No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMEN RABB,
Petitioner,

- v. -

CHRISTIAN PFEIFFER, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are as follows:

1. After a court of appeals finds that a petitioner has met the prima facie threshold to proceed in a successive petition pursuant to 28 U.S.C. § 2244(b)(2)(B), does due process require that the district court give the petitioner a fair opportunity to provide proof supporting his claims, including his claim that he is innocent, when the petitioner previously made repeated diligent efforts to stay his original appellate proceeding in order to further develop the record, but was prevented by the courts from returning to the district court to do so?

2. Did the Ninth Circuit Court of Appeals' summary denial of a certificate of appealability disregard the standards guiding COA determinations?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. Petitioner is not a corporation.

TABLE OF CONTENTS

page

TABLE OF CONTENTS

INDEX OF APPENDICES

page

VOLUME I

INDEX OF APPENDICES

page

VOLUME II

VOLUME III

TABLE OF AUTHORITIES

FEDERAL CASES **page(s)**

TABLE OF AUTHORITIES

FEDERAL CASES **page(s)**

FEDERAL STATUTES

TABLE OF AUTHORITIES

STATE CASES **page(s)**

STATE STATUTES

MISCELLANEOUS

INTRODUCTION

Damen Rabb, Sr. ("Mr. Rabb" or "Petitioner") is serving a seventy-five-years-to-life sentence for being a black man who made the mistake of having once been a gang member. It sure is not because he is guilty of an actual crime, or because the underlying conviction remains reliable, because it is undisputed that both of the victim-witnesses, Maurice Farmer and De'Shawn Chappell, have categorically stated that Mr. Rabb was not their assailant. What has been disputed is whether Messrs. Farmer and Chappell, themselves both black and gang members, are credible.

The determination of the magistrate judge in the Report and Recommendation is that the sworn statements of both men are worthless. (Pet. App. D-20.) That conclusion was made without ever hearing from either man in-person, without ever having judged their demeanor or heard the steadiness of their voices in conveying the powerful story of how Los Angeles Police Department ("LAPD") officers lied about Mr. Farmer and Mr. Chappell's actions and emotional state on the night of the crimes.

The district court's determination that Mr. Farmer and Mr. Chappell are incredible, came without the benefit of a hearing, or even deposition testimony to illuminate the credibility of the victims of his supposed crimes -- both of whom have categorically stated that Mr. Rabb is innocent. Mr. Rabb has come forward with evidence of his innocence that was never presented to the trier of fact. He has also provided evidence of potential perjury by members of the LAPD. An evidentiary hearing is necessary to provide Mr. Rabb with the opportunity to prove that LAPD officers lied about the disposition of the victims on the night of the crime so that manufactured statements could be entered through LAPD officers pursuant to California Code of Evidence § 1240, pertaining to "excited utterances."

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Based on the victims' sworn declarations exonerating Mr. Rabb as their assailant, the Ninth Circuit authorized the filing of a second or successive 28 U.S.C. § 2254 habeas corpus petition, finding that Mr. Rabb had made a prima facie showing for authorization under 28 U.S.C. § 2244(b)(2)(B). While the magistrate court was expected to examine the merits of Mr. Rabb's claims and/or whether the procedural requirements of 28 U.S.C. §§ 2244 and 2254 have been satisfied, the magistrate court did more than that, determining that there was "ample evidence" of "Petitioner's guilt." (Pet. App. D-27 n.2.) In fact, a critical review of the evidence against Mr. Rabb reveals it to be weak.

The magistrate court did not permit factual development, so the evidence against Mr. Rabb that was cited by the magistrate court was the exact same evidence that was before the Ninth Circuit, as was the newly discovered evidence. Thus, the very same evidence that the Ninth Circuit found constituted a prima facie showing, was the basis for the magistrate court's recommended dismissal. The magistrate court reached its conclusion without any process for testing the newly discovered evidence.

Because the district court's interpretation of the value of the exact same evidence is at odds with the Ninth Circuit's determination, it seems axiomatic that jurists of reason would at least find it debatable whether the petition states a valid claim of the denial of a constitutional right.

OPINIONS AND ORDERS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability on the procedural issues and substantive claims on which this petition is based was entered on January 14, 2021. *Rabb v. Spearman*, No. 20-55204, 2021 U.S. App. LEXIS 5862 (9th Cir. Jan. 14, 2021) (Pet. App. A-1). The Judgment and Order Accepting Findings and Recommendations of U.S. Magistrate

Judge denying Mr. Rabb's federal habeas petition was entered on January 30, 2020. *Rabb v. Spearman*, No. CV 17-9318-JAK (JPR), 2020 U.S. Dist. LEXIS 16157 (C.D. Cal. Jan. 30, 2020) (Pet. App. B-2, C-3). The Report and Recommendation of the Magistrate Court was entered on September 24, 2019. *Rabb v. Spearman*, No. CV 17-9318-JAK (JPR), 2019 U.S. Dist. LEXIS 208594 (C.D. Cal. Sep. 24, 2019) (Pet. App. D-20). The district court denied a Fed.R.Civ.Proc. 59(e) motion on April 1, 2020. (Pet. App. E-82.)

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit denying a certificate of appealability on the procedural issues and substantive claims addressed herein was entered on January 14, 2021. (*See* Pet. App. A-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Sixth and Fourteenth Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

> [N]or shall any state shall deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. Amend. XIV.

> The Petition also involves the following provisions of the federal habeas corpus statute:

28 U.S.C. § 2244. Finality of determination

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 [*28 U.S.C. § 2254*] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless--

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

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . .

(3)(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection. . . .

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(*See* Pet. App. X-324.)

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28 U.S.C. § 2253(c) –

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court....
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Mr. Rabb's innocence of the crimes for which he is incarcerated is not simply an allegation -- it has been confirmed by the two victim-witnesses in this case, Maurice Farmer and De'Shawn Chappell. (Pet. App. F-86-90.) Mr. Farmer was the primary victim of the crime. He stood inches from his assailant, who pulled a gun on him, reached into Mr. Farmer's pocket and took his money, and then stole the borrowed rental car Mr. Farmer was driving. Mr. Farmer was in the perfect position to identify his assailant. But Mr. Farmer did not testify, nor did Mr. Chappell, the other victim. In their place, the trial court allowed the testimony of Los Angeles Police Department Sergeant Frank Banuelos, who testified to purported excited utterances of Mr. Farmer and Mr. Chappell regarding what their assailant looked like and supposedly said during the robbery. During the pendency of Mr. Rabb's first appeal in the Ninth Circuit, counsel obtained their sworn declarations, revealing that Mr. Farmer and Mr. Chappell were not excited, as both men unequivocally state that they were calm. Thus, their statements were improperly admitted based on false testimony by Sgt. Banuelos. Absent his improperly admitted testimony, there could not have been a conviction.

Indeed, in his sworn declaration, Mr. Farmer categorically states that Mr. Rabb is not the man who robbed him:

> I remember the guy that robbed me and gun point at the gas station because I was pumping the gas when the gunmen stuck his hand in my poket and stolen my cash and then proseeded to the driver side of the car were my cousin Deshawn Chappell was sitting in the car.
>
> I seen photos which I signed the ones that Brian Pomerantz has shown me today . . . are not the person that robbed me that night I was car jacked.

(Pet. App 86 [*sic*].)[1]

Unfortunately, because non-capital habeas petitioners have no automatic right to postconviction counsel, Mr. Rabb, who was operating *pro se* in his state postconviction and his federal habeas until the Ninth Circuit appointed counsel on appeal, had no means or mechanisms to interview or even approach the witnesses earlier.[2] Moreover, Mr. Rabb's request for access to evidence that exonerates him was denied by the district court. (Pet. App. G-91-93.)

Because of the declarations obtained by appointed federal appellate counsel, there is now evidence demonstrating what Mr. Rabb has contended all along -- he is innocent. In Mr. Rabb's initial appeal, the Ninth Circuit, citing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), deferred to the California Court of Appeal's factually and legally flawed opinion that held that any error was harmless. (Pet. App. H-94.) Mr. Rabb then applied for leave to file a second or successive petition

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[1] On the back of the photograph of Mr. Rabb that was shown to Mr. Farmer on March 4, 2016, by Mr. Rabb's counsel, Mr. Farmer clarified that "[Mr. Rabb] is not the guy that jacked me for the car." (Pet. App. F-89.)

[2] *See* Givelber, Daniel, *The Right To Counsel In Collateral, Post-Conviction Proceedings*, 58 Md. L. Rev. 1393, 1395, 1409 (1999) (discussing the difficulty of gathering evidence while in prison and the lack of process guarantees in post conviction that exacerbate the problem).

under 28 U.S.C. § 2254. (Pet. App. I-97.) Finding that the application made a prima facie showing for authorization under 28 U.S.C. § 2244(b)(2)(B), the Ninth Circuit granted the application. (Pet. App. J-103.) It is from the disposition of that application that this petition for writ of certiorari arises.

The petition authorized by the Ninth Circuit was not fairly considered by the district court, which held that Mr. Rabb was not diligent and that there was evidence sufficient to convince the court of his guilt, without affording Mr. Rabb the opportunity to fully develop his supporting evidence through discovery or at a hearing in order to prove his allegations and entitlement to a successive petition. The court baselessly concluded that Mr. Rabb was guilty despite Maurice Farmer and De'Shawn Chappell saying that Mr. Rabb is innocent of robbing them. The only victims of the crime adamantly and consistently have exonerated Mr. Rabb, but the district court concluded that they were incredible without ever hearing from either man. There were no credibility findings based on a judge's firsthand observations, as Mr. Rabb was denied the opportunity to prove his claims. Neither victim has ever identified Mr. Rabb as their assailant, testified regarding his guilt, or as far as is known, even told anyone that Mr. Rabb was the man who robbed and carjacked them. The second or successive petition statute exists to prevent a manifest injustice, but Mr. Rabb has not been permitted to properly prove his case pursuant to that statute. Mr. Rabb is an innocent man who has served over fourteen years of a seventy-five-years-to-life sentence. Absent relief, he will not be eligible for parole for decades.

A. Procedural History

Mr. Rabb is a prisoner in state custody pursuant to a judgment of conviction in Los Angeles County Superior Court, Case Number BA290495. Mr. Rabb was convicted by a Los Angeles County Superior Court jury of two counts of carjacking in violation

of California Penal Code § 215(a), and two counts of second-degree robbery in violation of California Penal Code § 211. (Pet. App. K-106.) The jury also found true that a principal to the offenses was armed with a firearm, Mr. Rabb personally used a firearm, and he committed the offenses for the benefit of a criminal street gang, in violation of California Penal Code §§ 12022(a)(1), 12022.53(b), and 186.22(b)(1)(C). (*Id.*) The trial court determined that he had suffered two prior "serious felony" and "strike" convictions (Cal. Penal Code §§ 667(a)(1), (b)-(i); §§ 1170.12(a)-(d)). (*Id.*) Mr. Rabb was sentenced to a total prison term of 75 years to life. (*Id.*)

1. State Trial Court Proceedings

On September 19, 2005, at approximately 1:30 a.m., Los Angeles Police Department (LAPD) Officer David Ashley received a radio call broadcast that possible crimes had occurred at a gas station on the corner of Figueroa Street and Vernon Avenue. Within five minutes of receiving the radio call, Ashley arrived at the location where victims Maurice Farmer and De'Shawn Chappell were robbed and carjacked. Neither victim-witness testified at trial. Officer Ashley testified that Mr. Farmer appeared nervous and upset. He allegedly told Officer Ashley that a man had pointed a gun at him, asked him where he was from, and then took his borrowed rental car. Mr. Farmer allegedly described the assailant as a black male wearing a light blue tee-shirt, medium build, five feet six inches tall, with light skin, braids in his hair, a tattoo of a teardrop under his right eye, and a tattoo of a hand and finger on his forearm. Officer Ashley also testified that Mr. Farmer told him that a green Toyota Camry was involved in the incident. Officer Ashley testified that he immediately broadcasted the information he received from Mr. Farmer to LAPD units and stayed at the gas station with Messrs. Farmer and Chappell.

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Around the same time, Sergeant Frank Banuelos was on patrol about a mile away from the gas station when he saw a green Camry speeding with its lights off. After the car failed to stop at a red light, Sgt. Banuelos initiated a traffic stop. He parked approximately 30 feet away from the stopped Camry and illuminated the area with his police vehicle's overhead lights and spotlight. The female driver and a male passenger exited the Camry. The male passenger stared at Sgt. Banuelos for two to four seconds and then ran away. Sgt. Banuelos testified that before the passenger fled, the officer had the opportunity to observe that the passenger was a heavyset black male wearing a light blue long-sleeved shirt, and had light skin, braided hair, and a tattoo of a teardrop on his right cheek. Sgt. Banuelos radioed for assistance in setting up a perimeter and then detained the Camry's driver, who was later identified as Kendra Brown. As Sgt. Banuelos was placing Ms. Brown into custody, she spontaneously asked him whether her detention was related to what happened "at the gas station." Sgt. Banuelos asked Ms. Brown what gas station she was referring to, and she identified the gas station on Figueroa Street and Vernon Avenue. Sgt. Banuelos immediately called the LAPD communications division to inquire about whether there had been a request for service at a gas station on Figueroa Street and Vernon Avenue, and was connected through to Officer Ashley. Officer Ashley explained that he was at that location investigating a carjacking of a rental car and that the separate getaway vehicle was a green Camry. Sgt. Banuelos left Ms. Brown with another unit and drove to the gas station. He arrived at the gas station approximately 15 minutes after the thefts had occurred.

According to Sgt. Banuelos, both Mr. Farmer and Mr. Chappell appeared under "stress" from the incident. (Pet. App. L-138.) They were pacing back and forth and appeared "excited . . . mad, [and] physically shaken." (*Id.*) Sgt. Banuelos testified that

he had difficulty calming them down in order to speak with them. Sgt. Banuelos spoke with Mr. Farmer first, who said that he had been robbed of his vehicle and some personal property at gunpoint. Sgt. Banuelos testified that Mr. Farmer said he was pumping gas into a borrowed rental car when a green Camry, driven by a woman, approached him. A man (the assailant) exited the Camry, pointed a gun at Mr. Farmer, and asked him where he was from. Meanwhile, another man carrying a gun exited the Camry from the rear right passenger door and acted as a lookout. Mr. Farmer told the assailant that he was not a gang member. The assailant pointed the gun at Mr. Farmer, allegedly said "it's that 40's life" (Pet. App. L-142), and then took fifteen dollars from Mr. Farmer. After the assailant took the fifteen dollars from Mr. Farmer, the assailant asked Mr. Chappell whether he had any property and he responded in the negative.

Mr. Chappell told Sgt. Banuelos that the assailant had pointed a gun at him and had instructed him to get out of the rental car. Mr. Chappell complied and the assailant got in the rental car and drove off. The lookout reentered the Camry and that car drove off as well. According to Sgt. Banuelos, Mr. Chappell stated that during the incident he was afraid he would die. Sgt. Banuelos testified that both Mr. Farmer and Mr. Chappell described the assailant who drove off in the rental car as a black male with a blue shirt, braids, a tattoo under his right eye, and a tattoo on his forearm of a hand making a gang sign.

Back at the Camry's location, LAPD Officer Eddie Martinez was standing by with Kendra Brown in custody. A man, later identified as Earl Parron, walked up to the scene and asked the officers "what was going on." Mr. Parron, who is black, had broken leaves on his sweater. Officer Martinez and his partner decided to detain Parron because Sgt. Banuelos had told them that a black male had fled from the scene

earlier and Mr. Parron appeared as though he might have been running or possibly hiding based on the broken leaves on his sweater. When Sgt. Banuelos returned to the Camry's location, he indicated that Mr. Parron was not the man that he saw fleeing earlier from the Camry.

Officer Ashley testified that at around the same time, he transported Mr. Farmer and Mr. Chappell to the Camry's location for a field showup. According to Officer Ashley, as soon as Mr. Farmer and Mr. Chappell approached the location, they saw the green Camry and yelled, "that's the car, that's the car." Officer Ashley also claimed that they recognized Ms. Brown as the driver of the Camry and Mr. Parron as the lookout. Officer Ashley said that the witnesses told him that Mr. Parron and the assailant were carrying blue steel revolvers. Officers searched the Camry and found three loaded blue steel revolvers in the trunk.

That night, Sgt. Banuelos learned that the green Camry was registered to a person named Tequila Richmond. Sgt. Banuelos sent two officers to Ms. Richmond's home address. Ms. Richmond was never called to testify and there is no independent evidence of her statement. Sgt. Banuelos testified via double hearsay, and without objection, that the officers asked her about the whereabouts of her vehicle, and she told them that the green Camry belonged to her and that she had loaned it to Damen Rabb, her boyfriend. (Pet. App. L-161.) Sgt. Banuelos testified that he asked station officers to run a check on that name and they sent him a booking photograph of Mr. Rabb. At trial, Sgt. Banuelos testified that the person in the booking photograph was the person who he saw flee from the Camry.

The day after the robbery, officers located the rental car in an area where Ms. Brown had told them they would find it. Also on that day, LAPD Detective Theodore Williams interviewed co-defendant Parron, who was in custody, after he had waived

his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). According to Det. Williams, Mr. Parron told him the following:

> On the day of the incident, Parron, Brown, and [Mr. Rabb] were at the gas station on Figueroa Street and Vernon Avenue when they saw Farmer and Chappell. [Mr. Rabb] stated that he wanted to talk with Farmer and Chappell, and instructed Parron to act as his "backup" in case problems arose. Both [Mr. Rabb] and Parron were carrying handguns at the time. Parron saw [Mr. Rabb] approach Farmer and Chappell, board [Farmer's car], and drive off. Detective Williams prepared a six-pack photographic display that contained [Mr. Rabb's] photograph and presented it to Parron. Parron circled [Mr. Rabb's] photograph and identified [Mr. Rabb] as the individual who took Farmer's [car] at gunpoint. During the interview with Detective Williams, Parron appeared nervous and scared. Parron subsequently entered a plea of no contest to one count of carjacking. [Mr. Rabb] was arrested sometime after the incident in question.

(Pet. App. K-110.)

The State court's casual reference to Mr. Rabb being arrested "sometime after the incident in question," does little to explain yet other highly unusual facts in this case. In addition to being convicted without the testimony of either victim-witness, Mr. Rabb was not arrested until more than a year after the incident, and critical property booked in this case was destroyed just ten days after Mr. Rabb's arrest. That destruction on September 22, 2006, of two of the weapons recovered from the Camry (Pet. App. M-167), was six weeks before Mr. Rabb's preliminary hearing, and two months before an Information was filed against him. The guns were never fingerprinted, or if they were, no fingerprint report was ever given to the defense.

By the time of Mr. Rabb's trial, Mr. Farmer and Mr. Chappell were in custody on murder charges for an unrelated incident.[3] Outside the presence of the jury, both

[3] The California Court of Appeal referred to the victims being in custody on "unrelated charges" (Pet. App. K-106), but that is misleading. The murder charges Mr. Farmer and Mr. Chappell faced were unrelated to the carjacking, but related to one

individuals invoked their Fifth Amendment right against self-incrimination and the trial court ruled that they would not be required to take the witness stand at Mr. Rabb's trial. Kendra Brown, who was in custody pursuant to a plea agreement, also invoked her Fifth Amendment right against self-incrimination outside the presence of the jury and refused to testify. Co-defendant Parron did testify at trial, saying that he was not acquainted with Mr. Rabb and did not recognize him. Mr. Parron denied ever having spoken with Detective Williams, and denied identifying Mr. Rabb in a photographic display.

On behalf of the defense, private investigator Daniel Mendoza testified that in May 2007, he interviewed co-defendant Parron while Mr. Parron was in custody. During the interview, Mr. Parron allegedly told Mr. Mendoza the following: On the night of September 19, 2005, Mr. Parron consumed two grams of marijuana, two ecstasy pills, and a bottle of vodka at a party. After Mr. Parron was detained, the police coerced him into making certain incriminating statements. Mr. Parron denied knowing Mr. Rabb and stated that he did not recognize Mr. Rabb's photograph.

During the prosecution's case, the trial court told the jury that:

> The court is taking judicial notice and hereby advising the jury that Maurice Farmer was called as a witness in this case outside the presence of the jury, and that Maurice Farmer, with the advice of his counsel, refused to testify, basing his refusal on his constitutional privilege against self-incrimination.

(Pet. App. L-135.)

> The court is taking judicial notice of and is hereby advising the jury that DeShawn Chappell was called as a witness in this case outside the presence of the jury, and that DeShawn Chappell, with the advice of counsel, refused to testify, basing his refusal on self-incrimination.

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another, as it was the same murder.

(Pet. App. L-135-36 [*sic*].)

That statement misled the jury, as Mr. Chappell's attorney actually advised Mr. Chappell that he did not see any harm to his testifying and did not suggest that he invoke his Fifth Amendment right.

2. State Appellate Proceedings

Mr. Rabb filed a direct appeal from his conviction in the California Court of Appeal, case no. B206611. Among other things, the appellate brief on direct appeal, filed March 13, 2009, argued that: (1) the trial court erred by sustaining each victim's claim of a Fifth Amendment privilege against self-incrimination without requiring them to be sworn and without asking them specific questions so that it could determine whether each victim had a valid Fifth Amendment privilege; and (2) Mr. Rabb's Sixth Amendment confrontation clause right to confront the witnesses against him was violated by the trial court's rulings allowing Sgt. Banuelos to testify about the statements the victims made to him because the statements were testimonial and Mr. Rabb never had the opportunity to cross-examine the victims, and the statements were not admitted under any exception to the hearsay rule.

On February 10, 2010, the California Court of Appeal affirmed Mr. Rabb's convictions, but noted that the trial court erred in permitting Mr. Chappell to invoke the Fifth Amendment despite his attorney's advice that there was no need to do so. (Pet. App. K-124.) Mr. Rabb filed a petition for review in the California Supreme Court on those claims. It was denied on May 20, 2010. *People v. Rabb (Damen)*, No. S180644, 2010 Cal. LEXIS 4826 (May 20, 2010).

3. State Habeas Proceedings

On February 22, 2011, Mr. Rabb filed a *pro se* habeas petition in the California Supreme Court, case no. S190891, raising claims corresponding to other claims in the

direct appeal. The California Supreme Court denied it on August 10, 2011, with a citation to *In re Waltreus*, 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9, 13 (1965). *Rabb (Damen) on H.C.*, No. S190891, 2011 Cal. LEXIS 8344 (Aug. 10, 2011). Mr. Rabb's conviction became final on November 8, 2011.

4. First Federal Habeas Proceedings

Mr. Rabb's *pro se* petition for writ of habeas corpus was filed pursuant to 28 U.S.C. § 2254 on June 17, 2011. Because Mr. Rabb was forced to proceed *pro se*, no new evidence was presented to or developed in the federal district court. The petition contained four claims, including that: (1) Mr. Rabb's right to confront the witnesses against him was violated because the witnesses were not under oath or questioned in connection with their Fifth Amendment invocation; and (2) Mr. Rabb's right to confront the witnesses against him was violated because police officers were permitted to testify to testimonial statements by witnesses in place of the witnesses themselves. The four claims were the same ones raised in Mr. Rabb's direct appeal. Claims one and two were also addressed in the Petition for Review to the California Supreme Court.

On May 10, 2012, Mr. Rabb filed a motion requesting that counsel be appointed for him. (Pet. App. O-175.) The District Court never appointed counsel for him. Shortly thereafter, on May 29, 2012, Mr. Rabb requested leave of court to request a motion for evidentiary hearing. (Pet. App. N-168.) As part of that request, he argued that an evidentiary hearing was necessary because prosecutor

> Kenneth Von Helmort maliciously withheld evidence that would support Petitioner's plea of innocence. (*See* attach exhibit A[.]) To support this theory: on the date of 9-19-2005, Los Angeles Police Officer #37388 of the 77th Street Division collected and logged a VHS videotape into police property and later forward to the district attorneys office an assigned to the custody of Deputy D.A. Kenneth Von Helmort.

(Pet. App. N-170 [*sic*].)

The motion for evidentiary hearing noted that:

> Petitioner has never been identified by either victim or linked to the charged offenses by forensic evidence collected by investigators. [¶] Petitioner maintains his plea of innocence in this matter, and passionately ask this Honorable Judge/Court to grant this request for an evidentiary hearing and discovery motion in order to produce said VHS videotape. . . . The production of the VHS videotape by the District Attorney or Attorney Generals Office will show proof to the People of the State of California and all presiding justices in this juncture that Petitioner, Damen D. Rabb, is actually innocent. . . .

(Pet. App. N-170-71 [*sic*].)

Attached to the motion as Exhibit A was a property receipt for the videotape that shows it was taken into custody one hour after the carjacking.[4] (Pet. App. N-173.)

On July 2, 2012, the magistrate court issued a Report and Recommendation recommending that the District Court issue an Order (1) approving and accepting this Report and Recommendation; (2) denying Mr. Rabb's requests for an evidentiary hearing and appointment of counsel; and (3) directing that Judgment be entered denying the Petition and dismissing the action with prejudice. *Rabb v. Lopez*, No. CV 11-5110-JAK (JPR), 2012 U.S. Dist. LEXIS 154350 (C.D. Cal. July 2, 2012).

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[4] Mr. Rabb has repeatedly tried to gain access to that videotape. The State has not provided the tape to Mr. Rabb despite repeated requests. The State has implied that the tape was lost or destroyed, and argued that, in any event, is not exculpatory because Detective Williams—who co-defendant Parron accused under oath of fabricating testimony—says so. (Pet. App. M-167.) It is true that the original LAPD arrest report mentioned the tape, but Mr. Rabb's grossly ineffective trial counsel never asked for a copy or even viewed it.

As for Williams, he testified that he "was unable to see the carjacking" on the tape and that he could not see the faces or persons on the video clear enough to make an identification. (*Id.*) Even if that is true, video technology has vastly improved over the past fourteen years, perhaps allowing a forensic examiner to extract such details with today's equipment. Mr. Rabb has adamantly maintained his innocence and repeatedly requested the surveillance video to prove it. The tape should either be produced, or a negative inference should be held against the State, not Mr. Rabb.

Just before filing his Objections to the R&R, Mr. Rabb again requested discovery related to the surveillance tape from the scene. (Pet. App. P-182.)

Following Mr. Rabb's second request for the videotape, the magistrate court ordered Respondent to inform the Court of what the tape referenced in the documents attached by Mr. Rabb is; and whether it was produced to Mr. Rabb's trial counsel in discovery and, if not, why not. (Pet. App. Q-193.) Respondent replied with a Motion for Reconsideration and to Vacate the Order. (CACD Case No.2:11-cv-05110-JAK-JPR Dkt. No. 46.)

On October 25, 2012, the District Court granted Respondent's Motion for Reconsideration and accepted the findings and recommendation of the magistrate judge denying the Petition. (Pet. App. G-91) The District Court ordered that "(1) Respondent's Motion for Reconsideration is GRANTED; (2) Mr. Rabb's requests for an evidentiary hearing, appointment of counsel, and discovery are DENIED; (3) the Petition is DENIED without leave to amend; and (4) Judgment be entered dismissing the action with prejudice." (Pet. App. G-93.) The court entered the Judgment that same day, dismissing Mr. Rabb's case with prejudice. (Pet. App. R-194.) A timely notice of appeal was constructively filed on January 2, 2013. (Pet. App. S-195.)

5. First Ninth Circuit Proceedings

A Certificate of Appealability ("COA") was granted with respect to the following issues:

> (1) whether the trial court violated appellant's constitutional rights when it allowed the victims to invoke their Fifth Amendment privilege against self-incrimination and refuse to testify at appellant's trial without first requiring them to be questioned under oath, and (2) whether the trial court violated appellant's constitutional right to confront witnesses when it admitted victims' statements to Sergeant Banuelos.

(CACD Case No.2:11-cv-05110-JAK-JPR Dkt. No. 57.)

The Ninth Circuit's decision focused on the harmless error determination by the California Court of Appeal. (Pet. App. H-94.) The court stated that, "[i]n both instances, the California Court of Appeal reasonably applied clearly established law." (*Id.*)

Citing *Michigan v. Bryant*, 562 U.S. 344, 377-78 (2011), the Ninth Circuit also found that:

> [T]he trial court admitted statements made by the victims just fifteen minutes after the carjacking, while some perpetrators were still potentially armed and fleeing in a stolen car. The California Court of Appeal reasonably determined that the statements were directed to an ongoing emergency, not to a future prosecution, and thus they were nontestimonial.

(Pet. App. H-96.)[5]

Certiorari was denied. *Rabb v. Sherman*, 137 S. Ct. 1074 (2017).

6. Successive Proceedings

Eight days after certiorari was denied, Mr. Rabb filed an application for leave to file second or successive petition under 28 U.S.C. § 2254. (Pet. App. I-97.) Leave was granted on July 13, 2018. (Pet. App. J-103.)

7. Successive District Court Proceedings

Back before the magistrate court, Mr. Rabb was denied discovery and an evidentiary hearing because the court determined that Mr. Rabb could not satisfy either of § 2244(b)(2)(B)'s requirements, in that he failed to meet the due-diligence standard of § 2244(b)(2)(B)(i) and also failed to meet the actual-innocence standard of § 2244(b)(2)(B)(ii). (Pet. App. D-20.) The district court accepted the findings. (Pet. App. C-3.)

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[5] *Michigan v. Bryant* was decided more than eight months before Mr. Rabb's conviction became final.

8. Successive Ninth Circuit Proceedings

Mr. Rabb filed a Notice of Appeal on February 24, 2020. (CACD Case No. 2:17-cv-09318-JAK-JPR, Dkt. No. 48.) Because the district court denied a COA as to all issues, pursuant to Circuit Rule 22-1(d), Mr. Rabb was required to file a request for a COA in the court of appeals. Mr. Rabb timely filed his COA request in the Ninth Circuit on March 30, 2020. (Pet. App. U-201.) On January 14, 2021, the Ninth Circuit denied the request for a COA, stating that Mr. Rabb had "not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" (Pet. App. A-1.)

REASONS FOR GRANTING THE WRIT

I. AFTER A PETITIONER ON APPEAL IS IMPROPERLY PREVENTED FROM RETURNING TO THE DISTRICT COURT TO FURTHER DEVELOP THE RECORD, AND LATER IS PERMITTED THE OPPORTUNITY TO PROCEED ON THOSE CLAIMS IN A SUCCESSIVE PETITION PURSUANT TO 28 U.S.C. § 2244(b)(2)(B), DUE PROCESS REQUIRES THAT THE DISTRICT COURT MUST THEN GIVE THEM A FAIR OPPORTUNITY TO PROVE THE EVIDENCE SUPPORTING THEIR CLAIMS

In his first appeal, Mr. Rabb proceeded *pro se* in the federal district court. After being appointed counsel in the Ninth Circuit, Mr. Rabb filed a Motion for Stay Based on Newly Discovered Evidence on June 20, 2014. (*See* Ninth Circuit Case No. 13-55057, Dkt. No. 29-1.) A month later, Mr. Rabb filed an Addendum to Motion for Stay. (*Id.,* Dkt. No. 34-1.) The Ninth Circuit Court of Appeals denied the sought stay "without prejudice to renewing the arguments in the opening brief." (Pet. App. T-199.) Mr. Rabb diligently raised the argument in the opening brief. (Ninth Circuit Case No. 13-55057, Dkt. No. 47-1.) Mr. Rabb simultaneously filed a motion pursuant to Federal Rule of Civil Procedure, Rule 60(b) seeking a stay pursuant to *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862 (9th Cir. 1976) in the district court. (Case No.

2:11-cv-05110- JAK-JPR, Dkt. No. 63.) In each of these requests, Mr. Rabb sought a stay so that he could bring and develop claims of ineffective assistance of counsel and prosecutorial misconduct as they related to Mr. Rabb's innocence of the crimes.

In his first appeal, Mr. Rabb predicted to the court of appeal the likely possibility of the enormously prejudicial situation in which he now finds himself. While the factual predicate did not yet exist, the threat of a successive petition was entirely foreseeable; indeed, Mr. Rabb pled in his opening brief before the Ninth Circuit that,

> because Petitioner is at risk for having to file a successive petition despite the increased evidentiary burden that would inflict on him, Petitioner also has a motion for indication currently pending in the district court. . . . Petitioner should not be forced to litigate a successive petition because of the district court's error in not issuing a *Rhines*[6] stay; therefore, this case should be remanded with instructions similar to those in [*Quezada v. Scribner*, 611 F.3d 1165, 1168 (9th Cir. 2010)].

(Ninth Circuit Case No. 13-55057, Dkt. No. 47-1, at 45-46.)

The basic inequity which has now subjected Mr. Rabb to an unfairly stringent standard, is currently handled differently depending on the circuit. The Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts have held that when a prisoner seeks to amend a habeas petition that is pending on appeal following denial in the district court, the filing constitutes a "second or successive" petition under the AEDPA.[7]

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[6] *Rhines v. Weber*, 544 U.S. 269 (2005).

[7] In *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016), the Sixth Circuit Court of Appeals reconciled an intracircuit split by adopting a rule that a "motion to amend that seeks to raise habeas claims is a second or successive habeas petition when that motion is filed after the petitioner has appealed the district court's denial of his original habeas petition or after the time for the petitioner to do so has expired." *Id.* at 325. In *Phillips v. United States*, 668 F.3d 433 (7th Cir. 2012), the Seventh Circuit held that a prisoner's Rule 60(b) motion filed after the district court's denial must be characterized as "an 'application' for collateral relief," constituting a second application. *Id.* at 435. In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), the Eighth Circuit Court of Appeals "reject[ed petitioner's] claim that an amendment to a petition

Conversely, the Second and Third Circuit Courts have held that a filing seeking to amend a petition pending on appeal is not a "second or successive" petition.[8]

Because the Ninth Circuit explicitly permitted the stay issue to be raised in the opening brief and to continue throughout the appeal of Case No. 13-55057 (Pet. App. T-199), the harm did not perfect until the Mandate issued on July 5, 2016, at the earliest.[9] That denial triggered the prejudice, as trial counsel's ineffectiveness and the

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is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal." *Id.* at 1004. In *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020), the court noted that "a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." *Id.* at 635. However, the court concluded that "[b]ecause the petitioner did not move to amend until 'after the district court had denied his claims,' he was required to satisfy the requirements for successive petitions under § 2244(b)." *Id.* at 636. In *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007) (per curiam), the court rejected petitioner's argument that the Section 2244(b) gatekeeping provision did not apply to his motion to amend his habeas petition because that "habeas action ha[d] not been finally adjudicated on appeal." *Id.* at 540. The Tenth Circuit did hold otherwise in *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), where the court permitted "a habeas petitioner to supplement his habeas petition" when "his first habeas petition was already pending . . . on appeal" because the case presented "unique circumstances," including that the supplemental filing related to the prosecutor's active concealment of his own misconduct in a death penalty case. *Id.* at 1169, 1189-96.

[8] In the Second and Third Circuits, a district court's denial of a habeas petition is not considered a final adjudication, and a subsequent filing while the denial is pending on appeal is not a "second or successive" petition. In *Ching v. United States*, 298 F.3d 174 (2d Cir. 2002), written by Judge Sotomayor, the court considered a situation where the petitioner filed a habeas application in the district court asserting additional grounds for relief while the case was pending in the court of appeals. The district court denied the subsequent petition on the ground that it was "second or successive," but the Second Circuit reversed. *Id.* at 177. The Second Circuit followed that holding in other cases. *See Whab v. United States*, 408 F.3d 116 (2d Cir. 2005); *Grullon v. Ashcroft*, 374 F.3d 137 (2d Cir. 2004) (per curiam). In *United States v. Santarelli*, 929 F.3d 95 (3d Cir. 2019), the Third Circuit came to the same conclusion.

[9] Mr. Rabb argued in the district court that *Rudin v. Myles*, 781 F.3d 1043, 1054 n.13 (9th Cir. 2015) (citing *Hasan v. Galaza*, 254 F.3d 1150, 1154-55 (9th Cir. 2001)), supported his diligence because the prejudicial component of *Rudin* was not about learning of prejudice, but experiencing it. Thus, even if it were true that "Petitioner was aware that he suffered prejudice from counsel's alleged failure to secure Dr.

prosecutorial misconduct only then were foreclosed from consideration.

Denied the opportunity to properly raise those claims in the district court, Mr. Rabb sought leave to file a successive petition just eight days after the petition for writ of certiorari was denied by this Court. (*See* Pet. App. I-97; *Rabb v. Sherman*, 137 S. Ct. 1074 (2017).) On his return to the district court following leave by the Ninth Circuit, the district court held that Mr. Rabb failed to meet the due-diligence standard of § 2244(b)(2)(B)(i).

A. Mr. Rabb Was Diligent

According to the magistrate court and the district court, in order to be diligent, Mr. Rabb should have: (1) initially asked trial counsel to follow up with Dr. Shomer to ask him if he would have accepted less money. (Pet. App. D-63 ("if he believed that counsel should have done more to convince Dr. Shomer to accept a smaller payment, he was on notice of what the numbers being discussed were and could have asked counsel to follow up with Dr. Shomer to ask him if he would have accepted less; he does not claim that he did so."); Pet. App. C-8.); and (2) reached out to Messrs. Farmer and Chappell via "a family member or friend to contact them." (Pet. App. C-11 n.4.)

In faulting Mr. Rabb for not having "asked counsel to follow up with Dr. Shomer to ask him if he would have accepted less" (Pet. App. D-63), the magistrate court suggested that a petitioner must instruct their counsel on how to be effective in order to be diligent. That is a requirement that has never been articulated by this Court.

Shomer's testimony because he was convicted based in part on identification testimony" (Pet. App. D-64 n.19)—which it is not—the factual predicate triggered when the court foreclosed relief on his claim, which is the proposition *Rudin* stands for. This is because the ineffective assistance of counsel requires deficient performance and prejudice deriving therefrom, not an indication that there may be prejudice in the future. Unfortunately, as the district court admitted, it did not understand the claim. "The Court is not certain what semantic difference Petitioner seeks to draw . . ." (Pet. App. C-10.)

Moreover, the district court assumed without basis that there were family members or friends available to help Mr. Rabb. Because there was never a hearing granted, the district court had no evidence supporting that faulty assumption. Without outside help, Mr. Rabb could not even know how to contact Dr. Shomer, and would have been precluded from contacting Mr. Farmer and Mr. Chappell by the Department of Corrections. The district court assumed a lack of diligence based on unfounded assumptions that could easily have been confirmed or dispelled by an evidentiary hearing.

Mr. Rabb's options were limited by his incarceration -- a fact that should have been resolved in Mr. Rabb's favor. "[A] due diligence inquiry should take into account that prisoners are limited by their physical confinement." *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004). *See also Montenegro v. United States*, 248 F.3d 585, 592 (7th Cir. 2001) ("an evaluation of whether due diligence was exercised must take into account the conditions of confinement and the reality of the prison system") (citing *Wims v. United States*, 225 F.3d 186, 191 (2d Cir. 2000); *Easterwood v. Champion*, 213 F.3d 1321 (10th Cir. 2000) (the evaluation of due diligence "may not ignore[ ] the reality of the prison system")).

While some things may be accomplished from a prison cell, the matters cited by the district court could not have been. Mr. Rabb did all that he could, filing discovery requests for the videotape, filing requests for counsel, and repeatedly writing to the court expressing his concerns. Mr. Rabb did his best under unforgiving circumstances. Yet, denying the 59(e) motion, the district court wrote that, "the Court declines to consider whether [Mr. Rabb] should receive a COA on questions concerning his diligence [citation] because he never previously requested one." (Pet. App. E-84.) That is incorrect, as evidenced by the second COA question posed by Mr. Rabb to that court

("Does the due diligence requirement of 28 U.S.C. § 2244(b)(2)(B)(i) violate an innocent petitioner's constitutional right to due process?").

Section 2244(b)(2)(B)(ii) sets a rigidly difficult clear and convincing evidence standard. If a petitioner can meet that threshold based on innocence, should it matter when they are able to do so? *See McQuiggin v. Perkins*, 569 U.S. 383 (2013) (an actually innocent petitioner may overcome the expiration of the statute of limitations). In this case, where the victims have sworn that Mr. Rabb is innocent, it would seem that the competing harms weigh in favor of permitting Mr. Rabb the opportunity to, at the very least, have had the opportunity to prove his claims in an evidentiary hearing—and absent that—to have posited the question to a panel in the court of appeal.

Moreover, Mr. Rabb is not required to specifically frame every COA question for the district court. "If no express request is made for a certificate of appealability, the notice of appeal shall be deemed to constitute a request for a certificate." *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). *Asrar* would make no sense if petitioners had to precisely formulate the exact magic words of the question or lose the opportunity to appeal an issue.

B. Even Exhibiting Maximum Feasible Diligence, The Limitations Of Mr. Rabb's Imprisonment Would Have Prevented Discovery Of Critical Factual Predicates

Mr. Farmer's revelation that on "[t]he night of the car jacking [*sic*] I was carrying a gun when the police were talking to me and my cousin. I was not scared, I was calm," reveals substantial prejudicial information related to trial counsel's failure to properly investigate. (Pet. App. F-86.) Had reasonably effective trial counsel known that fact it would have changed everything, as Sgt. Banuelos' misleading and false testimony would not have come into evidence. There can be no doubt that

without Sgt. Banuelos' testimony, Mr. Rabb would not have been convicted; indeed, after several hours of deliberations over the course of two days, the jury reached its verdicts just thirty-three minutes after the conclusion of the read back of Sgt. Banuelos' testimony. (CT[10] at 223.) Moreover, Mr. Farmer has now illuminated the fact that "[t]he guy that robbed me never said this is forty crip [*sic*] or anything about gangs," a detail which contradicts the very first point made by the prosecutor in his closing argument. (Pet. App. F-86; Augmented RT[11] at 48.)

This is similar to *Hasan*, where the Ninth Circuit noted that the petitioner "had knowledge at the time of trial of some facts to support an assertion that his trial counsel's performance was deficient to an extent," but he "did not know at that time--nor did he have reason to know--what he later learned: the added facts that such an investigation would have revealed." *Hasan*, 254 F.3d at 1154. In *Hasan*, the petitioner later learned facts that materially changed the situation. *Id.* Only at that point did he have

> reasonable grounds for asserting that had his counsel investigated properly, he would have learned [facts that] could have contested the prosecution's representation. Only then did Hasan have a good faith basis for arguing prejudice--that is, that had his counsel investigated and brought this information before the trial court, the trial court may have ordered a new trial.

Id.

Like in *Hasan*, the due diligence inquiry here "turns on two factors: (1) whether [Mr. Rabb] was on inquiry notice to investigate further, and, if so, (2) whether [he] took reasonable steps to conduct such an investigation." *Solorio v. Muniz*, 896 F.3d 914, 921 (9th Cir. 2018). Mr. Rabb was not present at the crime scene, so he had no reason to

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[10] "CT" refers to the Clerk's Transcript of the trial court proceedings.

[11] "RT" refers to the Reporter's Transcript of the trial court proceedings.

believe that Sgt. Banuelos had lied when he said that Mr. Farmer had been agitated in the moments following the crime. Accordingly, he was not on notice to investigate that issue further. Moreover, even were he on notice, he could not have conducted such an investigation from prison. Mr. Rabb, who was *pro se* after his request for counsel was denied by the court, generally did his best to investigate items relating to his innocence, as he diligently tried to get the district court to obtain the surveillance video from the scene. But as an indigent and incarcerated person, he had no means or ability to interview the incarcerated Mr. Farmer. Of course, the issue is academic because he had no notice.

Sergeant Banuelos' testimony wrongly implicated Mr. Rabb, but that did not mean that Mr. Rabb could have known that Sgt. Banuelos was lying, or even that the officer knowingly lied. If Sgt. Banuelos had just been mistaken in his identification of Mr. Rabb, or relaying what Mr. Farmer had actually told him, there would be little recourse, but the newly obtained evidence suggests for the first time that this was not a simple misidentification, but possibly knowingly false testimony calculated to make manufactured testimony admissible. This is an issue that demands a hearing.

Moreover, it is reasonable to ask: if Sgt. Banuelos lied about some parts of the night, how can we trust any part of his account? *See* Jury Instruction No. 226, given in Mr. Rabb's case ("If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. . . .") (CT at 185.) Maurice Farmer's disposition on the night of the crimes was never known prior to counsel herein obtaining his declaration. The district court was abjectly wrong when it said that the factual predicate was known or could have been discovered sooner by Mr. Rabb. The fact that Mr. Rabb's trial team failed to get the information that would have made Sgt. Banuelos' testimony inadmissible, can only

now be raised because it was not previously known despite Mr. Rabb's diligent attempts to supplement information of his innocence.

C. Some Of The District Court's Reasoning Was Based On Misinterpretations Of The Record

The district court saw no reason for discovery or an evidentiary hearing because it believed that the record against Mr. Rabb was ironclad, but some of the evidence relied on by the district court was not even correct. For instance, the court said,

> although trial counsel told habeas counsel during that interview that "he was not aware of any surveillance tape and . . . never viewed it or sought to view it" (Opp'n, Ex. 15 at 6), the record makes plain that he in fact knew about it before trial (*see*, *e.g.*, Lodged Doc. 2, 3 Rep.'s Tr. at 1335). His cross-examination of a police witness at trial made clear that he knew of the surveillance tape, and the particular questions he asked suggested that he had watched it. (*See* R. & R. at 33 (citing Lodged Doc. 2, 3 Rep.'s Tr. at 1335).) Thus, there is no credible newly discovered evidence that trial counsel never watched the surveillance tape. Rather, he just didn't remember, seven years later, what had happened at trial.

(Pet. App. C-7-8.)

That is simply inaccurate. Only one question by trial counsel on the transcript page cited by the court relates to the videotape. That question and answer were:

> Q. Did he ever mention to you, Mr. Parron, that the officers told him that -- one or two officers told him that they had his -- everybody on tape, and they knew who had done this robbery and carjacking?
>
> A. I don't recall that the officers told them that. I wouldn't know that.

(3 RT 1335.)

Neither the question by trial counsel, nor the answer by Detective Theodore Williams, indicate that trial counsel had watched the videotape. All that question covers is what co-defendant Parron was told by the police about the tape. It is however telling that the Report and Recommendation wrongly cites the transcript and the district court repeats the error. It does not indicate the kind of independent

examination of the objections that Mr. Rabb was entitled to have the district court undertake.

D. Due Process Required That The District Court Give Mr. Rabb A Fair Opportunity To Prove The Evidence In Support Of The Facts Underlying His § 2244(b)(2)(B)(ii) Claim

Two of the questions that Mr. Rabb posed to the district court and the Ninth Circuit for a COA—and were rejected by those courts— arose from his query regarding the propriety of holding Mr. Rabb to the high standard dictated by 28 U.S.C. § 2244(b)(2)(B) when Mr. Rabb made numerous repeated attempts to develop these claims in his initial case. Once Mr. Rabb was forced to seek leave to file a second or successive petition, numerous additional hurdles were imposed. While Mr. Rabb successfully obtained permission to proceed on a second or successive petition, the impediments continue beyond that point.

Once back before the district court, both Mr. Rabb and the district court are expected to engage in a different level of 28 U.S.C. § 2244(b)(2)(B) inquiry at the district court level. As the Ninth Circuit explained in *United States v. Villa-Gonzalez*, 208 F.3d 1160 (9th Cir. 2000) (per curiam), in the district court "the prisoner must make more than another prima facie showing. The district court would otherwise be faced with reviewing and possibly overturning our unappealable grant of permission to file a second motion on the same showing by the petitioner under the exact same standard." *Id.* at 1164-65. Mr. Rabb is required to make more than a prima facie showing, but the district court must also be required to do more than simply rehash the existing record—otherwise the district court has done exactly what the Ninth Circuit forbade—overturning the circuit's grant of permission to file a second motion on the exact same record.

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"[U]nder section 2244(b)(4), a district court must conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the motion meets the statutory requirements for the filing of a second or successive motion." *Id.* at 1165. The district court acknowledged in its Order Accepting Findings and Recommendations of U.S. Magistrate Judge (Pet. App. C-3) that it must "conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the [petition] meets the statutory requirements [for the filing of a second or successive motion]." (Pet. App. C-4, quoting *Villa–Gonzalez*, 208 F.3d at 1165.) However, the court failed to follow the expectations of *Villa-Gonzalez*, where the Ninth Circuit held that "[i]f the existing record does not conclusively resolve the issue, the district court should order a response from the government and hold an evidentiary hearing." *Villa-Gonzalez*, 208 F.3d at 1165.

In *Villa-Gonzalez* the Ninth Circuit looked to "whether the district court properly denied Villa-Gonzalez's motion because the record conclusively shows that the motion failed to present newly discovered evidence that *would establish* by clear and convincing evidence that no reasonable factfinder would have found him guilty." *Id.* (emphasis added). The court of appeal used the prospective term "would establish" because "Villa-Gonzalez ha[d] not alleged facts that present[ed] clear and convincing evidence that no reasonable factfinder would have found him guilty." *Id.* Conversely, Mr. Rabb alleged facts that, if proven, would establish clear and convincing evidence that no reasonable factfinder would have found him guilty.

The district court did not conduct a thorough review of the evidence, failing to permit discovery, hold an evidentiary hearing, or hear from the victims who unequivocally exonerate Mr. Rabb. Habeas law is built on the premise that factual development of well pled claims is a necessary component of the adjudication of the

writ. *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (holding that "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry" into colorable claims). Mr. Rabb alleged that no reasonable factfinder would have found him guilty. Those allegations, supported by sworn declarations, necessitated an evidentiary hearing—or at least discovery—to test the validity of the evidence presented. *See Blackledge v. Allison*, 431 U.S. 63, 81-83 (1977) (petitioner is "'entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts'") (brackets in original).

Mr. Rabb alleged that both of the crime victims have exonerated him and would do so in court if given the opportunity to testify. Moreover, he alleged that the surveillance tape from the crime scene that has gone missing in police custody could independently exonerate him. But the district court failed to utilize its fact-finding capabilities, holding on the *exact same record* that was before the Ninth Circuit Court of Appeals at the time of the granting of the application to file the successive petition, that "Petitioner cannot seriously contend that the surveillance video or the eyewitness-identification expert's testimony would have established that he was actually innocent." (Pet. App. C-13.) The district court reviewed the record before it as though it were an appellate court, without utilizing the instruments available to it as a fact finding tribunal to resolve differing factual claims or ambiguities. That was already done by the Ninth Circuit, which saw fit to send the case back. When a trial court abdicates a critical tool in its fact-finding repository, it fails not only to utilize an important device exclusive to it, but also foregoes an important historical function of its position.

Mr. Rabb made repeated efforts to stay the proceedings in order to further develop the record. The Ninth Circuit's failure to properly do so has subjected him to

the high standards of § 2244(b)(2)(B) and the district court subsequently prevented him from proving his case. This Court should hold that when a petitioner makes discoveries on appeal and employs affirmative efforts to pursue their claims in the initial proceeding, but is wrongly prevented from doing so by the court of appeals, the petitioner should at least have a full and fair opportunity to prove up their evidence of innocence in the successive case. Following leave to proceed on a successive petition, when the evidence in the record is competing and contradictory in nature, § 2244(b)(2)(B) requires that the district court utilize its fact-finding function to establish credibility or reliability. To do otherwise defeats the purpose of § 2244(b)(2)(B)(ii), which exists for the purpose of affording an actually innocent defendant a path to habeas relief.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S SUMMARY DENIAL OF A COA DISREGARDED THE STANDARDS GUIDING COA DETERMINATIONS

This Court has explained that the "COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). While issuance of a COA "must not be pro forma or a matter of course," a prisoner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 327, 337 (2003) (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Where a procedural ruling is asserted to have interfered with proper merits disposition, then a movant must also show that reasonable jurists could debate the procedural ruling as well. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Both the magistrate court and the district court claimed to have taken Mr. Rabb's allegations as true, but found that he could not establish innocence. It is critical that this Court understand what that means. According to the district court:

- No one could possibly be persuaded by victim Maurice Farmer's sworn testimony that Mr. Rabb did not rob or carjack him, even if Mr. Farmer were found to be credible;
- No one could possibly be persuaded by victim De'Shawn Chappell's sworn testimony that Mr. Rabb did not rob or carjack him, even if Mr. Chappell were found to be credible; and
- No one could possibly be persuaded of Mr. Rabb's innocence by watching a videotape of the robbery and carjacking being committed by someone else.

Any person not persuaded by any of those items is not acting reasonably, so the argument is circular. While the district and magistrate courts claimed to have accepted Mr. Farmer's and Mr. Chappell's statements as true, the two victims' statements fundamentally contradict the police officer testimony at Mr. Rabb's trial.

Following the district court's denial of a COA, Mr. Rabb sought a COA from the Ninth Circuit. In a one-page denial, a different panel of judges from the one that authorized the successive petition, denied the COA saying,

> The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

(Pet. App. A-1.)

That determination is nonsensical because Mr. Rabb was not permitted to conduct discovery and no evidentiary hearing was held. Thus, based on the *exact same evidence* that caused three experienced Ninth Circuit judges to make the determination that based on the record before them Mr. Rabb had made a prima facie showing for authorization under 28 U.S.C. § 2244(b)(2)(B), the district court found that Mr. Rabb had not met the standards of that statute. It is not a hypothetical inquiry as to whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," because three Ninth Circuit judges did just that. Mr. Rabb was therefore improperly denied the opportunity to appeal the denial of his successor petition in the Ninth Circuit.

Both of the victims in this case have averred under oath that Mr. Rabb is innocent, thus the denial of a COA threatens to cause a manifest injustice. In a 59(e), Mr. Rabb sought to have the district court alter its previous ruling and issue a COA on one of the three previously requested issues or on the issues of whether Mr. Rabb was diligent; whether the factual predicate for his claims could not have been discovered previously through the exercise of due diligence; and whether he had pled facts sufficient to entitle him to discovery and a hearing to prove that the facts underlying the claim, when viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offenses. (Pet. App. V-224.) That too was denied. (Pet. App. E-82.)

This Court has explained that Mr. Rabb need not show that he should prevail. In *Miller-El*, this Court held "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." 537 U.S. at 337. Mr. Rabb has made the required "substantial showing of

the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Mr. Rabb must only demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted). He has done that.

This case is an outlier that requires this Court's intervention because a fundamental miscarriage of justice looms. Mr. Rabb was not afforded an opportunity to fully develop his supporting evidence through discovery or at a hearing in order to prove the allegations in his successive petition. If given the opportunity, Mr. Rabb would show that he was diligent and clearly and convincingly prove his innocence. His claims are not frivolous and their merit is, at least, debatable, as is the issue of whether he meets the requirements of 28 U.S.C. § 2244(b)(2)(B). Therefore, Mr. Rabb respectfully contends that the district court erroneously granted Respondent's motion to dismiss and the Ninth Circuit erred in failing to issue a COA.

CONCLUSION

Mr. Rabb has pled facts sufficient to entitle him to discovery and a hearing to prove that the facts underlying his claims, when viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offenses. Two simple issues have been made needlessly complex: if the witnesses exonerate Mr. Rabb and/or the videotape exonerates Mr. Rabb, he will have established by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offenses. Discovery and a hearing giving Mr. Rabb the opportunity to prove the facts he has pled are the only appropriate courses of action considering the facts that have been put

forth and supported by sworn declarations.

The Ninth Circuit, properly concerned that Mr. Rabb may be an innocent man serving a seventy-five-years-to-life sentence, found he established a prima facie case in his application for leave to file a second or successive petition. (*See* Ninth Circuit Case No. 17-70600, Dkt. No. 16-1.) Viewing the same record that was before the Ninth Circuit, the district court held that Mr. Rabb was not diligent and that there was sufficient evidence of his guilt. While a district court may normally do that without further evidentiary inquiry, in this case the only two victims of the crimes, Mr. Farmer and Mr. Chappell, who have never testified, say Mr. Rabb is innocent. They are the only victims, they are adamant and consistent in their exoneration of Mr. Rabb, and they have never identified him as their assailant, testified regarding his guilt, or as far as is known, even told anyone that he was the man who robbed and carjacked them. It is difficult to imagine a case where an evidentiary hearing could be more necessary.

As shown, the Ninth Circuit disregarded the applicable decisions by this Court, denying a COA on the issues presented by Mr. Rabb's appeal. Mr. Rabb is entitled to a proper review of his case. For these reasons, Mr. Rabb prays that the Court grant a writ of certiorari to review the decision of the Ninth Circuit, and/or grant a COA on the issues presented and remand to the Ninth Circuit for plenary appellate review.

Respectfully submitted,

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