

Original

HC-001

Name: ZAVIER MARKS
Address: CSATE B3-05-0648
P.O. Box 5248
Corcoran, CA 93212

SUPREME COURT
FILED

DEC 10 2024

CDCR or ID Number: BF2484

Jorge Navarrete Clerk
S.K.
Deputy

CALIFORNIA SUPREME COURT

(Court)

ZAVIER MARKS
Petitioner
B. Phillips ^{v.} WARDEN
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. S288280

(To be supplied by the Clerk of the Court)
Evidentiary hearing requested

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction or sentence and are filing this petition in the superior court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the superior court, you should file it in the county in which you are confined.

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original of the petition and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

RECEIVED
DEC 10 2024

Approved by the Judicial Council of California for use under rules 4.551 (as amended January 1, 2024) and 8.380 (as amended January 1, 2020) of the California Rules of Court. Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- ☐ A conviction ☐ Parole ☐ A violation of the Racial Justice Act under Penal Code section 745(a)
- ☒ A sentence ☐ Credits
- ☐ Jail or prison conditions ☐ Prison discipline
- ☐ Other (specify): _____

1. Your name: Zavier M. Marks
2. a. Where are you incarcerated? Substance Abuse Treatment Facility - SP
- b. If you are not incarcerated, are you on supervised release, such as probation, parole, mandatory supervision, or postrelease community supervision?
- ☐ Yes (specify): _____
- ☒ No
3. Why are you in custody or on supervised release? ☒ Criminal conviction ☐ Civil commitment
- Answer items a through i to the best of your ability.
- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").
- Premeditated Attempted Murder; Shooting at an inhabited dwelling.
- b. Penal or other code sections: PC-664-187, PC-246
- c. Name and location of sentencing or committing court:
- Rancho Cucamonga Superior Court, San Bernardino Co.
- d. Case number: FSB17002659
- e. Date convicted or committed: 11-09-17
- f. Date sentenced/Date of judgment: 01-03-18
- g. Length of sentence: 19 years to life
- h. When do you expect to be released? 05-28-30
- i. Were you represented by counsel in the trial court? ☒ Yes ☐ No If yes, state the attorney's name and address:
- James Gass
- 1200 Nevada St. Redlands, CA 92374

4. What was the LAST plea you entered? (Check one):

- ☒ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

- ☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

Ground 1

The Superior court violated petitioner's State and Federal constitutional right to due Process when it held a resentencing hearing without petitioner's knowledge, without petitioner being present and without petitioner's consent or a waiver to be present, and participate in the resentencing hearing after the court of appeal vacated his sentence on direct appeal.

Defendants have a state and federal Constitutional due Process right to be present at critical proceedings such as resentencing proceedings (Fourteenth Amendment to the U.S. Constitution, Article I, Section 15 of the California constitution; see also, *People v. Simmons* (2018) 23 Cal. App. 5th 987, 996; *People v. Rouse* (2010) 245 Cal. App. 4th 292, 300; *People v. Dodlin* (2005) 45 Cal. 4th 390, 453.) This right shall not be denied except where a defendant voluntarily, knowingly, intelligently and expressly waive his right to be present during a critical proceeding.

On March 13th, 2020, on direct appeal the Court of appeal, vacated petitioner's sentence and remanded the case for the trial court to exercise its discretion whether to strike the 5-year serious felony prior, pursuant to Senate Bill 1393.

On August 13th, 2020, the court held a resentencing hearing with the state and court appointed Counsel (James Gass), but

Violence involved, including petitioner's involvement." (See exhibit A)

By the Courts admission, it considered only aggravating factors, and did not have before it mitigating evidence for its consideration before deciding whether to strike the 5-year serious felony prior. Arguably, this is because petitioner was denied his right to be present and to participate.

Had Petitioner been present he would have presented mitigating evidence of his positive post-conviction in-prison conduct, reduced lower security level custody and personal testimony or written statement in mitigation as to why the court should exercise its discretion to strike the 5-year prior. Had the court considered the mitigating evidence and struck the 5-year prior, Petitioner's sentence would have been significantly reduced and made petitioner eligible for parole in 2024 instead of 2029.

In concluding, Petitioner was prejudiced by being denied his right to be present at the resentencing hearing on August 13th, 2020, and he has made a prima facie showing sufficient for an issuance of an order to show cause.

Ground 2

Counsel rendered ineffective assistance by (1) failing to have Petitioner present at his resentencing hearing. (2) Denied petitioner State and Federal due process right to participate in critical Sentencing Proceedings and (3) Did not have petitioner consent or waive his right to be present and participate in his resentencing hearing. This violates the Sixth and Fourteenth amendments to the U.S. Constitution and state equivalent.

As stated in Ground 1, On March 15th, 2020, on direct appeal, the court of appeal vacated petitioner's sentence and remanded the case for the trial court to exercise its discretion whether to strike the 5-year serious felony prior.

On August 13th, 2020, A resentencing hearing was held with the court, the state and state appointed counsel (James Cass). However Petitioner was not present, and did not consent or waive his right to be present and participate at the critical stage of resentencing. Due to the unconstitutional denial of petitioner's right to be present, he was not able to confer with counsel, advise counsel his desire to present mitigating evidence of his positive post-conviction in-prison conduct, reduction in security level custody and to present testimony or written statement to the court in mitigation and in consideration of its discretion whether to strike the 5-year prior and resentence

The Superior court's admission within the February 20, 2024, Denial of the writ of habeas corpus, acknowledges it only considered aggravating factors when deciding not to strike the 5-year prior. (See exhibit ~~D~~). If Petitioner had the opportunity to present mitigating evidence and the court exercised its discretion to strike the 5-year prior, Petitioner's sentence would have been significantly reduced, rendering him eligible for parole in 2029 instead of 2030.

There is a reasonable Probability, but for Counsel's deficient performance and prejudice therefrom, Petitioner would have received a more favorable outcome at the resentencing hearing. Petitioner has made a Prima facie showing, sufficient to issue an order to show cause.

Argument I

PETITIONER HAS MADE A PRIMA FACIE CASE FOR RELIEF AND HIS CLAIMS ARE NOT PROCEDURALLY BARRED AS UNTIMELY BECAUSE HE DID NOT RECEIVE NOTICE OF THE AUGUST 13, 2020, RESENTENCING HEARING, THE RULING, NOR HIS RIGHT TO APPEAL UNTIL SEPTEMBER 2023.

A. Petitioner had a Constitutional right to be present at the August 13, 2020, resentencing hearing.

"A defendant has the constitutional right to be present in court ... to allow him to participate at a critical stage and enhance the fairness of the proceeding (People v. Basler (2022) 80 Cal. App. 5th 46, 57; citing People v. Flinner (2020) 10 Cal. 5th 686, 710). Resentencing is a critical stage of a defendant's case (People v. Nieves (2021) 11 Cal. 5th 404, 508; People v. Guerrero (2022) 76 Cal. App. 5th 329 [Court erred by proceeding in defendant's absence with resentencing hearing to consider mitigating factors of youth when exercising discretion to select appropriate sentence].) This right is guaranteed by the Sixth and Fourteenth Amendment to the U.S. Constitution, as well as Article I, section 15 of the California Constitution" (People v. Blacksher (2011) 52 Cal. 4th 769, 798-799).

B. Petitioner did not receive notice of the August 13, 2020, resentencing hearing, the disposition, nor his right to appeal the ruling, therefore, he did not and could not

knowingly waive his due process right to be present.

A defendant's right to be present is absolute, however, a defendant can waive this right, but the waiver must be "voluntary, knowing, and intelligent" (People v. Nieves, supra, at p. 508). In order for a waiver to be valid "At minimum, there must be some evidence that the defendant understood the right he was waiving and the consequences of doing so" (People v. Davis (2005) 36 Cal. 4th 510, 532).

Petitioner contends that he did not waive his right to be present at the August 13, 2020, resentencing hearing, he did not know a hearing was taking place, and presents the following timeline as evidence that he did not know about the August 12, 2020, resentencing proceedings until on or about September 2023.

On May 3, 2019, Petitioner filed in the San Bernardino County Superior Court a Senate Bill 1437 ("SB 1437") petition for resentencing pursuant to penal code section 1170.95.

On March 13, 2020, on direct appeal this Court vacated Petitioner's sentence and remanded to the Superior Court for resentencing so the court could determine whether to strike the 5-year enhancement (RIR at p. 2).

Petitioner was not notified by his trial attorney, James Gass, nor the San Bernardino County Superior Court of a resentencing hearing that was to be held on August 13, 2020, or any other time.

On or about December 21, 2020, Petitioner did receive notice from the San Bernardino County Superior Court that the "SB 1437" petition for resentencing that he filed, in pro per, on or about May 3, 2019, was denied.

On or about January 5, 2022, Petitioner filed in the San Bernardino County Superior Court a different petition for resentencing; this time, pursuant to Senate Bill 775 ("SB 775").

On or about March 15, 2022, Petitioner was transported from California Substance Abuse Treatment Facility and State Prison to the West Valley Detention Center to appear for his SB 775 resentencing hearing in the San Bernardino County Superior Court that was held on March 17, 2022.

Between March 2022 through August 30, 2022, Petitioner informed David Goldstein (attorney appointed to represent Petitioner's SB 775 motion) that on direct appeal the Court of Appeal ordered a hearing regarding his 5-year enhancement, which had not taken place. Mr. Goldstein informed Petitioner that he would check into it, but never followed through, or relayed that a resentencing hearing was already held on August 13, 2020.

On or about August 30, 2022, the San Bernardino County Superior Court denied the SB 775 petition for resentencing and Petitioner was transported back to state prison in October 2022.

In August 2023, after Petitioner's repeated inquiry, a jailhouse lawyer advised him to write the clerk of the San Bernardino County Superior Court about the Court of Appeals' direct appeal order for a resentencing hearing regarding the 5-year enhancement, which Petitioner did and also requested a case docket sheet.

On or about September 17, 2023, Petitioner received a response from the clerk of the San Bernardino County Superior Court that contained the August 13, 2020, Minute order of the resentencing hearing regarding the Court's decision not to strike the 5-year enhancement. It was at this time Petitioner became aware that a hearing was held, he was denied his right to be present, his presence was waived without his knowledge or consent, the court denied striking the 5-year enhancement, his appeal rights, and that he should have been notified, but was not.

Between approximately, September 17, 2023--when Petitioner first became aware of the August 13, 2020, resentencing hearing--until on about January 3, 2024, when he placed a verified writ of habeas corpus petition in the mail to the San Bernardino County Superior Court, Petitioner was conducting legal research. The research was necessary to determine whether he had legal standing and recourse to challenge the due process violation to be present at the critical August 13, 2020, resentencing proceeding. The time between September 17, 2022 and January 3, 2024, amounts to a total of 103 days.

On February 24, 2024--when the Superior Court denied the writ of habeas corpus--until filing a subsequent writ of habeas corpus petition in the Court of Appeal on April 19, 2024, approximately a 60 day gap period elapsed. During this 60 day period, Petitioner sought the assistance of a jailhouse lawyer to conduct research and revise the habeas corpus claims in efforts to make a clear and effective presentation. The California Supreme Court has held, "such a delay of up to 120 days would never be considered substantial delay, would not, by itself make the claim untimely" (Robinson v. Lewis (2020) 9 Cal. 5th 883).

The August 13, 2020, Minute order does not reflect who waived Petitioner's presence. "A defense counsel's statement he had discussed the hearing with defendant and defendant would waive his presence was not sufficient to establish a knowing and intelligent waiver as there was no evidence counsel informed defendant of his right to attend, nor evidence that defendant understood he would be unable to contribute to the discussion of certain evidence by absenting himself from the hearing" (People v. Davis, supra, at p. 532).

Petitioner contends that he did not orally, or in writing waive his right to be present at the August 13, 2020, hearing (See Exhibit "B"; Declaration of Xavier Marks). Neither the record, or corresponding writing reflect that Petitioner waived his constitutional right (People v. Velasco (2023) 97 Cal. App. 5th 663).

A factual question exists as to who waived Petitioner's constitutional due process right to be present at the hearing? The Court? Counsel? If the Court or counsel waived Petitioner's right to be present at the critical resentencing proceeding on August 13, 2020, without his knowledge then Petitioner's constitutional right to due process was violated (People v. Fedalizo (2016) 246 Cal. Appl. 4th 98, 110 ["absent defendant must authorize the acts of his counsel"]; People v. Cutting (2019) 42 Cal. App. 5th 344, 348).

Further, Respondent argues that the August 13, 2020, Minute order reflects that the Court ordered Petitioner to be notified of his right to appeal, within 60 days, the judges refusal not to strike the 5-year enhancement and that "it can be concluded that Marks was informed of his right to file an appeal from the resentencing hearing" (RIR at p. 7). However, Petitioner, as stated post, contends that he never received notice of the August 13, 2020, minute order or right to appeal. Also, Respondent's confidence is misplaced and in fact undermined by the same Minute order's suggestion of oversight and less than efficient case management.

~~Although~~ the Court did not indicate, as reflected in the August 13, 2020, minute order whether the clerk of the court, or counsel was to notify Petitioner of his appeal rights. Second, Petitioner's declaration attests that he never received notice before or after the August 13, 2020, hearing. Third, the August 13, 2020, Minute order suggests that the Superior Court's ineffective management of case notification, particularly, where the court notes, "Counsel is also alerted to the fact that Mr. Marks filed a motion for 1170.95 resentencing over a year ago in May 2019, it does not appear that this motion was ever addressed" (See Exhibit "A"; August 13, 2020, Minute order at p. 2). Thus, arguably, it is plausible to conclude, as Petitioner states, he did not receive notice of the August 13, 2020, minute order, or his right to appeal.

Petitioner has made a made a prima facie case for relief and sufficient statement of facts that would entitle him to relief (People v. Duvall (1995) 9 Cal. 4th 464, 475).

C. The petition for writ of habeas corpus is not procedurally barred as untimely because it was filed without substantial delay.

Petitioner presented both grounds for relief contained in both writ of habeas corpus petitions, in the San Bernardino County Superior Court and the Court of Appeal, without substantial delay. Petitioner could not appeal, or challenge in a writ of habeas corpus his absence

until he became aware that a hearing had taken place on August 13, 2020. As previously stated, it was not until, on or about September 17, 2023, when Petitioner received a copy of the August 13, 2020, minute order and a case docket sheet from the clerk after Petitioner--in late August early September 2023, wrote a letter to the clerk of the San Bernardino County Superior Court.

If the Court determines there was substantial delay, Petitioner contends he has shown good cause for the delay (In re Robbins (1998) 18 Cal. 4th 770).

D. The unconstitutional denial of Marks presence at the August 13, 2020, resentencing hearing deprived him of the opportunity to participate in the proceedings, confer with counsel, and offer mitigating evidence.

California penal code section 1385 states in relevant part as follows:

"(b)(1) If the court has authority ...to strike or dismiss an enhancement, the court may instead strike the additional punishment ... for that enhancement in the furtherance of justice ... (c)(2) In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating evidence in subparagraph (A) to (I) are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. (A) Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of section 745."

Petitioner contends the August 13, 2020, minute order reflects the court only considered aggravating facts to support not striking the 5-year enhancement. Petitioner, if present at the hearing, could have and would have presented his positive post-conviction rehabilitation programming in prison as facts in mitigation. This evidence would consist of documents showing the completion of the following programs;

(1) Completion of General Educational Degree on 2/16/2018, (2) Yoga Mindfulness in 2018, (3) Victim's Awareness 11/10/2018, (4) Parenting "During and After Prison" 3/30/2019, (5) Grow 6/19/2019, (6) No violent disciplinary rules violation reports within CDCR (See Exhibit "C"; Certificates).

Further, Petitioner's denial to be present not only prevented his proffer of positive post-conviction behavior as mitigating evidence, but Petitioner was prevented from offering any "mitigating factors that arose after his original sentence; he may have expressed remorse; or he may have made a plea for leniency" (People v. Cutting, supra, at p. 350; see also, People v. Velasco, supra, at p. 675). Due to Petitioner's denial to be present he was not able to confer with

counsel or seek legal advice.

Petitioner, if afforded a new resentencing hearing based on the unconstitutional denial of his presence at the August 13, 2020, hearing, can further demonstrate continued positive rehabilitation programming, which includes, EDOVO (Online) Certificates on CDCR issued GTL tablets: (7) Criminal Process: The Basics 10/18/2023, (8) In the Courtroom 10/19/2023, (9) Introduction to Legal Studies 10/21/2023, (10) Career Exploration: The Transportation Industry 10/24/2023, (11) Introduction to Commercial Driving 10/24/2023, (12) Anger Management 10/29/2023, (13) PTSD for Veterans 11/05/2023, (14) Edwin's Culinary 11/5/2023, (15) Gabriela Camara Teaching Mexican Cooking 11/19/2023, (16) Grow with Google: Prepare for your Business Plan, (17) Grow with Google: Estimate Financing for your Business Plan 11/26/2023, (18) Grow with Google: Write your Business Plan 12/7/2023, (19) ARC Board of Parole Hearing Preparation 7/2024, (20) Stress Management 7/2024, (21) Level 2 security Placement, (22) Participation in e-learning classes at California Substance Abuse Treatment Facility & State Prison (current).

E. Standard of Review

The violation of Petitioner's constitutional right to be present at a critical stage is reviewed under the Chapman v. California (1967) 386 U.S. 18, 23, to determine if it is harmless beyond a reasonable doubt (People v. Mendoza (2016) 62 Cal. 4th 856, 902). Under that standard, the error "may be deemed harmless only if we can conclude beyond a reasonable doubt that the deprivation did not affect the outcome of the proceeding" (People v. Simms (2018) 23 Cal. App. 5th 987, 998; see also, People v. Rutterschmidt (2012) 55 Cal. 4th 650, 661 [federal constitutional error requires reversal of the judgment "unless the prosecution can show beyond a reasonable doubt that the error was harmless].) The Respondent has not shown that the denial of Petitioner's right to be present at the resentencing hearing was harmless error beyond a reasonable doubt.

F. Conclusion

Based on the foregoing, Petitioner has made a prima facie showing for relief, his claims are not procedurally barred as untimely, the claims were filed without substantial delay and/or there is good cause for the delay, ~~and Respondent has not demonstrated that the error was harmless beyond a reasonable doubt.~~ Accordingly, this Court should issue an order to show cause, appoint counsel, and order further proceedings.

Date: 12-03-24

Respectfully submitted,



Xavier Marks
Petitioner In Pro Per

7. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:
- a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"): _____
- b. Result: _____ c. Date of decision: _____
- d. Case number or citation of opinion, if known: _____
- e. All issues raised: (1) _____
(2) _____
(3) _____
- f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

8. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:
- a. Result: _____ b. Date of decision: _____
- c. Case number or citation of opinion, if known: _____
- d. All issues raised: (1) _____
(2) _____
(3) _____
9. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal (see *In re Dixon* (1953) 41 Cal.2d 756, 759):
N/A

10. Administrative review:
- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Dexter* (1979) 25 Cal.3d 921, 925.) Explain what administrative review you sought or explain why you did not seek such review:
N/A

- b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
Attach documents that show you have exhausted your administrative remedies. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474.)
11. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, sentence, commitment, or issue in any court, including this court? (See *In re Clark* (1993) 5 Cal.4th 750, 767–769 and *In re Miller* (1941) 17 Cal.2d 734, 735.)
☒ Yes If yes, continue with number 12. ☐ No If no, skip to number 14.

12. a. (1) Nature of proceeding (for example, "habeas corpus petition"): habeas Corpus petition
 (2) Name of court: Rancho Cucamonga Superior Court
 (3) Result (attach order or explain why unavailable): Petition denied
 (4) Date of decision: 02-20-24
 (5) Case number or citation of opinion, if known: WHCSB23000008
 (6) All issues raised: (a) On August 13th 2020 the trial court abused its discretion
 (b) Trial counsel rendered ineffective assistance when he failed...
 (c) _____

- b. (1) Nature of proceeding: habeas Corpus petition
 (2) Name of court: Court of appeal Fourth appellate district
 (3) Result (attach order or explain why unavailable): Petition denied
 (4) Date of decision: _____
 (5) Case number or citation of opinion, if known: _____
 (6) All issues raised: (a) On August 13th 2020 the trial court abused its discretion
 (b) Trial counsel rendered ineffective assistance when he failed
 (c) _____

13. If any of the courts listed in number 12 held a hearing, state name of court, date of hearing, nature of hearing, and result:

NO hearing held.

14. Explain any delay in discovering or presenting the claims for relief and in raising the claims in this petition. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; Pen. Code, § 1473(e).)

NO delay

15. Are you presently represented by counsel? ☐ Yes ☒ No If yes, state the attorney's name and address, if known:

16. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☒ No If yes, explain:

17. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

This petition is properly before this court

18. Answer the following questions if you are raising a claim of violation of the Racial Justice Act under Penal Code section 745(a):

a. Indicate which of the following apply to the case in which you are making a claim for violation of Penal Code section 745(a) (check all that apply):

- (1) ☐ Judgment is not final (for example, because an appeal is pending),
- (2) ☐ You are currently serving a sentence in the state prison or county jail under Penal Code 1170(h) for the felony conviction in which you are raising a Racial Justice Act claim,
- (3) ☐ This petition is filed **on or after** January 1, 2025, and judgment became final for a felony conviction on or after January 1, 2015, or
- (4) ☐ This petition is filed **on or after** January 1, 2026, and judgment is for a felony conviction.

b. I request relief based on the following (choose all that apply):

- (1) ☐ The judge, an attorney, a law enforcement officer, an expert, or a juror in the case exhibited bias or animus toward me because of my race, ethnicity, or national origin.
- (2) ☐ During in-court trial proceedings, the judge, an attorney, a law enforcement officer, an expert, or a juror used racially discriminatory language about my race, ethnicity, or national origin. (Racially discriminatory language does not include relaying language used by someone else that is relevant to the case, or giving a racially neutral and unbiased physical description of the suspect.)
- (3) ☐ I was charged with or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, **and** the prosecution more frequently sought or obtained convictions for more serious offenses against people who share my race, ethnicity, or national origin in the county where the convictions were sought or obtained.
- (4) ☐ I received a longer or more severe sentence compared to similarly situated individuals convicted of the same offense **and**:
 - (a) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants who share my race, ethnicity, or national origin than on others in that county; **and/or**
 - (b) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in that county.

c. Is your claim based on a statement or conduct by a judge? ☐ Yes ☐ No

If yes, please state the judge's name:

d. Do you want appointed counsel? ☐ Yes ☐ No

If yes, can you afford to hire counsel? ☐ Yes ☐ No

e. Do you request permission to amend a pending petition for writ of habeas corpus with this claim? ☐ Yes ☐ No

- (1) If yes, in what court is your petition pending? _____
- (2) If yes, what is the case number of your pending petition? _____

f. Do you request disclosure of evidence relevant to a potential violation of Penal Code section 745(a)? ☐ Yes ☐ No

- (1) ☐ The type of records or information sought is described as follows:

- (2) ☐ The reason the records or information are needed is as follows:

g. Are you raising this claim for the first time? ☐ Yes ☐ No

If no, are you raising it again because of new evidence that could not have been previously known to you?

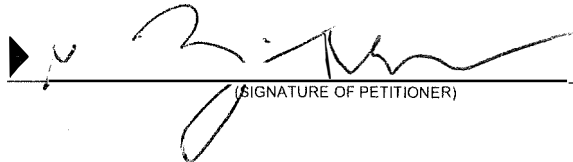
(1) ☐ Yes (explain):

(2) ☐ No (explain):

If you need additional space to answer any question on this petition, add an extra page and indicate that your answer is "continued on additional page."

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 11/20/24



(SIGNATURE OF PETITIONER)

EXHIBIT

"A"



SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN BERNARDINO
Rancho Cucamonga District
8303 Haven Avenue
Rancho Cucamonga, CA 91730
www.sb-court.org

MINUTE ORDER

Case Number: FSB17002569

Date: 8/13/2020

Case Title: People of the State of California vs. ZAVIER MICHAEL MARKS

Department R3 - Rancho Cucamonga

Date: 8/13/2020

Time: 8:30 AM

Other Hearing

Charges: PC664-PC187(A)-F, PC186.22(B)(1)(C)-E, PC12022.53(C)-E, PC12022.53(B)-E, PC186.22(B)(1)(B)-E, PC12022.53(D)-E, PC12022.53(E)(1)-A, PC246-F, PC12022.53(D)-E, PC186.22(B)(1)(C)-E, PC186.22(B)(1)(B)-E, PC186.22(B)(4)(B)-A, PC12022.53(E)(1)-A, PC12022.53(C)-E, PC12022.53(B)-E, PC667(A)(1)-E, PC1170.12(A)-(D)-A

Judicial Officer: Michael A Knish
Judicial Assistant: Marika Mahone
Court Reporter: Tonya Frye
Bailiff: E Brock

Appearances

District Attorney Reza Daghbandan present
Conflict Panel James Gass present
Defendant not present

Presence waived.

Proceedings

Defense states there is one issue, to Strike the Nickel Prior PC667(a)
Arguments presented by The People.
Arguments presented by Defense.
Matter taken under submission.
After due consideration of matter submitted, the Court now renders its decision.

The Court of Appeals remanded this case in order for the court to consider whether to strike the 667(a) allegation against Mr. Marks pursuant to the newly-granted authority under PC 1385 to do so. After consideration of the issue, the court has decided NOT to strike the allegation. The present crime was serious and violent, involving a shooting of multiple rounds at an apartment complex, hitting one victim. There was strong evidence that Mr. Marks was present at the scene, and a firearm shown to be involved in the shooting was found in proximity to Mr. Marks. The 667(a) allegation involved an attempted 1st degree burglary conviction just a year previous to the commission of the current crime. Even though the prior offense did not involve violence, and even though it is being used to double his sentence in this case, it is close in time to the current offense, and, given the seriousness of the crime in this case, the court finds no reason to deviate from the provisions of 667(a).

Therefore, the sentence will remain as given previously, and no updated abstract will be required.

The defendant is to be notified of his right to appeal this determination. A notice of appeal must be filed within 60 days of this decision.

Counsel is also alerted to the fact that Mr. Marks filed a motion for 1170.95 resentencing over a year ago, in May, 2019. It does not appear that this motion was ever addressed. Consequently, the court is setting a hearing date (for Mr. Marks only) on 9/8/2020 in Dept. R3 at 8:30 for consideration of the petition.

Hearings

Other Hearing set for 9/8/2020 at 8:30 AM in Department R3 - Rancho Cucamonga

Defendant's presence waived.

For consideration of PC1170.95 Petition filed 05/2019

Per Judge's Ruling 08/14/20

Custody Status

Case Custody - State Prison

== Minute Order Complete ==

****Minute Order printed**

EXHIBIT

"B"

Declaration of Xavier Marks

I, Xavier Marks, declare under penalty of perjury as follows;

1. I am the I in the cause of action entitled In re Xavier Marks on Habeas Corpus, No. D083965, San Bernardino County Superior Court Case No. FSB17002659.

2. On May 3, 2019, I filed in the San Bernardino County Superior Court a Senate Bill 1437 ("SB 1437") petition for resentencing pursuant to penal code section 1170.95.

3. On March 13, 2020, on direct appeal this Court vacated my sentence and remanded to the Superior Court for resentencing so the court could determine whether to strike the 5-year enhancement.

4. I was not notified by my trial attorney, James Gass, nor the San Bernardino County Superior Court of a resentencing hearing that was to be held on August 13, 2020, or any other time.

5. On or about December 21, 2020, I did receive notice from the San Bernardino County Superior Court that the "SB 1437" petition for resentencing that I filed, in pro per, on or about May 3, 2019, was denied.

6. On or about January 5, 2022, I filed in the San Bernardino County Superior Court a different petition for resentencing; this time, pursuant to Senate Bill 775 ("SB 775").

7. On or about March 15, 2022, I was transported from California Substance Abuse Treatment Facility and State Prison to the West Valley Detention Center to appear for my SB 775 resentencing hearing in the San Bernardino County Superior Court that was held on March 17, 2022.

8. Between March 2022 through August 30, 2022, I informed David Goldstein (attorney appointed to represent me on my SB 775 motion) that on direct appeal the Court of Appeal ordered a hearing regarding his 5-year enhancement, which had not taken place. Mr. Goldstein informed me that he would check into it, but never followed through, or relayed that a resentencing hearing was already held on August 13, 2020.

9. On or about August 30, 2022, the San Bernardino County Superior Court denied the SB 775 petition for resentencing and I was transported back to state prison in October 2022.

10. In August 2023, after my repeated inquiry, a jailhouse lawyer advised me to write the clerk of the San Bernardino County Superior Court about the Court of Appeals' direct appeal order for a resentencing hearing regarding the 5-year enhancement, which I did and also requested a case docket sheet.

11. On or about September 17, 2023, I received a response from

the clerk of the San Bernardino County Superior Court that contained the August 13, 2020, Minute order of the resentencing hearing regarding the Court's decision not to strike the 5-year enhancement. It was at this time I became aware that a hearing was held, I was denied my right to be present, my presence was waived without my knowledge or consent, the court denied striking my 5-year enhancement, my appeal rights, and that I should have been notified, but was not.

12. Between approximately, September 17, 2023--when I first became aware of the August 13, 2020, resentencing hearing--until on about January 3, 2024, when I placed a verified writ of habeas corpus petition in the mail to the San Bernardino County Superior Court, I was conducting legal research. The research was necessary to determine whether I had legal standing and recourse to challenge the due process violation to be present at the critical August 13, 2020, resentencing proceeding.

13. On February 24, 2024--when the Superior Court denied the writ of habeas corpus--until filing a subsequent writ of habeas corpus petition in the Court of Appeal on April 19, 2024, I sought the assistance of a jailhouse lawyer to conduct research and revise the habeas corpus claims in efforts to make a clear and effective presentation. I presented my claims without delay.

14. Had I been present at the August 13, 2020, resentencing hearing I would have conferred with counsel and urged him to present, as mitigating evidence, all my post-conviction certificates that demonstrate rehabilitation. I would have also asked counsel's legal advice as to what other mitigating evidence I could present to the court in efforts to strike the 5-year sentencing enhancement.

15. If I knew about the August 13, 2020, resentencing hearing I would have insisted to be present and would not have waived my right to be there. I was prejudicially denied of my constitutional right to be present and participate in the August 13, 2020, resentencing hearing.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief therefrom. Executed on this 23rd day of July 2024, in Corcoran, California.



Xavier Marks

EXHIBIT

"C"



OFFICIAL GED® TRANSCRIPT

Issued by the GED Testing Service as of **02/16/2018**

Martin D. Kehe
 Martin Kehe
 Vice President, Assessment Services

CANDIDATE INFORMATION

LAST NAME: MARKS	FIRST NAME: ZAVIER	MIDDLE: M.
ADDRESS: P.O. Box 567	ADDRESS2:	
CITY: Delano	STATE: CA	POSTAL CODE: 93216
ID NUMBER: 20180206-4406-5195	DATE OF BIRTH: 05/14/1990	COUNTRY: US
TESTING JURISDICTION: California	PASS DATE: 02/16/2018	PHONE: 6617212345

Click on a test subject area or performance level for more detailed information

TEST RESULTS

	LANGUAGE	DATE	SCORE*	PERFORMANCE LEVEL	STATUS	PERCENTILE RANK
<u>Social Studies</u>	English	02/16/2018	<u>152</u>	<u>GED®</u>	PASS	34
<u>Science</u>	English	02/16/2018	<u>150</u>	<u>GED®</u>	PASS	28
<u>Reasoning Through Language Arts</u>	English	02/14/2018	<u>154</u>	<u>GED®</u>	PASS	41
<u>Mathematical Reasoning</u>	English	02/13/2018	<u>145</u>	<u>GED®</u>	PASS	17
			TOTAL	601		
					OVERALL	
					PASS	

* The scores on the report are the highest scores achieved by the candidate and not necessarily the most recent. If retest scores are lower than scores previously achieved, the retest scores are not reported.

To learn more about score scales and content descriptions please visit www.GEDtestingaservice.com/transcriptinfo

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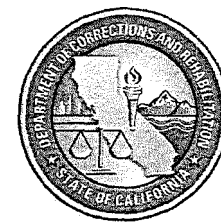
**CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION**

Office of Offender Services

Presents

Certificate of Completion

**To:
ZAVIER MARKS**



*For the Completion of the CB2Group in the
“Integrated Substance Use Disorder Treatment Program”
Given at the Substance Abuse Treatment Facility & State Prison- Corcoran*

On this day, April 30, 2024

A stylized, handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

**L. Babbs, CADTP
Program Director**

A handwritten signature in black ink, featuring a large, circular loop at the top and several smaller loops below it.

**N. Cheney, CSC/SUDCC II
Associate Program Director**

A handwritten signature in black ink, with a large, bold 'H' at the beginning and a long horizontal stroke extending to the right.

**H. Perez, CATC III
Counselor III**

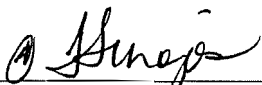
NAME: MARKS	CDCR#: BF2484	HOUSING: B3-5-6U
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On Tuesday, July 16, 2024, Inmate MARKS, # BF2484, is to be commended for his participation in the Stress Management Workshop conducted on Facility-B at the California Substance Abuse Treatment Facility and State Prison (CSATF/SP) in Corcoran, California.

The Stress Management Workshop is a 11-week voluntary program which focuses on three things: 1. What is stress? 2. How chronic stress affects you. 3. How you contribute to the stress of others, (i.e., neighbors, staff, family, etc.). Stress is something that all people deal with. Knowing what causes stress, developing healthy coping skills to manage it, and thereby reducing the stress that one adds to others is the core focus of this program. Participants are educated about stress, practice weekly meditation at the beginning of every class and get first hand perspective from prison staff such as medical personnel and officers. A Facility-B nurse volunteered her time to educate participants regarding the effects of prolonged stress on the human body, and a 2/W officer volunteered his time to share with participants how work related stress affects both officers and their families. A study conducted by Amy E. Lerman, University of California, Berkeley (2017) highlights the fact that correctional officers have some of the highest suicide and divorce rates amongst state employees.

Developing awareness into how one contributes to others' stress helps participants to develop empathy for officers, staff, other incarcerated people, including their own families. Both incarcerated people and prison employees are confronted with daily stressors brought on from living and working in a prison, a place that can at times be hostile, demanding, and exhausting. By learning to practice healthy coping skills such as meditation, mindfulness, regular exercise, hobbies, and learning how to set boundaries as well as practicing self-care, participants will become better equipped to handle the daily stressors that they face in prison. The long term goal for participants who practice these Stress Management skills is to be emotionally altruistic towards fellow human beings.

Inmate MARKS has taken the necessary steps to learn about Stress Management and is therefore better equipped to maintain emotional balance in this stressful environment. With practice these skills will benefit him while at the same time being mindful of how he treats others.



E. DELACRUZ
Facility "B" Captain
CSATF/SP

Original: Central File
cc: Captain

Date: 7/16/2024

Stress Management

General Chrono

Certificate of Completion

This is to certify that

Zavier Marks

has satisfactorily completed the two sessions in



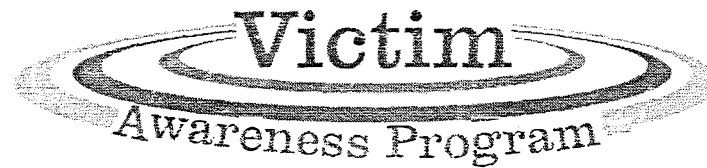
PARENTING

“During and After Prison”

on this 30th day of March, in the year of 2019, held at the
California Men’s Colony

June M. Mahay
TEACHER

J. John Harro
CHAPLAIN

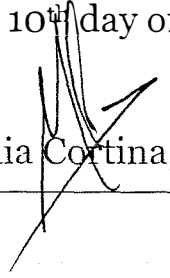


CERTIFICATE OF COMPLETION
AWARDED TO

XAVIER MARKS BF2484

For participating in our "Drive by shooting Crime Impact Workshop". The purpose of the workshop is to assist individuals to understand the impact of their crime, and to help them to make the necessary changes in their lives in order to live a productive life.

Awarded this 10th day of November, 2018


Amalia Cortina, Director

Certificate of Completion



This certificate acknowledges that Zavier Marks successfully completed PEP's "Yoga & Mindfulness" course during the Summer Session 2018 at Calipatria State Prison.

Course Instructor

A handwritten signature in black ink, appearing to read 'B. H. Mual', written over a horizontal line.

PEP Summer Session 2018

CERTIFICATE of Completion

This Certificate is Proudly Presented to
ZAVIER MARKS

For completing

RHU Eligible: Grow with Google: Estimate Financing for Your Business Plan

in our Educational Curriculum

11-26-2023

Date



Bin Hill

President of JES

CERTIFICATE of Completion

This Certificate is Proudly Presented to
ZAVIER MARKS

For completing

RHU Eligible: Grow with Google: Write Your Business Plan

in our Educational Curriculum

12-17-2023

Date



A handwritten signature in black ink, appearing to read "Zim Hill", written over a horizontal line.

President of JES

CERTIFICATE of Completion

This Certificate is Proudly Presented to
ZAVIER MARKS

For completing

RHU Eligible: Grow with Google: Prepare For Your Business Plan
in our Educational Curriculum

11-24-2023

Date



A handwritten signature in black ink, appearing to read "Zim Hiel".

President of JES

CERTIFICATE of **Completion**

This Certificate is Proudly Presented to

ZAVIER MARKS

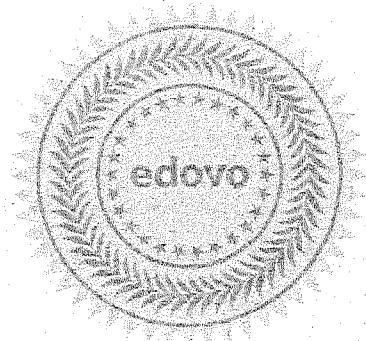
For completing

Anger Management

in our Educational Curriculum

10-29-2023

Date



Bin Hill

President of JES

CERTIFICATE of **Completion**

This Certificate is Proudly Presented to
ZAVIER MARKS

For completing
Criminal Process: The Basics
in our Educational Curriculum

10-18-2023

Date



Bin Hill

President of JES

CERTIFICATE of **Completion**

This Certificate is Proudly Presented to

ZAVIER MARKS

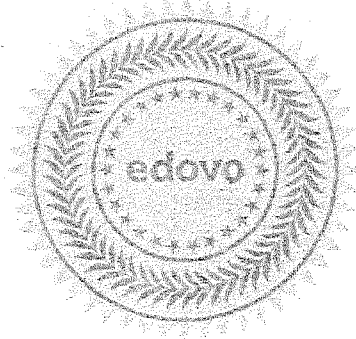
For completing

In the Courtroom

in our Educational Curriculum

10-19-2023

Date



A handwritten signature in black ink, appearing to read "Z. Hill", written over a horizontal line.

President of JES

CERTIFICATE of **Completion**

This Certificate is Proudly Presented to

ZAVIER MARKS

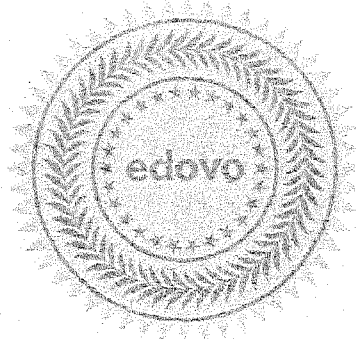
For completing

Introduction to Legal Studies

in our Educational Curriculum

10-21-2023

Date



A handwritten signature in black ink, appearing to read "B. Huel", written over a horizontal line.

President of JES

CERTIFICATE of Completion

This Certificate is Proudly Presented to
ZAVIER MARKS

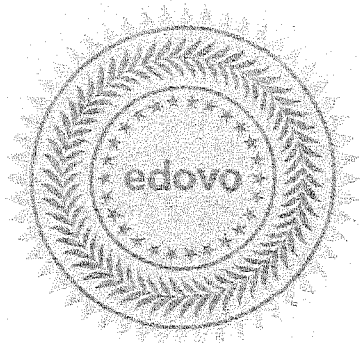
For completing

Career Exploration: The Transportation Industry

in our Educational Curriculum

10-24-2023

Date



Bin Hill

President of JES

CERTIFICATE of Completion

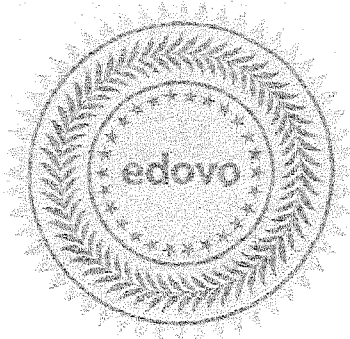
This Certificate is Proudly Presented to
ZAVIER MARKS

For completing

Introduction to Commercial Driving
in our Educational Curriculum

10-27-2023

Date



Ben Hill

President of JES

CERTIFICATE of Completion

This Certificate is Proudly Presented to

ZAVIER MARKS

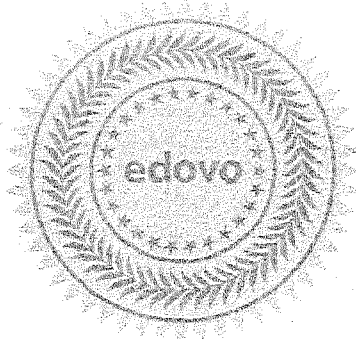
For completing

PTSD For Veterans

in our Educational Curriculum

11-05-2023

Date



A handwritten signature in black ink, appearing to read "Zim Hiel", written over a horizontal line.

President of JES

CERTIFICATE of **Completion**

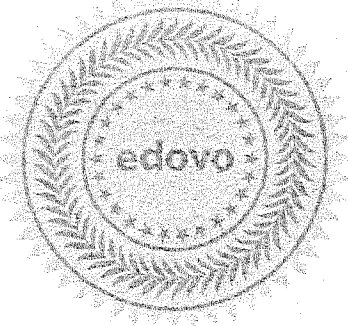
This Certificate is Proudly Presented to
ZAVIER MARKS

For completing

Gabriela Cámara Teaches Mexican Cooking
in our Educational Curriculum

11-17-2023

Date



B. Hill

President of JES

NAME: Xavier Marks

CDCR : BF2484

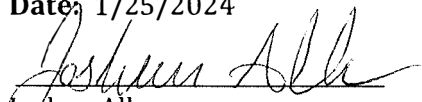
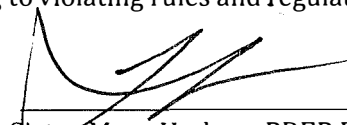
FAC : CSATF

HU : B3-5-6U

**CENTERING YOURSELF: CELL PHONES IN PRISON
RECOGNITION OF COMPLETION**

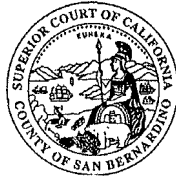
On 1/25/2024, Mr. Marks successfully completed the "CENTERING YOURSELF: CELL PHONES IN PRISON" Correspondence Course coordinated by the Partnership for Re-Entry Program (PREP), a Restorative Justice Ministry. This course is a two (2) lesson course on the use of "Cell Phones in Prison." These lessons are designed to promote an examination of one's thought process as it relates to rationalizing the use of a cell phone in prison despite the potential for dire consequences.

This course is designed to encourage looking at one's criminal thinking, impulse control/primary gratification, triggers, and control issues. Additionally, the need for familial/social interaction is also examined along with the consequences affecting these relationships as a result of being caught with a cell phone and/or other contraband. Life term inmates weigh short term gratification of cell phone use against sabotaging the possibility of disciplinary action and loss of privileges. In short, these lessons look at the criminal thinking involved in choices leading to violating rules and regulations.

Date: 1/25/2024
Joshua Allen
CY Coordinator
Sister Mary Hodges, PREP Foundress
Tony Kim PREP Director**Archdiocese of
LOS ANGELES****PREP**
PARTNERSHIP FOR RE-ENTRY PROGRAM

EXHIBIT

"D"



SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN BERNARDINO
San Bernardino District
247 West 3rd St
San Bernardino, CA 92415
www.sb-court.org

MINUTE ORDER

Case Number: WHCSB2400008

Date: 2/20/2024

Case Title: In the Matter of: ZAVIER M. MARKS

Department S20 - SBJC

Date: 2/20/2024

Time: 9:00 AM

Hearing on Petition for
Writ of Habeas Corpus

Judicial Officer: Gregory S Tavill

Judicial Assistant: Sylvia Ramirez

Court Reporter: Not Reported or Recorded

Bailiff: A Ramirez

Appearances

Petitioner present in custody via video

Proceedings

The court having read and considered the Petition for Writ of Habeas Corpus rules as follows:

Petition denied

See written ruling for Court findings

Order Denying Petition for Writ of Habeas Corpus Filed

Notice given by Judicial Assistant

Correspondence Coversheet Generated to Mail:

Copy of Court Order.

== Minute Order Complete ==

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

FEB 20 2024

BY Sylvia Ramirez
SYLVIA RAMIREZ, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

In the matter of

Case No. WHCSB2300008

Zavier M. Marks, Petitioner

ORDER

for Writ of Habeas Corpus

Petitioner Xavier M. Marks filed a petition for writ of habeas corpus on January 8, 2024.

On November 9, 2017, a jury convicted Petitioner and a codefendant of premeditated attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)) and shooting at an inhabited dwelling (Pen. Code, § 246).¹ On December 4, 2017, in a bifurcated proceeding, the trial court found true that Petitioner had a serious felony prior (Pen. Code, § 667, subd. (a)(1)) and a strike prior (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). On January 3, 2018, the trial court sentenced Petitioner to an aggregate term of 19 years to life - 14 years to life for attempted murder and 5 years for serious felony prior. On March 13, 2020, the Court of Appeal vacated Petitioner’s sentence and remanded his case for the trial court to exercise its discretion to strike the five-year serious felony prior pursuant to Senate Bill 1393.² On June 10, 2020, the

¹ The Court takes judicial notice of pertinent portions of FSB17002569, D076200, D080984, and S261697, as referenced herein. (See Evid. Code, § 452, subd. (d).)

² Effective January 1, 2019, Penal Code section 1385 no longer prohibits dismissing a five-year enhancement under Penal Code section 667, subdivision (a), for serious felony priors. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) § 2.) This change applies retroactively to defendants “whose sentences were not final when Senate Bill No. 1393 became effective. [Citation.]” (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208 (Emphasis added).)

1 Supreme Court denied review. Pursuant to the remittitur, the trial court held a hearing on
2 August 13, 2020, wherein, after arguments by the People and Defense (conflict panel),
3 the trial court declined to strike Petitioner's serious felony prior. Petitioner's sentence
4 remained unchanged. Subsequently, Petitioner filed a petition for resentencing pursuant
5 to Penal Code section 1172.6 (former Pen. Code, § 1170.95; Senate Bill 1437). On
6 August 30, 2022, the trial court denied the petition for resentencing.³ On February 22,
7 2023, the Court of Appeal affirmed the denial of the petition for resentencing.

8 In the petition, Petitioner contends that he was denied his state and federal due
9 process right to be present for the hearing on August 13, 2020, wherein, the trial court
10 declined to strike the serious felony prior. Petitioner also raises a concomitant claim of
11 ineffective assistance of counsel. The court receiving a petition for writ of habeas corpus
12 evaluates it by asking whether, assuming the petition's factual allegations are true, the
13 petitioner would be entitled to relief. (*In re Figueroa* (2018) 4 Cal.5th 576, 586; *In re*
14 *Clark* (1993) 5 Cal.4th 750, 769, fn. 9; *In re Lawler* (1979) 23 Cal.3d 190, 194.) If, taking
15 the facts alleged as true, the petitioner has established a prima facie case for relief on
16 habeas corpus, then an order to show cause should issue." (*Lawler*, at 194, see *Maas v.*
17 *Superior Court* (2016) 1 Cal.5th 962, 974.) "If no prima facie case for relief is stated, the
18 court will summarily deny the petition." (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) A
19 procedurally defective petition may also be summarily denied. (*Gomez v. Superior Court*
20 (2012) 54 Cal.4th 293, 301.) The petition fails to state a prima facie claim for habeas
21 relief.

22 It is true that "a criminal defendant has a right to be personally present at certain
23 pretrial proceedings and at trial under various provisions of law, including
24 the confrontation clause of the Sixth Amendment to the United States Constitution,
25 the due process clause of the Fourteenth Amendment to the United States
26 Constitution, section 15 of article I of the California Constitution, and [Penal Code]
27 sections 977 and 1043." (*People v. Kelly* (2007) 42 Cal.4th 763, 781, citing, *People v.*
28 *Cole* (2004) 33 Cal.4th 1158, 1230.) That right extends to sentencing and resentencing
29 proceedings. (*People v. Simms* (2018) 23 Cal.App.5th 987, 996 [defendant's right to be
30 personally present "extends to sentencing and resentencing proceedings"]; *People v.*
31 *Rouse* (2016) 245 Cal.App.4th 292, 300 [resentencing is a critical stage]; *People v.*
32 *Doolin* (2009) 45 Cal.4th 390, 453 [sentencing is a critical stage].)

33 "[A] defendant may waive his or her right to be present at a critical stage,
34 'provided the waiver is knowing, intelligent, and voluntary.'" (*People v. Quan* (2023) 96
35 Cal.App.5th 524, 534-535, citing *People v. Cunningham* (2015) 61 Cal.4th 609, 633, and

36 ³ Petitioner was present for the hearing.

1 *People v. Concepcion* (2008) 45 Cal.4th 77, 82.) “A defense counsel may also waive a
2 defendant's presence provided ‘there [is] some evidence that the defendant understood the
3 right he was waiving and the consequences of doing so.’” (*Quan*, at 535, citing *People v.*
4 *Davis* (2005) 36 Cal.4th 510, 532.) Penal Code section 977, as well, allows a waiver of
5 defendant’s right to be present. “If a [defendant] was not present at the hearing, the
6 reviewing court must determine ‘whether his [or her] absence was harmless beyond a
7 reasonable doubt.’” (*Quan*, at 536, citing *People v. Basler* (2022) 80 Cal.App.5th 46, 59.)
8 “[T]he defendant ‘bears [the] burden of demonstrating his [or her] absence resulted in
9 prejudice or denied his [or her] right to a fair hearing.’” (*Quan*, at 536, citing *Basler*, at
10 59.)

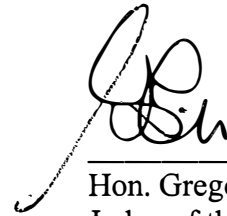
11 Although Petitioner points out to his counsel failures with respect to the hearing
12 on August 13, 2020, the petition fails to indicate whether he contacted his attorney
13 regarding the allegations, and counsel’s response, if any. (*People v. Ochoa* (1998) 19
14 Cal.4th 353, 434, citing and quoting *People v. Castillo* (1997) 16 Cal. 4th 1009, 1015
15 “[I]t is black letter law that ‘if the record sheds no light on why counsel acted or failed to
16 act in the challenged manner, we must reject [an ineffective assistance of counsel] claim
17 ... unless counsel was asked for an explanation and failed to provide one, or there could
18 be no satisfactory explanation for counsel’s performance.”.) Petitioner’s “unadorned and
19 unexplained assertions of ineffective assistance of counsel ... are inadequate to satisfy his
20 pleading burden.” (*Reno*, 55 Cal.4th at 499-500; see also *In re Martinez* (2009) 46
21 Cal.4th 945, 955-956 “[T]he petition should ... state fully and with particularity **the**
22 **facts** on which relief is sought [citations], as well as ... **include copies of reasonably**
23 **available documentary evidence** supporting the claim.” (Emphasis added.)); *Duvall*, 9
24 Cal.4th at 474; *People v. Karis* (1998) 46 Cal.3d 612, 656; *In re Swain* (1949) 34 Cal.2d
25 at 303-304; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 675 [The various exhibits that
26 normally “accompany a petition . . . do not constitute evidence, but rather supplement the
27 allegations to the extent they are incorporated by reference.”]; see *Reno*, at 493
28 “[C]onclusory allegations without specific factual allegations do not warrant relief.”]
29 citing *Duvall*, at 474.)

30 Even assuming as true that Petitioner was denied his right to be present, the
31 petition fails to allege any basis for habeas relief. The minute order reflects that the trial
32 court, on August 13, 2020, at the time it declining to strike Petitioner’s serious felony
33 prior, took into account the seriousness of Petitioner’s current offense and the violence
34 involved, including Petitioner’s involvement. Further, the trial court observed that
35 although Petitioner’s serious felony prior (of attempted first degree burglary) did not
36 involve violence, it was close in time to the current offense and had occurred “just a year”

1 prior to the current offense. Petitioner asserts that he could have conferred with his
2 attorney and presented favorable evidence. However, Petitioner fails to elucidate any
3 further in that regard, and fails to provide relevant supporting documents. Petitioner fails
4 to state what evidence or arguments he would have presented in order to overcome the
5 trial court's observations about his crimes or criminal history. Thus, Petitioner has failed
6 to "bear[] the burden of demonstrating that his absence resulted in prejudice or a denial of
7 the right to a fair hearing." (*Quan*, 96 Cal.App.5th 536, citing *Basler*, 80 Cal.App.5th at
8 59; see also *Martinez*, 46 Cal.4th at 955-956; *Duvall*, 9 Cal.4th at 474; *Karis*, 46 Cal.3d at
9 656; *Swain*, 34 Cal.2d at 303-304; *Rosenkrantz*, 29 Cal.4th at 675; *Reno*, 55 Cal.4th at
10 493 ["[C]onclusory allegations without specific factual allegations do not warrant
11 relief."]) citing *Duvall*, at 474.)

12
13 The petition is DENIED.

14
15 Dated: February 20, 2024



Hon. Gregory S. Tavill
Judge of the Superior Court

EXHIBIT

"E"

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal
Fourth Appellate District

FILED ELECTRONICALLY

09/04/2024

Brandon L. Henson, Clerk
By: Martha Torres

In re ZAVIER MICHAEL MARKS

D083965

on

(San Bernardino

Habeas Corpus.

Super. Ct. No. FSB17002659)

THE COURT:

The petition for writ of habeas corpus, informal response, and reply have been read and considered by Justices O'Rourke, Dato, and Rubin.

A jury convicted petitioner Xavier Michael Marks of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a); count 1) and shooting at an inhabited dwelling (Pen. Code, § 246; count 2). As to count 1, the jury found true allegations that the attempted murder was committed willfully and with deliberation and premeditation (Pen. Code, § 664, subd. (a)). The trial court also found true allegations that Marks suffered a conviction constituting both a serious felony prior conviction (Pen. Code, § 667, subd. (a)(1)) and a prior strike conviction (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). In January 2018, the court sentenced Marks to 19 years to life in prison, which included a five-year enhancement for the serious felony prior conviction. (*People v. Henderson* (2020) 46 Cal. App. 5th 533 (*Henderson*).)

While Marks's appeal was pending, the Legislature enacted Senate Bill No. 1393 (2018–2018 Reg. Sess.), effective January 1, 2019, which amended

Penal Code sections 667, subdivision (a)(1) and 1385, subdivision (b) to give trial courts discretion to dismiss, in the interest of justice, five-year prior serious felony enhancements. (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 426; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) This court determined in the appeal that Senate Bill No. 1393 applied retroactively to Marks's sentence. Accordingly, this court vacated Marks's sentence and remanded with directions the trial court resentence Marks after determining whether to strike Marks's five-year enhancement under Penal Code sections 667, subdivision (a)(1) and 1385. In all other respects the judgment was affirmed. (*Henderson, supra*, 46 Cal. App. 5th 533.)

Marks's resentencing hearing was held on August 13, 2020. Marks's appointed counsel appeared at the resentencing hearing and waived Marks's presence. After considering the arguments of the prosecution and defense counsel, the trial court declined to strike the enhancement based on the circumstances of the current crimes and Marks's criminal history. The court stated that Marks should be notified of his right to appeal the decision. Marks did not appeal from the resulting judgment or immediately file a writ petition.

In January 2024, Marks filed a petition for writ of habeas in the superior court claiming he was wrongfully denied his right to be present at his resentencing hearing. The superior court denied his petition, finding Marks failed to state a prima facie claim for relief.

Marks renews his claims in a writ petition filed in this court. He contends his counsel waived his presence at the resentencing hearing without his knowledge, preventing him from presenting mitigating evidence about his conduct in prison that could have affected the outcome of his resentencing.

He also claims counsel's conduct constitutes ineffective assistance of counsel, which prejudiced his ability to obtain resentencing relief.

In an informal response, the Department of Justice contends Marks's claims are procedurally barred, and on the merits, Marks fails to state a *prima facie* claim for relief.

Marks contends in his reply that his claims are not procedurally barred because he sought habeas corpus relief without substantial delay. He also continues to contend that the denial of his right to be present at the resentencing hearing deprived him of the opportunity to present mitigating evidence.

Marks is not entitled to relief. Given the more than two-year delay between Marks's resentencing hearing in August 2020 and when Marks filed his petition for habeas corpus relief in the superior court in January 2024, his current petition is untimely. (*In re Sanders* (1999) 21 Cal.4th 697, 703; *In re Swain* (1949) 34 Cal.2d 300, 302.) To explain the delay, Marks claims he was never notified of the resentencing hearing or the trial court's decision. He alleges that he contacted the clerk's office in August 2023 to inquire about the status of his resentencing, and it was not until the clerk's office responded to his inquiry in September 2023 with a copy of the minute order from his resentencing hearing that he learned he had been resentenced. However, Marks does not describe any efforts he made between when this court remanded his case for a resentencing hearing in March 2020 and when he contacted the clerk's office in August 2023. According to Marks's declaration, Marks also had petitions for resentencing relief pending in the trial court pursuant to Senate Bill Nos. 775 (2020–2021 Reg. Sess.) and 1437 (2017–2018 Reg. Sess.) between 2019 and 2022. Marks does not indicate that he ever inquired about the status of this court's remand order for

resentencing under Senate Bill No. 1393 during his other proceedings with the court or with counsel. “[A] person making a collateral attack on a final judgment must demonstrate diligence in investigating possible factual as well as legal bases for relief” and must “explain and justify any substantial delay in presenting a claim.” (*In re Clark* (1993) 5 Cal.4th 750, 785, fn. 21, 783.) Accordingly, Marks’s petition is procedurally barred as untimely. (*In re Reno* (2012) 55 Cal.4th 428, 459–460, 496–497, 511; *Clark*, at pp. 769, 799.)

Even if the petition was not procedurally barred, we conclude Marks has failed to state a prima facie claim for relief. A petitioner seeking habeas corpus relief bears a heavy burden to plead and prove sufficient grounds for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) “At the pleading stage, the petition must state a prima facie case for relief. To that end, the petition ‘should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.’” (*Martinez* (2009) 46 Cal.4th 945, 955–956.) Conclusory allegations made without any explanation of their factual bases are insufficient to state a prima facie case or warrant an evidentiary hearing. (*Duvall*, at p. 474.) We must presume the regularity of proceedings that resulted in a final judgment. (*Ibid.*)

Here, Marks’s petition relies on self-serving allegations that are not supported by reasonably available corroborating evidence. In denying Marks’s petition for habeas corpus filed in the superior court, the court noted that Marks failed to support his petition with a declaration from his counsel who represented him at the resentencing hearing or describe any efforts he made to contact counsel regarding his current claims. With his petition filed in this court, Marks continues to rely on his own allegations without

providing any declaration from counsel. Marks also does not describe any attempts he made to contact counsel or explain why a declaration from counsel is unavailable. The lack of counsel's declaration is particularly significant since the central issue in this case is that counsel waived Marks's presence at the resentencing hearing without his knowledge. Without evidence that sufficiently explains counsel's conduct, this "court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's . . . failure to take certain actions were objectively unreasonable." (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) Accordingly, absent additional evidence, Marks has not pled or proven sufficient grounds for habeas corpus relief.

The petition is denied.

DATO, Acting P. J.

Copies to: All parties

PROOF OF SERVICE BY MAIL
BY PERSON IN STATE CUSTODY

(CALIF. CCP §2015.5)

I, Zavier M. Marks, declare:
I am over 18 years of age and a party to this action. I am a resident of Substance Abuse Treatment Facility Prison,
in the county of Kings,
State of California. My prison address is: P.O. Box 5248 Corcoran, CA 93212,
On 12-03-24 (DATE)
I served the attached: Habeas Corpus petition

(DESCRIBE DOCUMENT)

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States mail in a deposit box so provided at the above-named correctional institution in which I am presently confined.

The envelope was addressed as follows:

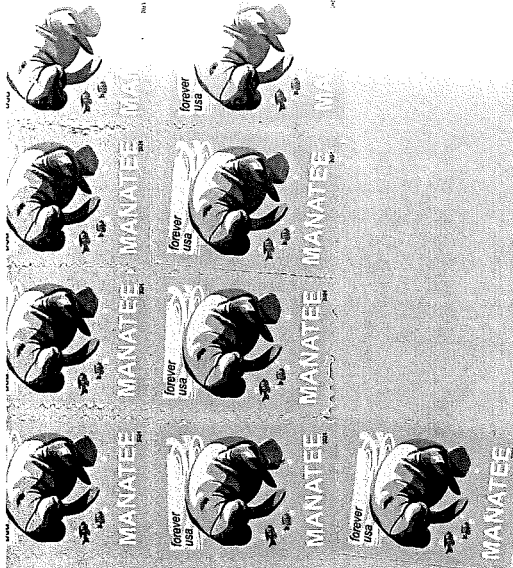
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4797

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on: 12-03-24
(DATE)

[Signature]
(DECLARANTS SIGNATURE)

FAVIER MARKS-DEFEND
STATE-SP.B3-05-00 u2
P.O. Box 5248
Corcoran, CA 93212



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12/3/29 R. Martinez

