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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent v. BARRY LAMON, Defendant and Appellant.	F051924 (Super. Ct. No. 06CM7367) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson and Timothy S. Buckley,* Judges.†

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Brian Alvarez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Retired Associate Justice of the Court of Appeal, Fifth District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Judge Atkinson presided over appellant's trial; Justice Buckley presided over appellant's sentencing hearing.

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STATEMENT OF THE CASE

On August 29, 2006, an information was filed in the Superior Court of Kings County charging appellant Barry Lamon with count I, felony battery while confined in state prison upon a non-confined person (Pen. Code,[1] § 4501.5), with four prior strike convictions (§ 667, subds. (b)-(i)) and two prior prison term enhancements (§ 667.5, subd. (b)). Appellant pleaded not guilty and denied the special allegations. On August 30, 2006, the court granted appellant's motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

On October 25, 2006, the court granted appellant's motion for appointment of counsel, dismissed one prior strike conviction, and appellant's jury trial began. On October 27, 2006, the jury found appellant guilty, and found the three prior strike convictions and two prior prison term enhancements true.[2]

On December 13, 2006, the court imposed the third strike term of 25 years to life plus two consecutive one-year terms for the prior prison term enhancements, to be served consecutively to the life term already being served.

FACTS

On the morning of February 25, 2006, Correctional Officers Daniel Fierro and Luis Urena were collecting breakfast trays from the inmates at Corcoran State Prison. The officers went to each cell with a plastic cart, and unlocked and opened the food port in the center of the cell door. The inmate placed the tray through the port, the officer retrieved the tray, placed it on the cart, closed and locked the port, and then moved on to the next cell. The officers were wearing face shields which went down to their chins,

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] In section III, *post*, we will address appellant's contention that one of the true findings on the prior strike convictions was not properly entered as the jury's verdict.

along with latex gloves and stab-resistent vests, and were armed with pepper spray. The officers wore such attire as it was common for the inmates to throw things at them, such as urine, blood or feces, a practice known as "gassing."

The process of opening and closing the food ports was noisy so that the inmates knew the officers were collecting the trays, and they were usually ready to hand over the trays. The food port was about waist-high. When the food port was closed and locked, there was still about a one-quarter inch gap between the door and the frame. Officer Urena testified an inmate would occasionally refuse to return his tray. In such a situation, the officers would call a supervisor, who would ask for the tray. If the inmate again refused, the supervisor would put together an extraction team, which usually encouraged the inmate to comply with the order.

Officers Fierro and Urena retrieved the tray from the inmate in cell 12, and were about to turn their attention to the adjoining cell 11, where appellant was the sole occupant. Appellant had been in that cell for a few days and the officers did not have any prior problems with him. As the officers locked the food port on cell 12, a liquid substance was thrown out of cell 11 and hit Officer Fierro on the left side of his face and went under his protective mask. Fierro was still facing cell 12 so that the left side of his body was against the door of cell 11. Fierro had been looking at the inmate in cell 12 when he was hit by the liquid, and that inmate had been standing in the back of his cell and had not thrown anything at him.

After he was hit by the liquid, Fierro looked into cell 11 and saw appellant standing by the door and holding his state-issue cup. There was liquid dripping from the food port and the cell door. Fierro turned away from cell 11 and alerted Urena that he had been gassed.

Officer Urena testified he was standing in front of cell 12 and facing cell 11, and saw the liquid "fly out" of cell 11's perforated door and hit Fierro. Urena testified the food trays were piled on the cart, but the trays did not obstruct his view of the cell door.

Urena believed the liquid had been thrown in an "upward" trajectory in order to hit Fierro under the face mask.

Officer Urena testified he immediately moved Fierro out of the way, and ordered appellant to place his back to the food port and submit to mechanical restraints. Appellant started to back up to the door but then picked up the cup, reached into the toilet with the cup, stood up, and started to turn toward the door. Urena believed appellant was being aggressive and about to "gas" him, and sprayed appellant with pepper spray. Appellant dropped the cup and ran to the back of the cell.

Officer Fierro immediately went for medical treatment. The liquid quickly dried and was not swabbed or tested. Officer Fierro testified that he did not smell any odor from the liquid and thought it could have been water, but he was not sure and the exact nature of the liquid was never determined.

The prosecution introduced appellant's section 969b packet into evidence, which contained appellant's custodial history, and abstracts of judgment showing that appellant was convicted of assault with a deadly weapon and intent to inflict great bodily injury in 1989 (§ 245, subd. (a)(1)), burglary in 1990 (§ 459), murder and attempted murder in 1997, and battery on a peace officer in 1999 (§ 243, subd. (c)).

Defense Evidence

Appellant testified that he had been at Corcoran for two days and did not have any prior problems with Officers Fierro and Urena. Based on the location of his cell, he was the first person to receive his food tray and the last to have his tray collected. On the morning of February 25, 2006, he did not eat his breakfast. Appellant testified he was concerned about the food because it made him sick the previous morning, "and it was a pattern of this type of thing." He could hear the officers collecting the tray from the adjoining cell. He sat on his bunk and told Officer Fierro that he was "holding the tray hostage," which meant that he refused to relinquish his food tray. Appellant testified he

told the officers, "'You're not getting this tray. Get it yourself,'" and asked to speak to a supervisor about the food.

Appellant testified that Officer Urena stepped around Officer Fierro, and Urena sprayed pepper spray directly at him. Appellant testified he was sitting on his bunk when Urena sprayed him the first time. After Urena used the spray, he ordered appellant to approach the cell door and said, "'Now you get your ass over here.'" Appellant testified he complied with Urena's orders, but Urena sprayed him again in an "improper use of force." Appellant threw down the tray, turned his back, covered up under a blanket, and tried to hide under the bunk.

Appellant disputed the testimony of Officers Fierro and Urena about the incident, and testified the food trays collected on their cart would have been too high for them to see into his cell. Appellant testified he did not throw any liquid out of his cell, he did not scoop any liquid out of the toilet, he did not "gas" anyone, he was sitting on his bunk and "holding [his] food tray hostage" when Urena used the pepper spray the first time, and he did not approach the cell door until ordered by Urena. Appellant testified Fierro never yelled that he had been gassed, and Urena used the pepper spray because he was mad that appellant refused to return the food tray and demanded to see a supervisor about the food. Appellant testified the officers wrote a "bogus" report about the alleged gassing to cover up Urena's improper use of pepper spray.

In the course of his trial testimony, appellant testified he first went to prison in 1989, he had never remained out of custody for more than five years as an adult, and returned to prison for parole violations. Appellant admitted he had been convicted of burglary, petty theft, and murder, and the murder conviction was pending on appeal.

"Q. And you mentioned you, you've been convicted of a [section] 187?

"A. Yes. I'm serving for it now.

"Q. Homicide?

"A. Yes.

"Q. Which is under appeal, as I understand it. Was that also an attempted murder in that same case?

"A. Yeah."

On cross-examination, the prosecutor asked appellant if he had ever stricken or attacked an officer, and appellant said yes.

"Q. Have you done that in the past?

"A. Yes, I have.

"Q. Is that there in the prison?

"A. Yes, it is.

"Q. Why would you do something like that?

"A. While they were killing us.

"Q. Is this through your food?

"A. No. This is when they were killing us in '98, '99. I was in the same prison, and it was not these exact same officers, but it was the same prison. The tape murders, the gladiator fights, I was a part of that."

On further cross-examination, appellant reviewed the section 969b packet, conceded he had suffered the prior convictions stated within, and did not dispute any of the convictions listed.

On appeal, appellant contends the trial court improperly denied his requests for continuances so he could defend himself at trial, that defense counsel was prejudicially ineffective for failing to exclude any references to appellant's prior conviction for battery on a correctional officer, we must reverse the jury's finding that his prior conviction for aggravated assault was a strike, and the jury's true finding on his prior murder conviction as a strike is invalid because it was never read aloud by the clerk of the court.

I.

DENIAL OF CONTINUANCES

Appellant initially represented himself in this criminal matter, and requested continuances to prepare for trial. The court denied the continuances, and appellant requested appointment of counsel for trial because he was not ready to defend himself. On appeal, he asserts the court abused its discretion when it denied his continuance requests and prevented him from asserting his Sixth Amendment right to represent himself.

Appellant presents this issue as a simple matter of the court abusing its discretion by denying his continuances so he could prepare his defense. However, a review of appellant's numerous pretrial motions, filed while he still represented himself, refutes appellant's assertions and supports the trial court's rulings in this case.

A. The Complaint and Appellant's Initial Motions

Appellant was a prisoner in Corcoran State Prison when he allegedly committed the instant offense on February 25, 2006, and remained in custody in the security housing unit (SHU) throughout the entirety of these proceedings.

On June 2, 2006, the complaint was filed. Prior to the preliminary hearing, the court granted appellant's request to represent himself and appointed Rex Payne as appellant's stand-by counsel. On August 17, 2006, the preliminary hearing was held, and appellant represented himself.

On August 29, 2006, the information was filed. On August 30, 2006, appellant filed a motion for ancillary funds and services, and declared he needed additional assistance to represent himself because he was in the SHU. Appellant further declared that he had a prescription for eyeglasses but it was not filled, the fluorescent lights in his cell were insufficient to read materials to prepare for trial; the postage and stationary supplies he received pursuant to California Department of Corrections (CDC) policies were insufficient to prepare for trial, and he needed additional postage, writing

instruments, file folders, and other materials beyond that permitted by CDC policies in order to represent himself.

Appellant also filed a lengthy motion for "protection" and requested the court order CDC to provide him with additional library services beyond those provided to inmates in the SHU. Appellant requested the court order an investigation into his allegations that the correctional officers at Corcoran were subjecting him to "an on-going pattern" of physical assaults and harassment and interfering with his right to represent himself. In the course of his "protection" motion, appellant declared he needed investigative services to support his defense that "his battery" on Officer Fierro "was justifiable self-defense" because Fierro was acting in concert with the warden and other officers to taint appellant's food with "pain-inducing chemical agents." Appellant further asserted that when he was housed in the state prison in Sacramento, various CDC officials conspired with prison gang members to kill appellant because of his "history of battery on corrections officers," his prison activism and lawsuits, and his knowledge that various CDC officials were involved in murders and physical assaults. Appellant asserted his food was tainted at both the Sacramento and Corcoran prisons as part of this conspiracy, and he suffered numerous physical symptoms that were not properly treated. Appellant's "protection" motion further asserted inmate Jimmie Harmon and investigator Ken Lazzarini were involved in a case in Amador County, and they could support the "justification of my battery" on Officer Fierro because they knew of CDC's "long-standing practice" to contract prison gang members to kill inmates. He also named other inmates who allegedly had their food tainted by CDC officials.

Based on all these allegations, appellant moved for an order of protection and preliminary injunction for an outside medical evaluation, and for CDC officials to provide him with various stationary supplies and telephone privileges beyond those permitted by CDC regulations for SHU inmates in order to represent himself.

B. The Arraignment and Appellant's Further Motions

On August 30, 2006, Judge Bissig presided over the arraignment. Appellant requested to represent himself pursuant to *Faretta*, and the court granted his motion. In doing so, the court admonished appellant that the right of self-representation did not entitle him to any special privileges.

> "… You are a confined inmate, and as such are obviously at somewhat of a disadvantage in terms of access to the various resources that an attorney might have available to him or her. Those problems are problems that you are taking on yourself and the Court is not going to fix those problems for you."

The court stated it would not issue any orders to alter appellant's conditions of confinement without a noticed hearing in which CDC was a party. The court further stated that the right of self-representation was conditioned upon orderly behavior and would be withdrawn if he was disruptive, and stand-by counsel to be available to take over the case.

The court advised appellant the prosecutor was a highly-skilled and highly-trained professional, appellant would be at a disadvantage, and appellant would have to abide by the same rules as to the filing of documents and motions.

> "… You're not going to receive any special privileges from the Court because of your pro per status. You're going to be expected to know the technical rules of substantive law and criminal procedure and evidence. You're going to have to comply with notice requirements on all motions that you file in the same manner as would be expected of a private or a court-appointed attorney. And if you have physical limitations or other limitations that prevent you from acting as your own attorney, you may not be able to proceed in that capacity. You will receive no special library privileges or extra time for preparation and will have no staff or investigators at your beck and call."

Appellant stated that the previous month, another judge already granted a motion for appointment of an investigator, and complained he had not seen the investigator, Mr. Vela. The court replied it had not seen any such motion or order for appointment of an

investigator.[3] The court advised appellant that he had to comply with the requisite procedures and submit a declaration showing good cause for the appointment of an investigator, so the court could "make a determination as to whether it is reasonable and appropriate to cause those expenses to be incurred. But it's a case-by-case determination. It's not an automatic thing."

The court set the pretrial conference for September 13, the trial readiness hearing on October 4, the trial confirmation on October 24, and the trial to begin on October 25, 2006. Appellant indicated his stand-by counsel was Rex Payne, and complained that he had not filed certain motions with the court. The court explained that stand-by counsel could not file appellant's motions.

The court turned to appellant's pending motion for ancillary funds and services to assist in his defense, noted the motion really requested better lighting in his cell and reading glasses, and stated it would treat these issues as physical impediments to self-representation. Appellant replied he just needed glasses. The court said he should take that up within the CDC review process, and declined to order CDC to provide him with glasses or make any special orders against CDC since it was not a party to the case. Appellant also requested additional funds for postage, and the court again advised him to take the matter up with CDC. Appellant complained that "[t]his is a kangaroo court, I can see that." The court replied that appellant's right of self-representation was conditioned on conducting himself in an orderly and appropriate manner.

C. Pretrial Motions and Hearings

On September 13, 2006, Judge LaPorte conducted the pretrial conference. Appellant complained that he was having trouble with his stand-by counsel, Mr. Payne. The court relieved Mr. Payne and appointed Brian Gupton as stand-by counsel.

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[3] The instant record does not contain any order appointing an investigator.

Appellant then requested to continue the trial because he was not prepared and had not talked to Mr. Velo, the investigator. Appellant stated that on July 27, 2006, Judge DeSantos appointed Mr. Velo as his investigator. Appellant complained that he did not have a working relationship with Mr. Velo, and admitted they had talked about the case but Mr. Velo refused to interview the 20 witnesses on his list.

Mr. Velo was present and advised the court that he had not received sufficient funds to interview the 20 witnesses on appellant's list because these witnesses were inmates who had been transferred to other prisons around the state. Mr. Velo was willing to conduct the investigation if sufficient funds were allocated.

The court advised appellant:

> "THE COURT: [¶] ... [Y]ou will need to identify for the Court, in terms of being able to approve the investigation, how these witnesses are connected with this particular alleged offense. Do you know what I'm saying?
>
> "[APPELLANT]: Yes, sir.
>
> "THE COURT: So there has to be some connection between the witnesses you're going to call and the offense. You'll need to identify for that so that I can then make sure that the amount of money that's available for Mr. Velo to interview those things, for the people who are going to be testifying in this case as opposed to for some other reason. Now, do you understand what I'm saying?
>
> "[APPELLANT]: Yes."

Mr. Velo advised the court that he believed the witnesses on appellant's list had nothing to do with the charged offense. The court replied that appellant was going to tender a motion to show how these witnesses were connected with the case. Appellant replied that he already had such a document and presented it to the court. Mr. Velo advised the court that he had personal issues which would conflict with the scheduled trial. The court relieved Mr. Velo and would consider appellant's motion. Appellant requested appointment of a process server and complained that his subpoenas were not

being served. The court replied that it would not instruct the sheriff and appellant needed to file a separate motion.

On September 19, 2006, Judge Atkinson conducted a hearing on appellant's pending motions. Appellant complained he was not receiving sufficient time in the prison law library to prepare. Appellant also complained he suffered from various physical disabilities and ailments, and asserted that CDC officials were contaminating his food in retaliation for the "allegations that were relevant to this immediate case." The court asked about his current ability to represent himself, and appellant said, "I'm representing myself just fine." Appellant also complained he had not been able to serve any subpoenas. The court turned to the investigator issue, and advised appellant that it needed a list of witnesses he wanted to subpoena and why they were relevant to the proceedings.

On October 2, 2006, the court filed an order which granted appellant's pending motion to relieve Mr. Velo from serving as his investigator "insofar as he does not want services" from Mr. Velo. The court denied appellant's motions for ancillary funds and appointment of a registered process server because appellant failed to state facts establishing good cause for the specific services.

On October 4, 2006, Judge Atkinson convened the trial readiness hearing. Appellant requested to vacate the trial date for at least 60 days because he was not prepared, his subpoenas had not been served, and he had not met with the new investigator appointed by Judge LaPorte.

The court replied that Judge LaPorte did not appoint another investigator because appellant had not shown good cause or a specific reason why an investigator was needed for specific services. The court advised appellant that his previous motions were denied on October 2, 2006, and appellant said he never received the order. The court provided appellant with a copy of the order, and appellant objected to the court's denial of the motions.

Appellant presented the court with additional motions for transcripts, appointment of Kenneth Lazzarini as the investigator, reasonable accommodations, and objections to the alleged obstruction of his case, and requested an immediate hearing on the motions. The court declined to hear the motions because appellant failed to properly notice and serve the prosecutor. Appellant complained he did not have sufficient time in the prison law library.

The court decided to continue the readiness hearing for a few days so appellant could properly serve his motions on the prosecutor. The court also explained why it denied his motions for ancillary funds and an investigator:

> "… You have not to date provided the Court with any facts, specific facts, justifying the expenditure of funds for any specific services that are relevant to any legally admissible evidence or leading to the same for any defense of the charge that you're facing. Maybe you've done it in your new motions, I'll examine them and I'll rule on them. But based upon what you've submitted, it's clear to me that you don't understand what you're doing, you don't know how to ask for what you need properly, and I'm afraid you won't know what to do at trial with any evidence if you get it and the Court will be required to exclude it if you don't try to introduce it properly. You know, you really need an attorney to do this."

Appellant said the court already appointed Mr. Velo as his investigator. The court replied that appellant did not want him. Appellant agreed but thought the court already found good cause for appointment of an investigator but just discharged Mr. Velo since he wanted more money, and "all of a sudden I need to submit new and improved grounds for an investigator."

The court explained appellant was not entitled to an investigator and he had to show why he needed one. "It has to be relevant, it has to be properly expended funds, and you haven't done it right. I'm really unimpressed with the quality of your legal work frankly and you're going to be at a terrible, terrible disadvantage at trial because you don't understand what you're doing." The court advised appellant to accept appointed counsel. Appellant refused and said he would "deal with this on appeal." The court

replied that "all your mistakes are something you cannot appeal," because he could not raise his own incompentency as his own attorney. Appellant declared that he was not incompetent, but that he had been obstructed from representing himself. The court explained it was just requiring him to follow the same rules required of any other attorney. Appellant asked how to file an interlocutory appeal, and the court declined to give him any legal advice.

On October 6, 2006, Judge Atkinson convened the continued readiness hearing, and placed on the record that appellant had been transported to the hospital. An officer stated appellant appeared normal during transportation and had been placed in a holding cell, but went into a fetal position and was incoherent and unable to answer any questions. The court noted it had previously denied appellant's motion for a continuance, was concerned whether appellant was trying to disrupt the proceedings, continued the readiness hearing for a few days, but kept the same trial date.

The record contains the discharge report from the hospital's emergency room, which states that appellant suffered a nondiabetic hypoglycemic reaction and had an episode of nondiabetic low blood sugar, which could have been caused by eating highly refined carbohydrates, drinking too much alcohol, intense exercise, fatigue, stress, and/or poor diet. He was treated and released the same day.

On October 10, 2006, appellant filed a "written list of objections to the ongoing pattern of obstruction of the judicial process." Appellant asserted the court, the public defender, and the investigator obstructed his ability to present his defense that CDC officials conspired to murder inmates. Appellant stated that he filed a civil rights lawsuit against CDC in 2003, gang members at the Sacramento prison attempted to kill him in 2004, CDC officials intentionally housed him with gang members at that time to facilitate the attempts on his life, and his food was poisoned. Appellant asserted he was transferred to Corcoran in 2006 to prevent him from revealing information about the conditions in Sacramento, and the Corcoran officers also tainted his food. Appellant declared Officer

Fierro lied about the alleged battery in this case to cover up the issue of the poisoned food and the contract on his life.

Appellant complained that he advised his previous stand-by counsel, Mr. Payne, about the conspiracy to kill him but Mr. Payne had not done anything. Appellant also complained that he had not been able to develop his defense, which included evidence of CDC's conspiracy to kill him and its attempts to suppress internal investigations. Appellant declared he needed an investigator to help him prepare for the "preliminary hearing."

Also on October 10, 2006, appellant filed a motion to vacate the scheduled trial date of October 24, 2006, and for a 90-day continuance. Appellant restated his allegations that there was a conspiracy among CDC officials to kill him, the conspiracy was the result of a civil rights lawsuit he filed when he uncovered a massive conspiracy to attack and kill inmates in the Sacramento prison, the warden of the Sacramento prison contracted prison gang members to kill him, his food was regularly poisoned, and Officer Fierro was part of this conspiracy and fabricated the charges against him. Appellant complained his previous stand-by counsel, Mr. Payne, failed to pursue any investigation of these issues, and the court failed to appoint another investigator to help him. Appellant alleged the trial court denied his previous motion for a protective order because it was part of the conspiracy against him. Appellant asserted he should receive a continuance to investigate these issues and prepare for trial.

Appellant filed a separate motion for appointment of Kenneth Lazzarini as his investigator because he already investigated these issues in the case of another inmate, Jimmie Harmon, and he was familiar with CDC's conspiracies against inmates. Appellant also filed a motion for appointment of a process server and for an unrestricted order for a process server to handle any matters appellant might need.

On October 10, 2006, Judge Atkinson convened the continued readiness hearing, and considered and denied appellant's pending motions for protection and for a hearing

to consider whether he had been obstructed from access to the court. The court also denied appellant's pending motion for appointment of Kenneth Lazzarini as his private investigator because he failed to show good cause. The court also denied his motion to continue the trial. The court noted appellant's motions for a continuance, an investigator, and the alleged obstruction of his access to the judicial process, were all tied together to his complaints that he needed more time to prepare.

> "And [appellant] is requesting a lot of the information to prepare for trial with the anticipation that he's going to be presenting as a defense to these charges witnesses and information that, as he stated, took place at other institutions, at other times, well preceding the charge in which he's facing, and the information that he wants to present to the Court is not a legal defense to the charge, it would be a waste of time and money for the Court to appoint investigators, issue subpoenas, have the witnesses transported, all of that is a waste because it does not produce any relevant admissible evidence that would constitute a defense to the charge in which he's—in which he's facing.
>
> "It might be of interest, it might be relevant to some other legal proceeding, but not to this charge. And based upon that those motions have been denied and that also negates the reason to continue the trial beyond its currently set date. So it would be a lack of any other showing, the Court will summon a panel for the trial on the currently set trial date."

On October 19, 2006, appellant filed another motion to continue the trial for at least 60 days, and again set forth his allegations that CDC officials conspired to attack and kill him, and the conspiracy was the result of a civil rights action he filed in an unrelated matter. Appellant further asserted that he became ill at the courthouse because he ate his entire breakfast that morning, the hospital verified his assertions that he was poisoned, and he was not physically ready for trial. Appellant declared he needed a continuance because the trial would conflict with the administrative schedule of his federal civil rights lawsuit, he needed more time to investigate the regular practice of CDC's officers to fabricate charges against inmates to cover up their own misconduct,

and his investigation would also show the warden of the Sacramento prison conspired to kill him.

On October 24, 2006, appellant filed a petition for writ of mandate for the court to grant a continuance, and again set forth the reasons previously alleged in his earlier motions.

On October 24, 2006, Judge Atkinson conducted the trial confirmation hearing. The prosecutor moved to dismiss one of the four alleged prior strike convictions because of an absence of proof, and the court granted the motion. The court turned to appellant's pending motion for a continuance. The court asked if appellant was doing okay. Appellant said he was not feeling well, he was "under attack" at the prison, his food was being tampered with, and that was why he passed out in the holding cell and was taken to the hospital. Appellant declared the emergency room physician "concurred that I was suffering a reaction to toxins in my system." Appellant said he was still unable to prepare for trial and had no control over his preparation time in prison.

The court noted appellant appeared capable of expressing himself at all hearings, and it saw no change in circumstances to support granting the continuance. Appellant said he had another deadline in an unrelated case before the Ninth Circuit, and he had insufficient time in the prison law library. The court stated appellant's continuance motion involved witnesses and incidents arising from an unrelated case in Sacramento which had nothing to do with the pending criminal charge, that appellant failed to state any legal cause for a continuance, and the trial remained set to begin the next day.

D. <u>First Day of Trial</u>

On October 25, 2006, Judge Atkinson convened the first day of trial. Appellant objected to the court's denial of his continuance motion and complained he did not have sufficient time to use the prison law library. Appellant introduced the emergency room report about the day he collapsed in the holding cell, and asserted the report "bares out"

his allegations against CDC. He was still having headaches, he was not feeling well, and he was not ready to proceed.

However, appellant also presented the court an application for appointment of counsel and asked if his stand-by attorney, Mr. Gupton, could represent him for trial "because I'm not being allowed to." Appellant stated his defense had been "castrated," he was in pain, he did not have any witnesses, subpoenas had not been served, and he did not have any defense funds. The court asked appellant if he wanted Mr. Gupton to represent him at trial, and appellant said yes. The court asked Mr. Gupton if he was ready to proceed, and Mr. Gupton replied he was. The court appointed Mr. Gupton, granted a brief recess for appellant to speak with Mr. Gupton, and then proceeded with trial. Mr. Gupton represented appellant throughout the entirety of the trial and appellant did not raise any objections to his representation.

E. Analysis

Appellant contends the court abused its discretion when it denied his requests for continuances to prepare for trial. Appellant asserts the reasons for his continuance requests were valid, and included his inability "to obtain ancillary funds, had limited access to the law library (one hour each Tuesday), and had serious documented health issues that precluded him from proceeding with trial." Appellant asserts the court's denial of the continuances resulted in the violation of his Sixth Amendment right to represent himself since he was unable to prepare and had to resort to appointed counsel.

A criminal defendant who knowingly and intelligently waives the right to counsel possesses a right under the Sixth Amendment of the federal Constitution to conduct his own defense. (*Faretta, supra,* 422 U.S. 806, 835-836; *People v. Jenkins* (2000) 22 Cal.4th 900, 959 (*Jenkins*).) To invoke that right, the defendant must request self-representation unequivocally and in a timely manner. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087.) A court's improper denial of a timely *Faretta* motion is reversible

per se. (*People v. Dent* (2003) 30 Cal. 4th 213, 217; *People v. Valdez* (2004) 32 Cal.4th 73, 98.)

When the defendant moves to dismiss counsel and undertake his own defense, he "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Faretta, supra*, 422 U.S. at p. 835; *Jenkins, supra*, 22 Cal.4th at p. 959.) The court must advise the defendant of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation. (*United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614, 624.) "'No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation.' [Citation.] Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.' [Citations.]" (*People v. Blair* (2005) 36 Cal.4th 686, 708 (*Blair*).)

While the court must be certain the defendant seeking to represent himself is aware of the inherent disadvantages in doing so, "this does not mean that the judge must serve as a surrogate lawyer for the defendant. [Citation.] The teachings of *Faretta* do not require a specific admonition demanding tutelage and legal advice by the trial court." (*United States v. Hayes* (9th Cir. 2000) 231 F.3d 1132, 1138 (*Hayes*).) "[T]he trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out. [Citation.]" (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 162; *Hayes, supra*, 231 F.3d at p. 1138; see also *People v. Barnum* (2003) 29 Cal.4th 1210, 1220-1221.) As such, it is sufficient for the court to advise a confined defendant that he will have no special library privileges or staff of investigators at his beck and call. (*Hayes, supra*, 231 F.3d at pp. 1138-1139 & fn. 4.) Moreover, a self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without

surrendering effective control over presentation of the defense case, may do so only with the court's permission and upon a proper showing. (*Martinez v. Court of Appeal*, *supra*, 528 U.S. at p. 162; *People v. Bloom* (1989) 48 Cal.3d 1194, 1219.)

There are corollary issues which arise when a criminal defendant seeks to represent himself, such as when the defendant requests continuances to prepare for trial. Generally a continuance in a criminal case may be granted only upon a showing of good cause, and a trial court has broad discretion to grant or deny the request. (§ 1050, subd. (d); *People v. Frye* (1998) 18 Cal.4th 894, 1012-1013; *Jenkins*, *supra*, 22 Cal.4th at p. 1037.) In making such a determination, the court must examine the circumstances of the case and consider the benefit the moving party anticipates, the likelihood such a benefit will actually accrue, the burden on the witnesses, jurors, and the court, and, most importantly, whether substantial justice will be accomplished by the grant of a continuance. (*Jenkins*, *supra*, 22 Cal.4th at p. 1037.) In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his motion for a continuance does not require reversal of a conviction. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

The trial court's ruling on a continuance motion is subject to different considerations when a defendant has exercised his *Faretta* rights. A defendant who represents himself must be given a reasonable opportunity to prepare his defense, and a denial of a continuance can be an abuse of discretion. (*People v. Cruz* (1978) 83 Cal.App.3d 308, 324-325.) When a trial court grants a *Faretta* motion in close proximity to trial, it may abuse its discretion and violate the defendant's rights to counsel and due process if it denies a timely request for a reasonable continuance to allow a defendant to prepare his defense. (*People v. Wilkins* (1990) 225 Cal.App.3d 299, 304-308 (*Wilkins*); *People v. Clark* (1992) 3 Cal.4th 41, 110; *People v. Hill* (1983) 148 Cal.App.3d 744, 756 (*Hill*); *People v. Fulton* (1979) 92 Cal.App.3d 972, 976.) The erroneous denial of a

defendant's request for a continuance after being granted in propria persona status is "usually treated as prejudicial per se." (*Hill, supra,* 148 Cal.App.3d at p. 758.)

In *People v. Maddox* (1967) 67 Cal.2d 647, a case decided before *Faretta*, the California Supreme Court held that "upon timely request," a defendant representing himself was entitled to a "reasonable continuance" to prepare his defense. (*Id.* at p. 648.) When the defendant therein entered his plea, he requested self-representation but his request was denied. On the morning trial began, the trial court changed its mind and allowed the defendant to represent himself, but refused to grant a continuance so he could obtain witnesses and prepare a defense. *Maddox* held the trial court had erred by denying the defendant's earlier self-representation request. (*Id.* at p. 651.) "The dispositive question ... is whether defendant was entitled to a reasonable continuance at that point to prepare himself for trial." (*Id.* at p. 652.) *Maddox* explained that a defendant, like an attorney, had to be given a reasonable opportunity to prepare a defense. Moreover, the defendant had not been given the statutorily-required five days to prepare for trial (§ 1049), an error of constitutional dimension. (*People v. Maddox, supra,* at p. 653.) *Maddox* explained that to deny the defendant a reasonable continuance would "render his right to appear in propria persona an empty formality[.]" (*Ibid.*)

In *Hill*, the defendant vacillated between representation by several different attorneys and self-representation over the course of several months. Before the trial court granted his eventual *Faretta* motion, it informed him that it would not grant a continuance if it allowed him to represent himself. The defendant's subsequent motion for a continuance was denied. *Hill* held that while the trial court could have denied the *Faretta* request as untimely, once self-representation was granted, the trial court was required to grant the defendant's request for a continuance. (*Hill, supra,* 148 Cal.App.3d at p. 757.)

> "'While it is now settled that a trial court may *deny* a request for self-representation made on the very eve of trial, on the ground that granting the

> motion would involve a continuance for preparation, the very rationale of that doctrine requires that, if the trial court, in its discretion, determines to *grant* the request for self-representation it must then grant a reasonable continuance for preparation by the defendant. [Citation.] .... [W]hile the disposition of an untimely pro. per. motion is discretionary, the disposition of a request for continuance following the grant of such a motion is not ...." (*Hill, supra,* 148 Cal.App.3d at p. 757.)

In *Wilkins,* the defendant made a *Faretta* request on the date trial was scheduled to begin. The defendant had been unable to make his request sooner because he had not been in the courtroom at either of the two pretrial hearings. (*Wilkins, supra,* 225 Cal.App.3d at pp. 302, 306.) When the defendant made his *Faretta* motion, the trial court informed him it would not grant a continuance but granted his request for self-representation. A few days later, the defendant unsuccessfully moved to continue, stating he needed time to prepare his defense and that his in propria persona privileges had not yet been implemented. *Wilkins* held the denial of the continuance had violated the defendant's rights to counsel and due process, and was reversible error. Since the defendant had been unable to make either his *Faretta* or continuance requests earlier than the date trial was to begin, "the request for a continuance must be considered timely." (*Id.* at p. 306.) *Wilkins* rejected arguments that the defendant had waived his right to a continuance, and held that a defendant cannot be forced to give up one constitutionally protected right to obtain another. (*Id.* at pp. 307-308.) As a separate and independent ground, *Wilkins* found the defendant had not been given the statutorily mandated five days to prepare. (*Id.* at pp. 308-309.)

In contrast, *People v. Jackson* (1978) 88 Cal.App.3d 490 (disapproved on other grounds in *People v. Barnum* (2003) 29 Cal.4th 1210, 1219, 1221-1222 & fn. 1), addressed a situation where the defendant, who was not in custody, was granted 10 days to prepare for trial after his *Faretta* motion was granted. His motion for a further continuance was denied. *Jackson* found the denial was not an abuse of discretion. "Rather than showing a reasonable need for a continuance, the record demonstrates that

defendant had ample time to prepare his defense. He had reason to believe that he would be representing himself 73 days prior to trial and was given 10 days to prepare his defense after his *Faretta* motion was formally granted." (*People v. Jackson, supra,* at p. 502.)

Another corollary issue in *Faretta* situations is when an incarcerated defendant argues he was not allowed a meaningful opportunity to prepare a defense or access to law books, witnesses, or other tools. (*Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443, 1446 (*Milton*).) In *Milton*, an incarcerated defendant represented himself but had no counsel, access to a library, a legal assistant, or an investigator, and only had limited access to a telephone. *Milton* held the defendant's right of self-representation was abridged due to essentially a complete denial of the means to defend himself. (*Id.* at pp. 1445-1446.) "[T]he defendant lacked all means of preparing and presenting a defense, and was unjustifiably prevented from contacting a lawyer or others who could have assisted him." (*Id*. at p. 1446.) "An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense." (*Ibid*.)

Even in *Milton*, however, "the defendant had no right to dictate what means would be made available to him to prepare his defense." (*Jenkins, supra,* 22 Cal.4th at p. 1000.) As an example, an in propria persona defendant's right to ancillary services arises "only when a defendant demonstrates such funds are 'reasonably necessary' for his or her defense by reference to the general lines of inquiry that he or she wishes to pursue. [Citation.] This requirement applies both to indigent defendants represented by counsel and to those who choose to represent themselves. [Citation.]" (*Blair, supra,* 36 Cal.4th at p. 733.) "In the final analysis, the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances. [Citation.] [¶] Thus, the crucial question underlying ... [a] defendant's constitutional claims is whether he had reasonable access to

the ancillary services that were reasonably necessary for his defense." (*Id.* at pp. 733-734.)

There are state regulations which prohibit limiting an administrative segregation inmate's access to the courts. (Cal. Code Regs., tit. 15, §§ 3164, 3343; see also *Wilson v. Superior Court* (1978) 21 Cal.3d 816, 826.) However, inmates who have elected self-representation have "no right to dictate" what means should be made available to them to prepare their defense. (*Jenkins, supra,* 22 Cal.4th at pp. 1000-1001; see also *United States v. Sarno* (9th Cir. 1995) 73 F.3d 1470, 1491; *United States v. Robinson* (9th Cir. 1990) 913 F.2d 712, 717.) The California Supreme Court has long held that prison rules promulgated pursuant to appropriate authority "may properly regulate the use of prison legal facilities by inmates in a manner which does not unreasonably impede access to the courts by such inmates," and that rules limiting inmates to one visit to the library per week "are manifestly reasonable." (*In re Harrell* (1970) 2 Cal.3d 675, 694; *People v. Rhinehart* (1973) 9 Cal.3d 139, 150, overruled on other grounds in *People v. Bolton* (1979) 23 Cal.3d 208, 213-214; *People v. Warren* (1988) 45 Cal.3d 471, 479-480.)

In instances in which a criminal defendant chooses self-representation, "[i]t is certainly true that a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense [citation], but this general proposition does not dictate the resources that must be available to defendants. Institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense. [Citations.] *When the defendant has a lawyer acting as advisory counsel, his or her rights are adequately protected*. [Citations.]" (*Jenkins, supra,* 22 Cal.4th at p. 1040, italics added.) "Affording a defendant a lawyer to act as advisory counsel adequately protects the right identified in the *Milton* case. [Citations.]" (*Id.* at p. 1001; see also *United States v. Wilson* (9th Cir. 1982) 690 F.2d 1267, 1271-1272.)

In the instant case, appellant asserts he timely requested continuances to prepare for trial, and the court's denial of his continuances interfered with his Sixth Amendment right to represent himself. However, appellant never asserted he was denied access to a law library or any of the other factors addressed in *Milton*. Instead, appellant demanded additional access to the law library, stationary supplies, and support services beyond those provided to an inmate in the SHU. The record herein reflects "no confusion on [appellant's] part regarding the meaning of the [*Faretta*] admonitions, risks of self-representation, or the complexities of his case ...." (*People v. Lawley* (2002) 27 Cal.4th 102, 142.) Indeed, the court herein specifically advised appellant that he would not receive any special accommodations as a confined inmate. (*Hayes, supra*, 231 F.3d at pp. 1138-1139 & fn. 4.) The record demonstrates that appellant was in the SHU when he asserted his *Faretta* rights and throughout the entirety of this case, and there are no allegations that he was placed in administrative segregation simply as a result of his assertion of his right to represent himself. (See, e.g., *Wilson v. Superior Court, supra*, 21 Cal.3d at p. 826.) Appellant was already subject to limitations on his privileges when he elected to represent himself, he was clearly advised that he was not entitled to special privileges, and his continuance requests were properly denied.

Appellant further asserts a continuance should have been granted because he was physically incapable of representing himself, and the hospital's emergency room report confirmed his allegations that he was being poisoned. However, the emergency room report stated he suffered a nondiabetic hypoglycemic reaction which could have been caused by eating highly refined carbohydrates, intense exercise, fatigue, stress, and/or poor diet. The report did not speculate that appellant's problem was caused by contaminated or poisoned food. The trial court specifically rejected this claim and noted appellant appeared healthy and capable of representing himself, and there is nothing in the record to refute the court's finding.

More importantly, however, the entirety of the record reflects that appellant's requests for continuances were entirely based on allegations about unrelated events at the Sacramento prison, which were apparently part of a pending civil rights lawsuit in federal court. Appellant never asserted that he needed more time to prepare his defense in order to track down inmates or officers who might have been witnesses to the events of the morning of February 25, 2006. Instead, appellant demanded unlimited investigative and subpoena services to look into his assertions about alleged activities of CDC officials in the Sacramento prison. Appellant attempted to tie these requests to the instant case, but the trial court properly found his requests for continuances were based on extraneous matters not related to the instant charge. Indeed, appellant essentially wanted the court to provide the financing for a "fishing expedition" apparently connected to his pending civil rights lawsuit. The court repeatedly advised appellant to file a motion setting forth good cause for appointment of an investigator to pursue his lengthy witness list, and why an investigator would help defend the criminal charge in this case. Appellant attempted to tie these disparate issues together, and even asserted that matters in Sacramento must be investigated to provide a defense to his "battery" of Officer Fierro, but his numerous motions repeatedly relied on his allegations about the events at the Sacramento prison and did not address the specific issues raised by the criminal charge in this case.

As in *Jackson*, appellant had ample time to prepare to represent himself in this case, and his advisory counsel provided an adequate alternative. (Cf. *Milton, supra,* 767 F.2d at pp. 1446-1447; *United States v. Wilson, supra,* 690 F.2d at p. 1272; *Jenkins, supra,* 22 Cal.4th at pp. 1001, 1040.) The court did not abuse its discretion when it denied appellant's continuance motions, and these denials did not violate his Sixth Amendment right to represent himself.

II.

INEFFECTIVE ASSISTANCE

While appellant was represented by counsel, he still elected to testify on his behalf and was subject to impeachment with his prior felony convictions. Appellant contends defense counsel was prejudicially ineffective because he failed to object to the prosecutor's references to his prior conviction for battery on a peace officer, and the admission of that prior conviction was prejudicial because it was similar to the charged offense.

"To prevail on a claim of ineffective assistance of counsel, defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.'" (*People v. Hart* (1999) 20 Cal.4th 546, 623.) Prejudice occurs only if the record demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Lucero* (2000) 23 Cal.4th 692, 728.) We presume that counsel's conduct falls within the wide range of reasonable professional assistance and we accord great deference to counsel's tactical decisions. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) "If 'counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.' [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. To engage in such speculations would involve the reviewing court '"in the perilous process of second-guessing."' [Citation.] Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal. [Citation.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an

explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; *People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

Evidence that a defendant committed misconduct other than that currently charged is inadmissible to prove that he has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subds. (a), (b); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) However, evidence of a defendant's prior conviction is admissible to impeach a testifying defendant where the prior offense was a crime of moral turpitude, because such an offense demonstrates a general "readiness to do evil" from which a willingness to lie can be inferred. (*People v. Castro* (1985) 38 Cal.3d 301, 314-315; *People v. Wheeler* (1992) 4 Cal.4th 284, 289, 295-296; *People v. Harris* (2005) 37 Cal.4th 310, 337.)

The instant record is silent as to counsel's reasons for failing to object to the prosecutor's cross-examination questions about appellant's prior conviction for battery on a peace officer. There is, however, one satisfactory explanation: the evidence was admissible and an objection would have been futile, such that counsel's failure to object was not ineffective. (*People v. Price* (1991) 1 Cal.4th 324, 386-387; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092.) The offense of felony battery on a peace officer, in violation of section 243, subdivision (c), is an offense of moral turpitude and may be used to impeach a testifying defendant. (*People v. Lindsay* (1989) 209 Cal.App.3d 849, 857.)

> "Battery upon a peace officer involves elements in addition to those necessary for a conviction of simple battery, or battery which causes serious injury: the willful and unlawful use of force must be: (1) upon a peace officer in the performance of his or her duties; and (2) the person committing the battery must know or reasonably should have known the victim of the battery was a peace officer.... [¶] The knowledge element of the crime of battery upon a peace officer (that defendant know or reasonably should have known the victim was a peace officer in the performance of his duties) clearly involves moral turpitude. There is no doubt the intentional, willful and unlawful use of force upon a peace

> officer, however slight, coupled with *actual* knowledge the victim is a peace officer in the performance of his or her duties, is clearly a crime of moral turpitude and demonstrates a readiness to do evil." (*People v. Lindsay, supra,* 209 Cal.App.3d at p. 857, italics in original; see also *People v. Clarida* (1987) 197 Cal.App.3d 547, 552; *People v. Marks* (2003) 31 Cal.4th 197, 238 (conc. opn. of Chin, J.).)

The prosecution herein was thus entitled to impeach the credibility of appellant's trial testimony with evidence that he had suffered a prior felony conviction involving moral turpitude. In addition, the jury was properly instructed pursuant to CALCRIM No. 316 as to the consideration of appellant's prior convictions.

> "If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

We are required to presume that the jury understands and follows the instructions it is given. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.)

Appellant complains the prosecutor improperly cited to the prior battery conviction in closing argument to assert that he had a bad character and propensity to commit the charged offense. In his closing argument, however, the prosecutor focused on the credibility issues between the two correctional officers and appellant, asserted appellant was the only person who had a bias, and argued appellant's prior felony convictions undermined the credibility of his trial testimony. The prosecutor cited the evidence which supported the prior conviction allegations, and again reminded the jury to consider his prior convictions when assessing appellant's credibility. "Once again, [appellant] got on the stand and told you he's assaulted officers in the past. That's not a surprise that he said that. There's nothing to believe he did not do it on this day just like the officers told you."

In *People v. Hinton* (2006) 37 Cal.4th 839, the court held that the prosecutor's closing argument references to a capital defendant's prior convictions for murder and

other violent crimes were not improper attacks upon the defendant's character, but instead a permissible attack on the defendant's credibility and rebuttal of his defense claim, and the argument was not error since the jury was properly instructed on the appropriate consideration of the prior convictions to impeach the defendant's credibility. (*Id.* at p. 870.)

The instant trial presented a fairly straightforward question to the jury to evaluate the credibility of Officers Fierro and Urena, that appellant threw a liquid substance at Officer Fierro, against appellant's testimony that he did not throw anything at Officer Fierro, Officer Urena improperly used pepper spray to punish him for holding back his breakfast tray, and the officers fabricated the allegations in this case to cover up their improper use of pepper spray. As in *People v. Hinton, supra,* 37 Cal.4th 839, 870, the entirety of the record reflects the prosecutor relied upon appellant's prior convictions to impeach his credibility, the jury was properly instructed on the issue, and defense counsel was not prejudicially ineffective for failing to object.

III.

THE PRIOR STRIKE CONVICTIONS

Appellant raises two separate issues as to the jury's findings that he suffered three prior strike convictions, and the court's reliance upon those findings to impose a third strike term. First, he asserts the jury's finding that his prior conviction for aggravated assault was a strike must be reversed for insufficient evidence because the prosecution failed to prove the aggravated assault was a serious or violent felony. Second, he asserts the jury's finding that his prior conviction for murder was a strike must be reversed because the verdict was never properly received by the court.

A. Background

As set forth *ante*, the information alleged appellant suffered four prior felony convictions within the meaning of the three strikes law: robbery (§ 211), murder (§ 187), attempted murder (§§ 664/187), and assault with a deadly weapon and with force likely

to produce great bodily injury (§ 245, subd. (a)(1)). It was also alleged that he served two prior prison terms based on his convictions for aggravated assault and burglary.

Prior to trial, the court granted the prosecution's motion to dismiss the prior robbery strike because of an absence of proof. Appellant elected not to bifurcate the matters of the three prior strike convictions and two prior prison term enhancements. At trial, the prosecution introduced the section 969b package to prove the special allegations. This evidence consisted of abstracts of judgment showing that appellant was convicted of burglary in 1990 (§ 459), murder and attempted murder in 1997, battery on a peace officer in 1999 (§ 243, subd. (c)), and "ASSLT/GRT BOD INJURY W/DW" in violation of section 245, subdivision (a)(1) in 1989.

The record reflects the jury filled out verdict forms which stated that it found appellant guilty of the charged offense; it found true that he served two separate prior prison term enhancements based on his convictions for aggravated assault and burglary; and he suffered three prior strike convictions for attempted murder, murder, and aggravated assault. All verdict forms were signed by the foreperson and dated October 27, 2006.

On October 27, 2006, the court convened and stated that the jury had reached a verdict. All the jurors entered the courtroom and the court ordered the foreperson to hand all verdict forms, signed or unsigned, to the bailiff. The foreperson complied and the bailiff handed the forms to the court. The court stated it had reviewed the verdicts, handed the signed forms to the clerk, and directed the clerk to read aloud the verdicts. The clerk read aloud that the jury found appellant guilty of battery upon a nonconfined person, and found true that he served prior prison terms based on his convictions for aggravated assault and burglary. The clerk also read aloud that the jury found true appellant suffered prior strike convictions for attempted murder in 1996 and aggravated assault in 1989. The clerk did not read aloud the verdict form which stated the jury found appellant suffered a prior strike conviction for murder.

The court asked the jury: "Are the verdicts *as read by the Clerk* the verdicts of the jury?" (Italics added.) The entire jury replied yes. The court asked if the parties wanted to poll the jury, and both the prosecutor and defense counsel said no. The court directed the clerk to record the verdicts, and asked the attorneys "to waive a reading of the verdicts as recorded in the minutes by the Clerk." Both the prosecutor and defense counsel so waived, and the court discharged the jury.

The minute order for October 27, 2006, states that the jury found appellant guilty of the charged offense, found the two prior prison enhancements true, and also found true that he suffered three prior strike convictions for aggravated assault, attempted murder, and murder.

Neither of the parties objected or advised the court that the clerk failed to read aloud the jury's finding on the prior murder conviction as a strike. At the sentencing hearing, the court imposed the third strike term of 25 years to life.

B. <u>The Prior Conviction for Aggravated Assault</u>

Appellant's first challenge to his third strike sentence is based on the aggravated assault strike. Appellant contends, and respondent concedes, the jury's finding that his prior assault conviction is a strike must be reversed for insufficient evidence.

Under the three strikes law, a prior conviction qualifies as a strike if it is a serious felony as defined in section 1192.7, subdivision (c), or a violent felony as defined in section 667.5, subdivision (c). (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525.) The determination of whether a prior offense constitutes a strike is based on whether it was a strike when the current offense was committed, not when the prior offense was committed. (*People v. James* (2001) 91 Cal.App.4th 1147, 1150-1151.) The court, rather than the jury, determines if a prior felony conviction is a serious or violent felony so as to constitute a strike. (*People v. Kelii* (1999) 21 Cal.4th 452, 454.)

Aggravated assault in violation of section 245 can be committed in two ways: (1) with a deadly weapon or (2) by means of force likely to cause great bodily jury. (§ 245, subd. (a)(1).) An assault with a deadly weapon is the only specific variant of section 245 that is listed as a serious felony. (§ 1192.7, subd. (c)(31).) Thus, in order to qualify as a serious felony, the prosecution must prove that an aggravated assault was actually committed with a deadly weapon. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 604-606; *People v. Luna* (2003) 113 Cal.App.4th 395, 398.) An offense is also a serious felony if the defendant "personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm." (§ 1192.7, subd. (c)(8).)

In the instant case, the prosecution's evidence in support of the prior strike convictions only consisted of the abstract of judgments and CDC intake reports, so that we look only to the least adjudicated elements of the prior offense. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262; *People v. Banuelos, supra*, 130 Cal.App.4th at pp. 606-607; *People v. Luna, supra*, 113 Cal.App.4th at p. 398.) The abstract of judgment merely stated that appellant was convicted of "ASSLT/GRT BOD INJURY W/DW" in violation of section 245, subdivision (a)(1). The evidence is insufficient to show the prior aggravated assault conviction is a strike.[4]

Respondent concedes the prosecution failed to prove appellant's prior conviction for aggravated assault was a serious or violent felony. Appellant asserts this prior strike

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[4] While the jury also found one prior prison term enhancement true based on the aggravated assault conviction, proof of an enhancement under section 667.5, subdivision (b) only requires the prosecution to establish the defendant was previously convicted of a felony; was imprisoned as a result of that conviction; completed the term of imprisonment; and did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction; the prosecution need not prove the prior felony was serious or violent. (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)

must be dismissed and the matter remanded for resentencing. However, neither double jeopardy nor due process bars a retrial on the prior conviction allegation, and on remand, the People may present additional evidence to demonstrate that the 1989 aggravated assault was an assault with a deadly weapon or involved other conduct making that crime a serious felony. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236, 239; *People v. Monge* (1997) 16 Cal.4th 826, 839.)

C. The Prior Murder Conviction

As noted *ante*, the jury filled out the verdict form which stated that it found true that appellant suffered a prior strike conviction for murder, but the clerk did not read aloud this verdict. Appellant contends the jury's true finding on the prior murder conviction must be reversed because the jury's finding was not declared in open court and acknowledged by the jury, such that the written verdict form cannot be given legal effect.

A criminal defendant has the statutory right to have a jury determine the truth of an allegation that he suffered a prior felony conviction. (§§ 1025, 1158; *People v. Wiley* (1995) 9 Cal.4th 580, 589; *People v. Vera* (1997) 15 Cal.4th 269, 274.) "The right to have a jury determine the truth of a prior conviction allegation does not flow from the jury trial provision of article I, section 16 of the California Constitution or the Sixth Amendment of the United States Constitution. It is derived from statute. [Citation.]" (*People v. Vera*, *supra*, at p. 277.)

Generally, a verdict is "complete" under section 1164 if it has been read and received by the clerk, acknowledged by the jury, and recorded. (*People v. Hendricks* (1987) 43 Cal.3d 584, 597; *People v. Bento* (1998) 65 Cal.App.4th 179, 188.) It is the oral declaration of the jurors, not the submission of the written verdict forms, which constitutes the return of the verdict. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1009; *People v. Lankford* (1976) 55 Cal.App.3d 203, 211, disapproved on other grounds in *People v. Collins* (1976) 17 Cal.3d 687, 694, fn. 4; *People v. Mestas* (1967) 253

Cal.App.2d 780, 786.) Those declarations must be rendered in open court. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 44, p. 71.) "The authenticity of the verdict is ascertained by requiring it to be orally declared in open court by the foreman." (*People v. Wiley* (1931) 111 Cal.App. 622, 625.)

While the defendant has a constitutional right to a unanimous jury (Cal. Const., art. I, § 16), sections 1163 and 1164 clarify there is no verdict absent unanimity in the oral declaration. (*People v. Green, supra*, 31 Cal.App.4th at p. 1009; *People v. Thornton* (1984) 155 Cal.App.3d 845, 858-859 (*Thornton*).) To ensure the verdict is unanimous, pursuant to statute, either party may request the court individually poll each juror to test whether it is his or her verdict. If any juror disavows the verdict or answers "in the negative, the jury must be sent out for further deliberation." (§ 1163; see also § 1164.) Only if no disagreement is expressed on polling is the verdict complete. (§ 1164.) Consequently, any juror is empowered to declare, up to the last moment, that he or she dissents from the verdict. (*Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266.) Thus, a verdict is not complete if a juror dissents during polling, a charged count is not resolved, or it does not make a required finding. (*People v. Bento, supra*, 65 Cal.App.4th at p. 188.)

In *Thornton, supra,* 155 Cal.App.3d 845, the jury dated and signed verdict forms finding the defendant not guilty of the charged offense but guilty of the lesser included offense. (*Id.* at p. 848.) The trial court asked the jury if it had reached a verdict and the foreperson said it had. However, instead of reading both verdicts, the clerk read only the not guilty form. (*Id.* at p. 849.) The jurors collectively acknowledged that this was their verdict. Both attorneys declined the trial court's invitation that the jurors be polled, and said there was no matter to address before the jury was discharged. (*Ibid.*) The trial court then excused the jury. (*Ibid.*) There was "no reading, acknowledgment or recordation of the [guilty] verdict form on the lesser offense." (*Id.* at p. 850, italics omitted.) After later realizing the error, the trial judge, over defense counsel's objection,

reassembled the jury the following day and had the clerk read both verdicts. (*Id.* at pp. 850-851.) The jury reassembled and collectively acknowledged that these were their verdicts and the clerk polled them individually as to both. (*Id.* at p. 851.)

Thornton held the court improperly reconvened the jury and that the correction of any such errors must predate the original dismissal of the jury, or, at least, its departure from the jury box following such dismissal. (*Thornton, supra,* 155 Cal.App.3d at pp. 853-854.) "Once a 'complete' verdict has been rendered per section 1164 and the jurors discharged, the trial court has no jurisdiction to reconvene the jury regardless of whether or not the jury is still under the court's control [citation]. However, if a complete verdict has not been rendered [citations] or if the verdict is otherwise irregular [citations], jurisdiction to reconvene the jury depends on whether the jury has left the court's control. If it has, there is no jurisdiction [citations]; if it hasn't, the jury may be reconvened [citations]. [¶] It would therefore appear that the reconvening in this case was beyond the trial court's jurisdiction." (*Id.* at p. 855.) *Thornton* found as "more fundamental[]" to its reasoning the facts that the reconvened jurors had gone an entire day free from the oaths that had bound them before they were dismissed and that they had been possibly exposed to outside influences during that time. (*Id.* at p. 856.)

Thornton thus evaluated the status of the case based on where it had been when the jury was first dismissed. *Thornton* held the violation of the defendant's rights to the jury's acknowledgment of the guilty verdict in open court and to have the jury polled was reversible per se, and that cases holding otherwise had been "severely criticized." (*Thornton, supra,* 155 Cal.App.3d at p. 857.) *Thornton* noted that in the criticized cases, the verdict had been read to the jurors in open court and had been acknowledged by them. (*Ibid.*)

> "We conclude that the mere turning in of the guilty verdict in this case cannot support a judgment of guilt. … [T]he only true verdict was the one finding [the defendant] not guilty of the charged offense, *since that was the*

> *only verdict unanimously endorsed by the jurors in open court*. We recognize that the guilty verdict form on the lesser included offense conflicted with the 'not guilty' verdict since a not guilty verdict, absent deadlock on lesser included offenses, generally implies acquittal of all lesser offenses included in the one charged. [Citation.] However, where two verdicts are conflicting [citation] or otherwise nonidentical [citation] and only one of them is orally acknowledged by the jurors, the acknowledged verdict is the only 'true' one and therefore the only one upon which judgment can be rendered." (*Thornton, supra*, 155 Cal.App.3d at p. 858, italics added.)

Thornton explained the fundamental reasons for requiring the jury to return its verdict in open court: "In [some] cases, the processes of requiring the jury to orally acknowledge their verdict and express individual assents to it have revealed that the entire jury was mistaken in signing a particular verdict form, or that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court. [Citations.] Thus, these processes are far from empty formalities.... It is these procedures that allow the defendant to 'test' whether the verdict form that was signed in the privacy of the jury room represents the 'true verdict,' i.e., the verdict that each and every juror is willing to hold to under the eyes of the world, or whether it is a product of mistake or unduly precipitous judgment." (*People v. Thornton, supra*, 155 Cal.App.3d at p. 859.)

Thornton thus held that jury acknowledgement of the verdict in open court is essential to the validity of the verdict. (*Thornton, supra,* 155 Cal.App.3d at p. 858.) If the jury merely returns a written verdict, but fails to unanimously endorse the verdict in open court, the verdict cannot normally be sustained based solely on the written form. (*Ibid*.; *People v. Green, supra,* 31 Cal.App.4th at p. 1009.) However, the verdict may be acknowledged in open court by the foreperson on behalf of the entire jury. (§ 1149; *People v. Wiley, supra*, 111 Cal.App. at p. 625; *Stalcup v. Superior Court* (1972) 24 Cal.App.3d 932, 936, disapproved in other grounds in *People v. Dixon* (1979) 24 Cal.3d 43, 53.)

In the instant case, the foreperson filled out and signed the verdict form that stated the jury found appellant suffered a prior strike based on his murder conviction. However, the clerk did not read aloud this verdict form. While the entire jury affirmed the verdicts, it was in response to the court's question: "Are the verdicts *as read by the Clerk* the verdicts of the jury?" (Italics added.) Both parties declined to poll the jurors and the jurors were dismissed.

Respondent concedes the jury's true finding on the prior murder conviction should have been read in open court and acknowledged by the jury, and that error occurred pursuant to *Thornton*. Respondent further concedes that *Thornton* held such an error was reversible per se. However, respondent asserts the instant case can be distinguished from *Thornton* because appellant testified at trial and admitted he suffered a prior murder conviction, such that the issue was not in dispute. While appellant admitted he suffered numerous prior convictions, he hedged his response when he was specifically asked about a murder conviction, and instead testified he was convicted of "homicide" and the matter was pending on appeal. We decline to rely on appellant's equivocal trial testimony to cure the failure to return a complete verdict on the truth of the prior murder conviction as a strike.

Appellant contends the discharge of the jury in this case precludes retrial of the special allegation under both state and federal principles of double jeopardy. While error occurred in this case pursuant to *Thornton*, there is one important distinction between the two situations. *Thornton* involved a defective verdict on the substantive offense, whereas the error in this case involved whether the jury found true the special allegation that appellant suffered a prior murder conviction within the meaning of the three strikes law. As respondent points out, double jeopardy protections generally do not extend to noncapital sentencing proceedings, including retrials of prior strike conviction allegations, which are considered enhancements rather than elements of the offense. (*People v. Seel* (2004) 34 Cal.4th 535, 541-542; *Monge v. California* (1998) 524 U.S.

721, 728-729, 734; *People v. Monge*, *supra*, 16 Cal.4th at pp. 844-845.) The determinations at issue in a prior strike conviction allegation proceeding do not place a defendant in jeopardy for an offense, and sentence enhancements have not been construed as an additional punishment for the previous offense. (*Monge v. California*, *supra,* 524 U.S. at pp. 728-729.) An enhanced sentence imposed on a repeat offender is not viewed as either a new offense or an additional penalty for the earlier offense, but as a stiffened penalty for the latest offense, which is "'considered to be an aggravated offense because a repetitive one.' [Citations.]" (*Id.* at p. 728*;* see also *People v. Barragan* (2004) 32 Cal.4th 236, 239, 241.) Thus, as a general rule, "double jeopardy principles have no application in the sentencing context. [Citation.]" (*Monge v. California*, *supra*, 524 U.S. at p. 730.) Just as the matter of the prior aggravated assault conviction may be remanded and retried, the special allegation of whether appellant's prior murder conviction is a strike may also be remanded for further appropriate proceedings without violating principles of double jeopardy.

DISPOSITION

Appellant's conviction of the substantive offense (Pen. Code, § 4501.5) and the true finding on the attempted murder prior "strike" conviction are affirmed. The true findings on the aggravated assault and murder prior "strike" convictions are reversed. The sentence imposed is reversed. The matter is remanded to the trial court for further

appropriate proceedings upon the conclusion of which the trial court shall prepare and serve as appropriate an amended abstract of judgment.

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HARRIS, Acting P.J.

WE CONCUR:

_____
DAWSON, J.

_____
HILL, J.