

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

OCT 28 2020

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

RODNEY LOUIS SIMS,

No. 19-55914

Petitioner-Appellant,

D.C. No. 2:19-cv-00313-PA-AFM

v.

Central District of California,
Los Angeles

KIMBERLY A. SEIBEL, Warden,

ORDER

Respondent-Appellee.

Before: W. FLETCHER and R. NELSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

AUG 29 2019

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

RODNEY LOUIS SIMS,

Petitioner-Appellant,

v.

KIMBERLY A. SEIBEL, Warden,

Respondent-Appellee.

No. 19-55914

D.C. No. 2:19-cv-00313-PA-AFM
Central District of California,
Los Angeles

ORDER

On August 27, 2019, the district court granted appellant's motion to reopen time for appeal. This appeal will move forward based on appellant's July 29, 2019, notice of appeal.

This court will rule on the request for a certificate of appealability and any pending motions in a later order.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Karen M. Burton
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX B

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

AUG 22 2019

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

RODNEY LOUIS SIMS,

Petitioner-Appellant,

v.

KIMBERLY A. SEIBEL, Warden,

Respondent-Appellee.

No. 19-55914

D.C. No. 2:19-cv-00313-PA-AFM
Central District of California,
Los Angeles

ORDER

Before: SCHROEDER and PAEZ, Circuit Judges.

Although the July 29, 2019, notice of appeal was not filed or delivered to prison officials within 30 days after entry of the June 18, 2019, judgment, appellant's notice of appeal includes an allegation (at page 12) that he did not receive notice of entry of judgment until July 16, 2019. We construe appellant's pro se notice of appeal as a motion to reopen pursuant to Federal Rule of Appellate Procedure 4(a)(6). *See United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011). The district court has not had an opportunity to rule on that motion.

This appeal is remanded to the district court for the limited purpose of allowing that court to rule on appellant's July 29, 2019, motion to reopen the time for appeal. The district court is requested to serve a copy of its decision on this court at its earliest convenience. Briefing is stayed pending further order of the court.

APPENDIX C

If the district court grants the motion to reopen, appellant does not need to file a new notice of appeal.

The Clerk will send a copy of this order directly to the district judge.

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 **RODNEY LOUIS SIMS,**

12 **Petitioner,**

13 **v.**

14 **KIMBERLY SEIBEL, Warden,**

15 **Respondent.**
16


Case No. 2:19-cv-00313-PA (AFM)

JUDGMENT

17 This matter came before the Court on the Petition of RODNEY LOUIS SIMS,
18 for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and
19 having accepted the findings and recommendation of the United States Magistrate
20 Judge,

21 IT IS ORDERED AND ADJUDGED that the Petition is denied and the action
22 is dismissed with prejudice.
23

24 DATED: June 17, 2019

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27 **PERCY ANDERSON**
28 **UNITED STATES DISTRICT JUDGE**

APPENDIX D

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 RODNEY LOUIS SIMS,

12 Petitioner,

13 v.

14 KIMBERLY SEIBEL, Warden,

15 Respondent.
16

Case No. 2:19-cv-00313-PA (AFM)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of
18 Habeas Corpus, records on file and the Report and Recommendation of United States
19 Magistrate Judge. The time for filing Objections to the Report and Recommendation
20 has passed and no Objections have been received. The Court accepts the findings
21 and recommendations of the Magistrate Judge.
22

23 DATED: June 17, 2019

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25 PERCY ANDERSON
26 UNITED STATES DISTRICT JUDGE
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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 **RODNEY LOUIS SIMS,**

12 **Petitioner,**

13 **v.**

14 **KIMBERLY SEIBEL, Warden,**

15 **Respondent.**
16

Case No. 2:19-cv-00313-PA (AFM)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE**

17
18 This Report and Recommendation is submitted to the Honorable Percy
19 Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and General
20 Order 05-07 of the United States District Court for the Central District of California.

21 **BACKGROUND**

22 In 2016, Petitioner was convicted of second-degree robbery. In addition, the
23 jury found true the allegation that Petitioner used a deadly weapon in the commission
24 of the offense. Pursuant to the Three Strikes Law, Petitioner was sentenced to state
25 prison for a term of 35-years-to-life. (ECF No. 1 at 1.) Petitioner appealed. The
26 California Court of Appeal affirmed the judgment, and the California Supreme Court
27 denied Petitioner's petition for review. (Respondent's Notice of Lodging, Lodged
28 Documents ("LD") 6, 8.) Petitioner filed habeas corpus petitions in the California

1 Superior Court, California Court of Appeal, and California Supreme Court, all of
2 which were denied. (LDs 9-14.)

3 On January 15, 2019, Petitioner filed this petition for writ of habeas corpus
4 pursuant to 28 U.S.C. § 2254. Respondent filed an answer to the petition on
5 March 29, 2019. On May 3, 2019, Petitioner filed a reply.

6 SUMMARY OF THE TRIAL EVIDENCE

7 The following summary is taken from the opinion of the California Court of
8 Appeal.¹ *See Moses v. Payne*, 555 F.3d 742, 746, n.1 (9th Cir. 2009) (state appellate
9 court's decision statement of facts is afforded a presumption of correctness that may
10 be rebutted only by clear and convincing evidence); *see* 28 U.S.C. § 2254(e)(1)). The
11 Court has independently reviewed the record, which confirms that the state appellate
12 court's summary of the evidence is a fair and accurate one.

13 1. The robbery

14 On August 8, 2015, Enrique Rodriguez was working at the front
15 desk of the Lincoln Plaza Hotel in Monterey Park. Around 5:00 a.m.,
16 defendant entered the hotel wearing a black hooded sweatshirt with the
17 hood pulled up, a shirt wrapped around his face, and a pair of black
18 basketball shoes with a white stripe running around the bottom of each
19 shoe. Carrying a box cutter in one hand and a screwdriver in the other,
20 Petitioner approached the front desk and said to Rodriguez, ““Open the
21 cash register [and] give me the money in the register, ... don't do
22 anything stupid, you probably have a family[.]”” Petitioner then moved
23 Rodriguez to a back room and made him lie down on the ground.
24 Petitioner returned to the front desk, took \$395 from the cash register,
25 and left the hotel. As he returned to his car, Petitioner tossed the box
26 cutter, screwdriver, and t-shirt that he had wrapped around his face in
27 an alley near the hotel, and he threw the sweatshirt he was wearing out

28 ¹ The Court has substituted “Defendant” with “Petitioner” throughout.

1 of his car window as he drove away.

2 **2. The arrest**

3 A few minutes after he no longer heard noises coming from the
4 hotel lobby, Rodriguez called 9-1-1 to report the robbery. Rodriguez
5 described Petitioner as a “black [male], ... mid-20s, approximately five-
6 eight to five-ten.”

7 Shortly after Rodriguez reported the robbery, Officer Raymond
8 Cota of the Monterey Park Police Department spotted Petitioner driving
9 a green car about half a mile from the hotel. After Officer Cota stopped
10 the car, he searched Petitioner and found a stack of bills totaling \$395
11 in one of Petitioner’s pockets, which matched the amount of money
12 missing from the hotel’s cash register. The bills were held together with
13 a paper clip in the same manner that the hotel used to store money in its
14 registers.

15 Officer Cota arrested Petitioner and brought him to Rodriguez for
16 identification. Although Rodriguez did not see Petitioner’s face during
17 the robbery, he identified Petitioner as the person who robbed the hotel
18 based on Petitioner’s skin color and the shoes Petitioner was wearing.
19 Specifically, Rodriguez observed that the pair of shoes Petitioner was
20 wearing after he was arrested matched the shoes worn by person who
21 robbed the hotel. After Rodriguez identified Petitioner, Officer Cota
22 booked Petitioner at the Monterey Park police station.

23 **3. The interrogation**

24 Officer Robin Lopez questioned Petitioner while he was in
25 custody at the police station. Before advising Petitioner of his *Miranda*¹
26 rights, Officer Lopez asked him several background questions about his
27 age, where he lived, his recent employment, and his relationships with
28 his daughter and mother.

1
2 ¹ *Miranda v. Arizona* (1966) 384 U.S. 436... (*Miranda*).

3 Officer Lopez then explained why she was questioning Petitioner:
4 “Okay, well um obviously you know why I’m here. We normally
5 wouldn’t be here at this time in the morning on a Saturday. But from
6 what I understand from the guys, you’ve been really cooperative with
7 everybody, which we all appreciate. Um, I really just wanted to kind of
8 come in here and give you an opportunity, tell me what happened and
9 give me your side of the story. ‘Cause like I said, the guys said you were
10 really cooperative and pretty remorseful, kind of realized after the deal
11 oh, what did I just do, right? So I know this isn’t your first time around
12 the block, so let me just read you your rights real quick.” Officer Lopez
13 read Petitioner his *Miranda* rights, which he acknowledged he
14 understood.²

15
16 ² Petitioner verbally acknowledged he understood his *Miranda*
17 rights and signed an acknowledgment form. Although the form was
18 never introduced in the trial court, Petitioner does not dispute that he
19 signed it.

20 Officer Lopez then immediately began questioning Petitioner
21 about what he had done during the days leading up to the robbery.
22 Petitioner explained that he had last worked two days earlier, and that
23 the day before the robbery he had run errands, cashed a paycheck, and
24 went to a karaoke bar with a female friend.

25 Officer Lopez asked Petitioner whether he was experiencing
26 financial difficulties that may have motivated him to rob the hotel.
27 Petitioner explained that he was having a difficult time making ends
28 meet because he had been released from prison about a year earlier and
had since purchased an expensive phone for his daughter and had

1 accumulated several parking tickets.

2 Petitioner then explained that he was “hurting right now” because
3 he loves his daughter and he knew that she and his mother would be
4 upset about his arrest. Officer Lopez asked Petitioner if he was feeling
5 bad because of what he had done at the hotel earlier that morning.
6 Petitioner responded that he felt “bad for what [he] did” because he “was
7 hurting too many people right now, hurting [himself].”

8 The conversation then turned to how Petitioner had arrived in
9 Monterey Park before he robbed the hotel. He explained that he drove
10 to Monterey Park after dropping his female friend off in Compton. He
11 had previously worked a security job in the city, so he was familiar with
12 the area. After driving around for a while, he thought the Lincoln Plaza
13 Hotel looked like a “good target,” so he parked his car about half a mile
14 away from the hotel. When he did not see anybody around, he walked
15 straight to the hotel.

16 Officer Lopez then tried to prompt Petitioner into describing what
17 he did once he got to the hotel. Petitioner responded that he wanted to
18 be a man and take responsibility for his actions, but he also did not want
19 to get himself into trouble by “say[ing] things” because he was a two-
20 time felon and knew that it would be bad for him to speak.

21 Officer Lopez asked Petitioner to cooperate with her. She
22 explained that the victim of the robbery had already identified him as a
23 suspect and that the police had video footage of him robbing the hotel.
24 She told Petitioner that by cooperating with the police, he could set a
25 positive example for his 15 year-old daughter.

26 She then asked Petitioner if he had used a box cutter during the
27 robbery. Petitioner replied, “I didn’t cut nobody, ma’am.” Officer Lopez
28 again asked Petitioner if he had carried a box cutter during the robbery,

1 to which Petitioner replied, "I want to be cooperative. I want to be
2 cooperative." Officer Lopez responded: "Well then I need you to be
3 cooperative, because ... you said it yourself. You're already a two-time
4 felon. The only thing that's going to help you at this point is you letting
5 me go to the DA next week and show them that you were cooperative,
6 that you feel some remorse, that you took responsibility for what you
7 did. You know, it may mean the difference between a new charge or just
8 a violation. Who knows? 'Cause you're on parole right now, right?"

9 Petitioner acknowledged that he was on parole and claimed that
10 he had made "too many mistakes." He confirmed that he carried a box
11 cutter during the robbery, but claimed that he did not use it to hurt
12 Rodriguez.

13 He then explained that he had gone 15 months since he was
14 released from custody without doing anything wrong, and that this was
15 his first time "doing something like this" since he got out of prison.
16 Officer Lopez told Petitioner that the robbery was only a "hiccup" that
17 he could move past when he got out "next week or next month."

18 Officer Lopez and Petitioner then engaged in the following
19 conversation:

20 "[Lopez:] You still have a future. It's not over for you. It may not
21 be until next month, but you certainly have that coming up, and you've
22 got to be able to show your daughter ...

23 [Petitioner:] Mm-hmm.

24 [Lopez:] That you made a mistake, that you owned up to it, that
25 you told the truth, you take your lumps, and then you get back to her.
26 Right?

27 [Petitioner:] Well I think I'll be doing 25 to life, ma'am. I can't
28 even, I hear what you saying; believe me. But these people not going to

1 let me off with nothing.

2 [Lopez:] Well I'm not saying you're going to get off with nothing,
3 but I don't necessarily think you're going to get 25 to, I mean I know you
4 said you got two priors. But if they didn't made them strikes, then ...

5 [Petitioner:] I think they did make them strikes.

6 ***

7 [Lopez:] Okay, okay. Well like I've said, I've looked at your raps.
8 It doesn't show that you have two strikes. It shows that you have the two
9 robberies. I'll definitely, you know, confirm that with the court when I
10 go up on Tuesday. But regardless, you need to be able to look yourself
11 in the mirror and know you did the right thing."

12 Petitioner told Officer Lopez that he had never intended to harm
13 anyone at the hotel. He then described in detail how he committed the
14 robbery. He said that he tossed the box cutter and screwdriver in an
15 alleyway as he walked back to his car and that he threw his sweatshirt
16 out of the window of his car as he was driving away from the hotel.
17 After concluding the interview at the police station, Petitioner
18 accompanied Officer Lopez and other police officers to an area near the
19 Lincoln Plaza Hotel, where he helped them recover the box cutter, the
20 screwdriver, and the t-shirt he used to cover his face during the robbery.

21 **4. The charges**

22 The People charged Petitioner with second-degree robbery (Pen.
23 Code §§ 211, 212.5, subd (c)), with an allegation that he personally used
24 a dangerous and deadly weapon (a box cutter and a screwdriver) during
25 the commission of the robbery (§ 12022, subd. (b)(1)). The People also
26 alleged Petitioner had been convicted of three prior serious felony
27 convictions, two of which were strikes within the meaning of the Three
28 Strikes law (§§ 667, 667.5, 1170.12, & 1192.7).

1 **5. The motion to exclude Petitioner's statements to Officer**
2 **Lopez**

3 Before the jury was selected, Petitioner moved to exclude the
4 statements he made about the robbery during his interrogation with
5 Officer Lopez. Petitioner argued the statements were unlawfully
6 obtained because he neither expressly nor impliedly waived his rights
7 under *Miranda*. He also argued that his confession was involuntary
8 because it was coerced by Officer Lopez's promises of leniency
9 concerning the prosecution of the robbery.

10 The court denied Petitioner's motion. The court first found that
11 Petitioner had implicitly waived his *Miranda* rights and that his waiver
12 was knowing, intelligent, and voluntary. The court observed that Officer
13 Lopez had read Petitioner his *Miranda* rights and Petitioner had
14 acknowledged being advised of his rights before making any
15 incriminating statements. The court also noted that Petitioner had
16 considerable experience speaking with law enforcement during his prior
17 run-ins with the law and that Officer Lopez used a "light touch" while
18 questioning Petitioner.

19 The court then found Petitioner voluntarily confessed to
20 committing the robbery. Specifically, the court found Officer Lopez did
21 not coerce Petitioner's confession by promising leniency in Petitioner's
22 prosecution for the robbery. The court observed that Officer Lopez's
23 statements to Petitioner that it could be possible he would not receive a
24 third-strike sentence if he were to cooperate with the police's
25 investigation involved "fairly light-handed passive references" that did
26 not "explicitly promis[e] anything." The court stated, "[Officer Lopez]
27 never expressly says I'm going to get you a deal if you tell me what
28 happened, I'm going to get you less than 25 to life. I mean, there are no

1 express promises or implied promises of leniency here. She leaves it
 2 very much up in the air.” The court explained that Officer Lopez’s
 3 statements to Petitioner reflected “uncertainty” that Petitioner’s
 4 commission of the robbery could lead to “a new charge, it could be a
 5 violation, who knows.”

6. The trial, verdict, and sentencing

7 Petitioner was tried in February 2016. Officer Lopez, Officer
 8 Cota, and Rodriguez testified for the prosecution. Officer Lopez
 9 testified about Petitioner’s statements during the August 8, 2015
 10 interrogation.⁴ Specifically, she explained that Petitioner was
 11 cooperative throughout the interrogation and that he had provided a
 12 step-by-step explanation of how he committed the robbery. Petitioner
 13 did not present any evidence in his defense.

14
 15 ⁴ The prosecution did not play the audio recording of the
 16 August 8, 2015 interrogation [for] the jury.

17 The jury convicted Petitioner of second-degree robbery and found
 18 true the allegation that he used a deadly and dangerous weapon during
 19 the commission of the crime. Before sentencing, Petitioner waived his
 20 right to a jury trial on the prior conviction allegations, the truth of which
 21 he later admitted. The court sentenced Petitioner to a total term of 35
 22 years to life in state prison.

23 (LD 6 at 2-9 (footnote omitted).)

24 PETITIONER’S CLAIMS

25 Petitioner alleges the following claims for relief:

- 26 1. Petitioner received ineffective assistance of counsel at trial. (ECF No. 1
 27 at 5, 55-62.)

2. The prosecution did not prove each element of robbery, therefore the evidence did not support Petitioner's conviction. (ECF No. 1 at 7, 64-68.)

3. "Tampering with Evidence Establishes Bases for Witness Conflicting and Inconsistent Statements." (ECF No. 1 at 8, 70-84.)

STANDARD OF REVIEW

A federal court may not grant a writ of habeas corpus on behalf of a person in state custody

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As used in section 2254(d)(1), the phrase "clearly established federal law" includes only the holdings, as opposed to the dicta, of Supreme Court decisions existing at the time of the state court decision. *Howes v. Fields*, 565 U.S. 499, 505 (2012) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Under section 2254(d)(1), a state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" about the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). This is true even where a state court's decision is unaccompanied by an explanation. In such cases, the petitioner must show that "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. Review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

1 Under section 2254(d)(2), relief is warranted only when a state court decision
2 based on a factual determination is “objectively unreasonable in light of the evidence
3 presented in the state-court proceeding.” *Stanley v. Cullen*, 633 F.3d 852, 859 (9th
4 Cir. 2011) (quoting *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004)). Further,
5 state court findings of fact – including a state appellate court’s factual summary – are
6 presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C.
7 § 2254(e)(1); see *Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

8 Petitioner presented his claims to the California Superior Court in a habeas
9 corpus petition. (LD 9.) The California Superior Court denied the petition because
10 Petitioner had failed to verify it.² (LD 10.) When Petitioner raised his claims to the
11 California Court of Appeal, he informed that court that the Superior Court refused to
12 consider the three claims included in this federal petition due to his failure to verify
13 the petition. Petitioner asked the California Court of Appeal to “acknowledge” these
14 claims. (LD 11 at 1.) The California Court of Appeal denied the petition, stating:

15 We have read and considered the petition for writ of habeas corpus filed
16 on April 27, 2018 We have also reviewed our file in case number
17 B271254, petitioner’s direct appeal from the conviction at issue in this
18 writ proceeding. The petition is denied.

19 (LD 12.) The California Supreme Court summarily denied Petitioner’s habeas corpus
20 petition. (LD 13, 14.)

21 For purposes of review, the Court looks through the California Supreme
22 Court’s unexplained denial to the last reasoned decision of the state court. See *Wilson*
23 *v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188, 1192 (2018) (federal court should “look
24 through” unexplained state-court decision to “the last related state-court decision
25 providing a relevant rationale” and presume that the unexplained decision adopted
26

27 ² Petitioner’s state petitions included an additional claim challenging the traffic stop leading to his
28 arrest. The Superior Court specifically rejected the traffic stop claim. (LD 10.) Petitioner does not
include a challenge to the traffic stop in his federal petition.

1 the same reasoning). Here, the California Court of Appeal's decision, which reflects
2 that the court considered and rejected Petitioner's claims on the merits. *See Seeboth*
3 *v. Allenby*, 789 F.3d 1099, 1103-1104 (9th Cir. 2015); *see also Harrington*, 562 U.S.
4 at 98.

5 DISCUSSION

6 I. Sufficiency of the Evidence (Ground Two)

7 Petitioner alleges that the evidence is insufficient to support his robbery
8 conviction.

9 Pursuant to clearly established federal law, evidence is sufficient to support a
10 conviction if, "after viewing the evidence in the light most favorable to the
11 prosecution, any rational trier of fact could have found the essential elements of the
12 crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).
13 Where evidence supports conflicting inferences, a reviewing court "must presume –
14 even if it does not affirmatively appear in the record – that the trier of fact resolved
15 any such conflicts in favor of the prosecution, and must defer to that resolution."
16 *Jackson*, 443 U.S. at 319, 326; *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per
17 curiam) (*Jackson* "makes clear that it is the responsibility of the jury – not the court
18 – to decide what conclusions should be drawn from evidence admitted at trial").

19 Furthermore, federal habeas corpus relief is warranted based upon insufficient
20 evidence only if the state court decision was objectively unreasonable. *Cavazos*, 565
21 U.S. at 2; *Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (on AEDPA review,
22 federal court owes "double dose of deference" to state court and may grant relief only
23 if it concludes that "the state court's determination that a rational jury could have
24 found that there was sufficient evidence of guilt ... was objectively unreasonable")
25 (quoting *Boyer v. Belleque*, 659 F.3d 957, 964-965 (9th Cir. 2011)).

26 In California, robbery is defined as the "felonious taking of personal property
27 in the possession of another, from his or her person or immediate presence, and
28 against his will, accomplished by means of force or fear." Cal. Penal Code § 211; *see*

1 *also People v. Gomez*, 43 Cal.4th 249, 257 (2008).

2 Here, the prosecution presented evidence that Petitioner entered the Lincoln
3 Plaza Hotel with a boxcutter and screwdriver. He demanded money from Rodriguez.
4 (Reporter's Transcript on Appeal ("RT") 362-375.) After Rodriguez opened the cash
5 register, Petitioner took Rodriguez to the back office and directed him to lie down on
6 the ground. Petitioner returned to the cash register, took the money, and fled. (RT 76-
7 378.)

8 Although the basis for his claim is not entirely clear, it appears that Petitioner
9 contends that the evidence was insufficient to show that Rodriguez had possession of
10 the property or that the property was taken from his immediate presence. Any such
11 argument lacks merit.

12 California law provides that possession may be actual or constructive.
13 Constructive possession requires that a person knowingly exercise control over or the
14 right to control property, either directly or through other persons. All employees have
15 constructive possession of their employer's property while on duty. *See People v.*
16 *Scott*, 45 Cal.4th 743, 753-756 (2009); *see also* CALCRIM No. 1600 ("A store or
17 business employee who is on duty has possession of the store or business owner's
18 property."). The jury could reasonably conclude that because Rodriguez was on duty,
19 he had constructive possession of the money Petitioner took from the hotel's cash
20 register. *See Lopez v. Sullivan*, 2012 WL 3279478, at *7 (C.D. Cal. Apr. 11, 2012)
21 ("All of the victims, including the manager, assistant manager, workers, drivers, and
22 a mechanic, constructively possessed the baby formula because they worked as a
23 team in loading and unloading the baby formula."), *report and recommendation*
24 *adopted*, 2012 WL 5289568 (C.D. Cal. Oct. 25, 2012); *see also Curtis v. Beard*, 2015
25 WL 4537877, at *9-12 (C.D. Cal. May 4, 2015), *report and recommendation*
26 *adopted*, 2015 WL 4537747 (C.D. Cal. July 27, 2015).

27 With regard to the "immediate presence" element, California law provides
28 that:

1 a thing is in the immediate presence of a person, in respect to robbery,
2 which is so within his reach, inspection, observation or control, that he
3 could, if not overcome by violence or prevented by fear, retain his
4 possession of it. Thus, "immediate presence" is an area over which the
5 victim, at the time force or fear was employed, could be said to exercise
6 some physical control over his property. Under this definition, property
7 may be found to be in the victim's immediate presence even though it is
8 located in another room of the house, or in another building on the
9 premises.

10 *Gomez*, 43 Cal.4th at 257 (internal quotation marks and citations omitted); *see People*
11 *v. Hayes*, 52 Cal.3d 577, 627 (1990). Thus, the "person or presence" element of
12 robbery has been found to be satisfied in many similar situations, including where:

13 the victims have been put in walk-in refrigerator while money is taken
14 from a cash register; the victims are tied up in one room while property
15 is taken from another room; the victim is assaulted in a motel room one
16 hundred seven feet away from the motel office from which the property
17 is stolen; a robber crashes through a ceiling into an office, causing the
18 victim to flee, and then steals from the office....

19 *People v. Prieto*, 15 Cal. App. 4th 210, 214 (1993) (citations omitted).

20 In light of the evidence, a rational jury could conclude that the money was
21 taken from Rodriguez's immediate presence because but for Petitioner's use of force
22 or fear to direct him into the back office, Rodriguez would have retained possession
23 over the money in the cash register. *See Gomez v. Herndon*, 2009 WL 1481115, at
24 *18 (C.D. Cal. May 26, 2009) (evidence sufficient to support finding that petitioner
25 took property from immediate presence of victim because "a rational juror could have
26 concluded that, but for petitioner firing a gun at [the victim], [the victim] could have
27 exercised physical control over the stolen money"). Accordingly, the state court's
28 determination of this claim was neither contrary to, nor an unreasonable application

1 of, clearly established federal law.

2 **II. Ineffective Assistance of Counsel (Ground One)**

3 Petitioner alleges that he received ineffective assistance of counsel because his
4 trial counsel: (a) referenced Petitioner's incriminating statements; (b) failed to object
5 to inaccuracies in the probation officer's report; (c) failed to cross-examine Officer
6 Lopez using prior inconsistent statements and request "production of writings used
7 to refresh [Officer Lopez's] memory"; (d) failed to object to prosecutorial
8 misconduct; and (e) failed to obtain a video recording of the traffic stop. (ECF No. 1
9 at 55-62, 100-104.)

10 **Clearly Established Federal Law**

11 The Sixth Amendment guarantees that a criminal defendant will not be
12 convicted without the effective assistance of counsel. *Strickland v. Washington*, 466
13 U.S. 668, 685-686 (1984). In order to establish ineffective assistance of counsel,
14 petitioner must identify the acts or omissions of counsel that were not the result of
15 reasonable professional judgment, and he must show a reasonable probability that
16 but for his counsel's errors, the result of the proceeding would have been different.
17 *Strickland*, 466 U.S. at 690, 694; *see Knowles v. Mirzayance*, 556 U.S. 111, 123, 127
18 (2009). "A reasonable probability is a probability sufficient to undermine confidence
19 in the outcome." *Strickland*, 466 U.S. at 694; *see also Knowles*, 556 U.S. at 127.
20 Because petitioner bears the burden of satisfying both prongs of the *Strickland*
21 standard, a federal court "need not determine whether counsel's performance was
22 deficient before examining the prejudice suffered by the defendant as a result of the
23 alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the
24 ground of lack of sufficient prejudice ... that course should be followed." *Strickland*,
25 466 U.S. at 687, 697.

26 **a. Referencing Petitioner's incriminating statements.**

27 Petitioner complains that trial counsel referred to his incriminating statements.
28 In support of this claim, Petitioner cites two portions of the Reporter's Transcript.

1 (ECF No. 1 at 100.) In the pages cited by Petitioner, defense counsel questions
2 Officer Lopez about whether she recalled Petitioner saying that he had no intention
3 of hurting anybody. (RT 360-361, 409.)

4 Petitioner has not explained how counsel's reference to evidence already
5 before the jury could have prejudiced him. This is particularly true here, where it is
6 clear that defense counsel's question was an attempt to place Petitioner in a
7 sympathetic light by emphasizing his lack of intent to harm Rodriguez. *See,*
8 *generally, Yarborough v. Gentry*, 540 U.S. 1, 9, (2003).

9 **b. Failure to object to inaccuracies in the probation report.**

10 Petitioner complains that trial counsel failed to object to factual inaccuracies
11 in the probation report. Petitioner points to a single inaccuracy: The probation report
12 indicates that Petitioner was stopped by the police because his vehicle matched the
13 one seen on the hotel surveillance camera (LD 15 at 111 (filed under seal)), but
14 Officer Cota testified that he stopped Petitioner because he saw him minutes after the
15 dispatch call came out. Petitioner was approximately half a mile from the hotel and
16 driving away from it, and Petitioner matched the description of the perpetrator. (RT
17 4-6, 13-16, 319-320.)

18 Assuming trial counsel's failure to correct the probation report constituted
19 deficient performance, Petitioner has not demonstrated prejudice. Petitioner fails to
20 explain how this factual inaccuracy affected either his conviction or sentence. The
21 probation report was prepared for purposes of sentencing. During sentencing, the trial
22 court explicitly relied upon Petitioner's criminal history – namely, three prior robbery
23 convictions, two of which qualified as “strikes” under California's Three Strikes
24 Law. (*See* RT 914.) The trial court also considered the fact that Petitioner was on
25 parole when he committed the robbery and that he was armed with two weapons
26 when he entered the hotel. The trial court found that Petitioner was “the type of
27 individual who falls within the spirit of the Three Strikes Law given his serious,
28 lengthy, violent criminal history.” (RT B5-B6, 914-915.) The reason Petitioner was

1 stopped by the police immediately after the robbery had no bearing on the trial court's
2 sentencing decision. Accordingly, Petitioner cannot demonstrate he was prejudiced
3 as result of trial counsel's allegedly deficient performance.

4 **c. Failure to cross-examine Officer Lopez with prior inconsistent**
5 **statements and request production of documents.**

6 Petitioner alleges that trial counsel failed to cross-examine Officer Lopez with
7 inconsistent prior statements. Petitioner's claim is based upon the following.

8 Officer Lopez testified that Petitioner told her that when he asked Rodriguez
9 to give him the money, Petitioner also said something to the effect of "you probably
10 have a family, don't you?" (RT 334.) However, after reviewing the transcript of the
11 interrogation, Officer Lopez clarified that *she* was the one who mentioned to
12 Petitioner that the victim probably had a family like Petitioner did. She was "basically
13 saying, like, you both have family," meaning both the victim and Petitioner. (RT 354-
14 355.) Thus, Officer Lopez's inconsistent testimony was cleared up by her subsequent
15 testimony. All of this evidence was before the jury. Petitioner complains that trial
16 counsel should have requested to review the transcript that Officer Lopez used to
17 refresh her recollection. However, he does not allege that Officer Lopez's
18 clarification regarding the interrogation is inaccurate. Petitioner fails to identify any
19 other "prior inconsistent statement" that trial counsel could have, but failed to, use to
20 cross-examine Officer Lopez. As a result, he has failed to demonstrate that counsel's
21 performance was deficient.

22 Moreover, in light of the overwhelming evidence, any failure to impeach
23 Officer Lopez with her imperfect memory did not prejudice Petitioner. As set forth
24 above, Petitioner was stopped half a mile from the hotel with money bound by
25 paperclips in the same manner used by the hotel (RT 321-323, 389-390); Rodriguez
26 positively identified Petitioner (RT 365-366, 370-371); and Petitioner confessed in
27 detail to the robbery (RT 331, 340-341). Furthermore, while Petitioner may not have
28 told Officer Lopez about his statement, Rodriguez testified that Petitioner said,

1 “Don’t make me hurt you ... you probably have family, don’t do anything stupid.”
2 (RT 375-376.) In light of the foregoing, Petitioner cannot demonstrate prejudice from
3 trial counsel’s alleged deficient performance in cross-examining Officer Lopez. *See*
4 *Hernandez v. Chappell*, __ F.3d __, 2019 WL 1970853, at *10 (9th Cir. May 3,
5 2019); *Wood v. Ryan*, 693 F.3d 1104, 1119 (9th Cir. 2012).

6 **d. Failure to object to prosecutorial misconduct.**

7 Petitioner asserts that trial counsel was deficient because he failed to object to
8 the prosecutor’s inflammatory and misleading argument to the jury. (ECF No. 1 at
9 100.) Reference to the portions of the closing argument cited by Petitioner reveals
10 the following:

- 11 • The prosecutor referred to Petitioner threatening Mr. Rodriguez and
12 making a comment “you have a family, I don’t want to have to hurt you,
13 you have a family. Those are serious threats when you have two
14 weapons like that.” (RT 406.)
- 15 • The prosecutor said Petitioner “has the box cutter and the screwdriver,
16 takes that money from the victim, confronts him and says, ‘I’m going to
17 take your money.’ And that’s a bully. That’s not – that’s not nice.
18 Psychologically damaging to a victim of that.” (RT 410.)
- 19 • The prosecutor told the jury that the taking of the property was
20 accomplished by force or fear. “Scared him. He said, you know, do you
21 have a family? Threatened to kill him. Grabbed him. Used that knife,
22 showed him the knife [sic].” (RT 423.)
- 23 • The prosecutor argued, “[t]hat’s why it’s a robbery. Because he used
24 those weapons, he used force, he scared him, and he used fear to take
25 the property on somebody who was smaller and wasn’t able to fight
26 back.” (RT 426.)

27 A prosecutor commits misconduct during closing argument when he
28 manipulates or misstates the evidence presented during the trial. *Darden v.*

1 *Wainright*, 477 U.S. 168, 181-182 (1986). At the same time, a prosecutor is permitted
2 to argue reasonable inferences based on the evidence and is afforded wide latitude to
3 “strike hard blows” in presenting closing argument. *See Ceja v. Stewart*, 97 F.3d
4 1246, 1253-1254 (9th Cir. 1996) (citations omitted).

5 The statements identified by Petitioner consist of permissible argument based
6 upon the evidence. The prosecutor was entitled to rely on Rodriguez’s testimony that
7 Petitioner said, “You probably have family, don’t do anything stupid” to argue that
8 Petitioner threatened Rodriguez. However, the prosecutor did misspeak when he
9 referenced Petitioner using as a knife rather than a box-cutter and screwdriver.³

10 Even assuming trial counsel should have objected to the prosecutor’s
11 argument, Petitioner has not demonstrated that this failure prejudiced him. Petitioner
12 admitted, and there was no dispute that, he used a box-cutter and a screwdriver in the
13 commission of the offense. There is no likelihood that the jury was misled by the
14 prosecutor’s mistaken statement about a knife. Any likelihood of prejudice was
15 further mitigated considering that the jury was explicitly instructed that it was to
16 decide Petitioner’s guilt based only on the evidence presented at trial and that
17 statements of counsel were not evidence. (*See* CT 58, 60-62.) The jury is presumed
18 to have followed those instructions. *Weeks v. Angelone*, 528 U.S. 225, 226 (2000)
19 (jury presumed to follow judge’s instructions); *see Cunningham v. Wong*, 704 F.3d
20 1143, 1159 (9th Cir. 2013) (the failure to object is generally a permissible tactical
21 decision and even if counsel should have objected, petitioner was not prejudiced
22 because the improper comments were brief and the jury was instructed that attorney
23 arguments were not evidence); *Carrillo*, 16 F.3d at 1051 (prosecutor’s misstatement
24 of fact could not have prejudiced jury were prosecutor urged jury to rely on its own

25 ³ The Court notes that the prosecutor’s misstatements may be fairly characterized as inadvertent
26 mistakes. *See Escareno v. Evans*, 2008 WL 4345138, at *17 (C.D. Cal. Sept. 17, 2008) (“courts are
27 reluctant to find prosecutorial misconduct where the prosecutor’s ‘misstatement has earmarks of
28 inadvertent mistake, not misconduct.’”) (quoting *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th
Cir. 1994).

1 recollection of facts and jury was instructed that attorney's statements were not
2 evidence).

3 **e. Failure to obtain video of the traffic stop.**

4 Petitioner complains that trial counsel failed to obtain a video recording of
5 traffic stop. According to Petitioner, the video would have shown that Officer Cota
6 initiated the traffic stop at an intersection one block away from the location identified
7 in his testimony. (ECF No. 1 at 60.)

8 An attorney's unreasonable failure to investigate and develop a viable defense,
9 including a defense of third-party culpability, may constitute ineffective assistance
10 of counsel. *See Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). The merit of such
11 a claim, however, depends on a showing that specific additional evidence to support
12 a defense could have been obtained and presented, and that the trial outcome would
13 likely have been different had counsel done so. *See Ceja v. Stewart*, 97 F.3d 1246,
14 1255 (9th Cir. 1996) (prejudice under *Strickland* requires showing what exculpatory
15 evidence further investigation would have uncovered); *Hendricks v. Calderon*, 70
16 F.3d 1032, 1042 (9th Cir. 1995) ("Absent an account of what beneficial evidence
17 investigation into any of these issues would have turned up, [petitioner] cannot meet
18 the prejudice prong of the *Strickland* test.").

19 Petitioner does not explain how the video would have provided exculpatory
20 evidence. Even assuming it would have shown that Officer Cota stopped Petitioner
21 one block away from where he testified he had done so, such evidence would, at best,
22 indicate that Officer Cota's memory was imperfect. Even if Officer Cota's credibility
23 were diminished in regard to the traffic stop, it would not undermine any of the
24 critical evidence against Petitioner. Accordingly, Petitioner has not demonstrated that
25 he was prejudiced by trial counsel's failure to obtain the video.

26 For the foregoing reasons, the state court's determination of this claim was
27 neither contrary to, nor an unreasonable application of, clearly established federal
28 law.

1 **III. Prosecutorial Misconduct (Ground Three)**

2 Petitioner contends that the prosecutor committed misconduct because he (a)
3 “tampered with evidence” and (b) failed to disclose evidence that could have
4 impeached the “principal prosecution witness.” (ECF No. 1 at 9, 70, 101-103.)

5 **a. “Tampering with evidence.”**

6 Petitioner’s assertion that the prosecutor tampered with evidence is based upon
7 a purported inconsistency regarding the amount of money taken from the cash
8 register. (ECF No. 1 at 70; ECF No. 22 at 8-10.) Petitioner’s claim is based upon
9 Rodriguez’s testimony that there was \$400 in the cash register and there was “also
10 some bills we keep underneath that there are fees that we charge to store baggage and
11 for parking, etcetera.” (RT 389.) Petitioner also focuses upon Rodriguez’s admission
12 that he was “not 100 percent sure” of the exact denomination of bills in the register.
13 (RT 390.) According to Petitioner, the foregoing demonstrates that Rodriguez
14 provided false testimony.

15 To begin with, the factual basis for Petitioner’s claim is belied by the record.
16 Rodriguez testified that there had been \$400 in the cash register, consisting of various
17 denominations of bills and coins. According to Rodriguez, all but the coins were
18 taken during the robbery. Among the cash in the register was a packet of 25 one-
19 dollar bills held together with a paper clip. The money was later returned to him. (RT
20 388-391.) Officer Cota testified that when Petitioner was arrested, \$395 in bound
21 bills was recovered from Petitioner’s pocket, including a stack of one-dollar bills
22 with paper clips on it. (RT 321-323.) When Officer Cota retrieved the money from
23 Petitioner’s pants pocket, he gave it to Agent Iglesias who took photographs of the
24 money, counted it, and then returned it to the victim. (RT 323.)

25 Nevertheless, even if the evidence could be construed as inconsistent,
26 Petitioner has not made out a meritorious claim of prosecutorial misconduct. The
27 knowing use of perjured testimony to obtain a conviction violates a criminal
28 defendant’s federal right to due process. *See Napue v. Illinois*, 360 U.S. 264, 268-

1 270 (1959); *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (en banc). In order
2 to prevail on a *Napue* claim, a petitioner must demonstrate that: (1) the testimony or
3 evidence was actually false; (2) the prosecution knew or should have known that the
4 testimony or evidence was actually false; and (3) the false testimony or evidence was
5 material. *Gentry v. Sinclair*, 705 F.3d 884, 903 (9th Cir. 2013).

6 Petitioner has not shown that any evidence offered by the prosecution was
7 actually false. *See, e.g., United States v. Bingham*, 653 F.3d 983, 995 (9th Cir. 2011)
8 (“Bingham points to nothing in the record that shows the intentional use of perjured
9 testimony. Certainly [the prosecution witness] made inconsistent statements, but that
10 is not enough for a *Napue* violation.”); *United States v. Williams*, 547 F.3d 1187,
11 1202 n.13 (9th Cir. 2008) (same). Furthermore, considering that Petitioner’s
12 confession was entirely consistent with Rodriguez’s testimony in almost every other
13 regard, even if Petitioner were able to show that Rodriguez falsely testified about the
14 amount of money taken from the register, it is not reasonably likely that the jury
15 would use this to reject Rodriguez’s testimony in its entirety. Petitioner never
16 disputed that he took cash from the hotel’s cash register — nor could he reasonably
17 do so in light of his confession. His defense at trial was that he entered the building
18 and stole money, but he did not apply force or fear to Rodriguez and, therefore, he
19 was guilty only of commercial burglary rather than robbery. (*See* RT 412-415.) For
20 all of these reasons, Petitioner’s claim lacks merit.

21 **b. Failure to disclose impeachment evidence.**

22 Petitioner makes a conclusory allegation that he was denied due process by the
23 “failure to disclose information that could have been used to impeach principal
24 prosecution witness.” (ECF No. 1 at 101.)

25 The prosecution’s suppression of evidence favorable to an accused violates
26 due process where the evidence is material, irrespective of the good faith or bad faith
27 of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1967). Evidence is material
28 if “there is a reasonable probability that, had the evidence been disclosed to the

1 defense, the result of the proceeding would have been different.” *Strickler v. Greene*,
2 527 U.S. 263, 280 (1999). A reasonable probability is one that is sufficient to
3 undermine confidence in the outcome of the trial. *See United States v. Bagley*, 473
4 U.S. 667, 676 (1985); *Maxwell v. Roe*, 628 F.3d 486, 509 (9th Cir. 2010).

5 The factual basis for Petitioner’s claim is not entirely clear, but it appears to
6 be based upon Officer Lopez’s testimony that when he asked Rodriguez to give him
7 the money, he said “you probably have a family, don’t you?” (*See* ECF No. 1 at 101-
8 104; ECF No. 22 at 12-13.) As discussed above, however, Officer Lopez corrected
9 her testimony after reviewing the transcript of the interrogation.⁴ Petitioner’s claim
10 fails because he has not identified any favorable evidence withheld by the
11 prosecution.

12 For the foregoing reasons, the state court’s determination of this claim was
13 neither contrary to, nor an unreasonable application of, clearly established federal
14 law.

15 RECOMMENDATION

16 For the foregoing reasons, it is recommended that District Judge issue an
17 Order: (1) accepting and adopting this Report and Recommendation; and
18 (2) directing that Judgment be entered denying the petition and dismissing this action
19 with prejudice.

20
21 DATED: 5/10/2019

22 

23 ALEXANDER F. MacKINNON
24 UNITED STATES MAGISTRATE JUDGE
25
26
27

28 ⁴ The Court notes that Petitioner obviously was present during the interrogation, yet he does not allege that Officer Lopez’s corrected testimony was inaccurate.

SUPREME COURT
FILED

NOV 14 2018

Jorge Navarrete Clerk

S249360

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RODNEY LOUIS SIMS on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL – SECOND DIST.

FILED

May 17, 2018

JOSEPH A. LANE, Clerk

Z. Clayton Deputy Clerk

In re

B289646

RODNEY LOUIS SIMS

(Super. Ct. No. GA096858)

on Habeas Corpus.

ORDER

THE COURT:

We have read and considered the petition for writ of habeas corpus filed on April 27, 2018. We have also reviewed our file in case number B271254, petitioner's direct appeal from the conviction at issue in this writ proceeding.

The petition is denied.



EDMON, P. J.



LAVIN, J.



DHANIDINA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
Superior Court of California
County of Los Angeles

MAR 15 2018

In re

RODNEY LOIUS SIMS,
On Habeas Corpus

Case No.: GA96858

ORDER

Sherri R. Carter, Executive Officer/Clerk
By M. Jones, Deputy

The Court, has read and considered Petitioner's Writ of Habeas Corpus filed March 14, 2018. The petition is DENIED for the following reasons:

1. Penal Code Section 1474 and Form MC-275 require that the petition be verified by oath or affirmation of the party making the application. In re McCarthy, 176 Cal. App. 3d 593, 596 (1986), (disapproved on other grounds as stated in People v. Godson, 226 Cal. App. 3d 277, 280 (1990)). The petition in this case is unverified by either oath or affirmation.
2. Petitioner makes vague claims about alleged inconsistencies in Officer Cota's trial testimony. To establish a prima facie case, a petitioner must allege facts that, if true, would entitle the petitioner to relief. CRC 4.55l(c)(1). If a petitioner fails to state a prima facie case, the court should summarily deny the petition. In re Duvall, 9 Cal. 4th 464, 474-475 (1995). Here, Petitioner has failed to allege facts that, if true, would entitle him to relief.
3. Petitioner suggests that the officer's traffic stop was illegal. "A writ of habeas corpus is not available to remedy convictions based on improper search or seizure because such errors do not expose innocent persons to convictions and are fully remediable on appeal." In Re Clark, 5 Cal. 4 750, 767 (1993).

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APPENDIX G

1 A. HE TOLD ME THAT HE APPROACHED THE VICTIM WITH A
2 BOX CUTTER IN ONE HAND AND SCREWDRIVER IN THE OTHER HAND AND
3 THAT HE DEMANDED THAT THE CLERK GIVE HIM THE MONEY FROM THE
4 CASH REGISTER.

5 Q. AND WHAT DID HE TELL YOU THAT THE CLERK DID OR
6 HOW THE CLERK REACTED?

7 A. THE CLERK COMPLIED WITH HIS DEMANDS, TOLD HIM
8 WHERE THE CASH REGISTER WAS.

9 Q. TO YOU REMEMBER, WAS THERE ANYTHING SPECIFIC IN
10 WHAT HE TOLD THE CLERK THAT YOU RECALL OR THAT STOOD OUT TO
11 YOU?

12 A. I RECALL THAT HE MADE A STATEMENT TO THE EFFECT
13 OF YOU HAVE A FAMILY OR YOU PROBABLY HAVE A FAMILY, DON'T
14 YOU? HE TOLD THE CLERK TO GIVE HIM THE MONEY. AND --

15 OR ONCE THE CLERK OPENED THE REGISTER, UNLOCKED
16 THE REGISTER FOR HIM, HE TOLD THE CLERK TO STEP BACK AND HE
17 TOLD HIM NOT TO MOVE.

18 Q. AND DID HE INDICATE TO YOU WHETHER OR NOT HE PUT
19 THE CLERK IN SOME AREA?

20 A. YES. HE ACTUALLY MOVED HIM OUT OF THAT AREA THAT
21 ~~YOU SAW ON THE PHOTO, WHICH WAS THE COUNTER, BACK TOWARDS OR~~
22 INTO A SMALLER OFFICE AND HAD HIM, I BELIEVE, LAY DOWN ON THE
23 GROUND, FACE FIRST ON THE GROUND.

24 Q. NOW, YOU'VE SUBSEQUENTLY BEEN THERE, TO THE
25 LINCOLN PLAZA HOTEL; IS THAT CORRECT?

26 A. YES.

27 Q. OKAY. SO I'M GOING TO SHOW YOU SOME PICTURES OF
28 IT JUST SO WHEN WE'RE TALKING, WE CAN ALL UNDERSTAND WHAT

1 MR. SWANSON: YEAH, FOR SURE.

2 WE'VE ALMOST DONE WITH HER ANYWAY, YOUR HONOR,

3 AND IT WILL BE OUR LAST WITNESS.

4 THE COURT: ALL RIGHT.

5 (A SIDE BAR CONFERENCE WAS HELD OUTSIDE

6 THE PRESENCE OF THE JURY AND THE REPORTER.)

7 THE COURT: GOOD AFTERNOON, MEMBERS OF THE JURY.

8 ALL THE JURORS AND ALTERNATES ARE PRESENT.

9 DETECTIVE LOPEZ, COULD YOU PLEASE RESUME THE

10 WITNESS STAND --

11 MR. SWANSON: COULD I GET ONE MOMENT, YOUR HONOR?

12 THE COURT: YES.

13 -- TO RESUME YOUR DIRECT EXAMINATION.

14 (THE INVESTIGATING OFFICER

15 CONFERRED WITH THE DISTRICT ATTORNEY.)

16 MR. SWANSON: CAN WE HAVE ONE BRIEF SECOND, YOUR HONOR?

17 THE COURT: YES.

18 YOU MAY INQUIRE.

19 MR. SWANSON: OH, OKAY.

21 DIRECT EXAMINATION

23 BY MR. SWANSON:

24 Q. DETECTIVE LOPEZ, WE -- WHEN WE WENT BACK, THE

25 ONLY REASON THAT WE TALKED ABOUT IN YOUR TESTIMONY WAS WITH
26 REGARD TO THE STATEMENTS BY THE DEFENDANT AT LUNCH; CORRECT?

27 A. YES.

28 Q. AND THAT'S SPECIFICALLY I HAD GIVEN YOU A

1 COPY OF THE TRANSCRIBED STATEMENTS MADE TO YOU FROM THAT DAY?

2 A. YES.

3 Q. AND THESE ARE WHAT'S TRANSCRIBED FROM THE AUDIO
4 PORTION?

5 A. CORRECT.

6 Q. OKAY. AND WE HAVE -- THERE'S COPIES OF THESE
7 THAT ARE AVAILABLE TO ALL SIDES?

8 A. YES.

9 Q. NOW, THERE WAS ONE PART THAT YOU --
10 PRIOR TO JUST RIGHT NOW, YOU HADN'T HAD A CHANCE
11 TO EVER READ THE TRANSCRIBED STATEMENTS. IS THAT FAIR?

12 A. THAT'S CORRECT.

13 Q. OKAY. THAT'S 'CAUSE OUR OFFICE TRANSCRIBED THE
14 STATEMENTS AS OPPOSED TO MONTEREY PARK POLICE DEPARTMENT?

15 A. YES.

16 Q. OKAY. SO WAS THE FIRST TIME --

17 WHEN WAS THE FIRST TIME YOU ACTUALLY HAD TO READ
18 THE DEFENDANT'S STATEMENTS TO YOU?

19 A. 30 MINUTES AGO.

20 Q. SO YOU REFRESHED YOUR MEMORY WITH THEM?

21 A. YES.

22 Q. AND, FOR THE MOST PART, EVERYTHING YOU TESTIFIED
23 TO WAS ALL ACCURATE?

24 A. YES.

25 Q. OKAY. ONE AREA WE JUST WANTED TO CLARIFY; IS
26 THAT CORRECT?

27 A. CORRECT.

28 Q. AND WHAT AREA WAS THAT?

1 A. THERE WAS A QUESTION THAT YOU HAD ASKED ME ABOUT
2 WHAT STATEMENTS, I BELIEVE, THE SUSPECT HAD MADE TO ME WITH
3 REGARD TO HAVING A FAMILY.

4 Q. AND WHAT DID HE TELL YOU IN THAT REGARD TO THE
5 FAMILY?

6 A. HE HAD -- WHEN I WAS QUESTIONING HIM AND I WAS
7 ASKING HIM TO TELL ME WHAT HAD HAPPENED AND WHETHER OR NOT HE
8 HAD SCARED OR INJURED THE VICTIM, I HAD MADE A COMMENT TO THE
9 EFFECT OF BECAUSE HE HAD A FAMILY LIKE YOU DO OR SOMETHING TO
10 THAT EFFECT.

11 Q. OKAY. SO IT WAS ABOUT YOUR FAMILY --

12 A. CORRECT.

13 Q. -- THE DEFENDANT'S FAMILY?

14 A. WELL, I WAS COMPARING --

15 I WAS BASICALLY SAYING, LIKE, YOU BOTH HAVE
16 FAMILY. HE HAS -- "HE" MEANING THE VICTIM -- HAS A FAMILY
17 LIKE YOU DO, MEANING THE SUSPECT.

18 Q. OKAY. SO THAT WAS THE EXTENT OF THE STATEMENTS
19 INVOLVING FAMILY?

20 A. CORRECT.

21 Q. VERY GOOD.

22 A. EXCUSE ME ONE SECOND.

23 THE COURT: I'M NOT ALLOWED TO TALK TO YOU.

24 THE WITNESS: COUNSELOR.

25 MR. SWANSON: ONE MOMENT.

26 Q. NOW, IS THERE ANYTHING ELSE REGARDING THAT
27 STATEMENT THAT YOU WANTED TO CLARIFY?

28 A. COUNSELOR, THE VICTIM IS SITTING IN COURT.

1 L You took the--

2 S And then when I didn't take that deal, that's--

3 L Ah.

4 S When they said you got two strikes, so I was facing 25 to life
5 at that time. And then I fought it for a year. And they finally go ahead
6 and gave me the eight years or whatever.

7 L So you took a deal rather than going to trial.

8 S Yeah. Yeah.

9 L Okay, okay. Well like I said, I've looked at your raps. It
10 doesn't show that you have two strikes. It shows that you have the two
11 robberies. I'll definitely, you know, confirm that with the court when I go
12 up on Tuesday. But regardless, you need to be able to look yourself in
13 the mirror and know you did the right thing. And you know you scared
14 the crap out of this poor fool. It's some Asian dude. I mean you know
15 how these Asians are. I mean some, probably some little weaselly, wiry
16 guy...

17 S Yeah.

18 L Sitting behind the counter.

19 S Yeah, I wouldn't want to hurt nobody, ma'am.

20 L Yeah. Let me ask you this. Had he not done what you told
21 him to do behind the counter, were you prepared to cut him?

22 S I was not.

23 L Okay.

24 S No, I was not.

25 L Okay. So you were just trying to scare him, right? Because
26 he's got a family to go home to also, just like you do. Okay, so you
27 didn't hurt him, and you weren't going to hurt him. You were just scaring
28 him so that you get a little bit of cash so you could take care of your

1 L Well I feel your pain, man. I get up at 5:15 every day to
2 come in here, so...

3 S Mm-hmm.

4 L I know what you're talking about. So you zonked out for a
5 while, and then you woke up, and then you're like okay, I'm ready to go
6 do this?

7 S I wasn't ready. I just, I just knew something was wrong
8 'cause it just didn't feel right.

9 L Yeah. What do you mean? Like what didn't feel right?

10 S My stomach wasn't feeling right.

11 L Oh, you mean you were nervous about doing it?

12 S Yeah.

13 L Okay, okay. And so you walked from where your car was
14 parked about a block away. You walked to the hotel.

15 S Mm-hmm.

16 L You go in. You see the guy at the counter. You confront
17 him. Do you remember what you said to him when you first got in there?

18 S Yeah, I just said open cash register up.

19 L Okay. Anything else?

20 S That's it.

21 L Okay.

22 S 'Cause he was like, you know, he was hesitant and so forth,
23 and I told him I got a family myself, you know.

24 L Mm-hmm, you told him that?

25 S Yes.

26 L Okay. Did you have them, tell him more than once to open
27 up the register?

28 S Yes.

1 JUST DIDN'T USE THE WORD ROBBED?

2 IS THAT WHAT YOU'RE ASKING ME?

3 Q. IT'S VERY SIMPLE.

4 DID HE TELL YOU THAT HE WENT TO THE HOTEL TO ROB
5 SOMEBODY?

6 A. YES.

7 Q. DID HE USE THOSE WORDS?

8 A. HE DIDN'T USE THE WORD "ROB." HE TOLD ME HE WENT
9 TO THE HOTEL TO COMMIT THAT CRIME.

10 Q. DID HE SAY - USE THE WORD "ROB"?

11 A. I DON'T THINK HE USED THAT ACTUAL WORD.

12 Q. OKAY. THAT'S ALL I'M ASKING.

13 A. OKAY.

14 Q. NOW, HE INDICATED THAT WHEN HE WAS AT THE HOTEL,
15 HE HAD A SCREWDRIIVER AND A BOX CUTTER; CORRECT?

16 A. YES, SIR.

17 Q. OKAY. HE NEVER TOLD YOU THAT HE SWUNG IT OR USED
18 IT IN ANY KIND OF ASSAULTIVE MANNER AGAINST THE VICTIM;
19 CORRECT?

20 A. OTHER THAN HOLDING IT, THAT'S CORRECT.

21 Q. ALL HE DID WAS HOLD IT; CORRECT?

22 A. YES.

23 Q. OKAY. HE ALSO TOLD YOU THAT THOSE TWO ITEMS WERE
24 ACTUALLY PART OF HIS WORK TOOLS; CORRECT?

25 A. YES.

26 MR. DESAI: IF I CAN HAVE A MOMENT, YOUR HONOR?

27 THE COURT: YES.

28 (THE DEFENSE ATTORNEY CONFERRED WITH THE DEFENDANT.)

1 UP. DON'T GET UP." I WAITED FOR A FEW MINUTES BEFORE I GOT
2 UP TO SEE IF HE WAS STILL THERE.

3 Q. WAS ANYONE ELSE WITH THE DEFENDANT?

4 A. NO.

5 Q. AND DO YOU KNOW, APPROXIMATELY, HOW MUCH WAS IN THE
6 REGISTER?

7 A. WE HAD \$400 IN BILLS AND COINS, A COMBINATION OF
8 BILLS AND COINS AND UNDERNEATH WE HAD, I BELIEVE, \$20 OF FEES
9 THAT WE CHARGE FOR STORING LUGGAGE, AND THINGS LIKE THAT.

10 Q. SO YOU WERE AWARE OF HOW MUCH WAS IN THE REGISTER
11 PRIOR TO OPENING IT?

12 A. YES.

13 Q. WHEN YOU GOT BACK TO THE REGISTER AND THE DEFENDANT
14 WAS NO LONGER THERE, WHAT DID YOU SEE INSIDE THE REGISTER?

15 A. IT WAS EMPTY. THE BILLS WERE GONE. THE COINS WERE
16 STILL THERE. I CHECKED UNDERNEATH -- ACTUALLY IT WAS KIND OF
17 RAISED UP, SO WHEN I CHECKED IT, THE BILL UNDERNEATH WERE
18 GONE, AND THAT'S ABOUT IT. THE BILLS WERE GONE.

19 MR. KIM: THANK YOU. NO FURTHER QUESTIONS.

20 THE COURT: CROSS?

21
22 CROSS-EXAMINATION

23
24 Q. BY MR. DESAI: GOOD MORNING.

25 A. GOOD MORNING.

26 Q. ARE YOU AWARE OF HOW MUCH WAS ACTUALLY IN THE CASH
27 BOX PRIOR TO THE INCIDENT?

28 A. YES, BECAUSE AFTER CLOSING SHIFT, WE'RE SUPPOSED TO

1 LEAVE EXACTLY \$400 IN THE REGISTER.

2 Q. SO IS THAT HOW MUCH WAS IN THE REGISTER?

3 A. YES, \$400 AND UNDERNEATH, AS I SAID, ABOUT \$20 IN

4 MONEY THAT'S NOT CONSIDERED ROOM CHARGES. IT'S JUST LUGGAGE
5 FEES. WE STORE A DIFFERENT AMOUNT FOR THAT.

6 Q. HOW MUCH MONEY WAS IN THERE AFTER THE INCIDENT

7 OCCURRED?

8 A. ALL THE BILLS WERE GONE. THE COINS WERE THERE, BUT
9 ALL THE BILLS WERE GONE.

10 Q. SO YOU DIDN'T COUNT EXACTLY HOW MUCH MONEY WAS

11 MISSING?

12 A. I DON'T REMEMBER EXACTLY. I KNOW IT WAS RETURNED.

13 IT WAS COUNTED, AND THERE WAS A REPORT MADE, AND THE OFFICER

14 COUNTED IT IN FRONT OF ME. SO WE MADE SURE THAT THE TOTAL WAS

15 \$400, BUT EXACTLY HOW MUCH WAS BILLS AND HOW MUCH WAS COINS, I

16 DON'T RECALL TO BE HONEST WITH YOU.

17 Q. YOU INDICATED THAT THE SUSPECT HAD AN OPENED BOX

18 CUTTER IN HIS POSITION; CORRECT?

19 A. IN HIS RIGHT HAND AND ANOTHER OBJECT IN HIS LEFT

20 HAND.

21 Q. WAS HIS RIGHT HAND EVER RAISED, OR WAS IT ALWAYS AT

22 HIS SIDE?

23 A. WELL, IT WAS ACTUALLY BENT AT THE ELBOW. BOTH OF

24 HIS ARMS WERE BENT AT THE ELBOW UNTIL I BEGAN TO MOVE BACK.

25 SO HE KIND OF -- I DON'T WANT TO SAY CHARGED ME, BUT HE KIND

26 OF MOVED TOWARD ME. SO AS I MOVED BACK, HE MOVED TOWARD ME

27 UNTIL HE REALIZED THE REGISTER WAS ON THE OTHER SIDE. SO WE

28 WENT THAT WAY. ONCE I UNLOCKED THE REGISTER WHILE I WAS

11000011

15x

1 THE COURT: OVERRULED.

2 Q. BY MR. SWANSON: SO DO YOU REMEMBER --

3 WELL, YOU SAID THAT THERE WAS \$400 THAT IS
4 SUPPOSED TO BE IN THE REGISTER?

5 A. CORRECT.

6 Q. AND THAT \$400, WHAT DOES THAT CONSIST OF?

7 A. BILLS, VARIOUS DENOMINATIONS, AND COINS AS WELL.
8 UNDERNEATH, THE MONEY THAT IS ACCOUNTABLE FOR -- AS FAR AS
9 THE HOTEL CHARGES, THE ROOM RATES. THERE'S ALSO SOME BILLS
10 THAT WE KEEP UNDERNEATH THAT THERE ARE FEES THAT WE CHARGE TO
11 STORE LUGGAGE AND FOR PARKING, ETCETERA.

12 Q. BUT IN THE CASH REGISTER IS GOING TO BE ABOUT
13 \$400 AND THAT CAN BE BOTH BILLS AND --

14 A. IT SHOULD BE EXACTLY \$400. THE COMBINATION OF
15 BILLS AND COINS.

16 Q. OKAY. I'LL PULL THIS DOWN RIGHT NOW.

17 HOW MUCH -- DO YOU REMEMBER WHAT BILLS WERE IN
18 THAT CASH REGISTER, WHAT TYPES?

19 A. WELL, THERE WERE \$1 BILLS, \$5 BILLS, \$10 BILLS
20 \$20 BILLS, WHAT WE USUALLY HAVE. OCCASIONALLY, WE'LL HAVE
21 \$50 BILLS AND \$100 BILLS.

22 Q. THAT DAY, DO YOU SPECIFICALLY REMEMBER THE
23 DENOMINATIONS OR NO?

24 A. I KNOW WE HAD PACKETS OF \$1 BILLS IN 25, PACKETS
25 OF 25 \$1 BILLS.

26 Q. WHEN YOU SAY PACKETS OF 25 \$1 BILLS, CAN YOU
27 DESCRIBE A LITTLE --

28 A. 25 BILLS HELD TOGETHER WITH A PAPER CLIP.

1 Q. DO YOU REMEMBER HOW MANY OF THOSE OR NO?

2 A. THE EXACT AMOUNT, NO, BUT I KNOW WE HAD SOME.

3 Q. YOU REMEMBER THE WAY THEY WERE PACKAGED, YOU
4 DON'T REMEMBER HOW MANY OF THEM THERE WERE?

5 A. HOW MANY OF EACH EXACT DENOMINATIONS, NO.

6 Q. DO YOU REMEMBER DENOMINATIONS YOU HAD OR --

7 A. NO. I BELIEVE THERE WERE 1S, 5S, 10S, AND 20S,
8 IF I'M NOT MISTAKEN.

9 Q. OKAY. BUT YOU'RE NOT 100 PERCENT SURE AT THIS
10 POINT?

11 A. NOT 100 PERCENT SURE.

12 Q. OKAY. DID -- WAS THE MONEY RETURNED TO YOU?

13 A. IT WAS.

14 Q. BY WHOM?

15 A. I BELIEVE IT WAS DETECTIVE LOPEZ.

16 Q. OKAY. BUT SOMEONE FROM LAW ENFORCEMENT?

17 A. YES. YES.

18 Q. WHEN THE MONEY WAS RETURNED, DID IT EVENTUALLY
19 ADD UP TO THE \$400?

20 A. IT DID. IT WAS THE EXACT AMOUNT WE WERE MISSING.

21 Q. INCLUDING THE CHANGE?

22 A. WELL, THE COINS WEREN'T TAKEN. ONLY THE BILLS
23 WERE TAKEN AND THE MONEY THAT WAS UNDERNEATH THE REGISTER.

24 Q. OKAY. WHAT I'M ASKING IS THE MONEY, INCLUDING
25 THE CHANGE, DID THAT ADD UP TO THE \$400?

26 A. OH, YES, IT DID.

27 Q. OKAY. SO DID THE CHANGE REPRESENT A PORTION --
28 THE CHANGE --

1 THERE WOULD HAVE BEEN A PORTION OF THAT \$400 THAT
2 WAS CHANGE?

3 A. CORRECT.

4 Q. SHOWING YOU WHAT'S BEEN MARKED AS PEOPLE'S 4.

5 DOES PEOPLE'S 4 -- IS THAT ACCURATE AS TO WHAT
6 WAS RETURNED TO YOU?

7 A. IT IS.

8 Q. I DON'T SEE ANY 10S.

9 A. NO, THERE ARE NO 10S.

10 Q. OKAY. SO DOES THAT JOG YOUR MEMORY OR --

11 A. IT DOES. I REMEMBER SEEING THAT EXACTLY.

12 Q. YOU REMEMBER SEEING THAT THE WAY IT LOOKS THERE?

13 A. YES. IT WAS COUNTED IN FRONT OF ME EXACTLY TO
14 VERIFY THAT THAT WAS THE AMOUNT THAT WAS BEING RETURNED TO
15 ME.

16 Q. IN PEOPLE'S 5, THAT'S THE 20S?

17 A. YES.

18 Q. PEOPLE'S 6 ARE THE 5S?

19 A. YES.

20 Q. AND THE PACKAGING IN PEOPLE'S 4, THE PAPER CLIPS
21 ON THE 1S, IS THAT CONSISTENT WITH HOW THE MONEY WAS
22 PACKAGED?

23 A. IT IS.

24 Q. DURING THIS PERIOD OF TIME WHEN YOU WERE -- WHERE
25 THE DEFENDANT WAS TAKING YOUR MONEY, HOW DID YOU FEEL?

26 A. I WAS SCARED.

27 Q. DID YOU EVER CONSIDER FIGHTING?

28 A. NO.

1 A. YES, I DID.

2 Q. BEFORE I GO TO THE EXHIBITS.

3 WHAT, IF ANYTHING, DID YOU FIND, SIR?

4 A. I LOCATED A LARGE AMOUNT OF CURRENCY IN MR. SIMS'
5 RIGHT FRONT PANT POCKET.

6 MR. SWANSON: MARKING AS PEOPLE'S 4 A ONE-PAGE
7 PHOTOGRAPH WITH THE NUMBERS 15-33068 AT THE BOTTOM.

8 (PEOPLE'S EXHIBIT NO. 4, PHOTO OF CURRENCY,
9 WAS MARKED FOR IDENTIFICATION.)

10 Q. BY MR. SWANSON: JUST OUT OF CURIOSITY, THAT
11 NO. 15-33068, WHAT IS THAT?

12 A. THAT'S OUR POLICE FILE NUMBER.

13 Q. IS THAT THE FILE NUMBER THAT YOU BOOK EVIDENCE
14 UNDER WHICH SOMEONE ELSE CAN LATER RETRIEVE THAT EVIDENCE?

15 A. YES.

16 Q. AND ABOVE THAT IS A LARGE AMOUNT OF CURRENCY. IS
17 THAT THE CURRENCY YOU FOUND?

18 A. YES, IT IS.

19 Q. AND WHERE DID YOU FIND THAT?

20 A. MR. SIMS' RIGHT FRONT PANT POCKET.

21 Q. I NOTICE THAT THERE ARE PAPER CLIPS ON A NUMBER
22 OF THE STACKS OF 1S.

23 WAS THAT THE CONDITION YOU FOUND THEM IN?

24 A. YES.

25 MR. SWANSON: MARKING AS PEOPLE'S 5 A ONE-PAGE
26 PHOTOGRAPH DEPICTING A NUMBER OF \$20 BILLS ON A TABLE.

27 (PEOPLE'S EXHIBIT NO. 5, PHOTO OF \$20 BILLS
28 ON A TABLE, WAS MARKED FOR IDENTIFICATION.)

1 Q. BY MR. SWANSON: WAS THAT THE AMOUNT OF \$20 BILLS
2 YOU FOUND?

3 A. YES.

4 MR. SWANSON: AND MARKING AS PEOPLE'S 6, A ONE-PAGE
5 PHOTOGRAPH DEPICTING A NUMBER OF \$5 BILLS ON THE TABLE.

6 (PEOPLE'S EXHIBIT NO. 6, PHOTO OF \$5 BILLS
7 ON A TABLE, WAS MARKED FOR IDENTIFICATION.)

8 Q. BY MR. SWANSON: WAS THAT THE SUM OF THE \$5 BILLS
9 YOU FOUND?

10 A. YES.

11 Q. ABOUT WHAT WAS THE TOTAL AMOUNT OF THESE BILLS?

12 A. AGENT IGLESIAS COUNTED AND ADVISED ME THERE WAS A
13 TOTAL OF \$395.

14 MR. DESAI: I'M GOING TO OBJECT AS HEARSAY, YOUR HONOR.

15 THE COURT: SUSTAINED.

16 MR. DESAI: MOTION TO STRIKE.

17 THE COURT: THE RESPONSE WILL BE STRICKEN.

18 Q. BY MR. SWANSON: TURNING YOUR ATTENTION TO
19 PEOPLE'S 4, THOSE STACKS OF 18, ARE THOSE STACKS OF 25
20 DOLLARS -- 25 \$1 BILLS?

21 A. I DON'T KNOW THE DENOMINATIONS THAT THEY WERE IN.

22 Q. YOU DON'T KNOW THE SIZE, YOU MEAN?

23 A. WELL, EACH STACK, I DON'T KNOW, YOU KNOW --

24 Q. THE STACKS.

25 A. -- HOW MUCH WERE IN EACH STACK. I DON'T KNOW.

26 Q. OKAY. BUT THAT WAS THE WAY YOU FOUND --
27 YOU FOUND 18, 55 AND 20S; CORRECT?

28 A. YES.

1 Q. AND THAT'S WHAT YOU GAVE TO SOMEBODY ELSE AT SOME
2 POINT, OR DID YOU BOOK IT DIRECTLY?

3 A. NO. WHEN I RETRIEVED THE PROPERTY FROM MR. SIMS,
4 I HANDED IT DIRECTLY TO AGENT IGLESIAS.

5 Q. AND AGENT IGLESIAS BOOKED THE MONEY? OR RETURNED
6 IT TO MR. RODRIGUEZ? DO YOU KNOW?

7 A. SHE COUNTED IT AND RETURNED IT TO THE VICTIM.

8 Q. OKAY. SO SHE RETURNED THAT MONEY TO THE VICTIM
9 AFTER TAKING PICTURES OF IT?

10 A. CORRECT.

11 Q. AND, AFTER SOME POINT, WAS MR. SIMS TRANSPORTED
12 BACK TO THE STATION?

13 A. YES.

14 Q. AND DID YOU BOOK MR. SIMS?

15 A. YES, I DID.

16 MR. SWANSON: MARKING AS A ONE-PAGE PHOTOGRAPH AS
17 PEOPLE'S 7. IT'S A PHOTOGRAPH OF MR. SIMS.

18 (PEOPLE'S EXHIBIT NO. 7, PHOTO OF
19 DEFENDANT; WAS MARKED FOR IDENTIFICATION.)

20 Q. BY MR. SWANSON: IS THAT MR. SIMS?

21 A. YES.

22 MR. SWANSON: NOTHING FURTHER.

23 THE COURT: CROSS-EXAMINATION.

24

25 CROSS-EXAMINATION:

26

27 BY MR. DESAI:

28 Q. GOOD MORNING.

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1 DIDN'T PLAY THE TAPE BECAUSE I DIDN'T WANT TO SPEND ANYMORE,
2 OF YOUR TIME THAN YOU HAD TO BE HERE. I THINK IT'S IMPORTANT
3 THAT YOU HEAR ALL THE FACTS.

4 BUT WE HAD DETECTIVE LOPEZ. RIGHT? SHE
5 TESTIFIED TO WHAT HE TOLD HER. AND REMEMBER ONE THING THAT
6 THE DEFENSE ASKED HER, HE ASKED HER SOMETHING ABOUT DID HE
7 INDICATE THAT HE DIDN'T WANT TO HARM THE VICTIM? AND
8 DETECTIVE LOPEZ DIDN'T REMEMBER WHAT THE VICTIM TOLD HER --
9 I'M SORRY -- WHAT THE DEFENDANT TOLD HER.

10 SO DEFENSE COUNSEL TOOK THE TRANSCRIPT OF THE
11 CONFESSION, PLACED IT IN FRONT OF DETECTIVE LOPEZ, AND ASKED
12 HER CAN YOU REEFRESH YOUR MEMORY BY GOING -- AND I THINK HE
13 SAID EVEN A CERTAIN PAGE, PAGE 17. SHE LOOKED, SHE READ:
14 SHE SAID, YES, HE DID SAY THAT.

15 SO THAT SHOWS THAT IF THERE WAS ANYTHING ELSE
16 THAT DETECTIVE LOPEZ HAD GOTTEN WRONG WHEN SHE TESTIFIED AS
17 TO THE DEFENDANT'S STATEMENT, COUNSEL COULD HAVE SAID, THAT'S
18 NOT ACCURATE, CORRECT? HE COULD HAVE IMPEACHED HER WITH THIS
19 DOCUMENT.

20 SO THE FACT THAT IT WAS TAPED AND THE FACT THAT
21 IT'S RECORDED AND THAT THE DEFENSE COUNSEL HAS A COPY, THAT'S
22 ALL IMPORTANT BECAUSE IT SHOWS THAT THE STATEMENTS THAT WERE
23 MADE ARE ACCURATE. AND THAT DETECTIVE LOPEZ' STATEMENTS
24 ABOUT WHAT THE DEFENDANT TOLD HER, THOSE STATEMENTS ARE
25 ACCURATE TOO AND YOU CAN TRUST THEM. OKAY?

26 SO, IN SUM, I TOLD YOU IT WAS GOING TO BE QUICK,
27 BUT SERIOUS. BOX CUTTERS. AND, HOPEFULLY, NO ONE EVER HAS
28 TO SEE WHAT BOX CUTTERS CAN DO. BUT WE CAN IMAGINE WHAT THEY

4

1 and you're going to be there for her, right? Because there's always
2 redemption after, right. To me, and this is just, I'm not a religious person
3 by nature, but this is the way I look at things. Unless you murdered
4 somebody, or you raped somebody, all things can be recovered from.
5 Because if you murder somebody, obviously you can't un-ring the bell,
6 right. And if rape some woman, and I'm not saying you have, I'm just
7 using as an example, that's not something you could ever undo for a
8 person, okay. With what happened this morning, yeah it was stupid.
9 You made a mistake, no doubt. I'm not going to, I'm not going to sit here
10 and lie to you. You made a mistake. But did you end up cutting that
11 guy?

12 S Hmm?

13 L Did you end up cutting that guy?

14 S No, (***).

15 L You had a box cutter, right?

16 S I didn't cut nobody, ma'am.

17 L Okay. But you had a box cutter on you, right?

18 S I want to be cooperative. I want to be cooperative.

19 L Well then I need you to be cooperative, because I want to
20 be, you said it yourself. You're already a two-time felon. The only thing
21 that's going to help you at this point is you letting me go to the DA next
22 week and show them that you were cooperative, that you feel some
23 remorse, that you took responsibility for what you did. You know, it may
24 mean the difference between a new charge or just a violation. Who
25 knows? 'Cause you're on parole right now, right?

26 S Yeah.

27 L So right now, the only person that can help you is you.
28 Rodney's got Rodney's fate in Rodney's hands. That's the bottom line.

A) GROUNDS: PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE THE TRIAL ATTORNEY FAILED TO: CROSS-EXAMINE WITNESSES WITH PRIOR INCONSISTENT STATEMENTS. ALSO, REQUEST PRODUCTION OF WRITING USED TO REFRESH THE MEMORY OF WITNESS ROBIN LOPEZ, RESULTING IN PERJURY SUBORNED BY THE DEFENSE COUNSEL UNDER, NIX V. WHITESIDE 475 U.S. 157 (1986), PETITIONER IN VIOLATION OF RIGHT TO COUNSEL, ALSO, DUE PROCESS OF LAW.

B) FACTS: COUNSEL ALLOWED WITNESS ROBIN LOPEZ TO CHANGE STATEMENTS ON THE STAND. THE PROSECUTOR STATED TO WITNESS ROBIN LOPEZ, DO YOU REMEMBER, WAS THERE ANYTHING SPECIFIC IN WHAT HE TOLD THE CLERK THAT YOU RECALL OR THAT STOOD OUT TO YOU. WITNESS ROBIN LOPEZ, STATED, I RECALL THAT HE MADE A STATEMENT TO THE EFFECT OF YOU HAVE A FAMILY OR YOU PROBABLY HAVE A FAMILY DON'T YOU? HE TOLD THE CLERK TO GIVE HIM THE MONEY. IN WHICH WITNESS ROBIN LOPEZ CHANGES THE ORIGINAL STATEMENT TO CORROBORATE PETITIONER'S INTERROGATION REPORT, STATING, I HAD MADE A COMMENT TO THE EFFECT OF BECAUSE HE HAD A FAMILY LIKE YOU DO OR SOMETHING TO THAT EFFECT. SEE, PG. 334, LINE, 9-14, PG. 355, LINE, 8-10, PG. 17, LINE, 25-:

(1)

APPENDIX H

2. A) GROUNDS: PROSECUTOR FAILED TO CORRECT WITNESS
PERTURBED TESTIMONY, UNDER, DEMARCO V. U.S.,
928 F.2D 1074 (11th CIR. 1991). FAILURE OF PROSECUTOR
TO CORRECT PERTURBED TESTIMONY OF WITNESS IS
GROUNDS FOR REVERSAL OF CONVICTION.

B) FACTS: THE PROSECUTOR ORIGINAL QUESTION WAS NOT
ABOUT WHAT STATEMENT PETITIONER MADE IN
REGARDS TO HAVING A FAMILY. THE ORIGINAL
QUESTION WAS, DO YOU REMEMBER, WAS THERE
ANYTHING SPECIFIC IN WHAT HE TOLD THE CLERK
THAT YOU RECALL OR THAT STOOD OUT TO YOU?
THE WITNESS ROBIN LOPEZ, MADE THE STATEMENT,
I RECALL THAT HE MADE A STATEMENT TO THE
EFFECT OF YOU HAVE A FAMILY OR YOU PROBABLY
HAVE A FAMILY, DON'T YOU? HE TOLD THE CLERK
TO GIVE HIM THE MONEY.

THE PROSECUTOR FAILED TO CORRECT THE WITNESS
PERTURBED TESTIMONY, ALLOWING THE WITNESS TO
REENTER TESTIMONY TO CORROBORATE WITH THE
INTERROGATION REPORT. SEE. PG. 334, LINE, 9-14, PG. 355,
LINE, 1-10, ALSO, PG. 17, LINE, 25-26.

3. A) GROUNDS: COUNSEL FAILED TO DISCLOSE EVIDENCE THAT
COULD HAVE BEEN USED TO IMPEACH THE PRINCIPAL
PROSECUTION WITNESS ROBIN LOPEZ, IN VIOLATION
(2) OF DUE PROCESS OF LAW, UNDER, U.S. V. SMITH,

77 F.3d 511 (D.C. Cir. 1996), THE FEDERAL COURT STATED, GOVERNMENT FAILURE TO DISCLOSE INFORMATION THAT COULD HAVE BEEN USED TO IMPEACH CREDIBILITY OF PRINCIPAL PROSECUTION WITNESS WARRANTS A REVERSAL.

B) FACTS: THE PRINCIPAL PROSECUTION WITNESS ROBIN LOPEZ, STATED, HE TOLD ME THAT HE APPROACHED THE VICTIM WITH A BOX CUTTER IN ONE HAND AND A SCRENDRIVER IN THE OTHER HAND AND THAT HE DEMANDED THAT THE CLERK GIVE HIM THE MONEY FROM THE CASH REGISTER. COUNSEL FAILED TO DISCLOSE PETITIONER'S INTERROGATION REPORT AS EVIDENCE TO SUPPORT WITNESS ROBIN LOPEZ'S FALSE TESTIMONY. SEE, PG. 334, LINE, 1-4, ALSO, PG. 23, LINE, 16-18

4. A) GROUNDS: COUNSEL FAILED EFFECTIVELY TO DEFEND AGAINST PERJURED STATEMENTS OF THE PRINCIPAL PROSECUTION WITNESS ROBIN LOPEZ IN CONCERN OF THE ORIGINAL STATEMENT ON RECORD. UNDER, U.S. V. CRONIC, 466 U.S. 648 (1985), PETITIONER'S COUNSEL SO UTTERLY FAILED TO DEFEND AGAINST THE CHARGES THAT THE TRIAL WAS FUNCTIONAL EQUIVALENT OF A GUILTY PLEA, RENDERING COUNSEL'S REPRESENTATION PRESUMPTIVELY INADEQUATE, IN VIOLATION OF RIGHT TO COUNSEL, ALSO, DUE PROCESS OF LAW. (3)

B). FACTS: THE PRINCIPAL PROSECUTION WITNESS ROBIN LOPEZ PROVIDED FALSE TESTIMONY, STATING THAT PETITIONER STATED, HE TOLD ME THAT HE APPROACHED THE VICTIM WITH A BOX CUTTER IN ONE HAND AND A SCREWDRIIVER IN THE OTHER HAND AND THAT HE DEMANDED THAT THE CLERK GIVE HIM THE MONEY FROM THE CASH REGISTER, AMONGST OTHER FALSE TESTIMONY.

COUNSEL ONLY DEFENSE WAS TO ACKNOWLEDGE PETITIONER'S GUILT AND MISSTATEMENTS. BUT NEVER DID COUNSEL DEFEND PETITIONER OF THE SUPPOSED INCRIMINATING STATEMENTS, STATED, BY WITNESS ROBIN LOPEZ. SEE PG. 334, LINE. 1-4, PG. 23, LINE. 16-18, PG. 359, LN. 14

PETITIONER MADE OUT A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA UNREASONABLY FOUND THE FACTS WHEN IT FAILED TO HOLD A HEARING ON DISPUTED FACTUAL ISSUES IN PETITIONER'S REPLY TO RESPONDENTS ANSWER FILED ON MAY 3, 2019, ACCEPTING PETITIONER'S ALLEGATIONS AS TRUE.

5. A) GROUNDS: THE TESTIMONY OR EVIDENCE WAS ACTUALLY FALSE UNDER, U.S. V. CUFFIE, 80 F.3d 514 (D.C. Cir. 1996), UNDISCLOSED EVIDENCE THAT PROSECUTION WITNESS HAD LIED IN EARLIER COURT PROCEEDING IN SAME CASE WAS ENOUGH FOR REVERSAL OF CONVICTION.

B) FACTS: AROUND OR ATLEAST 30 DAYS LATER AFTER THE INCIDENT, DURING PETITIONER'S PRELIMINARY HEARING. THE PROSECUTOR ASKED WITNESS ENRIQUE RODRIGUEZ, SO YOU WERE AWARE OF HOW MUCH WAS IN THE REGISTER PRIOR TO OPENING IT? WITNESS RODRIGUEZ, REPLIED, YES.

IN SAME PROCEEDING, DEFENSE COUNSEL ASKED WITNESS ENRIQUE RODRIGUEZ, SO YOU DIDNT COUNT EXACTLY HOW MUCH MONEY WAS MISSING? WITNESS RODRIGUEZ, REPLIED, I DON'T REMEMBER EXACTLY, THE WITNESS ALSO STATED, BUT EXAKTLY HOW MUCH WAS BILLS AND HOW MUCH WAS COINS, I DON'T RECALL TO BE HONEST WITH YOU.

8 MONTHS LATER DURING PETITIONER'S ORIGINAL TRIAL. THE PROSECUTOR ASKED WITNESS ENRIQUE RODRIGUEZ, WHEN THE MONEY WAS RETURNED, DID IT EVENTUALLY ADD UP TO THE \$400. WITNESS RODRIGUEZ, REPLIED, IT DID. IT WAS THE EXACT AMOUNT WE WERE MISSING. REFER TO SUPPORTING DOCUMENTS, SEE, PG. 8, LINE, 10-12, PG. 9, LINE, 10-16, ALSO, PG. 390, LINE, 18-26 AND, PG. 391, LINE 1-3.

6. A) GROUNDS: PROSECUTION KNEW OR SHOULD HAVE KNOWN THAT THE TESTIMONY OR EVIDENCE WAS FALSE, UNDER NAPUE V. ILLINOIS, 360 U.S. 264 (1959), THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN A CONVICTION,

B) FACTS: THE PROSECUTOR KNEW THAT THE TESTIMONY FROM WITNESS RAYMOND COTA WAS FALSE, BECAUSE WHEN WITNESS COTA STATED, THAT WHEN HE RETRIEVED THE PROPERTY FROM MR. SIMS HE HANDED IT DIRECTLY TO AGENT IGLESIAS. PROSECUTOR STATES, AND AGENT IGLESIAS BOOKED THE MONEY? OR RETURNED IT TO MR. RODRIGUEZ? DO YOU KNOW? OFFICER WITNESS COTA STATES, SHE COUNTED IT AND RETURNED IT TO THE VICTIM. BUT THE RECORD SHOWS THAT THE EVIDENCE WAS PHOTOGRAPHED AND BOOKED UNDER FILE NO. 15-33068.

PREVIOUS TESTIMONY, WITNESS RAYMOND COTA VERIFIED THAT, THAT IS THE FILE NUMBER THAT WHICH EVIDENCE IS BOOKED UNDER. LATER STATED BY WITNESS COTA, THAT THE MONEY WAS NOT BOOKED BUT COUNTED AND RETURNED TO THE VICTIM. SEE, PG. 323, LINE, ■-■, ALSO, PG. 321, LINE, ■-■
3-7 10-15

7. A) GROUNDS: THE FALSE TESTIMONY OR EVIDENCE WAS MATERIAL, ALSO, UNDER, MILLER V. PATE, 386 U.S. 1 (1966). PETITIONER CONVICTION WAS BASED ON EVIDENCE KNOWN TO BE FALSE. VIOLATING PETITIONER RIGHT TO A FAIR TRIAL.

B) FACTS: WITNESS ENRIQUE RODRIGUEZ TESTIFIED TO THE DENOMINATIONS OF 1, 5, 10 AND ~~20~~ \$20 BILLS, AS WELL AS REMEMBERING THE PACKAGING OF \$1 BILLS. BUT DID NOT REMEMBER HOW MANY OF THEM THERE WERE. IN EARLIER COURT PROCEEDING WITNESS RODRIGUEZ VERIFIED THAT HE WAS AWARE OF HOW MUCH MONEY WAS IN THE REGISTER PRIOR TO OPENING IT. Pg. 390, LINE 3-7. ALSO, PG. 8, LINE 10-12

ALSO, WITNESS RAYMOND COTA, TESTIFIED TO THE AMOUNT OF \$20 BILLS AND THE SUM OF \$5 BILLS. BUT WHEN QUESTIONED IN CONCERN OF THE STACK OF \$1 BILLS, WITNESS COTA, STATED, HE DID NOT KNOW HOW MUCH WERE IN EACH STACK. ALSO, THERE IS TWO CONFLICTING DETAILS IN CONCERN OF THE CURRENCY. WITNESS RAYMOND COTA, TESTIFIED TO \$1, \$5 AND \$20 BILLS. WITNESS ENRIQUE RODRIGUEZ, TESTIFIED TO \$1, \$5, \$10 AND \$20 BILLS. SEE, ~~PG. 389, LINE 17-20~~, AND, PG. 389, LINE 17-20, PG. 390, LINE 3-7 AND, PG. 322, LINE 1-28 AND, PG. 391, LINE 5-9

8. A) GROUNDS: PROSECUTOR VOUCHING, UNDER, U.S. V. YOUNG 470 U.S. 1 (1985), PETITIONER'S CONVICTION FOLLOWED FROM THE PROSECUTOR'S VOUCHING FOR THE CREDIBILITY OF A WITNESS. VIOLATION OF DUE PROCESS OF LAW.

B) FACTS: WITNESS RAYMOND COTA WAS ASKED BY THE PROSECUTOR IF HE KNEW OR NOT IF AGENT IGLESIAS BOOKED THE MONEY OR RETURNED IT TO MR. RODRIGUEZ. WITNESS COTA STATED, SHE COUNTED IT AND RETURNED IT TO THE VICTIM. THE PROSECUTOR KNEW THAT WITNESS COTA GAVE PERJURED TESTIMONY, SO TO SECURE THE WITNESS CREDIBILITY, THE PROSECUTOR VOUCHES FOR THE WITNESS BY STATING, OKAY, SO SHE RETURNED THAT MONEY TO THE VICTIM AFTER TAKING PICTURES OF IT. WITNESS COTA STATES, CORRECT. SEE. PG. 323, LINE, 5-10

THE PROSECUTOR ALSO VOUCHES FOR WITNESS ROBIN LOPEZ STATING, SO THAT SHOWS THAT IF THERE WAS ANYTHING ELSE THAT DETECTIVE LOPEZ HAD GOTTEN WRONG WHEN SHE TESTIFIED AS TO THE DEFENDANT'S STATEMENT, COUNSEL COULD HAVE SAID, THAT'S NOT ACCURATE, CORRECT? HE COULD HAVE IMPEACHED HER WITH THIS DOCUMENT.

SO THE FACT THAT IT WAS TAPED AND THE FACT THAT IT'S RECORDED AND THAT THE DEFENSE COUNSEL HAS A COPY, THAT'S ALL IMPORTANT BECAUSE IT SHOWS THAT THE STATEMENTS THAT WERE MADE ARE ACCURATE. AND THAT DETECTIVE LOPEZ

STATEMENTS ABOUT WHAT THE DEFENDANT TOLD HER, THOSE STATEMENTS ARE ACCURATE TOO AND YOU CAN TRUST THEM. OKAY? SEE, PG, 409, LINES, 15-25

PETITIONER HAS SHOWN SEVERAL CONSTITUTIONAL VIOLATIONS DUE PROCESS OF RIGHTS ACTS INVOLVING PETITIONER DEFENSE COUNSELOR, ~~TRIAL~~ PROSECUTOR. AS WELL AS PERJURED TESTIMONY AGAINST THE PRINCIPAL PROSECUTION WITNESS ROBIN LOPEZ, AND WITNESS ENRIQUE RODRIGUEZ ALSO, WITNESS RAYMOND COTA. PETITIONER ALSO DEMONSTRATES OFFICIAL MISCONDUCT ON BEHALF OF THE MONTEREY PARK POLICE DEPARTMENT, TAMPERING WITH EVIDENCE.

CONCLUSION

BASED ON THE FOREGOING REASONS, PETITIONER RESPECTFULLY SUBMITS THAT THE COURTS JUDGEMENT IS SUBJECT TO DEBATE AMONG JURISTS OF REASON: AND CONSEQUENTLY GRANTED RELIEF, AND THAT A COA SHOULD BE GRANTED ON ONE OR MORE OF THE ISSUES PREVIOUSLY LISTED.

DATED; JULY 24, 2019

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RESPECTFULLY SUBMITTED,
Rodney Louis Sims
PETITIONER.