No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL MANN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KOPENY
Counsel of Record for Petitioner
MICHAEL MANN

LAW OFFICES OF WILLIAM J. KOPENY
8001 Irvine Center Drive, Suite 400
Irvine, California 92618-2956
Telephone (949) 754-2944
Facsimile (949) 754-2912
E-mail: wjk@writsnappeals.com

QUESTION PRESENTED

1.

Whether Certiorari Should Be Granted to Examine and Overrule California's Rule That the Sixth Amendment Right to a Speedy Trial Does Never Applied to a Case in Which the Defendant Is Charged by Complaint and Arrested and Arraigned on the Complaint but Always Requires That He Be Either Indicted or Held to Answer on an Information

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Miscellaneous:

Petitioner, MICHAEL MANN, respectfully prays that a writ of certiorari issue to review the decision of Division Three of the Second District California Court of Appeal, affirming his criminal conviction.

OPINION BELOW

The opinion of the Court of Appeal, which was filed on June 7, 2011, as modified in an order filed on June 28, 2011, as well as the order of the California Supreme Court denying Mr. Mann's petition for discretionary review, are reproduced in the Appendix at pp. 1-31.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257, subdivision (a). The order of the State Supreme Court denying discretionary review was entered on September 21, 2011. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ..."

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question presented on this Petition was raised in the Orange County California Superior Court and on direct appeal to the California Court of Appeal and in Petitioner's petition for discretionary review in the California Supreme Court. The Court of Appeal addressed the issue extensively. Please see Opinion, Appendix pp. 21-23.

The opinion of the Court of Appeal sets out the evidentiary framework of the case, but overlooks some procedural facts related to the sole issue raised here – the delay of over 7 years between Appellant's arrest and arraignment on a felony criminal complaint in the Orange County Superior Court, and his subsequent trial on the charges in that complaint.

Petitioner was convicted of assault with a deadly weapon (auto) on a police officer, hit and run with property damage, and possession for sale or transportation of heroin. He was sentenced to a total of 8 years in State Prison.

Based on the same set of facts (i.e., a state and federal investigation into his alleged drug use and trafficking), Petitioner was charged with possession for sale of marijuana in federal court, and on his guilty plea was sentenced to ten years in federal prison.

The record shows that on December 14, 2001 the district attorney of Orange County filed a felony complaint in the Orange County Superior Court,

charging Petitioner with assault, hit and run, and narcotic offenses. Petitioner was arrested on that complaint, and posted bail.

Prior to his first appearance, however, two things happened: (1) the state prosecutor filed an amended complaint charging mostly the same crimes on December 26, 2001; and (2) Petitioner was arrested on the federal marijuana charges on December 27, 2001.

At all times, the state court and state prosecutors knew full well why Petitioner failed to appear in state court on January 14, 2002, when his arraignment on the amended complaint was scheduled, because at his counsel's request, with the concurrence of the state prosecutor, a warrant was held until February 1, 2002 when a pretrial hearing was set. The opinion below confirms that Appellant was within the jurisdiction of the state court after the initial complaint was filed, and that the court and state prosecutor knew he was in federal custody on January 14 and February 1, 2002.

Petitioner was eventually brought to state court on his demand for trial under a state statute, on November 13, 2007. In his pretrial motions to dismiss, based on both state and federal Speedy Trial law, and based on due process and state statutory law, Petitioner clearly invoked his Sixth Amendment right to a speedy trial.

First the Superior Court, and later the Court of Appeal rejected his Sixth Amendment argument based solely on the fact that under California Supreme Court law, interpreting this Court's holdings on when the Sixth Amendment right to a speedy trial is triggered, ruled that "the federal right does not come into play until an indictment or information has been filed or the

defendant has been arrested and held to answer." Please see Opinion, Appendix, p. 21, citing *People v. Lowe*, 40 Cal.4th 937, 943, 35 Cal.Rptr.3d 209, 154 P.3d 358 (Cal. 2007).

On his appeal to the State Court of Appeal, and in his petition for discretionary review in the California Supreme Court, Petitioner argued that the state rule is not precisely what this Court had ruled regarding when the Sixth Amendment right to a Speedy Trial attaches in a felony prosecution, and further that the reasons for the state rule, first announced in *People v. Hannon*, 19 Cal.3d 588, 607-608, 138 Cal.Rptr. 885, 564 P.2d 1203 (Cal. 1977).

People v. Hannon, *supra*, in turn was interpreting a passage in this Court's decision in *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

SUMMARY OF ARGUMENT

This Court should grant certiorari to address the situation that now exists in California, and the circumstances of this case, in which Petitioner: (1) was charged by Complaint in the Superior Court, the California Court of general jurisdiction of felony criminal cases; (2) Petitioner was arrested on that complaint; (3) Petitioner was arraigned on that complaint; and (4) petitioner was in federal custody for one month shy of 6 years before being brought back to the Superior Court for trial, and then only on his own initiative.

The present case falls between a case in which a person is charged by complaint, but never arrested or brought to court and arraigned, and a case in which a person is charged by Indictment or Information or held to answer a criminal charge.

Also, when the state initially set forth its holding in *Hannon*, *supra*, state law did not define the "commencement" of a felony charged as it does now - by the filing of a complaint, and such complaints were filed in inferior (Municipal) courts, not in the Superior Courts which have state constitutional jurisdiction to try and adjudicate felony cases.

If Certiorari is granted, Petitioner will argue that under *Barker v. Wingo,*407 U.S. 514 (1972) which famously held the Sixth Amendment right was not a "second class right" required dismissal of this case.

ARGUMENT

1.

Certiorari Should Be Granted to Examine and Overrule California's Rule That the Sixth Amendment Right to a Speedy Trial Does Never Applied to a Case in Which the Defendant Is Charged by Complaint and Arrested and Arraigned on the Complaint but Always Requires That He Be Either Indicted or Held to Answer on an Information

Certiorari should be granted because the California Court of Appeal upheld a conviction where the record shows Petitioner was deprived of the right to a speedy trial as guaranteed by the Sixth Amendment.

A defendant's right to a speedy and public trial is constitutionally guaranteed by the Sixth Amendment of the United States Constitution. *United States* v. *Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *United States v. Lovasco*, 431 U.S. 783 (1977).

Citing *People v. Lowe,* 40 Cal.4th 937, 56 Cal.Rptr.3d 209, 154 P.3d 358 (2007), the California Court of Appeal held that the Sixth Amendment right to a speedy trial does not come into play until an indictment or an information has been filed or the defendant has been arrested and held to answer. Opinion, Appendix, p. 21.

In *People v. Lowe,* 40 Cal.4th 937 (2007), 942, the California Supreme Court made a similar statement

citing *People v. Martinez,* 22 Cal.4th 750, 94 Cal.Rptr.2d 381, 996 P.2d 32 (2000).[1] *Martinez,* in turn, did not analyze the issue but relied on *People v. Hannon*, 19 Cal.3d 588, 605-606, 138 Cal.Rptr. 885, 564 P.2d 1203 (1977). In *People v. Martinez*, *supra*, Justice Kennard wrote:

> "The first difference concerns the point at which the speedy trial right attaches. Under the *state* Constitution, the filing of a felony complaint is sufficient to trigger the protection of the speedy trial right. (*People v. Hill* (1984) 37 Cal.3d 491, 497, fn. 3, 209 Cal.Rptr. 323, 691 P.2d 989; *People v. Hannon* (1977) 19 Cal.3d 588, 607-608, 138 Cal.Rptr. 885, 564 P.2d 1203 (*Hannon*).) Under the *federal* Constitution, however, the filing of a felony complaint is by itself insufficient to trigger speedy trial protection. (*Hannon, supra,* at pp. 605-606, 138 Cal.Rptr. 885, 564 P.2d 1203.) The United States Supreme Court has defined the point at which the federal speedy trial right begins to operate: '[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the

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[1] "But the rights differ from each other in two significant respects. First, the state constitutional right arises upon the filing of a felony complaint, whereas the federal right does not come into play until an indictment or an information has been filed or the defendant has been arrested and held to answer. Second, an 'uncommonly long' delay triggers a presumption of prejudice under the federal Constitution, but not under the state Constitution. (*Martinez, supra,* 22 Cal.4th at pp. 765-766, 94 Cal.Rptr.2d 381, 996 P.2d 32.) Here, defendant raises only a claim under the state Constitution." *People v. Lowe*, *supra*, 40 Cal.4th at 942.

> Sixth Amendment.' (*United States v. Marion* (1971) 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468.)"

In *Martinez*, Justice Kennard merely repeated without any analysis the holding in *People v. Hannon, supra,* 19 Cal.3d 588, where Chief Justice Wright had been concerned with the two situations compared by the this Court in *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). In *Hannon*, the Court wrote:

> "In the case of a person charged in a complaint who has not yet been apprehended by law enforcement authorities, however, the requirement of arrest and holding to answer before the right to a speedy trial applies, affords less protection than that set forth in *Jones*. * * * Thus we conclude that the Supreme Court intended by its use of the foregoing phrase [in *Marion*] to hold that the filing of a complaint is by itself insufficient to trigger the protection of the right to a speedy trial under the federal Constitution." *People v. Hannon*, *supra*, 19 Cal.3d at 605-606.

In this case, Mr. Mann was not merely "charged in a complaint" but "not yet apprehended by law enforcement authorities." Rather, he had been arrested and arraigned in 2001. (12/15/01 Minute Order, CT, 3).

Regardless, at the time *Hannon* was decided, California law had not defined the commencement of the prosecution as it has now -- as when "the defendant is arraigned on a complaint that charges a felony." (See Penal Code Section 804(c).)

Nor was jurisdiction of felony complaints in the court of general jurisdiction, i.e., the Superior Court, when *Hannon* was decided. Rather, complaints were then handled by magistrates, not judges of the Superior Court, and a felony did not even reach the Superior Court except by Indictment or following a preliminary hearing and an order holding the accused to answer.

Thus, in *Serna v. Superior Court, supra,* 40 Cal.3d 239, 257 the Supreme Court invoked the jurisdiction of the Superior Court as a further basis for its *Hannon* decision, while implying an inkling it may have been incorrectly decided.

> "A felony complaint, unlike a misdemeanor complaint, does not confer trial jurisdiction. It invokes only the authority of a magistrate, not that of a trial court. (§ 806.) * * * In addition, the filing of a felony complaint, unlike indictment or accusation by information, does not threaten oppressive pretrial incarceration. The time constraints within which the preliminary hearing must be conducted or the complaint dismissed and the defendant released (§ 859b) ensure that the defendant is not subjected to extended anxiety or public opprobrium, and by giving the defendant immediate notice of the charge and opportunity to defend avoid prejudice to the defense. This step, preliminary to formal accusation in the court with jurisdiction over the prosecution of the charge, does not implicate the Sixth Amendment right to speedy trial if our interpretation of Marion is correct." *Id.*, 40 Cal.3d at p. 257

Neither this jurisprudence nor the logic of this discussion justifies denying Appellant in the present case the benefit of the Sixth Amendment 4-prong balancing test mandated by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972).

In the first place, Appellant was not merely charged by complaint, but he was arrested and arraigned on the complaint, which under California law "commenced the prosecution" against him. See Penal Code Section 804, subdivision (c). This alone is sufficient to trigger his Sixth Amendment rights, including his right to counsel, and his right to a Speedy Trial.

In the second place, unlike the imaginary defendant referred to in *Serna v. Superior Court*, *supra*, Appellant was indeed "subjected to extended anxiety or public opprobrium." Because he was incarcerated on another, related federal charge the entire time from and after his December 2001 arraignment, he had neither the immediate "opportunity to defend" nor the chance to "avoid prejudice to the defense" by virtue of the short time limits that apply to preliminary hearings.

Petitioner believes that any reasoned application of the four-pronged test would lead to the conclusion that he was denied the right to a speedy trial under the Sixth Amendment to the United States Constitution.

The above quoted statements in *Serna*, *Hannon*, *Martinez*, and *Lowe* are all either holdings, or close enough to holdings that the Court of Appeal could not do otherwise but to reject Petitioner's Sixth Amendment argument, as it did.

This Court, then, is the only Court that can address whether, under *United States v. Marion*, *supra*, the present case triggers the defendant's Sixth Amendment right to a speedy trial.

The reason this is important in this case is that the test for violating the Sixth Amendment is far different from the California Constitutional test, or the federal due process pre-trial delay test. Both of those tests require evidence of delay and prejudice flowing from the delay, and this Court must balance the two.

Under the Sixth Amendment test, a four prong balancing test under *Barker v. Wingo*, *supra*, 407 U.S. 514 applies. Under that test, the court must balance the length of the delay, the reason for the delay, the defendant's assertion of the right, and any prejudice. However, no one factor is either necessary or sufficient to establish a violation of the Sixth Amendment right, and a defendant can be entitled to a dismissal under it even if there is no prejudice shown. *Strunk v. United States,* 412 U.S. 434 (1973).

Under the four prong Sixth Amendment balancing test set forth in *Barker v. Wingo*, *supra*, Appellant is entitled to relief. The length of the delay is substantial (over 7 years), and prosecuting officials knew he was in federal custody since early 2001. The reason for the delay is simply that no effort was made to bring him to trial by any California officials, who simply let him sit and serve the bulk of his 10 year federal sentence, even though the federal charges arose out of the same investigation as the drug related charges in this state case, and even though this state inaction would inevitably result, as it did, in the loss of any opportunity for concurrent sentences. The defendant's assertion of

his right to a speedy trial, is a non-factor, or it militates against him because he was in federal prison and he also failed to demand a trial for many years. Finally, the prejudice flowing from the delay is significant, despite contrary conclusions by the Court of Appeal. The Court of Appeal analyzed only the fair trial forms of prejudice (and Appellant's maintains it did so erroneously).

Indeed, the Sixth Amendment requires dismissal where the four factors on balance favor finding a violation even where there is no prejudice. *Strunk v. United States* (1973) 412 U.S. 434. Moreover, Sixth Amendment prejudice includes "oppressive pretrial incarceration" . . . "anxiety and concern of the accused" and "he possibility that the defense will be impaired." *Barker v. Wingo*, *supra*, 407 U.S. at p. 532.

Certiorari should be granted to determine if Appellant's Sixth Amendment right to a Speedy Trial was violated by the years of delay and the prejudice in this case, given the failure of the state or its agents to bring Appellant to trial, without any justification of valid reason.

The jurisprudence of this Court's post-*Marion* speedy trial cases also support the proposition that California is wrong in requiring either an Indictment, Information or an order holding a defendant to answer to trigger the Sixth Amendment Right to a Speedy Trial.

Although in *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the "formal accusation" took the form of an Indictment, in California, by statute, the Legislature has defined the commencement of a felony prosecution, i.e., the "formal

accusation" as the filing of a criminal complaint. *California Penal Code Section 804(c).* Moreover, in this case, the defendant was not only formally accused (as was *Doggett*), he was actually arrested and arraigned on the charges, and subjected to bail for the entire nearly 7 year period of delay.

> "We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence. *Barker,* 407 U.S., at 532, 92 S.Ct., at 2193; see also *Smith v. Hooey,* 393 U.S. 374, 377-379, 89 S.Ct. 575, 576-578, 21 L.Ed.2d 607 (1969); *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.' 407 U.S., at 532, 92 S.Ct., at 2193. Doggett claims this kind of prejudice, and there is probably no other kind that he can claim, since he was subjected neither to pretrial detention nor, he has successfully contended, to awareness of unresolved charges against him." *Doggett v. United States*, *supra*, 505 U.S. 647.

In *United States v. Loud Hawk*, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) this Court explained that the Sixth Amendment applied to periods of delay

during which the defendant was subjected to restraints such as actual incarceration or being subject to bail.

> "During much of the litigation, respondents were neither under indictment nor subject to bail. (Fn.om.) Further judicial proceedings would have been necessary to subject respondents to any actual restraints. Cf. *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). As we stated in *MacDonald:* '[W]ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, 'a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." ' 456 U.S., at 9, 102 S.Ct., at 1502." *Id*., 474 U.S. at 311, 106 S.Ct. at 654. See also *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) acknowledging that the right to a speedy trial may apply "as early as arrest."

Finally, in *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205(1975), just four years after *Marion* was decided, this Court held that a 22-month delay between defendant's arrest and his indictment triggered his Sixth Amendment right to a speedy trial. There this Court held the defendant became an "accused" when he was arrested. It was not necessary for him to "held to answer" or Indicted in order for the Sixth Amendment right to a speedy trial to apply, and the same rule should be applied in this case, contrary to the California rule requiring in all cases not only an

arrest, but an order holding the defendant to answer before the Sixth Amendment right to a speedy trial is triggered.

Clearly, in the present case, "charges were outstanding" and Petitioner was subjected to restraints (i.e., subject to bail on the State charges for the entire delay. Indeed, there was a state detainer based on those outstanding charges during his entire period of incarceration in federal prison.

Under the Sixth Amendment test, the mere loss of a material witness or the fading of memories is sufficient to constitute prejudice. *Barker* v. *Wingo, supra*, 407 U.S. 514.

In *Barker v. Wingo*, *supra*, this Court dealt with the Sixth Amendment right to a Speedy Trial, not the California Constitutional right. On the issue of prejudice, and the purpose of the right to a speedy trial, this Court said in *Barker*:

> "This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id*., 407 U.S. at p. 532.

A defendant's right to a speedy and public trial is constitutionally guaranteed by the Sixth Amendment of the United States Constitution. *United States* v. *Marion* (1971) 404 U.S. 307; *United States v. Lovasco* (1977) 431 U.S. 783.

Under the four prong Sixth Amendment balancing test set forth in *Barker v. Wingo*, *supra*, Appellant is entitled to relief. The length of the delay is substantial (over 7 years), and prosecuting officials knew he was in federal custody since early 2001. The reason for the delay is simply that no effort was made to bring him to trial by any California officials, who simply let him sit and serve the bulk of his 10 year federal sentence, even though the federal charges arose out of the same investigation as the drug related charges in this state case, and even though this state inaction would inevitably result, as it did, in the loss of any opportunity for concurrent sentences. The defendant's assertion of his right to a speedy trial, is a non-factor, or it militates against him because he was in federal prison and he also failed to demand a trial for many years. Finally, the prejudice flowing from the delay is significant, despite contrary conclusions by the Court of Appeal. The Court of Appeal analyzed only the fair trial forms of prejudice (and Appellant's maintains it did so erroneously).

Indeed, the Sixth Amendment requires dismissal where the four factors on balance favor finding a violation even where there is no prejudice. *Strunk v. United States* (1973) 412 U.S. 434. Moreover, Sixth Amendment prejudice includes "oppressive pretrial incarceration" . . . "anxiety and concern of the accused" and "he possibility that the defense will be impaired." *Barker v. Wingo*, *supra*, 407 U.S. at p. 532.

Conclusion

Certiorari should be granted to determine if Appellant's Sixth Amendment right to a Speedy Trial was violated by the years of delay and the prejudice in this case, given the failure of the state or its agents to bring Appellant to trial, without any justification of valid reason.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 20th day of December, 2011.

WILLIAM J. KOPENY
8001 Irvine Center Drive
Suite 400
Irvine, California 92618
(949) 754-2944
wjk@writsnappeals.com

Counsel of Record for Petitioner
MICHAEL MANN

APPENDIX

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As Modified on June 28, 2011

California Court of Appeal, Fourth District, Division 3

The PEOPLE, Plaintiff and Respondent,
v.
Michael MANN, Defendant and Appellant.
No. G042810.

(Super.Ct.No. 01NF3414).
June 7, 2011.

OPINION

FYBEL, J.

INTRODUCTION

In December 2001, the truck that defendant Michael Mann was driving struck a vehicle stopped at a driver's license checkpoint conducted by Buena Park police officers, and almost struck an officer. Defendant sped away from the checkpoint and down a cul-de-sac where the truck he was driving hit a fence and struck a police car before ultimately coming to rest. Defendant's blood tested positive for cocaine, opiates, and "methamphetamine and/or related compounds." Police officers found over 45 grams of cocaine and over 6 grams of heroin, syringes, a digital scale, and over $3,000 in cash in the truck. Later that month, defendant was arrested by federal authorities for marijuana cultivation. He pleaded guilty to the federal charge and was given a 10–year prison sentence.

Over five years later, in June 2007, while serving his federal sentence, defendant sent the district attorney's office a demand for trial on the assault, narcotics, and

hit and run offenses that were alleged in an amended complaint the district attorney had filed against defendant in December 2001. In August 2007, the district attorney requested temporary custody of defendant from the federal authorities in order to bring him to trial on those offenses, and received the federal authorities' assent in October. The district attorney filed an information in February 2008, and, following a jury trial, on May 2, defendant was found guilty of committing the offenses of possession of cocaine for sale, sale or transportation of cocaine, sale or transportation of heroin, possession of heroin, misdemeanor hit and run with property damage, and two counts of aggravated assault on a peace officer.

Defendant contends the judgment should be reversed because his right to a speedy trial under Penal Code section 1381.5, the state Constitution, and the federal Constitution were violated. (All further statutory references are to the Penal Code unless otherwise specified.) He further contends his due process right to a fair trial was violated because the government destroyed narcotics evidence, a blood sample, and an audio and video tape of defendant's interview before trial. Defendant asserts such evidence might have assisted his defense by showing that he was so high on narcotics, he was unaware of his actions when he drove his truck through the checkpoint.

We affirm. Defendant's claim that his speedy trial right under the federal Constitution was violated is without merit because that right did not attach until the information was filed in February 2008. (*People v. Martinez* (2000) 22 Cal.4th 750, 765, 94 Cal.Rptr.2d 381, 996 P.2d 32 (*Martinez*).) As trial was completed by May 2, 2008, defendant has failed to demonstrate a violation

of that right. As to his claim that his right to a speedy trial under section 1381.5 and the California Constitution was violated, defendant has failed to show he suffered any prejudice as a result of the delay in his being brought to trial. Furthermore, defendant's due process right to a fair trial claim fails because he did not show the state failed to preserve any exculpatory evidence of such a nature that he " ' "would be unable to obtain comparable evidence by other reasonably available means." ' " (*People v. Carter* (2005) 36 Cal.4th 1215, 1248, 32 Cal.Rptr.3d 838, 117 P.3d 544.)

FACTS

On December 12, 2001, police officers conducted a driver's license checkpoint at an intersection in Buena Park. At 3:20 p.m., Officer Ralph Bretta was checking the license of a driver of a stopped vehicle when he heard Officer Wally Miller yell, "look out." Bretta could see through his peripheral vision a truck was approaching him; he jumped on top of the hood of the stopped vehicle and "held on." The truck struck the stopped vehicle, moving it three or four feet. Bretta rolled off the hood and saw Miller running to a "chase vehicle" to pursue the truck.

D.T. was walking with a friend down the cul-de-sac where he lives when he heard sirens. D.T. turned around and saw a white pickup truck approaching them very quickly, while closely followed by a police car. D.T. saw the truck make a left turn in front of a house, "go[ ] up the front yard," pull back out, and, in so doing, hit a grassy hill and fence. He stated the driver "trie[d] to go back out again on [the street]," but his truck got stuck between a white van in front of a house and a pole. The truck struck a police car (causing the police car's airbags

to deploy) before it became stuck. The truck's wheels continued to spin and "smoke was coming out and mud going around all over the place."

Marlene Vilchis told Officer Nathaniel Booth that she saw the truck as it was pursued by a police car. She told Booth she saw the truck pull into a driveway, back up, and then crash into that police car with such force that the truck spun around 180 degrees. When the truck moved forward, it became stuck. (The truck sustained damage to its entire front area and had no damage to the rear portion.)

Officer Michael Lovchik responded to a radio call Miller had made seeking assistance on the cul-de-sac. When Lovchik arrived at the cul-de-sac, he saw the truck's tires spinning while stuck. Officers verbally commanded defendant to get out of the truck; defendant did not comply. Officer Pinchot, using a baton, broke the driver's side window. While other officers restrained defendant and unbuckled his seatbelt, Lovchik reached into the truck through the driver's side window and turned off the ignition. The officers pulled defendant out of the truck.

Lovchik saw defendant chewing a white powdery substance that appeared to Lovchik to be cocaine or methamphetamine. Although defendant ignored Lovchik's demand to "spit whatever you've got out of your mouth," defendant told Lovchik, "it was cocaine." While waiting for the paramedics to arrive, defendant vomited at least twice. A "white little piece of paper came out of his mouth," which appeared to Lovchik to be a bindle commonly used to contain drugs.

Lovchik prepared a report of the incident and did not note in his report that defendant appeared to him to be under the influence of narcotics; he stated that if he had observed defendant exhibiting symptoms of being under the influence of narcotics, he would have made a note in his report.

During a search of the truck, the police officers found (1) over 45 grams of cocaine; (2) over 6 grams of heroin; (3) syringes, prescription bottles in defendant's name, and a digital scale; (4) over $3,000 in cash inside of the truck; (5) two cell phones (one was broken); and (6) a small amount of a substance that appeared to be some kind of cutting agent.[2]

On that same day, defendant's blood was drawn by a licensed vocational nurse who was certified to withdraw blood samples. Defendant stipulated that the nurse used a kit prepared by the Orange County Sheriff's crime lab in accordance with title 17 of the California Code of Regulations and that she drew defendant's blood in a medically approved manner. The results from the testing conducted on the sample of defendant's blood showed: "Cocaine positive, methamphetamine and/or related compounds, positive, opiates, positive." Defendant stipulated his blood sample "was destroyed by the Orange County crime lab pursuant to Orange County crime lab retention procedures on January 14, 2004."

On the night of December 12, 2001, Investigator Brian McConnell, along with Sergeant Gary Worrall and

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[2] The police officers also collected other samples of suspected narcotics which were not tested because they "appeared to be visually similar to one of the other items tested."

another detective, conducted a search of defendant's residence. They found 27.2 grams of a substance which presumptively tested positive for cocaine. They also found a cashier's check in an amount over $1,000, and over $1,000 in cash and coins. McConnell testified that a normal dose of cocaine would weigh between a 10th and a quarter of a gram. In light of the quantity of cocaine found, McConnell expressed his opinion that it was possessed for sale.[3]

Also on December 12, defendant was interviewed by Officer Marc Odom. Odom wrote down statements defendant made during that interview in a report. Defendant told Odom that he had come upon the checkpoint, "got nervous," and "tried to conceal a duffel bag that contained some narcotics." Odom testified that defendant said, "[h]is accelerator got stuck. He wasn't able to stop his vehicle, causing him to go through the check point. And when he tried to stop, he said his brake pedal wouldn't press down and he—that a 7–Up bottle that's, that he had purchased earlier in the day had rolled behind the brake, not allowing him to stop his vehicle. [¶] And he just remembers police officers yelling at him to get out of the car." Defendant said he did not hear the police officers behind him trying to pull him over, and he did not remember "ramming into a police car." Defendant also told Odom that he had been using cocaine for the previous few days and had most recently used cocaine at 2:00 p.m. that day. Defendant said he had been using cocaine and heroin for 15 to 20 years.

Detective Ron Furtado also interviewed defendant that evening. It appeared to Furtado that defendant

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[3] In a later search of defendant's residence, $500,000 was found under the house.

understood the questions being asked of him. Furtado did not notice any objective symptoms that defendant was under the influence of narcotics. Defendant stated to Furtado that "he had [gone] for about three streets when the police caught up to him" and that he "almost killed a police officer." Defendant told Furtado that when he saw the cones for the checkpoint, he thought, "[o]h, shit. Cones," grabbed his big duffel bag, and threw it in the backseat. He said he "went around and into a neighborhood" and "ended up at a riverbed." Defendant further stated, "I didn't even know that the guy, all right, a police officer got hurt."

Furtado testified that he made an audio and video tape of that interview. He did not know if the tape had been destroyed. (The record is unclear as to when the tape went missing.) Furtado testified that in his experience, individuals who use heroin and cocaine at the same time "are trying to achieve some type of normalcy. To counteract, they want the effect of feeling the stimulant, the rush, the increased stamina, increased energy level. But yet they don't want to show the objective symptoms of that." Furtado testified heroin can be used to counteract the symptoms of cocaine use.

The confirmed cocaine and heroin found in defendant's truck, along with the suspected narcotics found in the truck and at defendant's house (collectively, the narcotics evidence), were returned by the Orange County crime lab to the Buena Park Police Department on August 28, 2002. Those items were destroyed by the Buena Park Police Department on October 10, 2007.

Defendant testified at trial that he started using cocaine when he was 14 years old and first used heroin when he was 16 years old; he began using drugs daily

when he was 17 years old. He also testified he supported himself by growing and selling marijuana. He stated he purchased cocaine and heroin in large quantities to get a better price and the drugs found in his truck and residence were his, for his personal use. Defendant testified his memory of the incident underlying the charged offenses was poor because he was on drugs at the time, and further testified he did not try to run over a police officer at the checkpoint and was unaware he had hit a police car in the cul-de-sac.

PROCEDURAL BACKGROUND

On December 14, 2001, the district attorney filed a felony complaint in Orange County Superior Court, alleging defendant committed assault and narcotics offenses, and a hit and run offense. An amended felony complaint was filed on December 26, alleging defendant committed offenses which included possession of heroin for sale; possession of methamphetamine for sale; sale or transportation of cocaine, methamphetamine, and heroin; hit and run with property damage; and assault with a deadly weapon on a peace officer.

On December 27, 2001, defendant was arrested by federal authorities.[4] On January 14, 2002, after defendant did not appear in Orange County Superior Court as to the offenses alleged in the amended felony complaint, the court ordered a warrant issued and held for defendant until February 1, on which date a pretrial hearing was set. When defendant did not appear in

[4] Defendant was arrested by federal authorities for marijuana cultivation. He pleaded guilty and was sentenced to 10 years in federal prison. He has been in custody since December 27, 2001.

court on February 1 because he was in federal custody, the court ordered the warrant released.

On July 5, 2007, the district attorney received defendant's demand for trial under section 1381.5; defendant was still serving time in a federal prison. On August 13, the district attorney executed a request for temporary custody of defendant for transfer to Orange County Superior Court for trial on the offenses alleged in the amended felony complaint. The district attorney's request was endorsed by a superior court judge on August 16. In a letter dated October 26, 2007, the district attorney was notified of the assent of the federal authorities[5] to make defendant available for trial in state court.

Defendant first appeared in Orange County Superior Court on November 13, 2007. Defendant moved to dismiss the action. The preliminary hearing and the hearing on the motion to dismiss were initially scheduled for November 27, but were rescheduled to December 6, and then to January 3, 2008, with defendant's agreement that no time between November 27, 2007 and January 3, 2008 would be counted as part of the 90–day time period set forth in section 1381.5.[6]

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[5] By September 7, 2007, defendant was transferred from Taft federal prison to Lompoc federal prison.

[6] As discussed in detail *post,* section 1381.5 requires that upon receiving a demand for trial from a defendant in federal custody, the district attorney must "promptly inquire" of the federal authorities as to the defendant's availability to be tried in state court. Upon receipt of the federal authorities' assent to make the defendant available, section 1381.5 requires that the defendant be brought to trial within 90 days of the district attorney's receipt of such assent.

On January 23, 2008, defendant filed a written motion to dismiss the felony complaint on the ground section 1381.5 was violated by the district attorney's failure to promptly seek the federal authorities' assent in making defendant available for trial. The preliminary hearing and the hearing on the motion to dismiss were rescheduled to January 28, then to February 11, and then to February 19. The minute order, dated February 11, 2008, stated, "[c]ounsel stipulate[d] that they are within reasonable time."

Following the preliminary hearing, the trial court ordered defendant held to answer on February 27, 2008. The court denied defendant's motion to dismiss, stating that the 40–day period between the district attorney's receipt of defendant's demand for trial and inquiry of the federal authorities at the correctional facility where defendant was incarcerated constituted a sufficiently prompt inquiry "[u]nder the circumstances." In addition, the trial court stated: "Having reviewed the file more carefully and the judge's notes, I'm going to deny the motion to dismiss because there was a waiver of [section] 1381 rights to and including January 3rd. Waivers were on November 27th, 2007 to December 6th. And on December 6th, defendant again waives [section] 1381 rights to be tolled to next preliminary hearing date which was January 3rd."

On February 27, 2008, the district attorney filed an information alleging defendant committed the following offenses: (1) two counts of aggravated assault on a peace officer in violation of section 245, subdivision (c) (counts 1 and 2); (2) possession of cocaine for sale in violation of Health and Safety Code section 11351 (count 3); (3) sale or transportation of cocaine in violation of Health and Safety Code section 11352, subdivision (a) (count 4); (4)

sale or transportation of heroin in violation of Health and Safety Code section 11352, subdivision (a) (count 5); (5) possession of heroin for sale in violation of Health and Safety Code section 11351 (count 6); (6) sale or transportation of methamphetamine in violation of Health and Safety Code section 11379, subdivision (a) (count 7); and (7) hit and run with property damage in violation of Vehicle Code section 20002, subdivision (a) (count 8).

On March 21, 2008, the trial court's minute order stated the jury trial was set on April 2, 2008. Also, it stated, "[n]o time waiver and all right[s] are preserved."

On April 1, 2008, defendant filed another motion to dismiss the felony complaint, arguing that the 90–day period provided under section 1381.5 had expired and that April 2 would be the 108th day since the 90–day period was triggered. The prosecution filed an opposition to the motion.

On April 2, 2008, the trial court denied the motion to dismiss, and the jury trial was continued to April 9 and then to April 16, at the request of defendant. The minute order, dated April 9, 2008, stated defendant expressly waived the statutory time for a jury trial. Again at defendant's request, the jury trial was continued to April 21. On April 21, the prosecution and defendant's counsel answered ready for trial which was trailed to April 22.

On April 22, 2008, defendant filed a motion to set aside the information under section 995, on the grounds the prosecution (1) failed to provide exculpatory evidence, identified as a police report and photographs, to the defense prior to the preliminary hearing; (2)

presented false evidence to the magistrate (specifically, representations that certain evidence was analyzed by the Orange County forensics laboratory, which was not so analyzed); and (3) failed to present any admissible evidence that certain evidence contained controlled substances. The prosecution filed an opposition. Defendant withdrew the motion.

On April 23, 2008, the trial court granted defendant's request to continue the trial until April 24. Defendant's counsel orally reasserted defendant's motion to dismiss for the district attorney's failure to comply with section 1381.5. On April 24, a jury was selected, counsel made their opening statements, and the prosecution called its first two witnesses.

On April 29, 2008, the court denied defendant's motion to dismiss on section 1381.5 grounds. Defendant moved to dismiss the narcotics offenses on the ground that evidence had been destroyed by the Buena Park Police Department on October 10, 2007. The court deemed that motion as a due process motion and denied it because there was no bad faith and "no exculpatory value was known as to this evidence."

On April 30, 2008, the court granted defendant's motion to dismiss count 7 (sale or transportation of methamphetamine) and it was dismissed.

On May 2, 2008, the jury found defendant guilty as charged as to counts 1, 2, 3, 4, 5, and 8. As to count 6, the jury found defendant guilty of violating Health and Safety Code section 11350, possession of heroin, which is a lesser included offense of count 6.

On June 11, 2008, defendant filed a motion to dismiss on the ground his due process and speedy trial rights under the California Constitution had been violated. On July 11, defendant filed a motion for a new trial on the grounds a police officer gave false testimony against defendant, there was newly discovered evidence of a material witness, errors had been committed by the Buena Park Police Department and the Orange County crime lab in destroying evidence, and insufficient evidence supported counts 1, 2, 3, 5, and 8. On August 15, defendant filed a petition for a writ of habeas corpus in superior court, arguing he had received ineffective assistance of counsel and false evidence had been presented to the jury.

After a number of continuances and hearings, in October 2009, the trial court denied the petition for a writ of habeas corpus, the motion for a new trial, and the motion to dismiss brought on the grounds of violations of defendant's rights to a speedy trial and due process.

Defendant was sentenced to a total prison term of 8 years to run consecutive to defendant's federal case sentence. Defendant appealed.

DISCUSSION

I.

SPEEDY TRIAL REQUIREMENT UNDER SECTION 1381.5

"Section 1381.5 permits federal prisoners with pending criminal state actions to request to be brought to court for trial or for sentencing in the state case.

When the district attorney receives a defendant's demand, he or she 'shall promptly inquire' of the federal warden 'whether and when such defendant can be released for trial or for sentencing' in the state case. [Citation.] The district attorney must bring the defendant to trial or for sentencing within 90 days of receiving word from the federal authorities that defendant will be released for trial or for sentencing. If the defendant is not brought to trial or for sentencing as provided, section 1381.5 states, 'the court in which the action is pending shall, on motion or suggestion of the ... defendant or his counsel, dismiss the action.' " (*People v. Wagner* (2009) 45 Cal.4th 1039, 1051, fn. 6, 90 Cal.Rptr.3d 26, 201 P.3d 1168.)[7]

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[7] Section 1381.5 provides in full: "Whenever a defendant has been convicted of a crime and has entered upon a term of imprisonment therefor in a federal correctional institution located in this state, and at the time of entry upon such term of imprisonment or at any time during such term of imprisonment there is pending in any court of this state any criminal indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced the district attorney of the county in which such matters are pending, upon receiving from such defendant a request that he be brought to trial or for sentencing, shall promptly inquire of the warden or other head of the federal correctional institution in which such defendant is confined whether and when such defendant can be released for trial or for sentencing. If an assent from authorized federal authorities for release of the defendant for trial or sentencing is received by the district attorney he shall bring him to trial or sentencing within 90 days after receipt of such assent, unless the federal authorities specify a date of release after 90 days, in which event the district attorney shall bring the prisoner to trial or sentencing at such specified time, or unless the defendant requests, in open court, and receives, or, in open court, consents to, a continuance, in which event he may be brought to trial or sentencing within 90 days from such request or consent. [¶] If a defendant is not brought to trial or for sentencing as provided by this section, the court in which the action is pending shall, on motion or suggestion of the district attorney, or representative of the United States, or the defendant or his counsel, dismiss the action."

Defendant contends section 1381.5 was violated in two respects. First, he argues that although the district attorney received his demand for trial on July 5, 2007, "[i]t was not until August 13, 2007 that the District Attorney executed a request for the transfer of [defendant] to Orange County for trial, and the request was not endorsed by a Superior Court judge until August 16, 2007.... There is no evidence of when it was actually sent to the federal authorities. Thus, there is no evidence that the District Attorney 'promptly inquired' of federal authorities after receiving [defendant]'s demand for trial on July 5."

The trial court found that under the circumstances, the district attorney satisfied the "promptly inquire" requirement of section 1381.5. We cannot say the trial court erred in so finding. This case is distinguishable from *People v. Brown* (1968) 260 Cal.App.2d 745, 750–751, 67 Cal.Rptr. 288, in which the appellate court concluded the "promptly inquire" requirement of section 1381.5 was not satisfied because the district attorney took no action on the defendant's trial demand for nine months.

Defendant next contends section 1381.5 was also violated because he was not brought to trial within 90 days of the date the district attorney received the federal authorities' assent to make him available for trial. In the opening brief, defendant argues: "The 'consent' from the federal authorities that commenced the 90 days period in Section 1381.5 running was dated October 26, 2007. Ninety days after October 26, 2007 is January 24, 2008. However, the time between November 27, 2007 and December 6, 2007 and both of those days were excluded from the 90 days period by agreement of [defendant] as authorized in Section 1381.5. That

amounts to 10 days, and thus the 90 days under Section 1381.5 ran ten days after January 24, 2008, or on February 3, 2008."

In the respondent's brief, the Attorney General provides a different analysis of the running of the 90–day period as follows: "[Defendant] first appeared in court on November 13, 2007, eighteen days after the federal authorities assented to the district attorney's request (October 26, 2007).... On November 27, 2007 (day 32), [defendant] agreed to toll the ninety day period until December 6, 2007, then the ninety days was again tolled until January 3, 2008.... After January 3, 2008, [defendant] repeatedly agreed to delay his preliminary hearing, thereby resulting in a delay of his trial.... As the trial court correctly noted ..., by failing to insist on having his preliminary hearing date, [defendant] failed to protect his speedy trial right. Moreover, on February ... 27, 2008 (day 87), [defendant] was arraigned on the Information.... At that time, without objection, a trial setting conference was set for March 21, 2008, beyond the ninety days."[8]

We do not need to decide whether the 90–day requirement of section 1381.5 was violated because defendant failed to show he suffered prejudice as a

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[8] In *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 94, 106 Cal.Rptr. 786, 507 P.2d 90, the California Supreme Court stated: "*The only duty placed upon an accused in protecting his right to a speedy trial is to object when his trial is set for a date beyond the statutory period* and then move to dismiss once that period expires, or merely move to dismiss if the statutory period expires without a trial date being set. The petitioner has done this and more. Although not required of him to perfect his speedy trial claim, petitioner in fact repeatedly attempted to remind the authorities of his status and of the need for his retrial, and there are no circumstances which suggest that he waived his right to a speedy trial." (Italics added.)

result of any such violation. (*Martinez, supra,* 22 Cal.4th at p. 769, 94 Cal.Rptr.2d 381, 996 P.2d 32 [“ ‘[O]nce a defendant has been tried and convicted, the state Constitution in article VI, section 13, forbids reversal for nonprejudicial error,’ and so on appeal from a judgment of conviction a defendant asserting a statutory speedy trial claim must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review”].) Defendant acknowledges that in determining the extent to which he suffered any prejudice as a result of the district attorney's violation of section 1381.5, the relevant timeframe is “the time between the demand (June 2007) and the trial (April 2008).”

Defendant contends, “the record amply demonstrates that the delay following [defendant]'s demand for trial has ‘impaired his ability to defend against the charged crime[s]’ “ because “the following evidence was destroyed by the authorities *after* [defendant] was brought back to Orange County for trial”: (1) all of the alleged narcotics in the case were destroyed approximately three months after he demanded trial; (2) “Furtado testified that there was an audio and video tape that would have completely laid out the demeanor, the quality of [defendant]'s statements and his appearance, which had been destroyed”; and (3) blood that was drawn from defendant on December 12, 2001 and tested positive for cocaine, opiates, and “methamphetamine and related compounds” had been destroyed.

Nothing in the record shows when the audio and video tape Furtado testified he had made during his interview of defendant went missing or was destroyed; nothing suggests it was lost or destroyed during the

time relevant to our section 1381.5 analysis (between June 2007 and April 2008). Defendant stipulated that his blood sample was destroyed in January 2004—over three years before the relevant time period. Thus, the loss of the audio and video tape and the blood sample cannot support defendant's argument of prejudice suffered as a result of any section 1381.5 violation. In any event, and as addressed in greater detail *post* in parts II and III, even if such evidence had been destroyed or lost during the relevant time period, it was immaterial under the circumstances of this case.

As for the narcotics evidence that was destroyed in October 2007, defendant argues: "Because ... all of the drug evidence (including the syringes, spoons and prescription bottles of methadone) had been destroyed prior to the trial but after [defendant] demanded a trial, the delay in acting on that demand resulted in significant prejudice to him in the form of whole categories of evidence being lost to him and in preventing him from being able to prove that both cocaine and heroin were in the spoons and syringes in the truck, that he had them in his system afterwards, and that the combined effect of the two drugs he took was to mask the effect of one another was to render him incapable of wilfully assaulting anyone, to render him unaware that anyone in the accident was a police officer, and to render him unaware that he had been in an accident, and thus had a duty to stop. [¶] This is the classic form of prejudice flowing from denial of a statutory speedy trial right."

Defendant has failed to demonstrate that he suffered any prejudice as a result of the destruction of the narcotics evidence for several reasons. First, trial evidence established that defendant was under the

influence of narcotics at the time of the charged offenses and he admitted possession and use of heroin and cocaine on the day of the offenses; that defendant personally used narcotics was well established at trial. Thus, the unavailability of the spoons and syringes found in the truck (as well as defendant's blood sample) was not prejudicial.

Second, defendant does not contend the laboratory testing methods that were used on the tested evidence were improper or the results were inaccurate. Third, Furtado testified about the "masking effect" the simultaneous use of cocaine and heroin might have, which would explain defendant presenting the appearance of not being under the influence. Fourth, defendant speculates that further testing would have demonstrated the narcotics evidence as particularly pure. Even if further testing would have established the narcotics evidence as particularly pure, such evidence would not prove defendant's possession was solely for personal use, not for sales; defendant might not yet added a cutting agent before dividing the large quantities of the narcotics evidence found in his possession into saleable amounts.

Finally, the conclusion defendant did not suffer prejudice as a result of the destruction of the narcotics evidence is consistent with defendant's decision not to make any effort to locate and retest the narcotics evidence before trial. Defendant argues in the opening brief: "Without the substances found being retained, [defendant] could not re-weigh them, re-test them or test them for purity to show that he cut them for personal use, rather than for maximum profit." Defendant's argument is purely hypothetical as the record shows defendant never made an attempt to reweigh, retest, or

test for purity the narcotics evidence. The record shows defendant did not raise this issue until the middle of trial, on April 29, 2008.

Defendant has failed to demonstrate he suffered prejudice as a result of any violation of section 1381.5.

II.

THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL

In the opening brief, defendant argues the judgment should be reversed because his right to a speedy trial under the California Constitution was violated. That portion of the brief contains a lengthy discussion of defendant's right to a speedy trial under the United States Constitution and suggests the judgment should be reversed under the federal Constitution as well.[9] Even if we were to assume both arguments were properly raised in this appeal, as discussed *post,* both arguments lack merit.

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[9] In the reply brief, defendant argues: "[I]n the event this Court does not reverse on any other ground, it is urged to address the argument [defendant] makes at pp. 46–51, 106 Cal.Rptr. 786, 507 P.2d 90 mentioned above, to allow him to preserve this issue for further possible review. In other words, *[defendant] is entitled to a ruling on his Sixth Amendment Speedy Trial argument.*" (Fn.omitted.)

A.

Defendant's Constitutional Right to a Speedy Trial Under the United States Constitution Was Not Violated Because He Was Brought to Trial Within Three Months of the Filing of the Information.

"The state and federal Constitutions guarantee a defendant facing criminal charges the right to a speedy trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right protects an accused from facing an unduly lengthy period in which criminal charges are pending. [Citation.]" (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1193, 117 Cal.Rptr.3d 327, 241 P.3d 828.) "But the rights differ from each other in two significant respects. First, the state constitutional right arises upon the filing of a felony complaint, whereas the federal right does not come into play until an indictment or an information has been filed or the defendant has been arrested and held to answer." (*People v. Lowe* (2007) 40 Cal.4th 937, 942, 56 Cal.Rptr.3d 209, 154 P.3d 358.)

The California Supreme Court stated in *Martinez, supra,* 22 Cal.4th at page 755, 94 Cal.Rptr.2d 381, 996 P.2d 32: "The United States Supreme Court has defined the point at which the federal speedy trial right begins to operate: '[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provisions of the Sixth Amendment.' "

Here, the preliminary hearing occurred on February 19, 2008 after which defendant was held to answer on the offenses charged in the amended felony complaint.

The information was thereafter filed on February 27, 2008. Trial began in April 2008 and the jury returned its verdict on May 2. Even if we were to consider the date of the preliminary hearing (February 19) as the "point at which the federal speedy trial begins to operate" (*Martinez, supra,* 22 Cal.4th at p. 755, 94 Cal.Rptr.2d 381, 996 P.2d 32), the record does not reflect any delay in bringing defendant to trial. Quite the contrary, the trial was completed within three months of that date. We find no federal constitutional violation.

Defendant argues in the reply brief that "various reasons support the conclusion that the current state of California law on this point is wrong," and seeks to "preserve this issue for further possible review." As discussed *ante, People v. Lowe, supra,* 40 Cal.4th at page 942, 56 Cal.Rptr.3d 209, 154 P.3d 358, and *Martinez, supra,* 22 Cal.4th at page 755, 94 Cal.Rptr.2d 381, 996 P.2d 32, clearly articulate the rule that the federal speedy trial right does not begin to operate before the formal indictment or information, or " 'the actual restraints imposed by arrest and holding to answer a criminal charge' " (*Martinez, supra,* at p. 755, 94 Cal.Rptr.2d 381, 996 P.2d 32). We are bound by the decisions of the California Supreme Court and we thus follow them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

B.

Defendant Has Failed to Demonstrate Prejudice in Support of His State Constitutional Speedy Trial Violation Claim.

"Under the *state* Constitution, the filing of a felony complaint is sufficient to trigger the protection of the speedy trial right." (*Martinez, supra,* 22 Cal.4th at p. 754, 94 Cal.Rptr.2d 381, 996 P.2d 32.) "Under the *state* Constitution's speedy trial right, however, no presumption of prejudice arises from delay after the filing of a complaint and before arrest or formal accusation by indictment or information [citation]; rather, in this situation a defendant seeking dismissal must affirmatively demonstrate prejudice [citation]." (*Id.* at p. 755, 94 Cal.Rptr.2d 381, 996 P.2d 32.) "The defense has the initial burden of showing prejudice from a delay in bringing the defendant to trial. Once the defense satisfies this burden, the prosecution must show justification for the delay. If the prosecution does that, the trial court must balance the prejudice to the defendant resulting from the delay against the prosecution's justification for the delay." (*People v. Lowe, supra,* 40 Cal.4th at p. 942, 56 Cal.Rptr.3d 209, 154 P.3d 358.)

Defendant argues he suffered the following "categories of prejudice" as a result of the delay in prosecution of the charged offenses: (1) the blood sample was destroyed and thus unavailable for further testing; (2) the audio and video tape of defendant's interview with Furtado went missing or was destroyed; and (3) certain witnesses' memories have faded.

Defendant did not establish how the destruction of his sample of blood in 2004 prejudiced his defense. The blood sample tested positive for the presence of cocaine, opiates, and "methamphetamine and/or related compounds." (He was acquitted of the only offense involving methamphetamine.) Defendant testified that at the time of the charged offenses, he was under the

influence of cocaine and heroin as he had used cocaine at 2:00 that afternoon. Defendant does not challenge the methodology employed in the testing of the blood sample, and does not challenge the results. Instead, he argues further testing could have been done to more precisely identify which drugs were in defendant's system on December 12, 2001. Defendant fails to explain how that evidence would have assisted him in defending against the charged offenses.

As to the audio and video tape of defendant's interview with Furtado on December 12, 2001, as discussed *ante,* the record does not show when the tape was lost or destroyed. It might have been immediately destroyed by reusing the tape to record a different interview. There is no evidence the loss of that tape was attributable to the delay in bringing this case to trial. Furthermore, the contents of the tape are unknown; the record does not show that anyone ever reviewed the tape's contents or quality, and whether it might have benefited the defense is speculative at best. Testimony was provided that defendant did not appear to be under the influence at the time of the charged offenses. On the other hand, testimony showed that an individual under the influence of both cocaine and heroin might not appear to be under the influence of anything given the masking effect that combination of drugs can have as to the symptoms of intoxication. Furthermore, the jury was informed that defendant's blood indeed tested positive for narcotics. Thus, even if the tape contained footage of defendant appearing to be under the influence of narcotics by, for example, slurring his speech, such evidence would be cumulative of the evidence already produced on this point. (See *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506, 149 Cal.Rptr. 597, 585 P.2d 219 [holding the defendant not prejudiced by delay

because loss of memory regarding details of break-ins were "not of crucial significance since he ha[d] admitted that they occurred" and "his primary defense relate[d] to his intent at the time the crimes were committed"].)

Defendant's opening brief cites a number of examples of trial witnesses testifying that they could not remember or be certain about particular facts or circumstances they were asked about on the stand. Defendant contends that testimony shows he was prejudiced as a result of the trial delay. Although it is true that prejudice might be shown by witnesses' fading memories attributable to the passage of time, the alleged lost evidence must make a difference in the defense of the case or result in the denial of a fair trial. (*Scherling v. Superior Court, supra,* 22 Cal.3d at p. 506, 149 Cal.Rptr. 597, 585 P.2d 219.)

Defendant cites the following testimony in support of his contention he was prejudiced as a result of witnesses' faded memories about the events underlying the charged offenses.

1. Lovchik testified (a) as far as he could recall, the diagram shown to him by counsel was consistent with where the vehicles were when he drove down the street on December 12, 2001; (b) he probably stopped his motorcycle just north of the collision; (c) he did not remember if there were other sirens activated when he arrived at the scene; (d) he did not recall formulating an opinion whether defendant appeared under the influence at that time; (e) when he heard the officers tell defendant to shut off the truck, he did not remember whether the other officers had their weapons drawn or what Lovchik was doing; (f) when Lovchik reached into defendant's truck to turn off the ignition, he did not

recall defendant trying to stop him, which officer was restraining defendant, or whether anyone covered defendant's mouth; (g) Lovchik did not remember whether he was touching defendant when he was removed from the truck or whether anyone struck defendant with a weapon; (h) he was not certain whether the soda can and the baggie fell out of the truck at the time defendant was taken from the truck; and (i) he did not know how long he remained on the scene.

2. Tamara Banks testified (a) she did not recall whether she found a pager in defendant's truck; (b) she did not remember how much of the substance she suspected was methamphetamine was found in the truck; and (c) she did not believe any pay/owe sheets were retrieved, but did not recall.

3. D.T. testified he did not remember the person in the pickup truck or whether a lot of cars were parked on either side of the street the day of the charged offenses. He did not remember how defendant was removed from the truck, whether he saw any officers hit defendant, or how long it took for the paramedics to arrive. He remembered the police were shouting for a while, but he did not remember what they were saying. Vilchis testified she did not remember a collision or whether the police officers demanded that defendant get out of the truck. She did not remember seeing damage to the police car or telling an officer the truck had backed out of the driveway and struck the police car.

4. Bretta testified he did not remember who the third chase officer was that day. McConnell testified that he and two other officers searched defendant's residence on the day of the incident and he believed they found cocaine at the same time. He vaguely recalled it

being located "on a dresser or *something*." He also did not remember to whom the cashier's check he found was made out and could only guess how much a gram of heroin cost in 2001. Worrall did not recall whether he did paperwork regarding asset forfeiture or the approximate amount of cash found at defendant's residence.

5. Furtado did not remember if he saw defendant at the scene or whether he saw defendant or Odom before defendant was taken to the hospital. Furtado did not remember if he seized any bindles from defendant's truck. Odom remembered from his report that defendant felt pain following the collision, but not from his memory. Odom did not remember whether defendant was handcuffed at the hospital.[10]

We have carefully considered each of these items. Even assuming the above identified witnesses' loss of memory on those points is fairly attributable to the delay in bringing defendant to trial in this case, what they did not remember at trial was not material for the trier of fact to resolve the issues under the circumstances of this case.

Defendant did not establish reversible error.

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[10] In his appellate briefs, defendant mentions the death of certain witnesses before trial. Defendant has not provided any analysis of how he was prejudiced by any deceased witness's unavailability at trial.

III.

DUE PROCESS CHALLENGE BASED ON DESTRUCTION OR LOSS OF EVIDENCE IS WITHOUT MERIT.

Defendant contends he was denied a fair trial in violation of his due process rights because the government was responsible for the destruction or loss of potentially exculpatory evidence.[FN10] For the reasons we discuss *post,* defendant's argument lacks merit.

> FN10. Defendant has not shown that the prosecution failed to disclose evidence in its possession. In any event, "[i]t is plain that the federal constitutional provision 'requires disclosure [by the prosecution] *only* of evidence that is both favorable to the accused and "material either to guilt or to punishment." ' [Citation.] Hence, it is not correct to state, for example, that 'the prosecution's duty of disclosure extends to *all* evidence that reasonably appears favorable to the accused....' [Citation.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5, 37 Cal.Rptr.2d 446, 887 P.2d 527.)

In *People v. Carter, supra,* 36 Cal.4th at page 1246, 32 Cal.Rptr.3d 838, 117 P.3d 544, the California Supreme Court stated: " 'Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." [Citations.] To fall within the scope of this duty, the evidence "must both possess an

exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." [Citations.]' "

Defendant argues his due process rights were violated by destruction or loss of the audio and video tape, the narcotics evidence, and the blood sample. As to the audio and video tape, defendant argues it might have shown objective signs of his being under the influence and supported his defense that he was extremely high on December 12, 2001. As we discussed *ante,* whether the tape might have shown objective signs of defendant's being under the influence is pure speculation. It is not clear when the tape initially disappeared or what it contained. In any event, defendant testified at trial that he was under the influence of heroin and cocaine at the time of the incident underlying the charged offenses and testing on his blood sample confirmed the presence of cocaine, methamphetamine and/or related compounds, and opiates in his system. Even if the audio and video tape showed defendant exhibited signs of being under the influence of narcotics, it would be cumulative and thus not material. (See *In re Miranda* (2008) 43 Cal.4th 541, 575, 76 Cal.Rptr.3d 172, 182 P.3d 513 [" 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different" ' "].)

As to the destruction of the narcotics evidence and the blood sample, " '[t]he state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected

to tests, the results of which might have exonerated the defendant." [Citation.] In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." [Citations.] [¶] 'On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to supports its ruling.' " (*People v. Carter, supra,* 36 Cal.4th at p. 1246, 32 Cal.Rptr.3d 838, 117 P.3d 544; *People v. DePriest* (2007) 42 Cal.4th 1, 42, 63 Cal.Rptr.3d 896, 163 P.3d 896 [same].) As discussed in detail *ante,* defendant has failed to demonstrate how the inability to conduct further testing on the narcotics evidence and the blood sample under the circumstances of this case might have exonerated him. Furthermore, defendant has not produced evidence of bad faith on the part of the state in the destruction of such evidence.

We find no due process violation.

DISPOSITION

The judgment is affirmed.

WE CONCUR: O'LEARY, Acting P.J., and IKOLA, J.

Supreme Court
FILED
September 21, 2011
Frederick K. Ohlrich, Clerk
_____Deputy

Court of Appeal, Fourth Appellate District,
Division Three - No. G042810

S194899

IN THE SUPREME COURT OF CALIFORNIA

In Banc

THE PEOPLE,
Plaintiff and Respondent,

v.

MICHAEL MANN,
Defendant and Appellant

The petition for review is denied.

Werdegar, J., was absent and did not participate.

CANTIL-SAKAUYE
Chief Justice

California Penal Code Section 804, subd. (c)

§ 804 Commencement of a prosecution for an offense

Except as otherwise provided in this chapter, for the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs: . . . (c) the defendant is arraigned on a complaint that charges the defendant with a felony.