No. _____

IN THE

Supreme Court of the United States

KENNETH CLARK

Petitioner,

v.

MATTHEW CATE

Respondent

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

SEP 16 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH CLARK, Petitioner-Appellant, v. MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, Respondent-Appellee.	No. 18-55452 D.C. No. 5:10-cv-01081-DMG-JCG MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted September 11, 2019
Pasadena, California

Before: OWENS, R. NELSON, and MILLER, Circuit Judges.

California state prisoner Kenneth Clark appeals from the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for second-degree murder. The district court rejected Clark's argument that his untimely petition should be reviewed on the merits because he passes through the

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

actual innocence gateway. Because the parties are familiar with the facts, we do not recount them here. We affirm.

"The standard of review for a *Schlup* claim is not entirely settled in this circuit." *Stewart v. Cate*, 757 F.3d 929, 938 (9th Cir. 2014). We need not determine whether *Schlup* claims should be reviewed de novo or for abuse of discretion, however, because Clark's actual innocence claim fails under either standard.

To pass through the actual innocence gateway, Clark must show it is "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt[.]" *House v. Bell*, 547 U.S. 518, 538 (2006). Here, Clark did not present "new reliable evidence," *Schlup v. Delo*, 513 U.S. 298, 324 (1995), to overcome this "demanding" and "seldom met" standard. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (citation omitted).

Despite Monroe Thomas's numerous recantations, his inconsistent statements did not offer a "trustworthy eyewitness account[]." *Schlup*, 513 U.S. at 324. Because "[r]ecantation testimony is properly viewed with great suspicion," Clark has not proved it is more likely than not that no reasonable juror would credit Thomas's pre-trial statements and trial testimony over his recantations. *Jones v. Taylor*, 763 F.3d 1242, 1248 (9th Cir. 2014) (citation omitted).

Clark also failed to prove that no reasonable juror would discount the additional four eyewitnesses' testimony. All four new eyewitnesses had a personal connection to Clark, came forward eleven years after the crime, and offered accounts of the shooting with some important inconsistencies.

Ultimately, although Clark presented a significant amount of new evidence, the district court correctly concluded that the new evidence was not reliable, and Clark therefore did not meet his burden to demonstrate it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 28 2020

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

KENNETH CLARK, Petitioner-Appellant, v. MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, Respondent-Appellee.	No. 18-55452 D.C. No. 5:10-cv-01081-DMG-JCG Central District of California, Riverside ORDER

Before: OWENS, R. NELSON, and MILLER, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and petition for rehearing en banc are DENIED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLARK,

Petitioner,

v.

MATTHEW CATE,

Respondent.

Case No. ED CV 10-1081 DMG (JCG)

JUDGMENT

IT IS ADJUDGED that the above-captioned action is **DISMISSED WITH PREJUDICE** for the reasons set forth in the Magistrate Judge's second Report and Recommendation.

DATED: April 5, 2018

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLARK,

Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation,

Respondent.

Case No. ED CV 10-1081 DMG (JCG)

ORDER ACCEPTING SECOND REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DENYING CERTIFICATE OF APPEALABILITY

I.

INTRODUCTION AND BACKGROUND

In accordance with the mandate of the Ninth Circuit Court of Appeals, this matter is before the Court to determine whether petitioner Kenneth Clark ("Petitioner") meets the "actual innocence" standard articulated in *Schlup v. Delo*, 513 U.S. 298 (1995), such that his untimely federal habeas petition ("Petition") can proceed on the merits. [Doc. # 28 at 3-7.] The Magistrate Judge presided over an evidentiary hearing ("Federal Evidentiary Hearing") to allow Petitioner an opportunity to make a credible showing of actual innocence in connection with his conviction for the second-degree

murder of Misael Rosales in May 2004. [*See* Doc. ## 76-77 (together, "Federal Hearing Transcript" or "Fed. Hr'g Tr.").] Thereafter, the Magistrate Judge issued a second Report and Recommendation ("Second R&R"), recommending the dismissal of the action with prejudice because the Petition is untimely, and Petitioner's claim of actual innocence did not meet the exacting standard set forth in *Schlup*. [Doc. # 91.] Petitioner timely filed objections to the Second R&R ("Objections"). [Doc. # 93.]

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Second R&R, Petitioner's Objections, and the entire record. After having made a careful and thorough *de novo* determination of the portions of the Second R&R to which the Petitioner has objected, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge. There are a few issues, however, that warrant brief amplification.

Petitioner first objects to the Magistrate Judge's findings that a juror could reasonably credit Monroe Thomas's pretrial statements and trial testimony over his contradictory post-trial statements. Specifically, Petitioner contends that: (1) the record rebuts the Second R&R's conclusion that Monroe Thomas's post-trial statements were coerced; (2) the testimony of Tia Shakir, Charvette McGee, and Mrs. Clark was credible; (3) the Second R&R mischaracterized Monroe Thomas's "reluctance" to affirm his post-trial statements; and (4) Monroe Thomas did not see the shooting. (Objections at 4-9.)

The Court is not persuaded, however, that a reasonable juror would credit Monroe Thomas's post-trial statements, for several reasons.

First, to the extent that Monroe Thomas' post-trial statements recant his trial testimony, such recantation testimony is usually reviewed with skepticism. *See, e.g., Jones v. Taylor*, 763 F.3d 1242, 1248 (9th Cir. 2014) (quoting *Dobbert v. Wainwright*, 468 U.S. 1231 (1984) (Brennan, J., dissenting from denial of certiorari)); *Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) (finding that witness's "recantation

testimony is even more unreliable because his trial testimony implicating petitioner is consistent with the other evidence, while his recantation is not"); *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 the witness had a "history of making contradictory statements in [the] case").

Second, such skepticism is particularly appropriate give the circumstances surrounding Thomas' post-trial statements. *See Jones v. Taylor*, 763 F.3d 1242, 1248 (9th Cir. 2014) (noting that a witness's recantation must be "considered in addition to his trial testimony and in the context in which he recanted"). Notably, after the trial, Monroe Thomas felt pressured to "help [Petitioner]," as "people [who] knew [Petitioner]" had – with a "certain look" – told Thomas' nephew that Thomas needed to "watch out." (*See* Fed. Hr'g Tr. at 73-74, 79-80.)

Third, although Monroe Thomas testified at the Federal Evidentiary Hearing that he "didn't see [Petitioner] shoot Miguel [Rosales]," he reiterated again that "at the time" of the shooting, he was afraid of Petitioner. (Fed. Hr'g Tr. at 58, 74.) Although Monroe Thomas did not identify the reason why he would have been afraid of Petitioner, a reasonable juror could find that this fear would make sense only if he truly believed that Petitioner *was* the shooter. Furthermore, when asked why he initially identified Petitioner as the shooter, Monroe Thomas replied, "My friend was dead. And he was the one that we were in the situation with." (*Id*. at 72.)

Ultimately, although Monroe Thomas testified at the State Evidentiary Hearing that Petitioner had not hit him and that someone other than Petitioner had been carrying a gun (Pet. Ex. 105 at 10-11, 31, 33), this testimony was effectively disavowed by Monroe Thomas himself during his cross-examination at the Federal Evidentiary Hearing, where he stated clearly that Petitioner had hit him and brandished a gun. (*See* Fed. Hr'g Tr. at 54-56.) Even when the Deputy Public Defender – during

re-direct examination – attempted to elicit the same testimony Monroe Thomas had given at the State Evidentiary Hearing, Monroe Thomas only stated that he could not remember "exactly" who hit him, and that he had "seen two guns," one of which belonged to someone other than Petitioner. (*Id*. at 64-66, 68.) Importantly, these statements do not contradict the testimony that Petitioner gave at trial or during cross-examination at the Federal Evidentiary Hearing.

As for Petitioner's objections to the Second R&R's conclusion that a reasonable juror would not credit the testimony of Petitioner's eyewitnesses – Paul Leonard Terry ("Terry"), Lafennus Jamal Lindquist ("Lindquist"), Willie Owens ("Owens"), and Coral Denise Nettles ("Nettles") – that Buddha[1] shot Rosales, the Court agrees with the Second R&R's conclusion, and finds that their testimony is not reliable evidence of Petitioner's actual innocence.

First, the significant delay in these eyewitnesses coming forward with any version of this alternative story – 11 years after Petitioner's criminal trial – does bear on the reliability of this new evidence. *See Schlup*, 513 U.S. at 332; *see also McQuiggin*, 569 U.S. at 385 ("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."). In fact, many of the reasons ostensibly presented for now coming forward existed before the Federal Evidentiary Hearing. For example, although Terry states that he can come forward now because he is a "different person" who longer engages in criminal activity (*see* Fed. Hr'g Tr. at 144), it appears that he had not engaged in any criminal activity for at least several years before the Federal Evidentiary Hearing. (*See* Resp. Ex. 204.) Similarly, Lindquist says that he can testify now that he has successfully avoided the "rift-raft" that worried him initially (*see* Fed. Hr'g Tr. at 185). Yet, he too has been away from that criminal activity for several

[1] Consistent with both the Second R&R and Petitioner's Objections, this Court refers to Duval Thomas as "Buddha."

years. (*See* Resp. Ex. 209.) By contrast, Owens' stated reason for waiting 11 years to come forward – a reluctance to disrupt his relationships with Buddha's relatives – is wanting, insofar as Owens acknowledged that he maintains relationships with Buddha's relatives to this day. (*See* Fed. Hr'g Tr. at 215-16, 248-49.) Hearing these explanations, a jury could reasonably conclude that Lindquist and Owens testified at the Federal Evidentiary Hearing mainly, if not solely, because Terry asked them to. (*See id.* at 215-16, 248-49.) Petitioner thus fails to persuade the Court that the fact that "these witnesses are no longer living criminal existences is entirely consistent with their willingness to now testify." (*See* Objections at 13.)

Second, the testimony of Petitioner's eyewitnesses raises serious credibility issues due to their personal relationships with Petitioner and his family, and their criminal histories. *See House*, 547 U.S. at 552 (observing that testimony from eyewitnesses with no evident motive to lie "has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused").

Third, Petitioner's characterization of the variations within the four eyewitnesses' testimony as "minor" inconsistencies is inaccurate. Rather, the testimony of the new eyewitnesses is inconsistent in key ways. For instance, and as the second R&R noted, Terry testified that he helped Petitioner examine the damage to his car at the scene of the accident, and Nettles testified that she helped Petitioner's then-girlfriend, Jessica, at the scene of the accident. Yet, Nettles testified that she never saw Terry, whom she knew, that night. [*Compare* Doc. # 76 at 138-39 *with* Doc. # 77 at 309, 357-57, 367.] Additionally, some of the witnesses remembered the screams of Petitioner's girlfriend – when the victim accidentally backed up with his car and pinned her between Petitioner's car door and car – while others did not. [*Compare* Doc. # 76 at 158, 59, Doc. # 77 at 324, 360, 367 *with* Doc. # 76 at 175, 238.] Furthermore, there was varying testimony regarding the size of the crowd that

witnessed the accident. Owens remembered seeing 10 to 15 people, while Nettles remembered seeing a hundred people in the parking lot and around 30 people near Petitioner's car. [*Compare* Doc. # 76 at 252 *with* Doc. # 77 at 337, 355.] Interestingly, all four of these witnesses claimed to be completely sober on the night of the shooting, despite the fact that it took place at 1:00 a.m. outside a liquor store, a drug-dealing hotspot, and a "dirty dancing" motorcycle club party. [*See* Doc. # 76 at 19, 118-19, 198, 125-26, 167, 205; Doc. # 77 at 310, 314, 354.]

Moreover, the alternate murder narrative presented by the new eyewitnesses is ultimately unconvincing. As the Second R&R noted, there is "no evidence that the victim was robbed – of the buffer or anything else." (Second R&R at 18 n. 18.) [*See also* Doc. # 76 at 208-09, 211; Doc. # 77 at 366-67.] Notably, the "instigating" or "heckling" described by the witnesses was aimed at Monroe Thomas and the victim, and was about the accident involving Petitioner's car and girlfriend. [*See* Fed. Hr'g Tr. at 71-72 ("*They hit the car. We can get paid.*"); *id.* at 137-38 ("*Ooh, he bumped into your car. He fucked up your car. Get him. He fucked up your car man.*"); *id.* at 210-11 ("As soon as the [victim] backed into the car, the people started going crazy and like *Hey, F-that*, cursing and everything, trying to tell [Petitioner] to come on out, and [Petitioner] was going to do this and that and F-him and all that stuff."); *id.* at 323-34 ("*Stop. Pull up. Pull up. . . . You just backed up. What are you doing*?"]. At that point, according to Monroe Thomas, no one was talking about the buffer. (*Id.* at 79.) As such, the Court rejects the notion that under these circumstances, Petitioner would not possibly have shot the victim, but Buddha potentially would have done so because of the buffer.

More importantly, the testimony of Petitioner's new eyewitnesses supports Petitioner's guilt because it provides "a more robust motive for Petitioner's murder of the victim" for the reasons stated in the Second R&R. (*See* Second R&R at 19-20.)

In sum, Petitioner has failed to establish that it is "more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence." *Schlup*, 513 U.S. at 316.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the Petition and dismissing this action with prejudice; and

3. The Clerk serve copies of this Order on the parties.

Additionally, for the reasons stated in the R&R and above, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, the Court declines to issue a certificate of appealability.

DATED: April 5, 2018

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLARK,

Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation,

Respondent.

Case No. ED CV 10-1081 DMG (JCG)

REPORT AND RECOMMENDATION TO DISMISS ACTION AS UNTIMELY

I.

INTRODUCTION AND SUMMARY

This habeas proceeding is before the Court on remand from the Ninth Circuit Court of Appeals. The Ninth Circuit mandated that petitioner Kenneth Clark ("Petitioner") be afforded an opportunity to make a credible showing of actual innocence in connection with his conviction for the second-degree murder of Misael Rosales in May 2004.[1] *See Clark v. Cate*, 581 F. App'x 654 (9th Cir. 2014).

[1] In its decision, the Ninth Circuit agreed with this Court's determination that Petitioner's federal habeas petition ("Petition") was untimely. *See Clark*, 581 F. App'x at 655. However, as the Ninth Circuit explained, under the then-recent Supreme Court decision, *McQuiggin v. Perkins*,

On January 19 and 20, 2016, the Court presided over Petitioner's evidentiary hearing (the "Federal Hearing" or "Hearing"). [*See* Dkt. Nos. 76-77 (together, "Hearing Transcript" or "Hr'g Tr.").]

The Court heard first from Mr. Monroe Thomas, who was the sole eyewitness to testify at Petitioner's trial, and whose post-trial recantations were a principal focus of the Ninth Circuit's decision on appeal. *See Clark*, 581 F. App'x at 657 ("[A]dditional testimony from Thomas may substantiate Clark's actual innocence claim . . . .").

Next, Petitioner introduced the testimony of four new eyewitnesses. These individuals pointed to a different perpetrator of the crime, namely, Duval "Buddha" Thomas, an area drug-dealer who died in September 2004.[2]

For three overall reasons, the Court finds that Petitioner has failed to satisfy his burden under *Schlup v. Delo*, 513 U.S. 298 (1995). That is, Petitioner has failed to persuade the Court that it is "more likely than not that no reasonable juror would have convicted [Petitioner] in the light of the new evidence." *See id.* at 327.

First, notwithstanding Petitioner's efforts to impeach Thomas, a juror could reasonably credit Thomas's pre-trial statements and trial testimony, which implicated Petitioner and were corroborated by circumstantial evidence.

Second, a juror could reasonably discredit the new eyewitnesses' testimonies that Buddha shot and killed the victim. Among other reasons, Petitioner's four new eyewitnesses waited eleven years to come forward, offered testimonies that were inconsistent with known facts and with each other, and accused an individual who had no apparent motive to assault the victim.

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133 S. Ct. 1924 (2013), a credible showing of actual innocence would compel the Court to consider his untimely Petition on the merits. *See Clark*, 581 F. App'x at 656.

[2] At the Hearing, Duval Thomas was consistently referred to by his nickname, "Buddha" (or "Booty"). (*See, e.g.*, Hr'g Tr. at 6, 118, 163, 199.) In the interest of clarity – and given the significant role of *Monroe* Thomas in this proceeding – the Court will likewise refer to *Duval* Thomas by his nickname: Buddha.

Third, reviewing all the evidence, including the evidence presented at Petitioner's trial and at the Federal Hearing, a juror could reasonably conclude that Petitioner murdered the victim out of anger, anxiety, and/or to defend his reputation within the community.

In sum, and as discussed in greater detail below, the Court finds that a juror could reasonably conclude that Petitioner had a motive to, and did, murder Misael Rosales. *See House v. Bell*, 547 U.S. 518, 538 (2006) (noting that function of habeas court reviewing actual-innocence claim is "to assess the likely impact of the evidence on reasonable jurors").

As such, the Court concludes that the Petition should not be considered on its merits, but should be dismissed with prejudice as untimely. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

II.

PROCEDURAL HISTORY

In 2005, Petitioner was convicted of second-degree murder and sentenced to state imprisonment for 55 years to life. [Dkt. No. 1 at 2.]

Petitioner appealed, and on March 27, 2006, the California Court of Appeal affirmed the judgment. [Dkt. No. 69-5]; *People v. Clark*, 2006 WL 763670 (Cal. Ct. App. Mar. 27, 2006).

Petitioner filed a petition for review in the California Supreme Court, which denied the petition on June 14, 2006. [Dkt. No. 69-6.]

Petitioner also filed several state habeas petitions, all of which were denied. [Dkt. Nos. 69-3, 69-4, 69-7, 69-8, 69-9, 69-10.]

On June 21, 2010, Petitioner filed the instant Petition for Writ of Habeas Corpus ("Petition").[3] [*See* Dkt. No. 1 at 1, 11.]

[3] In determining the filing date of a petition, pro se prisoners are entitled to the benefit of the "mailbox rule," which dictates that a document's constructive filing date is "the date a petitioner delivers it to the prison authorities for filing by mail." Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002).

Thereafter, Respondent filed a Motion to Dismiss the Petition ("Motion"), arguing that the Petition was barred by the one-year limitation period set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1). [Dkt. No. 7.] Petitioner filed an opposition and Respondent filed a reply. [Dkt. Nos. 12, 11.]

On February 24, 2011, this Court recommended that the Motion be granted (the "First Report and Recommendation" or "First R&R"). [Dkt. No. 14.] On March 15, 2011, Petitioner filed objections ("Objections") to the First R&R. [Dkt. No. 15.] Therein, he asserted a "gateway" claim of "actual innocence," such as would allow an untimely federal habeas petition to be considered on its merits. [*Id.* at 1, 3]; *see also McQuiggin*, 133 S. Ct. at 1928; *Schlup*, 513 U.S. at 324. On April 5, 2011, the District Court issued an order addressing the Objections, rejecting Petitioner's *Schlup* gateway claim, and adopting the First R&R ("Order"). [Dkt. No. 16.] On the same day, the District Court entered judgment dismissing this action with prejudice ("Judgment"). [Dkt. No. 17.]

On April 19, 2011, Petitioner appealed the Order and Judgment to the Ninth Circuit Court of Appeals. [Dkt. No. 18.] On June 27, 2014, the Ninth Circuit vacated the Order and Judgment, and remanded Petitioner's case to this Court for an evidentiary hearing regarding Petitioner's *Schlup* claim. [Dkt. No. 28]; *Clark*, 581 F. App'x 654.

On January 19 and 20, 2016, this Court presided over the Federal Hearing. [Dkt. Nos. 72-73, 76-77.]

III.

LEGAL STANDARDS

A. Timeliness under AEDPA

Under AEDPA, a federal petition for writ of habeas corpus ordinarily must be filed within one year of the date on which the state court judgment becomes "final," *i.e.*, within a year of the conclusion of direct appellate review, or of the expiration of

time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). This limitation period is tolled during the pendency of properly filed applications for state post-conviction review, such as state habeas petitions, and is sometimes subject to equitable tolling. 28 U.S.C. § 2244(d)(2); *Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir. 2014).

In the instant case, the Court has already determined that the Petition – even accounting for tolling – is untimely. (First R&R at 3-11.) That finding was adopted by the District Court and affirmed by the Ninth Circuit. (Order at 2-6); *Clark*, 581 F. App'x at 655.

B. The Actual-Innocence Gateway

A petitioner's claim of "actual innocence" can "serve[] as a gateway through which a petitioner may pass," notwithstanding the expiration of AEDPA's limitation period. *McQuiggin*, 133 S. Ct. at 1928. This actual-innocence gateway serves as a "fundamental miscarriage of justice exception" to procedurally barred habeas claims, so that courts can "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324; *see also McQuiggin*, 133 S. Ct. at 1932.

However, "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 133 S. Ct. at 1928. To establish an actual-innocence gateway claim, a petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup*, 513 U.S. at 316. 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." *Id.* at 324. To succeed, "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 evaluating an actual-innocence claim, the Court considers the totality of the evidence, old and new, "without regard to whether it would necessarily be admitted

under rules of admissibility that would govern at trial." *House*, 547 U.S. at 537-38 (internal quotation marks omitted). On that holistic record, the Court makes a "probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 538 (quoting *Schlup*, 513 U.S. at 329). In conducting this inquiry, the court's "function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538.

IV.

THE EVIDENTIARY RECORD

A. Evidence Presented at Petitioner's Criminal Trial

At trial, Petitioner's conviction was supported by the testimony of a single eyewitness, Monroe Thomas, whose testimony was corroborated by other circumstantial evidence. As Thomas recalled, on the evening in question, the victim inadvertently backed his car into Petitioner's parked car.[4] (Lodg. No. 12, Reporter's Transcript ("RT") at 22-23.) Petitioner approached the victim's car and initiated discussion. (*Id.* at 25.) Petitioner walked away, and Thomas observed that Petitioner had a gun in his right pocket.[5] (*Id.* at 26.)

Thomas and the victim exited the victim's car to look for damage. (*Id.* at 27.) At Thomas's suggestion, the victim retrieved his insurance papers from his car.[6] (*Id.* at 27-78.) Petitioner walked up to Thomas and punched Thomas in the head, after which Thomas fled for a place of relative safety. (*Id.* at 28-29.) Petitioner brandished a gun

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[4] A dent on the passenger's side door of the car Petitioner was driving was consistent in height with the bumper of the victim's car, and paint transfers on the bumper of the victim's car matched the color of the car Petitioner was driving. (RT at 117-18, 123-24.)

[5] A nearby liquor store's surveillance video placed Petitioner in the store minutes before the shooting. (*See* Petr's Ex. 117 at 1:03:50.) Petitioner admitted that he is the individual in the video. (RT at 125-26.) For some of the time he is shown, Petitioner appears to clutch something in his right pocket. (*See* Petr's Ex. 117 at 1:04:06-1:04:43; RT at 165.) Less than four minutes before the shooting, Petitioner rushes out of the store, seemingly in response to an event outside the store. (*See* Petr's Ex. 117 at 1:04:43.)

[6] The victim's car insurance papers were found next to his body. (RT at 90.)

and began pacing. (*Id.* at 31-32.) When Thomas last saw Petitioner and the victim, the two men were standing between two and three feet apart.[7] (*Id.* at 39.)

Thomas looked away from Petitioner and the victim for 2-3 seconds as he entered a nearby liquor store, at which time Thomas heard a gunshot.[8] (*Id.* at 34-35.) Thomas then saw Petitioner run to the driver's side of his car. (*Id.* at 38.) Petitioner's car left the scene. (*Id.*) When Thomas emerged from the store, he found the victim lying in the parking lot, bleeding from his head. (*Id.* at 40-41.)

Notably, Thomas knew Petitioner, and from the morning after the incident through his trial testimony, Thomas consistently implicated Petitioner in the shooting. (*Id.* at 52-53, 85-87, 134-135.)

B. Thomas's Post-Trial Statements

After the trial, Thomas provided Petitioner with two declarations and testified at a state evidentiary hearing. In these post-trial statements, Thomas recanted certain portions of this trial testimony that implicated Petitioner in the shooting.

According to Thomas's first declaration, on the night of the murder, Thomas and the victim attempted to sell a floor buffer – stolen from the victim's workplace – in order to buy drugs. (Petr's Ex. 104.) In the liquor store parking lot, "two bikers" tried to buy the buffer, and became angry when the victim refused to sell it at a low cost. (*Id.*)

After the victim hit Petitioner's car, Petitioner, Thomas, and the victim surveyed the cars and found no damage. (*Id.*) Petitioner said "it's cool[;] there is nothing wrong." (*Id.*) However, "a lot of people [were] yelling," and the two bikers who had been involved in the confrontation concerning the buffer stated that Thomas was "still taking up for the Mexican." (*Id.*)

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[7] Stippling around the victim's wound indicated that he had been shot at close range, *i.e.*, from a distance of less than three feet. (RT at 102-05.)

[8] In the surveillance video, Thomas is seen entering the liquor store at the moment the victim is shot, and in what looks like a startled manner. (*See* Petr's Ex. 117 at 1:08:19; Hr'g Tr. at 441-42.)

One of the bikers hit Thomas, who ran away from the scene, towards the liquor store. (*Id.*) Thomas then "saw one of the bikers start walking around [the victim] with a weapon that appeared to be a [gun] . . . ." (*Id.*) As Thomas entered the liquor store, he "heard one shot" and then turned around to see "the biker guy with the gun" running away. (*Id.*)

However, at Petitioner's trial, Thomas "testified under oath falsely due to pressure and threats of myself and my wife going to jail" for an outstanding bench warrant related to a 1989 welfare fraud conviction. (*Id.*)

In 2006, Petitioner submitted Thomas's first declaration to a state habeas court, and, in January 2007, a hearing was held to determine Thomas's credibility (the "State Hearing"). (*See* Petr's Ex. 105.) Before Thomas testified, the state court judge cautioned that: "[If] I am convinced that you lied during the trial of [Petitioner], I am going to direct the district attorney to file a criminal [c]omplaint against you for perjury, a felony." (*Id.* at 7.)

Thereafter, Thomas testified that, on the night of the shooting, Thomas and the victim had gone to the liquor store to sell a stolen buffer and to buy drugs. (*Id.* at 17, 46-47, 49.) Before the shooting, Thomas and the victim had been involved in an altercation over the buffer, with people other than Petitioner. (*Id.* at 49.)

Despite the judge's warning, Thomas further testified that, after the shooting and at trial, Thomas had been "mistaken" about the identity of the man who hit him and brandished the gun. (*Id.* at 10-11, 31.) That man was not Petitioner, but rather was one of the men involved in the altercation over the buffer. (*Id.* at 31, 33.)

In his second declaration, Thomas stated that his "testimony at trial was false." (Petr's Ex. 106 at 1.) Thomas and the victim had parked in front of the liquor store and were trying to sell the buffer. (*Id.* at 2.) In particular, Thomas and the victim attempted to negotiate with two men: a "motorcycle dude" and a man who "might have been a guy I knew named Bobby Neal." (*Id.*) When they could not agree on a price

for the buffer, the "motorcycle guy" punched the victim and brandished a gun. (*Id.* at 3.)

Thomas and the victim got into the victim's car, and the victim backed into Petitioner's car. (*Id.* at 3-4.) Petitioner walked past Thomas and the victim, who emerged from the victim's car, but no one "could see any damage to [Petitioner's] car." (*Id.* at 4.) As Thomas stood by the victim's car, lighting a cigarette, "one of the two guys walked up and hit [Thomas]." (*Id.*) Thomas ran away. (*Id.*) "Just as [Thomas] got to the front door of the liquor store, [he] heard a shot." (*Id.*) Thomas stated that he "did not see who fired the shot," but nonetheless concluded: "I never saw [Petitioner] shoot [the victim]. Instead, it was one of those two guys who had hit [the victim]." (*Id.* at 4-5.)

According to this second declaration, Thomas had not wanted to testify at trial "but [the authorities] came and got [him] for a $3,000 violation that was 20 years old." (*Id.* at 5.) "It was clear to [Thomas] that [his own criminal] case was dismissed because of the way [he] testified." (*Id.*)

C. <u>The Federal Hearing</u>

At the Federal Hearing, the Court heard testimony from Thomas, seven new fact witnesses, and Petitioner's expert witness.

After the Court discussed the purpose of Thomas's appearance at the Hearing,[9] Thomas testified that, on the evening of the murder, Thomas and the victim had gone to a parking lot shared by a liquor store and motorcycle club, with hopes of selling a floor buffer that the victim had taken from the hospital where he worked. (Hr'g Tr. at 32, 38-39.) Once there, Thomas and the victim haggled with Bobby Neal and a second

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[9] Mindful of the claim in Thomas's second declaration that his State Hearing testimony was affected by a threat of imprisonment (*see* Petr's Ex. 106 at 5-6), the Court stressed to Thomas at the outset: "[T]oday, all we want, all we care about – both sides – is just the absolute truth of what happened that evening. We welcome you to, please, without fear, or sympathy, or passion, or duress of any sort, just simply tell us what you know about that evening. Do you understand that? We just want to know the truth. Nothing else." (Hr'g Tr. at 23.) Thomas responded affirmatively. (*Id.*)

individual. (*Id.* at 40-42.) One of these men threatened to steal the buffer, and one of them pulled out a gun. (*Id.* at 42.)

Thomas and the victim got into the victim's car and began to leave, but the victim backed his car into another vehicle. (*Id.* at 43-44.) A woman standing beside the other vehicle screamed in pain. (*Id.* at 70-71.) Clark emerged from the liquor store, approached the victim's vehicle, and initiated discussion. (*Id.* at 46, 54.)

Thomas and the victim emerged to look for damage; Thomas "didn't see any," but prompted the victim to get his insurance papers from the glove compartment. (*Id.* at 47.) Thomas observed that Petitioner had a gun in his right pocket. (*Id.* at 54-55.) A crowd of people were "hollering," trying to "instigat[e]" violence against the victim. (*Id.* at 47.)

Thomas returned to the victim's car to get a cigarette. (*Id.* at 55.) Petitioner approached Thomas and punched Thomas in the face. (*Id.* at 55-56.) Thomas ran away. (*Id.* at 56.) When Thomas turned around, he saw Petitioner walking "back and forth and around" with the gun in his hand. (*Id.*) Thomas reached the liquor store, turned to face the door, and heard a gunshot. (*Id.* at 57.)

On redirect examination, Petitioner's counsel sought to impeach Thomas with various statements in his post-trial declarations and State Hearing testimony. (*Id.* at 60-68.) When Thomas was asked about his prior statements that he had been hit by one of the two "bikers" whom he had been in a confrontation with, Thomas testified that he did not recall making the statements. (*Id.* at 60-63.) Likewise, when asked about prior statements recanting his trial testimony that Petitioner was carrying a gun, Thomas testified that he did not remember making such statements, and explained that there were "two different guys with guns." (*Id.* at 64-67.)

Petitioner then introduced the testimony of four new eyewitnesses: Paul Leonard Terry, Lafennus Jamal Lindquist, Willie Owens, and Coral Denise Nettles. These individuals testified that Buddha, not Petitioner, murdered the victim. (*See id.* at 117-18, 162-63, 199, 302.) Three other witnesses – Thomas's niece, Petitioner's wife, and

Petitioner's niece – testified concerning Thomas's first post-trial declaration. (*See id.* at 82-116.) Finally, Petitioner called an expert witness who testified as to why an eyewitness to a murder might wait more than eleven years to inform authorities that he or she had witnessed the event. (*See id.* at 267-92.)

Respondent cross-examined each witness, and Petitioner and Respondent each submitted exhibits. The Court posed questions to the testifying witnesses. The Court also posed questions to, and heard argument from, counsel for both Petitioner and Respondent.

The Court has considered the relevant record in its entirety. Below, the Court discusses particular testimony, exhibits, and argument from the Federal Hearing as are pertinent to its analysis of Petitioner's actual-innocence claim.

V.

DISCUSSION

A. Thomas's Pre-Trial Statements and Trial Testimony Remain Persuasive Evidence of Petitioner's Guilt

Preliminarily, the Court finds that a juror could reasonably credit Thomas's pre-trial statements and trial testimony, which implicated Petitioner and were corroborated by circumstantial evidence, for five reasons.

First, Thomas testified to the same primary facts indicative of Petitioner's guilt during the trial and at the Federal Hearing. Notably, at Petitioner's trial and at the Federal Hearing, Thomas consistently testified that: (1) the victim backed his car into the car Petitioner was driving, (RT at 23-24; Hr'g Tr. at 43-44); (2) a crowd of people heckled Thomas and the victim, (RT at 66; Hr'g Tr. at 45); (3) Petitioner hit Thomas in the head and brandished a gun,[10] (RT at 26-32; Hr'g Tr. at 54-56); (4) Petitioner began

[10] Although Thomas indicated at the intervening State Hearing that Petitioner had not hit him and that someone other than Petitioner had been carrying a gun, (Petr's Ex. 105 at 10-11, 31, 33), on questioning by the Court, Thomas clearly testified that Petitioner hit him and was carrying a gun. (Hr'g Tr. at 69, 70.)

pacing with the gun in his hand, (RT at 31-32; Hr'g Tr. at 56); and (5) the victim was shot shortly thereafter, (RT at 35-38; Hr'g Tr. at 56-58).

Second, on the same calendar day as the shooting, Thomas gave a statement to police that aligned with his trial testimony. (RT at 127-35.) Also, soon thereafter, Thomas immediately identified Petitioner from a photographic lineup as the individual who had punched him in the head and confronted the victim with a handgun. (*Id.* at 51-54, 127-35.)

Third, notwithstanding the allegations advanced in Thomas's post-trial declarations, the Court cannot find sufficient evidence that the substance of Thomas's pre-trial statements or trial testimony was coerced at the time. As discussed above, soon after the shooting, Thomas readily identified Petitioner as the likely shooter. (*See id.* at 51-54, 127-35.) At that time, neither Thomas nor the investigating authorities believed that there was a warrant out for Thomas's arrest. (*See id.* at 18, 54, 130.) Regardless, at trial, Petitioner's counsel described Thomas as "very anxious to cooperate" with police, indicating that Thomas's years-old, outstanding probation violation had prompted Thomas to lie about the events of the evening in question. (*See id.* at 58-60, 180, 183-84, 189.) That is, importantly, Thomas's purported motivation to lie at trial was expressly presented to – and is deemed to have been weighed by – the jury that ultimately convicted Petitioner. *See United States v. Carr*, 761 F.3d 1068, 1075 (9th Cir. 2014) (holding that jury was properly allowed to weigh reliability of witness's testimony where witness "undoubtedly felt pressure to cooperate" but where jury was "aware of [that witness's] incentive to cooperate"); *cf. also United States v. Vinton*, 429 F.3d 811, 817 (8th Cir. 2005) ("Testimony is not unreliable as a matter of law just because a witness is . . . a cooperating witnesses.").

Fourth, to the extent Thomas's post-trial statements purport to recant his trial testimony, they are "properly viewed with great suspicion." *See Jones v. Taylor*, 763 F.3d 1242, 1248 (9th Cir. 2014). To assess the likely impact they would have on jurors, the Court considers Thomas's purported recantations "in the context in which

he recanted." *See id.* Here, Thomas acknowledged that, after the trial, he had been asked to "help" Petitioner, and had felt pressured to do so. (Hr'g Tr. at 79-80.)

The circumstances of Petitioner's first post-trial declaration likewise detract from its probative value: in March 2006, Petitioner's wife arrived unannounced at Thomas's mother-in-law's home in Ohio, took Thomas to the library, and typed up his first declaration.[11] (*See id.* at 92-95, 103-104.) Finally, at the Federal Hearing, on questioning from Petitioner's counsel – in open court and without any threat of repercussions – Thomas evinced a telling reluctance to affirm his post-trial statements concerning the incident. (*See id.* at 60-68.) Reviewing the above, the Court finds that Thomas's post-trial statements would not necessarily impact the trustworthiness of his trial testimony in the mind of a reasonable juror. *See Jones*, 763 F.3d at 1248.

Fifth, Petitioner's argument that Thomas's post-trial statements render his trial testimony unreliable, and thus warrant granting Petitioner's *Schlup* claim, is unavailing.[12] [*See* Dkt. No. 83 ("Petitioner's Brief" or "Petr's Br.") at 32-33.] By this logic, Petitioner would prevail no matter the reliability of Thomas's post-trial statements, as a reliable recantation would lend as much support to a *Schlup* claim as an unreliable recantation. This is not the law. *See Tizeno v. Janda*, 2015 WL 4507284, at *26 (C.D. Cal. July 20, 2015) ("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.").

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[11] Petitioner's wife testified that Thomas first called her to express regret for testifying against Petitioner, but then became unreachable by phone. (*See* Petr's Ex. 108; Hr'g Tr. at 89-92, 96.)

[12] The tension in Petitioner's position warrants attention. But for Thomas's post-trial statements, the Petition would have been dismissed as untimely, and the Federal Hearing would not have been held. *See Clark*, 581 F. App'x at 655-57. Now, Petitioner questions Thomas's credibility, and appears to argue that Petitioner's trial testimony and post-trial statements, taken together, are a nullity. (*See* Hr'g Tr. at 429; Petr's Br. at 32-33.)

Thus, the Court finds that Thomas's pre-trial statements and trial testimony remain persuasive evidence of Petitioner's guilt, and could reasonably be credited by jurors, notwithstanding Petitioner's efforts to undermine Thomas's credibility.[13] *See Schlup*, 513 U.S. at 330 (when newly presented evidence calls into question the credibility of witnesses presented at trial, "the habeas court may have to make some credibility assessments"); *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.").

B. The Testimonies of Petitioners' New "Eyewitnesses" Do Not Undermine His Conviction

At the Federal Hearing, Petitioner introduced four new "eyewitnesses," all of whom identified Buddha (*see* n.2, *supra*), a local drug-dealer, as the shooter. The Court finds that the testimonies of Petitioner's new eyewitnesses – Paul Leonard Terry ("Terry"), Lafennus Jamal Lindquist ("Lindquist"), Willie Owens ("Owens"), and Coral Denise Nettles ("Nettles") – would not persuade a reasonable juror that Petitioner is actually innocent. Five reasons drive this conclusion.

First, Petitioner's new eyewitnesses waited eleven years to come forward with their testimonies, and none satisfactorily explained the delay. Most notably, Nettles testified that she was afraid Buddha might harm her or her family if she came forward, notwithstanding that Buddha died in September 2004, four months before Petitioner's trial. (*See* Hr'g Tr. at 334; Petr's Ex. 115; RT at 1.) Nettles further represented that she did not learn of Buddha's death until 2015, even as she acknowledged that Buddha was "notorious" within the community. (Hr'g Tr. at 334, 339.) Be that as it may,

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[13] Of course, given that Petitioner himself impugns Thomas's credibility, Thomas's various post-trial statements are not "new reliable evidence" of Petitioner's actual innocence. *See Schlup*, 513 U.S. at 324.

Nettles also testified that, on the *day after* the incident, she informed Petitioner's wife that Buddha was the real killer. (*Id.* at 374.)

Considering how assiduously Petitioner's wife pursued evidence of Thomas's purported recantation (*see id.* at 103-05), a juror could reasonably find it questionable that Nettles's version of events was not presented to any court before her appearance at the Federal Hearing. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988) (finding it "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed").

Separately, Terry testified that, at the time of the murder, he was a drug-dealer and thus was wary of being labelled a "snitch."[14] (Hr'g Tr. at 143.) Petitioner's expert witness testified concerning the dangers faced by "snitches" in certain communities. (*Id.* at 270-78.) Today, Terry explains, he is a "changed" man, with a respectable job. (*Id.* at 118, 143.) But the Court is skeptical that Terry serendipitously "changed" the very day he was contacted about the Federal Hearing. Given Terry's 23-year friendship with Petitioner, (*see id.* at 119), a juror could reasonably find it less than sincere that Terry made no effort to publicly exonerate Petitioner at some earlier point during his personal transformation. *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.").

Second, the testimonies of Petitioner's new eyewitnesses are inconsistent with known facts and with each other. For example, three of the four new eyewitnesses testified that Petitioner did not have a gun on the evening in question, while two of the

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[14] Lindquist offered essentially the same explanation. (*See* Hr'g Tr. at 180.) By contrast, Owens's stated reason for waiting eleven years to come forward – a reluctance to disrupt his relationships with Buddha's relatives – is wanting, insofar as Owens acknowledged that he maintains relationships with Buddha's relatives to this day. (*See id.* at 215-16, 248-49.) Hearing these explanations, a jury could reasonably conclude that Lindquist and Owens testified at the Federal Hearing mainly, if not solely, because Terry asked them to. (*See id.* at 186, 224.)

four went so far as to testify that it was not in Petitioner's nature to *ever* carry a gun.[15] However, (1) when Petitioner was subsequently arrested in his car, a loaded gun was found in plain view; (2) Petitioner's wife testified that this gun belonged to Petitioner; and (3) Petitioner had suffered previous convictions for armed robbery and carrying a concealed weapon. (*See* RT at 95-96; Hr'g Tr. at 99; Resp's Ex. 201.)

Further, the Court is struck by material variations in the factual accounts of Terry and Nettles, who both testified that they were in Petitioner's immediate presence at the time of the homicide. (Hr'g Tr. at 142, 330-31.) Among other things, Terry and Nettles gave differing accounts as to: whether the car Petitioner was driving had been damaged, (*id.* at 138-39, 361); whether Petitioner's girlfriend had been injured, (*id.* at 158, 322); and whether Petitioner and the victim exchanged insurance information, (*id.* at 138-39, 328). Indeed, although Nettles was "a couple of feet" from Petitioner at the time of the murder, (*id.* at 331), and is friends with Terry, (*id.* at 358), and although Terry likewise testified that he was "standing with" Petitioner at the time of the murder, (*id.* at 142), Nettles testified that she did not see Terry at all during the evening in question, (*id.* at 358). Mindful of these inconsistencies, a juror could reasonably discredit the testimony of these witnesses concerning the crucial point on which they do agree: that Buddha, not Petitioner, shot the victim. *See Hill v. Uribe*, 2011 WL 6396472, at *2 (S.D. Cal. Dec. 16, 2011) (finding that petitioner "[did] not meet the high standard required to pass through the *Schlup* 'actual innocence' gateway" where new witnesses "contradict[ed] each other and the record on important details").

Third, Petitioner's new eyewitnesses all have some personal connections – by blood, marriage, or friendship – to the Clark family. (*See* Hr'g Tr. at 119, 146, 164, 230, 335-36); *see also Hill*, 2011 WL 6396472, at *2-3 (rejecting petitioner's actual-

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[15] When asked if Petitioner "often carr[ied] a gun," Terry testified that Petitioner was "not a shooter." (Hr'g Tr. at 159.) Lindquist likewise recalled that carrying a gun was "not [Petitioner's] style." (*Id.* at 189.) Nettles testified that she did not see Petitioner with a gun that evening. (*Id.* at 311-12.) Only Owens demurred, recalling that he was too far away to see. (*Id.* at 241.)

innocence gateway claim due in part to the questionable credibility of new witnesses who were "part of [petitioner]'s circle of friends"); *cf. also Musladin v. Lamarque*, 555 F.3d 830, 850 (9th Cir. 2009) (affirming denial of habeas petition where probative value of excluded testimony of a "close family member" was undermined by its "questionable reliability"). Even Owens, who claimed that he and Petitioner "weren't friends": (1) appears to be friends with Terry, who is friends with Petitioner; and (2) has a son who is related to Petitioner's wife. (*See* Hr'g Tr. at 119, 146, 210, 216-17, 223-24, 230.)

Fourth, all of Petitioner's new eyewitnesses have criminal histories, and three of the four new eyewitnesses have notable criminal histories.[16] (*See* Hr'g Tr. at 149-51, 182-83, 302-03; Resp's Exs. 203-07, 209); *see also Monk v. Gonzalez*, 583 F. App'x 674, 677 (9th Cir. 2014) (holding that affidavit in support of actual-innocence claim was not credible, in part, because affiant had multiple felony convictions); *Kelly v. Beard*, 2014 WL 895447, at *12 (S.D. Cal. Jan. 15, 2014) (finding credibility of declaration in support of actual innocence "tenuous at best" given declarant's multiple convictions for crimes of moral turpitude).

Fifth, the narrative advanced by Petitioner's new eyewitnesses is disjointed and unconvincing. Petitioner contends that the four new eyewitnesses "collectively provided a compelling narrative of how [the victim's] failed drug deal with [Buddha] turned deadly." (Petr's Br. at 1.) However, far from "compelling," the new eyewitnesses' narrative is largely muddled.

According to Petitioner's first new eyewitness, Terry: Buddha had been drinking and "hanging out" in a "small group" that also included an individual known as "Robbo"; Thomas and the victim tried to sell the buffer to Robbo; Robbo started "hollering" at the pair; someone made a vague threat to steal the buffer; and Robbo –

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[16] Although there is no evidence that Owens was convicted of a crime, at the Federal Hearing, Owens admitted to a history of drug-dealing. (*See* Hr'g Tr. at 222-23.)

not Buddha – hit Thomas in the face. (Hr'g Tr. at 128-32.) Having reviewed the record, the Court finds the link between this interaction and the fatal shooting unlikely.

Further, the only "failed drug deal" referenced during the two-day Federal Hearing involved Petitioner's third new eyewitness, Owens, who testified that he, Buddha, and the victim discussed a three-party transaction: Owens would get the buffer, the victim would receive drugs, and Buddha would get cash. (*Id.* at 205-07.) According to Owens, this tripartite deal fell apart not because Thomas and the victim demanded too much, but because Owens could not easily fit the buffer into his car. (*Id.* at 208.)

In sum, while Petitioner contends that "[Buddha's] confrontation with [Thomas] and [the victim] . . . gave rise to [Buddha's] motivation to assault, and kill, [the victim]" (Petr's Br. at 30-31), the Court finds little evidence of such a confrontation in the record.[17] Tellingly, when Owens was asked what motive Buddha might have for shooting the victim, Owens replied, "I have no idea."[18] (Hr'g Tr. at 244.) The Court finds that a juror could reasonably reach the same conclusion, and discredit the testimony of Petitioner's four new eyewitnesses on the grounds that Buddha had no evident motive to assault the victim.

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[17] Notably, Petitioner's counsel failed to ask Thomas if he and the victim had had any interaction with Buddha, or if Thomas recognized Buddha as the other individual (besides Petitioner) whom Thomas had seen with a gun. (*See* Hr'g Tr. at 65, 68.) By contrast, Petitioner's counsel asked each of Petitioner's four new eyewitnesses if they recognized Buddha from his driver's license photo, and further asked all four new eyewitnesses to identify Buddha in the surveillance video. (*See id.* at 119-20, 164-65, 200-01, 305-07.)

[18] Earlier in his testimony, Owens suggested that the group of men in the parking lot, including Buddha, sought to somehow leverage the commotion caused by the vehicular collision to "rob and get that buffer." (Hr'g Tr. at 211.) But a juror could reasonably conclude that Buddha had no interest in the buffer. If Buddha had wanted the buffer, he evidently could have obtained it via barter (*see id.* at 130), or, indeed, by simply robbing the victim during their initial interaction. In any event, there is no evidence that the victim was robbed – of the buffer or anything else. (*See id.* at 366-367.)

C. Additional Circumstantial Evidence Supports Petitioner's Conviction

Finally, having considered all the evidence, the Court observes that the testimonies of Petitioner's four new eyewitnesses present a fuller picture of the events leading up to the victim's murder. Reviewing their accounts along with the evidence presented at trial, a juror could reasonably find the new eyewitnesses' testimonies to be, in truth, *more compelling* of Petitioner's culpability insofar as they provide a more robust motive for Petitioner's murder of the victim.

According to Nettles, she, Petitioner, and a woman named Jessica – whom Nettles identified as Petitioner's girlfriend – had been "partying," including by doing drugs, for two days. (Hr'g Tr. at 309, 351-52.) The car Petitioner was driving belonged to Petitioner's wife. (*Id.* at 153.) As such, as Terry explained, "if [the car] came home dented up, [Petitioner] was going to be in big trouble." (*Id.*) When the victim backed his car into Petitioner's wife's car, the victim inadvertently pinned Jessica between the door and frame of Petitioner's wife's car for a full minute, causing Jessica to scream. (*Id.* at 360.) Nettles recalled that Jessica's legs were badly bruised in the encounter. (*Id.* at 322.) However, after Petitioner rushed from the store, Petitioner inspected the car before tending to Jessica, because, as Nettles recalled, he was "more [worried] about [his wife] and that truck." (*Id.* at 360-61.) Petitioner's wife's car had indeed been dented. (RT at 117-18, 123-24; Hr'g Tr. at 361.) Meanwhile, a crowd of people excitedly encouraged Petitioner to take action against the victim, who could not speak or understand English very well. (Hr'g Tr. at 44-45; 126; 136-38; 211.)

Reviewing all the evidence, a juror could reasonably conclude that Petitioner murdered the victim out of anger, anxiety, and/or to defend his reputation within the community.

First, a juror could reasonably conclude that Petitioner was angry at the victim, who had damaged Petitioner's wife's car, injured his girlfriend, and may have been

unable to express regret or otherwise fully communicate with Petitioner concerning the incident.

Second, a juror could reasonably surmise that, shortly before the murder, the victim had suddenly, if inadvertently, caused Petitioner a great deal of personal anxiety, as Petitioner must have wondered how he would explain the car's damage to his wife (leaving aside that Petitioner's wife might also learn that Petitioner had spent two days "partying" with his girlfriend).

Third, multiple witnesses recalled that, immediately after the accident, the gathered crowd excitedly goaded Petitioner to take action. (*Id.*) A juror could reasonably conclude that Petitioner was thereby incited to attack the victim, in order to defend his reputation within the community.[19]

In sum, looking at the holistic record, including the evidence presented at trial and at the Federal Hearing, the Court finds that a juror could reasonably conclude, as the jury did at Petitioner's trial, that Petitioner had a motive to, and did, murder the victim. *See House*, 547 U.S. at 538 (noting that function of habeas court reviewing actual-innocence claim is "to assess the likely impact of the evidence on reasonable jurors"). Put another way, Petitioner has failed to present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial . . . ." *See Schlup*, 513 U.S. at 316. As such, the Court cannot find that it is "more likely than not that no reasonable juror would have convicted [Petitioner] in the light of the new evidence." *See id.* at 327.

Accordingly, the Petition should not be considered on its merits, but should be dismissed as untimely. *See McQuiggin*, 133 S. Ct. at 1928

[19] As one of Petitioner's own witnesses observed, "reputation is everything in the streets." (Hr'g Tr. at 156.)

VI.

RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) directing that Judgment be entered dismissing this action with prejudice; and (3) denying a certificate of appealability. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

DATED: February 23, 2017

Hon. Jay C. Gandhi
United States Magistrate Judge

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This Report and Recommendation is not intended for publication. Nor is it intended to be included or submitted to any online service such as Westlaw or Lexis.

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