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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KENNETH HARVEY SHOCKMAN, Defendant and Appellant.	D056138 (Super. Ct. No. SCD220290)
In re KENNETH HARVEY SHOCKMAN on Habeas Corpus.	D058287

APPEAL from a judgment and a petition for habeas corpus of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Judgment affirmed as modified; petition denied.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil

Gonzalez, Andrew Mestman and James Flaherty, Deputy Attorneys General, for Plaintiff and Respondent.

In this criminal case, by virtue of the untimely delivery of a criminal file to the prosecutor, the prosecutor belatedly discovered defendant's prior conviction for the sale of methamphetamine was based on defendant's use of a unique modus operandi and one observed in the drug transaction which gave rise to the instant proceedings: in both instances, methamphetamine was found in plastic bags which had been wrapped in cocktail napkins. Because of the similarity in modus operandi, the trial court permitted both the prosecution and a co-defendant to cross-examine the defendant with respect to the prior conviction.

We reject defendant's contention that admission of the prior conviction was erroneous or otherwise unfair to him. We also reject his contention, asserted by way of petition for writ of habeas corpus,[1] that his counsel was ineffective in failing to discover the similarity between the uncharged and charged offenses or that this alleged failure was prejudicial.

STATEMENT OF CASE

Appellant Kenneth Harvey Shockman was tried with an alleged confederate, Robert Edwin Peary III. While the jury was deliberating, Peary pled guilty under the terms of an agreement with the prosecution. The jury then convicted Shockman of

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1 We have consolidated his appeal, *People v. Shockman*, D056138, with his petition for a writ of habeas corpus, *In re Kenneth H. Shockman*, D058287.

transporting for sale, possessing for sale and possessing methamphetamine. (Health & Saf. Code, §§ 11377, 11378, 11379.)

In a bifurcated proceeding, the trial court found Shockman had previously suffered a conviction for possession of methamphetamine for sale and a prior "strike" conviction within the meaning of Penal Code[2] sections 667, subdivisions (b) through (i), and 1192.7, subdivision (c)(23). The trial court also found that Shockman had served a prior prison term within the meaning of section 667.5. The trial court struck the prior strike under section 1385 and sentenced Shockman to a term of 10 years in prison composed of: a three-year midterm on the transportation for sale count (count 1), a consecutive three-year enhancement on that count under Health and Safety Code section 11370.2, a consecutive one-year prior prison term enhancement and a consecutive three-year term for violating the terms of his probation in the prior case.

STATEMENT OF FACTS

Prosecution Case

In April 2009 undercover narcotics officers employed by the San Diego Police Department arrested an individual named Collier on suspicion he was selling methamphetmine in the Old Town area of San Diego. The undercover officers recovered Collier's cellular telephone (cell phone) and searched the contact list stored in the phone's memory. One of the officers, Luke Johnson, sent a text message from Collier's cell phone to a number of contacts he found in its memory. Johnson's text stated: "Can you

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2 All further statutory references are to the Penal Code unless otherwise indicated.

bring me some?" Within two minutes, Johnson received a text from one of the contacts, which stated: "You're ready already?" The text was sent from someone identified in the cell phone's memory as "Rob"; later, police were able to identify "Rob" as Robert Peary, Shockman's co-defendant.

Johnson and Peary then sent each other a series of text messages. Johnson sent Peary a text message which stated that he had a lot of customers waiting. Peary responded with a text message which stated: "From K or C. Does it matter? And how much? The usual?" Based on his training and experience, Johnson believed "K" and "C" referred to suppliers of methamphetamine and Peary wanted to know if Collier had any preference as to suppliers. Johnson sent Peary another text message which stated that he wanted to double his usual order and he wanted it from K. Peary responded with a text message which stated: "I will check for availability and price. Please hold." Five minutes later, Peary sent Johnson another text message: "K is going to be picking me up shortly. I'm hoping to be there in 45 or less." Peary then sent another text message which stated: "Me and K are coming to you." Then, by way of further text messages, Johnson and Peary agreed to meet on a bike path near an E-Z8 motel on Pacific Coast Highway.

Johnson and other police officers went to the location where Peary agreed to meet. Upon arriving Johnson sent Peary a text message: "Are you here and how much?" Peary responded by text message: "I'm here and it[']s 750." Shortly thereafter, undercover officers observed Shockman driving a gold BMW in the vicinity of an EZ8 motel on Pacific Coast Highway. A man, later identified as Peary, was in the passenger seat.

After Shockman's car pulled into the motel parking lot and then pulled out, the officers observed someone walking to the bike path.

Officer Johnson followed Shockman and saw Shockman drive to the adjacent bike path three times. Officer Johnson stopped Shockman and then went to the bike path where he found Peary walking briskly along a ramp; Johnson stopped Peary and a small package dropped from Peary's shorts. The package was a small plastic bag wrapped with a rubber band, which was itself wrapped in a black cocktail napkin. The cocktail napkin appeared to have been cut with scissors. Inside the plastic bag Johnson discovered 13.94 grams of methamphetamine.

After recovering the methamphetamine from Peary, narcotics officers searched Shockman's residence, where they found further incriminating evidence. On Shockman's bed they found pieces of black cocktail napkins, black rubber bands, small plastic bags and a pair of scissors. The cocktail napkins, rubber bands and plastic bags were similar to the items used to wrap the methamphetamine which dropped from Peary's shorts. On a nightstand they found a spoon with residue that was consistent with methamphetamine, a scale with a black cocktail napkin on it and a prescription bottle that contained .96 grams of methamphetamine. The narcotics officers also found a business card with a pricelist for methamphetamine.

Officer Johnson testified that although he had participated in the investigation of over 500 narcotics cases, he had never seen or heard about a practice of packaging methamphetamine in cocktails napkins.

Defense

At trial Shockman testified on his own behalf. According to Shockman, Peary was a friend who called and asked Shockman for a ride while Shockman was not at home. According to Shockman, he told Peary to wait inside Shockman's home and that he would pick him up in about 30 minutes. Shockman then picked Peary up, took Peary to where Peary wanted to go and was stopped by police. Shockman testified he did not know Peary was carrying methamphetamine and did not know Peary was involved in other drug transactions.

Shockman claimed he uses the scale narcotics officers found in his home to measure medical marijuana. Shockman also admitted there were black cocktail napkins in his home, but he testified he did not cut or alter them. Finally, Shockman testified he did not know there was a small amount of methamphetamine in his home.

In addition to his testimony and over the strenuous objections of both the prosecution and Peary, the trial court permitted Shockman to play for the jury an audio recording of a conversation between Shockman and Peary. The conversation took place while Shockman and Peary were in the back of a police car. According to Shockman, he did not know the conversation was being recorded. In the clearly audible portions of the recording, Shockman expresses surprise Peary was carrying any methamphetamine and Peary responds by admitting he had a small amount for his personal use. In the recorded conversation, Peary also tells Shockman that he told police that Shockman was merely giving him a ride and that Shockman had no clue about what Peary was doing.

Shockman's portrayal of the conversation as one which neither he nor Peary knew was being recorded was substantially undermined by one whispered statement Peary made near the beginning of their conversation. After Shockman asked Peary "[w]hat the hell were you doing anyway?" Peary, in a clearly audible voice, stated: "I just went down and had to fucking, meet somebody." However, immediately after this audible statement, Peary can be heard on the recording whispering: "They found it."

The trial court permitted Peary's counsel to cross-examine Shockman with respect to a prior conviction Shockman suffered for the sale of methamphetamine and Shockman's prior use of cocktail napkins as a means of wrapping the methamphetamine. The trial court also permitted the prosecution to cross-examine Shockman in some detail with respect to the prior conviction.

DISCUSSION

I

In his principal arguments on appeal, Shockman contends: the trial court erred in permitting Peary to introduce Shockman's 2002 methamphetamine sales conviction in his cross-examination of Shockman; and then erred again in permitting the People to introduce details of the prior conviction in its cross-examination of Shockman. In the alternative, and by way of his petition for a writ of habeas corpus, Shockman argues his counsel was ineffective in failing to discover the similarity between his prior conviction and the instant offense, which similarity caused the trial court to admit evidence of the prior conviction. We find no error and no ineffective assistance of counsel which prejudiced Shockman.

A. *Background*

1. *Adversity Between Defendants*

The record suggests that in important practical respects, the trial court's ultimate decision to permit Peary and the prosecution to use Shockman's 2002 conviction grows out of litigation choices Shockman himself made and his co-defendant's response to those choices. First, it appears that prior to trial the prosecution offered Peary and Shockman a plea bargain which Peary wanted to accept and which Shockman would not agree to accept. The prosecution's offer required that both defendants accept the plea and Shockman's unwillingness to accept the plea prevented Peary from getting the benefit of the prosecution's offer.

The adversity between Shockman and Peary was heightened at trial when Shockman took the stand and stated that he did not know what Peary was doing. The adversity reached a peak when Shockman offered the recording of his conversation with Peary. In objecting to the recording, Peary's counsel told the trial court: "[I]f you play the entire tape -- it buries both of them. I know Mr. Shockman does not feel that way, but I think the whole context is they are both very slick and both very knowledgeable about drugs." In warning Shockman's counsel about the hazards of relying on the recording,

the trial court agreed with Peary's assessment of the impact of the recording: "I think the whisper comment is very harmful to Mr. Shockman."[3]

2. *The Trial Court's Evolving View of Shockman's Prior Conviction*

Before the adversity between Shockman and Peary reached its peak, the prosecutor moved in limine to admit Shockman's prior conviction. The prosecutor represented the conviction grew out of a "sting" operation in which Shockman was first subjected to a parole search and found in possession of 6.98 grams of methamphetamine. In a search incident to his 2002 arrest, police found 151.41 grams of methamphetamine and over $20,000 in cash in Shockman's house. In the 2002 case, Shockman admitted possessing drugs for sale.

The trial court denied the prosecutor's in limine motion. The trial court found that although the prior conviction was relevant on the issues of Shockman's knowledge of the nature of methamphetamine and his intent to sell it, the prejudice created by the conviction outweighed its probative value. However, the court advised the parties that if Shockman took the stand and testified he did not know anything about methamphetamine, the conviction would be admitted.

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3 At trial, Shockman's counsel readily acknowledged that he understood the recording had the potential to harm his client. However, he also indicated that he believed the potential benefits of presenting the recording outweighed its risks. Shockman makes no claim that in successfully introducing the tape his counsel was ineffective.

After the People rested their case-in-chief, Shockman took the stand and, as we have indicated, denied knowing Peary possessed or was selling methamphetamine. He did admit he possessed black napkins, but stated that he did not cut or alter them.

Before Shockman's direct testimony was complete and outside the presence of the jury, counsel and the trial court then discussed two outstanding and related evidentiary issues: Shockman's request that the recorded conversation between Shockman and Peary be admitted and the prosecutor's renewed effort, in light of new information, to use Shockman's 2002 methamphetamine sales conviction. As we have indicated, Shockman was successful in convincing the trial court to permit him to play the recording. In particular, the trial court rejected Peary's counsel's vigorous objection that Peary's statements on the tape were hearsay which substantially harmed him and implicated his rights under *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 US 123 [88 S.Ct. 1620]. In overruling Peary's objection, the trial court concluded Shockman, who was testifying, could use Peary's statements against Peary.

The trial court then took up the prosecutor's renewed request to introduce evidence of Shockman's 2002 conviction. According to the prosecutor, during the course of trial her office was able to retrieve from storage its file on the previous conviction, including police reports. The police reports disclosed that in investigating the 2002 crime, police discovered Shockman had wrapped methamphetamine in blue cocktail napkins.

Initially, the trial court indicated that notwithstanding the similarity between the modus operandi employed in both instances, it would not permit the prosecution to use the prior conviction either as substantive evidence or as impeachment. The trial court

found that although the use of cocktail napkins was a unique modus operandi and therefore clearly admissible under Evidence Code section 1101, subdivision (b), because the prosecution had closed its case-in-chief and Shockman had begun testifying on the assumption he would not be confronted with the prior conviction, it would not be fair to permit the prosecution to introduce the conviction. The trial court further found that because Shockman had not denied using cocktail napkins to package methamphetamine, the prosecution could not use the prior conviction to impeach his testimony. The trial court, however, noted that if Shockman testified in a manner which indicated that he knew nothing about the use of napkins as a means of packaging methamphetamine, the prosecution could use the prior conviction to impeach his testimony.

Next, Peary's counsel, having received a ruling Shockman could use the damaging recording of her client's statement against him, turned the tables, so to speak, on Shockman: Peary's counsel argued that if Shockman could use Peary's recorded statements against Peary, Peary should be permitted to use Shockman's conviction against him. The trial court agreed with Peary's counsel's argument. The trial court noted Peary had not put on his defense case-in-chief and that the use of cocktail napkins was classic modus operandi evidence admissible under Evidence Code section 1101. The trial court emphasized that the difference between the prosecution's ability to use the prior conviction and Peary's was the fact that Peary had not yet put on his case-in-chief.

Having obtained the right to use the prior conviction in her client's case-in-chief, Peary's counsel then asked for permission to use the conviction in her cross-examination of Shockman. The trial court again agreed with Peary's counsel.

Shockman then resumed the stand, and while he was on the stand his counsel played the recording of his conversation with Peary. Peary's counsel then conducted her cross-examination in which she confronted him with his prior conviction and the use of cocktail napkins in that case. Shockman admitted he used cocktail napkins in the 2002 case, but denied he used the napkins for the purposes of selling methamphetamine. According to Shockman, he used the napkins in 2002 to keep the methamphetamine safe: "It wasn't necessarily to wrap it up for sales."

When Peary's counsel was finished cross-examining Shockman, and shortly after the prosecutor began her cross-examination, the trial court initiated a sidebar conference in which the trial court advised counsel that in denying that the blue napkins had been used in 2002 as a means of selling methamphetamine, Shockman had opened the door for the prosecution to impeach his explanation with the details of the 2002 conviction, including in particular the $20,000 found in his home.

The prosecutor then cross-examined Shockman in some detail with respect to his 2002 conviction, including the use of blue cocktail napkins and the $20,000 police found in his residence.

B. *Evidence Code section 1101, subdivision (b)*

Under Evidence Code section 1101, subdivision (b), evidence of a prior conviction or other wrongful conduct is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." A prior offense is admissible to show identity where it shares "common features that are sufficiently

distinctive so as to support the inference that the same person committed both acts. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) However, to establish identity " '[t]he pattern and characteristics of the crime must be so unusual and distinctive as to be like a signature.' " (*Ibid*.)

As the trial court noted, here the common use of cocktail napkins as a means of packaging methamphetamine is a classic example of evidence admissible under Evidence Code section 1101, subdivision (b). We note that in his direct testimony, Shockman plainly implied he did not have anything to do with Peary's possession of methamphetamine, including in particular the fact that it was packaged in black cocktail napkins. Thus, the identity of the person who supplied Peary with the methamphetamine that dropped from Peary's pants was a vigorously disputed issue. In this context, Officer Johnson testified he had never, in his lengthy experience as a narcotics officer, found methamphetamine wrapped in a cocktail napkin. Officer Johnson's testimony was sufficient to establish the existence of a criminal "signature" required for admission of the prior conviction as proof that Shockman had supplied the methamphetamine recovered from Peary.

Admittedly, in addition to finding that an uncharged offense meets the similarity requirements of Evidence Code section 1101, subdivision (b), a court must also determine that the probative value of the evidence is substantial and outweighs its potentially prejudicial impact. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 404-405.) " 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged

offenses are admissible only if they have *substantial* probative value.' [Citation.]" (*Id*. at p. 404.)

Here, it is plain from the record that in the absence of evidence Shockman had used cocktail napkins in packaging the methamphetamine that gave rise to the 2002 conviction, the trial court was unconvinced that the other circumstances associated with the earlier conviction provided substantial probative evidence that Shockman was engaged in the sale of methamphetamine at the time he was stopped with Peary in 2009. However, the record shows the trial court's assessment changed when it was advised Shockman had used cocktail napkins in committing the prior offense. Like the trial court, we find the very unusual and unique nature of the modus operandi Shockman employed gave his prior conviction the substantial level of probative value required for admission of an uncharged offense.

Importantly, because the prior uncharged offense involved Shockman's admission of the prior crime, there was no risk it would unduly prejudice him. His admission eliminated any risk evidence of the previous offense would be based on testimony from anybody with an interest in the instant offense. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Moreover, because the uncharged conduct resulted in a conviction, there was no risk the jury would have any unwarranted desire to punish him again for that crime. (*Ibid*.)

In sum then, in admitting Shockman's 2002 conviction, the trial court did not not abuse the discretion provided by Evidence Code section 1101, subdivision (b).

C. *Peary's Use of the Prior Conviction*

Shockman argues that notwithstanding the admissibility of his prior conviction, Peary's counsel engaged in misconduct in using the prior conviction against him and that the trial court should have granted his motion for a mistrial, based on such misconduct. We find no misconduct.

We agree that where one defendant's counsel has engaged in a pattern of misconduct which prejudiced another defendant's rights, the prejudiced defendant may assert the misconduct amounted to a denial of due process. (See *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095-1096.) In *People v. Estrada* a co-defendant's counsel disregarded the trial court's orders and engaged in an egregious pattern of improperly impugning the credibility of the appellant. On appeal the court found highly improper counsel's comments on: "appellant's prior arrests, his suggestion that other evidence not presented at trial showed appellant's guilt, his suggestion appellant's failure to testify at [his client's] preliminary hearing was relevant to his credibility, his use of appellant's prior convictions to suggest appellant had a propensity to commit crimes, and his suggestion appellant's own attorney did not believe him . . . ." (*Id.* at p. 1106.) The extreme nature of counsel's conduct caused the court to find that appellant had been denied due process.

Here, in contrast, there is nothing in this record which suggests Peary's counsel engaged in anything other than a very skillful, vigorous and entirely ethical representation of her client's interest. It is true that she attacked Shockman's credibility,

but only with evidence of a prior conviction both we and the trial court have found admissible. Peary's counsel in no manner infringed on Shockman's right to a fair trial.

We recognize that the dissent believes Peary's counsel had no valid reason to attempt to incriminate Shockman and hence no valid reason to use Shockman's prior conviction against him. The record rebuts this contention.

Peary's counsel clearly recognized Perry had no defense on the merits to the case against him. Counsel's entire closing argument is as follows: "Ladies and gentlemen, I want to thank you for your patience and for your close attention to this case. It's seldom that I stand up in front of a jury, as seldom as never, and say 'What can I say?' I mean, you have the evidence. I hope you don't think that Mr. Peary and I wasted your time. You may wonder why we're here. But that's not relevant to your decision. And I'm going to say two words, and then I'm going to sit down. Two words that will not [a]ffect your decision but might have [a]ffected Mr. Peary's life. I want you to take that away from this experience. And that is 'adequate healthcare.' Thank you."

In response to this argument, the prosecutor stated: "Thank you, your honor. [¶] Ladies and gentlemen, I have to start with saying what is obvious. You heard sympathetic stories in the courtroom. That is something that I can't ignore. You have obviously seen both defendants listening with hearing devices. You heard Mr. Peary's medical difficulties in the past. And you heard about it on the tape. But when you took an oath as jurors, each one of you raised your hand and you promised to follow the law in this case. You promised to put those aside. Not just for Mr. Peary, but for Mr. Shockman as well."

Although, like other courts, we do not embrace jury nullification, courts have consistently recognized that defense counsel, such as Peary's attorney, may, as a practical matter have no other means of protecting their clients' interests. (See e.g. *Strickland v. Washington* (1984) 466 U.S. 668, 695 [104 S.Ct. 2052]; *People v. Montanez* (Ill.App. 1 Dist. 1996) 667 N.E.2d 548, 552-553; *Silvers v. State* (2008 Kan.App.) 173 P.3d 1167, 1171 ["When defense attorneys have made an educated, well-considered decision to rely on a jury nullification strategy, appellate courts have generally concluded such attorneys afforded effective assistance of counsel."] Thus in pursuing what was plainly a jury nullification strategy, Peary's counsel was not doing anything improper.

Importantly, any judgment about Peary's counsel and her use of Shockman's prior conviction cannot be made without giving due consideration to counsel's overall nullification strategy. Shockman's defense, in which he portrayed himself as having been exploited by Peary, plainly undermined Peary's attempt to engender sympathy and Peary's slim hope for jury nullification. In this context Peary's counsel's use of Shockman's prior conviction was no more than an entirely legitimate effort to salvage some sympathy by demonstrating that Shockman was, if anything, the more experienced and sophisticated of the two drug dealers.

We hasten to also point out that there is nothing in the record to support the dissent's related suggestion that there was a pre-existing agreement between the prosecutor and Peary's counsel to jointly undermine Shockman's defense. In this regard we once again point out that it was Shockman himself who brought on a great deal of adversity from Peary by introducing into evidence the incriminating recording, including

in particular the damning whisper: "They found it." Introducing the recording and its consequences are in no sense attributable to the prosecutor or Peary's counsel.

This brings us to Shockman's related contention that the defendants' adversity gave rise to a right to a separate trial. "[A]ntagonistic defenses do not warrant severance unless the acceptance of one party's defense would preclude acquittal of the other." (*People v. Lewis* (2008) 43 Cal.4th 415, 461.) Here, acceptance of Peary's nullification defense did not preclude a finding that Shockman was not guilty. This was not an instance where only one defendant could be found guilty. (*Ibid*.) In light of the other substantial and independent evidence of Shockman's guilt, the gross unfairness needed to overcome the statutory preference for joint trials is not present here. (*Ibid*.; see also § 1098.)

D. *Discovery*

We also reject Shockman's contention the prosecution interfered with his discovery rights. First, we note evidence of the prior conviction and in particular Shockman's use of cocktail napkins in that case was not exculpatory evidence and hence not within the scope of the prosecutor's constitutional disclosure obligations. (See *People v. Burgener* (2003) 29 Cal.4th 833, 875.)

It is true section 1054.1, subdivisions (d) and (f), and section 1054.7 require that, 30 days prior to trial, prosecutors disclose the felony convictions of material witnesses and the recorded statements of witnesses the prosecutor intends to call. Thus, the police reports in the prior proceeding would be within the scope of the prosecutor's disclosure

obligations under section 1054.1, if we assume the prosecution intended to call the author or authors of those reports as witnesses. (See § 1054.1, subd. (f).)

However, even if we assume the police reports were subject to section 1054.1, subdivision (f), the obligation to disclose them 30 days prior to trial was subject to an exception for material which becomes known to a party within 30 days of trial. Such late discovered material is not barred, but must be disclosed immediately. (§ 1054.1.) Here, the record shows that the prosecutor in fact promptly disclosed the police reports to Shockman's counsel after receiving the file from storage. Thus, admission of the prior conviction did not involve any violation of the prosecutor's duties under section 1054.7.

E. *Ineffective Assistance of Counsel*

By way of his petition for a writ of habeas corpus, Shockman contends his counsel was ineffective in not obtaining the police reports related to his 2002 conviction prior to trial. We find no ineffective assistance of counsel and nothing in counsel's performance which would have altered the outcome of his case.

1. *Declarations of Counsel and Shockman*

In support of his petition, Shockman relies on a declaration from his counsel which states that counsel on his own should have obtained the file in the prior case. Counsel states he should not have relied on Shockman to remember all the details of his prior conviction and communicate them to him because Shockman was 64 years old at the time of trial, had a difficult time with his memory and was very hard of hearing. Counsel states that had he discovered the similarity in the crimes, in particular Shockman's use of cocktail napkins in both instances, he would have advised Shockman

to accept the prosecutor's offer of a plea bargain. Counsel further states that even if Shockman did not take the plea offered, he would have advised Shockman not to take the stand in his own defense and would have adopted a different approach to voir dire and opening statement.

In a declaration we permitted Shockman to file following oral argument, Shockman states that although he had many differences with his trial counsel, had his counsel advised him about the damaging nature of the 2002 case, he would have followed advice from his lawyer to accept the plea bargain offered by the prosecution and that in any event he would also have accepted advice that he not testify on his own behalf.

2. *Legal Principles*

"An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.] . . .

"To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citations.]

"Our Supreme Court recently reiterated the obligations of appellate courts in reviewing claims of ineffective assistance of counsel: ' " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" ' [Citation.]

" 'Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances. [Citation.]' [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1148.)

3. *Analysis*

a. *Counsel was Effective*

The first difficulty we have with Shockman's claim of ineffective assistance of counsel is his claim his counsel's performance was deficient. A fairly persuasive argument can be made that counsel acted reasonably in relying on Shockman to tell him about any pertinent details of the prior crime.

The record here shows Shockman was himself a fairly competent, although unsuccessful, methamphetamine distributor and criminal. He had in Peary a subdistributor who, evidently, Shockman had been supplying methamphetamine on a fairly regular basis. In the recording of Shockman's conversation with Peary, we also have evidence of a fairly sophisticated criminal who, caught in a difficult situation in the back of a police car, quickly attempted to manufacture a conversation which exculpated him and which, notwithstanding Shockman's denial, the record suggests he knew was being recorded.

Next, we have in Shockman's testimony at trial an imaginative criminal who attempted to create a version of events in which Peary, not he, was responsible for wrapping the methamphetamine in the very incriminating cocktail napkin. In this context, it is simply not credible to accept his counsel's suggestion that age or a hearing impairment prevented Shockman from remembering and communicating Shockman's earlier use of cocktail napkins. Rather, given the important role of the cocktail napkins in the instant offense, and Shockman's overall competence and creativity, it was quite

reasonable for his counsel to rely on Shockman to share significant and pertinent details of the prior offense.[4]

b. *No Prejudice*

However, even if we were to find that Shockman's counsel was deficient in failing to discover the similarity in crimes, the record will not show Shockman was in any material manner prejudiced by that failure.

Earlier discovery of the police reports by counsel or the prosecution would not have prevented admission of the prior crime. Earlier discovery by either side would only have in fact increased the likelihood that the details of the 2002 conviction were introduced at trial. Thus, in the absence of counsel's alleged ineffectiveness, it is *more likely* the prior conviction would have been admitted.

Nonetheless, Shockman and his counsel state that had they been aware of the similarity in crimes, counsel would have advised his client to accept the plea bargain offered by the prosecution prior to trial. Counsel's declaration is insufficient to show prejudice. In order to show counsel's conduct prevented him from accepting a plea bargain more favorable than the sentence he received, Shockman must present a "credible, independently corroborated prima facie showing of a *reasonable probability*

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[4] From the perspective of a criminal defendant, it is understandable that Shockman would *not* share information about the prior conviction with counsel. If counsel had been aware of the detailed similarity in crimes at the time the prosecution made its initial motion in limine, counsel plainly would have been hampered in making a good faith argument the crimes were not similar enough to permit admission of the prior offense. As the record shows, counsel, unburdened by any detailed information about the prior crime, was successful in defeating the prosecution's in limine motion.

that he would have accepted the plea offer but for his trial counsel's" alleged ineffectiveness. (*In re Alvernaz* (1992) 2 Cal.4th 924, 946 (*Alvernaz*).)

In *Alvernaz*, although the defendant himself stated in a declaration that in the absence of his counsel's error he would have accepted the prosecution's offer, the court found no independent corroboration of that claim. Rather, the court found that "[t]he declarations of petitioner and his trial counsel, however, and the reasonable inferences drawn therefrom, establish that petitioner's decision to reject the plea offer was motivated primarily by a persistent, strong, and informed hope for exoneration at trial, and that any evaluation of precise sentencing options was secondary in his thinking." (*In re Alvernaz, supra,* 2 Cal.4th at p. 945.)

Here, Shockman presents a record which is no more convincing than the one considered in *Alvernaz.* The declarations of Shockman and his counsel, which is all that has been offered in support of Shockman's claim, state that Shockman would have accepted the plea bargain offered by the prosecution. The declarations require that we speculate that Shockman would have accepted the prosecution's offer. That speculation is not credible proof that Shockman would have accepted the offer. (See *Alvernaz, supra*, 2 Cal.4th at p. 944.) Moreover, it is strongly rebutted by other circumstances disclosed in the record.

In particular, we must presume that when Shockman declined the prosecution's offer, he was aware not only of the similarity in the two crimes, but of the quantum of other incriminating evidence against him. We also note that Shockman was fully aware that his unwillingness to accept the offered plea prevented Peary from obtaining the

benefits of the offer. Thus, Shockman was likely aware of the high risks of conviction, but was nonetheless willing to forego the benefits of the bargain not only for himself but for Peary. These circumstances suggest that rather than a defendant convinced of his innocence, as in *Alvernaz*, Shockman was a defendant who believed he had little to lose by forcing the prosecution to try its case against him. The result, however, is the same: the record strongly suggests this defendant would not have accepted the prosecution offer even if counsel had been fully aware of all the details of the prior crime.

In the alternative, Shockman and his counsel state that even if Shockman had not accepted the plea, counsel's trial tactics, including his decision to put Shockman on the stand, would have been different had he known about Shockman's prior use of cocktail napkins. Again we find no prejudice. Even assuming a different approach to voir dire, opening statement, argument and Shockman's decision to testify, we have little doubt Shockman would have been convicted. The prosecution's case, even conceding changes in the defense case, would have consisted of: the text messages from Peary, Shockman's prompt arrival at the scene with Peary, the methamphetamine wrapped in cocktail napkins recovered from Peary, the cocktail napkins, methamphetamine and paraphernalia found at Shockman's residence and Shockman's prior conviction. With due respect, Shockman's silence and any alternative tactics adopted by counsel would have not have been sufficient to overcome this virtual mountain of incriminating evidence.

In sum, even if counsel's representation was subject to criticism, Shockman has not shown that he was harmed by any deficiency in counsel's performance. Thus we deny Shockman's petition.

II

Next, Shockman argues the prosecution failed to properly prove his prior convictions and prison term because in doing so it relied on a fingerprint expert who compared fingerprints taken by other technicians in both the prior proceedings and in this case. He argues that the prosecution was required under *Melendez-Diaz v. Massachsuetts* (2009) 129 S.Ct. 2527, 2529 (*Melendez-Diaz*), to authenticate the prior fingerprints with testimony from the technicians who took the fingerprints. We find no such requirement in *Melendez-Diaz*.

In *Melendez-Diaz* the defendant was being prosecuted for drug trafficking, and in establishing its case against him the prosecution relied on the affidavit of a forensic expert who had concluded the substance found in the defendant's possession was cocaine. The court held that because the expert was not produced at trial and available for cross-examination, the prosecution's use of the expert's affidavit violated the defendant's right to confront the witnesses against him. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532; Sixth Amend., U.S. Const.) The court found the affidavit implicated the defendant's Sixth Amendment rights because it was plainly prepared in the expectation that it would be used as evidence of the defendant's guilt. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) However, the court expressly recognized that nontestimonial records prepared in the normal course of performing a recordkeeper's duties were outside the scope of the confrontation clause. (*Ibid*., fn. 1.)

Here, in no sense can the work of the technicians who took Shockman's fingerprints in the earlier proceedings and recorded those facts be considered testimonial

within the meaning of *Melendez-Diaz*. The fingerprinting process did not implicate Shockman in any crime, but rather provided a record of his identity at a certain point in the earlier proceedings. The principally administrative purpose of this means of identifying criminal litigants is obvious: it prevents innocent members of the public from being subjected to misidentification as the participants in criminal proceedings and permits law enforcement personnel to identify criminals in their custody with some certainty. The fact that the administrative records of the fingerprints could also be used in criminal proceedings to subject Shockman to sentence enhancements did not alter their inherently nontestimonial nature. (See *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1222-1224.)

III

Finally, Shockman contends the trial court erred in imposing on him a $600 restitution fine during his probation revocation hearing. As he points out, the trial court had previously imposed a $200 restitution fine in the probation proceeding.[5] In light of that fact, we agree with Shockman that the trial court had no power to impose the second fine. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 820.) Accordingly, we will modify the judgment to strike the $600 fine.

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5 We take judicial notice of the records of the prior probation proceeding, which are part of the record in a related appeal, D053948.

DISPOSITION

The imposition of the $600 restitution fine is stricken, and as modified the judgment is affirmed. The trial court is directed to amend the abstract of judgment to conform with this modification. The petition is denied.

BENKE, Acting P. J.

I CONCUR:

NARES, J.

Aaron, J., dissenting.

I.

The Trial Court Erred in Permitting Peary's Counsel and the Prosecutor to Introduce Evidence of Shockman's Prior Conviction

A. Having prohibited the prosecution from introducing evidence of Shockman's prior conviction on the ground that to do so would be unfair, the trial court erred in permitting codefendant Peary to introduce that same evidence

The trial court denied the prosecutor's in limine motion to admit Shockman's prior conviction on the ground that the prejudicial impact of the conviction outweighed its probative value. Having received this ruling, Shockman took the witness stand to testify in his own defense and stated that he was unaware at the time he gave Peary a ride on the day of the offense that Peary had methamphetamine in his possession, or that he was planning to sell it. Shockman admitted that he had black cocktail napkins at his apartment, but denied having cut or altered them. Shockman testified that Peary had been alone inside Shockman's apartment before Shockman picked him up, implying that Peary was the person who had wrapped the methamphetamine in the cocktail napkins.

While Shockman was still on the witness stand, the prosecutor belatedly obtained the case file from Shockman's previous conviction, which had been in storage. The police reports from the prior offense indicated that, as in the present case, the methamphetamine had been packaged in cocktail napkins. Based on the similarity of the packaging method in the two cases, the prosecutor renewed her request to be permitted to introduce evidence of Shockman's prior conviction. The trial court denied this request. In denying the request, the trial court stated that in its view, the use of cocktail napkins

was unique and that the court would, under normal circumstances, find the evidence to be admissible under Evidence Code section 1101, subdivision (b). However, because the prosecution had not introduced the evidence in its case-in-chief, and Shockman had taken the stand and testified in his own defense with the understanding that evidence of his prior conviction would not be introduced, the court would not permit the prosecutor to introduce the evidence at this stage of the proceedings. The court further ruled that it would not allow the prosecution to impeach Shockman's testimony with evidence of the prior conviction because Shockman had not denied having used napkins to package methamphetamine. In essence, as the majority states, the court precluded the prosecutor from introducing evidence of Shockman's prior conviction in the middle of the defense case, on the ground that to do so would be unfair to the defense.

Yet, when codefendant Peary's counsel argued that she should be allowed to introduce the very same evidence, apparently as "payback" for Shockman having introduced the taped recording of the conversation between Shockman and Peary in the back of the police car in which Peary made incriminating statements, the trial court allowed her to do so.[1]

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1 Peary's attorney had previously made clear her displeasure with Shockman for having refused to accept the pretrial package deal, thus forcing Peary to go to trial. After the file of Shockman's prior conviction arrived and while the prosecutor was arguing that she should be permitted to use evidence from that file to impeach Shockman, Peary's counsel acknowledged that the issue was "not really my business," but then stated, "I will point out that Mr. Shockman prevented Mr. Peary from taking a deal and now he's on the stand throwing Mr. Peary under the bus and claiming to know nothing about drugs and cocktail napkins."

The majority approves of the manner in which the trial court handled this matter, apparently on the basis that Shockman's declining to accept the "package deal" plea bargain that the prosecutor had offered to Shockman and Peary prior to the trial—thereby causing Peary to have to go to trial against his will—somehow justified Peary's attorney effectively taking over the prosecution of Shockman. The majority states, "Peary's counsel, having received a ruling Shockman could use the damaging recording of her client's statement against him, turned the tables, so to speak, on Shockman: Peary's counsel argued that if Shockman could use Peary's recorded statements against Peary, Peary should be permitted to use Shockman's conviction against him." (Maj. opn. at p. 11.)

The majority's analysis on this point is deeply flawed. Shockman's defense at trial was that he had merely given Peary a ride to the location of the proposed drug transaction, and that he did not know that Peary was planning to sell methamphetamine. Significant portions of the recorded conversation between Shockman and Peary that took place in the back seat of the police vehicle supported Shockman's defense. Specifically, during that conversation, Shockman expressed surprise that Peary had methamphetamine in his possession, and Peary told Shockman that he had told the police that he had called Shockman for a ride, and that Shockman "had no clue" where Peary was going. The recording of Shockman and Peary's conversation was thus central to Shockman's defense.

In stark contrast, evidence pertaining to Shockman's prior conviction was *entirely irrelevant* to Peary's defense. In fact, Peary did not put on *any* defense. Peary was arrested as he was about to engage in a prearranged, hand-to-hand sale of

methamphetamine. Peary had unwittingly exchanged text messages with a police officer to arrange the transaction, and officers observed Peary as he arrived at the prearranged location. Methamphetamine fell to the ground from Peary's pants when Peary was confronted by Officer Johnson. Whether Shockman knew that Peary was conducting a methamphetamine sale, or whether Shockman was Peary's source of supply, had no impact on Peary's culpability. The majority concedes that acceptance of Peary's "defense"[2] would not have "preclude[d] a finding that Shockman was not guilty." (Maj. opn. at p. 18.) Similarly, a finding that Shockman was guilty would not have reduced Peary's culpability.

In arguing that the trial court should allow her to introduce evidence that cocktail napkins were used to package methamphetamine in Shockman's prior offense, even if the court would not permit the prosecutor to do so, Peary's counsel stated, "Mr. Peary should be able to bring them out. We're not the government. *Tit for tat.* It's getting kind of nasty in here." (Italics added.) Peary's counsel's argument that "if Shockman could use Peary's recorded statements against Peary, Peary should be permitted to use Shockman's conviction against him" (maj. opn. p. 11), might be a deeply engrained concept on the playground, but it has no basis in the law; "tit for tat" is not among the purposes enumerated in Evidence Code section 1101, subdivision (b) for which evidence of a defendant's commission of other crimes may be introduced. Yet the majority accepts this argument in finding no error, justifying Peary's attorney's tactic by repeatedly stating that

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2 Peary did not testify at trial and presented no witnesses or evidence.

Peary and Shockman were "adverse" to each other at trial once Shockman declined the plea bargain, thereby forcing Peary to go to trial, and noting that this adversity increased after Shockman introduced the recording of the conversation between Shockman and Peary that took place in the police vehicle.

The mere fact that codefendants are "adverse" in the sense that they are unhappy with each other's trial choices or strategies, does not give a codefendant's attorney license to step into the shoes of the prosecutor and introduce evidence that is inculpatory as to the other defendant, but irrelevant to her client's defense. What is notably missing here is any showing by Peary's counsel that evidence of Shockman's prior conviction had any relevance whatsoever to Peary's defense.[3]

It is unorthodox, to say the least, for a codefendant's attorney to take up where the prosecutor left off in introducing damaging evidence of prior acts under Evidence Code section 1101, subdivision (b) *when the evidence in question has no bearing on the codefendant's culpability*. The majority attempts to justify this tactic on the basis that, "the identity of the person who supplied Peary with the [meth] . . . was a vigorously disputed issue." (Maj. opn. at p. 13.) While this may have been a vigorously disputed issue *between the prosecution and Shockman*, as stated above, whether Shockman was or

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3 Shockman's counsel objected to Peary's counsel introducing evidence of Shockman's prior offense. After the court ruled that the prosecutor would not be permitted to introduce the evidence and Peary's counsel made her "tit for tat" argument, Shockman's counsel stated, "I don't think it makes logical sense that the other party can bring in everything negative that Mr. Shockman has ever done, subject to the same rules [i.e., Evid. Code, § 1101, subd. (b)]."

was not Peary's supplier was *irrelevant* to Peary's defense, since inculpating Shockman did not in any way exonerate Peary.

In addition, when the file of Shockman's prior conviction arrived, the court precluded the prosecutor from using evidence from that file on the ground that to do so at that point in the trial would be unfair to Shockman, who had taken the stand in reliance on the court's pretrial ruling excluding that evidence. The trial court based its ruling to allow Peary's counsel to introduce evidence of Shockman's prior conviction on the fact that Peary had not yet put on his case-in-chief, stating that "any party who has not yet put on his case-in-chief is not prohibited from using [Evidence Code section] 1101[, subdivision] (b) in this scenario."[4] However, if, as the trial court found, it would have been unfair to allow the prosecutor to introduce evidence of Shockman's prior conviction after Shockman had taken the witness stand and begun testifying "on the assumption that he would not be confronted with [his] prior conviction" (maj. opn. at p. 11), it was equally unfair to allow Peary's counsel to introduce the very same evidence at the same stage of the proceedings. As this court stated in a similar context, "[T]he direction of a blow is less important than the wound inflicted." (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095 [characterizing the impact of the improper introduction of damaging information by a codefendant's attorney, rather than by the prosecutor].)

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4 The trial court made no finding that the evidence of Shockman's prior conviction was relevant to Peary's defense, much less that its probative value *as to Peary's defense* outweighed its prejudicial effect. In the absence of such a finding, whether the evidence was relevant to prove Shockman guilty is immaterial, since it was not Peary's responsibility to secure a conviction of Shockman.

There is simply no legitimate basis for the trial court's having allowed Peary's attorney to effectively be "cross-deputized" as a prosecutor, and permitting that attorney to introduce evidence of Shockman's prior conviction—evidence that had no bearing on Peary's culpability, and that the court had prohibited the prosecutor from introducing on the ground that to do so would be unfair.

B. The trial court compounded its error by allowing the prosecution to introduce details pertaining to Shockman's prior conviction, on cross-examination of Shockman

Before the untimely arrival of the file of Shockman's prior conviction, the trial court had ruled that because Shockman had not denied having used cocktail napkins to package methamphetamine, the court would not permit the prosecutor to use evidence of the prior conviction to impeach his testimony. The court had further ruled that if Shockman were to testify in a manner that rendered the cocktail napkin evidence "pure impeachment . . . or character," then the court would permit the prosecution to use the evidence of the prior offense to impeach this testimony. As the trial court acknowledged, Shockman took the witness stand with the understanding that his prior conviction would not be introduced against him unless he were to "open the door" by denying knowledge of cocktail napkins being used to package methamphetamine. On direct examination, Shockman simply denied having cut or altered the black cocktail napkins that police found in his apartment, and the trial court ruled that this testimony had not opened the door to the use of evidence of his prior conviction to impeach him. In view of the trial court's previous ruling regarding "opening the door," Shockman undoubtedly had no intention of engaging in any further discussion concerning cocktail napkins.

The subject of using cocktail napkins to package methamphetamine came up again during Shockman's testimony only because the trial court erroneously allowed Peary's attorney to cross-examine Shockman about the facts of his prior conviction, and in particular, the use of cocktail napkins to package the methamphetamine in that case. Peary's attorney began her cross-examination of Shockman by grilling him about his knowledge of drugs being packaged in cocktail napkins, and the fact that in his prior offense, police found methamphetamine at his residence packaged in blue cocktail napkins. When questioned by Peary's attorney concerning the napkin issue, Shockman denied that he had wrapped methamphetamine in cocktail napkins "for the purposes of sale" in 2002, and stated that he had done so "[j]ust to keep it safe."

The trial court's ruling allowing *Peary* to cross-examine Shockman concerning his prior conviction, made after Shockman had begun testifying, entirely changed the landscape of the trial, to Shockman's great disadvantage. If the trial court had not allowed Peary's counsel to cross-examine Shockman about the use of cocktail napkins in his prior offense, Shockman clearly would not have mentioned the subject of using cocktail napkins to package methamphetamine. However, after Shockman gave this testimony in response to questioning by Peary's attorney, the court called a sidebar conference at which the court stated that Shockman's answers to Peary's counsel's questions had opened the door, and that the court would now permit the prosecutor to question Shockman about the circumstances of his prior conviction. The prosecutor proceeded to cross-examine Shockman in great detail about the prior offense.

One of the most unseemly aspects of the manner in which events unfolded in the trial court is that the sequence of the events makes it appear that the prosecutor and Peary coordinated the attack on Shockman, and that Peary and his attorney were "rewarded" for introducing the damning evidence that the prosecutor had been prohibited from introducing herself. Rather than the prosecutor cross-examining Shockman first, Peary's attorney went first, questioning Shockman about his prior conviction, thereby causing Shockman to "open the door" to impeachment on this subject by the prosecutor. Immediately after Peary's attorney completed her cross-examination of Shockman, the prosecutor began her cross-examination by stating, "Mr. Shockman, I'm going to start where Miss Sunday [Peary's attorney] left off."

Worse, after Peary's counsel introduced the evidence of Shockman's prior conviction—effectively decimating Shockman's defense and opening the door to the prosecutor questioning Shockman about his prior conviction—the prosecutor offered Peary *the same plea bargain* that had been offered before trial, but at that time, only as a "package deal." Peary accepted the offer and was allowed to plead guilty.

II.

Shockman Has Made a Prima Facie Showing That His Trial Counsel Rendered Ineffective Assistance and That He was Prejudiced by His Counsel's Conduct

Shockman's attorney admitted at trial that he had rendered "gross ineffective assistance of counsel" by failing to investigate the circumstances of Shockman's prior case. After the trial court ruled that it would permit Peary's counsel to question Shockman about the circumstances of his prior offense, Shockman's attorney stated that if

he had been aware of the similarities between Shockman's prior offense and the offense in this case, he would not have had Shockman testify. Counsel also told the court that his voir dire and opening statement would have been different. In this court, trial counsel has filed a declaration in support of Shockman's petition for writ of habeas corpus in which he admits that he rendered ineffective assistance in failing to obtain the police reports pertaining to Shockman's prior conviction before the trial in this case. Trial counsel further avers that if he had discovered, prior to trial, the similarities between that crime and the crimes charged in the present case, and in particular, the fact that in both cases, the drugs were packaged in cocktail napkins, he would have advised Shockman to accept the plea bargain that the prosecutor offered. Counsel also reiterates the statements that he made in the trial court to the effect that if Shockman had refused to accept the offer, he would have advised Shockman not to take the stand, and asserts that he would have adopted a different approach to both voir dire and opening statement.

In a declaration filed in support of his petition for habeas corpus, Shockman states that if his counsel had advised him concerning the damaging nature of the evidence of the prior offense, he would have accepted the plea offer, and in any event, he would not have taken the witness stand to testify in his own defense.

The majority concludes that Shockman's trial counsel did not render effective assistance, going so far as to suggest that counsel's failure to investigate the circumstances of Shockman's prior conviction actually redounded to Shockman's benefit. Specifically, the majority states, "A fairly persuasive argument can be made that counsel acted reasonably in relying on Shockman to tell him about any pertinent details of the

prior crime." (Maj. opn. at p. 22.) The majority proceeds to make the twisted argument that if Shockman's counsel had been aware of the similarities between the prior and current offenses before trial, "counsel plainly would have been hampered in making a good faith argument the crimes were not similar enough to permit admission of the prior offense. As the record shows, counsel, *unburdened by any detailed information about the prior crime* was successful in defeating the prosecution's in limine motion." (*Id*. at p. 23, fn. 4, italics added.) The majority thus literally holds that Shockman's attorney's ignorance was bliss because counsel's ignorance of the circumstances of Shockman's prior conviction enabled counsel to make an argument that, in reality, had no factual support.

However, that bliss was short lived. What the majority fails to acknowledge in its analysis of this issue is that Shockman's counsel's failure to investigate the circumstances of Shockman's prior conviction ultimately blew up in their faces when the file of Shockman's prior offense arrived while Shockman was on the witness stand, and the trial court proceeded to allow both Peary's counsel and the prosecutor to have a field day examining Shockman about the damning evidence from the case file of the prior offense.

In concluding that Shockman suffered no prejudice from his counsel's failure to obtain the police reports regarding the prior conviction, the majority maintains that the declarations filed by trial counsel and by Shockman "require that we speculate that Shockman would have accepted the prosecution's offer" (citing *In re Alvernaz* (1992) 2 Cal.4th 924, 944), and that this inference is "strongly rebutted by other circumstances disclosed in the record." (Maj. opn. at p. 24.)

Ironically, as the basis for this assertion, the majority proceeds to lay out its own speculative conclusions about Shockman's unexpressed thought processes, stating that Shockman was "likely aware of the high risks of conviction, but was nonetheless willing to forego the benefits of the bargain not only for himself but for Peary" (maj. opn. at pp. 24-25), and that "[t]hese circumstances suggest that rather than a defendant convinced of his innocence, as in *Alvernaz*, Shockman was a defendant who believed he had little to lose by forcing the prosecution to try its case against him." (*Id*. at p. 25.) The majority concludes, "The result, however, is the same: the record strongly suggests this defendant would not have accepted the prosecution offer even if counsel had been fully aware of all the details of the prior crime." (*Ibid*.)

Contrary to the majority's assertion, this remarkable conclusion is entirely unsupported by the record. First, as noted, Shockman's attorney has stated under penalty of perjury that if he had been aware of the similarities between Shockman's prior offense and the current offense, he would have advised Shockman to accept the plea bargain that was offered prior to trial, and Shockman has stated under penalty of perjury that if he had known that such incriminating evidence existed and would be used against him, he would have accepted the offer. In addition to these declarations, the record indicates that Shockman proceeded to trial not because he "believed he had little to lose by forcing the prosecution to try its case against him," as the majority asserts, but rather, because, given the trial court's pretrial ruling that the prosecutor would not be permitted to use his prior conviction against him, he believed he had a viable defense, i.e., that he had simply given

Peary a ride and knew nothing about the methamphetamine transaction that was to take place.

The majority's speculative assertions concerning Shockman's state of mind and what he would have done are based on improper fact finding and improper credibility determinations. At this stage of the habeas corpus proceedings, the only question for this court is whether Shockman has established a prima facie case that his counsel rendered ineffective assistance, and that he was prejudiced thereby. The questions that the majority poses—and purports to answer—are precisely the questions that a trial court should determine at an evidentiary hearing.

Shockman has made a prima facie showing that his trial counsel rendered ineffective assistance in failing to investigate the circumstances of Shockman's prior conviction and obtain the police reports pertaining to that case, before the trial in the present case. He has further made a prima facie showing that he was prejudiced by his counsel's conduct. Specifically, his trial counsel's statement that he would have advised Shockman to accept the plea bargain, and Shockman's statement that he would have accepted the plea bargain, if they had known about the incriminating information in the police reports from Shockman's prior case, constitute a prima facie showing of prejudice.

Under these circumstances, this court should issue an order to show cause as to why Shockman's petition for writ of habeas corpus should not be granted, returnable in

the Superior Court, with directions that the court conduct an evidentiary hearing and issue a decision on the petition.[5]

AARON, J.

[5] The Attorney General filed a response to the habeas corpus petition, concurrently with its respondent's brief in the appeal.