A. Declaration of Bill E. Erickson

On December 9, 2011, an individual named Bill E. Erickson declared under penalty of perjury that he was in the courtroom in which defendant was sitting on the morning of May 17, 2010, from 8:50 a.m. to 11:00 a.m. (i.e., before the case was assigned to Judge Schwarm's courtroom). While Erickson was in the courtroom, "no one sat next to Mr. Wagner or conversed with him. By the time I left, Mr. Wagner's

attorneys had not yet arrived in court.” This material, if accurate, arguably undermines testimony by Rackauckas that defendant told her that morning to see if she could obtain a deal from the prosecutor.

In response to this declaration, Kay Rackauckas declared under penalty of perjury (in a declaration attached to the Attorney General’s return to the petition): she sat next to Mr. and Mrs. Wagner at approximately 9:00 a.m.; by 9:30 a.m., defendant made clear he wanted to ask for a plea bargain; and no one (other than Keller and Rackauckas) sat near the defendant, particularly not anyone named “Bill E. Erickson.” Keller confirmed Rackauckas’s recollection in her declaration submitted with the return. Rackauckas LLP reiterated the following: “Mr. Wagner told me he wanted to plead guilty, but Mrs. Wagner did not want him to. While he was not concerned about himself, he informed me that it had been hard on Mrs. Wagner. We talked at length about the plea and what I thought his chances were at trial and, if convicted, what I thought his sentence would be. At the end of our conversation, Mr. Wagner said that he wanted to plead guilty.”

B. April 30, 2010 Letter Purportedly Sent to Defense Counsel

According to a declaration signed by Deana, she forwarded to Keller Rackauckas associate May Trinh an unsigned April 30, 2010 letter purportedly prepared by Dr. Richard C. Hanna (on Kaiser Permanente letterhead). The letter states in relevant part: “I am one of Mr. Wagner’s orthopedic surgeons at Kaiser Permanente, in Riverside. On February 4, 2010 I performed shoulder surgery on Mr. Wagner. I . . . prescribed him Norco, a strong narcotic pain medication. Mr. Wagner was advised to take the medication at the onset of any pain and not to wait for the pain to get to[o] bad before taking them. [¶] . . . I anticipated a full recovery by the end of April or by the beginning of May. I also anticipated I would be able to wean Mr. Wagner from his current ongoing

prescription of Norco, and switch Mr. Wagner to an alternative form of non mind altering pain medication. [¶] As of today, Mr. Wagner has not yet been weaned from Norco, and continues the use of his ongoing prescription. . . . [¶] It is still my medical opinion, that Mr. Wagner, while under his current medications will be of no assistance to his attorney, will not be able to comprehend or understand the trial proceedings, and his capacity to participate will be severely diminished.”

Attached to the return filed by the Attorney General is a declaration signed by Dr. Hanna. Dr. Hanna asserts under penalty of perjury: “I did not author the letter nor did I authorize anyone to write the letter on my behalf; indeed I do not recognize the letter.” The Attorney General submits that the document submitted by defendant is fraudulent.

C. Declaration of Olga P. Zalabak

On January 9, 2012, an individual named Olga P. Zalabak declared under penalty of perjury that she received a phone call from Deana on May 17, 2010, at approximately 12:40 p.m. Deana “sounded upset and concerned. Deana asked me if I had access to a computer, and she explained Mr. Wagner needed to make a very important decision in the next 30 minutes and they were left alone with no access to any resources. Deana asked if I could locate a plea form on the computer and explain to her what was on it so she could explain it to Mr. Wagner. [¶] 6. Deana told me she allowed Brad to take several Norco that morning because she thought Brad would only be receiving judge assignment. I told Deana I was at work and that I didn’t have access to a computer. [¶] 7. I have known Mr. Wagner for approximately 16 years and I can attest I have witnessed Mr. Wagner when he is under the influence of Norco and when he is not, and that although his physical demeanor appears to be the same, he has no memory of any of our conversations. [¶] 8. I observed the dramatic deterioration in Mr. Wagner’s arm from January 2010 to May 2010. In that period of time I witnessed Mr. Wagner’s

right arm begin to bend and curve in an outward direction and I witnessed Mr. Wagner's extreme pain and increased intake of Norco." Although some of this material may be hearsay, if admissible and deemed credible Zalabak's testimony could provide some limited support to defendant's and Deana's testimony.

D. New Material Pertaining to Representation of Counsel

In new declarations signed by defendant, Deana, and Azar, defendant expands the scope of his ineffective assistance of counsel allegations against the firm Keller Rackauckas LLP. In general, these three individuals make factual assertions that, if believed, would call into question the veracity of Keller's and Rackauckas's testimony and suggest the firm Keller Rackauckas LLP provided incompetent representation to defendant throughout the case. Defendant claims his attorneys should have more thoroughly investigated the allegations made by Jane Doe No. 2 and Jane Doe No. 3, which he argues are completely false (and that videotape evidence exists showing one of the victims could not identify defendant). Defendant suggests Jane Doe No. 1's civil attorney engaged in misconduct and manufactured the claims of Jane Doe No. 2 and Jane Doe No. 3. Defendant claims his attorneys did not retain sufficient expert witnesses for trial. Defendant claims he was told he had a good case and would win his motion and win at trial before his attorneys made an abrupt change on the date of the plea bargain.

The Attorney General's return includes declarations from Keller, Rackauckas, associate May Trinh, prosecuting attorney Lynda Fernandez, Jane Doe No. 1's civil attorney, and other materials convincingly demonstrating that the defendant, Deana, and Azar declarations are some combination of incomplete, inaccurate, misinformed, and misleading. We need not set out these materials in detail, as most of

the efforts of defendant to create factual disputes about the quality of his representation serve only to obscure the issues actually before this court.⁷

DISCUSSION

“On application of the defendant at any time before judgment . . . the court may . . . for a good cause shown, permit [a] plea of guilty to be withdrawn and a plea of not guilty substituted.” (Pen. Code, § 1018.) “‘Good cause’ means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment and must be shown by clear and convincing evidence.” (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917 (*Ravaux*)). “A defendant’s guilty plea must be knowing, intelligent, and voluntary.” (*People v. Aguirre* (2011) 199 Cal.App.4th 525, 528.) But “[t]he fact that [defendant] may have been persuaded, or was reluctant, to accept the plea is not sufficient to warrant the plea being withdrawn. [Citation.] ‘Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.’” (*Ravaux*, at p. 919.) We review defendant’s appeal of the trial court’s factual findings for substantial evidence and its denial of defendant’s application to withdraw his guilty plea for an abuse of discretion. (*Id.* at p. 917.)

“Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] ‘It is well settled that where ineffective

⁷ Ms. Keller’s declaration is particularly noteworthy for its explanation that this is the first time in her 34 years of practice that she has submitted a declaration in opposition to a client’s petition for writ of habeas corpus: “***This case is entirely different.*** Mr. Wagner’s habeas petition and the supporting declarations are replete with lies and outright fabrications. In addition, I believe at least two of the documents submitted as exhibits have been forged or fabricated. I intend in this declaration to detail the nature and extent of the misrepresentations, and my grounds for believing that the aforementioned documents have been fabricated.”

assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.” (*In re Resendiz* (2001) 25 Cal.4th 230, 239 (*Resendiz*), abrogated on another ground in *Padilla v. Kentucky* (2010) ___ U.S. ___ [130 S.Ct. 1473].) “To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.” (*Ibid.*) Prejudice is demonstrated in the plea bargain context “by establishing that a reasonable probability exists that, but for counsel's incompetence, [defendant] would not have pled guilty and would have insisted instead, on proceeding to trial.” (*Id.* at p. 253.)

SVP Consequences of Guilty Plea

Under the SVP act, a “sexually violent predator” can be civilly committed for an indeterminate term after the conclusion of his or her prison term. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1186-1187.) “‘Sexually violent predator’ means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (Welf. & Inst. Code, § 6600, subd. (a)(1).)

Defendant claims both the court and his trial counsel failed to adequately inform him of the possibility that he could be subject to civil commitment after his four-year prison term.

“‘In all guilty plea and submission cases the defendant shall be advised of the direct consequences of conviction.’ [Citation.] ‘This judicially mandated rule of criminal procedure encompasses only primary and direct consequences of a defendant's

impending conviction as contrasted with secondary, indirect or collateral consequences.’ [Citation.] The advice requirement generally extends only to ‘penal’ consequences.” (*People v. Moore* (1998) 69 Cal.App.4th 626, 630.) “Any commitment . . . under the SVP Act will be neither a ‘direct’ nor a ‘penal’ consequence of [a guilty] plea [A] court [is] not required to advise of the possibility of such a commitment, and there [is] no abuse of discretion in refusing to allow withdrawal of [a] plea.” (*Id.* at pp. 630-631; see also *People v. Ibanez* (1999) 76 Cal.App.4th 537, 546 [“the law does not require defendant be advised of the potential consequences under the [SVP Act]”].) Even assuming an inmate is referred for a screening under the SVP Act, “this screening would not necessarily lead to a finding that [the inmate] was a sexually violent predator . . . under the SVP Act. Any such determination would require additional steps and would depend on additional findings which would not be controlled by [the] plea and admissions [therein].” (*Moore*, at p. 632.) Thus, the court did not commit error by not fully describing the potential consequences of the SVP Act.

A failure to advise a client of some collateral consequences of a guilty plea does not amount to ineffective assistance of counsel. (*People v. Reed* (1998) 62 Cal.App.4th 593, 597-601 [lack of advice pertaining to custody credit limitations].) On the other hand, an affirmative misrepresentation by counsel about the collateral consequences of a guilty plea might (depending on whether prejudice was suffered) constitute ineffective assistance of counsel. (*Id.* at p. 601; see also *Resendiz, supra*, 25 Cal.4th at pp. 242-248 [immigration consequences].) Under these authorities, one might extrapolate a bright line rule that, absent an affirmative misrepresentation about the SVP Act, defense counsel did not provide ineffective assistance.

But the United States Supreme Court subsequently disagreed (at least in the immigration context) with *Resendiz* that a dichotomy exists between affirmative misrepresentations and omissions in the realm of advising criminal defendants about so-called “collateral consequences” prior to guilty pleas. (*Padilla v. Kentucky, supra*, 130

S.Ct. 1484] [“A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. . . . Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available”].) In holding that competent representation includes informing a defendant of the immigration consequences of a guilty plea, the Supreme Court noted: “We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance required under [*Strickland v. Washington* (1984) 466 U.S. 674, 689]. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.” (*Padilla*, at p. 1481.)

Given the state of the law and the potential for serious undesirable consequences for sex offenders under the SVP Act (much like the serious consequence of deportation), it is plausible that a defendant could successfully demonstrate he or she received ineffective assistance of counsel with regard to pre-guilty plea advice (or the lack thereof) about the SVP Act. (Cf. Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of Sexually Violent Predators* (2008) 93 Minn. L.Rev. 670, 674 [proposing rule that defendants receive “warnings whenever a reasonable person in the defendant’s situation would deem knowledge of the consequence, penal or otherwise, to be a significant factor in deciding whether to plead guilty”].)

But regardless of the theoretical possibility, this is not a case in which ineffective assistance can be shown. First, the trial transcript from the plea hearing indicates defendant was made aware (by defense counsel Keller) of the SVP Act and had no reservations about pleading guilty. Second, Keller testified that she informed defendant of the potential consequences of the SVP Act and that she did not consider it to be likely that defendant would be committed under the SVP Act. Defendant contests the

verity of Keller's testimony (which was found to be generally credible by the trial court) but does not contest the merits of Keller's advice on this point. Based on the trial court's credibility findings and Keller's testimony, Keller's performance was not deficient. Moreover, even if we were to assume Keller did not inform defendant of the possibility under the SVP Act for indefinite civil commitment, defendant has not demonstrated prejudice in this case. Absent a non-speculative chance of involuntary civil commitment under the SVP Act, it is not reasonably probable such a concern would have affected defendant's calculation of whether to accept the plea bargain.

In the final analysis, defendant's claim that he was insufficiently advised with regard to SVP is superfluous to his claim that his Norco intake made him incapable of understanding the proceedings of May 17, 2010. If defendant was competent to understand the proceedings, he received sufficient information and opportunities to understand the SVP issue under the circumstances of his particular case. If defendant was not competent to understand the proceedings, the SVP issue is beside the point as he did not voluntarily plead guilty.

Defendant's Mental Competency to Understand and Agree to His Guilty Plea

Our review of defendant's appeal is limited to whether there is substantial evidence to support the court's finding that defendant "was not impaired to the point that his independent judgment was overcome at the time he entered the guilty plea." (*Ravaux, supra*, 142 Cal.App.4th at p. 918.) "It is entirely within the trial court's discretion to consider its own observations of the defendant in ruling on such a motion. [Citation.] The court may also take into account the defendant's credibility and his interest in the outcome of the proceedings." (*Ibid.*) Other witnesses who personally observed a defendant on the date of the plea bargain may be relied on in determining whether a defendant was impaired. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1253 [testimony of sheriff's deputies].) Written statements in a *Tahl* form and oral statements on the trial

record may be used as support for a finding that a defendant understood the proceedings. (*Ravaux*, at p. 918.)

Given our deferential review of the court's factual findings and discretionary ruling, we affirm the court's order denying defendant's motion to withdraw his guilty plea. Objective evidence from the plea hearing indicates defendant was able to initial and sign his *Tahl* form, and respond to the court's inquiries on the record. Subjective observations of Judge Schwarm, Keller, and Rackauckas indicate defendant was exercising independent judgment at the time he entered his guilty plea. Keller's testimony was particularly compelling in its description of defendant's active participation in his defense and the negotiation of the plea bargain prior to entering his guilty plea. The court was certainly entitled to believe the testimony of Keller and Rackauckas over the testimony of defendant and Deana, who each had motivations to lie and thereby further delay the date of judgment for defendant. The uncontested medical testimony supported three inferences: (1) defendant suffered from severe pain; (2) defendant had been prescribed Norco, a substance capable of undermining an individual's cognitive abilities; and (3) hypothetically, if defendant took too much Norco on the date in question, he likely would have been incapable of understanding a *Tahl* form and change of plea hearing. But the key dispute was whether defendant actually was intoxicated by Norco on the morning and early afternoon of May 17, 2010, not whether he hypothetically could have been.

We also reject defendant's claim that he received ineffective assistance of counsel with regard to an alleged failure to recognize or discover defendant was impaired to the extent he could not enter a voluntary guilty plea. Although an ineffective assistance of counsel claim was not explicitly raised below, the court found the issue to have been raised implicitly by the nature of the contentions in defendant's motion to withdraw his guilty plea. The court offered the following observation of defendant's counsel: "Here there is nothing to show . . . that Ms. Keller's performance fell below

prevailing professional norms. She met extensively with the defendant in the weeks before the trial and counseled him regarding his guilty plea [¶] In any event, it's hard for the court to determine what the prejudice would be, because . . . I don't really know what the facts are in this particular case. All I can say in terms of prejudice is, a four-year offer on this case is a pretty good offer in light of the fact that somebody is looking at 11 years 6 months in state prison. [¶] . . . It's the court's belief that counsel is not ineffective on this particular case."

Thus, according to the trial court, defendant was not seriously impaired. His guilty plea was knowing, intelligent, and voluntary. Keller and Rackauckas were credible; defendant and Deana were not. Neither Keller nor Rackauckas provided ineffective assistance of counsel by failing to inquire further as to defendant's mental condition. Despite the new evidence submitted by the parties, we need not order an additional evidentiary hearing as the only relevant factual disputes have been resolved in a manner that we independently agree with based on our review of the record. (See *In re Hardy* (2007) 41 Cal.4th 977, 990-991 [no evidentiary hearing necessary because "petitioner has already presented evidence in a contested hearing, and the referee has already determined the truth of facts alleged, including the credibility of various witnesses"].)

Most of the new allegations in defendant's habeas petition have an extremely tenuous connection to his guilty plea. And defendant's facially inaccurate nitpicking at the performance of highly respected defense counsel's preparation for trial is not well taken, as overwhelming evidence submitted by the Attorney General demonstrates: (1) there was good reason for defendant to plead guilty with regard to the merits of his case; and (2) trial counsel engaged in extensive preparations for trial, including the procurement of expert testimony and investigation of the victims' claims. It is unnecessary for the resolution of the appeal and habeas petition to specifically address

particular contentions about the actions of defendant's habeas counsel and whether certain documents submitted in the petition were fabricated.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.⁸

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.

⁸ Respondent's request to insert the declaration of computer expert Robert Radus to exhibit K of the formal return is granted.