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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BENYAM KIDANE,
Petitioner,
v.
THOMAS L. CAREY, Warden,
Respondent.

No. C 05-5396 CW
ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

_____ /

Petitioner Benyam Kidane is a prisoner of the State of California who is incarcerated at California State Prison - Solano. He has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he challenges the validity of his 2003 state conviction. Respondent opposes the petition. Having considered all of the papers filed by the parties, the Court DENIES the petition for a writ of habeas corpus.

BACKGROUND

Unless stated otherwise, the following facts are taken from the state court of appeal's September 23, 2004 denial of Petitioner's appeal, or from the petition.

1 I. Facts

2 A. The Charged Offense

3 On April 7, 1999, Mohammad Nazari was working as a cashier in
4 a convenience store at a Shell station in Milpitas. Between 9:00
5 and 10:00 p.m., a light-skinned black man, about eighteen to twenty
6 years old, and between five feet four inches and five feet six
7 inches tall, entered the store. He was wearing a black jacket with
8 a hood, a baseball cap, and white pants. The man pointed a black
9 revolver at Nazari and said, "Show your hands, don't touch
10 nothing." He also said that he didn't want any trouble, and just
11 wanted the money in the register. After Nazari handed him the
12 money, the robber told Nazari to lift up the register drawer.
13 Nazari did so, and showed that there was no money under the drawer.
14 The robber also took some seventy-five-cent cigars from a box on
15 the counter. Before he left, the robber demanded the telephone
16 receiver, disconnected the cord, and placed the receiver in his
17 pocket.

18 Nazari called the police from a pay phone. Officer James
19 Geibig responded to the call and obtained Nazari's description of
20 the robber. On June 8, 2002, more than two years later, Nazari
21 examined a six-photo lineup that included Petitioner's photo.
22 Nazari did not identify anyone as the robber. However, Nazari
23 identified Petitioner at trial as the robber and identified a
24 jacket that had been found in Petitioner's car when he was
25 arrested.

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1 B. Other Crimes Evidence

2 1. The Davis Robbery of May 4, 1999

3 On May 4, 1999, Daniel Nielson was working at a convenience
4 store at a Chevron station located off of Interstate 80 in Davis.
5 Between 9:30 and 10:00 p.m., a black man, in his late teens or
6 early twenties, about five feet ten inches tall, entered the store.
7 The man wore a black jacket and baseball cap and pointed what
8 looked like a nine-shot Herrington and Richardson .22-caliber
9 revolver at Nielson. The robber said something to the effect of
10 "I'm sorry I have to do this," and told Nielson to give him all the
11 money. The robber also told Nielson to lift up the register
12 drawers and give him the money that was there. Nielson gave him
13 between \$150 and \$200 in a plastic Chevron store bag. The robber
14 then told Nielson to unplug the handset from the telephone and hand
15 it to him. Nielson did so, and the robber left. On May 6, 1999,
16 Nielson positively identified Petitioner as the robber from a
17 photographic lineup. On October 3, 1999, Nielson did not identify
18 Petitioner as the perpetrator from a live lineup. At trial,
19 Nielson testified that he recognized Petitioner from the May 4,
20 1999 robbery.¹

21 2. The Vacaville Robbery of May 4, 1999

22 On May 4, 1999, officers responded to a robbery at about 10:20
23 p.m. at a Beacon gas station and convenience store in Vacaville.
24 Officers found a 1972 Oldsmobile Cutlass parked across the street
25 from the station. Petitioner was lying on the back seat with a

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27 ¹ The state court of appeal's September 23, 2004 decision
28 does not identify which trial this testimony is from.

1 black jacket covering his head. Officers searched the car and
2 found: a loaded nine-shot Herrington and Richardson .22 caliber
3 revolver; a black hooded Timberland jacket² with \$680 cash in a
4 pocket; a plastic Chevron store bag containing \$157; a pair of
5 binoculars; four "Swift" brand cigars; and a toy cigarette lighter
6 in the shape of a gun. In front of Petitioner's car, in the
7 bushes, officers recovered a telephone handset and a cord.

8 Officer Jeff Datzman spoke with Mackit Chalal, the clerk at
9 the Beacon gas station. Chalal told Datzman that he had been
10 robbed at gunpoint at about 10:15 p.m. Chalal described the robber
11 as a black man in his twenties, about five feet six inches tall,
12 wearing a dark jacket. The robber initially acted like a regular
13 customer by taking a beverage from the refrigerator and walking to
14 the counter. However, at the counter, the man took out a black
15 steel revolver and said, "I want all your money." He also told
16 Chalal to lift up the drawer in the cash register. Chalal gave the
17 money to the robber. The robber then demanded the handset to the
18 telephone and Chalal gave it to him.

19 Datzman later showed Chalal the gun found in Petitioner's car.
20 Chalal identified it as the gun that the robber had used. Chalal
21 also positively identified Petitioner as the robber.

22 C. Petitioner's Admissions

23 Officer Paul Nar interviewed Petitioner on May 6, 1999 at the
24 Solano County jail about the robbery of the Chevron gas station in
25 Davis. Petitioner stated that he robbed a Chevron station but did
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27 ² This was the jacket that Nazari identified at trial.

1 not realize that it was in Davis, that he needed the money for his
2 family, and that his mother had been after him to get a job.
3 Petitioner also described the robbery to Nar, including demanding
4 the handset from the clerk. Petitioner stated that he received
5 about \$150 from the Chevron robbery, but that was not enough and he
6 decided to stop in Vacaville and rob a Beacon gas station.
7 Petitioner also told Nar that he used a .22 caliber nine-shot
8 revolver with a three to four inch barrel. Nar asked Petitioner to
9 write a letter of apology to the victim and Petitioner did so.

10 II. Procedural History

11 On July 20, 1999, a felony complaint was filed charging
12 Petitioner with the Milpitas robbery, and a warrant was issued for
13 his arrest.

14 On January 27, 2000 Petitioner was sentenced to thirteen years
15 in state prison for the Vacaville robbery.

16 On June 22, 2000, Petitioner was notified of an outstanding
17 warrant from Yolo County, and was transported there to face
18 prosecution for the Davis robbery. On June 25, 2002, the charges
19 against Petitioner for the Davis robbery were dismissed.

20 On July 18, 2002, Petitioner was transferred back to Ironwood
21 State Prison in Riverside County. On July 25, 2002, Petitioner was
22 served with the Santa Clara County warrant for the Milpitas
23 robbery. Petitioner alleges that he was not given any notice of
24 the warrant for the Milpitas robbery prior to this.

25 Petitioner proceeded to trial in Santa Clara County for the
26 Milpitas robbery. At trial, Petitioner testified that he could not
27 remember what he was doing on the evening of April 7, 1999 but that

1 he did not rob the Shell station in Milpitas. In May, 1999,
2 Petitioner was twenty-two years old, five feet eight inches tall,
3 and weighed about 150 pounds. Petitioner admitted that he
4 committed the robbery in Vacaville on May 4, 1999, but claimed that
5 he used a toy gun. He also admitted that he took a phone handset
6 during the Vacaville robbery.

7 Petitioner testified that he did not rob a Chevron station in
8 Davis on May 4, 1999, and that Officer Nar was lying when he
9 testified that Petitioner confessed to this robbery. Petitioner
10 admitted that the weapon found in his car belonged to him, and that
11 he had purchased it two days earlier. Petitioner further testified
12 that the signed apology for the Davis robbery was not written by
13 him. According to Petitioner, Nar lied "about anything that he's
14 accusing me of."

15 The trial court admitted evidence of the Davis and Vacaville
16 robberies to prove the issues of identity, common scheme or plan,
17 intent, motive, and knowledge. Chalal was unavailable as a witness
18 at trial. The trial court admitted statements Chalal made to
19 Officer Datzman identifying Petitioner as the robber and the weapon
20 found in Petitioner's car as the weapon used against him.

21 A jury found Petitioner guilty of robbery and found true the
22 enhancement allegation that he used a gun. On April 8, 2003,
23 Petitioner was sentenced to three years in state prison for the
24 robbery plus ten years for the gun enhancement. The trial court
25 ordered that the sentence be served concurrently with Petitioner's
26 thirteen-year sentence for the Vacaville robbery.

27 On April 8, 2003, Petitioner appealed the judgment, claiming
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1 that the trial court erred in admitting other crimes evidence and
2 the hearsay statements of Chalal. On July 1, 2004, Petitioner
3 filed a petition for a writ of habeas corpus in the state court of
4 appeals claiming that trial counsel was ineffective in failing to
5 move for dismissal of the charges on speedy trial grounds. On
6 September 23, 2004, the state court of appeal affirmed the
7 conviction and, by separate order, summarily denied the habeas
8 petition.

9 On November 12, 2004, Petitioner filed in the California
10 Supreme Court a petition for review of the denial of his appeal and
11 a petition for review of the denial of his habeas petition. These
12 petitions for review contained the same claims as those in
13 Petitioner's appeal and habeas petition filed in the state court of
14 appeal. On December 15, 2004, the California Supreme Court
15 summarily denied both petitions for review.

16 Thereafter, Petitioner filed in the state court of appeal a
17 motion to recall the remittitur.³ The motion to recall the
18 remittitur contained two claims that were not included in
19 Petitioner's appeal or habeas petition to the state court of appeal
20 and the California Supreme Court. These claims were that
21 (1) Petitioner was erroneously denied pre-sentence custody credits
22 in violation of his federal rights, and (2) trial and appellate
23 counsel were prejudicially ineffective in failing to raise the

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25 ³ A motion to recall the remittitur asks the California
26 Supreme Court or court of appeal to reassert its jurisdiction over
27 a case. See Hayward v. Stone, 496 F.2d 844, 846 (9th Cir. 1974).
28 It may be used as an adjunct to, or in place of, a state petition
for a writ of habeas corpus in cases in which the appropriate
remedy is the reinstatement of the appeal. Id.

1 issue of pre-sentence custody credits. Resp.'s Ex. I, Motion to
2 Recall Remittitur. On May 3, 2005, the state court of appeal
3 summarily denied the motion to recall the remittitur. On July 8,
4 2005, Petitioner unsuccessfully attempted to file a motion to
5 recall the remittitur in the California Supreme Court; it was
6 denied because the deadline to file it had passed on July 2, 2005.
7 Pet.'s Traverse, Ex. 4. Petitioner states that he was late in
8 filing the motion to recall the remittitur in the California
9 Supreme Court because the state court of appeal failed to notify
10 him of its May 3, 2005 denial of his motion until June 24, 2005.
11 (Pet.'s Traverse, Ex. 5.)

12 The present petition was docketed by the Clerk of this Court
13 on December 29, 2005. Petitioner presents five claims for relief:
14 (1) that trial counsel was ineffective in failing to move for
15 dismissal of the charges on speedy trial grounds; (2) that the
16 admission of evidence of uncharged prior bad acts denied Petitioner
17 his due process rights to a fair trial; (3) that the erroneous
18 admission of hearsay evidence denied Petitioner his Sixth Amendment
19 right to confront witnesses against him; (4) that Petitioner was
20 erroneously denied pre-sentence custody credits in violation of his
21 federal constitutional rights; and (5) that trial and appellate
22 counsel were prejudicially ineffective in failing to raise the
23 issue of pre-sentence custody credits at the time Petitioner was
24 sentenced or on appeal. Petitioner alleges that he has exhausted
25 his state remedies regarding these claims.

26 LEGAL STANDARD

27 Under the Antiterrorism and Effective Death Penalty Act of
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1 1996 (AEDPA), a district court may grant a petition challenging a
2 state conviction or sentence on the basis of a claim that was
3 "adjudicated on the merits" in state court only if the state
4 court's adjudication of the claim: "(1) resulted in a decision that
5 was contrary to, or involved an unreasonable application of,
6 clearly established Federal law, as determined by the Supreme Court
7 of the United States; or (2) resulted in a decision that was based
8 on an unreasonable determination of the facts in light of the
9 evidence presented in the State court proceeding." 28 U.S.C.
10 § 2254(d).

11 Challenges to purely legal questions resolved by the state
12 court are reviewed under § 2254(d)(1); the question on review is
13 (a) whether the state court's decision contradicts a holding of the
14 Supreme Court or reaches a different result on a set of facts
15 materially indistinguishable from those at issue in a decision of
16 the Supreme Court; or (b) whether the state court, after
17 identifying the correct governing Supreme Court holding, then
18 unreasonably applied that principle to the facts of the prisoner's
19 case. Lambert v. Blodgett, 393 F.3d 943, 978 (9th Cir. 2004).

20 The state court decision to which § 2254(d) applies is the
21 "last reasoned decision" of the state court. Ylst v. Nunnemaker,
22 501 U.S. 797, 803-04 (1991). The last reasoned decision
23 constitutes an "adjudication on the merits" for purposes of
24 § 2254(d) if the court finally resolved the rights of the parties
25 on the substance of the claim, rather than on the basis of a
26 procedural or other rule precluding state review of the merits.
27 Barker v. Fleming, 423 F.3d 1085, 1092 (9th Cir. 2005).

1 Where the state court gives no reasoned explanation of its
2 decision on a petitioner's federal claim and there is no reasoned
3 lower court decision on the claim, a review of the record is the
4 only means of deciding whether the state court's decision was
5 objectively reasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th
6 Cir. 2003). When confronted with such a decision, a federal court
7 should conduct "an independent review of the record" to determine
8 whether the state court's decision was an unreasonable application
9 of clearly established federal law. Id.

10 DISCUSSION

11 I. Ineffectiveness of Trial Counsel in Not Raising Speedy Trial 12 Grounds for Dismissal

13 A. Ineffective Assistance of Counsel Legal Standard

14 In order to prevail on a Sixth Amendment ineffectiveness of
15 counsel claim, a petitioner must establish two things. First, he
16 must establish that counsel's performance was deficient, i.e., that
17 it fell below an "objective standard of reasonableness" under
18 prevailing professional norms. Strickland v. Washington, 466 U.S.
19 668, 687-88 (1984). Second, he must establish that he was
20 prejudiced by counsel's deficient performance, i.e., that "there is
21 a reasonable probability that, but for counsel's unprofessional
22 errors, the result of the proceeding would have been different."
23 Id. at 694. A reasonable probability is a probability sufficient
24 to undermine confidence in the outcome. Id.

25 For the first prong of the test, the relevant inquiry is not
26 what defense counsel could have done, but rather whether the
27 choices made by defense counsel were reasonable. Babbitt v.

1 Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). It is unnecessary
2 for a federal court considering a habeas ineffective assistance
3 claim to address the prejudice prong of the Strickland test if the
4 petitioner cannot establish incompetence under the first prong.
5 Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998).

6 For the second prong of the test, the defendant must show that
7 counsel's errors were so serious as to deprive the defendant of a
8 fair trial whose result is reliable. Strickland, 466 U.S. at 688.
9 The defendant must show that there is a reasonable probability
10 that, but for counsel's unprofessional errors, the result of the
11 proceeding would have been different; a reasonable probability is a
12 probability sufficient to undermine confidence in the outcome. Id.
13 at 694.

14 Trial counsel is not ineffective for failing to raise a
15 meritless motion. Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir.
16 2005); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996); see,
17 e.g., Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) (failure to
18 file suppression motion not ineffective assistance where counsel
19 investigated filing motion and no reasonable possibility evidence
20 would have been suppressed).

21 B. Speedy Trial Legal Standard

22 California Penal Code § 1381, which governs state prisoners'
23 rights to a speedy trial, provides:

24 Whenever a defendant has been convicted, in any court of
25 this state, of the commission of a felony or misdemeanor
26 and has been sentenced to and has entered upon a term of
27 imprisonment in a state prison . . . and at the time of
28 the entry upon the term of imprisonment . . . there is
pending, in any court of this state, any other
indictment, information, [or] complaint, . . . the

1 district attorney of the county in which the matters are
2 pending shall bring the defendant to trial . . . within
3 90 days after the person shall have delivered to said
4 district attorney written notice of the place of his or
5 her imprisonment . . . and his or her desire to be
6 brought to trial . . . In the event that the defendant is
7 not brought to trial . . . within the 90 days the court
8 in which the charge . . . is pending shall, on motion
9 . . . dismiss the action.

10 However, the ninety-day period under section 1381 is tolled
11 when the defendant has been made unavailable for trial in one
12 county by virtue of being detained in trial proceedings in another.
13 People v. Boggs, 166 Cal. App. 3d 851, 856 (1985).

14 When the prisoner makes a proper statutory "speedy trial"
15 dismissal motion under section 1381, he is not required to show any
16 prejudice from the delay between the filing of a complaint and
17 arrest. People v. Martinez, 22 Cal. 4th 750, 766 (2000). However,
18 a dismissal pursuant to section 1381, where the charge is a felony,
19 is not a bar to another prosecution for the same offense. See Cal.
20 Penal Code § 1387; Crockett v. Superior Court, 14 Cal. 3d 433, 439
21 (1975). A second prosecution is barred only if the defendant can
22 show "actual prejudice." People v. Clark, 172 Cal. App. 3d 975,
23 980-81 (1985).

24 C. Analysis

25 Petitioner claims that his trial counsel was prejudicially
26 ineffective in failing to raise speedy trial violations as grounds
27 for dismissal. Petitioner's defense attorneys submit declarations
28 in which they state that they did not file a motion to dismiss on
state speedy trial grounds because they believed the prosecution
would refile the charges, rendering the motion to dismiss futile.
(Ex. A, B of Resp.'s Ex. D.) Because Petitioner was sentenced for

1 the Vacaville robbery on January 27, 2000, while the complaint for
2 the Milpitas robbery was still pending against him, and wasn't
3 served with the warrant for the Milpitas robbery until July 25,
4 2002, the ninety-day period was exceeded. However, the two years
5 that Petitioner was detained in trial proceedings for the Davis
6 robbery, from June 22, 2000 to July 18, 2002, tolled the statutory
7 time limit and provided good cause for the Santa Clara County
8 prosecutor's failure to prosecute the Milpitas robbery. Boqgs, 166
9 Cal. App. 3d 851 at 856. However, the five months between
10 Petitioner's sentencing for the Vacaville robbery and his receipt
11 of the warrant for the Davis robbery, i.e. January 27, 2000 to June
12 22, 2000, affect the statutory time limit. Thus, the warrant for
13 the Milpitas robbery was served at least two months after the
14 ninety-day speedy trial period had lapsed for that charge.

15 Although Plaintiff may have obtained a dismissal of the
16 Milpitas robbery charges on speedy trial grounds, the Santa Clara
17 County prosecutor simply could have refiled the charges, forcing
18 Petitioner to show actual prejudice to bar his prosecution.
19 Defense counsel reasonably concluded that a motion to dismiss on
20 speedy trial grounds was futile.

21 Citing People v. Martinez, 37 Cal. App. 4th 1589, 1596 (1995),
22 Petitioner argues that, due to the prosecutor's delay in serving
23 the warrant for the Milpitas robbery, he was prejudiced because he
24 lost the opportunity to serve concurrent sentences. However, after
25 Petitioner filed his brief, the California Supreme Court in People
26 v. Lowe, 40 Cal. 4th 937, 945-46 (2007), held that prejudice cannot
27 be shown "solely because the delay in bringing the defendant to
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1 trial has cost the defendant the chance to serve the sentence on
2 that charge concurrently with the sentence in another case." The
3 Lowe court explained:

4 If that were so, a delay in bringing a defendant to trial
5 would require dismissal of even a very serious charge
6 (such as murder), despite overwhelming evidence of the
7 defendant's guilt, merely because the defendant was
8 denied the potential benefit of serving some slight
9 portion (perhaps only a few months) of the sentence for
10 that crime concurrently with a sentence previously
11 imposed in another case. In that situation, the drastic
12 sanction of dismissal would be grossly disproportionate
13 to the harm that the defendant actually suffered--the
14 mere possibility, however slight, that the sentence
15 ultimately imposed for the dismissed crime might have
16 been effectively reduced in some measure, however small,
17 by concurrent service with the sentence for another
18 crime.

19 Id. The Lowe court disapproved Martinez on the issue of prejudice
20 due to the loss of the possibility of concurrent sentencing. Id.
21 at 946 n.3.

22 Because trial counsel is not ineffective for failing to make a
23 meritless motion, the state court of appeal applied federal
24 ineffective assistance of counsel law reasonably to conclude that
25 counsel was not ineffective.

26 Petitioner did not establish that trial counsel's performance
27 was deficient; therefore, the state court of appeal did not need to
28 address whether Petitioner was prejudiced by counsel's performance.

II. State Procedural Bar of Claim Regarding Admission of Evidence
of Uncharged Prior Bad Acts

Petitioner failed to object in the trial court that the
admission of evidence of prior bad acts violated his constitutional
rights, and the state court of appeal deemed this issue to be
waived on appeal, citing People v. McPeters, 2 Cal. 4th 1148, 1174

1 (1992).

2 In cases in which a state prisoner has defaulted his federal
3 claims in state court pursuant to an independent and adequate state
4 procedural rule, federal habeas review of the claims is barred
5 unless the prisoner can demonstrate cause for the default and
6 actual prejudice as a result of the alleged violation of federal
7 law, or demonstrate that failure to consider the claims will result
8 in a fundamental miscarriage of justice. Coleman v. Thompson, 501
9 U.S. 722, 750 (1991).

10 For a state procedural rule to be independent, the state law
11 basis for the bar must not be interwoven with federal law. La
12 Crosse v. Kernan, 244 F.3d 702, 703 (9th Cir. 2001). To be
13 "adequate," the state procedural bar must be "clear, consistently
14 applied, and well-established at the time of the petitioner's
15 purported default." Calderon v. United States Dist. Court (Bean),
16 96 F.3d 1126, 1129 (9th Cir. 1996) (internal quotations and
17 citation omitted). In addition, to bar federal habeas review, the
18 state court must have clearly and expressly invoked the default
19 through a "plain statement." Harris v. Reed, 489 U.S. 255, 265-66
20 (1989).

21 The Ninth Circuit has recognized and applied the California
22 contemporaneous objection rule to affirm denial of federal habeas
23 petitions on grounds of procedural default where there was a
24 complete failure to object at trial. Inthavong v. Lamarque, 420
25 F.3d 1055, 1058 (9th Cir. 2005); Paulino v. Castro, 371 F.3d 1083,
26 1092-93 (9th Cir. 2004); Vansickel v. White, 166 F.3d 953, 957-58
27 (9th Cir. 1999) (claim was procedurally barred by an adequate and
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1 independent state ground where it was procedurally barred in state
2 court for failure to object contemporaneously at trial).

3 The state court of appeals clearly and expressly found that
4 Petitioner defaulted his claim, thus satisfying the Harris "plain
5 statement" requirement.

6 Petitioner has not argued that there is cause for his default
7 and actual prejudice as a result of the admission of evidence of
8 prior bad acts, nor that failure to consider this claim will result
9 in a fundamental miscarriage of justice. Thus, this Court is
10 barred from reviewing this claim and denies it.

11 However, even if the claim were reviewed on the merits, it
12 would fail. Habeas corpus relief is unavailable for violations of
13 state law or for alleged error in the interpretation or application
14 of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Engle
15 v. Isaac, 456 U.S. 107, 119 (1982); Peltier v. Wright, 15 F.3d 860,
16 861-62 (9th Cir. 1994). A state court's procedural or evidentiary
17 ruling may be subject to federal habeas review only if it violates
18 federal law, either by infringing upon a specific federal
19 constitutional or statutory provision or by depriving the defendant
20 of the fundamentally fair trial guaranteed by due process. Pulley
21 v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d
22 918, 919-20 (9th Cir. 1991). A federal court can disturb on due
23 process grounds a state court's procedural or evidentiary ruling
24 only if the ruling was arbitrary or so prejudicial that it rendered
25 the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355,
26 1357 (9th Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9th
27 Cir.) (1986).

1 Although the state appellate court did not consider
2 Petitioner's due process claim because the court found that
3 Petitioner had waived it, the court addressed and rejected
4 Petitioner's claim that the evidence was improperly admitted under
5 state law to prove identity. See Resp's Ex. C, People v. Kidane,
6 Court of Appeal # H025825 5-8 (2004). The state appellate court
7 reviewed California Evidence Code § 1101 which provides that prior
8 evidence of misconduct is inadmissible if it's used to establish
9 that the defendant possessed a disposition or propensity to commit
10 the charged offense. The rule is not applicable to prior
11 misconduct evidence that shows a fact such as motive, opportunity,
12 intent, preparation, plan, or identity.⁴ The appellate court cited
13 People v. Ewoldt, 7 Cal. 4th 380, 404 (1994), which discussed how
14 prior misconduct can be probative of identity when "the uncharged
15 misconduct and the charged offense share common features that are
16 so distinctive as to support the inference that the same person
17 committed both acts. The pattern and characteristics of the crimes
18 must be so unusual and distinctive as to be like a signature." The
19 appellate court then compared the facts of the two uncharged

21 ⁴California Evidence Code § 1101(a) provides:

22 ". . . evidence of a person's character or a trait of his
23 or her character . . . is inadmissible when offered to
 prove his or her conduct on a specified occasion."

24 California Evidence Code § 1101(b) provides:

25 "Nothing in this section prohibits the admission of
26 evidence that a person committed a crime, civil wrong, or
27 other act when relevant to prove some fact (such as
 motive, opportunity, intent, preparation, plan,
 knowledge, identity, absence of mistake or accident
 . . .) other than his or her disposition to commit such
 an act."

1 offenses with the charged offense and found that the following
2 facts showed that Petitioner was the perpetrator of both the Davis
3 and Vacaville robberies: (1) all three robberies occurred between
4 9:00 and 10:00 pm; (2) at all three robberies, the perpetrator used
5 a gun, demanded money, including money stored under the cash
6 register drawer; (3) in all three robberies, before the perpetrator
7 fled on foot, he took the receiver of the telephone with him. Id.
8 at 7. Based on these similarities, the appellate court concluded
9 that the other crimes evidence was properly admissible as evidence
10 of identity.

11 The appellate court also addressed the arguments Petitioner
12 makes here, that the taking of the telephone receiver in each
13 robbery was not sufficiently distinctive. The appellate court
14 noted that officers had testified that no one in their experience
15 had ever reported that a robber removed the telephone receiver from
16 the crime scene. The appellate court also pointed out that the
17 dissimilarities in the crimes raised by Petitioner were minor "and
18 thus do not establish that the trial court abused its discretion in
19 admitting the other crimes evidence." Id. at 7-8.

20 Based upon the appellate court's analysis, it reasonably
21 concluded that the other crimes evidence was properly admitted as
22 evidence of identity. This ruling was not arbitrary or so
23 prejudicial that it rendered the trial fundamentally unfair.
24 Therefore, on the merits of this claim, the state court opinion was
25 not contrary to, and did not involve an unreasonable determination
26 of the facts in light of the evidence presented. Habeas relief on
27 this claim is not warranted.

1 III. Erroneous Admission of Hearsay Evidence

2 The Confrontation Clause of the Sixth Amendment provides that
3 the accused in criminal cases has the right to "be confronted with
4 witnesses against him." U.S. Const. amend. VI. Out-of-court
5 statements by witnesses that are testimonial are barred under the
6 Confrontation Clause unless (1) the witnesses are unavailable, and
7 (2) the defendant had a prior opportunity to cross-examine the
8 witnesses. Crawford v. Washington, 541 U.S. 36, 59 (2004).

9 On federal habeas corpus review, the standard applicable to
10 violations of the Confrontation Clause is whether the inadmissible
11 evidence had an actual and prejudicial effect upon the jury.

12 Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing
13 Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

14 Petitioner claims that the admission of Chalal's
15 identification statements violated his right to confrontation. The
16 state court of appeal concluded the admission of Chalal's
17 identification statements was erroneous. However, because other
18 evidence indicated that Petitioner committed the prior Vacaville
19 robbery, the state court of appeal found that the erroneous
20 admission of Chalal's statements had no prejudicial effect upon the
21 jury and was harmless. This finding was not unreasonable. The
22 jury had before it evidence that approximately five minutes after
23 the Vacaville robbery, police officers found Petitioner across the
24 street from the gas station with a black jacket over his head. A
25 loaded revolver, a plastic Chevron bag containing \$157, and \$680 in
26 cash were found in his car. Petitioner also admitted that he
27 decided to rob the Beacon station in Vacaville after he robbed the

1 Chevron station in Davis and he had been convicted of the Vacaville
2 robbery. Moreover, even if Chalal's identification statements had
3 been excluded and the jury had not found that Petitioner committed
4 the prior Vacaville robbery, it is not likely that the jury would
5 have found that Petitioner did not commit the Milpitas robbery;
6 there was still strong evidence that Petitioner committed the
7 Milpitas robbery. Therefore, the state court was reasonable in
8 concluding that the erroneous admission of Chalal's statements was
9 harmless.

10 IV. Denial of Pre-Sentence Custody Credits

11 Petitioner claims that he was erroneously denied custody
12 credits and that his appellate and trial counsel were prejudicially
13 ineffective for failing to raise this claim in state court at
14 sentencing or on appeal.

15 A. Pre-Sentence Custody Credits

16 California Penal Code § 2900.5(a) provides, "In all felony and
17 misdemeanor convictions, either by plea or by verdict, when the
18 defendant has been in custody, including . . . any time spent in a
19 jail [or] prison . . . all days of custody of the defendant . . .
20 shall be credited upon his or her term of imprisonment . . ."

21 However, California Penal Code § 2900.5(b) provides, "For the
22 purposes of this section, credit shall be given only where the
23 custody to be credited is attributable to proceedings related to
24 the same conduct for which the defendant has been convicted." A
25 defendant cannot obtain credit for confinement prior to his
26 conviction unless he proves that but for the conduct which led to
27 the sentence against which he seeks credit, he would not have been

1 subjected to that custody. People v. Bruner, 9 Cal. 4th 1178,
2 1193-95 (1995).

3 B. Ineffective Assistance of Appellate Counsel

4 The Due Process Clause of the Fourteenth Amendment guarantees
5 a criminal defendant the effective assistance of counsel on his
6 first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 391-405
7 (1985). Claims of ineffective assistance of appellate counsel are
8 reviewed according to the standard set out in Strickland. Miller
9 v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). A defendant
10 therefore must show that counsel's advice fell below an objective
11 standard of reasonableness and that there is a reasonable
12 probability that, but for counsel's unprofessional errors, he would
13 have prevailed on appeal. Id. at 1434. Appellate counsel does not
14 have a constitutional duty to raise every non-frivolous issue
15 requested by defendant. Id. at 1434 n.10. In many instances,
16 appellate counsel will fail to raise an issue because counsel
17 foresees little or no likelihood of success on that issue; indeed,
18 the weeding out of weaker issues is widely recognized as one of the
19 hallmarks of effective appellate advocacy. Id. at 1334. Appellate
20 counsel therefore will frequently remain above an objective
21 standard of competence and have caused the client no prejudice for
22 the same reason: a decision not to raise a weak issue. Id.

23 C. Analysis

24 Under California Penal Code § 2900.5(a)-(b), Petitioner is not
25 entitled to presentence custody credits because the custody credits
26 he seeks are attributable to the Vacaville robbery proceedings, not
27 the Milpitas robbery proceedings. The state court of appeal

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1 therefore was not unreasonable in denying this claim. In addition,
2 because federal courts generally do not review state sentences that
3 are within statutory limits, the Court denies this claim. Walker
4 v. Endell, 850 F.2d 470, 476 (9th Cir. 1987).

5 Because Petitioner was clearly not entitled to presentence
6 custody credits under state law, no prejudicial error resulted from
7 trial and appellate counsel not raising this issue. The claim
8 regarding the denial of presentence custody credits was weak and
9 therefore, neither trial nor appellate counsel was ineffective in
10 failing to raise it.

11 This Court will not address Respondent's arguments that these
12 claims are unexhausted because they are denied on the merits.

13 CONCLUSION

14 For the foregoing reasons, the petition for a writ of habeas
15 corpus is DENIED.

16 IT IS SO ORDERED.

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18 Dated: 8/24/07



CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 KIDANE,

Case Number: CV05-05396 CW

6 Plaintiff,

CERTIFICATE OF SERVICE

7 v.

8 CAREY et al,

9 Defendant.
10 _____/

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
12 District Court, Northern District of California.

13 That on August 24, 2007, I SERVED a true and correct copy(ies) of the attached, by
14 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter
15 listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an
16 inter-office delivery receptacle located in the Clerk's office.

17 Benyam Kidane P68906
18 California State Prison-Solano
19 P.O. Box 4000
20 Vacaville, CA 95696

21 Juliet B. Haley
22 California Attorney General's Office
23 455 Golden Gate Avenue
24 Suite 11000
25 San Francisco, CA 94102-7004

26 Dated: August 24, 2007

27 Richard W. Wieking, Clerk
28 By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California