

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 3 2018

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

ISIDRO ROMAN,

Petitioner-Appellant,

v.

S. FRAUENHEIM,

Respondent-Appellee.

No. 17-17376

D.C. No. 4:16-cv-02985-HSG  
Northern District of California,  
Oakland

ORDER

Before: SCHROEDER and HURWITZ, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 60(b) motion. Appellant's motions to dismiss all previous rulings regarding his petition without prejudice (Docket Entry Nos. 2, 3, and 4) are construed as a request for a certificate of appealability and denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

The Clerk is directed to open appellant's request for authorization to file a second 28 U.S.C. § 2254 petition in the district court (Docket Entry Nos. 2, 3, and 4) as an application for authorization to file a second or successive § 2254 petition.

Any pending motions are denied as moot.

**DENIED.**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ISIDRO ROMAN,

Petitioner,

v.

S. FRAUENHEIM, Warden,

**Respondent.**

Case No. 16-cv-02985-HSG (PR)

**ORDER TO SHOW CAUSE; DENYING  
LEAVE TO PROCEED IN FORMA  
PAUPERIS**

Re: Dkt. Nos. 3, 6

Petitioner, a state prisoner incarcerated at Please Valley State Prison, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He also seeks to proceed *in forma pauperis* under 28 U.S.C. § 1915.

## BACKGROUND

According to the petition, in 1994, a San Mateo County Superior Court jury found Petitioner guilty of second degree murder with personal use of a firearm. He was sentenced to 19 years to life in state prison. The California Court of Appeal affirmed in 1995, and the California Supreme Court denied review in 1996. The claims raised herein were raised in unsuccessful habeas petitions in the state superior court, the California Court of Appeal, and the California Supreme Court. The instant action was filed on June 3, 2016.

## DISCUSSION

## **A. Standard of Review**

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A district court considering an application for a writ of habeas corpus shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are

1 vague or conclusory, palpably incredible, or patently frivolous or false. *See Hendricks v. Vasquez*,  
2 908 F.2d 490, 491 (9th Cir. 1990).

3 **B. Claims**

4 As grounds for federal habeas relief, Petitioner claims that the prosecution violated Brady  
5 v. Maryland, 373 U.S. 83 (1963) by failing to disclose various pieces of exculpatory evidence  
6 showing that the victim posed a threat to petitioner at the time of the shooting, forcing petitioner to  
7 act in self-defense. Petitioner asserts that he only recently learned of the evidence after counsel  
8 was appointed to assist him in state court proceedings in relation to DNA evidence. Liberally  
9 construed, the claims appear arguably cognizable under § 2254 and merit an answer from  
10 Respondent. *See Zichko v. Idaho*, 247 F.3d 1015, 1020 (9th Cir. 2001) (federal courts must  
11 construe *pro se* petitions for writs of habeas corpus liberally).

12 **C. Motion for Leave to Proceed *In Forma Pauperis***

13 Petitioner seeks to proceed *in forma pauperis* ("IFP") under 28 U.S.C. § 1915. *See* Docket  
14 Nos. 3 and 6. Petitioner has submitted a Certificate of Funds, signed by an authorized officer that  
15 shows that the average deposits to Petitioner's account for the six months preceding the filing of  
16 the IFP application were \$83.34, and the average balance in his account for the same time period  
17 was \$11.85. Based on this information, the Court finds that Petitioner is able to afford the \$5.00  
18 filing fee in this action. Accordingly, his applications to proceed IFP are DENIED.

19 **CONCLUSION**

20 For the foregoing reasons,

21 1. Petitioner's applications to proceed *in forma pauperis* are DENIED. Petitioner must  
22 pay the \$5.00 filing fee within **thirty (30)** days of the date of this order or face dismissal of this  
23 action for failure to pay the filing fee.

24 2. The Clerk shall mail a copy of this order and the petition with all attachments to the  
25 Respondent and the Respondent's attorney, the Attorney General of the State of California. The  
26 Clerk shall also serve a copy of this order on Petitioner.

27 3. Respondent shall file with the Court and serve on Petitioner, within **sixty (60)** days of  
28 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing

1 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on  
2 the claims found cognizable herein. Respondent shall file with the answer and serve on Petitioner  
3 a copy of all portions of the state trial record that have been transcribed previously and that are  
4 relevant to a determination of the issues presented by the petition.

5 If Petitioner wishes to respond to the answer, he shall do so by filing a traverse with the  
6 Court and serving it on Respondent within **thirty (30) days** of the date the answer is filed.

7 4. Respondent may file, within **sixty (60) days**, a motion to dismiss on procedural grounds  
8 in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules  
9 Governing Section 2254 Cases. If Respondent files such a motion, petitioner shall file with the  
10 Court and serve on Respondent an opposition or statement of non-opposition within **twenty-eight**  
11 **(28) days** of the date the motion is filed, and Respondent shall file with the Court and serve on  
12 Petitioner a reply within **fourteen (14) days** of the date any opposition is filed.

13 5. Petitioner is reminded that all communications with the Court must be served on  
14 Respondent by mailing a true copy of the document to Respondent's counsel. Petitioner must  
15 keep the Court informed of any change of address and must comply with the Court's orders in a  
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
17 pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772  
18 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

19 6. Upon a showing of good cause, requests for a reasonable extension of time will be  
20 granted provided they are filed on or before the deadline they seek to extend.

21 This order terminates Docket Nos. 3 and 6.

22 **IT IS SO ORDERED.**

23 Dated: 8/31/2016

25   
26 HAYWOOD S. GILLIAM, JR.  
27 United States District Judge  
28

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7 ISIDRO ROMAN,  
8 Plaintiff,  
9 v.  
10 S. FRAUENHEIM,  
11 Defendant.

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28 Case No. 16-cv-02985-HSG

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/31/2016, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Isidro Roman  
J#41754  
P.O. Box 8500  
Coalinga, CA 93210

Dated: 8/31/2016

Susan Y. Soong  
Clerk, United States District Court

By: \_\_\_\_\_  
Nikki D. Riley, Deputy Clerk to the  
Honorable HAYWOOD S. GILLIAM, JR.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

12 ISIDRO ROMAN,  
13 Petitioner,  
14 v.  
15 S. FRAUENHEIM, Warden,  
16 Respondent.

Case No. 16-cv-02985-HSG (PR)

**ORDER GRANTING MOTION TO  
DISMISS; DENYING CERTIFICATE OF  
APPEALABILITY**

Re: Dkt. No. 15

18 Petitioner, a *pro se* prisoner, has filed this action for a writ of habeas corpus pursuant to 28  
19 U.S.C. § 2254. Respondent has moved to dismiss the petition on the grounds that it is:  
20 (1) procedurally defaulted, and (2) untimely under the Antiterrorism and Effective Death Penalty  
21 Act of 1996 (“AEDPA”), 28 U.S.C. § 2244(d). Petitioner has filed an opposition, and respondent  
22 has filed a reply. For the reasons given below, the motion will be granted.

**BACKGROUND**

24 In 1994, petitioner was convicted by a San Mateo County jury of second degree murder  
25 with personal use of a firearm. Petition at 2.<sup>1</sup> He was sentenced to 19 years to life in state prison.

27  
28 <sup>1</sup> All page numbers used herein refer to those affixed to the top of the page by the Court’s  
electronic filing program.

1 Ex. A.<sup>2</sup> The conviction was affirmed on appeal in 1995. *Id.* The California Court of Appeal's  
2 online Register of Actions shows that petitioner did not seek direct review in the California  
3 Supreme Court. The state appellate court summarized the events of the crime as follows:

4 On November 4, 1993, [petitioner] and Jose Manuel Gonzales (also known by the  
5 nickname "Mafia") got into an argument over a business exchange transaction. At one  
6 point, Mafia attacked [petitioner] and began beating his head repeatedly against a door  
7 jamb. A neighbor broke up the fracas after which both men traded angry threats and  
8 insults. Mafia vowed to come back, "shoot up" [petitioner]'s house and kill him, his wife  
9 and his children.

10 On the night before the shooting, Mafia telephoned [petitioner] and told him he wanted to  
11 fix things between them one way or the other. [Petitioner] told him not to come over and  
12 that he did not want to talk with him.

13 The next morning Mafia rode up to [petitioner]'s house on his motorcycle. [Petitioner],  
14 armed with a revolver in his waistband, met him at the door. The two men stood facing  
15 each other and spoke for a few minutes. Suddenly, [petitioner] pulled out his gun and fired  
16 several shots. As Mafia fell backwards and stumbled over his motorcycle, [petitioner]  
17 came toward him and fired again at close range. He fired a final shot into Mafia's head  
18 from about two to three feet away. Of the four gunshot wounds sustained, only the head  
19 wound was sufficient to cause death.

20 Dkt. No. 15 at 12-13.

21 On August 19, 2014<sup>3</sup>, petitioner filed a habeas petition in the San Mateo County Superior  
22 Court, in which he claimed that the prosecution violated its discovery obligations under *Brady v.*  
23 *Maryland*, 373 U.S. 83 (1963)<sup>4</sup>, by allegedly failing to disclose to defense counsel (1) arrest  
24 reports of the victim in unrelated incidents involving sales of narcotics and possession and  
25 concealment of firearms, and (2) evidence that a second weapon was at the crime scene. Ex. B,

26 <sup>2</sup> All references herein to exhibits are to the exhibits submitted by respondent in support of the  
27 motion to dismiss.

28 <sup>3</sup> The record before the Court does not show when petitioner's first state habeas petition was filed,  
29 but respondent represents that it was filed on August 19, 2014. Petitioner agrees that it was  
30 stamped "filed" at the state superior court on August 19, 2014 but asserts that he does not  
31 remember the date it was handed to prison officials for mailing. Dkt. No. 26 at 2.

32 <sup>4</sup> In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the  
33 suppression by the prosecution of evidence favorable to an accused upon request violates due  
34 process where the evidence is material either to guilt or to punishment, irrespective of the good  
35 faith or bad faith of the prosecution." *Id.* at 87. The Supreme Court has since made clear that the  
36 duty to disclose such evidence applies even when there has been no request by the accused.  
37 *United States v. Agurs*, 427 U.S. 97, 107 (1976).

1 Petition at 9, 13, 16-17. As evidence of the former, petitioner submits the allegedly suppressed  
2 police reports concerning incidents involving the victim. Petition at 50-79. As evidence of the  
3 latter, petitioner submits the San Mateo County Sheriff's Office Crime Scene Report. *Id.* at 91-94.  
4 The report does not specifically state that a second weapon was found at the crime scene. Rather,  
5 it states that a "spent nominal caliber 38, semi-jacketed bullet" was found in the living room of the  
6 residence of the yard where the incident took place. *See id.* Petitioner appears to argue that this  
7 was evidence of a second weapon because he had been armed with a caliber .357 revolver.  
8 Petition at 16-17. Nothing in the record shows that a second weapon was ever recovered from the  
9 crime scene, from the victim, or elsewhere. Petitioner's opening brief on appeal conceded that no  
10 gun was recovered from the victim. *Id.* at 38.

11 Petitioner argued that suppression of these materials was prejudicial to his self-defense  
12 claim at trial insofar as they would have helped show that he was defending himself against the  
13 victim, who had a propensity for violence and purportedly had a weapon. Ex. B, Petition at 15-18.  
14 Petitioner asserted that he only learned of the allegedly suppressed evidence after counsel was  
15 appointed to assist him in 2012 in state court proceedings in relation to DNA evidence. Petition at  
16 9; Dkt. No. 1-1 at 6; Dkt. No. 26 at 1.<sup>5</sup>

17 The Superior Court denied the petition on February 11, 2015. Ex. B. The court found that  
18 petitioner had not proffered any evidence that the victim's arrest record had not been provided to  
19 defense counsel, and found that the material had "scant exculpatory value." *Id.* The court also  
20 held, citing *In re Clark*, 5 Cal. 4th 750, 765 (1993) and *In re Robbins*, 18 Cal. 4th 770 (1998), that  
21 petitioner's claim that the police withheld reports pointing to a second weapon being at the crime  
22 scene was procedurally barred because the petition was unduly delayed. Ex. B.

23 On March 23, 2015, petitioner filed a petition for writ of habeas corpus in the California  
24 Court of Appeal. Ex. C. On May 22, 2015, that court issued an Order stating:

25 [Petitioner] has filed a petition for writ of habeas corpus alleging that  
26 evidence discovered in 2012 shows a key witness perjured himself, and the  
prosecutor withheld exculpatory evidence, at [petitioner]'s trial for the 1993 murder of

27  
28 <sup>5</sup> Petitioner states that the state superior court, in 2013, denied relief in connection with the DNA  
evidence and that the denial was affirmed on appeal. Dkt. No. 26 at 1-2.

1 Jose Manuel Gonzales. The petition is procedurally barred because it is untimely. *In  
2 re Sanders* (1999) 21 Cal.4th 697, 703-704. Further, the record petitioner presents  
3 was not presented to the superior court (*In re Steele* (2004) 32 Cal.4th 682, 692),  
4 and, in any event, does not substantiate his claim for habeas relief (*In re Swain* (1949)  
5 34 Cal.2d 300). For all of these reasons, the petition for writ of habeas corpus is  
6 denied, and the request for the appointment of counsel is denied as moot.

7 *Id.*

8 On September 30, 2015, petitioner filed another petition for writ of habeas corpus in the  
9 court of appeal. Ex. D. That court denied that petition without an opinion on February 29, 2016.  
10 *Id.* On April 20, 2016, the California Supreme Court denied review without an opinion. Ex. E.

11 The instant federal petition for writ of habeas corpus was filed in this Court on June 3,  
12 2016. Therein, petitioner again asserts that the prosecution violated *Brady* by failing to disclose  
13 exculpatory evidence showing that the victim posed a threat to petitioner at the time of the  
14 shooting, forcing petitioner to act in self-defense.

## 15 DISCUSSION

16 A federal court will not review questions of federal law decided by a state court if the  
17 decision also rests on a state law ground that is independent of the federal question, and adequate  
18 to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). In those cases in  
19 which the state court decision is based on an independent and adequate state procedural rule,  
20 federal habeas review of the claims is barred unless the petitioner can demonstrate cause for the  
21 default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that  
22 failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 750. The  
23 state bears the burden of proving the adequacy of a state procedural bar. *Bennett v. Mueller*, 322  
24 F.3d 573, 585-86 (9th Cir. 2003).

### 25 A. Independent and Adequate Procedural Rule

26 As noted, the California Court of Appeal on May 22, 2015 issued a reasoned order in  
27 which it denied petitioner's state habeas petition because, *inter alia*, it was not timely filed. Under  
28 *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the subsequent summary denials of petitioner's state  
habeas petitions by the California Court of Appeal, in petitioner's second petition to that court,  
and the California Supreme Court also constituted rejections on timeliness grounds. *See id.* at

1 801-06 (holding that where the last reasoned opinion on a claim expressly imposes a procedural  
2 bar, it should be presumed that a later decision summarily rejecting the claim did not silently  
3 disregard the bar and consider the merits of the claim).

4 The United States Supreme Court has determined that California's timeliness rule is an  
5 independent state ground adequate to bar habeas corpus relief in federal court. *See Walker v.*  
6 *Martin*, 562 U.S. 307, 321 (2011). That rule requires state habeas petitions to be filed without  
7 "substantial delay," as measured from the time the petitioner knew or reasonably should have  
8 known the basis for the claim, which is sufficiently specific to be regarded as a "firmly  
9 established" rule. *Id.* at 317-18. The rule is also "consistently applied," even though the state  
10 court may deny a petition on the merits if that is the easier path; "[d]iscretion enables a court to  
11 home in on case-specific considerations and to avoid the harsh results that sometimes attend  
12 consistent application of an unyielding rule." *Id.* at 319-20.

13 Petitioner contends that there is no default because the California Court of Appeal did not  
14 clearly and expressly invoke the default. To the contrary, the California Court of Appeal in its  
15 May 22, 2015 order clearly stated that "[t]he petition is procedurally barred because it is untimely"  
16 and cited to *In re Sanders*, 21 Cal. 4th 697, 703-04 (1999). *In re Sanders* discusses the procedural  
17 bars against untimely state habeas petitions and "insist[s] [that] a litigant mounting a collateral  
18 challenge to a final criminal judgment do so in a timely fashion." 21 Cal. 4th at 703. The fact that  
19 the court denied the petition on alternative grounds does not change this analysis. *See Bennett v.*  
20 *Mueller*, 322 F.3d 573, 580 (9th Cir. 2003) ("A state court's application of a procedural rule is not  
21 undermined where, as here, the state court simultaneously rejects the merits of the claim."). *See*  
22 *also Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir. 1996) (concluding that Nevada Supreme  
23 Court rested its dismissal of petition on independent state procedural grounds because it stated that  
24 any discussion of merits was strictly for purpose of demonstrating that petitioner's procedural  
25 defaults could not be overcome by showing of cause and prejudice). Nor does the brevity of the  
26 court's opinion alter this analysis. *See Walker*, 562 U.S. at 310 (holding California courts may  
27 signal that a habeas petition is denied as untimely by simply citing to the controlling decisions).

28 Petitioner also contends that the California Court of Appeal was in error in dismissing the

1 petition as untimely. Petitioner's argument is not grounds for avoiding the procedural bar. "A  
2 basic tenet of federal habeas review is that a federal court does not have license to question a state  
3 court's finding of procedural default, if based upon an adequate and independent state ground."  
4 *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). Because the California courts are the  
5 final expositors of California law, the state court's conclusion here that the state's timeliness rule  
6 was not satisfied is binding here. *See Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999)  
7 (federal courts lack jurisdiction to review state court applications of procedural rules; refusing to  
8 review state court's finding of procedural default).

9 Thus, respondent has sufficiently demonstrated that the instant petition is procedurally  
10 barred from federal review.

11 **B. Cause and Prejudice Exception**

12 Procedural default, however, can be overcome if a petitioner "can demonstrate cause for  
13 the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate  
14 that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*,  
15 501 U.S. at 750. The "cause standard" requires the petitioner to show that "some objective factor  
16 external to the defense impeded counsel's efforts' to raise the claim." *McCleskey v. Zant*, 499  
17 U.S. 467, 493 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "Without  
18 attempting an exhaustive catalog of such objective impediments to compliance with a procedural  
19 rule," the Supreme Court has noted that "a showing that the factual or legal basis for a claim was  
20 not reasonably available to counsel, or that some interference by officials made compliance  
21 impracticable, would constitute cause under this standard." *Murray*, 477 U.S. at 488 (internal  
22 quotation and citations omitted). As to the prejudice prong, petitioner bears the burden of  
23 showing, "not merely that the errors at his trial created a *possibility* of prejudice, but that they  
24 worked to his *actual* and substantial disadvantage, infecting his entire trial with error of  
25 constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). "To ascertain the  
26 level to which such errors taint the constitutional sufficiency of the trial, they must 'be evaluated  
27 in the total context of the events at trial.'" *See Paradis v. Arave*, 130 F.3d 385, 393 (9th Cir.  
28 1997) (quoting *Frady*, 456 U.S. at 169).

1       Here, petitioner does not even attempt to show cause and prejudice. Nor is there anything  
2       in the record to suggest he could make the requisite showing. To the extent petitioner argues that  
3       he personally did not know of the purportedly exculpatory evidence until 2012 or later, there is  
4       still no showing that the prosecution withheld the evidence from defense counsel or that the  
5       evidence was not otherwise known to the defense. *See Coe v. Bell*, 161 F.3d 320, 344 (6th Cir.  
6       1998) (“There is no *Brady* violation where a defendant knew or should have known the essential  
7       facts permitting him to take advantage of any exculpatory information, or where the evidence is  
8       available . . . from another source, because in such cases there is really nothing for the government  
9       to disclose.”) (omission in original) (internal quotation marks omitted). Indeed, there is no reason  
10      to believe that petitioner’s own trial counsel would not have obtained the crime scene report,  
11      which is the only evidence petitioner offers to suggest there was a second weapon at the crime  
12      scene. Petitioner thus fails to establish cause.

13       Furthermore, even assuming, arguendo, the prosecution actually failed to disclose the  
14      evidence and petitioner somehow lacked knowledge of the facts behind the evidence, the Court  
15      finds the claimed error did not work to petitioner’s “*actual* and substantial disadvantage, infecting  
16      his entire trial.” *Frady*, 456 U.S. at 170. Specifically, the record shows that the threat of violence  
17      posed by the victim was presented at trial. The California Court of Appeal, on direct appeal, noted  
18      that the victim’s nickname was “Mafia” and that the evidence at trial was that he had threatened to  
19      shoot up petitioner’s house and kill him, his wife and children. Ex. A. The appellate court also  
20      noted petitioner’s testimony at trial that the victim announced just prior to the shooting that he had  
21      come back to kill petitioner and that the victim made a sudden move towards his waistband  
22      causing petitioner to fear that the victim was reaching for a weapon. *Id.* The opening brief  
23      petitioner attached to his petition discusses the uncontradicted evidence that the victim severely  
24      beat up petitioner just a few days before the shooting. Petition at 36-37. The purportedly  
25      suppressed evidence would have added little information about the victim’s character that was not  
26      already apparent from the evidence. Viewing the “total context of the events at trial,” including  
27      information reasonably known to the defense, the Court cannot say the introduction of the  
28      purportedly new exculpatory evidence would have changed the verdict. *Paradis*, 130 F.3d at 393.

1                   Finally, if petitioner had no prior knowledge of the spent nominal caliber 38 bullet at the  
2 crime scene or of the victim's criminal history, then the evidence would have been of questionable  
3 relevance to his self-defense claim anyway. Under California law, self-defense requires an actual  
4 and reasonable belief in the need to defend. *People v. Humphrey*, 13 Cal. 4th 1073, 1082 (1996).  
5 Objective reasonableness is judged from the viewpoint of a "reasonable person in a similar  
6 situation and with similar knowledge" as the defendant. *Id.* at 1082-83. By way of the instant  
7 petition, petitioner appears to be claiming that, prior to 2012, he had no knowledge that the victim  
8 had a criminal record, or that a spent bullet was found at the crime scene. If that is the case, he  
9 cannot show that these factors were relevant to his interpretation of the victim's behavior, and he  
10 therefore cannot show that the trial court would have admitted the evidence for purposes of  
11 establishing self-defense. Thus, petitioner cannot show that he was prejudiced as a result of the  
12 claimed error.

13                  **C.      Miscarriage of Justice Exception**

14                  If a state prisoner cannot meet the cause and prejudice standard, a federal court may still  
15 hear the merits of procedurally defaulted claims if the failure to do so would constitute a  
16 "miscarriage of justice." *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992). Under this exception, a  
17 petitioner may establish a procedural "gateway" permitting review of defaulted claims if he can  
18 show that "a constitutional violation has probably resulted in the conviction of one who is actually  
19 innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citation omitted).

20                  [I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have  
21 confidence in the outcome of the trial unless the court is also satisfied that the trial was free  
22 of nonharmless constitutional error, the petitioner should be allowed to pass through the  
23 gateway and argue the merits of his underlying claims.

24                  *Id.* at 316; *see Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) ("[T]he miscarriage of  
25 justice exception is limited to those *extraordinary* cases where the petitioner asserts his innocence  
26 and establishes that the court cannot have confidence in the contrary finding of guilt.").

27                  The required evidence must create a colorable claim of actual innocence, as opposed to  
28 legal innocence as a result of legal error. *Schlup*, 513 U.S. at 321. It is not enough to show that a  
reasonable doubt exists in the light of new evidence, instead, a petitioner must show "that it is

1 more likely than not that ‘no reasonable juror’ would have convicted him.” *Id.* at 329. “To be  
2 credible, such a claim requires petitioner to support his allegations of constitutional error with new  
3 reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts,  
4 or critical physical evidence—that was not presented at trial.” *Id.* at 324. This does not mean a  
5 petitioner need always affirmatively show physical evidence that he did not commit the crime with  
6 which he is charged. *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002). Rather, a  
7 petitioner may pass through the *Schlup* gateway by promulgating evidence “that significantly  
8 undermines or impeaches the credibility of witnesses presented at trial, if all the evidence,  
9 including new evidence, makes it ‘more likely than not that no reasonable juror would have found  
10 petitioner guilty beyond a reasonable doubt.’” *Id.* (quoting *Schlup*, 513 U.S. at 327). The court’s  
11 function is not to make an independent factual determination about what likely occurred, but  
12 rather to assess the likely impact of the evidence on reasonable jurors. *Schlup*, 513 U.S. at 329.

13 Here, as discussed above, petitioner fails to show that the victim’s arrest record or police  
14 reports documenting the crime scene were not known to defense counsel or could not have  
15 reasonably been obtained by defense counsel based on information already known to the defense.  
16 Thus, petitioner fails to establish that the evidence is actually new. Further, as also discussed  
17 above, the allegedly new evidence would not show that the facts of the offense were substantially  
18 different from what they appeared to be at the time of trial and may not have been admitted at trial  
19 at all. Thus, petitioner fails to show that this evidence would have made it “more likely than not  
20 that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”  
21 *Gandarela*, 286 F.3d at 1086.

22 Accordingly, the Court finds that the instant petition is procedurally defaulted for purposes  
23 of federal habeas review, and respondent’s motion to dismiss will be granted.<sup>6</sup>

## 24 CONCLUSION

25 For the foregoing reasons:

26 1. Respondent’s motion to dismiss the instant petition is GRANTED.

27  
28 <sup>6</sup> Because the Court dismisses the petition as procedurally defaulted, it need not address  
respondent’s alternative argument that the petition is also untimely.

1           2. Petitioner has not shown "that jurists of reason would find it debatable whether the  
2 district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).  
3 Accordingly, a certificate of appealability is DENIED.

4           3. The Clerk shall terminate all pending motions, enter judgment, and close the file.

5           **IT IS SO ORDERED.**

6           Dated: May 30, 2017

7             
8           HAYWOOD S. GILLIAM, JR.  
9           United States District Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ISIDRO ROMAN,  
Plaintiff,  
v.  
S. FRAUENHEIM,  
Defendant.

Case No.16-cv-02985-HSG

## **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 5/30/2017, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Isidro Roman  
C.D.C. J#41754 D5-135  
P.O. Box 8500  
Coalinga, CA 93210

Dated: 5/30/2017

**Susan Y. Soong  
Clerk, United States District Court**

By: Nikki D. Riley, Deputy Clerk to the  
Honorable HAYWOOD S. GILLIAM, JR.

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7 ISIDRO ROMAN,  
8 Petitioner,  
9 v.  
10 S. FRAUENHEIM, Warden,  
11 Respondent.

Case No. 16-cv-02985-HSG (PR)

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**ORDER DENYING MOTION FOR  
RECONSIDERATION**

Re: Dkt. No. 31

On June 3, 2016, petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court dismissed the petition as procedurally defaulted, declined to issue a Certificate of Appealability, and entered judgment in favor of respondent on May 30, 2017. Now before the Court is petitioner's motion for reconsideration.

Because the motion was filed after judgment was entered, it is construed as a request for relief from judgment under Federal Rule of Civil Procedure 60(b). *See* Civil L.R. 7-9(a) (allowing motions for reconsideration only with respect to pre-judgment interlocutory orders). Rule 60(b) provides for reconsideration where one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered before the court's decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief. Fed. R. Civ. P. 60(b); *School Dist. 1J v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Motions for reconsideration should not be frequently made or freely granted; they are not a substitute for appeal or a means of attacking some perceived error of the court. *Id.*

Petitioner's motion fails to make the showing required under Rule 60(b) or otherwise to show good cause for reconsideration. To the contrary, the motion concedes that petitioner's trial

1 counsel possessed the victim arrest records and crime scene report that petitioner claims were  
2 illegally withheld by the prosecution, thereby refuting the *Brady*<sup>1</sup> claim underlying the petition.

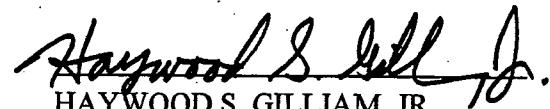
3 See Mot. for Recon. at 5, 10<sup>2</sup> (list of documents contained in trial counsel's case file).

4 Accordingly, the request for relief from judgment is DENIED.

5 No further filings will be accepted in this closed case.

6 **IT IS SO ORDERED.**

7 Dated: 10/18/2017



9  
10 HAYWOOD S. GILLIAM, JR.  
11 United States District Judge  
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United States District Court  
Northern District of California

27 <sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

28 <sup>2</sup> All page numbers used herein refer to those affixed to the top of the page by the Court's  
electronic filing program.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ISIDRO ROMAN,  
Petitioner,  
v.  
S. FRAUENHEIM, Warden,  
Respondent.

Case No. 16-cv-02985-HSG (PR)

**ORDER DENYING PETITIONER'S  
"MOTION FOR LEAVE TO AMEND"**

Re: Dkt. No. 38

On June 3, 2016, petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court dismissed the petition as procedurally defaulted, declined to issue a Certificate of Appealability, and entered judgment in favor of respondent on May 30, 2017. On October 18, 2017, the Court denied petitioner's motion for relief from judgment. Now before the Court is petitioner's "motion for leave to amend," in which he requests that the Court "dismiss any and all petition now pending before this court and moot/dismiss any and all previous ruling issued by this court in the above entitled action" Dkt. No. 38. The motion is DENIED as there is no petition pending in this action. As noted above, the petition was dismissed on May 30, 2017, and judgment was entered the same day. To the extent petitioner disagrees with the Court's ruling, he should present his arguments on appeal if and when the Ninth Circuit grants him a Certificate of Appealability. To the extent he seeks to bring new claims, he may file a new federal petition for writ of habeas corpus only after first obtaining from the Ninth Circuit an order authorizing this Court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A).

1           The Clerk shall send petitioner an "Application For Leave To File Second Or Successive  
2 Petition" in the Ninth Circuit.

3           This order terminates Dkt. No. 38.

4           **IT IS SO ORDERED.**

5           Dated: 1/5/2018

6             
7           HAYWOOD S. GILLIAM, JR.  
8           United States District Judge

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

FEB 21 2019

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

ISIDRO ROMAN,

No. 18-72181

Applicant,

v.

ORDER

S. FRAUENHEIM,

Respondent.

Before: FERNANDEZ, SILVERMAN, and WATFORD, Circuit Judges.

Applicant's motion for appointment of counsel is denied.

The application for authorization to file a second or successive 28 U.S.C.

§ 2254 habeas corpus petition in the district court is denied. The applicant has not made a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Any pending motions are denied as moot.

No further filings will be entertained in this case.

**DENIED.**

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

ISIDRO ROMAN — PETITIONER  
(Your Name)

VS.

STATE OF CALIFORNIA — RESPONDENT(S)

PROOF OF SERVICE

I, ISIDRO ROMAN, do swear or declare that on this date,  
ON 07-08-19, as required by Supreme Court Rule I have  
served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS  
and PETITION FOR A WRIT HABEAS CORPUS on each party to the above proceeding  
or that party's counsel, and on every other person required to be served, by depositing  
an envelope containing the above documents in the United States mail properly addressed  
to each of them and with first-class postage prepaid, or by delivery to a third-party  
commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

SUPREME COURT OF THE UNITED STATES

U.S. SUPREME COURT BUILDING 1 FIRST NORTHEAST.

WASHINGTON, DC 20543, and CALIFORNIA OFFICE OF ATTORNEYS

GENERAL'S OFFICE OF XAVIER VECERRA P.O.BOX 944255 SACRAMENTO, CA  
I declare under penalty of perjury that the foregoing is true and correct. 94244-2550

Executed on 07-08-19, 2019

Isidro Roman  
(Signature)

**Additional material  
from this filing is  
available in the  
Clerk's Office.**