No. _____

IN THE

Supreme Court of the United States

HOLLINS TIZENO

Petitioner,

v.

GERALD JANDA, WARDEN

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLINS TIZENO, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 15-56150 D.C. No. 2:12-cv-05157-BRO-RNB MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Beverly Reid O'Connell, District Judge, Presiding

Argued and Submitted March 6, 2019
Pasadena, California

Before: FERNANDEZ and M. SMITH, Circuit Judges, and CHRISTENSEN,** Chief District Judge.

Petitioner Hollis Tizeno appeals the district court's order denying his petition for writ of habeas corpus, arguing that the district court erred by raising procedural default sua sponte and by finding that he failed to show actual

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Dana L. Christensen, Chief United States District Judge for the District of Montana, sitting by designation.

innocence to overcome procedural barriers pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995). We have jurisdiction pursuant to 18 U.S.C. § 1291, and we affirm.

1. We have held that the district court retains "discretion to raise procedural default sua sponte if doing so furthers" the interests of comity, federalism, and judicial efficiency, as long as the court "give[s] a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal." *Boyd v. Thompson*, 147 F.3d 1124, 1127–28 (9th Cir. 1998).

We find these interests furthered in this case. The California Supreme Court cited *In re Clark*, 855 P.2d 729, 740–41 (Cal. 1993), in its summary denial of Tizeno's petition. As explained in *Clark*, that court has long imposed "the rule that absent a change in the applicable law or the facts, [it] will not consider repeated applications for habeas corpus presenting claims previously rejected," and "refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." *Id.* at 740. We need not determine whether the bar against piecemeal or successive petitions is an adequate and independent state ground to find that the interests of comity and federalism are furthered by raising the bar sua sponte. Judicial efficiency also supports raising the procedural bar. In Tizeno's opposition to the State's motion to dismiss, he specifically conceded that his claims are barred due to California's procedural rules regarding piecemeal presentation of claims. In fact, Tizeno cited *Clark*, quoting,

"The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose." *Id.* at 741.

Furthermore, Tizeno had proper notice and an opportunity to respond. In addition to conceding that his petition was barred by California's procedural rule against piecemeal presentation of claims in a previous brief, Tizeno received notice of the bar and its consequences when the magistrate judge filed his Report and Recommendations with the district court. Tizeno then had the opportunity to respond by filing objections to the magistrate judge's findings. This is sufficient under *Boyd*.[1]

2. Even assuming we review a *Schlup* claim de novo, Tizeno fails to meet the *Schlup* standard. "To be credible, such a[n actual innocence] claim requires petitioner to support his allegations of constitutional error with new *reliable* evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324 (emphasis added). Tizeno presents only unreliable and incredible evidence from a witness's recantation testimony to establish actual innocence.

[1] Because we find the district court acted within its discretion in raising the procedural bar, we do not address whether the State specifically raised the bar against piecemeal or successive litigation when it generally raised *Clark*'s untimeliness bar.

This cannot meet *Schlup*'s high standard. *See id.* at 321 (establishing that the *Schlup* gateway is intentionally "'rare' and [] only [] applied in the 'extraordinary case'").

AFFIRMED.[2]

[2] We deny Tizeno's motion to stay and remand the case. Even if his *Brady* claim has merit, it faces the same procedural bars as his other claims, and remand would therefore be futile.

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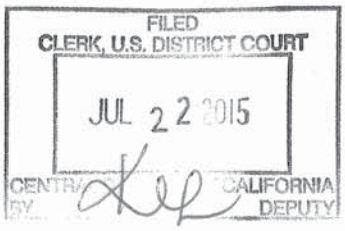

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOLLINS TIZENO,

Petitioner,

vs.

GERALD JANDA, Warden (A),

Respondent.

Case No. CV 12-5157-BRO (RNB)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: 7.20.15

BEVERLY REID O'CONNELL
UNITED STATES DISTRICT JUDGE

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOLLINS TIZENO,

Petitioner,

vs.

GERALD JANDA, Warden (A),

Respondent.

Case No. CV 12-5157-BRO (RNB)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: 7.20.15

BEVERLY REID O'CONNELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOLLINS TIZENO, Petitioner, vs. GERALD JANDA, Warden (A), Respondent.	Case No. CV 12-5157-BRO (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Beverly Reid O'Connell, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On June 13, 2012, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet.") herein, which included a supporting memorandum ("Pet. Mem."). Concurrently, he filed a request for appointment of counsel (which the Court subsequently granted). The Petition was directed to petitioner's 1992 conviction of first degree murder and attempted first degree murder, and purported to allege seven grounds for relief.

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On October 24, 2012, respondent filed a Motion to Dismiss on the grounds that (a) the Petition was time barred, and (b) petitioner had failed to exhaust his state remedies with respect to Grounds One through Four and Six of the Petition.[1] The exhaustion of state remedies issue ultimately became moot when the California Supreme Court denied petitioner's habeas petition raising claims corresponding to Grounds One, Two, Three, and Seven of the Petition; and petitioner then withdrew Grounds Four and Six.

At a status conference held on August 16, 2013, the Court advised of its view that the record currently before the Court was not sufficient for the Court to make a determination of when the limitation period commenced running with respect to Grounds One, Two, Three, and Seven of the Petition. The Court also noted that, technically, the procedural default defense was not yet before the Court because it was not raised in the Motion to Dismiss, which predated the California Supreme Court's denial order, and respondent had not yet filed an Answer. Given the present state of the record, the Court explained that it currently was contemplating issuing an Order denying the Motion to Dismiss without prejudice to respondent reasserting the statute of limitations defense in its Answer to the Petition (along with the procedural default defense). The Order further would provide that it would not be necessary for respondent to brief the merits of petitioner's claims at this time; rather, respondent's supporting memorandum could be confined to the affirmative defenses and petitioner's actual innocence claim. Both sides' counsel expressed their concurrence

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[1] At a status conference held on November 20, 2012, the Court advised counsel that, based on its review of petitioner's two California Supreme Court filings, the Court not only concurred with respondent that Grounds One, Two, Three, Four, and Six of the Petition were unexhausted, but the Court also believed that the actual innocence claim being alleged in Ground Seven was unexhausted because petitioner had failed to present that claim as a violation of his federal constitutional rights when he raised his actual innocence claim in his second Petition for Review.

with this approach.

In accordance with the approach agreed-upon at the August 16, 2013 status conference, the Court issued an Order that same date denying the Motion to Dismiss without prejudice to respondent reasserting the statute of limitations defense in his Answer to the Petition (along with the procedural default defense). The Order further provided that it would not be necessary for respondent to brief the merits of petitioner's claims at this time; rather, the supporting memorandum could be confined to the affirmative defenses and petitioner's actual innocence claim.

In accordance with the Court's August 16, 2013 Order, respondent filed an Answer to Petition ("Ans."), in which respondent asserted inter alia that the Petition was time barred and that Grounds One, Two, Three, and Seven were procedurally defaulted. The Answer was accompanied by a supporting memorandum ("Ans. Mem.") that was directed solely to the procedural default issue and petitioner's actual innocence claim.

On January 2, 2014, petitioner filed a Traverse ("Trav.") that likewise was directed solely to the procedural default issue raised by respondent and petitioner's actual innocence claim.

Thus, as of the filing of the Traverse, the current posture of this case was as follows. Petitioner was alleging the following five grounds for relief:

> 1. (a) Petitioner's pre-trial identification by the two main prosecution witnesses was the result of impermissibly suggestive identification techniques, and (b) the prosecution failed to disclose information relating to the pre-trial identification by one of those witnesses that was favorable to the defense, in violation of petitioner's federal constitutional rights under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (See Pet. at ¶ 7.a; Pet. Mem. at 3-5.)

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2. Petitioner's conviction was obtained by the knowing use of false testimony by the same two prosecution witnesses, in violation of petitioner's federal constitutional rights under Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). (See Pet. at ¶ 7.b; Pet. Mem. at 5-6.)

3. Even if the testimony of the two witnesses was presented in good faith and without knowledge of its falsity, petitioner's conviction based on false evidence violated his federal constitutional right to due process. (See Pet. at ¶ 7.c; Pet. Mem. at 6-7.)

4. [withdrawn]

5. The trial court's failure to grant petitioner's motion to represent himself was a denial of his federal constitutional right to self-representation under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). (See Pet. at ¶ 7.e; Pet. Mem. at 7-9.)

6. [withdrawn]

7. Petitioner is actually innocent. (See Pet. at ¶ 7.g; Pet. Mem. at 10-12.)

Respondent was contending that all five grounds were time barred and that Grounds One, Two, Three, and Seven also were procedurally defaulted.

Petitioner had conceded that Ground Five was time barred (subject to his actual innocence claim).[2] However, petitioner disputed that Grounds One, Two, Three, and

[2] Petitioner conceded that Ground Five was time barred in his Supplemental Opposition to the Motion to Dismiss, subject to his actual innocence claim. Accordingly, the Court's finding hereafter that petitioner has failed to make a sufficient showing to qualify for the actual innocence exception to the statute of limitations and the procedural default doctrine is completely dispositive of Ground

(continued...)

Seven were time barred. Rather, petitioner maintained that Grounds One, Two, Three, and Seven of the Petition were timely filed under 28 U.S.C. § 2244(d)(1)(D) because he did not discover the factual predicate of those claims until February 3, 2011. Petitioner also disputed that Grounds One, Two, Three, and Seven of the Petition were procedurally defaulted. Moreover, petitioner contended that, in any event, he qualified for the actual innocence exception to the statute of limitations and the procedural default doctrine.

Per an Order re Further Proceedings issued on February 4, 2014, the Court advised the parties of its conclusion that the record currently before the Court was not sufficient for the Court to make a determination of when the limitation period commenced running with respect to Grounds One, Two, Three, and Seven of the Petition. However, the Court was prepared to find that respondent had adequately pled in the Answer the existence of independent and adequate state-law procedural ground as an affirmative defense to Grounds One, Two, Three, and Seven of the Petition; that petitioner's bare assertion in his Traverse that respondent "has failed to meet his burden to establish that [In re]Clark[, 5 Cal. 4th 750, 767-69 (1993)] is an adequate and independent bar as applied to Tizeno" was insufficient to satisfy petitioner's burden under Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir.), cert. denied, 540 U.S. 938 (2003) to place the procedural default defense in issue; and that, as a result of petitioner's failure to meet his burden, respondent had been relieved of any further duty to carry his "ultimate burden" under Bennett with respect to the claims as which the procedural default defense had been pled. The Court also was prepared to find that petitioner had not established the requisite cause for his procedural default; and that petitioner's failure to establish the requisite "cause" for his procedural default obviated the need for the Court to even reach the issue of

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[2](...continued)
Five.

whether petitioner had demonstrated the requisite "prejudice" from the procedural default.

Accordingly, the question had become whether this case qualified for the actual innocence exception to the statute of limitations and the procedural default doctrine.

The Court noted that, in support of his actual innocence claim, petitioner was relying on the "affidavits" (which actually were declarations under penalty of perjury) of the prosecution's two main witnesses, Bianka Logie ("Bianka") and Antawong Thompson ("Thompson"), that were secured by his state habeas counsel in 2011. The Court advised that it had considered those declarations in light of the evidence presented at petitioner's trial, which the Court has independently reviewed, and that it concurred with petitioner that Bianka's testimony was the "linchpin" of the prosecution's case. She was the only prosecution witness who placed petitioner near the scene of the crime with a gun. No physical evidence connected petitioner to the crime. Without Bianka's testimony, the prosecution did not have enough inculpatory evidence to support even a showing of probable cause to arrest, let alone proof of petitioner's guilt beyond a reasonable doubt.

The Court acknowledged the plethora of case authority questioning the reliability of recantation testimony. The Court noted, however, that there was no per se rule that any actual innocence claim predicated solely on recantation testimony must be rejected.

The Court further advised that it had considered whether the record here (which included trial testimony by Bianka's parents to the effect that she was a compulsive and habitual liar) would arguably support a finding, without conducting an evidentiary hearing, that her 2011 recantation of her trial testimony was not sufficiently creditworthy to satisfy Schlup's "new reliable evidence" standard. If there had been any evidence presented at trial incriminating petitioner other than Bianka's testimony, or any evidence presented at trial that corroborated Bianka's testimony incriminating petitioner, the Court likely would have found without

conducting an evidentiary hearing that Bianka's recantation was not sufficiently creditworthy to satisfy the "new reliable evidence" standard under Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). However, there was no such other evidence here and the Court believed that the Ninth Circuit's decision in Majoy v. Roe, 296 F.3d 770 (9th Cir. 2002) at the very least, accorded it the discretion to decide to defer making a determination of whether Bianka's recantation was sufficiently creditworthy to satisfy Schlup's "new reliable evidence" standard until after it saw and heard Bianka testify live and subject to cross-examination. The Court advised that this was what the Court had decided to do.

As for Thompson, the Court advised that, if petitioner had been relying solely on the Thompson declaration in support of his actual innocence claim, the Court would have found, without conducting an evidentiary hearing, that petitioner had not met his burden under Schlup. The only parts of Thompson's declaration that qualified as "new evidence" were the statement in ¶ 6 that, when he was shown the photo array on September 1, 1990, he was told by a police officer that "the person who had shot [his] cousin was in one of the photos," and the statement in ¶ 7 that he "chose the one that most closely resembled the person [he] recalled seeing on the bicycle approximately 9 weeks before." Those statements were inconsistent with the evidence presented at trial regarding the circumstances of Thompson's September 1, 1990 identification of petitioner and with Thompson's unequivocal identification testimony at trial. However, Thompson also testified at trial that he never saw the shooter, and nothing in his declaration actually exculpated petitioner. Nevertheless, the Court advised, it had concluded that Thompson's statement in his declaration regarding the suggestive technique allegedly utilized by law enforcement to secure Thompson's identification of petitioner, if credited, might have corroborating effect with respect to Bianka's evidentiary hearing testimony regarding the tactics law enforcement allegedly utilized to secure her inculpatory testimony. Accordingly, the Court advised, it also had decided that it would like to see and hear Thompson testify

live at the evidentiary hearing, subject to cross-examination.

The evidentiary hearing in this matter ultimately was held on February 10, 2015. In accordance with the briefing schedule set at the conclusion of the evidentiary hearing, respondent filed a post-evidentiary hearing brief on March 18, 2015 ("Resp. PH Brief") and petitioner then filed his post-hearing brief on April 15, 2015 ("Pet. PH Brief"). At the Court's direction, respondent filed a reply to petitioner's post-hearing brief on April 24, 2015 ("Resp. Reply"), and petitioner filed a surreply thereto on May 5, 2015 ("Surreply").

Thus, this matter now is ready for decision. For the reasons discussed hereafter, the Court finds that (a) Grounds One, Two, Three, and Seven of the Petition are procedurally defaulted; and (b) petitioner has not made a sufficient showing to qualify for the actual innocence exception to the statute of limitations and the procedural default doctrine. The Court therefore recommends that the Petition be denied and that this action be dismissed with prejudice.

BACKGROUND

On March 13, 1992, a Los Angeles County Superior Court jury convicted petitioner of one count of first degree murder while discharging a firearm at an occupied motor vehicle and one count of attempted first degree murder with personal use of a firearm. (See Clerk's Transcript ["CT"] at 143-46.) On August 28, 1992, following the denial of a new trial motion, the trial court sentenced petitioner to state prison for an aggregate indeterminate term of 30 years to life. (See CT 158-60.)

Petitioner appealed, claiming that the trial court had erred in impliedly denying petitioner's request to represent himself, in violation of petitioner's state and federal constitutional rights; that the trial court had erred in excluding certain impeachment evidence pursuant to Cal. Evid. Code § 352, in violation of petitioner's federal constitutional rights to confront and cross-examine a witness and to present a defense; that the trial court had abused its discretion in petitioner's motion for a new trial on

the attempted murder count for insufficient evidence; and that the trial court had improperly imposed concurrent punishments for the same enhancement allegation as to both counts. (See Lodged Document ["LD"] 18.) On September 23, 1993, in an unpublished decision, the California Court of Appeal rejected the first three claims, but found the fourth claim well taken. It modified the judgment to reflect that the enhancement allegation imposed on the second count was stayed, but in all other respects affirmed the judgment. (See LD 1.)

In petitioner's ensuing Petition for Review, filed in pro per, petitioner raised claims corresponding to the first three claims he had raised on direct appeal. (See LD 2.) On December 29, 1993, the California Supreme Court summarily denied the Petition for Review without comment or citation to authority. (See LD 3.) Thereafter, petitioner filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on May 16, 1994. (See Pet. Exhibits O & P.)

At some point in 1996, petitioner apparently made a motion to the trial court requesting transcripts of the voir dire proceedings, which the trial court denied on August 1, 1996. Then, nearly seven years later, petitioner made another request in the Superior Court for transcripts of the voir dire proceedings, which was denied on July 21, 2003. (See LD 4.) Petitioner then filed a petition for writ of mandate relating to his transcripts request in the Court of Appeal, which was denied on September 30, 2003. (See LD 5.)

Petitioner's first collateral challenge to his conviction took the form of a petition for writ of habeas corpus filed (through counsel, Los Angeles County Public Defender Terri Greene Foster) on April 1, 2011. The petition purported to be based on newly discovered evidence, namely that petitioner's pre-trial identification by the two main prosecution witnesses was the result of impermissibly suggestive identification techniques by the detectives who thus misled the prosecution's two main witnesses into testifying falsely at the preliminary hearing and at trial. Petitioner claimed that he was entitled to habeas relief pursuant to Cal. Penal Code

§ 1473. In support of the petition, petitioner submitted affidavits from the prosecution's two main witnesses, as well as the affidavits of three jurors indicating that, had they known of the new evidence reflected in the affidavits from the two prosecution witnesses, they would not have voted to convict petitioner. (See LD 6.) On April 13, 2011, the trial court issued an order denying petitioner's habeas petition. It found the witness affidavits "utterly without credibility." (See LD 7.)

Petitioner (through the same counsel) then filed another habeas petition in the Superior Court on September 1, 2011, in which he essentially renewed the same claims, based on the same affidavits. (See LD 8.) On September 12, 2011, the Superior Court issued an order denying the petition for being successive and on the merits. (See LD 9.)

Next, petitioner (through different counsel, Los Angeles County Public Defenders Albert J. Menaster and Albert Camacho) filed a petition for writ of habeas corpus in the California Court of Appeal on November 14, 2011, in which they repeated petitioner's claims based on the "newly discovered" evidence contained in the affidavits of the prosecution's two main witnesses and requested an evidentiary hearing. (See LD 10.) On December 7, 2011, the Court of Appeal summarily denied the petition without comment or citation to authority. (See LD 11.)

Petitioner (through the same counsel) then petitioned the California Supreme Court for review of the Court of Appeal summary denial. (See LD 12.) The sole issue presented was stated as follows: "When a person is convicted of both a homicide and an attempted homicide based solely upon the eyewitness testimony of two civilian witnesses, and those witnesses years later recant their in-court identifications and now state that their identifications were based on manipulative actions by the investigating detectives, do the current declarations of those two witnesses establish a prima facie showing that this newly discovered evidence casts fundamental doubt on the accuracy and reliability of the proceedings, requiring an order to show cause to be issued?" (See id. at 1-2.) Following the filing of an

Answer by respondent and a Reply thereto by petitioner, the California Supreme Court issued an Order on February 29, 2012, summarily denying the Petition for Review without comment or citation to authority. (See LD 13-15.)

The filing of the Petition herein followed on June 13, 2012. After respondent filed the Motion to Dismiss inter alia for failure to exhaust state remedies, petitioner (through appointed counsel herein) filed a petition for writ of habeas corpus in the California Supreme Court on May 9, 2013, wherein he alleged claims corresponding to Grounds One, Two, Three, and Seven of the Petition. (See petitioner's Status Report filed July 17, 2013, Exhibit A.) On July 17, 2013, the California Supreme Court summarily denied petitioner's habeas petition, citing In re Clark, 5 Cal. 4th at 767-69. (See id., Exhibit B.)

DISCUSSION

I. Grounds One, Two, Three, and Seven of the Petition are procedurally defaulted.

Respondent contends that Grounds One, Two, Three, and Seven of the Petition are procedurally defaulted because, when petitioner raised those claims in his California Supreme Court habeas petition, the California Supreme Court denied the petition with a citation to In re Clark, 5 Cal. 4th at 767-69. (See Ans. at 1; Ans. Mem. at 23-25.)

In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment in the case must clearly and expressly indicate that its judgment rests on a state procedural bar. See Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); see also Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992). Moreover, "the application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." Park v. California, 202 F.3d

1146, 1151 (9th Cir.), cert. denied, 531 U.S. 918 (2000). "For a state procedural rule to be 'independent,' the state law basis for the decision must not be interwoven with federal law." La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.) ("Federal habeas review is not barred if the state decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law.'"), cert. denied, 519 U.S. 1001 (1996). "A state law ground is so interwoven if 'the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed.'" Park, 202 F.3d at 1152. In order for a procedural bar to be adequate, state courts must employ a "firmly established and regularly followed state practice." Ford v. Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

Here, the Court concurs with respondent that the California Supreme Court's citation of Clark "clearly and expressly" indicated that the petition was being denied on procedural grounds. However, unlike respondent, the Court does not construe the California Supreme Court's Clark citation as necessarily signifying that the habeas petition was being denied for untimeliness, which the United States Supreme Court held in Walker v. Martin, 562 U.S. 307, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011) constituted an independent and adequate state law ground. In its denial order, the California Supreme Court cited pages 767-69 of the Clark decision, which stand for a different proposition - i.e., that, absent a change in the applicable law or the facts, repeated applications for habeas corpus presenting claims previously rejected (or that were known to the petitioner at the time of a prior collateral attack on the judgment) will not be considered. If the California Supreme Court meant by its Clark citation to signify that the petition was being denied for untimeliness, it presumably would either (a) have cited page 784, where it explained that "any substantial delay in the filing of a petition after the factual and legal bases for the claim are known or should have been known must be explained and justified" or (b) also have cited In re

Robbins, 18 Cal. 4th 770, 780 (1998). See, e.g., Bennett, 322 F.3d at 581-83 (recognizing California's untimeliness bar is represented by citations to Robbins and Clark), cert. denied, 540 U.S. 938 (2003); see also Martin, 131 S. Ct. at 1124 ("California courts signal that a habeas petition is denied as untimely by citing the controlling decisions, i.e., Clark and Robbins.").

In Bennett, 322 F.3d at 586, the Ninth Circuit held that, "[o]nce the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner." The Ninth Circuit observed that a petitioner could satisfy this burden "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." Id.

Here, the Court finds that respondent has adequately pled in the Answer the existence of independent and adequate state-law procedural ground as an affirmative defense to Grounds One, Two, Three, and Seven of the Petition. In his Traverse, petitioner merely asserts that respondent "has failed to meet his burden to establish that Clark is an adequate and independent bar as applied to Tizeno," and cites Bennett. (See Trav. at 17.) However, the Court finds that, under Bennett, this bare assertion by petitioner is insufficient to satisfy petitioner's burden to place the procedural default defense in issue. Moreover, as a result of petitioner's failure to meet his burden, the Court finds that respondent has been relieved of any further duty to carry his "ultimate burden" under Bennett with respect to the claims as which the procedural default defense has been pled.

Consequently, federal habeas review of Grounds One, Two, Three, and Seven of the Petition is barred unless petitioner can demonstrate cause for his procedural default and actual prejudice as a result of the alleged violation of federal law. See Coleman, 501 U.S. at 750; Smith v. Baldwin, 510 F.3d 1127, 1146 (9th Cir. 2007), cert. denied, 555 U.S. 830 (2008); Bennett, 322 F.3d at 580; Park, 202 F.3d at 1150.

To satisfy his burden of demonstrating "cause" for the procedural default, petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

In his Traverse, petitioner contends that he can establish the requisite cause and prejudice by demonstrating the ineffective assistance of his state-appointed post-conviction counsel, Mr. Camacho, as he previously argued in his original opposition to the Motion to Dismiss. (See Trav. at 17-18, citing petitioner's Opposition to the Motion to Dismiss ["Opp."] at 15-18.)[3] For the following reasons, however, the Court finds that petitioner has not established the requisite cause for his procedural default.

First, in Murray, the Supreme Court did state that "constitutionally ineffective assistance of counsel . . . is cause for a procedural default." Murray, 477 U.S. at 488; see also Bonin v. Calderon, 77 F.3d 1155, 1158 (9th Cir.), cert. denied, 516 U.S. 1143 (1996). However, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default." Murray, 477 U.S. at 492; see also Bonin, 77 F.3d at 1158 ("counsel's ineffectiveness will constitute cause only if it amounts to an 'independent constitutional violation'"). Further, the Supreme Court also stated that a claim of ineffective assistance of counsel must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. See Murray, 477 U.S. at 489. Here, petitioner has never presented to the state courts as an independent claim that Mr. Camacho rendered ineffective assistance

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[3] The Court notes that, on the cited pages of his Opposition to the Motion to Dismiss, petitioner was arguing that the ineffective assistance of his second habeas counsel, Mr. Camacho, constituted good cause for his failure to exhaust his unexhausted claims in state court, for purposes of satisfying the first prerequisite for a stay under Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005).

in his post-conviction representation of petitioner.

Second, there is no constitutional right to counsel for the purpose of filing a state habeas petition and where no constitutional right to counsel exists, there can be no claim for ineffective assistance. See Pennsylvania v. Finley, 481 U.S. 551, 556-57, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); Wainwright v. Torna, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982); Miller v. Keeney, 882 F.2d 1428, 1432 (9th Cir. 1989) ("If a state is not constitutionally required to provide a lawyer, the constitution cannot place any constraints on that lawyer's performance."); see also Sanchez v. United States, 50 F.3d 1448, 1456 (9th Cir. 1995) ("there is no constitutional right to counsel at a collateral, post-conviction section 2255 proceeding" and "[w]ithout such a right, [petitioner] cannot assert a claim for ineffective assistance of counsel").

Third, petitioner's reliance on the Supreme Court's recent decision in Martinez v. Ryan, - U.S. -, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) for a contrary proposition is misplaced. There, an Arizona inmate raised ineffective assistance of trial counsel claims in his federal habeas petition that the State argued were procedurally barred under an Arizona procedural rule precluding relief on a claim that could have been raised in a previous state collateral proceeding. The petitioner did not dispute that this procedural rule was well established. He instead argued that he could overcome this hurdle to federal review because he had cause for his default, namely that his first postconviction counsel was ineffective in failing to raise any claims in the first collateral proceeding. The district court ruled that Arizona's preclusion rule was an adequate and independent state-law ground to bar federal habeas review and that the petitioner had not shown cause to excuse his procedural default because, under Coleman, 501 U.S. at 753-55, an attorney's errors in a postconviction proceeding do not qualify as cause for a default. The Ninth Circuit affirmed. See Martinez, 132 S. Ct. at 1314-15.

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The Supreme Court noted that Coleman "left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." See Martinez, 132 S. Ct at 1315. However, the Supreme Court did not resolve this constitutional question. See id. Instead, the Supreme Court "qualifie[d] Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings[4] may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." See id. The Supreme Court characterized this ruling as an "equitable ruling" as opposed to a "constitutional ruling," and explained that its holding did "not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts," and did "not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." See id. at 1319-20. The Supreme Court summarized its holding as follows:

> "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Id. at 1320.

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[4] The Supreme Court defined "initial-review collateral proceedings" as "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." See Martinez, 132 S. Ct. at 1315.

Petitioner's reliance on Martinez to show cause for his procedural default of Grounds One, Two, Three, and Seven is misplaced for at least two reasons. First, the alleged ineffective assistance of Mr. Camacho here did not occur at petitioner's initial collateral review proceeding, and as noted, the Supreme Court explicitly limited its equitable ruling to the initial collateral review proceeding. Second, and most importantly, the narrow exception to Coleman recognized in Martinez applied only to defaulted ineffective assistance of trial counsel claims. Although the Ninth Circuit subsequently extended the Martinez exception to defaulted ineffective assistance of appellate counsel claims, see Nguyen v. Curry, 736 F.3d 1287, 1293-95 (9th Cir. 2013), it did not extend the Martinez exception to any other procedurally defaulted claims. Here, none of petitioner's procedurally defaulted claims is an ineffective assistance of trial counsel claim or an ineffective assistance of appellate counsel claim. See also Hunton v. Sinclair, 732 F.3d 1124, 1126-27 (9th Cir. 2013) (holding that the Martinez exception did not apply to the ineffectiveness of state habeas counsel in failing to raise a Brady claim), cert. denied, 134 S. Ct. 1771 (2014).

Because petitioner must demonstrate both cause and prejudice (see Murray, 477 U.S. at 494), his failure to establish the requisite "cause" for his procedural default obviates the need for the Court to even reach the issue of whether petitioner has demonstrated the requisite "prejudice" from the procedural default. See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

II. Petitioner has not made a sufficient showing to qualify for the actual innocence exception to the statute of limitations and the procedural default doctrine.

The Supreme Court has recognized an exception to the requirement that the petitioner demonstrate both "cause" and "prejudice," where the petitioner can demonstrate that failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice because he is actually innocent of the crimes of

which he was convicted. See, e.g., Coleman, 501 U.S. at 750; Murray, 477 U.S. at 496; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993). However, in order to qualify for this "miscarriage of justice" exception, the petitioner must "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." See Schlup, 513 U.S. at 324 (recognizing that such evidence "is obviously unavailable in the vast majority of cases"). Further, to establish the requisite probability that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 327.

In McQuiggin v. Perkins, - U.S.-, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013), the Supreme Court held that a "convincing showing" of actual innocence under Schlup also can overcome the AEDPA statute of limitations.

A. The "actual innocence" standard

Under Schlup, petitioner must establish his factual innocence of the crime, and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); Jaramillo v. Stewart, 340 F.3d 877, 882-83 (9th Cir. 2003). The Supreme Court has stressed that the exception is limited to "certain exceptional cases involving a compelling claim of actual innocence." House v. Bell, 547 U.S. 518, 521, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006); see also Schlup, 513 U.S. at 324 (noting that "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare"). Moreover, the Ninth Circuit has noted that, because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000) (citing Calderon v. Thomas, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998)).

In reviewing a Schlup actual innocence claim, the Court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." Schlup, 513 U.S. at 331-32. As explained by the Supreme Court in Schlup, this is a "probabilistic determination about what reasonable, properly instructed jurors would do." Id. at 329. The "new evidence" need not be newly available, just newly presented–i.e., evidence that was not presented at trial. See Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003), cert. denied, 541 U.S. 998 (2004). Further, "[i]n assessing the adequacy of petitioner's showing, . . . the district court is not bound by the rules of admissibility that would govern at trial." See Schlup, 513 U.S. at 327; see also House, 547 U.S. at 537-38 ("the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial" (internal quotation marks omitted)). Accordingly, as described by Judge Kozinski in his dissenting opinion in Carriger v. Stewart, 132 F.3d 463, 485-86 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1133 (1998), in evaluating a claim of actual innocence, a habeas court is required to posit a hypothetical jury that is entitled to consider both admissible and inadmissible evidence, so long as the inadmissible evidence is reliable.

B. The evidence presented at trial

Since petitioner's actual innocence claim requires consideration of the evidence presented at his trial, the Court has independently reviewed the state court record. The following is a summary of the evidence presented at petitioner's trial, which the jury found sufficient to prove that petitioner was guilty of murder and attempted murder.

The first witness to testify was Antawong Thompson. He testified that on July 3, 1990, at about 7:00 p.m., he and his cousin David Moch were on the sidewalk outside of Thompson's residence on 57th Street and Western Avenue in Los Angeles.

Thompson further testified that on that day and time he saw a Ford Bronco drive by with three guys in it, one of whom was petitioner. Thompson said that the Bronco was high up off the ground and the back top was off of it. The Bronco was not in the lane closest to Thompson; rather, it was in the center lane. (See 1 RT 104-07.)

Petitioner was in the back seat of the Bronco, "trying to stare us down." Petitioner was directly in front of him and his cousin, and petitioner was staring at them with his head to his right side over his right shoulder. Petitioner turned his head while staring at them as the car drove at a slow pace. Petitioner stared at them the entire time until the Bronco went southbound on Western, out of view. The Bronco then returned driving northbound on Western, along the side of the street where Thompson and his cousin were standing, and petitioner was still staring at them from the back seat of the Bronco. The Bronco drove southbound on Western Avenue, driving by Thompson and his cousin a third time, but this time, petitioner was not in the back of the vehicle. There were two men in the front of the Bronco, but Thompson could not describe what they looked like. After the Bronco passed by the third time, Thompson saw petitioner again, but this time on a bicycle. Petitioner rode his bicycle across the street from the two men, circling and "riding back and forth" on his bicycle on the sidewalk while still looking at them. Thompson and his cousin got into a car to drive to get something to eat, and petitioner rode off. (See 1 RT 106-16, 159-60, 163.)

Thompson and his cousin waited a few minutes in the vehicle while they tried to fix a speaker. Thompson's cousin then drove down Western on Slauson, and then drove westbound on Slauson, passing Saint Andrews and a dairy. After driving one block, they heard a shot, and it felt to Thompson like the shot hit the car. Thompson's cousin slammed on the breaks to stop the vehicle, and put the vehicle in park. Thompson got down and heard about four more shots that also sounded like they hit the car. Thompson's cousin was "fitting to get out of the car" before the second set of shots, but he never made it out (See 1 RT 122). When Thompson

looked up, he saw his cousin with blood everywhere, especially on his head. Realizing his cousin was dead, Thompson drove the vehicle to a fire station to seek help, crashing into the fire station. (See 1 RT 117-23, 142-43, 138-39, 154.)

After crashing at the fire station, Thompson was taken to a police station where he spoke with some detectives, including a Detective Flores. Thompson identified to Detective Flores the person he saw in the Bronco and on the bicycle as wearing black khakis or Dickeys, a white t-shirt, a red belt, some L.A. Gear boots, and that the person was medium-height and had a Jheri curl hairstyle that was fading. A couple of days after the shooting, Thompson was shown some books with photographs at the police station. Thompson viewed about 300 photographs in the books. The detectives said the photographs were of "people from around that area" and that he might see the person who committed the crime in the books. Thompson thought they were "gang books." Thompson recognized a lot of people in the books, and assumed the person he was trying to identify belonged to a Blood gang because the person he saw had a red belt. Thompson could not identify the person he had seen on the day of the shooting in any of those books.[5] (See 1 RT 123-27, 157-58, 160, 162, 169.)

On September 1, 1990, about two months after the shooting, detectives came to Thompson's house with a six-pack of photographs in a folder. Detectives read something to him from the back of the folder before he looked at the photographs. As the detective pulled out the six-pack, Thompson said "That's him right there" and pointed to photograph number three as "the person who shot my cousin" and whom he saw in the car and on the bicycle. The detective wrote on the six-pack "photo 3 card C," to identify the photograph Thompson had picked. Thompson also wrote

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[5] During cross-examination on this first viewing of photographs, Thompson appeared to have been confused by the questioning and stated that he had picked a person named Demarcus Coleman. (See 1 RT 161.) However, he immediately corrected himself and said that he did not pick anyone on this occasion. (See 1 RT 162.)

under the photograph, "This is the person that was on the bike and the person that was looking hard at my cousin." The person in photograph three was in court, seated at defense table and identified as petitioner. Thompson said the only difference in appearance between the person he identified in the photograph and petitioner in court was that the person in the photograph had longer hair, and petitioner wore glasses in court. Thompson further testified that, at the preliminary hearing in this case in November 1990, he had identified petitioner as the person he had seen in the Bronco and on the bicycle. Thompson also was shown a booking photograph of petitioner at trial. Thompson confirmed that the photograph was of the person he saw in the Bronco and then on the bicycle. He described the hair on the person in the photograph as "a J[h]eri curl that went bad, like nappy, curly, you know in the middle somewhere," and confirmed that Petitioner's hair looked that way when he saw him on the day of the crime. Thompson stated that he was absolutely certain that petitioner was the person staring at him and his cousin from the back of the Bronco and circling the street on a bicycle while staring at them right before his cousin was shot and killed. (See 1 RT 127-35, 146, 169-70; 2 RT 266-67.)

Thompson also testified that he was wearing blue cords and a black jacket, and his cousin was wearing brown pants, a brown leather jacket, and a white or blue shirt. There are two gangs that hang out near his residence, the 55 Neighborhood Crip, and Van Ness Gangsters, which is a Blood gang. The color blue is associated with the Crip gang and the color red is associated with the Blood gang. (See 1 RT 145-46, 165.)

The next prosecution witness, Ruth Street, testified that she was working at the dairy across the street from where the shooting occurred. She saw somebody with a white t-shirt pass by and also said she thought she saw some kids or somebody on a bike wearing a white t-shirt before the shooting. She then heard the shots, and called 911. While she was talking to the 911 operator, a customer told her that the shooter looked black, was on a bicycle, and was wearing a white shirt. Street said she never

actually saw anyone on a bicycle with a gun in hand. (See 1 RT 174-77, 181-82.)

The next prosecution witness, Los Angeles Police Department Officer David Winslow, testified that, on the night of the shooting, he and his partner were stopped at a traffic light at the corner of Slauson and Normandie when someone pulled up in a truck and said that a shooting had just taken place, and the shooter was on a bicycle. Another person approached and said that somebody was dead in a van. The officers went to the fire station where they saw Thompson and his cousin. (See 1 RT 185-88.)

The next prosecution witness was Bianka. Bianka testified that, on July 3, 1990, she heard around five gunshots at her father's house. She looked out the front door of the house, towards the dairy, and saw a boy riding a bicycle. The bike rider was wearing a white t-shirt and black pants, and rode towards Bianka. She heard screaming and went to the back of the house to look for her father, and returned to front porch no more than ten seconds later. At that point she saw the person on the bicycle directly in front of her, riding in the middle of the street and shoving a gun into his pants pocket. She said the barrel was in the pocket, but she could see the rest of the gun, including its brown handle. Bianka identified petitioner in court as the person she saw on the bicycle on the day of the shooting, putting a gun into his pocket. Bianka identified the gun as a revolver. She did not see anyone else on a bicycle at that time. Bianka did not talk to the police that night because her father told her not to get involved for her safety. (See 2 RT 194-201, 240, 307-09.)

Bianka further testified that she had seen petitioner before in the neighborhood on several occasions, the last time around February 1990 at a parade. She remembered seeing petitioner at the parade dressed in a long-sleeve red turtle neck, black pants, and red belt, and thought he was brave to come to a parade dressed like that because his attire could cause problems with Crip gang members. About a week after the shooting, she saw petitioner at 54th Street and Van Ness when he went to a car that she was in to talk to another girl. (See 2 RT 202-03, 325, 328-31, 335-37.)

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Detectives Marks and Flores contacted Bianka at her mother's house on August 16, 1990, and Bianka told them what she had seen on the night of the shooting; she also told them that she had seen the shooter in the neighborhood, but did not know his name. She said petitioner had a "natural" hairstyle, and that he had on a white t-shirt and black pants. The detectives brought books of photographs with them. She did not remember if the officers gave her any type of admonition regarding the photographs. Officers first showed her some enlarged pictures of a bunch of people in a park. Bianka recognized several people and had pointed out a picture, but she was not sure about this tentative identification because the picture was not good. She then looked at fifty to a hundred pictures in a gang book, but did not recognize anyone. Bianka then looked at a Van Ness Gangsters gang book, and was able to identify the person she saw on the bicycle with the gun in one of the photographs. Officers had her write her identification down on a piece of paper. She wrote that the photo was of the person she saw "putting the gun in his pocket after I heard the shots fired" (See 2 RT 209-10), and indicated that she thought she knew him since the first grade. (See 2 RT 203-11, 231.)

Bianka identified petitioner in court as the person in the photograph she picked out for the detectives. Bianka further testified that petitioner looked much different in court than he did during the night of the shooting, wearing glasses in court, and wearing his hair much differently. Bianka stated that she had met a representative from the Public Defender's office and spoken with him twice, telling him that she knew nothing about the case because she was pregnant, fearful of her child's life, and had received a threatening phone call. (See 2 RT 210-11, 216.)

Bianka explained that the phone call had come from county jail to her mother's house. Bianka's boyfriend's brother, Demarcus Coleman, placed the call and turned the phone over to petitioner. Petitioner asked Bianka if she knew anything about the murder, and when Bianka said she did not, petitioner told her that he had seen her name on a report. Bianka said that she knew nothing of the shooting and petitioner

told her that if she did not testify then everything would be alright. Bianka understood this to be a threat on her life. Bianka also testified that neither of her parents wanted her to testify. (See 2 RT 217, 228-31, 242, 244.)

Bianka further testified about the shooter; she said that she saw his eyes the night of the shooting, and that they were sagging. By referring to one of the rows of the courtroom, Bianka indicated that she was approximately 34 feet away from the person on the bike when he was putting the gun into his pocket. She testified she was sure that petitioner was the person she saw riding the bicycle and putting a gun in his pocket. (See 2 RT 231-33.)

On cross-examination, Bianka recalled telling neighbor Karen Wandrick right after the shooting about the boy on the bicycle with a gun, but denied that she told the neighbor the boy was named Moe. Bianka did admit telling the same neighbor about a week after the shooting that Bianka had seen Moe recently when he had approached her car. Bianka admitted telling her father about seeing the boy on the bicycle after the shooting. Bianka could not remember when she got the phone call from jail when petitioner talked to her. (See 2 RT 235-37, 239-40, 243, 246.) A recess was then taken to discuss defense counsel's use of impeachment evidence to show that Bianka was a liar and had been hospitalized in a mental institution in the seventh grade because of her lying. (See 2 RT 247-76.)

When cross-examination resumed, Bianka admitted being in the psychiatric unit and eating disorder unit of Edgemont Hospital in the sixth and seventh grades. Bianka's mother did not like the facility, so she had Bianka transferred to Westwood CPC Hospital, a psychiatric hospital. Bianka denied knowing anything about a Carlson School and Hospital Program, and could not recall if she was in that program in 1987. Bianka denied being sent to Edgemont Hospital for lying; rather, she was there for her eating disorder and because she was having problems getting along with other kids and a teacher. After a lengthy cross-examination, Bianka admitted that while talking with her neighbor Wandrick right afer the shooting, Wandrick, after

hearing Bianka's description of the shooter, said it was Moe. Bianka further testified that the bicycle the shooter was riding was a ten-speed, as opposed to a beach cruiser. With regards to the hairstyle of the person she saw on the bicycle, Bianka testified that she saw a natural afro, not a Jheri curl. Bianka was shown a photograph of a young black person who she recognized as Moe. Bianka remembered that when the detectives met with her and showed her a group photograph of people in a park, they pointed out a person in the middle of the photograph, whom Bianka identified as petitioner. But Bianka could not remember if the detective pointed out a person before or after she said the photo looked like petitioner. Bianka also testified that they pointed to three or four other people. When they pointed to Moe and asked if he was the person with the gun, she said "no." (See 2 RT 284-85, 287-88, 312-13, 315, 318-25, 327-28.)

The final prosecution witness was Detective Joe Flores. Flores testified that at about 12:30 a.m. on the morning of July 4, 1990, the morning after the shooting, he spoke with Thompson at the police station. Detective Flores was with Detective Marks, his partner, when the interview of Thompson took place. Thompson described the subject as a black male, wearing a white t-shirt, black Dickey pants, black lowcut L.A. Gear shoes, white socks, and a red belt. Two days later, on July 6, 1990, the detective showed some gang books to Thompson. Before viewing the gang books, Flores read Thompson a photo admonition, which, among other things, advised Thompson that the group of photographs he was about to view might or might not contain a picture of the person who committed the crime under investigation, Thompson viewed approximately 300 photographs. One of the pages in the Van Ness Gangsters gang book contained a picture of petitioner taken in 1987, but Thompson did not identify the person in the photograph. (See 2 RT 343-47.)

Detective Flores also interviewed Ruth Street on July 6, 1990. She told him that she saw an individual on a bicycle wearing a white t-shirt riding toward Manhattan Place moments before the shooting. (See 2 RT 349-50.)

On August 16, 1990, Detective Flores met with Bianka. Bianka told the detective that she had seen the suspect prior to the shooting and recognized him. Detective Flores showed two pages of photographs, with sixteen photographs on each page, to Bianka. Prior to showing the photographs he read Bianka the same admonition he had read to Thompson. One of the photographs was of a person named Lavelle Morton, also known as "Little Moe." (See 2 RT 352). Bianka identified the photograph as someone she knew. But Bianka said the photograph was not the person on the bicycle with the gun. (See 2 RT 350-53.)

Later that day, Detective Flores returned to Bianka's residence and showed her two more photographs and some gang books. One was a three-by-five inch photograph of a group of people with a person in it who was circled. Bianka could not identify the person circled in the picture because it was too grainy. Bianka did not identify anyone from the first gang book, which contained about one hundred photographs. She identified a photograph in the Van Ness Gangsters gang book, which contained about fifty photographs, as petitioner. She expressed no doubt or hesitation about her identification of petitioner in the gang book as the person on the bicycle. Flores had Bianka write out her identification of petitioner. (See 2 RT 353-55.)

On July 10, 1990, one week after the murder, Detective Flores contacted petitioner in front of his house, about seven blocks from where the murder took place. Petitioner admitted being a member of the Van Ness Gangsters. Petitioner was not on crutches, and did not have a limp or appear to have any difficulty walking. Detective Flores also came into contact with petitioner again on August 13 and 15, 1990. On both those occasions petitioner was accompanied by a person named Kedrick Charles, and Charles was on crutches at the time and told Flores he had been shot in the leg. On August 30, 1990, Detective Flores arrested petitioner. At the time of his arrest, petitioner was wearing a red belt and red shoes. Immediately after arresting petitioner, Flores searched petitioner's residence and found a red

handkerchief or bandana in his room. A photograph of petitioner was taken and included in a six-pack that was later shown to Thompson on September 1, 1990. Thompson was again read the same photograph admonishment, and identified petitioner's photo in the six-pack as the person who had stared at him from the Bronco and returned on the bicycle. Thompson did not indicate any hesitation or uncertainty, and was "rather quick" to identify petitioner. Flores had Thompson write out his identification of petitioner. (See 2 RT 356-59; 3 RT 384-85, 387-88; 4 RT 600-01.)

Detective Flores also testified that the Van Ness Gangsters gang is a Blood gang, and that the color red is associated with that gang. Crips gangs are associated with the color blue. Flores explained that gang colors are typically displayed on the belt, shoes, and handkerchief. Crips and Blood gangs do not get along. The area where the shooting took place was on the outer limit of Van Ness Gangsters gang territory. Areas immediately outside that area were claimed by Crips gangs that have struggled with the Van Ness Gangsters gang. Flores explained that the term "hard looking" is a manner of staring at someone and is considered a gang challenge. A "hard look" or "hard looking" is an example of a way of showing that the person is infringing on someone else's territory. (See 3 RT 380-87.)

On cross-examination, Detective Flores admitted that Thompson had told him that the suspect had been on a black beach cruiser bicycle on the night of the murder. Detective Flores then testified that, when petitioner's home was searched, no gun was found, and during the occasions that the detective had seen petitioner, petitioner was never on a bicycle and he could not recall whether he ever wore a red scarf. Detective Flores admitted that he had searched for, but never found the Bronco. He admitted that Bianka never told him about the time she saw the shooter with her girlfriends. But then, on re-direct, he testified that Bianka did tell him about having contact with the person on the bicycle with the gun a week after the shooting. (See 3 RT 402-03, 406-08, 422.)

When Detective Flores met with Thompson on July 6, 1990, Flores showed Thompson a 16-pack of photographs on the first page of a gang book, and Thompson pointed at Demarcus Coleman as a person who was similar to the person he saw on the bicycle, but Thompson never identified the person in the photo as the person on the bicycle. Thompson said that the person on the bicycle was older, heavier, and had a longer hairstyle, than the person depicted in the 16-pack. Petitioner's photograph was on the fifth page of the book, but Thompson did not pay any attention to that photograph. Flores then canvassed the neighborhood, speaking with several people, including Ruth Street, and no person said anything about the gunman being on a bicycle. (See 3 RT 409-11, 414, 416, 422-23, 425, 598.)

The first defense witness was Bianka's stepmother Della Logie. Mrs. Logie testified that she had known Bianka since Bianka was two years old. Mrs. Logie testified that Bianka was a liar, and would tell lies in school and in the neighborhood to make things go her way. For some period of time, Bianka attended school at Edgemont Hospital because her biological mother thought she should go there. Bianka went there because of her eating disorders and lying. At Edgemont Hospital, they tried to counsel her on her eating habits and about being dishonest. Mrs. Logie testified that Bianka never told her about a shooting or about seeing a boy on a bicycle on the night the shooting occurred; what Bianka heard about the shooting, she heard from neighbors. Mrs. Logie's first information that Bianka knew something about the shooting was when the investigators went to her house. Mrs. Logie confronted Bianka about her involvement when the investigators left, and Bianka denied the statements attributed to her, and even denied signing an agreement to talk to investigators, even though Bianka's signature was clearly visible on the agreement. Mrs. Logie testified that Bianka deliberately lied on other occasions to get her way and to satisfy herself, and that sometimes Bianka was not even aware she was lying. Mrs. Logie confronted Bianka on other occasions about lies that Mrs. Logie knew could not possibly be true, but Bianka continued to maintain that they were true

anyway. Mrs. Logie testified that Bianka's lying caused a lot of disagreements and pain in their family. (See 3 RT 433-39, 443-48.)

Bianka's father, Gerald Logie, testified next. He testified that, when he got home on the evening of July 3, 1990, Bianka never mentioned anything about a shooting or seeing a boy on a bicycle with a gun. Mr. Logie said he did not believe that Bianka heard screaming and saw a boy with a gun on a bicycle that evening. He testified that he had had a lot of trouble and problems with Bianka and her lying. (See 3 RT 456-58.) On cross-examination, Mr. Logie admitted that he did not know what Bianka might or might not have seen on the night of July 3, 1990. (See 3 RT 471.)

Petitioner's mother, Stephana Dyett, was the next defense witness. She testified that she had never seen petitioner wear the red scarf found in his room. She also had never seen the handgun bullets officers found in his room. Prior to July 3, 1990, petitioner was living with his friend Vincent, because petitioner had been shot. Petitioner was shot in the leg, and needed crutches to walk. She never really talked with her son about how he was shot. Dyett had seen her son wear a red belt and red t-shirt, even though she asked him not to wear that color because they lived in a Van Ness Gangsters gang neighborhood, and Van Ness Gangsters is a Blood gang that associates with the color red. She did not recall petitioner ever wearing L.A. Gear shoes as he mostly liked Nikes. Dyett had been told that her son was a gang member, and she knew he hung around gang members, but she had never seen him participate in any gang activities or anything illegal. Dyett then brought up Detective Marks, stating that he disliked her sons and that she heard him say that he would get the Tizeno boys, petitioner and his brother, and that Marks had arrested both of them at one time or another. (See 3 RT 475-80, 485-97, 516-17.)

The next witness, Tasela Hicks, testified that she was petitioner's girlfriend, having met him on June 16, 1990. Hicks testified that prior to July 3, 1990, petitioner was on crutches because he was shot in the leg, and when she saw him on July 5,

1990, he was also on crutches. She said petitioner admitted he was in the Van Ness Gangsters gang. (See 3 RT 519, 522-23, 525-27.)

The last defense witness was petitioner. Petitioner testified that he grew up and hung around gang members, and would sometimes wear red even though his mother did not want him to, but he did not consider himself an actual gang member. Petitioner spoke with the detectives before the murder took place while they were filming America's Most Wanted in his neighborhood, and apparently gave them a friend's name instead of his name at that time. Petitioner denied ever admitting to any officer that he was a Van Ness Gangster gang member. Petitioner said that he lied to his girlfriend about "gang banging" in the Van Ness Gangsters gang. Petitioner stated that he did not have a problem lying to police or his girlfriend about his gang membership. Petitioner was contacted and questioned three times about the homicide. Petitioner described his gunshot wound as having gone through his right calf, and the doctor had said the leg was not broken, but that petitioner needed to stay off it for a month and a half. He was shot near a housing project on or about June 13 or 14, 1990, and was on crutches until about mid-July 1990. He could not ride a bicycle at that time because it would put too much pressure on his wounds. He was never in a Bronco at that time and does not even know anyone who owns a Bronco. He did not know how the bullets or the bandana got in his room at his mother's house because he was not staying there at the time. (See 4 RT 545-49, 551, 555-56, 561-67, 571-72, 574.)

On July 3, 1990, petitioner was at his friend Vincent's house, getting the house ready for a barbeque the next day. He slept from about 4:30 in the morning of July 4th until around noon. Petitioner denied ever owning L.A. Gear shoes, saying that he only owned Nikes. Defense counsel asked about his eyes and the glasses he was wearing in court. Petitioner said he was half blind in his right eye. He did not wear glasses growing up though, and as a result there was a lot of pressure on his left eye to help the right eye, and the left eye consequently became weaker. Petitioner

testified that he had never fired a gun. (See 4 RT 554, 557-58, 561, 584.)

C. Petitioner's "new" evidence

When petitioner first raised his actual innocence claim in the state courts and in his Petition herein, he was relying on the affidavits of Thompson and Bianka secured by his state habeas counsel in which they purported to recant their trial testimony.

As noted above, when petitioner presented the Thompson and Bianka affidavits to the Superior Court in support of his collateral challenge, the court found that the affidavits were "utterly without credibility." (See LD 7.) At the November 20, 2012 status conference, the Court remarked that it did not believe that this credibility finding was binding on the Court or even entitled to a presumption of correctness or even had any bearing on the Court's determination of whether petitioner had met his burden under Schlup. 28 U.S.C. § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." However, the Ninth Circuit has held that "the presumption of correctness and the clear-and-convincing standard of proof only come into play once . . ." it is found that the state court reasonably determined the facts in light of the evidence presented in the state proceeding. See Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.), cert. denied, 543 U.S. 1038 (2004). One example cited by the Ninth Circuit of when the state court's fact-finding process would not survive this intrinsic review is when a state court makes evidentiary findings without holding a hearing and giving the petitioner an opportunity to present evidence. See id. at 1001. Here, the Superior Court judge who considered and denied the habeas petition was not the trial judge. His finding that the affidavits were "utterly lacking in credibility" was made without his ever having observed the witnesses' demeanor, either while testifying at trial or in connection with the habeas petition. Moreover, the judge

provided no explanation for his credibility finding. The Court therefore has proceeded on the assumption that the presumption of correctness does not apply here and that the Court has to make its own independent determination of whether petitioner has met his burden under Schlup.

The following is a summary of the evidence adduced at the evidentiary hearing.

The first witness to testify was Thompson. He testified that sometime after Moch was murdered, detectives showed him a six-pack photographic lineup. Initially, Thompson stated that when the detectives showed him the photographs they told him that the person who shot and killed Moch was in the line-up. Later, Thompson testified that when the detectives showed him the photographs they asked him "whether the person who shot and killed" Moch was in one of the pictures. (See Reporter's Transcript of 2-10-15 Evidentiary Hearing ["EH RT"] 10, 12, 14.)

Thompson recalled that he selected petitioner's photograph from the six-pack as the person he saw the day of the shooting. After he selected petitioner's photograph, he recalled that the detectives smiled and reacted "as if they . . . had their guy." (See EH RT 12-15.)

Thompson confirmed at the evidentiary hearing that at the time he selected petitioner's photograph, he personally handwrote in the "comments of witness" section of the six-pack: "This is the person that was on the bike, and this is the person that was looking hard at David." Thompson also authenticated his signature on the six-pack. He did not, however, write the words "Photo No. 3, Card C." Instead, he believed one of the officers made the notation. (See EH RT 14-15, 17; Resp. Exh. 109.)

Thompson also recalled an earlier meeting with the police when he looked at gang books. Thompson was asked if he originally identified a person named Demarcus Coleman who resembled the person on the bike. He did not remember that name, but he remembered telling the officers a person with "similarities . . . could have been the person." (See EH RT 17.)

Thompson affirmed that he testified twice – at the preliminary hearing and at petitioner's trial – and identified petitioner as the person he saw in the car and on the bicycle the day of the shooting at both proceedings. Thompson confirmed that at trial he was "absolutely certain" that petitioner was the person he had seen that day. Thompson said that he testified truthfully at both the preliminary hearing and trial. (See EH RT 15-16.)

Bianka testified out-of-order due to her late arrival at the evidentiary hearing. Bianka initially said that on the day of the shooting, she was outside the front of her father's house when she heard gunshots. Later, she stated that she was "unclear" where she was when she heard the gunshots. She acknowledged that at her 2014 deposition she said she was on the front porch when she heard the gunshots. Bianka further acknowledged that in her 2011 declaration secured by his state habeas counsel Terri Foster and in a recorded conversation with Foster, she stated she was at her friend Karen's house when she heard the gunshots. (See EH RT 52, 80-85, 89-91.)

Bianka then acknowledged she testified at trial that she was on the "service porch" of her father's house when she heard gunshots. She said that she "recently found out . . . what service porch meant," and testified she thought the service porch was the front porch despite her trial testimony suggesting she meant the back porch. Finally, she admitted she was "back and forth" with where she was at when the shots occurred, and said she could have been on the front service porch, on the grass, or on the sidewalk. (See EH RT 83-87, 92.)

Bianka testified at the evidentiary hearing that after she heard the gunshots, she immediately went inside the house to look for her father, and then went back outside to walk across the street to Karen's house. She stated that as she stepped out of her house, she saw a "guy" riding a ten-speed bike through the dairy parking lot, shoving a brown paper bag into his right pants pocket. She also referred to the bicyclist as a "grown man" in his late twenties to mid-thirties. When presented with her trial testimony that after hearing the shots she saw a "boy" on the bicycle, then went to

talk to her dad, and then returned to the front of house, Bianka said she did not recall the testimony but admitted "it's there." (See EH RT 52-57, 61, 92-93.)

Bianka thought the bicyclist was "cute." She did not connect him to the shooting at that time. She initially stated that although she did not know the bicyclist, she had seen him around the neighborhood. Bianka acknowledged that when asked at her deposition if it was true that she knew the bicyclist from "around the neighborhood," she answered, "I didn't know him at all." When confronted with her recorded statement to Foster that she did not know petitioner from around the neighborhood, Bianka simply said she "didn't hear that" and did not recall what she said to Foster, although she admitted it was her voice on the recording. On re-direct examination at the evidentiary hearing, Bianka initially said she did not recall whether she knew the bicyclist from around the neighborhood, then moments later she said she believed she had seen him around the neighborhood. She explained that there was a difference, to her, between seeing someone around the neighborhood and knowing them. (See EH RT 55-57, 93-97, 116-17.)

Bianka testified at the evidentiary hearing that she told Karen about the "cute" boy she had seen on the bicycle to see if Karen had also seen him. They discussed the earlier gunshots, which Karen had heard. While discussing the gunshots, Karen told Bianka that she should be careful because the boy on the bike had seen her and could have been the shooter. Karen's statement scared Bianka because she thought that if the bicyclist was involved in the shooting and saw her, he could possibly "come back for" her. According to Bianka, Karen was the first person to introduce the notion that she should be afraid of the bicyclist. (See EH RT 57-58, 99-101.)

Later, Bianka learned that someone had been shot and killed in front of the fire department. At some point, two detectives got in touch with her, and they met in person at Bianka's mother's house. Bianka recalled the detectives' names were Flores and Marks. They asked her about the boy on the bicycle. Bianka did not independently recall the conversation she had with the detectives and, although she

recalled giving a description of the bicyclist, she could not remember what description she gave. However, she remembered that she told the police that she saw the bicyclist putting a black revolver with a brown handle into his pocket, which was not true. Bianka explained that, although she initially told the detectives that she saw the bicyclist putting a brown paper bag into his pocket, she changed the paper bag to a gun because the detectives continually asked her if she was sure that what she saw was a paper bag. She recounted that at one point a detective asked her if she was sure "it wasn't a gun possibly with a brown wooden handle?" And, "after being asked that several times," and "with [her] little young mind" she just said that it was a gun. (See EH RT 58-63, 65, 117-18.)

Bianka recalled she was "prepped" before she entered the courtroom to testify at petitioner's trial, but could not recall whether anyone from the prosecution team told her to testify at trial that she saw petitioner with a gun. At the evidentiary hearing, Bianka stated that although she said at her deposition that she simply made up petitioner having a gun, "that's not what [she] meant." (See EH RT 73, 106-07.)

Bianka denied that she told the police that she went to elementary school with the boy on the bicycle or that she saw him outside of a barber shop after the shooting. She stated that she never mentioned a boy named "Moe" to the police and did not recall ever knowing any such person. She denied that she told detectives that, through a conversation with a girlfriend, she learned the bicyclist's name was "possibly Holli[n]s" or that he went by "Papa CK." Bianka also said she never had a conversation with her girlfriend about a boy she saw at a parade. (See EH RT 63-64, 66, 69.)

At some point prior to trial, Bianka looked at some photographs. She thought it was "six or more pictures." One of the pictures was circled. She did not recognize the person in the circled photograph and had never seen him before. The detectives pointed to the circled picture and asked if that was the boy she had seen on the bicycle. Initially, she said no, but the detectives asked her several times if she was

sure. Bianka then jokingly told the detectives what Karen had told her about the bicyclist seeing her and the detectives told her it "could possibly be true." Bianka testified at the evidentiary hearing that the detectives never told her that she was in danger or that the person in the photograph was the person on the bicycle, but she "perceived it that way." However, Bianka confirmed that, in her declaration signed under penalty of perjury, she unambiguously stated that the detectives said the person in the photograph knew who she was and was going to "get" her. (See EH RT 68-70, 104-06, 110-11, 114.)

Bianka stated at the evidentiary hearing that, despite knowing the person in the circled photograph was not the person she had seen on the bicycle, she selected that photograph and told detectives he was the bicyclist. She explained she selected that photograph because of "pressure," because she "wanted to just get it over with," and because she assumed the detectives "knew something" so she "just went along with what they were pressuring" her to do. Bianka stated later at the evidentiary hearing that, despite knowing petitioner was not the boy on the bicycle, she was scared of the boy in the photograph because she was young and pregnant at the time she made the identification. (See EH RT 67-68, 70, 75, 104, 111, 113-14.)

Bianka authenticated her handwritten statement and signature on the photographic identification form and confirmed that when she selected the photograph of petitioner as the person on the bicycle, she wrote, "Page No. 5, Photo No. 10, this is the person I saw on Manhattan Place putting the gun in his pocket after I heard the shots fired[.] I have known [him] about since I was in the first grade." (See EH RT 102; Resp. Exh. 106.)

Looking at petitioner at the evidentiary hearing, Bianka did not recognize him and said she did not know him. She testified that he was not the person she saw on the bicycle with the gun. However, she admitted she identified petitioner at trial as the person with the gun. (See EH RT 51, 63, 65, 75, 97, 106, 109-10.)

// A portion of the recorded conversation with Foster was played at the

evidentiary hearing where Bianka said that she was looking at the boy on the bicycle because he was "cute" and that was the whole point in discussing the boy with Karen. At one point Bianka said she "ended up having a baby by his friend." When Foster asked Bianka whose friend, Bianka said, "Hollins' friend." When confronted with those statements at the evidentiary hearing, Bianka acknowledged that the tape reflected that she told Foster that she had a baby by Hollins' friend, but Bianka declared that it was not true. When asked if she lied during her conversation with Foster, Bianka explained that she was "on medication" during the conversation and did not "recall everything that was said." (See EH RT 97-99, 106; Resp. Exh. 100, 6:58-8:00.)

Bianka stated at the evidentiary hearing that despite the fact that she took an oath and swore to tell the truth at petitioner's trial, she testified falsely at that proceeding. She explained she did so because she was pregnant and scared for her life. She did not recall whether she told anyone at the time of trial that petitioner was not the person she had seen on the bicycle. She said she lied about a lot of things as a kid. (See EH RT 70-71, 73-74, 79, 109.)

Bianka stated at the evidentiary hearing that she never received a phone call from petitioner while he was in jail. She said she lied under oath at trial about that phone call because she was scared of petitioner, the person who was in the photograph, based on what Karen and the detectives said and she "just wanted to hurry up and do anything" to get "them gone and make this be over with." (See EH RT 72.)

At the evidentiary hearing, Bianka explained that she recently told inconsistent versions of what occurred during the events surrounding the shooting because it happened over twenty-five years ago and she does not remember everything. She indicated she goes "back and forth" and said, "I fight myself," trying to decide what happened and what did not happen, and that her mind fills in the blanks. (See EH RT 65, 74-75, 117.)

Bianka admitted she was convicted in 2008 of felony grand theft, which she characterized as "fraud." She also admitted she was convicted in 2009 of receiving stolen property, and in 2010 of stealing a vehicle. (See EH RT 75-76, 78-79, 91.)

Finally, Detective Marks testified at the evidentiary hearing. He was the lead detective into the murder of Moch and the attempted murder of Thompson. He was a detective for twenty-six years and was retired at the time of the evidentiary hearing. Marks generally did not have an independent recollection of the investigation. (See EH RT 21-22, 24, 27, 29, 35-40, 128-29.)

Marks stated that although he did not have an independent recollection of Bianka from 1992, he recalled how he first came into contact with her. Marks recalled that Bianka's neighbor contacted the police and told them that Bianka had seen something the day of the shooting. He and his partner followed up and contacted Bianka. He did not have a present recollection about any of Bianka's allegations, including whether a picture was circled when she identified petitioner as the boy on the bicycle, whether he told her how to testify at trial, whether anyone on the prosecution's team told Bianka how to testify, or whether he threatened Bianka. Marks confirmed that it is common for witnesses of gang crimes to fear their safety, and agreed that it was "not beyond the realm of possibility" that Bianka would have been afraid. (See EH RT 21-25, 130.)

Marks did not recall the specifics of his meeting with Thompson and did not recall how Thompson described the person he saw in the car and on the bike. (See EH RT 33, 35-36.)

Marks confirmed that the Chronological Record received at the evidentiary hearing was an accurate representation of the work he and his partner did during the investigation into the shooting. Marks also authenticated numerous documents from the investigation that were contained in the prosecution's trial file. (See EH RT 30, 32-34, 40-48, 119; Pet. Exh. 1.)

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D. Analysis

1. Bianka's recantation testimony was not reliable evidence of petitioner's actual innocence.

In the few cases the Court has located in which the Schlup standard was found to have been met, the "new evidence" consisted of credible evidence that the petitioner had a solid alibi for the time of the crime, numerous exonerating eyewitness accounts of the crime, DNA evidence excluding the petitioner and identifying another potential perpetrator, a credible confession by a likely suspect explaining that he had framed the petitioner, and/or evidence contradicting the very premise of the prosecutor's case against the petitioner. See, e.g., House, 547 U.S. at 521, 528-29, 540, 548-54; Larsen v. Soto, 742 F.3d 1083, 1087-91 (9th Cir. 2013); Souter v. Jones, 395 F.3d 577, 581-84, 591-92, 596 (6th Cir. 2005); Carriger, 132 F.3d at 465, 471, 478; Lisker v. Knowles, 463 F. Supp. 2d 1008, 1018-28 (C.D. Cal. 2006); Garcia v. Portuondo, 334 F. Supp. 2d 446, 455-56 (S.D.N.Y. 2004); Schlup v. Delo, 912 F. Supp. 448, 451-55 (E.D. Mo. 1995).

There is plethora of case authority questioning the reliability of recantation testimony. See, e.g., United States v. Willis, 257 F.3d 636, 645 (6th Cir. 2001) ("[A]ffidavits by witnesses recanting their trial testimony are to be looked upon with extreme suspicion." (internal quotation marks omitted)); United States v. Leibowitz, 919 F.2d 482, 483 (7th Cir. 1990) ("Judges view recantation dimly."), cert. denied, 499 U.S. 953 (1991); United States v. Nixon, 881 F.2d 1305, 1311 (5th Cir. 1989) ("The recanting of prior testimony by a witness is ordinarily met with extreme skepticism."); Landano v. Rafferty, 856 F.2d 569, 572 (3d Cir. 1988) ("Courts have historically viewed recantation testimony with great suspicion."), cert. denied, 489 U.S. 1014 (1989); see also Herrera v. Collins, 506 U.S. 390, 423, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (O'Connor, J., concurring) (affidavits made many years after trial, purporting to exculpate a convicted prisoner through a new version of events, are "not uncommon" and "are to be treated with a fair degree of skepticism");

Dobbert v. Wainwright, 468 U.S. 1231, 1233, 105 S. Ct. 34, 36, 82 L. Ed. 2d 925 (1984) (Brennan, J., dissenting from denial of certiorari) ("Recantation testimony is properly viewed with great suspicion."); Carriger, 132 F.3d at 483 (Kozinski, J., dissenting) ("Recanting testimony has long been disfavored as the basis for a claim of innocence" and is viewed, on review, "with extreme suspicion.").

However, there is no per se rule that any actual innocence claim predicated solely on recantation testimony must be rejected. If there was such a rule, the Ninth Circuit would not have remanded for an evidentiary hearing in Majoy, for purposes of a determination by the district court whether the prosecution witness's recantation of his pretrial statements implicating the petitioner was credible or "the familiar, untrustworthy, and unreliable about-face by a self-interested criminal, as argued by the Respondent." See Majoy, 296 F.3d at 776.

Here, for the reasons discussed hereafter, the Court finds that the recantation testimony upon which petitioner is relying in support of his actual innocence claim is unreliable and not credible.

a. Bianka's delay in recanting

Bianka testified at trial in March of 1992. (2 RT 191, 194.) It was not until Foster tracked down Bianka in prison and interviewed her in November 2010 that Bianka began recanting her trial testimony. (See respondent's November 6, 2014 Notice of Lodgment, Lodgment A ("Foster Depo.") at 17-18.) Bianka finally memorialized her recantation in a declaration under penalty of perjury in February 2011, almost two decades after she testified. (See Pet. Exh. T.) Neither petitioner nor Bianka have offered an explanation for her delay in recanting the testimony, and the delay is a significant factor in the reliability of her recantation. See McQuiggin, 133 S. Ct. at 1928 ("[A] federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay . . . as a factor in determining whether actual innocence has been reliably shown."); Herrera, 506 U.S. at 417-18 (witness affidavits

proffered for actual innocence claim were suspect when produced more than eight years after petitioner's trial with no satisfactory explanation for delay); Jones v. Taylor, 763 F.3d 1242, 1249 (9th Cir. 2014) (noting that recanting witnesses "changed their stories long after trial with no more explanation than that their memories and understandings of the events had changed" and that "[t]he timing of the recantations casts some doubt on their veracity").

b. Prior felony convictions

In 2008, Bianka was convicted of grand theft. (See EH RT 78.) She was also charged with perjury in conjunction with that offense, but those charges were dismissed as part of a plea agreement. (See EH RT 78, 91; Resp. Exhs. 115-0009, 116-0013, 117-0005 to -0007.) Regarding the perjury charges, Bianka admitted that she filed false affidavits in an effort to obtain more childcare payments than she was legally entitled to. (See EH RT 78.) In 2009, Bianka was convicted of receiving stolen property. (See EH RT 78; Resp. Exh. 116-0001, 116-0015 to -0016, 116-0018.) In 2010, she was convicted of stealing a vehicle. (See EH RT 79; Resp. Exh. 115-0016.) Bianka admitted she has been to prison twice for her offenses. (See EH RT 78-79.)

As petitioner admits, these are crimes of moral turpitude that adversely affect Bianka's credibility (Pet. PH Brief at 11). See Monk v. Gonzalez, 583 F. App'x 674, 677 (9th Cir. 2014) (affidavit in support of actual innocence claim not credible, in part, because affiant had multiple felony convictions); United States v. Rutledge, 28 F.3d 998, 1004 (9th Cir. 1994) (permissible for district court to consider prior convictions in evaluating credibility), cert. denied, 513 U.S. 1177 (1995); Kelly v. Beard, 2014 WL 895447, at *12 (S.D. Cal. Jan. 15, 2014) (credibility of declaration in support of actual innocence claim was "tenuous at best" because declarant had numerous convictions for crimes of moral turpitude), Report and Recommendation Adopted by 2014 WL 895446 (S.D. Cal. Mar. 6, 2014).

c. Demeanor and manner of testifying at evidentiary hearing

The Court was able to listen to Bianka's testimony and observe her demeanor at the evidentiary hearing. The Court notes that when Bianka was confronted with some of the more glaring inconsistencies in her recantation she became evasive and sarcastic in her responses to respondent's counsel's questions, and even admitted that she was "a little agitated" by the questioning. (See, e.g., EH RT 98, 111-12.) Moreover, as petitioner recognizes, Bianka readily admitted to committing perjury in this case (see Pet. PH Brief at 9-10), and she appeared to downplay it in a nonchalant manner, referring to her alleged perjury at trial and other things she lied about as "typical kid stuff." (See EH RT 73-74.) Accordingly, the Court draws an adverse inference from her demeanor and manner of answering questions at the evidentiary hearing. See House, 547 U.S. at 556 (Roberts, C.J., concurring in judgment in part, dissenting in part) (noting that, critical to the actual innocence determination was district court's ability to consider the new evidence at a comprehensive evidentiary hearing, observe the witnesses' demeanor, and make findings about reliability of the new evidence); United States v. Mejia, 69 F.3d 309, 315 (9th Cir. 1995) (the purpose of hearing live testimony is to "enable[] the finder of fact to see the witness's physical reactions to questions, to assess the witness's demeanor, and to hear the tone of the witness's voice.").

d. Bianka's familiarity with petitioner

Bianka testified at the evidentiary hearing that she did not know petitioner. (See EH RT 51, 95.) She also testified that she did not know him from around her neighborhood. (See EH RT 96.) Yet, in her December 2010 recorded conversation with Foster she revealed she in fact was much more familiar with petitioner than she conveyed at the evidentiary hearing. Bianka told Foster she had seen petitioner around her neighborhood, repeatedly referred to him as "Hollins," and said all her friends knew petitioner because "we all lived in the same neighborhood." (See Resp.

Exh. 100 at 9:51-9:59, 21:18-22:14.) She even admitted she "ended up having a baby by his friend." (See Resp. Exh. 100 at 6:58-8:00.) When this latter admission was played at the evidentiary hearing she initially, and incredibly, indicated that she actually said that she "*could have had* a baby by his friend." (See EH RT 98 (emphasis added).) Then she denied that she had a baby with petitioner's friend. (See EH RT 98-99.) When confronted with the discrepancy she said she did not recall admitting she had a baby with petitioner's friend but admitted "[t]hat's what it says on the tape." (See EHRT 98-99.) Finally, she explained, for the first time, that she was on medication when she spoke with Foster. (See EH RT 99.)

From this, it is apparent that Bianka was either untruthful in her conversation with Foster, which was the genesis of petitioner's actual innocence claim, or untruthful in her testimony before the Court regarding her familiarity with petitioner. This affects her credibility in two ways. First, her untruthfulness at either stage discounts her credibility and the reliability of her recantation because it shows she blatantly lied. Second, Bianka's familiarity with petitioner and his friend reveals obvious bias and an incentive for her recantation. See, e.g., House, 547 U.S. at 552 (noting that testimony from "friends or relations of the accused" might have less probative value than testimony from disinterested witnesses); Washington v. Delo, 51 F.3d 756, 761 (8th Cir.) (witness statements supporting actual innocence claim were "[a]t worst, . . . considered potentially biased statements made by a friend and a relative about events that are now over twelve years old"), cert. denied, 516 U.S. 876 (1995); Rowland v. Baca, 2013 WL 1858883, at *6-*7, *10 (C.D. Cal. Jan. 3, 2013) (prospective testimony from girlfriend and friend would have been minimally persuasive and biased, and thus insufficient to support actual innocence claim), Report and Recommendation Adopted by 2013 WL 1858627 (C.D. Cal. Apr. 28, 2013).

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e. Bianka's recantation of her identification of petitioner is illogical

As mentioned, Bianka testified at the evidentiary hearing that, after hearing shots and seeing a boy on a bicycle putting a brown paper bag into his pocket, she discussed the incident with her neighbor Karen. (See EH RT 52, 54-55.) Karen told her to be careful because he could have been the shooter and might have seen her. (See EH RT 57-58, 100-01.) When officers later presented Bianka with the photo line-up with the allegedly circled photograph, Bianka jokingly told the detectives what Karen had told her about the bicyclist seeing her and asked them if what Karen said was true. The detectives said it could be true, which scared Bianka. (See EH RT 67, 109-11, 113.) She then identified the person in the photograph as the bicyclist, and falsely identified petitioner at trial because she was scared for herself and her unborn baby. (See EH RT 67-68, 70, 73, 101-02.)

Bianka was adamant at the evidentiary hearing and in her conversation with Foster that she knew at the time of her identification that petitioner was not the bicyclist, claiming they did not look alike at all. (See EH RT 70-71, 75, 110, 113; Resp. Exh. 100 at 22:17-23:03 ("honestly . . . I didn't believe it to be Hollins after seeing him in the courtroom"). However, if she was so scared of the bicyclist, she would not have identified at trial someone she clearly knew was not that person. When confronted with this, and asked specifically what she was afraid of when she identified petitioner even though she knew he was not the bicyclist, she replied that only "God knows," and pointed out that she is a grown woman now "and things are much more clearer today to me than it was back then." (See EH RT 109.) She also explained that she "assumed" the detectives knew petitioner was the boy on the bicycle and said "[she thought] that [she] was a detective [herself] trying to put the situation together," so she just went along with it and "lied." (See EH RT 110-11, 113-14.)

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Similarly, Bianka did not adequately explain her trial testimony about receiving a call from petitioner when he was in jail telling her that if she did not testify then everything would be alright, which she understood to be a threat to her life. (2 RT 217, 228-30.) At the evidentiary hearing she denied that she received the call. (See EH RT 72.) When asked why she testified about it at trial, she again explained that she was fearful of the person in the picture based on what Karen and the detectives said and that she "just wanted to hurry up and do anything to just get them gone and make this be over with." (See EH RT 72.) Again, the basis of her fear and the need to concoct the story about receiving a threatening call from petitioner is directly at odds with her certainty that petitioner was not the bicyclist. Indeed, when confronted at the evidentiary hearing with why she would identify someone who she knew was not the person she was allegedly afraid of, Bianka admitted that it does not make sense to her today. (See EH RT 110.) Ultimately, as petitioner concedes, "none of it makes sense: if [Bianka] was so terrified of [petitioner] after the shooting and was receiving calls from him in jail, why would she have come forward and voluntarily spoken with the police at all?" (Pet. PH Brief at 16.) Accordingly, the Court finds that Bianka's recantation of her identification of petitioner is illogical.

f. Other inconsistencies in Bianka's recantation

As summarized above in Section II.C, Bianka has provided multiple versions of where she was when she initially heard gunshots on the day of the shooting. She testified at the evidentiary hearing she was outside the front of her father's house, but also later said that she was "unclear" where she was when she heard the gunshots. (See EH RT 52, 80-85.) She also said she could have been on the front service porch, on the grass, or on the sidewalk. (See EH RT 86, 92.) At her 2014 deposition she said she was on the front porch when she heard the gunshots. (See respondent's November 6, 2014 Notice of Lodgment, Lodgment B ("Bianka Depo.") at 13-14.) Finally, in her 2010 conversation with Foster, and in her 2011 declaration, she stated

she was across the street at her friend Karen's house when she heard the gunshots. (See Resp. Exh. 100 at 5:43-6:01; Pet. Exh. T; EH RT 89-91.)

After acknowledging that she testified at trial that she was on the "service porch" of her father's house when she heard gunshots, she provided a confusing and contradictory explanation of what she meant by a service porch, ultimately saying it was the front porch. However, at her deposition, she clearly referred to the service porch as "the back porch." (See Bianka Depo. at 16; EH RT 87.)

Bianka also testified at the evidentiary hearing that the "guy" on the bicycle was as a "grown man" in his late twenties to mid-thirties. (See EH RT 52-57, 61, 92-93.) But, in her declaration, she described a "boy" riding the bicycle who was "around her age" of 15 years old. (See Pet. Exh. T.) Further, Bianka testified at the evidentiary hearing that the bicyclist put a "brown paper bag in his pocket." (See EH RT 54-55.) But, in her declaration, she said the bicyclist put a "small plastic bag" in his pocket. (See Pet. Exh. T.)

Also, as summarized above, Bianka gave confusing testimony about whether she knew the bicyclist from around the neighborhood, ultimately saying that she had seen him around the neighborhood. (See EH RT 55-57, 93-97, 116-17.) When asked at her deposition if she remembered testifying at trial that she had known the bicyclist from seeing him around the neighborhood, she said she did not remember the testimony and said she "didn't know him at all." (See Bianka Depo. at 106.) Her explanation at the evidentiary hearing that there was a difference between seeing someone around the neighborhood and knowing someone from around the neighborhood did not adequately explain this discrepancy.

When asked at the evidentiary hearing whether the police told her the boy on the bicycle was out to get her, she replied, again confusingly, that she "remember[ed] them saying -- kind of coinciding with what Karen said. It could have been jokingly. I'm not saying they meant that, but being the age I was back then, that's just what I perceived." (See EH RT 104-05.) When respondent's counsel repeated the question

of whether they actually told her the boy on the bicycle was out to get her, she admitted they never told her that. (See EH RT 105.) But this testimony directly conflicted with a statement in her declaration that "[t]he detective who put the photo on the table told me that the person in the circled photo had seen me, knew who I was, and was going to 'get' me." (See Pet. Exh. T.)

When asked at the evidentiary hearing whether any prosecutor or police officer told her to testify about the gun at trial, she said she "can't say yes or no." (See EH RT 106.) At her deposition, she said she did not remember whether anyone told her to say she saw a gun, and agreed that she simply made up her trial testimony. (See Bianka Depo. at 97.) But this again conflicted with a statement in her declaration that "[t]he detective and the district attorney . . . did not ask me what I would say, they told me what to say." (See Pet. Exh. T.)

When questioned about these and many other discrepancies in Bianka's recantation, she often said she simply did not remember and pointed out that it has been 25 years since the crime. (See, e.g., EH RT 52-53, 55-56, 59-60, 64-66, 68, 72, 74-75, 80-84, 86, 88, 91, 93, 97, 99-100, 103-04, 106-10, 115-17.) Indeed, the passage of time since petitioner's trial would necessarily dim Bianka's memory of many of the details of petitioner's case. But to be credible, at a minimum, there must be some recollection and internal consistency in a recantation about critical facts a witness to a murder would remember, such as where she was when the crime occurred, or whether she was told what to say in court. See United States v. Vesich, 724 F.2d 451, 460 (5th Cir. 1984) (memory loss does not constitute recantation of false testimony); cf. Williams v. Woodford, 859 F. Supp. 2d 1154, 1167 (E.D. Cal. 2012) ("While slight variations are inevitable in a witness's story, her explanation of where [petitioner] was the night of the murder and what he was doing has been unwavering."). Here, there are so many inconsistencies in Bianka's recantation that it is simply not believable. See Nooner v. Hobbs, 689 F.3d 921, 935 (8th Cir. 2012) (upholding recantation adverse credibility assessment where there were

inconsistencies between declarations and evidentiary hearing testimony, motivations for recanting, and because witness had a "history of making contradictory statements in [the] case"), cert. denied, 134 S. Ct. 58 (2013); Davis v. Brazleton, 2013 WL 1964834, at *16 (E.D. Cal. May 10, 2013) ("[T]he fact that [the witness] has changed his story so many times makes yet another change of tune in a recantation far less compelling and credible as well.").

In short, Bianka's delay in recanting, her prior convictions, dishonesty about her familiarity with petitioner, and her illogical and inconsistent statements all cast significant doubt on her recantation. Accordingly, the Court finds that the recantation testimony upon which petitioner is relying in support of his actual innocence claim is unreliable and not credible.

2. Petitioner has not met his burden under Schlup.

In his Post-Hearing Brief, petitioner did not even purport to argue that Bianka's recantation testimony constituted reliable evidence of petitioner's actual innocence. Instead, petitioner advanced a new theory. According to petitioner, if the Court finds Bianka's recantation testimony not credible, petitioner has met his burden under Schlup of establishing that no reasonable juror would have convicted him had they seen the full panoply of evidence establishing Bianka's incredibility. (See Pet. PH Brief at 1, 11-14, 18.) Petitioner explains that this theory emerged following the evidentiary hearing, and that Bianka's "recantation is new, reliable evidence of her utter lack of credibility." (See Surreply at 1.) According to petitioner, because "there is no reason to credit anything [Bianka] has ever said" the Court cannot have confidence in the jury's 1992 verdict. (See Pet. PH Brief at 12-13; Surreply at 5.)

However, an actual innocence claim must be "credible," which "requires petitioner to support his allegations of constitutional error with new reliable evidence – . . . [such as] trustworthy eyewitness accounts . . . --that was not presented at trial." See Schlup, 513 U.S. at 324 (emphasis added); see also Jones, 763 F.3d at 1247 ("In

order to pass through the Schlup actual innocence gateway . . . [the] new evidence must be reliable[.]"). In assessing this requirement in the recanting witness context, the Ninth Circuit explained in Majoy that if the district court found that the recanting witness's "post-trail claims are credible, and that in light of [trial testimony] and other evidence [petitioner was not culpable], then the Schlup gateway would seem to open." Majoy, 296 F.3d at 776. On the other hand, if the district court found the recantation not credible, "then [the] petition will have failed." Id.

Petitioner's new theory is not based on credible and reliable evidence of his actual innocence. Rather it is based on Bianka's wholly incredible recantation. Accordingly, the Court concurs with respondent that the inquiry ends and petitioner's actual innocence claim fails. See Majoy, 296 F.3d at 776; Majoy v. Roe, 651 F. Supp. 2d 1065, 1078 (C.D. Cal. 2009) ("Because the Ninth Circuit remanded to this Court to determine the credibility of [the] recantation, and because this Court has determined it was not credible, petitioner's Schlup claim must fail"); see also Goldblum v. Klem, 510 F.3d 204, 225-26 (3d Cir. 2007) ("First, a court must decide 'whether the petitioner has presented new reliable evidence,'" and "[s]econd, only if a petitioner [has done so] does a court ask 'whether it is more likely than not that no reasonable juror could have convicted him in light of the new evidence.'" (citation omitted)), cert. denied, 555 U.S. 850 (2008); Weeks v. Bowersox, 119 F.3d 1342, 1352 (8th Cir. 1997) ("Because Weeks has not presented new reliable evidence that he is actually innocent, he can not pass through the actual innocence gateway."); Anderson v. Clarke, 2014 WL 6712639, at *3 (E.D. Va. Nov. 26, 2014) ("The Court need not proceed to [the] second . . . inquiry [of whether it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt] unless the petitioner first supports his or her claim with evidence of the requisite quality." (internal quotation marks and citations omitted)).

Petitioner does not address the Ninth Circuit's direction to the district court when it remanded in Majoy. Instead, petitioner contends the "legitimacy" of his new

theory is established by the Ninth Circuit's earlier decision in Carriger, 132 F.3d 463. (See Pet. PH Brief at 11-14, Surreply at 1-3.) According to petitioner, "Carriger stands for the proposition that new evidence that undermines the credibility of the prosecution's case may alone suffice to get an otherwise barred petitioner through the Schlup gateway." (Surreply at 1 (internal quotation marks and citation omitted).) Petitioner maintains that because Carriger did not resolve who committed the crime, "[t]his Court need not believe any specific story that [Bianka] has told in order to find [p]etitioner has met his burden under Schlup." (Pet. PH Brief at 13.)

However, petitioner's reliance on Carriger is completely misplaced. There, the defendant had been convicted and sentenced to death for murder in 1978. See 132 F.3d at 465. The chief prosecution witness implicating Carriger, Robert Dunbar, recanted his trial testimony and confessed to the crime in state habeas proceedings in October 1987. Id. at 465, 467, 471. Shortly thereafter, in December 1987, Dunbar recanted his confession and testified that his 1978 trial testimony had been truthful. Id. The trial court found Dunbar's confession was false and his 1978 trial testimony was truthful, and therefore denied state habeas relief. Id. at 467, 473. On federal habeas corpus, the district court gave deference to the state court's credibility finding and concluded that Carriger had not shown actual innocence sufficient to permit consideration of his procedurally barred claims under Schlup. Id. at 473.

In reviewing the case en banc, the Ninth Circuit "consider[ed] first whether we may rely in any part on Dunbar's confession, or whether the district court correctly deferred to the state court's rejection of the confession." Carriger, 132 F.3d at 473 (emphasis added). The Ninth Circuit concluded that the state court's credibility finding was not fairly supported by the record and thus did not warrant deference by the district court. Id. at 473-75. On the contrary, the Ninth Circuit found that "Dunbar's post-trial confession was more reliable than either his trial testimony or his December 1987 recantation [of his confession]." Id. at 475. After making that determination, it then considered the now-credited confession "along with the other

evidence, which points directly to Dunbar as to Carriger," and concluded that, under Schlup, it was more likely than not that no reasonable juror hearing all of the evidence would have voted to convict Carriger beyond a reasonable doubt. Id. at 478-79. Accordingly, the Ninth Circuit found that Carriger passed through the Schlup actual innocence gateway, warranting consideration of the merits of his constitutional claims of trial error. Id. at 479.

Petitioner contends here that there are numerous similarities between Dunbar and Bianka, including that they were both habitual liars; family members admitted they were liars; both admitted to lying under oath; and both had extensive criminal histories. (See Pet. PH Brief at 14.) Petitioner points out that his jury found Bianka credible, and Carriger's jury similarly found Dunbar credible, "yet the en banc panel of the Ninth Circuit nevertheless found that Carriger had met the actual innocence burden under Schlup by establishing Dunbar's utter lack of credibility." (See Surreply at 3.) The fallacy in petitioner's reading of and reliance on Carriger is that the Ninth Circuit majority did not find Dunbar's initial recantation and confession unreliable. To the contrary, the Ninth Circuit majority ultimately *credited* Dunbar's initial recantation and confession. Carriger, 132 F. 3d at 473-75; see also id. at 488 (Kozinski, J., dissenting) ("The majority . . . [found] Dunbar's confession credible."). Here, by way of contrast, the Court has found and petitioner implicitly has conceded that Bianka's recantation is unreliable and not credible.

Petitioner's new theory also fails for other reasons. First, petitioner's new theory essentially is that because Bianka told so many different stories in her recantation, her trial testimony also must have been false. (See Pet. PH Brief at 13 (contending that Bianka has told a different story every time she has been asked about the events and, considered with her history of dishonesty, nothing she has ever said should be credited), 15 (contending that the primary difference between respondent's position and the theory petitioner advances is "whether [Bianka] can ever be trusted" and that "[t]he fact that the jury credited her trial testimony is immaterial"); Surreply

at 2 (contending that petitioner has shown that the critical witness against him cannot be trusted which casts a vast doubt over the reliability of his conviction).) But petitioner points to no authority, outside of his fallacious reading of Carriger, supporting his contention that this Court's determination that Bianka's recantation is not credible would in turn make her trial testimony false. See Christian v. Frank, 595 F.3d 1076, 1084 n.11 (9th Cir.) (eyewitness's recantation of trial identification at evidentiary hearing before district court did not render his earlier testimony false), cert. denied, 131 S. Ct. 511 (2010); Allen v. Woodford, 395 F.3d 979, 994 (9th Cir.) (a witness's "later recantation of his trial testimony does not render his earlier testimony false"), cert. denied, 546 U.S. 858 (2005); Nixon, 881 F.2d at 1312 ("To conclude, as the district court did, that [a recanting witness's] habeas testimony was incredible is not the same as concluding that his trial testimony must also have been false."). Indeed, "it is illogical to infer that a witness who was 'puzzling and inconsistent' both at trial and in [her] attempted recantation must have lied at trial." Nixon, 881 F.2d at 1312.

Second, under petitioner's new theory, he would succeed in obtaining habeas relief no matter what the Court determined regarding the reliability and credibility of Bianka's recantation. (See Pet. PH Brief at 1 ("There are two ways [petitioner] can meet the actual innocence burden . . . [t]he first, and simplest, is if the Court finds [Bianka's] recantation credible . . . [and t]he second way is if the Court finds that . . . [Bianka] is not credible.").) But if that were the law, every inmate alleging the common claim that he is actually innocent due to eyewitness recantation would be entitled to relief. See Carriger, 132 F.3d at 484 (Kozinski, J., dissenting) ("[a]s in many cases, recanting testimony is all too common"); Johnson v. Biter, 2012 WL 3765110, at *5 (C.D. Cal. May 18, 2012) (noting gang expert testimony that "it was common for witnesses to recant their original statements" in gang cases), Report and Recommendation Adopted by 2012 WL 3765105 (C.D. Cal. Aug. 26, 2012); Torres v. Pliler, 2005 WL 2179196, at *13 (E.D. Cal. Sept. 8, 2005) (noting "credible and

logical testimony that recanting witnesses are quite common in gang-related cases"), Report and Recommendation Adopted by 2006 WL 708335 (E.D. Cal. Mar. 20, 2006). The Court refuses to adopt a framework that would transform Schlup into a game of "heads-I-win-tails-you-lose" under which federal habeas petitioners always win no matter the reliability of the recantation testimony upon which their actual innocence claims are premised.

Finally, throughout this case, and in support of the new theory, petitioner has repeatedly reminded the Court of its February 4, 2014 Order re Further Proceedings wherein it found that without Bianka's testimony, the prosecution did not have enough inculpatory evidence to prove petitioner's guilt beyond a reasonable doubt. (See Pet. PH Brief at 11-12; Surreply at 4.) As mentioned, in that Order the Court advised that it had considered Bianka's recanting declaration in light of the evidence presented at petitioner's trial and concurred with petitioner that Bianka's testimony was the "linchpin" of the prosecution's case. Inasmuch as Bianka's testimony was essential to the prosecution's case, it must necessarily also be the "linchpin" of petitioner's actual innocence claim. Accordingly, in order to succeed, it was incumbent on petitioner to produce a credible recantation from Bianka.[6] He failed to

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[6] In his Post-Hearing Brief, petitioner mentioned that the trial court barred the defense from calling Ginger Gutman, a social worker who investigated a report by Bianka that her biological mother was abusing her, allegations which Gutman eventually concluded were untrue. (See Pet. PH Brief at 9, 11 n.10; 2 RT 247-49.) In the Surreply, petitioner "moves to expand the previously ordered hearing" to include the proffered testimony of Gutman "to the extent the Court believes it cannot consider [it]." (Surreply at 4 n.3.) The trial court precluded Gutman's proffered testimony because it related to a single isolated incident, dealt with an inter-family dispute that had little relevance, was too collateral, and would require an undue consumption of time to present to the jury. (See 2 RT 269, 273.) Petitioner had ample opportunity to proffer Gutman's testimony at the status conferences preceding the evidentiary hearing or list her on his final witness list, but failed to do so. For (continued...)

do so.

3. Conclusion

As Justice O'Connor emphasized in Schlup, the Supreme Court strove to "ensure that the actual innocence exception remains only a safety valve for the extraordinary case." Schlup, 513 U.S. at 333 (O'Connor, J., concurring) (internal quotation marks omitted). Petitioner's is not such a case.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: May 13, 2015

ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

[6](...continued)
that reason, as well as the fact that evidence that Gutman's proffered testimony does not buttress the credibility of Bianka's evidentiary hearing testimony and therefore is irrelevant to the Court's determination of whether petitioner has met his burden under Schlup, petitioner's motion to expand the evidentiary hearing record is denied.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOLLINS TIZENO, Petitioner, vs. LELAND McEWEN, Warden, Respondent.	Case No. CV 12-5157-BRO (RNB) ORDER RE FURTHER PROCEEDINGS

The current posture of this case is as follows. Petitioner is alleging the following five grounds for relief:

1. (a) Petitioner's pre-trial identification by the two main prosecution witnesses was the result of impermissibly suggestive identification techniques, and (b) the prosecution failed to disclose information relating to the pre-trial identification by one of those witnesses that was favorable to the defense, in violation of petitioner's federal constitutional rights under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (See Pet. at ¶ 7.a; Pet. Mem. at 3-5.)

2. Petitioner's conviction was obtaining by the knowing use of false testimony by the same two prosecution witnesses, in violation

of petitioner's federal constitutional rights under Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). (See Pet. at ¶ 7.b; Pet. Mem. at 5-6.)

3. Even if the testimony of the two witnesses was presented in good faith and without knowledge of its falsity, petitioner's conviction based on false evidence violated his federal constitutional right to due process. (See Pet. at ¶ 7.c; Pet. Mem. at 6-7.)

4. [withdrawn]

5. The trial court's failure to grant petitioner's motion to represent himself was a denial of his federal constitutional right to self-representation under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). (See Pet. at ¶ 7.e; Pet. Mem. at 7-9.)

6. [withdrawn]

7. Petitioner is actually innocent. (See Pet. at ¶ 7.g; Pet. Mem. at 10-12.)

Respondent contends that all five grounds are time barred and that Grounds One, Two, Three, and Seven also are procedurally defaulted.

Petitioner concedes that Ground Five is time barred (subject to his actual innocence claim).[1] However, petitioner disputes that Grounds One, Two, Three, and Seven are time barred. Rather, petitioner maintains that Grounds One, Two, Three, and Seven of the Petition were timely filed under 28 U.S.C. § 2244(d)(1)(D) because he did not discovery the factual predicate of those claims until February 3, 2011. Petitioner also disputes that Grounds One, Two, Three, and Seven of the Petition are

[1] Petitioner conceded that Ground Five was time barred in his Supplemental Opposition to the Motion to Dismiss, subject to his actual innocence claim.

procedurally defaulted. Moreover, petitioner contends that, in any event, he qualifies for the actual innocence exception to the statute of limitations and the procedural default doctrine.

The record currently before the Court is not sufficient for the Court to make a determination of when the limitation period commenced running with respect to Grounds One, Two, Three, and Seven of the Petition. However, the Court is prepared to find that respondent has adequately pled in the Answer the existence of independent and adequate state-law procedural ground as an affirmative defense to Grounds One, Two, Three, and Seven of the Petition; that petitioner's bare assertion in his Traverse that respondent "has failed to meet his burden to establish that Clark is an adequate and independent bar as applied to Tizeno" is insufficient to satisfy petitioner's burden under Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir.), cert. denied, 540 U.S. 938 (2003) to place the procedural default defense in issue; and that, as a result of petitioner's failure to meet his burden, respondent has been relieved of any further duty to carry his "ultimate burden" under Bennett with respect to the claims as which the procedural default defense has been pled. The Court also is prepared to find that petitioner has not established the requisite cause for his procedural default; and that petitioner's failure to establish the requisite "cause" for his procedural default obviates the need for the Court to even reach the issue of whether petitioner has demonstrated the requisite "prejudice" from the procedural default.

Accordingly, the question becomes whether this case qualifies for the actual innocence exception to the statute of limitations and the procedural default doctrine.

In order to qualify for the "actual innocence" exception, a habeas petitioner must "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." See Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (recognizing that such

evidence "is obviously unavailable in the vast majority of cases"). Further, to establish the requisite probability that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 327.

Under Schlup, petitioner must establish his factual innocence of the crime, and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); Jaramillo v. Stewart, 340 F.3d 877, 882-83 (9th Cir. 2003). However, as the Ninth Circuit observed in Gandarela v. Johnson, 286 F.3d 1080, 1086 (9th Cir. 2002) (internal citations omitted), cert. denied, 537 U.S. 1117 (2003):

> "In seeking to prove actual innocence, to avoid a procedural default, a petitioner for a writ of habeas corpus need not always affirmatively show physical evidence that he or she did not commit the crime with which he or she is charged. . . . Rather, a petitioner may pass through the Schlup gateway by promulgating evidence that significantly undermines or impeaches the credibility of witnesses presented at trial, if all the evidence, including new evidence, makes it 'more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'"

In reviewing a Schlup actual innocence claim, the Court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." Schlup, 513 U.S. at 331-32. As explained by the Supreme Court in Schlup, this is a "probabilistic determination about what reasonable, properly instructed jurors would do." Id. at 329. The "new evidence" need not be newly available, just newly presented–i.e., evidence that was not presented at trial. See Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003), cert. denied, 541 U.S. 998

(2004). Further, "[i]n assessing the adequacy of petitioner's showing, . . . the district court is not bound by the rules of admissibility that would govern at trial." See Schlup, 513 U.S. at 327; see also House v. Bell, 547 U.S. 518, 537-38, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (noting that "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial" (internal quotation marks omitted)). Accordingly, as described by Judge Kozinski in his dissenting opinion in Carriger v. Stewart, 132 F.3d 463, 485-86 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1133 (1998), in evaluating a claim of actual innocence, a habeas court is required to posit a hypothetical jury that is entitled to consider both admissible and inadmissible evidence, so long as the inadmissible evidence is reliable.

In Majoy v. Roe, 296 F.3d 770, 775 (9th Cir. 2002), the Ninth Circuit reversed a district court's dismissal of a habeas petition for untimeliness and remanded the matter for an evidentiary hearing where it appeared that the petitioner might be able "to muster a plausible factual case meeting the exacting gateway standard established by the Supreme Court in Schlup for overriding a petitioner's clear failure to meet deadlines and requirements for filing a timely petition in federal court." However, as the Court previously advised the parties, it does not construe Majoy as either (a) mandating that the district court hold an evidentiary hearing whenever a habeas petitioner just proffers "new evidence," which, if found credible, would make it "more likely than not that no reasonable juror would have convicted him," or (b) precluding the district court from reaching the conclusion, without conducting an evidentiary hearing, that the "new evidence" being proffered by the petitioner does not qualify as new *reliable* evidence for purposes of meeting the Schlup standard. If Majoy were so construed, the Court in essence would be applying the same standard that is applied in deciding a summary judgment motion. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)

("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). However, the Supreme Court expressly held in Schlup that the summary judgment standard is not the standard to be applied in determining whether to conduct an evidentiary hearing on a habeas petitioner's claim of actual innocence. "Instead, the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." See Schlup, 513 U.S. at 331-32; see also McQuiggin v. Perkins, - U.S. -,133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013) (clarifying that "a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown"); House, 547 U.S. at 537. Thus, the Supreme Court clearly has contemplated that, in some instances, the determination of reliability can be made by the district court without conducting an evidentiary hearing.

Here, in support of his actual innocence claim, petitioner is relying on the "affidavits" (which actually are declarations under penalty of perjury) of the prosecution's two main witnesses, Bianka Logie and Antawong Thompson, that were secured by his state habeas counsel in 2011. The Court has considered those declarations in light of the evidence presented at petitioner's trial, which the Court has independently reviewed.

The Court concurs with petitioner that Logie's testimony was the "linchpin" of the prosecution's case. She was the only prosecution witness who placed petitioner near the scene of the crime with a gun. No physical evidence connected petitioner to the crime. Without Logie's testimony, the prosecution did not have enough inculpatory evidence to support even a showing of probable cause to arrest, let alone proof of petitioner's guilt beyond a reasonable doubt.

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The Court is mindful of the plethora of case authority questioning the reliability of recantation testimony. See, e.g., United States v. Willis, 257 F.3d 636, 645 (6th Cir. 2001) ("[A]ffidavits by witnesses recanting their trial testimony are to be looked upon with extreme suspicion." (internal quotation marks omitted)); United States v. Leibowitz, 919 F.2d 482, 483 (7th Cir. 1990) ("Judges view recantation dimly."), cert. denied, 499 U.S. 953 (1991); United States v. Nixon, 881 F.2d 1305, 1311 (5th Cir. 1989) ("The recanting of prior testimony by a witness is ordinarily met with extreme skepticism."); Landano v. Rafferty, 856 F.2d 569, 572 (3d Cir. 1988) ("Courts have historically viewed recantation testimony with great suspicion."), cert. denied, 489 U.S. 1014 (1989); see also Herrera v. Collins, 506 U.S. 390, 423, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (O'Connor, J., concurring) (affidavits made many years after trial, purporting to exculpate a convicted prisoner through a new version of events, are "not uncommon" and "are to be treated with a fair degree of skepticism"); Dobbert v. Wainwright, 468 U.S. 1231, 1233, 105 S. Ct. 34, 36, 82 L. Ed. 2d 925 (1984) (Brennan, J., dissenting from denial of certiorari) ("Recantation testimony is properly viewed with great suspicion."); Carriger v. Stewart, 132 F.3d 463, 483 (9th Cir. 1997) (Kozinski, J., dissenting) ("Recanting testimony has long been disfavored as the basis for a claim of innocence" and is viewed, on review, "with extreme suspicion.").

However, there is no per se rule that any actual innocence claim predicated solely on recantation testimony must be rejected. If there was such a rule, the Ninth Circuit would not have remanded for an evidentiary hearing in Majoy, for purposes of a determination by the district court whether the prosecution witness's recantation of his pretrial statements implicating the petitioner was credible or "the familiar, untrustworthy, and unreliable about-face by a self-interested criminal, as argued by the Respondent." See Majoy, 296 F.3d at 776.

The Court has considered whether the record here (which includes trial testimony by Logie's parents to the effect that she is a compulsive and habitual liar)

would arguably support a finding, without conducting an evidentiary hearing, that her 2011 recantation of her trial testimony is not sufficiently creditworthy to satisfy Schlup's "new reliable evidence" standard. And, if there had been any evidence presented at trial incriminating petitioner other than Logie's testimony, or any evidence presented at trial that corroborated Logie's testimony incriminating petitioner, the Court likely would have found without conducting an evidentiary hearing that Logie's recantation was not sufficiently creditworthy to satisfy Schlup's "new reliable evidence" standard. However, there is no such other evidence here and the Court believes that Majoy, at the very least, accords it the discretion to decide to defer making a determination of whether Logie's recantation is sufficiently creditworthy to satisfy Schlup's "new reliable evidence" standard until after it sees and hears Logie testify live and subject to cross-examination. See also Teleguz v. Pearson, 689 F.3d 322, 331 (4th Cir. 2012) ("This Court has counseled that, when a witness providing the 'only direct evidence implicating [a petitioner] in the murder-for-hire scheme' recants his testimony, this recantation 'strongly suggests that an evidentiary hearing may be warranted.'"). That is what the Court has decided to do.

As for Thompson, if petitioner had been relying solely on the Thompson declaration in support of his actual innocence claim, the Court would have found, without conducting an evidentiary hearing, that petitioner had not met his burden under Schlup. The only parts of Thompson's declaration that qualify as "new evidence" are the statement in ¶ 6 that, when he was shown the photo array on September 1, 1990, he was told by a police officer that "the person who had shot [his] cousin was in one of the photos," and the statement in ¶ 7 that he "chose the one that most closely resembled the person [he] recalled seeing on the bicycle approximately 9 weeks before." Those statements are inconsistent with the evidence presented at trial regarding the circumstances of Thompson's September 1, 1990 identification of petitioner and with Thompson's unequivocal identification testimony at trial.

However, Thompson also testified at trial that he never saw the shooter, and nothing in his declaration actually exculpates petitioner.

Nevertheless, the Court has concluded that Thompson's statement in his declaration regarding the suggestive technique allegedly utilized by law enforcement to secure Thompson's identification of petitioner, if credited, might have corroborating effect with respect to Logie's evidentiary hearing testimony regarding the tactics law enforcement allegedly utilized to secure her inculpatory testimony. Accordingly, the Court also has decided it would like to see and hear Thompson testify live at the evidentiary hearing, subject to cross-examination.

IT THEREFORE IS ORDERED as follows:

1. Within seven (7) days of the service date of this Order, counsel shall confer with each other and then propose a mutually convenient date for a status conference. The proposed date shall be within sixty (60) days of the service date of this Order.

2. The purpose of the status conference will be to set a date for the evidentiary hearing. The Court will expect petitioner's counsel to have confirmed the availability of Logie and Thompson. The Court also will expect both counsel to have conferred in advance about the timing of the evidentiary hearing and to be prepared at the status conference to propose a date.

3. The Court also will expect both counsel to be prepared at the status conference to disclose the identities of any witnesses other than Logie and Thompson whose testimony they contemplate presenting at the evidentiary hearing, as well as the nature of the contemplated testimony. The Court will then make the determination whether the contemplated testimony is relevant to the Court's determination of whether petitioner has met his burden under Schlup. Any witnesses not

//

disclosed at the status conference will not be permitted to testify at the evidentiary hearing.

DATED: February 4, 2014

ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

S210623

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re HOLLINS TIZENO on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Clark* (1993) 5 Cal.4th 750, 767-769.)

SUPREME COURT
FILED

JUL 17 2013

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

CA No. 15-56150

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLINS TIZENO, Petitioner-Appellant, v. GERALD JANDA, Warden, Respondent-Appellee.	DC No. CV 12-05157-JAK-JEM

APPELLANT'S MOTION TO REMAND TO THE DISTRICT COURT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOHN A. KRONSTADT
United States District Judge

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Petitioner-Appellant Hollins Tizeno, through his undersigned counsel, moves this Court to stay this appeal and remand the case to the district court such that Tizeno can amend his federal habeas petition to include a *Brady*[1] claim arising out of newly discovered impeachment evidence regarding the lead detective in this case, Richard Marks. Detective Marks' investigation led to the dubious identifications of Tizeno, without which the State could not have convicted Tizeno of first-degree murder and attempted murder. The requested stay and remand is consistent with "Congress' intent to channel prisoners' claims first to state court," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), and this Court's decision in *Gallegos v. Ryan*, 820 F.3d 1013 (9th Cir. 2016) (granting petitioner's motion to remand in light of new impeachment evidence regarding the lead detective). The requested relief will promote judicial efficiency and, if necessary, allow the Court to review this case based on a fully-developed record.

I. PROCEDURAL POSTURE

In 1992, Tizeno was convicted of the 1990 murder of David Moch and attempted murder of Antawong Thompson, and sentenced to an indeterminate term of 30 years to life in prison.[2] On June 13, 2012, Tizeno filed a pro se petition in the

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] Tizeno briefly outlines the relevant procedural history here. A more complete version is included in Appellant's Opening Brief, Dkt. Entry 11 at 3-5.

district court alleging, inter alia, that the use of suggestive identification techniques and the failure to turn over exculpatory evidence to the defense was prosecutorial misconduct. D.C. Dkt. 1, at 13-17.[3] The magistrate judge held an evidentiary hearing on the issue of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995). D.C. Dkt. 47, 106. Following the hearing, the magistrate judge issued a report and recommendation finding that Tizeno's claims were procedurally defaulted and that Tizeno had failed to establish actual innocence to surpass the procedural default. ER 13-67. The district court accepted the magistrate judge's report and recommendation and entered judgment against Tizeno. ER 11-12. This timely appeal followed.

This case has been briefed in this Court, but not yet argued or submitted for decision. The Court issued an order indicating that the case is being considered for oral argument in March 2019. Dkt. Entry 52.

[3] "D.C. Dkt" refers to the District Court's docket. "Dkt. Entry" refers to this Court's docket. "ER" refers to the excerpts of record filed in conjunction with Tizeno's opening brief on appeal. "R. Ex." refers to the exhibits concurrently filed in support of this motion.

II. TIZENO HAS A COLORABLE BRADY CLAIM: NEWLY DISCOVERED EVIDENCE REVEALS THAT THE STATE WITHELD CRITICAL IMPEACHMENT EVIDENCE REGARDING DETECTIVE RICHARD MARKS

A. Statement of Relevant Facts

Marks was one of two detectives assigned to investigate the July 3, 1990 murder of Moch and attempted murder of Thompson. The case against Tizeno was based on an eyewitness identification by Bianka Logie and supported by an eyewitness identification by Thompson, both of which were obtained by Marks. The district court held that, absent Logie's testimony, the "prosecution did not have enough inculpatory evidence to support even a showing of probable cause to arrest [Tizeno]." D.C. Dkt. 47 at 6:25-26.

Marks and his partner Joe Flores were assigned to the case on July 3, 1990 at approximately 10:15 p.m. ER 1101. Early the next morning, Marks and Flores interviewed Thompson for the first time. ER 1101. Thompson stated that he and Moch were standing outside of Moch's home. Thompson claimed that, at some point prior to the shooting, he observed a man, first sitting in the back seat of a Ford Bronco and then riding a bicycle, staring at he and Moch. The man was medium height, wearing black khakis, a white T-shirt, a red belt, and LA gear boots. ER 1035-36. He stated that the man's hair was styled as a "jeri curl" that needed resetting. ER 1036. The bicycle he saw the man riding was a beach cruiser style bicycle. ER 636.

Two days later, on July 6, Marks and Flores met with Thompson again to review "gang mug books" (photographs of known gang members). Although it is undisputed that Tizeno's photo was included in one of the mug books, Thompson did not select Tizeno's photograph. Instead, Thompson pointed to a photograph of Demarcus Coleman, a man who looks nothing like Tizeno,[4] and said the man he saw on the bicycle resembled Coleman. ER 643-644.

On July 6, Marks and Flores canvassed the area near the location of the shooting and interviewed Karen Wandrick. Wandrick told them that her 15-year-old neighbor Bianka Logie claimed to have seen "Moe,"[5] a local gang member, biking away from the general location of the shooting. ER 1103. On July 9, Marks (alone) called Wandrick who confirmed that Moe was the bicyclist, and he had threatened Logie and attempted to coerce her into not speaking to the police. ER 1104. During this call, Wandrick apparently told Marks that Logie's parents did not want her cooperating with the police. *Id*.

---

[4] It is undisputed that Coleman and Tizeno look nothing alike. *See* D.C. Dkt. 46-4 at 2 for photo comparison.

[5] "Moe" was the street name for a local gang member named Lavelle Morton. ER 823; ER 1103. Morton attended Western Elementary School with Logie. ER 823. Marks and Flores attempted to interview Morton, but he fled when he saw them. ER 1105. Although Marks issued a felony want for Morton, Morton was never interviewed with respect to this case. ER 1107.

Approximately six weeks after the shooting, on August 16, Marks and Flores interviewed Logie who now claimed, consistent with the threats, that the bicyclist was not Moe. Instead, she stated that she could not recall the bicyclist's name, but she had known him from the neighborhood most of her life and that they had attended Western Avenue Elementary school together. ER 1107.

Later that day, Marks (alone) called Logie and during that phone call she allegedly claimed to have learned that the bicyclist was named "Hollis."[6] Marks and Flores then met with Logie again. Marks showed Logie a photograph and Marks immediately pointed out Tizeno and asked if that was who she saw.[7] Logie stated she was not certain, but then picked Tizeno's photograph out of a gang mugbook. ER 1108. Logie and Tizeno never went to school together. At this interview, Logie now claimed to have seen a gun in the bicyclist's hand. She had

[6] The misspelling of Tizeno's first name as "Hollis" appears in an earlier entry in Marks' police chronology. ER 1106.

[7] In his deposition, Marks explained that he would initially ask a witness to view photographs and only after the witness was unable to identify someone would he then point out a specific individual and inquire whether the witness recognized that person. D.C. Dkt. 79-1 at 32-33. He further explained that he would carefully document this action in his report and would not withhold that information. *Id*. Marks admitted that the chronological report indicated that he pointed out the photograph of Tizeno. *Id*. at 69:1. There is no statement in any of the reports that Logie initially indicated she did not recognize anyone. *See, generally,* E.H. Ex. 9.

previously told Wandrick that she saw "something" in the bicyclist's hand, but made no mention of a gun.

After arresting Tizeno, Marks informed Thompson's father that he would be making an arrest and wanted Thompson to review a photo lineup. Thompson then identified Tizeno as the man he saw on the bicycle and in the Bronco.

Logie and Thompson's descriptions of the suspect were different in terms of the bicycle he was riding (beach cruiser versus ten speed), his hair style (Jeri-curl versus Afro-style), and his clothing (black dickies versus jeans, bright red belt versus no mention of a belt).

Marks did not testify at Tizeno's trial. Logie testified at Tizeno's trial that Tizeno was the man she saw on the bicycle carrying a gun, and Tizeno was convicted. Tizeno's convictions were affirmed on appeal. In 2011, Tizeno filed a habeas petition in the superior court alleging that his convictions were based on false testimony, and included a declaration from Logie wherein she admitted falsely implicating Tizeno. ER 383-84. The petition was denied without factual development, and the higher state courts summarily denied relief. Tizeno's federal habeas petition followed.

1. Post-trial revelations concerning Marks

As the Parties prepared for an evidentiary hearing in this case, Tizeno learned that, in 1986, the Los Angeles District Attorney's Office dismissed a

death-eligible murder case against Frederick Terrell and, in the disposition report, the Deputy District Attorney noted that Marks had "structured" an interview with an eyewitness such that he "would not eliminate Terrell" as a suspect.[8] R. Ex. A, Aalto Disposition Report and Stipulation. This evidence was offered at the evidentiary hearing, but because the district court did not find Logie's testimony credible, the court ruled that Tizeno had failed to establish actual innocence.

Although the LADA dismissed charges against Terrell, it successfully prosecuted his-codefendant Andrew Wilson for murder and, in 1986, he was sentenced to life in prison without the possibility of parole. After Tizeno filed his opening brief in this Court, Tizeno learned that: (1) Marks' affidavit in support of Wilson's arrest warrant indicated that Marks directed eyewitness Saladina Bishop to a photograph of Wilson before she had identified him (R. Ex. B at 25) and this evidence was not disclosed to Wilson, in contravention of Marks' deposition testimony in the Tizeno case; (2) undisclosed police reports and LADA notes called into question Bishop's credibility (R. Ex. C; R. Ex. E at 89-90); (3) Marks had secured an undisclosed $1000 witness payment to Bishop (R. Ex. D); and, (4) undisclosed records established that Bishop herself may have been involved in the crime (R. Ex. E at 87-89).

[8] A detailed history of the discovery is laid out in Appellant's Motion to Stay the Briefing Schedule, Dkt. Entry 29, and supporting reply brief, Dkt. Entry 33.

Wilson filed a habeas petition in the superior court alleging that: (Claim 1) Bishop's identification of Wilson was the result of a suggestive and constitutionally prohibited procedure; (Claim 2) Wilson was convicted based on false testimony of both Bishop and Marks; (Claim 3 and 4) the state withheld evidence impeaching both Marks and Bishop; (Claim 5) cumulative error; (Claim 6) Wilson is factually innocent. R. Ex. F. The LADA conceded cumulative error, dropped all charges, and Wilson was released after having served over 30 years in prison. Wilson has since filed a civil lawsuit against, inter alia, the county of Los Angeles and Marks. *Wilson v. Los Angeles, et. al.*, C.D. Cal. Case No. 18-CV-5775. The discovery cut-off date runs through October 2019. *Id*. at D.C. Dkt. 28.

Following Wilson's release, Tizeno moved this Court to stay the appellate proceedings and moved in the district court for a written indication that the district court would entertain a motion for relief from judgment. D.C. Dkt. 134. This Court stayed the appellate proceedings while the district court considered Tizeno's motion. Dkt. Entry 34, 38, 40, 42, 44, 46, 48. The district court denied Tizeno's motion, finding that Tizeno did not meet the strict requirements of Federal Rule of Civil Procedure 60(b) and (d). D.C. Dkt. 146 at 8-12. The issue presented in this motion is distinct from that which was presented to the district court. Tizeno is now attempting to bring a new claim of prosecutorial misconduct, not previously litigated in district court, rather than seeking to reopen the judgment in his case

because of new facts that were not previously before the district court. Accordingly, the district court's findings with respect to Tizeno's motion for a indicative ruling are not relevant to these proceedings.

B. Tizeno's Brady Claim is Potentially Meritorious

A prosecutor's suppression of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment. *Brady,* 373 U.S. at 87. A *Brady* claim lies when three elements exist. First, the evidence must be "favorable to the defense, either because it is exculpatory or impeaching." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). Second, the "government must have willfully or inadvertently failed to produce the evidence." *Id*. Third, the suppressed evidence must have been material in that it "prejudiced the defendant." *Id*. To show prejudice, "it isn't necessary to find that the jury would have come out differently." *Id*. at 1018. Prejudice is shown when "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id*. (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

1. The suppressed evidence is favorable to Tizeno

Any evidence that "would tend to call the government's case into doubt is favorable for *Brady* purposes." *Id.* at 1012. The court below found that impeachment evidence and evidence about faulty identification procedures was at least relevant to Tizeno's actual innocence showing. That evidence, however, was

limited in that it only established that Marks had attempted to influence an identification such that a particular suspect would not be eliminated. The new evidence shows that Marks affirmatively influenced a witness (Bishop) to identify a suspect (Wilson) who she knew well at the time of the crime, yet did not identify until Marks directed her to his photograph. Further, Marks provided benefits to her for identifying Wilson, and concealed both the circumstances of the identification and the benefits.

This evidence would have provided the defense an opportunity to call into question the dramatic change in Logie's story and the significance of her August 16, 1990 telephone call with Marks. Before talking with Marks, Logie claimed the bicyclist was carrying something and she knew him because they had gone to school together. After, Logie claimed to see "Hollis," someone she had not gone to school with or had any known prior contact with, who she now claimed was carrying a gun. Later that afternoon, Marks placed a photograph of Tizeno in front of Logie and pointed Tizeno out to her, and soon thereafter she identified Tizeno from the gang mugbook as the man she saw riding the bicycle. ER 1107-08.

The impact of Marks's private conversation with Logie and his having pointed to the photograph of Tizeno would have been bolstered by the Wilson disclosures. Marks buried the fact that he pointed out the picture of Tizeno to Logie before she identified him. There is no mention of Marks pointing to Tizeno's

photograph in any police report related to this case, and neither Logie nor Flores testified that Marks pointed to Tizeno's photograph. Indeed, the jury was totally unaware that this had occurred. The only place where this is preserved is in the police chronology of the investigation in this case. Had defense counsel been made aware that Marks had previously used this technique to successfully influence a 1984 identification, counsel would have subpoenaed Marks or moved to exclude Logie's "identification" in Tizeno's 1992 trial.

The evidence from the Wilson case is especially favorable to Tizeno because of the similarities in the two prosecutions, tending to show that a Marks-led identification could not be trusted against Tizeno any more than it could be trusted against Wilson. The similarities are summarized in the chart that follows.

Wilson	Tizeno
No physical evidence. Prosecution based solely on eyewitness identifications by Bishop, Pace, and Sanders.	No physical evidence. Prosecution based solely on eyewitness identifications by Logie and Thompson.
Bishop initially viewed three separate mug books at the police station, but did	Thompson initially viewed two separate mug books at the police station, but did

not pick out a photo of Wilson. R. Ex. G at 243.[9]	not pick out a photo of Tizeno. ER 929.
Bishop selected a photograph of Johnny McKinney and claimed to be almost certain he was one of the two assailants. McKinney was eliminated as a suspect because he was in custody at the time of the crime. R. Ex. H at 317-320; R. Ex. I at 459. McKinney bears no resemblance to Terrell. R. Ex. A at 3.	Thompson selected a photograph of Demarcus Coleman as resembling the person he saw riding a bike. Coleman was eliminated as a suspect because he was in custody at the time of the crime. ER 644, ER 1102. Coleman bears no resemblance to Tizeno. D.C. Dkt. 46-4 at 2.
Marks had evidence inculpating someone else (Marshaunt Jackson) but dropped the investigation. R. Ex. G at 281-83; R. Ex. I at 460, 470, 476.	Marks had evidence inculpating someone else (Lavel Morton) ER 1103-1107, but dropped the investigation. ER 1107.
Marks structured a witness interview such that the witness (Clarence Pace) would not eliminate a suspect (Terrell).	Marks structured a witness interview such that the witness (Thompson) would not eliminate a suspect (Tizeno). ER

[9] Remand Exhibits G and H are volumes 6 and 7 of the reporter's trial transcript in *People v. Wilson*. If the Court so directs, Tizeno will file the entirety of the *Wilson* transcripts.

R. Ex. A at 3.	1108; ER 100; D.C. Dkt. 79-1 at 33-34.
Approximately six weeks after Hanson's death, Marks directed Bishop to a photo of Wilson, and only then did she identify Wilson. R. Ex. B at 25.	Approximately six weeks after Moch's death, Marks directed Logie to a photo of Tizeno, and only then did she identify Tizeno. ER 1107-08.
Prior to her interactions with Marks, Bishop claimed to have not known either of the assailants and was able to offer only physical descriptions of the men. R. Ex. B at 23. After, she identified Wilson, a man she had known for several years and for whom she had previously been employed as a babysitter and with whom she had even briefly lived. R. Ex. J at 493.	Prior to her interactions with Marks, Logie claimed to have known the bicyclist for years and insisted she had gone to school with him. After, she identified Tizeno, a man she had never gone to school with or had any prior knowledge of.
Following Wilson's arrest, Bishop claimed Wilson called her from jail attempting to coerce her into not testifying against him. R. Ex. I at 484, 486.	Following Tizeno's arrest, Logie and her mother claimed Tizeno called her from jail attempting to coerce her into not testifying against him. No recording of this alleged call was

No recording of this alleged call was ever provided to the defense.	ever provided to the defense.
In response to the alleged phone calls, Marks secured a witness relocation payment to Bishop of $1000. R. Ex. D. The LADA did not disclose this payment until 2016.	There has been no disclosure as to any action taken in response to the alleged phone calls.
Marks had a history with Wilson, frequently stopping him to question him about residential burglaries having taken place in the neighborhood. R. Ex J at 494-95. Pace asked the prosecutor why Marks had it in for Terrell. R. Ex. A at 3. Sanders claimed that Marks threatened him and his family unless Sanders cooperated with Marks. RT 1114.	Marks had a history with Tizeno. When Marks showed up to execute a search warrant on Tizeno's family home, Tizeno's mother requested that Marks not conduct the search and stated that "[a]ny other officer in the world could go in my home." ER 730. She explained that Marks had some kind of vendetta against her son and had been saying that he would arrest Tizeno for some time. ER 728-31.

2. The prosecution, either willfully or inadvertently, failed to disclose the evidence

The State never disclosed the evidence impeaching Marks. *Brady* protects against both willful and inadvertent failures to produce evidence. *Milke*, 711 F.3d at 1012. Regardless of whether the particular prosecutor in this case knew about Marks' impeachment evidence, the State had an obligation to produce it. *Id.* at 1016.

Tizeno cannot be faulted for failing to discover this evidence. The Supreme Court has rejected the proposition that "the prosecution can lie and conceal and the prisoner still has the burden to … discover the evidence … so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected." *Banks v. Dretke*, 540 U.S. 668, 696, 698-703 (2004) (citation omitted). A "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696.

3. Had the evidence been disclosed, there is a reasonable probability that the outcome would have been different

Defense counsel develops a trial strategy based on evidence that is available. The Supreme Court has recognized that when the State withholds evidence, the State is essentially telling the defense that "the evidence does not exist." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Relying on this misrepresentation, defense counsel "might abandon lines of independent investigation, defenses, or

trial strategies that it otherwise would have pursued." *Id*. When the withheld evidence affects the defense strategy, courts have found the evidence to be material and prejudicial to the defendant. *See, e.g., Kyles*, 514 U.S. at 445-47 (noting that the defendant could have used the suppressed evidence to outline an alternative defense attacking the integrity of the police investigation).

Here, Tizeno's trial counsel's strategy was to argue that Logie was lying. While counsel was able to show that Logie's credibility was suspect, she could not explain why Logie would have chosen Tizeno's photograph. Indeed the prosecutor stressed in his closing that Logie had no reason to lie (ER 410, 420, 448). Evidence that Marks influenced Logie to select the photograph of Tizeno, combined with evidence that Marks had previously influenced an identification would have created doubt surrounding Logie's identification. Given that Logie's identification was, in the prosecutor's estimate, the strongest evidence against Tizeno (ER 445-46) the undisclosed evidence would have changed the dynamic of the trial.

III. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT AND THE INTERESTS OF JUDICIAL EFFICIENCY AND ECONOMY SUPPORT THE REQUESTED REMAND

Tizeno seeks a remand to the district court such that he may amend his petition to include this *Brady* claim. In *Gallegos v. Ryan*, 820 F.3d 1013 (9th Cir. 2016), this Court granted Petitioner Gallegos' motion to remand based on evidence impeaching Detective Saldate, the lead detective in Gallegos' prosecution, which

emerged in the post-conviction proceedings in *Milke v. Ryan*, 711 F.3d 998, 1020-21 (9th Cir. 2013). In *Milke*, Saldate testified at trial that, when interrogated, Milke waived her *Miranda*[10] rights and confessed to her involvement in her son's murder. *Id*. at 1001. Contrarily, Milke stated that she asserted her right to counsel and denied involvement in her son's killing. *Id*. at 1002. During post-conviction proceedings, evidence emerged concerning Saldate's history of lying under oath which had resulted in multiple confessions being suppressed or excluded. *Id.* at 1003. The evidence also established that Saldate suffered a five-day suspension for accepting sexual favors from a female motorist and then lying about it. *Id*. at 1007. This Court found that these "court documents and … information in [Saldate's] personnel file fit within the broad sweep of *Giglio*, and it was the prosecutor's 'duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id*. at 1006 (quoting *Kyles*, 514 U.S. at 437-38). The Court made particular note of Saldate's conduct with the female motorist, stating "Saldate had no compunction about abusing his authority with a member of the public, a vulnerable woman who, like Milke, found herself alone with him and under his control." *Id*. at 1007.

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Court found prejudice in the state's failure to provide this impeachment evidence to Milke because Saldate's testimony regarding her confession was the only direct evidence linking Milke to the crime and the impeachment evidence could have convinced the jury that Saldate was untrustworthy based on his history of lying or based on his habit of taking advantage of women in his power. *Id*. at 1019. The Court vacated Milke's convictions and death sentence.

In *Gallegos,* 820 F.3d 1013 (9th Cir. 2016), Gallegos was arrested for murder and allegedly made a full confession to his involvement in the crime when interrogated by Saldate. Gallegos later made a second confession in the presence of Saldate and his partner. *Id* at 1018. Gallegos' confession was admitted at trial along with forensic evidence tying him to the crime. *Id*. at 1018-10.

After his case was fully briefed in this Court, and the Court had granted relief to Milke, Gallegos filed a motion to stay the appellate proceedings and remand to the district court such that Gallegos could pursue a new *Brady* claim based on the new evidence impeaching Saldate that was brought to light in *Milke*. This Court granted the motion and remanded to the district court. *Id.* at 1015-16.

Gonzalez v. Wong, 667 F.3d 965, 980 (9th Cir. 2011), is also instructive. Petitioner Gonzalez raised a *Brady* claim in federal court that was supported by newly discovered evidence not considered by the state court. In remanding the case to the district court with instructions to stay the federal habeas proceedings, the

Court discussed Congress' intent in AEDPA "to channel prisoners' claims first to the state courts." *Id*. at 978-79 (quoting *Pinholster*, 563 U.S. at 182). The Court noted that its proposed stay was the same process "employed when a petitioner files a petition containing unexhausted claims." *Id*. at 980 (citing *Rhines v. Weber*, 544 U.S. 269, 278 (2005)). Gonzales met the *Rhines* test in that he "had good cause for not presenting the new evidence to the state court, [had] not engaged in intentional dilatory litigation tactics, and . . . [had] a potentially meritorious claim." *Id*. at 980. The stay provided "the state court with the first opportunity to resolve this claim," yet protected the petitioner's "interest in obtaining federal review of his claim." *Id*. Finally, Gonzales's "interest in obtaining federal review … outweigh[ed] the competing interests in finality and speedy resolution of federal petitions." *Id*. (quoting *Rhines*, 544 U.S. at 278).

The reasoning of *Gallegos* and *Gonzalez* applies here. Tizeno did not raise this claim previously because he did not know about the impeachment evidence. Nor could he have reasonably discovered this evidence. *See* D.C. Dkt. 134 at 5-7, 8-9 (outlining Tizeno's attempts to gain access to impeachment evidence and explaining how the evidence eventually came into his possession). Tizeno has not engaged in dilatory litigation tactics; indeed this is his second attempt to bring the case back to the district court. Finally, he has a potentially meritorious claim.

The proposed stay and remand will allow the state court to evaluate the claim in the first instance and, if necessary, will permit this Court to address all of Tizeno's claims based on a fully developed record, and will further judicial interests of economy, efficiency and the fair administration of justice. *Cf. Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing the simplification of issues, proof, or questions of law which would result from a stay as a favorable factor in deciding whether to grant a stay).

IV. CONCLUSION

For the foregoing reasons, Tizeno respectfully requests the Court stay the appeal and remand this case such that Tizeno may amend his federal habeas petition to include his newly discovered *Brady* claim.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: December 20, 2018 By */s/ Jonathan C. Aminoff*
JONATHAN C. AMINOFF
Deputy Federal Public Defender

Attorney for Petitioner-Appellant
HOLLINS TIZENO

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 27(d), 32(a)(7)(C), and Circuit Rule 32-1, I certify that this motion to remand is proportionally spaced, has a typeface of 14 points or more, and does not exceed 20 pages.

DATED: December 20, 2018

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF

No. _____

IN THE

Supreme Court of the United States

HOLLINS TIZENO

Petitioner,

v.

GERALD JANDA, WARDEN

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF SERVICE

I, Jonathan C. Aminoff, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on June 18, 2019, a copy of Appendix to Petition for Writ of Certiorari was mailed postage prepaid to:

The names and addresses of those served are as follows:

Dana M. Ali Counsel for Respondent
300 S. Spring Street
Suite 1702
Los Angeles, CA 90013
(213) 897-5573

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

Executed on June 18, 2019.

/s/ Jonathan C. Aminoff
Jonathan C. Aminoff*

Attorney for Petitioner
Hollins Tizeno
**Counsel of Record*