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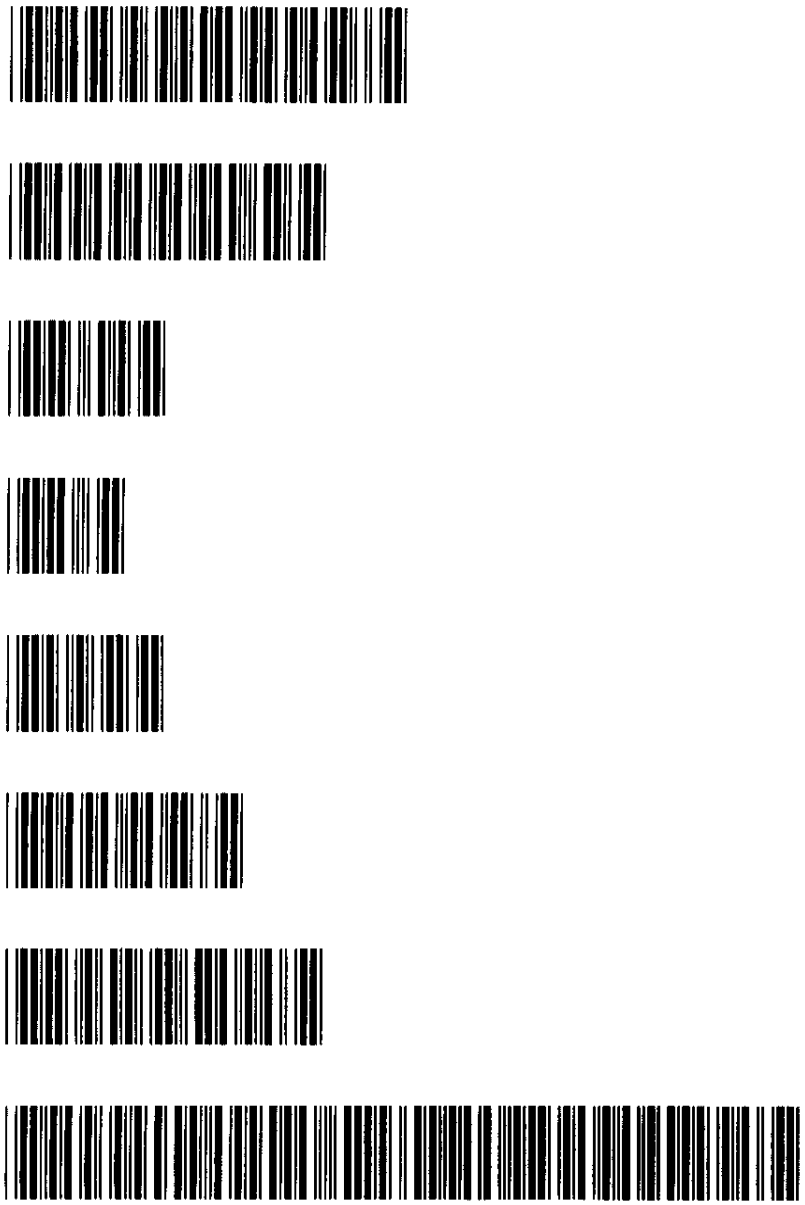

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RESP.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARREN D. CHAKER, Petitioner, v. SAN DIEGO SUPERIOR COURT, Respondent THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Civil Number 99-2260-BTM (AJB)

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARREN D. CHAKER, Petitioner, v. SAN DIEGO SUPERIOR COURT, Respondent.	Civil Number: 99-2260-BTM (AJB) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS
THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE PETITION SHOULD BE DISMISSED FOR FAILURE TO EXHAUST STATE REMEDIES

Petitioner raises new grounds in this Petition which have not yet been raised in his appeal to the Supreme Court of California.

28 U.S.C. A. section 2254(b)(1)–(2) states in pertinent part:

> (B)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the state; . . . (2) An application for a writ of habeas corpus may be denied on

> the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.

Federal law is well settled that a petition for a writ of habeas corpus cannot be granted until the petitioner has first exhausted all available state judicial remedies. A state petitioner should provide the highest court of the state with an opportunity to rule on the merits of the claim or by demonstrating that no other state remedies remain available. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983); *Larche v. Simons*, 53 F.3d 1068, 1071 (9th Cir. 1995).

"[M]ere similarities of claims is insufficient to exhaust." *Duncan*, 513 U.S. at 366. "Federal judges will not presume that state judges are clairvoyant." *Petrucelli v. Combe*, 735 F.2d 684, 689 (2d Cir. 1984).

New bases for ineffective assistance of counsel not previously included in the state petition are unexhausted. (*See Carriger v. Lewis*, 971 F.2d 329, 333–34 (9th Cir. 1992) (en banc); *Pappageorge v. Sumner*, 688 F.2d 1294 (9th Cir. 1982).)

On June 11, 1999, Petitioner filed a Petition for Writ of Habeas Corpus, with the California Supreme Court, based on the following grounds: double jeopardy, for allowing counsel to withdraw, lack of legal necessity, and consent was voided because Petitioner was on medication; stale misdemeanor; involuntary plea due to failure to investigate a defense and failure to explain direct consequences of a change of plea; due process; and **ineffective assistance of counsel for not seeking a dismissal based on double jeopardy;** and involuntary plea due to oppression caused by the Petitioner being in custody. (*See* Exhibits 16 and 17 to the Notice of Lodgment, which are true and correct copies of the June 11, 1999, Petition for Writ of Habeas Corpus and the Supplemental Points and Authorities, respectively, and which are incorporated herein by this reference.)

On or about October 21, 1999, Petitioner filed and served a Petition for Writ of Habeas Corpus, with the United States District Court, setting forth seven grounds: (1) Double Jeopardy; (2) Ineffective Assistance of Counsel, based on the fact defense attorney failed to seek a dismissal based on Double Jeopardy; **(3) Ineffective Assistance of Counsel, based on**

defense counsel failing to obtain defense medical documentation that Petitioner was on prescription medication; (4) Ineffective Assistance of Counsel, based on defense counsel failing to explain the sentencing consequences of Petitioner changing his plea to nolo contendre; (5) Due Process Violation; (6) Involuntary Plea, based on the fact Petitioner believed he would have to stay in jail if he did not change his plea; and (7) Stale Misdemeanor. (*See* Exhibit 19 to the Notice of Lodgment, which is a true and correct copy of the Petition for Writ of Habeas Corpus, filed on October 21, 1999, and which is incorporated herein by this reference.)

At the state court level, Petitioner asserted specific facts of failure to investigate a medical defense and failure to explain direct consequences of change of plea, to support his allegation that his plea was involuntary. (*See* Exhibit 16 and 17 to the Notice of Lodgment.) However, at the federal level, Petitioner is now using those same facts to instead support his allegation that he had ineffective assistance of a counsel. (*See* Exhibit 19 to the Notice of Lodgment.) **New bases for ineffective assistance of counsel not previously included in the state petition are unexhausted.** *See Carriger*, 971 F.2d at 333-34; *Pappageorge*, 688 F.2d at 1294. Since federal judges will not presume that state judges are clairvoyant and the mere similarities of claims is insufficient to exhaust, there is no question that Petitioner has presented a petition for habeas corpus relief that contains unexhausted claims. *See Petrucelli*, 735 F.2d at 689; *Duncan*, 513 U.S. at 366. Federal law is absolutely settled that the filing of such a petition is improper. Therefore, the Petition for Writ of Habeas Corpus should be dismissed.

II

THE ENTIRE PETITION, OR ALTERNATIVELY, GROUNDS TWO, FOUR, FIVE, SIX AND SEVEN, SHOULD BE DISMISSED FOR ABUSE OF THE WRIT BECAUSE THE CLAIMS COULD HAVE BEEN BUT WERE NOT RAISED IN THE EARLIER FEBRUARY 11, 1998, FEDERAL HABEAS PETITION

Federal Habeas Petition claims that could have been previously raised in an earlier petition but which were not should be dismissed. Habeas Rule 9(b); 28 U.S.C. A. section

2254. "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders v. United States*, 373 U.S. 1, 18 (1963). The abusive petitions bar in Rule 9(b) states that new grounds presented in a later petition not included in the first, are legally subject to dismissal whether or not the prior petition was dismissed for failure to exhaust. *Farmer v. McDaniel*, 98 F.3d 1548, 1555–57 (9th Cir. 1996).

Petitioner filed a prior federal Habeas Petition with this Court on February 11, 1998, which was denied by this Court for failure to exhaust. (*See* Exhibit 8 to the Notice of Lodgment.) In his February 11, 1998, Petition, Petitioner raised three grounds: (1) Involuntary Plea for not being informed of all possible consequences of plea; (2) Double Jeopardy; and (3) Ineffective Assistance of Counsel for failure to bring a medical defense. In the instant Petition for Writ of Habeas Corpus, filed October 21, 1999, Petitioner raises seven grounds for his Petition and states his original federal writ was denied for failure to exhaust state remedies on March of 1998. (*See* Exhibit 19 to the Notice of Lodgment, at 5 and attachment, at 1–3, paragraph 22 (a) - (g).)

Clearly, Petitioner failed to raise the following grounds in his initial federal Habeas Petition: Ground two: Ineffective Assistance of Counsel for failing to move for a dismissal; Ground four: Ineffective Assistance of Counsel for failure to advise potential consequences of plea; Ground five: Due Process Violation; Ground six: Involuntary Plea based on facing continued custody; Ground seven: Violation of the Stale Misdemeanor Rule.

Based on the above, the entire Petition, or alternatively Grounds two, four, five, six and seven, should be dismissed for abuse of the Writ. *See* Habeas Rule 9(b); 28 U.S.C. A. section 2254; *Sanders*, 373 U.S. at 18.

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III

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE STATE APPELLATE COURT'S DECISION REJECTING PETITIONER'S CLAIMS WERE AUTHORIZED BY STATE LAW AND NEITHER CONTRARY TO NOR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

A. STANDARD OF REVIEW

Federal courts must apply federal constitutional law in cases properly before them under the federal habeas statute. (Citations omitted.) It is thus a district court's duty to apply the law of the appropriate circuit to all persons presenting claims within its jurisdiction. State interpretations of the federal constitution and laws are persuasive authority, but a district court may consider them on federal questions only if the question is otherwise open. *Bittaker v. Enomoto*, 587 F.2d 400, 402 n.1 (9th Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

"Findings of fact by state court are presumptively correct, 28 U.S.C. section 2254(d), and are reviewed under clearly erroneous standard." *Weston v. Kernan*, 50 F.3d 633, 636 (9th Cir. 1995). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

B. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER WAIVED HIS NONJURISDICTION FEDERAL ISSUES WHEN HE MADE A VOLUNTARY, KNOWING AND INTELLIGENT PLEA OF NOLO CONTENDRE WHICH FORECLOSED ON FEDERAL HABEAS RELIEF

Mitchell v. Superior Court, 632 F.2d 767, 769 (9th Cir. 1980), *cert denied*, 451 U.S. 940 (1981), states that a voluntary and intelligent guilty plea forecloses on federal habeas relief.

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty

> plea. He may only attack the voluntary and intelligent character of the guilty plea."

Id. (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

> Before the trial court may accept a guilty plea, the court must ensure that the defendant "has a full understanding of what the plea connotes and of its consequence." A plea is involuntary, and thus insufficient to support a conviction, if the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." The record reflects that [the defendant] expressly waived his legal rights and conceded the factual basis for the charged offenses . . . . In determining if a plea is voluntary and intelligent . . . the critical issue is whether the defendant understood the nature and substance of the charges against him . . . ."

Taylor v. Whitley, 933 F.2d 325, 329 (5th Cir. 1991) (quoting *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976)).

California Penal Code section 1016 states in pertinent part: "a plea of nolo contendre shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty . . . ."

Here, Petitioner pled nolo contendre on September 30, 1997. (*See* para. 7 to Supporting Decl. of Lench, which is incorporated herein by this reference.) On that date, Petitioner signed a change of plea form which states that defense counsel believed the plea was made "knowing, intelligent and voluntary in all respects." (*See* Exhibit 1 to Notice of Lodgment, which is a true and correct copy of the Plea of No Contest Misdemeanor signed by Petitioner, and which is incorporated herein by this reference.) Petitioner has not claimed that at the time he entered his plea, he did not understand the nature and substance of the charges against him. *See Taylor*, 933 F.2d at 329; *Boykin*, 395 U.S. at 244; *Henderson*, 426 U.S. at 645 n.13. The trial court denied Petitioner's Motion to Withdraw Plea ruling Petitioner's plea was voluntary and intelligent. (*See* Exhibit 22 to the Notice of Lodgment, at 50, lines 13–15.) Therefore, Petitioner made a voluntary and intelligent plea and based on the holding in *Mitchell*, Petitioner's plea of nolo contendere foreclosed on federal habeas relief and his Petition for Writ of Habeas Corpus should be denied. *See id.* at 769; *Estelle*, 502 U.S. at 67.

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C. PETITIONER'S GROUND ONE FAILS BECAUSE HE DID NOT SUFFER DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits double jeopardy, as follows: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The California constitutional provision, contained in Article 1, section 15, is essentially the same as the Federal Constitution. *Gomez v. Superior Court*, 50 Cal. 2d 640, 649 (1958).

> The Supreme Court has enumerated several purposes for this protection: (1) to ensure the finality of judgments in criminal cases; (2) to avoid compelling a defendant to live in a constant state of anxiety and insecurity attendant with successive prosecutions for the same offense; (3) to avoid giving the prosecution an unfair opportunity to retry the defendant using information gained from the first trial concerning the strengths and weaknesses of the State's case; (4) to ensure that the defendant's right to have his fate decided by the first jury empaneled is protected; and (5) to avoid the imposition of multiple punishments for the same offense. United States v. DiFrancesco, 449 U.S. 117, 127-29, 101 S.Ct. 426, 432-33, 66 L.Ed.2d 328 (1980) (citations omitted).

The court further stated,

> For these reasons, upon declaration of a mistrial, retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by "manifest necessity.

Weston, 50 F.3d at 636.

The underlying idea is that the state, with all its resources, should not repeatedly attempt to convict an individual for an alleged offense. *Green v. United States*, 355 U.S. 184, 187–88 (1957). In this case, the focus is on the constitutional provision which protects against multiple prosecution and punishment for the same offense. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

1. Jeopardy Did Not Attach Because Petitioner Moved for and Consented to a Mistrial

Petitioner claims that jeopardy attached when the trial court declared a mistrial without defense counsel present. Petitioner had no attorney, because the court found "a break down of

communication between Mr. Chaker (Petitioner) and his counsel Ray Keramati." (ESS at 4, lines 10–12, lodged as Exhibit 20.)

"Whether a defendant's right not to be placed in double jeopardy has been violated is reviewed de novo." *Weston*, 50 F.3d at 636. "However, factual findings concerning governmental conduct, upon which the denial is based, are reviewed for 'clear error.'" *United States v. Lun*, 944 F.2d 642, 644 (1991) (quoting *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984)).

"Where a mistrial has been declared at request of defendant, The Double Jeopardy Clause is no bar to retrial unless the defendant can show that the 'conduct giving rise to the successful motion for mistrial was intended to provoke defendant into moving for a mistrial.'" *Lun*, 944 F.2d at 644 (quoting *Oregon v. Kennedy*, 456 U.S. 667 (1982)).

"A defendant's consent to mistrial may be inferred 'only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order.'" *Weston*, 50 F.3d at 637 (quoting *Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991)). Where a defendant has the "opportunity to object to a mistrial declared sua sponte but failed to do so" shows the defendant's implied consent. *Id.* at 637. *See United States v. Smith*, 621 F.2d 350, 351–52 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981) (defense counsel's failure to object to mistrial amounted to implied consent).

Here, Petitioner moved for and consented to the mistrial. *See Weston*, 50 F.3d at 636. The court then advised Petitioner that the matter could be retried and that he had no right to double jeopardy. (ESS at 4, lines 12–14 lodged as Exhibit 20.) *See id.* The Petitioner failed to object to the mistrial or withdraw his motion. *See Smith*, 621 F.2d at 351–52. Therefore, retrial of this matter was permitted because Petitioner consented to the mistrial, and no double jeopardy attached. *See id.*; *Weston*, 50 F.3d at 637; *Lun*, 944 F.2d at 644.

2. Assuming *Arguendo* that Defendant did not Consent to the Mistrial, Manifest Necessity Dictated Declaration of a Mistrial

Petitioner requested a mistrial after the prosecution had rested and before the defense had presented evidence or closing arguments. (ESS at 4, lines 12–14, lodged as Exhibit 20;

Transcript of Motion to Withdraw Plea at 13, lines 14–18, lodged as Exhibit 22.) *See Lun*, 944 F.2d at 644. This is significant, because it supports the necessary discharge of the jury. *See Weston*, 50 F.3d at 636. Additionally, where discharge is a necessity, Petitioner's consent, or lack thereof, becomes irrelevant. *See id.* at 638.

"The Supreme Court says that manifest necessity exists 'when the ends of public justice would not be served by a continuation of the proceedings.'" *Id.* (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971)).

> We must weigh the protections afforded by the Double Jeopardy Clause against society's interest in determining guilt or innocence and we afford the state trial court discretion in evaluating the circumstances before it in deciding whether to declare a mistrial. The State bears the heavy burden of demonstrating the 'high degree' of necessity required for a declaration of mistrial without the defendant's consent.

Id. (Citations omitted.)

"The state trial court properly exercised its discretion . . . '[w]hen an error certain to result in reversal occurs,' [in this situation] manifest necessity is apparent. If such an error exists, double jeopardy will not attach to a declaration of mistrial." *Id.* (quoting *United States v. Bates*, 917 F.2d 388, 394 (9th Cir. 1990)).

People v. McNally, 107 Cal. App. 3d 387 (1980) analyzes legal necessity. After McNally's trial had commenced, the Deputy Public Defender representing him discovered that the Public Defender's Office had represented the victim in two other cases. The court found a conflict of interest existed, relieved defense counsel and declared a mistrial. *Id.* at 389.

The Court of Appeal affirmed the conviction, holding that legal necessity required the mistrial. It found that a disabling conflict of interest existed as to the defendant's original counsel, requiring the appointment of substitute counsel. Since this conflict was not akin to a procedural or legal error, the defendant's consent to mistrial was not required. *Id.* at 390.

The Court found that "if counsel must represent conflicting interests or is ineffective because of the burdens of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel." *Id.* at 391. Here, Petitioner's attorney had a conflict with Petitioner himself. As in *McNally*, defense counsel could no

longer effectively represent the client's interests. Had the court forced Mr. Keramati to continue representing Petitioner when they had "a break down of communication," Petitioner would have a meritorious ineffective assistance claim. (ESS at 4, lines 10–11, lodged as Exhibit 20.)

In fact, *McNally* made the same complaint that Petitioner makes now. *McNally* asserted that, instead of declaring a mistrial when the conflict arose, the court should have appointed a substitute attorney, granted a recess and resumed the trial at a later date. *Id.* at 392. The court found, however, that *McNally's* suggestion was impractical.

> Substitution of counsel at trial would necessarily result in new counsel being required to fully familiarize himself with the facts of the case, a task which would include reinterviewing witnesses. It would be necessary to obtain a transcript of all prior proceedings, including the testimony to date at the trial, the opening statements, if any, and probably the jury voir dire. The delay incident to this process would be substantial. Recalling the sworn jury after such a delay would present extremely difficult problems . . . . All of these problems, as well as others not detailed here, make respondent's solution unworkable.

Id. at 392–93. In the instant case, had the court appointed new counsel to resume the trial, the defense would have endured the problems *McNally* described above.

McNally cites *People v. Manson*, which illustrates the necessity of granting a mistrial when, as occurred here, "there has arisen a breakdown in a relationship between the accused and his counsel frustrating the realization of a fair trial." *People v. Manson*, 61 Cal. App. 3d 102, 202 (1976). In *Manson*, counsel for a co-defendant disappeared after the parties rested, but before the final ruling on jury instructions and before closing arguments. The court appointed another lawyer over the co-defendant's objection. The co-defendant moved for a mistrial, since the new lawyer, who was absent during the taking of evidence, could not effectively argue credibility. The court denied the motion. The Court of Appeal reversed the co-defendant's conviction, holding that substituted counsel interrupted the continuity of representation and deprived the co-defendant of the minimal requirement of effective counsel, which includes effective closing summation. *Manson*, 61 Cal. App. 3d at 198, 201. Counsel's

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disappearance was, therefore, an event of "legal necessity" which should have resulted in the granting of a mistrial. *Id.* at 202.

Petitioner's situation is similar to that of the co-defendant in *Manson*. Petitioner no longer had an attorney to represent him and moved for mistrial. (ESS at 4, lines 9–14, lodged as Exhibit 20.) The Court of Appeal in *Manson* held that denying such a motion and appointing another attorney to complete the trial would deprive the defendant of effective assistance of counsel. *See id.* at 202. Therefore, in light of federal and state case law, it was proper for the court to grant Petitioner's mistrial motion. *See id.*; *McNally*, 107 Cal. App. 3d at 389; *Weston*, 50 F.3d at 638.

3. Defendant's Plea of Nolo Contendere Relinquished His Protection from Double Jeopardy

"The legal effect of [a plea of nolo contendere] shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit." *Ellis v. Dyson*, 421 U.S. 426, 428 n.3 (1975).

"The relinquishment of protection from double jeopardy when defendant pleads guilty derives not from any inquiry into defendant's subjective understanding of the range of potential defenses but from the admissions necessarily made upon entry of a voluntary plea of guilty." Fed. R. Crim. P. 11; 18 U.S.C.A.; *United States v. Broce*, 488 U.S. 563, 573 (1989). Defendant was "advised that, in pleading guilty, [he was] admitting guilt and waiving [his] right to a trial of any kind. A failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea. . . . '[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.'" *Id.* at 574 (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)).

The court properly granted Petitioner's mistrial motion and Petitioner's subsequent voluntary and intelligent plea of nolo contendere also relinquished his protection from double jeopardy. *See id.* Therefore, Petitioner's ground one, double jeopardy claim, must fail.

D. PETITIONER'S GROUNDS TWO, THREE AND FOUR ALL FAIL BECAUSE COUNSEL RENDERED EFFECTIVE ASSISTANCE

The court follows a "circumstance-specific reasonableness requirement" when reviewing whether there was ineffective assistance of counsel. *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000). A defendant claiming ineffective assistance of counsel "must show (1) that counsel's representation 'fell below objective standard of reasonableness,' [citation omitted] and (2) that counsel's deficient performance prejudiced defendant." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

"This additional 'prejudice' requirement was based on our conclusion that '[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (quoting *Strickland*, 466 U.S. at 691 and 694).

"Courts must 'judge reasonableness of counsel's conduct on facts of particular case, viewed as of time of counsel's conduct.'" *Flores-Ortega*, 120 S. Ct. at 1029 (quoting *Strickland*, 466 U.S. at 690). "'Judicial scrutiny of counsel's performance must be highly deferential.'" *Id.* (quoting *Strickland*, 466 U.S. at 689).

Normally, there is strong presumption of reliability of judicial proceedings which a defendant asserting ineffective assistance must overcome by showing how specific errors of counsel undermined reliability of finding of guilt. *Id.* at 1037. In cases involving mere "attorney error" defendant must demonstrate that error actually had adverse effect on defense. *Id.*

"[I]n order to satisfy the 'prejudice' requirement, [Petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Here, Petitioner claims that counsel failed to properly advise him concerning his criminal charge. He specifically alleges that Mr. Burgener was ineffective because he did not (1) move for dismissal on the grounds of double jeopardy; (2) advise Petitioner regarding a potential defense before the no contest plea; or (3) advise Appellant that his plea could result

in sex offender registration, affect his right to bear arms, right to travel at will and may result in a Fourth Amendment waiver.

However, Petitioner has presented no evidence that Mr. Burgener provided anything less than adequate and proper counsel.

1. Ground Two Fails Because Petitioner's Counsel Was Not Required To Move For A Dismissal, Since Petitioner Had Not Suffered Double Jeopardy

Petitioner argues that counsel was ineffective for not moving to dismiss the charge based on double jeopardy. Assuming defense counsel should have made such a motion, failure to do so did not prejudice Petitioner. Here, had defense counsel moved to dismiss based on a double jeopardy claim, any trial court following the law would have denied the motion and Petitioner would be in the same position he was in before defense counsel made the motion. Specifically, Petitioner would still be facing the Penal Code section 647(k) charge and the decision whether to plead guilty. *See Hill*, 474 U.S. at 57. (*See also* Respondent's Brief, Section I, attached as Exhibit 6 to the Notice of Lodgment.) An error by Petitioner's counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding since the error had no effect on the judgment. *See Hill*, 474 U.S. at 57. Therefore, counsel's failure to assert a meritless double jeopardy defense did not prejudice Petitioner and Petitioner's ground two, ineffective assistance claim, fails on that basis.

2. Ground Three Fails Because Counsel's Decision To Reject A Meritless Medical Defense Was Reasonable

The justifications for imposing the "prejudice" requirement in *Strickland v. Washington* are also relevant in the context of guilty pleas:

> "The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore,

> the defendant must show that they actually had an adverse effect on the defense."

Hill, 474 U.S. at 57–58 (quoting *Strickland*, 466 U.S. at 693). *See also United States v. Schaflander*, 743 F.2d 714 (1984); cert. denied, 470 U.S. 1058 (1985) (evidence did not show that there was a reasonable probability that the results of the proceeding would have been different if counsel had introduced additional evidence, interviewed additional witnesses, or done additional investigation, so ineffective assistance of counsel claim failed.)

Petitioner argues that he was denied effective assistance of counsel because counsel did not raise a prescription medication defense, i.e., the "Vicodin defense." Absolutely nothing in the record demonstrates that the "Vicodin defense" has any merit. When Petitioner moved to withdraw his plea, he had the opportunity to present medical and scientific evidence (expert witnesses, declarations, affidavits) as to Vicodin's nature, purpose and effects. He failed to do so. Petitioner presented no evidence as to how much Vicodin he ingested at any given time. Instead, he merely asserted that "[a]t the time of the alleged offense I was under the influence of Vicodan (sic) and Motrin medications which negates the specific intent of PC 647(k)." (*See* Declaration of Darren D. Chaker In Support Of His Motion To Withdraw His Guilty Plea at 3, lines 13-16, attached as Exhibit 3 to the Notice of Lodgment.) Petitioner never articulated his basis for that conclusion.

Petitioner failed to demonstrate how ingestion of Vicodin could defeat his specific intent to commit the crime charged any more than ingestion of aspirin could. Since he presented no evidence that the "Vicodin defense" has any merit, he cannot overcome the strong presumption that counsel represented him competently. Since Petitioner has failed to show that his counsel's failure to assert the meritless "Vicodin defense" actually had an adverse effect on the defense, Petitioner's ground three, ineffective assistance claim, fails on this basis as well. *See Hill*, 474 U.S. at 57–58.

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3. Ground Four Fails Because Defense Counsel Was Correct Not To Advise Petitioner That His Plea Could Result In Sex Offender Registration, a Restriction in the Right to Bear Arms, Right to Travel at Will and a Fourth Amendment Waiver

Petitioner claims that defense counsel was ineffective for not advising him that Penal Code section 290 registration could result from his plea, and other potential probationary terms. But, counsel would have been mistaken to advise Petitioner that his plea could result in sex offender registration. (*See* Respondent's Brief, Section II, lodged as Exhibit 6 to the Notice of Lodgment.) First, Penal Code section 290 does not mandate registration where a Penal Code section 647(k) conviction occurs. Second, a court that orders sex offender registration for a Penal Code section 647(k) plea is likely violating the defendant's constitutional right to be free from cruel and unusual punishment in violation of the Eighth Amendment. Counsel's failure to advise Petitioner of the potential for Section 290 registration, or the court's possible restriction of Petitioner's right to bear arms, right to travel at will, or Fourth Amendment Waiver, should not be construed by this Court as an error as none of these things were contemplated or made part of the sentence. Additionally, Petitioner has not shown that there is a reasonable possibility that, but for his counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 59. Thus, Petitioner has failed to make a showing of prejudice resulting from his counsel's actions. *See Flores-Ortega*, 120 S. Ct. at 1029. Therefore, Petitioner's fourth ground regarding an ineffective assistance claim, fails on this basis as well.

E. PETITIONER'S GROUND FIVE FAILS BECAUSE HIS DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE OFFICE OF THE CITY ATTORNEY DID NOT CHARGE DEFENDANT FOR APPROXIMATELY THREE MONTHS AFTER THE TIME OF THE OFFENSE

The speedy trial provision under the Sixth Amendment does not protect against pre-accusation delay. *United States v. Marion*, 404 U.S. 307, 313 (1971). "[C]ourts of Appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved." *Id.* at 315. "There is thus no need to press the

Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function." *Id.* at 323.

A claim of due process based on pre-accusation delay requires a showing of actual prejudice. *Id.* at 315.

> "We do not rely on the mere lapse of time between the commission of the offenses and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above (post-indictment delay, prejudice) which motivates our decision."

Id. (quoting *Taylor v. United States*, 99 U.S.App.D.C. 183, 238 F.2d 259 (1956)). This type of delay is only relevant on the issue of whether the defendant had been denied a fair trial. *Id.*

Here, Petitioner argues that his due process right was prejudiced because the Complaint was filed three months after the offense. Petitioner's argument is without merit. Unless and until the Petitioner demonstrates actual prejudice, there can be no deprivation of the Petitioner's due process rights. *See id.*

The three months involved between the offense date and filing of a formal complaint is well within the statutory limit of one year for a misdemeanor criminal offense. *See* California Penal Code section 802(a). The government is entitled to a reasonable time to investigate an offense to determine whether proceeding with criminal charges is warranted. *See Marion*, 404 U.S. at 313. No purposeful, oppressive or deliberate obstruction is present in this instance. Petitioner claims he was unable to find a material witness who moved out of the state between the time of the offense and the filing of the complaint against him. However, Petitioner moved for a mistrial before presenting any defense evidence and then pled nolo contendere. (*See* ESS at 4, lines 9–14, lodged as Exhibit 20; Exhibit 1.) Thus, Petitioner has not shown any actual prejudice from his alleged witness leaving the state or a denial of a right to a fair trial. *See id.* at 315. Therefore, no violation of due process has occurred.

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F. PETITIONER'S GROUND SIX FAILS BECAUSE HIS NOLO CONTENDRE PLEA WAS VOLUNTARY

"A plea of nolo contendre shall be considered the same as a plea of guilty . . . ." California Penal Code section 1016. *See Ellis*, 421 U.S. at 428 n.3.

"'A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.'" *United States v. McGahey*, 449 F.2d 738, 739 (9th Cir. 1971) (quoting Fed. R. Crim. P. 32(d)).

Manifest injustice is defined as "guilty pleas entered upon unkept promises or otherwise rendered involuntary." *Id.* at 738–39. "[I]f a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe." *Id.* at 739.

Petitioner claims that, on the day he pled nolo contendere, his custody status rendered his plea involuntary. Based on the record before this Court, however, Petitioner's claims do not amount to "manifest injustice" for withdrawal of his plea, because he did not prove that his plea was entered upon unkept promises, nor was it rendered involuntary. *See id.* Here, Petitioner moved the court for a Motion to Withdraw his plea which was denied. (*See* Exhibit 22 to the Notice of Lodgment.)

State courts have declined to find good cause to withdraw a guilty plea when defendants claim they were rushed into a decision but had not requested a continuance. *People v. Watts*, 67 Cal. App. 3d 173 (1977) [defendant contended that he was denied a reasonable time to deliberate and consider the plea bargain]. In *Watts*, the court found that neither the defendant nor his counsel requested additional time and denied the motion.

In *People v. Urfer*, 94 Cal. App. 3d 887, 892 (1979), the defendant claimed he yielded unwillingly to counsel's persuasions that he enter a guilty plea. The court refused to permit the defendant to withdraw his plea, stating:

> Assuming [Petitioner] was reluctant or "unwilling" to change his plea, such state of mind is not synonymous with an involuntary act. Lawyers and other professional men often persuade clients to act upon advice which is unwillingly or reluctantly accepted. And the fact that such advice is unwillingly or reluctantly acted upon is not a ". . . factor overreaching defendant's free and clear judgment" of what should be done. . . .

The court further noted that being "unwilling" is not synonymous with an involuntary act and contrasted the definition of "involuntary" (i.e., done without choice or against one's will, unintentional) with "unwillingly" (i.e., reluctant, offering resistance) and concluded that the defendant's unwillingness was not legally sufficient to show the plea was involuntary. *Id.*

Here, although Petitioner may have felt anxious because he was in custody, the record proves that he was aware of the alleged facts and circumstances of the charged offense, acted on advice of counsel, and knowingly and voluntarily signed a change of plea form. (*See* Transcript of Entry of Guilty Plea at 4, line 7, through page 6, line 7; at 6, line 23, through page 7, line 1, lodged as Exhibit 2.) The initialed and signed change of plea refutes any allegation to the contrary. (*See* Exhibit 1 to the Notice of Lodgment.)

In *People v. Hunt*, 174 Cal. App. 3d 95, 103 (1985), the court acknowledged that "[o]ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." In other words, just because Petitioner in the instant case hoped the court would release him from custody upon his plea of nolo contendre (which it did), his plea does not become involuntary as a result. (*See* Exhibit 2, Transcript of Entry of Plea at page 10, lines 9–11.)

Additionally, "[t]he trial court on a contested motion to withdraw a plea of guilty . . . is the trier of fact and hence the judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences." *People v. Quesada*, 230 Cal. App. 3d, 525, 533 (1991). Here, during its ruling on Petitioner's motion to withdraw his plea, the court stated explicitly that it found Petitioner's testimony not credible:

> The Court, at this time, finds that the evidence shows, by clear and convincing evidence, as well as proof beyond a reasonable doubt, the Defendant's plea was voluntary, and knowingly made, that he knew what he was doing. The Court finds that there is no reason to doubt Mr. Burgener's credibility in today's testimony . . . . The Court finds that Mr. Burgener's testimony appears to coincide with the change of plea, that was to have taken place in this case, based upon the trial, the transcript of the plea of guilty. Additionally, **the Court finds that there was every reason to doubt Mr. Chaker's testimony today in this matter.**

Transcript of Motion to Withdraw Plea at 49, lines 6–20, lodged as Exhibit 22. (Emphasis added.)

In deciding whether to allow a defendant to withdraw a plea, the trial court is not bound by uncontradicted statements of the defendant. *People v. Brotherton*, 239 Cal. App. 2d 195, 201 (1966). The only evidence supporting Petitioner's claim that the plea was involuntary is Petitioner's testimony, which the Honorable Gale Kaneshiro determined was not credible. Although Petitioner complains that his plea was made under "fear, oppression and misconception," he did not submit medical records, jail records, independent witness declarations, or other reliable evidence to support that claim. (*See* Exhibit 19 to the Notice of Lodgment, at 3, paragraph f.) However, there *was* evidence which contradicted Petitioner's testimony. First, Petitioner did not inform the court or counsel during the plea that he needed a continuance. Second, Petitioner indicated on the plea form that he entered his plea "freely and voluntarily." Third, the plea form indicates that his attorney believed that the plea was "knowing, intelligent and voluntary in all respects." Fourth, the court found that the plea was voluntary. (*See* Change of Plea Form at 2, lodged as Exhibit 1; Exhibit 2 Transcript of Entry of Guilty Plea, at 7, line 4.)

In court, Petitioner also verified his knowledge and understanding of the plea and specifically told the court that he was satisfied with counsel. (*See* Transcript of Entry of Plea at 5, lines 15–19, lodged as Exhibit 22.) Based on the above, the trial court did not find erroneously that Petitioner's plea was voluntary. *See Weston*, 50 F.3d at 636.

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G. PETITIONER'S GROUND SEVEN FAILS BECAUSE FEDERAL AND STATE LAW ONLY REQUIRE PROBABLE CAUSE FOR A VALID ARREST AND NOT THAT A MISDEMEANOR BE COMMITTED IN AN OFFICER'S PRESENCE

There is no federal constitutional requirement that a misdemeanor be committed in an officer's presence. *Street v. Surdyka*, 492 F.2d 368, 371(4th Cir. 1974); *Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990). Historically, the presence requirement was grounded in English Common Law. *United States v. Watson*, 423 U.S. 411, 418 (1976). Although early United States Supreme Court cases did apply the common law rule, it has never been given constitutional force. *Surdyka*, 492 F.2d at 371 n.2; *Welsh v. Wisconsin*, 466 U.S. 740, 747 (1984) (White J., dissenting). Therefore, the common law rule may be relaxed by state statute, *Surdyka*, 492 F.2d at 371; *Welsh*, 466 U.S. at 747; and "the law of the state where the arrest without a warrant takes place determines its validity." *United States v. Di Re*, 332 U.S. 581, 589 (1948). The only federal constitutional requirement is that the arrest be based upon probable cause. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959); *Surdyka*, 492 F.2d 372 n.3; *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990). Since federal constitutional law does not require an officer's presence for a misdemeanor arrest, California must follow the same standard pursuant to Proposition 8. *See Bittaker*, 587 F.2d at 402.

It is obvious that the only federal constitutional requirement is that the arrest be based upon probable cause. California case law is also clear that where a citizen observes a crime and reports that crime to the police who then make an arrest, the arrest is valid. The court in *Padilla v. Meese*, 184 Cal. App. 3d 1022 (1986), noted:

> An arrest is more than a transient momentary incident; it is a continuous transaction. Thus [its] validity . . . is not compromised simply because the transaction is commenced by one officer (or citizen) but completed by another (officer), for any person making an arrest may summon as many persons as he deems necessary to aid him.

Id. at 1030.

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Here, the victim clearly saw Defendant peeking over an interior wall to look at her while she was naked in a tanning salon. The victim reported the misdemeanor crime to the police, who then made the arrest. Therefore, the arrest is valid. *See id.*

CONCLUSION

For the foregoing reasons, the People respectfully submit that the Petition for Writ of Habeas Corpus be denied.

Dated: _____, 2000

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DECLARATION OF SERVICE BY MAIL	)	Civil Number: 99-2260-BTM(AJB) Petitioner: Darren D. Chaker

I, Janette A. Myers, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 1200 Third Avenue, Suite 700, San Diego, California, 92101-4106. I served the following document(s): **RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Darren D. Chaker
311 N. Robertson Blvd. #123
Beverly Hills, CA 90211

San Diego Superior Court
Clerk of the Superior Court
220 W. Broadway
San Diego, CA 92101

I then sealed each envelope, and with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on April 3, 2000.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 3, 2000, at San Diego, California.

Janette A. Myers

PROOF OF SERVICE BY MAIL
(C.C.P 1013A AND 2015.5)