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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JEFFREY W. SPRADLEY,<br><br>Defendant and Appellant. | B154544<br><br>(Los Angeles County<br>Super. Ct. No. KA051184) |
| In re<br><br>JEFFREY W. SPRADLEY,<br><br>on<br><br>Habeas Corpus. | B160827 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Theodore D. Piatt, Judge. Affirmed in part, reversed in part, and remanded. Habeas corpus petition denied.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Jennifer A. Jadovitz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Jeffrey W. Spradley appeals from the judgment entered following a jury trial that resulted in his conviction for possession of a controlled substance, methamphetamine. Spradley was sentenced to a prison term of seven years.

Spradley contends that the trial court erred by (1) denying his *Pitchess*[1] pretrial discovery motion; (2) refusing his request to file a supplemental declaration in support of the *Pitchess* motion; (3) denying his motion for a continuance; (4) instructing the jury with CALJIC No. 17.41.1; and (5) failing to obtain an adequate waiver of his right to counsel. He further complains that (6) the evidence was insufficient to support the verdict; and (7) his admissions of prior conviction allegations are invalid because the record does not show they were knowing and intelligent. Finally, in his petition for writ of habeas corpus, which we consider concurrently herewith, Spradley argues that his counsel was prejudicially ineffective for failing to introduce impeachment evidence. We agree that Spradley's admissions of the prior conviction allegations are invalid and reverse the true findings on the allegations. In all other respects, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *Prosecution's case.*

On November 18, 2000, at approximately 6:20 p.m., Spradley was driving a Ford truck with a cracked windshield. Glendora Police Officer James De Mond determined that the truck's registration had expired, and, due to the cracked windshield and expired registration, initiated a traffic stop. Spradley exited the truck. He was holding a cellular telephone in his left hand, and his right fist was closed. De Mond requested that Spradley get back inside the truck. Before he did so, Spradley placed his closed fist inside the truck bed, out of De Mond's sight. After Spradley reentered the truck, De Mond observed a small plastic bag on the ledge of the truck bed's liner. It contained "a little bit" of a white crystalline substance that appeared to be methamphetamine. An empty, torn plastic bag of a similar type was discovered behind the bench seat in the truck's cab.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

When a backup officer arrived, De Mond advised Spradley that he was under arrest, conducted a pat-down search, and found $800 in Spradley's pocket. The plastic bag contained 0.46 grams of a powder substance that contained methamphetamine.

When at the jail approximately one hour after his arrest, Spradley showed signs of being under the influence of methamphetamine. Because his symptoms were severe, he was transported to a hospital and was eventually admitted to intensive care. De Mond testified that, in his opinion, Spradley was under the influence of methamphetamine.

b. *Defense case.*

Spradley's girlfriend, Susan Haney,[2] was leaving her apartment when she saw that Spradley had been stopped by police. According to Susan, Spradley was holding a cellular telephone in one hand and an object that appeared to be a bottle of Coca-Cola in the other when he reentered his truck. He did not place either hand inside the truck bed area. After Spradley was placed inside a police car, the officers searched the rear area of the truck bed. When Haney asked why Spradley was being arrested, one of the officers informed her that he did not have proper identification.

Susan's husband, Barry Haney,[3] arrived home in time to see Spradley exiting the truck with his hands in the air. Spradley was holding a Coca-Cola in one hand and a telephone in his other. Barry did not know whether the officer had recovered anything from the truck.

2. *Procedure.*

Trial was by jury. Spradley was convicted of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Spradley admitted allegations that he had suffered one prior "strike" conviction (Pen. Code, §§ 667, subds. (b) – (i), 1170.12,

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[2] For ease of reference, we will refer to Susan and Barry Haney by their first names.

[3] The Haneys had developed a platonic relationship over the years and remained married to meet child care needs. Barry was aware of, and untroubled by, Susan's relationship with Spradley.

subds. (a) – (d))[4] and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Spradley to a total term of seven years in state prison, imposed a restitution fine, and imposed and stayed a parole revocation fine. Spradley appeals.

**DISCUSSION**

1. *Issues related to Spradley's Pitchess motion.*

a. *Additional facts.*

Trial in the instant matter was set for July 31, 2001. On July 12, 2001, Spradley's request for an order shortening time for service of his *Pitchess* motion was granted, and the motion was filed. Spradley sought records related to any allegations that De Mond had engaged in official misconduct amounting to moral turpitude, including allegations of false arrest, planting evidence, fabricating police reports, and giving false testimony or committing perjury.[5]

In support of the motion, Spradley's counsel filed a declaration stating, inter alia: "Officer De Mond is contending that he stopped the defendant's truck for a cracked windshield and expired registration and, in the course of the traffic stop, found a quantity of methamphetamine in the bed of the defendant's truck. Officer De Mond is further contending that he saw the defendant place (or 'drop') the drugs into the bed of the truck as he (the defendant) exited the vehicle. [¶] The defendant contends that Officer De

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[4] All further undesignated statutory references are to the Penal Code.

[5] Spradley sought all records of the Glendora Police Department about any alleged acts of official misconduct by De Mond amounting to moral turpitude, including, but not limited to, allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, giving false testimony, or the commission of perjury; the names, addresses, and telephone numbers of all persons who had filed such complaints; the names, addresses and telephone numbers of all persons interviewed by the Glendora Police Department in the course of investigating such complaints; all statements by such complainants; all tape recordings, notes, and memoranda of the Glendora Police Department related to any such investigation; the names and assignments of persons who participated in any such investigations; and all records of discipline imposed by the Glendora Police Department upon De Mond as a result of any such investigation.

Mond is lying when he claims that the defendant 'dropped,' or possessed any drugs whatsoever in this incident. The defendant denies any possession of any illegal drugs at the time and place of this incident and asserts that, to the extent that Officer De Mond has prepared any type of written report to that effect, he has falsified such report and to the extent that Officer De Mond will so testify at trial of this matter, he will be offering perjured testimony." The declaration also explained that the requested information would be used at trial to impeach De Mond and show his purportedly poor character for honesty, and to locate witnesses who would testify that De Mond had a habit of engaging in such acts as false arrest and planting evidence. A copy of the eight-page arrest report, which contained numerous details about the incident, was attached to the declaration. The Glendora Police Department and Officer De Mond opposed the motion.

The trial court denied the motion because defense counsel's declaration had failed to establish good cause for the discovery, in that it did not provide a "specific factual scenario." The court also expressed concern that the request was overbroad; that the declaration stated nothing more than Spradley's contention that De Mond was lying; and that the police report indicated Spradley was taken to the hospital after the arrest as a result of his drug use. It invited further comment from the defense regarding the "factual scenario." Defense counsel stated, "It's difficult for me to imagine how far more specific I can get. I mean the defendant says this cop is lying, he planted the drugs. That's – I don't know how more specific we can be here."

Defense counsel nonetheless sought leave to file a supplemental declaration. The trial court pointed out that trial was scheduled for the following Monday. Defense counsel stated he intended to move for a continuance "for this reason and other reasons in this case." The trial court responded that if a continuance was granted, the court "would encourage [counsel] to take a second pass" at the *Pitchess* motion. Counsel for the City of Glendora refused to stipulate to waive the statutory period for the service of a supplemental declaration. The trial court, noting that an order shortening time had been granted once so that the *Pitchess* motion could be heard prior to trial, denied Spradley's request to file a supplemental declaration.

b. *The trial court did not abuse its discretion by denying Spradley's Pitchess motion.*

Spradley complains that the trial court abused its discretion by denying his *Pitchess* motion. He argues, "[f]or the trial court to conclude that appellant failed to set forth a 'specific factual scenario' because he merely asserted that the officer was 'lying' about appellant's possession of the methamphetamine is ridiculous." We discern no error.

*Pitchess* established that a criminal defendant may, under some circumstances, compel discovery of evidence in a law enforcement officer's personnel file where such evidence is relevant to the defendant's ability to defend against a criminal charge. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219; *Pitchess, supra,* 11 Cal.3d at p. 534; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019 (*California Highway Patrol*).) The *Pitchess* holding was later codified in sections 832.7 and 832.8 and Evidence Code sections 1043 and 1045. (*People v. Mooc, supra,* 26 Cal.4th at pp. 1219-1220; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1037-1038; *California Highway Patrol, supra,* 84 Cal.App.4th at p. 1019.)

Evidence Code sections 1043 and 1045 establish a two-step procedure for a criminal defendant's discovery of peace officer records. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1019.) First, pursuant to Evidence Code section 1043, the defendant must file a written motion for discovery, including a description of the type of information sought, and supported by affidavits showing, among other things, good cause for the discovery. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1019.) The "threshold for discovery embodied in [Evidence Code] section 1043" is "relatively low." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83 (*City of Santa Cruz*).) The accused " 'may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' [Citation.] In contrast to the detailed showing required by some civil discovery statutes [citations], the requisite showing in a criminal matter 'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession

of the prosecution." (*City of Santa Cruz, supra,* 49 Cal.3d at pp. 84-85; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9.) After the defendant establishes good cause, the trial court reviews the records in camera to determine whether they are relevant to the issues. (Evid. Code, § 1045; *California Highway Patrol, supra,* at p. 1020.)

"A showing of 'good cause' requires defendant to demonstrate the relevance of the requested information by providing a 'specific factual scenario' which establishes a 'plausible factual foundation' for the allegations of officer misconduct committed in connection with defendant. [Citations.]" (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1020; *City of Santa Cruz, supra,* 49 Cal.3d at pp. 85-86; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1146-1147 (*City of San Jose*).) The "plausible factual foundation" may be established by a review of the police reports in conjunction with defense counsel's declaration. (*City of Santa Cruz, supra,* 49 Cal.3d at pp. 85-86.) The party seeking discovery bears the burden of establishing good cause. (*City of Fresno v. Superior Court* (1988) 205 Cal.App.3d 1459, 1473.) The Legislature's intent in establishing the good cause requirement was to protect peace officer personnel records against " 'fishing expeditions' " conducted by the defense. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1024.)

Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court's ruling for abuse. (*People v. Mooc, supra,* 26 Cal.4th at p. 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

We conclude the trial court did not abuse its discretion. Mere conclusory statements asserting officer misconduct, in the absence of a specific factual scenario establishing a plausible factual foundation, are insufficient to show good cause. (*California Highway Patrol, supra,* 84 Cal.App.4th at pp. 1020-1021.) For example, in *City of San Jose, supra,* 67 Cal.App.4th at pp. 1139, 1149, the defendant was charged with receiving stolen property and being a felon in possession of a firearm after a gun was found at his residence. A declaration in support of the defendant's *Pitchess* motion stated, " 'Defendant disputes the truthfulness of the allegations as set forth in the police

report,' " and asserted that the police did not obtain knowing and voluntary consent to enter his residence, material misrepresentations in the police report and/or court testimony were made to conceal that fact, and the evidence disclosed in the search was mishandled. (*Id.* at p. 1139.) *City of San Jose* found those averments, coupled with the police report, were insufficient to establish good cause. (*Id.* at pp. 1146-1148.) The declaration did not specify whether the consent was coerced or simply not obtained; what particular statements in the police report or which portions of the officers' testimony contained material misrepresentations; or which items of evidence were mishandled, and how. (*Id.* at pp. 1146-1147.)

Here, Spradley's motion was likewise deficient in that it failed to establish a plausible factual foundation. (*Warrick v. Superior Court* (2003) ___ Cal.App.4th ___ [2003 WL 1564272].) The supporting declaration was little more than a general denial of the charges. It set forth a conclusory averment that Spradley believed De Mond was lying "when he claims that the defendant 'dropped,' or possessed any drugs." The declaration did not directly say that De Mond planted the drugs. It did not aver that the traffic stop was pretextual, that Spradley's windshield was intact, or that his registration was current. The declaration did not contest any other fact in the police report, including, among other things, that Spradley exited the truck and moved to the truck bed area when stopped; that Spradley had a cellular telephone in his hand; that De Mond found an empty plastic bag in the cab; that Spradley yelled, "Fuck," when the backup officer arrived; that Spradley was carrying $800 in his pocket; or that De Mond discovered an open bottle of Captain Morgan rum in the truck. Most significantly, the declaration did not dispute the police report's account that Spradley was admitted to the hospital when he showed signs of being under the influence of methamphetamine during the booking process. There was no suggestion as to *why* De Mond would wish to plant methamphetamine on an innocent motorist during a *legitimate* traffic stop.

Whether or not this was sufficient to establish a specific factual scenario (*Warrick v. Superior Court, supra,* ___ Cal.App.4th ___), it manifestly did not establish a *plausible* factual foundation. " 'Plausible' means 'seemingly true' [citation], having an appearance

of truth or reason; seemingly worthy of approval or acceptance; credible; believable; a *plausible excuse; a plausible plot.*' [Citation.] It denotes a degree of reasonable probability, a degree of apparent credibility greater than mere possibility." (*Warrick v. Superior Court, supra,* ___ Cal.App.4th at p. ___.) While we do not suggest that the trial court must credit the defendant's account over the officer's in order to find good cause, the scenario outlined by the defendant must at least be plausible. Here, contrary to Spradley's argument, defense counsel's declaration made simply an unspecific allegation of misconduct without alleging any facts that provided reason to believe the misconduct had actually occurred.

Spradley relies upon *People v. Hustead* (1999) 74 Cal.App.4th 410, 416-418, *People v. Gill* (1997) 60 Cal.App.4th 743, and *People v. Memro* (1985) 38 Cal.3d 658, 682, for the proposition that counsel's declaration was sufficient to establish good cause. We find these authorities distinguishable. *People v. Hustead* found that the defendant had made a sufficient showing of good cause for discovery of evidence relating to the officer's alleged history of misstating or fabricating facts in his police reports. (*People v. Hustead, supra,* 74 Cal.App.4th at p. 416.) There, the declaration alleged that the officer made material misstatements regarding whether the defendant had driven in a dangerous manner, a fact denied by the defendant. *Hustead* concluded, without further analysis, that these allegations were sufficient to establish a plausible factual foundation. (*Id.* at p. 417.) Here, in contrast, our examination of the record – in particular the undisputed fact that Spradley was under the influence of methamphetamine shortly after the arrest – convinces us that Spradley's scenario was *not* plausible. (See *Warrick v. Superior Court, supra,* ___ Cal.App.4th ___.)

Unlike in *People v. Gill, supra,* 60 Cal.App.4th at page 750, in which the defendant averred that an officer had planted contraband on him to cover up for the officer's use of excessive force (*id.* at p. 750), here Spradley offered no plausible theory for De Mond's purportedly planting the evidence.

In *People v. Memro,* the defendant asserted that his confession had been made after promises of leniency and threats of violence by members of the South Gate police

force. Defense counsel represented at the hearing that he had located three or four persons who claimed they had confessed after being threatened or beaten by South Gate police officers. (*People v. Memro, supra,* 38 Cal.3d at pp. 673, 680-681.) "*Memro* is distinguishable because there the court considered two diametrically opposed but internally consistent versions of events, and collateral evidence supported rather than detracted from the moving party's allegations. This is not to say that collateral supportive evidence is necessary for a plausible factual foundation, only that it contributes to that finding." (*Warrick v. Superior Court, supra,*___ Cal.App.4th ___.)[6] In sum, we discern no abuse of discretion.

c. *The trial court did not err by denying Spradley's request to file a supplemental declaration in support of his Pitchess motion.*

Spradley also asserts that the trial court should have granted him leave to file a supplemental declaration in support of his *Pitchess* motion. We disagree. The supplemental declaration could not have been filed within the statutory time limit. (Evid. Code, § 1043; Civ. Proc. Code, § 1005, subd. (b).) An order shortening time had been granted once already. Trial was scheduled within a week. While the trial court had discretion to issue an order shortening time if good cause existed to do so (Civ. Proc. Code, § 1005, Cal. Rules of Court, rule 317, subd. (b)), there was an insufficient showing of good cause. Spradley's counsel had stated that he did not know how to make the declaration more specific. Presumably, if other facts had existed that would have established a plausible factual foundation, they would have been included in the original declaration or mentioned by counsel during argument on the *Pitchess* motion. Under these circumstances, we conclude the trial court did not err by denying the request for a second order shortening time.

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[6] Because we conclude that Spradley failed to establish good cause for the requested discovery, we need not address the question of whether the request was overbroad.

2. *The trial court did not abuse its discretion by denying Spradley's request for a continuance.*

Spradley next asserts that the trial court erred by denying his request for an approximately two-month continuance, filed five days before trial was to begin. Spradley asserted that a continuance was necessary so that (1) his petition for a writ of prohibition challenging the trial court's denial of his *Pitchess* motion could be heard by the appellate court; and (2) he could develop newly discovered evidence. He asserted that "[t]he defense has discovered a prior incident involving the arresting officer in this case which will provide potential impeachment evidence if interviews of the witnesses involved produce the statements from said witnesses which the defense anticipates they will." Spradley represented that the incident had not been known to the defense until the afternoon before the motion was filed. Because the witnesses were represented by counsel, the defense could not contacted them directly and had sent a letter to their attorney. During argument, Spradley's counsel added that additional investigation needed to be performed "on collateral issues regarding this police officer" to produce impeachment evidence "or other evidence relative to this trial. . . ." The trial court denied the motion.

Continuances in a criminal case may be granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (d); *People v. Frye* (1998) 18 Cal.4th 894, 1012.) The trial court "has broad discretion to grant or deny the request." (*People v. Frye, supra*, 18 Cal.4th at pp. 1012-1013; *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.] One factor to consider is whether a continuance would be useful. [Citation.]" (*People v. Frye, supra,* at p. 1013.) The court considers " ' "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result . . . ." ' " (*People v. Jenkins, supra,* at p. 1037.) We review the trial court's decision for abuse of discretion. (*Ibid; People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

When a continuance is sought to secure the attendance of a witness, the defendant must establish that (1) he or she exercised due diligence to secure the witness's attendance; (2) the witness's expected testimony was material and not cumulative; (3) the testimony could be obtained within a reasonable time; and (4) the facts to which the witness would testify could not otherwise be proven. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1037.)

Here, Spradley's motion fell short of establishing these factors. Due diligence was not shown. While the motion stated that the incident had been discovered only the preceding day, there was no showing of why it had not been, or could not have been, discovered earlier. The matter had already been continued. As Spradley concedes, the motion failed to show that the witnesses' testimony could be obtained within a reasonable period of time. Moreover, the new evidence was only of speculative value. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1038; *People v. Beeler* (1995) 9 Cal.4th 953, 1003-1004.) The nature of the purportedly impeaching incident was not stated. The defense represented that interviews "will provide *potential* impeachment evidence *if* interviews" produced the evidence the defense anticipated. (Italics added.) The trial court did not abuse its discretion, nor did the denial violate Spradley's due process rights. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 1039-1040.)

3. *The evidence was sufficient to support the verdict.*

Spradley asserts the evidence was insufficient to support the verdict because the People presented no evidence that the 0.46 grams of the substance recovered from the truck constituted a usable quantity of methamphetamine.

When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.)

Reversal is not warranted unless it appears that " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The elements of possession of a controlled substance are (1) dominion and control of the substance, (2) in a quantity usable for consumption or sale, (3) with knowledge of its presence and of its restricted dangerous drug character. (*People v. Morales* (2001) 25 Cal.4th 34, 41; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) " ' "Each of these elements may be established circumstantially." ' [Citation.]" (*People v. Morales, supra,* at p. 41.) *People v. Leal* (1966) 64 Cal.2d 504, 505, 512, held that a "minute crystalline residue" of a substance containing heroin, weighing approximately 32 milligrams and found on a spoon, was insufficient to support a narcotics possession charge. However, *Leal*'s "usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66; *People v. Morales, supra,* at p. 48.) Indeed, a defendant may be convicted of possession of drugs despite having ingested the drugs prior to arrest, if sufficient circumstantial evidence, over and above evidence of ingestion, exists to prove the possession. (*People v. Palaschak, supra,* 9 Cal.4th at pp. 1237, 1241.)

Applying the foregoing principles, we conclude the evidence was sufficient. The People proved Spradley possessed 0.46 grams of the substance, which is more than a useless trace or residue. (See *People v. Karmelich* (1979) 92 Cal.App.3d 452, 456.) The jury was entitled to infer, based upon the quantity found and the commonly known fact that small amounts of narcotics are capable of being ingested by narcotics users, that the amount found was usable.

4. *The trial court did not prejudicially err by instructing with CALJIC No. 17.41.1.*

Spradley next argues that the trial court erred by instructing the jury with CALJIC No. 17.41.1.[7] Spradley contends that CALJIC No. 17.41.1 was coercive, inhibited jurors' exercise of their independent judgment, and invaded the secrecy of jury deliberations, all in violation of his rights to due process, trial by jury, and a unanimous verdict. He urges that because the instruction purportedly affected the "integrity of the fact finding process," it requires per se reversal.

After appellant's opening brief was filed, the California Supreme Court held in *People v. Engelman* (2002) 28 Cal.4th 436, that CALJIC No. 17.41.1 "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Id.* at pp. 439-440.) The court decided that because the instruction could be misunderstood or misused, it is "inadvisable and unnecessary" for trial courts to give it in the future. (*Id.* at p. 445.) However, because the jury is duty-bound to follow the trial court's instructions and lacks the right to engage in nullification, the instruction, while inadvisable, does not violate a defendant's constitutional rights. (*Id.* at p. 441.) Accordingly, while trial courts should not give this instruction in the future, we conclude there was no error in the instant case.

5. *Spradley's waiver of his right to counsel at sentencing was knowing and intelligent.*

a. *Additional facts.*

After the jury convicted him, Spradley moved to represent himself. Spradley completed a petition to proceed in propria persona. The trial court reviewed the four-page petition, confirmed that the initials and signature on the form were Spradley's, and

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[7] That instruction, as provided to the jury, read: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

confirmed that Spradley had read and understood the form. The trial court asked, "Do you understand that . . . at any time that you're in the Superior Court system operating in pro per and opposed by this gentleman to my right who's a lawyer and the member of the District Attorney's office, that you're just simply at a disadvantage. Do you understand that?" Spradley replied affirmatively. The trial court also told Spradley, "you don't have to represent yourself and you shouldn't represent yourself and this form actually advises you it is not in your best interest to represent yourself."

The petition advised Spradley, inter alia, that he had the rights to be represented by an attorney, to a speedy trial by jury, to subpoena witnesses or records for his defense, to confront and cross-examine witnesses, to testify, and against self-incrimination. The petition also advised that "it is the advice of the court and other experts that it is extremely unwise for a person to represent himself, and the court strongly advises me against going pro per." Spradley initialed each of these advisements. He also initialed sections stating, inter alia, that he would have to follow all the criminal and evidentiary rules of law without the trial court's help; and that he would not be given special consideration or assistance.

b. *Discussion.*

Spradley contends that his waiver of his right to counsel during sentencing proceedings was invalid because it was not knowing and intelligent. (*Faretta v. California* (1975) 422 U.S. 806, 835-836; *People v. Noriega* (1997) 59 Cal.App.4th 311, 318-319.) We disagree.

A criminal defendant who knowingly and intelligently waives his or her right to counsel has a Sixth Amendment right to self-representation. (*Faretta v. California, supra,* 422 U.S. at pp. 835-836; *People v. Jenkins, supra,* 22 Cal.4th at p. 959.) "The requirements for a valid waiver of the right to counsel are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion. [Citation.] The trial

court may not determine a defendant's competency to waive counsel by evaluating his ability to present a defense. [Citation.] [¶] On appeal, we examine de novo the whole record – not merely the transcript of the hearing on the *Faretta* motion itself – to determine the validity of the defendant's waiver of the right to counsel. [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069-1070; *People v. Lawley* (2002) 27 Cal.4th 102, 139.)

To make a valid waiver of the right to counsel, a defendant should be advised of the dangers and disadvantages of self-representation. (*People v. Koontz, supra,* 27 Cal.4th at p. 1070.) However, " 'The test of a valid waiver of counsel is not whether specific warnings or advisements were given but 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.' " (*People v. Pinholster* (1992) 1 Cal.4th 865, 929.) "No particular form of words is required." (*People v. Koontz, supra,* at p. 1070; *People v. Lawley, supra,* at p. 140.)

The record demonstrates Spradley was adequately admonished regarding self-representation and made a knowing and intelligent waiver of his right to counsel. First, Spradley confirmed that he had read and understood the information in the petition, which fully advised him of his rights and the perils of self-representation. It is clear Spradley actually did read and thoughtfully consider the petition; he not only initialed each advisement, but he modified some portions of the petition to reflect that he was representing himself at sentencing rather than at trial. Spradley obviously knew the nature of the charges against him, as he correctly indicated on the petition that he had been charged with violation of Health and Safety Code section 11377, subdivision (a). Spradley attended school through the 11th grade, had prior experience with the judicial system, and had observed his counsel try the instant matter prior to sentencing. The record as a whole is sufficient to validate Spradley's waiver.

Spradley attempts to show his waiver was invalid by cataloguing various advisements, suggested by *People v. Lopez* (1977) 71 Cal.App.3d 568, 572-574, that the trial court did not orally provide to him. However, the petition Spradley initialed did

contain the advisements he now claims the trial court failed to provide. Moreover, "the purpose of the suggested *Lopez* admonitions is to ensure a clear record of a knowing and voluntary waiver of counsel, not to create a threshold of competency to waive counsel." (*People v. Koontz, supra,* 27 Cal.4th at p. 1071.) Although Spradley complains that the trial court failed to ascertain whether he could read and write, his ability to do both was clearly evidenced by his notations on the petition. While Spradley complains that neither the petition nor the trial court informed him of the potential sentencing range, proof of an invalid waiver is not established "by simply pointing out that certain advisements were not given." (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1824.)

6. *Yurko error.*

a. *Additional facts.*

The information alleged that Spradley had suffered one prior "strike" conviction for shooting at an inhabited dwelling (§ 246) and had served a prior prison term within the meaning of section 667.5, subdivision (b). Prior to trial, the parties discussed whether Spradley wished to admit the prior conviction allegations. The following colloquy occurred:

"[The Court]: Mr. Spradley, there's a prior here we're not going to put it in front of the jury. I will bifurcate the prior, meaning when I read the charge to the jury, I'm going to read to them what the charge is, and allegations of possession of a controlled substance, methamphetamine, and have you had a chance to talk to your client about what he wants to do with the prior?

"[Defense Counsel]: I have, Your Honor. If I may put something on the record.

"[The Court]: Yes.

"[Defense Counsel]: Mr. Spradley, I have discussed with you admitting or not admitting the existence of this strike prior in the sense it is your strike prior or it's not your strike prior. I've told you that an admission that it is your strike prior does not preclude me or you from – you through me from later arguing the propriety of charging that against you as a strike. You can still argue that it shouldn't be charged against you as a strike for legal reasons and that have to do with the kind of case that it was or things

like that. [¶] But you can nonetheless admit that it is your strike prior, and still reserve that kind of an argument to make later on, am I correct, Your Honor?"

"[The Court]: Yes, that's true. I think you're suggesting to me that among other things, under [*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497] you could suggest that it be stricken or stayed or whatever.

"[Defense Counsel]: Right. Okay. Now, understanding that, Mr. Spradley, do you admit that it is your strike prior and by it, I mean case A533030, charging a conviction of a Penal Code section 246, shooting at an inhabited dwelling on February 13, 1986, in Los Angeles County Superior Court; is that your prior?

"[Spradley]: Yes, it is, Your Honor.

"[The Court]: Do you understand then that by admitting the prior at this time, it will never be mentioned during this trial, number one. And secondly, by admitting the prior now you have to – you're effectively waiving and giving up your right to have either a jury trial or a court trial as to the prior; is that what you wish to do; waive and give up your right to a court trial or a jury trial as to the prior only?

"[Spradley]: No. That's not what I wish to do.

"[Defense Counsel]: As to the issue, you're giving up the right to have a jury or a court decide the issue of is it your prior; that's all you're giving up?

"[Spradley]: Okay. Not whether . . . it's legally a prior?

"[Defense counsel]: Right.

"[Spradley]: Is that correct?

"[Prosecutor]: Your Honor, there's two priors.

"[The Court]: It's two separate priors and they are listed under different sections of the code. One is a strike prior and the other one is a non-strike prior, but 667.5(b) prior, meaning that on that prior which is 273.5, that he spent some time in state prison.

"[Spradley]: Yes, sir.

"[The Court]: I think what we could do at this time if you want to talk to him further, bifurcate him and let you discuss with him and bring the jury in and get started."

"[Defense counsel]: That's fine.

"[The Court]: I'll get back to you on the issue of the prior."

Before the jury rendered its verdict, the parties again addressed the issue, as follows:

"[The Court]: There was some question as to whether or not we actually took the admission to each prior listed under the two different sections. [¶] There's the prior under 1170.12 and 667(b) through (i), and that is 246 and then there's a 273 prior under 667.5(b). Do you remember our conversation about this, sir?

"[Spradley]: Yes, sir, I do.

"[The Court]: And my recollection is that I asked you if you admitted the priors and you said you did, but I didn't refer to exact priors so let me do that, now?

"[Spradley]: Yes, sir.

"[The Court]: You're charged in case A53030 of having violated Penal Code section 246 on February 13, 1986, Los Angeles County, California and that prior is alleged under section 1170.12(a) and (d), of the Penal Code and 667(b) through (i), do you admit that is prior? [*sic*]

"[Spradley]: Yes, sir.

"[The Court]: Do you waive and give up your right to a court or jury trial in order to admit that prior?

"[Spradley]: Yes.

"[The Court]: And secondly, you're charged with having committed KA028146, a violation of section 273.5 [on] February 9, 1996, in Los Angeles County California, under section 667.5(b). [¶] Do you admit that prior?

"[Spradley]: Yes, sir.

"[The Court]: And you waive and give up your right to a court trial or jury trial in admitting that prior?

"[Spradley]: Yes, I do."

Based upon Spradley's admissions, his sentence was doubled pursuant to the Three Strikes law, and a one-year prior prison term enhancement was imposed. (§§ 667, subds. (b) – (i), 1170.12, 667.5, subd. (b)).

b. *Discussion.*

Spradley asserts that his admissions to the prior conviction allegations were invalid because the trial court failed to advise him of his rights to confrontation and against self-incrimination, failed to inform him that the People were required to prove the priors beyond a reasonable doubt, and failed to advise him of the consequences of his admissions. He also posits that his admission of the section 667.5, subdivision (b) allegation was defective, as the trial court failed to ask whether he admitted he had served a prison term and failed to remain free of prison custody or the commission of a new offense for five years thereafter. We agree that the trial court's failure to give the proper admonishments invalidated Spradley's admissions.

*In re Yurko* (1974) 10 Cal.3d 857, held that trial courts are constitutionally required to expressly and specifically advise defendants who intend to admit prior convictions of their *Boykin/Tahl* rights,[8] i.e., the right to a jury trial on the prior, to confront and cross-examine witnesses, and against self-incrimination. (*In re Yurko, supra,* 10 Cal.3d at pp. 863-864; *People v. Allen* (1999) 21 Cal.4th 424, 437; *People v. Campbell* (1999) 76 Cal.App.4th 305, 309-310.) The record must reflect the defendant's waiver of each of these rights. (*In re Yurko, supra,* at p. 865.) Additionally, as a judicially declared rule of criminal procedure, the trial court must inform the defendant of the effect of the admission on the punishment to be imposed upon conviction of the substantive crime charged. (*Id.* at p. 864.) No specific formula is required, "as long as the record shows by direct evidence that the accused was fully advised of his rights." (*People v. Cooper* (1991) 53 Cal.3d 771, 839.)

In *People v. Howard* (1992) 1 Cal.4th 1132, 1175, the California Supreme Court reiterated that trial courts were required to expressly advise defendants on the record of their *Boykin/Tahl* rights, but concluded that a trial court's failure to provide the requisite admonitions did not require per se reversal. (*Id.* at pp. 1174-1175, 1179.) Instead, the error is evaluated under the federal test, and the admission is valid if the record

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[8] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

affirmatively shows it was voluntary and intelligent under the totality of the circumstances. (*People v. Howard, supra,* at p. 1175; *People v. Allen, supra,* 21 Cal.4th at p. 438; *People v. Campbell, supra,* 76 Cal.App.4th at p. 310.)

Here, the record is sufficient to show that Spradley was advised of and waived his right to a jury or court trial on the charges. The People acknowledge that the record does not show Spradley was expressly advised of his rights to confront witnesses and against self-incrimination. The People urge, however, that Spradley's admissions were voluntary and intelligent when viewed in the totality of the circumstances. They argue that defense counsel had discussed the admissions with Spradley; Spradley had observed his own jury trial on the current offense, during which he exercised his right to confront witnesses and his right against self-incrimination; and he had suffered prior convictions and therefore had prior experience with the criminal justice system. The People also contend that Spradley "was undoubtedly aware of any sentencing consequences resulting from his admissions" because his attorney "likely" informed him of the consequences.

In *People v. Howard, supra,* 1 Cal.4th 1132, the Supreme Court held that a defendant's admission of a prior prison term was voluntary and intelligent despite the trial court's failure to obtain an express waiver of the privilege against self-incrimination before accepting the defendant's admission. (*Id.* at p. 1180.) The court explained, "[t]he record in this case affirmatively demonstrates that defendant knew he had a right not to admit the prior conviction and, thus, not to incriminate himself. The court specifically informed defendant that he had a right to force the district attorney to prove the prior conviction in a trial and that, in such a trial, he would have the rights to a jury and to confront adverse witnesses. The admonitions were not empty words because defendant was actively represented by counsel and preparing for trial on charges to which he had pled not guilty. Moreover, there was a strong factual basis for the plea." (*Id.* at p. 1180.)

Several other courts have found a defendant's admissions not knowing and voluntary where, as here, the defendant was advised of and waived only the right to jury trial. (*People v. Torres* (1996) 43 Cal.App.4th 1073, 1082; *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1247-1248; *People v. Howard* (1994) 25 Cal.App.4th 1660, 1665;

*People v. Carroll* (1996) 47 Cal.App.4th 892, 897 [defendant was advised of right to jury trial prior on priors before his first trial, but was not properly readvised before second trial].) In contrast to *People v. Howard, supra,* 1 Cal.4th 1132, *Torres* concluded that the admissions were not voluntary and intelligent. " 'We have no doubt that [defendant] was in fact aware of his right to . . . confront witnesses and his right to remain silent, all of which he had just exercised in trial. What is impossible to determine from this silent record is whether [defendant] not only was aware of these rights, but was also prepared to waive them as a condition to admitting his prior offenses.' " (*People v. Torres, supra,* 43 Cal.App.4th at p. 1082.)

Similarly, in *People v. Van Buren* (2001) 93 Cal.App.4th 875, the defendant's attorney represented that the defendant was " 'willing to waive jury and have [the] issue . . . heard before the court.' " (*Id.* at p. 883.) The trial court informed the defendant that he had the right to "a trial" on the issue, but obtained only a waiver of a court, not a jury, trial from the defendant. The trial court did not advise the defendant of, or obtain waivers of, the rights to confrontation or against self-incrimination. *Van Buren* concluded that the deficiencies were more significant than those in *People v. Howard, supra,* 1 Cal.4th 1132, and invalidated the admissions. (*Id.* at p. 884.)

In *People v. Moore* (1992) 8 Cal.App.4th 411, defense counsel represented that the defendant wished to admit his prior conviction. The court took the admission without advising him of any of his three constitutional rights. The prosecutor then took up the second prior, and the defendant was properly advised of his rights. (*Id.* at p. 415.) On appeal, the court held that the "admonitions and waivers [were] insufficient to support appellant's admission of one of the two prior convictions charged as enhancements, but that they are sufficient for the other." (*Id.* at p. 413.) The court explained, "there were no admonitions at all with respect to any of the three constitutional rights. All that preceded appellant's admission of the prior was the statement of counsel stipulating to the prior, and stating that appellant wanted to admit to it. If this were sufficient, it is difficult to discern what would not be." (*Id.* at p. 417.) The court rejected the People's argument that the waivers on the second admission allowed an inference that the first admission

was knowing and voluntary: "We decline to speculate as to what appellant may have thought. All of the pertinent authorities, through and including *Howard,* [*supra,* 1 Cal.4th 1132], require that the *record* demonstrate that the waivers were voluntary and intelligent. This record does not meet the test." (*Id.* at p. 418.)

In *People v. Campbell*, *supra*, 76 Cal.App.4th at p. 310, a defendant's admissions could not be considered voluntary and intelligent where the trial court failed to give any admonitions with respect to the three constitutional rights. *Campbell* rejected the argument that the defendant's prior experience with the criminal justice system allowed the inference that his admissions were valid. "If this experience were sufficient to constitute a voluntary and intelligent waiver of constitutional rights, courts would rarely be required to give *Boykin/Tahl* admonitions. Under *Howard,* we are not permitted to imply knowledge and a waiver of rights on a silent record." (*Id.* at p. 310; see also *People v. Johnson* (1993) 15 Cal.App.4th 169, 177-178 [admissions invalid where no advisements given, despite appellate court's view that the defendant was doubtless aware of his rights, which he had just exercised at trial].)

On May 1, 2002, the California Supreme Court granted review in *People v. Mosby* (2002) 95 Cal.App.4th 967, on the question of whether an admission of a prior conviction was voluntary and intelligent where the defendant was informed only of his jury trial right. (*People v. Mosby, supra,* 95 Cal.App.4th 967, review granted May 1, 2002, S104862.)

Pending further guidance from our Supreme Court, we conclude that the record is insufficient to allow a finding that Spradley's admissions were knowing and intelligent. Spradley's first discussion with the court and counsel reflected his confusion about the nature of the admissions. During the parties' second discussion, the trial court failed to provide any admonitions or take any waivers of Spradley's rights to confrontation and against self-incrimination. As the foregoing authorities have made clear, we cannot infer from Spradley's attendance at his trial on the substantive charges that he understood the nature of his rights in the different context of the trial of his prior convictions. (E.g., *People v. Van Buren, supra,* 93 Cal.App.4th at p. 884; *People v. Torres, supra,* 43

Cal.App.4th at p. 1082; *People v. Johnson, supra,* 15 Cal.App.4th at p. 178.) Likewise, Spradley's experience with the criminal justice system cannot serve as a substitute for the proper admonishments and waivers. (*People v. Campbell, supra,* 76 Cal.App.4th at p. 310.) Moreover, Spradley was not advised on the record of the fact that the admissions would increase his punishment. The deficiencies in the record are more serious than those in *People v. Howard, supra,* 1 Cal.4th 1132.

The People urge that the error was harmless, as there is no reasonable probability that "if appellant had been expressly advised of his constitutional rights he would have denied the prior convictions and they would not have been found to be true." *People v. Stills* (1994) 29 Cal.App.4th 1766, 1770-1771, considered and rejected the same argument. *Stills* explained that in *People v. Guzman* (1988) 45 Cal.3d 915, cited by the People, before accepting the defendant's admission the trial court properly advised him of his rights to cross-examine witnesses, to call witnesses, to remain silent, and to be represented by counsel; it also advised him of the legal consequences of admitting the priors. The *Guzman* trial court's mistake was that, instead of telling the defendant he had a right to a "jury trial," it stated he had the right to a hearing at which the truth of the prior convictions would have to be proved beyond a reasonable doubt. (*People v. Stills, supra,* 29 Cal.App.4th at pp. 1770-1771 [discussing *People v. Guzman, supra,* 45 Cal.3d 915, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13].) *Stills* concluded that, where no admonitions had been given, the *Guzman* harmless error analysis did not apply. "The record does not affirmatively show – it does not even contain a hint – that appellant knew of his constitutional rights and voluntarily waived them in admitting the prior. Thus, it does not matter whether the allegation would likely have been found true . . . . Under *Howard,* that is not the focus of our inquiry." (*People v. Stills, supra,* 29 Cal.App.4th at p. 1771.)

In light of the foregoing authorities, we reverse the true findings on the prior conviction allegations. We remand the matter to the trial court for a determination of the truth of the prior conviction and prison term allegations. (*People v. Moore, supra,* 8 Cal.App.4th at pp. 418-422.)

7. *Spradley's ineffective assistance of counsel claim lacks merit.*

a. *Additional facts and contentions.*

Officer De Mond testified that after finding the methamphetamine in the truck bed, he placed Spradley under arrest and transported him to the Glendora Police station. As Spradley was "sitting in [the] booking cage at the police facility" approximately one hour after the initial stop, he began behaving abnormally. Spradley's condition worsened and he was transported to a hospital for treatment. De Mond stayed at the hospital with Spradley for approximately four hours. De Mond did not transport Spradley back to jail because Spradley was admitted into the intensive care unit.

During cross-examination by defense counsel Michael Coghlan, De Mond confirmed that he had placed Spradley under arrest. De Mond was unsure whether the booking process had been completed before Spradley was transported to the hospital, but his police report showed a booking number, indicating that the process had been started. Coghlan questioned De Mond regarding the circumstances of Spradley's release. He elicited from De Mond that Spradley was released, not "cited out." If an individual is "cited out," he or she is released with a citation for a court appearance. Spradley, on the other hand, was released for further investigation; he was not required to return for a court appearance. Coghlan also elicited an admission from De Mond that he had released Spradley under section 849, subdivision (b)(1). When Coghlan asked, "And what is 849(b)(1), what does that say?" the prosecutor objected. The trial court stated, in the jury's presence, "I don't want to have read the whole code section, why don't you just inquire as to whether or not it is a detention and release, because that's what it is." Coghlan continued: "[I]s it your understanding of 849(b)(1) officer that you release someone if, you as the officer [are] satisfied that there are insufficient grounds for making a criminal complaint against the person arrested?" De Mond replied, "I believe I release them of charges for further investigation." On further cross-examination, De Mond testified that he felt further investigation was necessary. However, De Mond had no doubt that Spradley had been in possession of methamphetamine and was under the

influence; the release was due "more [to] the fact that he was in intensive care at the hospital at the time."

In his petition for a writ of habeas corpus, Spradley presents a "Certificate of Release" signed by De Mond, indicating that Spradley was released pursuant to section 849, subdivision (b)(1)). Spradley points out that charges were not filed in the instant matter until January 26, 2001, approximately two months after his encounter with De Mond. Spradley asserts that his counsel was ineffective for failing to "present evidence that petitioner was released from custody following his arrest because the arresting officer believed there were insufficient grounds to make a criminal complaint against petitioner." Spradley argues that De Mond could have checked a box on the form showing that he was released pursuant to section 849.5, instead of 849, subdivision (b)(1); counsel did not make the jury aware of the meaning of section 849(b)(1); and counsel did not "cross-examine the officer in a way that would have shown that a release for further investigation was inconsistent with a release pursuant to subdivision (b)(1) of section 849."

b. *Discussion.*

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants. . . . A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, " 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' [Citation.]" ' [Citation.]" (*People v. Holt, supra,* 15 Cal.4th at p. 703.)

Penal Code section 849, subdivision (b)(1) provides: "(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever: [¶] (1) He or she is satisfied that there are

insufficient grounds for making a criminal complaint against the person arrested." Section 849.5 provides, "In any case in which a person is arrested and released and no accusatory pleading is filed charging him with an offense, any record of arrest of the person shall include a record of release. Thereafter, the arrest shall not be deemed an arrest, but a detention only."

Spradley's contention lacks merit. First, defense counsel elicited evidence of and argued the point suggested by Spradley. The jury heard that Spradley was released without a return date, although De Mond could have released him with a citation for a later court appearance. The jury also heard that Spradley was released pursuant to section 849, subdivision (b)(1), which Coghlan characterized as a release due to insufficient grounds and De Mond characterized as a release for further investigation. In closing argument, Coghlan urged De Mond was not credible. "[T]he officer released Mr. Spradley under a Penal Code section that says basically, we are releasing you because we don't have enough information in our opinion to convict him . . . . [Y]et the officer stands before us now with all kinds of very strong testimony about Mr. Spradley possessing drugs, and Mr. Spradley being under the influence of drugs. [¶] . . . [¶] And so the fact that they would let him go, and now he stands before you charged with something indicates that obviously this case was filed some time after November of last year. . . . why the delay?" In short, Coghlan made the arguments suggested by Spradley.

Coghlan had a tactical reason for failing to pursue the topic further. In an April 8, 2002 letter responsive to Spradley's appellate counsel's request for information, Coghlan explained: "You have to understand the circumstances under which Spradley was cited out under PC 849. He had been arrested and taken to the police station. They were in the process of booking him when Spradley began exhibiting signs of drug overdose. [¶] On the basis of Spradley's condition, which came on suddenly and without warning during the booking process, the officers decided to terminate the booking process and take Spradley to the hospital immediately. When they got him to the hospital and had him seen by the doctor, the doctor wanted him admitted and that is what was done. [¶] At that point, the officers had little choice but to cite Spradley out. To try and attack Officer

De Mond for citing Spradley out under these circumstances would not have suited the defense very well in my judgment[.] It is fairly obvious that citing Spradley out at that point was the only option available and *trying to take advantage of the wording of the cite out section to argue that Officer De Mond did not believe he really had a case could easily have been interpreted by the jury as a cheap shot by the defense and, in the long run, would have run contrary to Spradley's interests.*" (Italics added.)

We do not view these explanations as inadequate, as Spradley suggests. Regardless of what box was checked on the form, it was undisputed that De Mond transported Spradley to the police station, the booking process was begun, and Spradley was admitted to intensive care due to his intoxication. De Mond testified that he was certain that Spradley possessed the methamphetamine, despite the fact Spradley was released. Given these facts, counsel could reasonably have believed that attempting to push the matter further would have appeared to the jury as an attempt to unfairly capitalize on a technicality.

In any event, even assuming defense counsel should have introduced the certificate, provided a definition of section 849, subdivision (b)(1), and cross-examined De Mond more effectively, we conclude it is not reasonably probable a determination more favorable for Spradley would have resulted. The evidence against Spradley was very strong. Based upon the evidence elicited and the argument made, the jury was already aware of the purported inconsistency of Spradley's release with De Mond's account of finding the methamphetamine in the truck.

## DISPOSITION

The judgment of conviction is affirmed. The portions of the judgment imposing an additional one-year enhancement imposed pursuant to section 667.5, subdivision (b), and doubling Spradley's sentence for his conviction of possession of methamphetamine pursuant to the Three Strikes law are reversed. The cause is remanded for trial on the issue of whether Spradley suffered the prior convictions, and for resentencing. Spradley's petition for writ of habeas corpus is denied.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.