

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

APPENDIX VOLUME II

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DOCKETED
LOS ANGELES

MAY 16 2008

BY M. MUNAR

NO. LA2008501818PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF-RESPONDENT,

VS.

DAMEN RABB,

DEFENDANT-APPELLANT.

NO. BA292809
CONSECUTIVE W/
BA290495

MAY 01 2008

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE BOB S. BOWERS,, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

JUNE 11, 12, 13, AUGUST 8, 2007

JANUARY 22, 31, 2008

APPEARANCES:

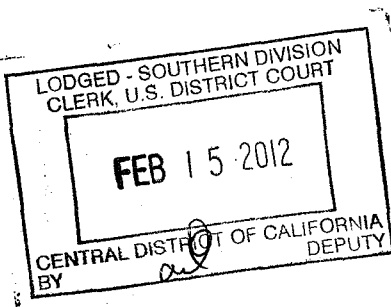
FOR THE RESPONDENT:

EDMUND G. BROWN, JR.
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 1701
LOS ANGELES, CALIFORNIA 90013

FOR THE APPELLANT:

IN PROPRIA PERSONA

VOLUME 3 OF 3

PAGES 1201-1342/1500; 1501-1540-1800;
1801-1811/2100; 2101-2110-2400;
2401-2416-2700; 2701-2705, INCLUSIVECHRISTINE S. ROMAN, CSR #9351
CYNTHIA A. ROMERO, CSR #7861
MARTHA EMERICH, CSR #6864
SYLVIA A. ALSTON, CSR #6236
OFFICIAL REPORTERS

COPY

1 CASE NUMBER: BA290495
2 CASE NAME: PEOPLE V. DAMEN RABB
3 LOS ANGELES, CALIFORNIA
4 MONDAY, JUNE 11, 2007
5 DEPARTMENT 105 HON. BOB S. BOWERS, JR, JUDGE
6 REPORTER: SYLVIA A. ALSTON, CSR #6236
7 TIME: 8:50 A.M.

8 APPEARANCES:

9 DEFENDANT RABB REPRESENTED BY KEN K.
10 BEHZADI, ATTORNEY; KENNETH L. VON HELMOLT,
11 DEPUTY DISTRICT ATTORNEY, REPRESENTING THE
12 PEOPLE OF THE STATE OF CALIFORNIA
13

14 THE COURT: DAMEN RABB, BA290495. MR. RABB IS
15 PRESENT IN COURT. RESPECTIVE COUNSEL ARE PRESENT.

16 MR. VON HELMOLT, SIR.

17 MR. VON HELMOLT: THANK YOU, YOUR HONOR. WE
18 SPOKE ON FRIDAY ABOUT, I DON'T KNOW IF IT WAS FRIDAY,
19 BUT THERE WERE A COUPLE DIFFERENT ISSUES THAT HAVE
20 ARISEN IN THIS CASE.

21 FIRST IS THE PROPRIETY OF HAVING A WITNESS
22 WHO IS NOT THE DEFENDANT ASSERT A BLANKET FIFTH
23 AMENDMENT RIGHT, AND NOT BE REQUIRED TO TAKE THE STAND.
24 I HAVE A CASE ON THAT PROPOSITION THAT I WOULD LIKE TO
25 SHARE WITH COURT AND COUNSEL.

26 IT IS, FOR THE RECORD, PEOPLE V. JOSE
27 MANUEL LOPEZ, THAT IS 71 CAL.APP.4TH, 1550. IN THAT
28 CASE, A WITNESS WHO WAS ALSO A GANG MEMBER WAS CALLED

1 KIND OF FINGERPRINT ANALYSIS PERFORMED ON THE THREE GUNS
2 THAT WERE RECOVERED FROM THE TOYOTA CAMRY?

3 A I DON'T KNOW.

4 MR. BEHZADI: NO FURTHER QUESTIONS, YOUR HONOR.

5 THE COURT: MR. VON HELMOLT?

6 MR. VON HELMOLT: NO REDIRECT.

7 FOR THE RECORD, THE WITNESS IS RETURNING
8 THE EXHIBIT TO THE DEPUTY DISTRICT ATTORNEY.

9 MR. VON HELMOLT: I'M OUT OF WITNESSES FOR THIS
10 MORNING.

11 THE COURT: OKAY.

12 LADIES AND GENTLEMEN, I'M JUST GOING TO
13 READ THIS TO YOU RIGHT NOW. WE APPARENTLY WILL HAVE
14 SOME MORE WITNESSES THIS AFTERNOON.

15 THE COURT IS TAKING JUDICIAL NOTICE OF AND
16 HEREBY ADVISING THE JURY THAT KENDRA BROWN WAS CALLED AS
17 A WITNESS IN THIS CASE, OUTSIDE THE PRESENCE OF THE
18 JURY, AND THAT KENDRA BROWN, WITH THE ADVICE OF HER
19 COUNSEL, REFUSED TO TESTIFY, BASING HER REFUSAL UPON HER
20 CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

21 THE COURT IS TAKING JUDICIAL NOTICE AND
22 HEREBY ADVISING THE JURY THAT MAURICE FARMER WAS CALLED
23 AS A WITNESS IN THIS CASE OUTSIDE THE PRESENCE OF THE
24 JURY, AND THAT MAURICE FARMER, WITH THE ADVICE OF HIS
25 COUNSEL, REFUSED TO TESTIFY, BASING HIS REFUSAL ON HIS
26 CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.

27 THE COURT IS TAKING JUDICIAL NOTICE OF AND
28 IS HEREBY ADVISING THE JURY THAT DESHAWN CHAPPELL WAS

1 CALLED AS A WITNESS IN THIS CASE OUTSIDE THE PRESENCE OF
2 THE JURY, AND THAT DESHAWN CHAPPELL, WITH THE ADVICE OF
3 COUNSEL, REFUSED TO TESTIFY, BASING HIS REFUSAL ON
4 SELF-INCRIMINATION.

5 LADIES AND GENTLEMEN, WE WILL BE IN RECESS
6 AT THIS POINT. AND YOU ARE ORDERED TO COME BACK AT 1:30
7 P.M.

8 YOU ARE ORDERED NOT TO DISCUSS THIS CASE
9 AMONGST YOURSELVES NOR WITH ANYONE ELSE, NOR ARE YOU TO
10 FORM ANY OPINIONS REGARDING THE ULTIMATE ISSUES TO BE
11 RESOLVED.

12 1:30 P.M.

13 THANK YOU.

14
15 (JURORS DEPART COURTROOM.)
16

17 THE COURT: ALL OF THE JURORS HAVE LEFT THE
18 COURTROOM AT THIS POINT. MR. VON HELMOLT, HOW MANY
19 WITNESSES DO YOU HAVE LEFT, SIR?

20 MR. VON HELMOLT: I HAVE SERGEANT BANUELOS. YOU
21 MEAN TODAY OR IN TOTAL, YOUR HONOR?

22 THE COURT: WE ARE GOING TO BE GOING UNTIL ABOUT
23 4:30 THIS AFTERNOON. HOW MANY PEOPLE DO YOU HAVE NOW
24 BETWEEN 1:30 AND 4:30?

25 MR. VON HELMOLT: ONE, POSSIBLY TWO.

26 THE COURT: THAT WILL TAKE US TO 4:30?

27 MR. VON HELMOLT: NO. SERGEANT BANUELOS.

28 THE COURT: COUNSEL, YOU MAY HAVE A PROBLEM WITH

1 MR. BEHZADI: THANK YOU.

2 THE COURT: WE ARE AGAIN ON THE RECORD IN THE
3 MATTER OF THE PEOPLE OF THE STATE OF CALIFORNIA VS.
4 DAMEN RABB, BA290495.

5 MR. RABB IS PRESENT. RESPECTIVE COUNSEL
6 ARE PRESENT, AND THE JURORS ARE ALSO PRESENT AT THIS
7 POINT.

8 MR. VON HELMOLT.

9 MR. VON HELMOLT: THANK YOU, YOUR HONOR. THE
10 PEOPLE CALL SERGEANT BANUELOS TO THE STAND.

11
12 FRANK BANUELOS,
13 CALLED AS A WITNESS BY THE PEOPLE, WAS SWORN AND
14 TESTIFIED AS FOLLOWS:

15 THE CLERK: YOU DO SOLEMNLY STATE THAT THE
16 TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE
17 THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND
18 NOTHING BUT THE TRUTH SO HELP YOU GOD.

19 THE WITNESS: I DO.

20 THE CLERK: PLEASE HAVE A SEAT.

21 PLEASE STATE YOUR FIRST AND LAST NAME,
22 SPELLING YOUR FIRST AND LAST NAME FOR THE RECORD.

23 THE WITNESS: MY NAME IS FRANK BANUELOS. FIRST
24 NAME F-R-A-N-K, LAST NAME IS SPELLED B-A-N-U-E-L-O-S.

25 MR. VON HELMOLT: MAY I ENTER THE WELL TO TURN
26 THE PROJECTOR ON, YOUR HONOR?

27 THE COURT: YES.

28 ///

1 WHEN YOU MET WITH THE VICTIM OR VICTIMS --
2 FIRST OF ALL, LET ME ASK YOU, DO YOU REMEMBER THE NAMES
3 OF THE PEOPLE YOU MET WITH THAT MORNING?

4 A OFFHAND, I JUST REMEMBER THEIR LAST NAME.

5 Q WHAT WERE THEIR NAMES?

6 A I BELIEVE MR. FARMER AND MR. CHAPPELL.

7 Q DID YOU CONTACT THEM?

8 A YES, I DID.

9 Q AND WHAT APPEARED TO YOU TO BE THEIR
10 DEMEANOR, WHEN YOU CONTACTED THEM?

11 A IT VARIED. THEY WERE EXCITED. THEY WERE
12 MAD, PHYSICALLY SHAKEN. THEY COULDN'T STOP WALKING.
13 THEY KEPT KIND OF PACING BACK AND FORTH, AND IT WAS KIND
14 OF DIFFICULT FOR ME TO ACTUALLY CALM THEM DOWN AND TALK
15 TO THEM.

16 Q DID YOU GET THE IMPRESSION THAT THEY WERE
17 STILL UNDER STRESS BECAUSE OF THE INCIDENT THAT BROUGHT
18 YOU OVER THERE?

19 A YES.

20 Q ALL RIGHT.

21 YOU MET WITH THE VICTIMS.

22 DO YOU REMEMBER IF YOU SPOKE TO ONE OR THE
23 OTHER FIRST, OR DID YOU SPEAK TO BOTH OF THEM AT THE
24 SAME TIME?

25 A I SPOKE TO EACH ONE INDIVIDUALLY.

26 Q ALL RIGHT.

27 DO YOU REMEMBER WHO YOU SPOKE TO FIRST?

28 A I BELIEVE I SPOKE TO MR. FARMER, WHO WAS

1 THE DRIVER OF THE CAR THAT WAS TAKEN.

2 Q ALL RIGHT.

3 NOW, DO YOU KNOW WHAT KIND OF CAR WAS
4 TAKEN?

5 A IT WAS AN SUV. IT WAS A CHEVY EQUINOX I
6 BELIEVE.

7 Q I'M SHOWING YOU WHAT'S BEEN MARKED
8 PEOPLE'S 21 FOR IDENTIFICATION.

9 DO YOU RECOGNIZE THE PERSON IN THAT
10 PHOTOGRAPH?

11 A YES.

12 Q WHO IS THAT?

13 A THAT IS MR. FARMER.

14 Q YOU RECOGNIZE HIM FROM THE PHOTOGRAPH AND
15 THE NAME UNDER?

16 A CORRECT.

17 Q DO YOU RECOGNIZE -- I'M SHOWING YOU WHAT'S
18 BEEN MARKED PEOPLE'S 22.

19 DO YOU RECOGNIZE THAT?

20 A YES, I DO.

21 Q AND THAT IS THE OTHER VICTIM?

22 A YES, MR. CHAPPELL.

23 Q AND WHEN YOU SPOKE TO MR. FARMER, WHAT DID
24 HE TELL YOU HAPPENED?

25 A HE STATED THAT HE WAS ROBBED OF HIS
26 VEHICLE AND I BELIEVE SOME PERSONAL PROPERTY AT
27 GUNPOINT.

28 Q OKAY.

1 WHAT DID HE TELL YOU HAPPENED?

2 A HE STATED HE WAS GETTING GAS AT THE
3 STATION AT VERNON AND FIGUEROA, WHEN HE OBSERVED A GREEN
4 CAMRY THAT WAS PARKED ON THE OTHER SIDE OF THE ISLAND.
5 HE DID NOT PAY ANY ATTENTION TO THE VEHICLE. THEY DROVE
6 AWAY, AND HE DIDN'T THINK ANYTHING OF IT.

7 HE WAS IN THE MIDDLE OF PUMPING GAS INTO
8 THAT SUV WHEN THE GREEN CAMRY REAPPEARED. AT THAT TIME,
9 MR. RABB -- WELL, HE STATED THAT A MALE BLACK EXITED THE
10 FRONT PASSENGER SIDE OF THE VEHICLE, CONFRONTED HIM
11 WHILE THE FEMALE REMAINED IN THE VEHICLE WITH PARRON.

12 AND ANOTHER GENTLEMAN, ANOTHER MALE BLACK
13 EXITED THE REAR RIGHT PASSENGER DOOR AND STAYED AS A
14 LOOKOUT, ALSO CARRYING A FIREARM.

15 Q DID YOU SAY THAT THE FIRST SUSPECT WHO WAS
16 ULTIMATELY IDENTIFIED AS MR. RABB WAS HOLDING A FIREARM?

17 A YES.

18 Q AND --

19 MR. BEHZADI: YOUR HONOR, MOVE TO STRIKE
20 MR. RABB'S NAME ON THIS. THE VICTIM IDENTIFIED A
21 PERSON, A MALE BLACK. THE NAME OF MY CLIENT SHOULD NOT
22 BE MENTIONED AT THIS POINT.

23 THE COURT: SORRY. CAN I SEE COUNSEL AT SIDEBAR?
24

25 (THE FOLLOWING PROCEEDINGS WERE
26 HELD AT SIDEBAR:)

27

28 THE COURT: THE OBJECTION AT THIS POINT IS

1 SUSTAINED. YOU WILL BE ABLE TO CLOSE IT UP LATER ON.

2 NO SPEAKING OBJECTIONS. JUST ASK TO
3 APPROACH AND YOU WILL BE ALLOWED TO APPROACH.

4 MR. BEHZADI: YES, YOUR HONOR.

5

6 (THE FOLLOWING PROCEEDINGS WERE
7 HELD IN OPEN COURT IN THE PRESENCE
8 OF THE JURY:)

9

10 THE COURT: LADIES AND GENTLEMEN, THE DEFENSE
11 OBJECTION IS SUSTAINED. YOU ARE TO TREAT THAT ANSWER AS
12 THOUGH YOU HAD NEVER HEARD IT.

13 BY MR. VON HELMOLT:

14 Q DID MR. FARMER TELL YOU WHAT THE MAN WITH
15 THE BLUE SHIRT, TELL YOU WHAT HE DID AFTER HE GOT OUT OF
16 THE CAMRY?

17 A HE STATED HE APPROACHED HIM.

18 Q WAS HE HOLDING ANYTHING IN HIS HAND?

19 A A FIREARM.

20 Q WHAT DID MR. FARMER TELL YOU THE MAN WITH
21 THE BLUE SHIRT DID NEXT?

22 A HE ASKED THEM WHERE THEY WERE FROM, WHICH
23 IS STREET VERNACULAR FOR ASKING SOMEBODY WHAT GANG THEY
24 ARE FROM.

25 Q THEN WHAT HAPPENED?

26 A THE VICTIM STATED THAT HE WAS NOT A GANG
27 MEMBER.

28 AND THEN THE MALE AGAIN ASKED HIM WHAT HE

1 HAD, IN REFERENCE TO PERSONAL PROPERTY.

2 Q OKAY.

3 AND THIS WAS ALL AT GUNPOINT?

4 A YES.

5 Q WHAT HAPPENED AFTER THAT?

6 A THE MALE SUBSEQUENTLY STATED, "IT'S THAT
7 40'S LIFE," AND THEN STARTED SEARCHING HIS PERSON FOR
8 PROPERTY.

9 Q AND DID MR. FARMER TELL YOU WHAT HE WAS
10 FEELING AT THAT TIME?

11 A MR. FARMER SAID HE WAS AFRAID THAT HE WAS
12 GOING TO GET SHOT.

13 Q OKAY.

14 AND DID HE TELL YOU WHETHER THE MAN IN THE
15 BLUE SHIRT POINTING THE GUN AT HIM TOOK ANYTHING FROM
16 HIM?

17 A YES, HE DID.

18 Q WHAT DID MR. FARMER TELL YOU THE MAN WITH
19 THE BLUE SHIRT TOOK?

20 A HE STATED HE TOOK \$15 FROM HIS PERSON.

21 Q WHAT HAPPENED AFTER THAT?

22 A HE TOLD HIM TO STEP -- GET AWAY FROM THE
23 CAR, AND THEN HE CONFRONTED MR. CHAPPELL.

24 Q WHERE WAS MR. CHAPPELL AT THE TIME?

25 A I BELIEVE MR. CHAPPELL WAS SEATED IN THE
26 DRIVER'S SEAT OF THE EQUINOX.

27 Q WHAT HAPPENED AFTER THAT?

28 A I BELIEVE HE ASKED HIM IF HE HAD ANY

1 PROPERTY ON HIM ALSO.

2 Q THE MAN WITH THE BLUE SHIRT ASKED
3 MR. CHAPPELL IF HE HAD ANY PROPERTY?

4 A THAT'S CORRECT.

5 Q WHAT HAPPENED AFTER THAT?

6 A I BELIEVE MR. CHAPPELL DIDN'T HAVE ANY
7 PROPERTY. AND THE MALE POINTED THE GUN AT HIM AND TOLD
8 HIM TO GET OUT OF THE CAR.

9 Q DID MR. CHAPPELL GET OUT OF THE CAR?

10 A YES.

11 Q HOW DO YOU KNOW THAT?

12 A HE TOLD ME SO.

13 Q WHAT HAPPENED AFTER THAT?

14 A THE MALE ENTERED THE CAR. THE OTHER
15 GENTLEMAN WHO WAS ACTING AS A LOOKOUT REENTERED THE
16 GREEN CAMRY AS IT WAS DRIVEN BY THE FEMALE BLACK. AT
17 THAT TIME, BOTH VEHICLES LEFT THE GAS STATION. THEY
18 EXITED THE GAS STATION AND DROVE AWAY WESTBOUND ON
19 VERNON FROM THE GAS STATION.

20 Q OKAY.

21 AND IT WAS A SHORT TIME AFTER THAT, THAT
22 YOU STOPPED THE CAMRY, AFTER YOU SAW IT GOING EAST; IS
23 THAT CORRECT?

24 A THAT'S CORRECT.

25 Q AND AFTER YOU SPOKE WITH THE VICTIMS,
26 MR. FARMER AND MR. CHAPPELL, AT THE GAS STATION, WHAT
27 DID YOU DO?

28 A I WENT BACK -- ACTUALLY, I COORDINATED

1 WITH THE 77TH PATROL UNIT THAT WAS THERE AND ADVISED
2 THEM I HAD A CAR MATCHING THE DESCRIPTION AS WELL AS A
3 FEMALE DETAINED A FEW BLOCKS AWAY.

4 Q ALL RIGHT.

5 AND DO YOU REMEMBER, KENDRA BROWN, YOU HAD
6 AN OPPORTUNITY TO OBSERVE HER RELATIVELY CLOSE UP?

7 A YES.

8 Q I'M SHOWING YOU WHAT'S BEEN MARKED
9 PEOPLE'S 18 FOR IDENTIFICATION.

10 CAN YOU RECOGNIZE THE PERSON IN THAT
11 PHOTOGRAPH?

12 A YES.

13 Q WHO IS THAT?

14 A THAT IS MS. BROWN.

15 Q ALL RIGHT.

16 AND SHE WAS THE LADY THAT WAS DRIVING THE
17 CAMRY WHEN YOU SAW IT AND YOU STOPPED IT?

18 A CORRECT.

19 Q AND AFTER YOU COORDINATED WITH THE 77TH
20 UNIT AT THE GAS STATION, WHAT DID YOU DO?

21 A I DROVE BACK TO THE SCENE WHERE MS. BROWN
22 WAS BEING DETAINED AT.

23 Q WHAT DID YOU SEE WHEN YOU GOT THERE?

24 A WHEN I GOT THERE, THE OFFICERS THAT WERE
25 MAINTAINING THE PERIMETER ADVISED ME -- ACTUALLY, I
26 OBSERVED THEY HAD ANOTHER INDIVIDUAL DETAINED.

27 Q AND CAN YOU DESCRIBE THE OTHER INDIVIDUAL
28 THEY HAD DETAINED?

1 A HE WAS A MALE BLACK, ALSO IN HIS 20'S,
2 THIN, APPROXIMATELY I BELIEVE 6 FEET TALL, AND I BELIEVE
3 HE WAS WEARING A SWEATSHIRT.

4 Q DID YOU LEARN HIS NAME?

5 A EVENTUALLY I DID, YES. I DON'T RECALL AT
6 THE MOMENT.

7 Q WOULD IT REFRESH YOUR RECOLLECTION TO
8 REVIEW YOUR REPORT?

9 A YES, IT WOULD.

10 MR. VON HELMOLT: MAY THE WITNESS REFRESH HIS
11 RECOLLECTION, YOUR HONOR?

12 THE COURT: YES.

13 BY MR. VON HELMOLT:

14 Q HAS IT REFRESHED YOUR RECOLLECTION?

15 A YES, IT HAS.

16 Q WHAT WAS THE NAME OF THE SUSPECT THAT WAS
17 THERE WHEN YOU RETURNED?

18 A EARL PARRON.

19 Q DID YOU HAVE AN OPPORTUNITY TO OBSERVE
20 MR. PARRON?

21 A YES, I DID.

22 Q SHOWING YOU WHAT'S BEEN MARKED PEOPLE'S 20
23 FOR IDENTIFICATION, DO YOU RECOGNIZE THE PERSON IN THAT
24 PHOTOGRAPH?

25 A YES, I DO.

26 Q WHO IS THAT?

27 A THAT'S MR. PARRON.

28 Q AND WHAT HAPPENED AFTER YOU GOT BACK TO

1 THE CAMRY AND YOU SAW MS. BROWN AND MR. PARRON? WHAT
2 HAPPENED AFTER THAT?

3 A THE 77TH UNIT BROUGHT THE TWO VICTIMS OVER
4 TO OUR LOCATION AND CONDUCTED A FIELD SHOWUP.

5 Q WERE YOU PRESENT AT THE FIELD SHOWUP?

6 A YES, I WAS.

7 Q DID YOU HEAR ANY STATEMENTS BY THE
8 VICTIMS, MR. FARMER AND MR. CHAPPELL, AT THE LOCATION OF
9 THE CAMRY?

10 A I DON'T RECALL IF I WAS NEXT TO THEIR STOP
11 OR THEY ADVISED ME ABOUT THE IDENTIFICATION.

12 Q OKAY.

13 WHAT DID YOU DO AFTER THE IDENTIFICATION
14 PROCEDURE?

15 A I ADVISED THE OFFICERS, OUR SOUTHWEST
16 PATROL OFFICERS, TO ARREST AND TRANSPORT MR. PARRON AND
17 MS. BROWN TO SOUTHWEST STATION FOR FURTHER
18 INVESTIGATION.

19 Q ALL RIGHT. THANK YOU.

20 BACK AT THE SCENE, WHEN YOU WERE SPEAKING
21 TO MR. FARMER AND MR. CHAPPELL, DID THEY GIVE YOU ANY
22 DETAILS OF THE -- IDENTIFY THE PERSON THAT HAD ROBBED
23 THEM, THE MAN IN THE BLUE SHIRT?

24 A YES.

25 Q WHAT DID THEY TELL YOU?

26 A THEY TOLD ME ABOUT -- THAT THE INDIVIDUAL
27 THAT HAD ROBBED THEM AT GUNPOINT, THEY TOLD ME ABOUT THE
28 THREE BRAIDS IN HIS HAIR, AND ALSO SAID SOMETHING ABOUT

1 THE TATTOOS ON HIS FACE AS WELL AS A DISTINCTIVE TATTOO
2 ON HIS FOREARM I BELIEVE, A TATTOO OF A HAND MAKING A
3 GANG SIGN.

4 Q OKAY.

5 AND DID THEIR DESCRIPTION MATCH WHAT YOU
6 SAW OF MR. RABB WHEN HE GOT OUT AND FLED THE TOYOTA
7 CAMRY?

8 A YES.

9 Q WHEN MR. RABB GOT OUT AND RAN AWAY FROM
10 YOU, HE HAD THE SAME KIND OF BRAIDED HAIR THEY
11 DESCRIBED?

12 A THAT'S CORRECT.

13 Q HE HAD THE BLUE SHIRT ON THEY DESCRIBED?

14 A THAT'S CORRECT.

15 Q HE HAD A TATTOO ON HIS FACE?

16 A YES.

17 Q DID YOU SEE IF HE HAD A TATTOO ON HIS ARM?

18 A NO, I DID NOT.

19 Q TO THIS DATE, DO YOU KNOW WHETHER OR NOT
20 MR. RABB HAS A TATTOO ON HIS ARM?

21 A I LEARNED FROM DEPARTMENT RESOURCES THAT
22 HE DOES.

23 Q BUT AT THE TIME, YOU HAD NO IDEA?

24 A NO, I DID NOT.

25 Q DID MR. CHAPPELL TELL YOU HOW HE WAS
26 FEELING DURING THE CRIME?

27 A YES, HE DID.

28 Q WHAT DID HE TELL YOU?

1 A HE SAID HE WAS AFRAID AND THOUGHT HE WAS
2 GOING TO GET KILLED.

3 Q WERE YOU PRESENT DURING THE INVENTORY
4 SEARCH OF THE CAMRY?

5 A YES, I WAS.

6 Q AND DO YOU REMEMBER WHO CONDUCTED THAT
7 SEARCH?

8 A I BELIEVE IT WAS OFFICER CEJA.

9 Q ALL RIGHT.
10 AND DID YOU SEE HIM RECOVER ANYTHING FROM
11 THE CAMRY?

12 A YES, I DID.

13 Q WHAT DID HE RECOVER?

14 A HE RECOVERED THREE HANDGUNS FROM THE TRUNK
15 OF THE CAMRY.

16 Q CAN YOU DESCRIBE THE GUNS?

17 A I BELIEVE THEY WERE REVOLVERS.

18 Q DO YOU KNOW WHO BOOKED THOSE INTO
19 EVIDENCE?

20 A OFFICER CEJA DID.

21 Q OKAY.

22 I'M HANDING YOU WHAT'S BEEN MARKED
23 PEOPLE'S 23 FOR IDENTIFICATION.

24 CAN YOU TAKE THE ITEM INSIDE OUT OF THE
25 ENVELOPE, PLEASE?

26 A (WITNESS COMPLIES.)

27 Q DID YOU HAVE AN OPPORTUNITY TO EXAMINE THE
28 GUNS THAT OFFICER CEJA RECOVERED FROM THE TRUNK OF THE

1 CAMRY?

2 A YES, I EVENTUALLY DID.

3 Q THE ITEM REMOVED FROM THE ENVELOPE MARKED
4 PEOPLE'S 23, DOES THAT APPEAR TO BE ONE OF THOSE GUNS?

5 A YES.

6 Q HOW DO YOU RECOGNIZE IT?

7 A I RECOGNIZE IT FROM THE CASE NUMBER.

8 Q OKAY.

9 THAT'S ON THE ENVELOPE?

10 A CORRECT.

11 Q THANK YOU.

12 AND DOES IT APPEAR TO BE -- LOOKS LIKE ONE
13 OF THE SAME GUNS THAT WAS RECOVERED?

14 A YES.

15 Q ALL RIGHT.

16 NOW, HOW DID YOU IDENTIFY MR. RABB
17 ULTIMATELY AS A SUSPECT IN THIS CASE?

18 A I WAS TRYING TO VERIFY IF THE CAMRY WAS
19 STOLEN ITSELF. SO WHAT I DID IS I HAD TWO OFFICERS
20 RESPOND TO THE REGISTERED OWNER'S ADDRESS ON THE
21 REGISTRATION AND HAD THEM TO DETERMINE IF THE CAR WAS
22 STOLEN OR NOT.

23 Q DO YOU KNOW THE NAME OF THE PERSON WHO WAS
24 THE REGISTERED OWNER?

25 A I DON'T RECALL, NO.

26 Q IS IT IN YOUR REPORT?

27 A IT SHOULD BE, YES.

28 Q WOULD IT REFRESH YOUR RECOLLECTION TO

1 REVIEW THE REPORT?

2 A YES, IT WOULD.

3 MR. VON HELMOLT: MAY HE REFRESH HIS
4 RECOLLECTION, YOUR HONOR?

5 THE COURT: YES.

6 THE WITNESS: OKAY.

7 BY MR. VON HELMOLT:

8 Q IS YOUR RECOLLECTION REFRESHED, OFFICER?

9 A YES.

10 Q WHAT WAS THE NAME OF THE REGISTERED OWNER?

11 A IT WAS TEQUILA RICHMOND.

12 Q DO YOU REMEMBER THE NAME OF THE OFFICERS
13 THAT HAD GONE OVER TO MS. RICHMOND'S HOUSE?

14 A OFFICER GONTRAM AND OFFICER GONZALEZ.

15 Q AND AFTER THEY HAD VISITED MS. RICHMOND'S
16 HOUSE, DID YOU SPEAK TO THEM ON THE RADIO OR IN PERSON?

17 A ON THE RADIO.

18 Q WHAT DID YOU DO AFTER YOU SPOKE TO THEM ON
19 THE RADIO?

20 A AT THAT MOMENT OR --

21 Q DID YOU OBTAIN A PHOTOGRAPH OF AN
22 INDIVIDUAL?

23 A YES. EVENTUALLY, I DID, YES.

24 Q WHAT WAS THE INDIVIDUAL WHOSE PHOTOGRAPH
25 YOU OBTAINED?

26 A MR. RABB'S.

27 Q AND WHAT DID YOU DO ONCE YOU GOT THE
28 PHOTOGRAPH?

1 A I VERIFIED THAT THAT WAS THE INDIVIDUAL
2 THAT RAN FROM ME.

3 Q SO YOU GOT A COPY OF A PHOTOGRAPH OF
4 MR. RABB AND LOOKED AT IT?

5 A YES. I GOT A BOOKING PHOTO.

6 Q WHEN YOU LOOKED AT THAT, YOU REALIZED
7 THAT'S THE GUY?

8 A YES.

9 Q DID YOU EVER SPEAK TO THE REGISTERED OWNER
10 OF THE CHEVY EQUINOX, THE SMALL SUV THAT GOT STOLEN?

11 A I NEVER SPOKE TO THE REGISTERED OWNER.
12 THE CAR WAS A RENTAL.

13 Q DID YOU SPEAK TO THE PERSON THAT RENTED
14 THE CAR?

15 A YES, I DID.

16 Q DO YOU REMEMBER THAT PERSON'S NAME?

17 A NO, I DON'T.

18 Q WOULD IT REFRESH YOUR RECOLLECTION TO
19 REVIEW THE REPORT?

20 A YES, IT WOULD.

21 MR. VON HELMOLT: MAY HE REFRESH HIS
22 RECOLLECTION, YOUR HONOR?

23 THE COURT: YES.

24 BY MR. VON HELMOLT:

25 Q PLEASE DO SO, SERGEANT.

26 A OKAY.

27 Q WHAT WAS THE NAME OF THE PERSON THAT HAD
28 RENTED THE CHEVY EQUINOX?

1 A ANABEL CORREA.

2 Q DID SHE FILL OUT A STOLEN VEHICLE REPORT?

3 A YES, SIMULTANEOUSLY WITH THE CRIME REPORT.

4 Q OKAY.

5 DID YOU TAKE THAT REPORT OR SOMEONE ELSE?

6 A I BELIEVE THE 77TH UNIT DID.

7 MR. VON HELMOLT: OKAY.

8 IF I COULD HAVE JUST A MOMENT, YOUR HONOR.

9 THE COURT: YES.

10 MR. VON HELMOLT: THANK YOU.

11 Q ARE YOU AWARE OF WHETHER THE TWO PEOPLE
12 THAT WERE ARRESTED THAT NIGHT, MS. BROWN AND MR. PARRON,
13 WHETHER THEY HAD ANY GANG AFFILIATION?

14 A YES.

15 Q WHAT GANG AFFILIATION DID THEY HAVE?

16 A THEY WERE ROLLING 40'S CRIPS.

17 Q HOW DID YOU LEARN THAT?

18 A I PULLED THEIR ARREST HISTORY AND SPOKE TO
19 SEVERAL GANG OFFICERS THAT NIGHT.

20 MR. VON HELMOLT: NOTHING FURTHER.

21 THE COURT: MR. BEHZADI.

22 MR. BEHZADI: THANK YOU.

23

24 CROSS EXAMINATION =

25 BY MR. BEHZADI:

26 Q GOOD AFTERNOON, SERGEANT.

27 A GOOD AFTERNOON.

28 Q YOU MENTIONED, SERGEANT, THAT ON OR ABOUT

1 SEPTEMBER 19TH OF '05, YOU STOPPED THIS GREEN TOYOTA
2 CAMRY AROUND THE INTERSECTION OF 45TH AND KANSAS?

3 A CORRECT.

4 Q AND THAT WAS FOR A VEHICLE CODE VIOLATION?

5 A THAT'S CORRECT.

6 Q SPEEDING?

7 A SPEEDING, RUNNING A RED LIGHT AND DRIVING
8 ON A SUSPENDED LICENSE.

9 Q EVENTUALLY AT SOME POINT, WITHIN A FEW
10 MINUTES, THE CAR STOPPED AND YOU STOPPED BEHIND THAT
11 VEHICLE?

12 A YES.

13 Q NOW, THIS HAPPENED AROUND 1:30 IN THE
14 MORNING?

15 A THAT IS CORRECT.

16 Q IS IT FAIR TO SAY THAT IT WAS PRETTY DARK
17 AT THAT TIME?

18 A YES, IT WAS.

19 Q AND WHEN YOU STOPPED YOUR VEHICLE, WERE
20 YOU -- FIRST OF ALL, WERE YOU WITH A PARTNER OR WERE YOU
21 BY YOURSELF?

22 A I WAS BY MYSELF.

23 Q WHAT WAS THE DISTANCE BETWEEN YOUR CAR AND
24 THE TOYOTA CAMRY WHEN BOTH OF THE VEHICLES HAD STOPPED?

25 A I WOULD SAY APPROXIMATELY 30 FEET.

26 Q THIRTY FEET.

27 AND YOU MENTIONED THAT YOU FOUND OUT THAT
28 THE TOYOTA CAMRY WAS BEING DRIVEN BY A FEMALE --

1 A YES.

2 Q -- DRIVER?

3 AND ALSO THERE WAS A PASSENGER IN THE
4 CAMRY?

5 A CORRECT.

6 Q AND YOU INSTRUCTED BOTH PERSONS TO GET OUT
7 OF THE CAR?

8 A NO. THEY WERE ALREADY EXITING THE VEHICLE
9 WHEN I APPROACHED.

10 Q AND THE DRIVER OF THE CAR, WHICH WAS A
11 FEMALE, DID YOU TALK TO HER 30 FEET AWAY OR YOU
12 APPROACHED HER CLOSER?

13 A PROBABLY FROM 30 FEET AWAY. I NEVER
14 ADVANCED TOWARDS THEIR LOCATION.

15 Q SO YOU JUST STAYED FROM 30 FEET AWAY AND
16 COMMUNICATED AT 30 FEET AWAY TO BOTH THE DRIVER AND THE
17 PASSENGER?

18 A THAT'S CORRECT.

19 Q NOW, WOULD IT BE CORRECT IF I SAY THAT
20 BOTH OF THE VEHICLES, YOUR VEHICLE AND THE CAMRY, WERE
21 BOTH IN THE SAME DIRECTION?

22 A NO.

23 Q ARE YOU SAYING THAT THE CAMRY WAS OPPOSITE
24 YOUR DIRECTION?

25 A THE FRONT OF THE VEHICLE WAS FACING AWAY
26 FROM ME.

27 Q THE FRONT OF THE VEHICLE WAS FACING AWAY
28 FROM YOU?

1 A YES.

2 Q SO DOES THAT MEAN THAT IT'S THE SAME
3 DIRECTION AS YOUR VEHICLE?

4 A NO. FOR CLARIFICATION, MY CAR WAS FACING
5 EASTBOUND ON 45TH STREET. THE GREEN CAMRY WAS FACING
6 SOUTHBOUND IN THE DRIVEWAY OF THAT LOCATION.

7 Q SO IT WAS --

8 A KIND OF LIKE A --

9 Q LIKE A 90-DEGREE ANGLE?

10 A CORRECT.

11 Q NOW, YOU MENTIONED THAT THE PASSENGER OF
12 THE VEHICLE GOT OUT OF THE CAMRY AT THE SAME TIME AS THE
13 DRIVER?

14 A YES.

15 Q AND, OFFICER -- SERGEANT, I'M SORRY,
16 EVENTUALLY THAT PASSENGER RAN AWAY FROM YOU?

17 A THAT'S CORRECT.

18 Q NOW, THAT PASSENGER WAS A MALE BLACK?

19 A YES.

20 Q HE DID NOT STOP TO STARE AT YOU FOR 30
21 SECONDS OR SO WHEN HE FLED AWAY AFTERWARDS?

22 A HE DID STOP, BUT NOT FOR 30 SECONDS.

23 Q APPROXIMATELY CAN YOU TELL US HOW MANY
24 SECONDS HE STOPPED BEFORE HE STARTED RUNNING AWAY?

25 A SOMEWHERE BETWEEN TWO SECONDS TO FIVE
26 SECONDS.

27 Q TWO TO FIVE SECONDS.

28 DID YOU ASK HIM TO STOP?

1 A YES.

2 Q NOW, AT THE TIME THAT YOU WERE LOOKING AT
3 THIS PASSENGER FOR THAT COUPLE OF SECONDS, YOU DID NOT
4 HAVE ANY FLASHLIGHT POINTED AT HIS FACE, DID YOU?

5 A I DIDN'T HAVE A FLASHLIGHT, BUT I HAD MY
6 POLICE CAR SPOTLIGHTS ON AND OUR OVERHEAD LIGHTS. WE
7 HAVE WHAT WE CALL ALLEY LIGHTS THAT ILLUMINATE THE AREA.

8 Q NOW, THIS SPOTLIGHT IN YOUR VEHICLE, THAT
9 WAS NOT DIRECTLY POINTED AT THE PASSENGER'S FACE; ISN'T
10 THAT A FAIR STATEMENT?

11 A YEAH, I BELIEVE THAT WOULD BE FAIR TO SAY.
12 YES.

13 Q NOW, YOU MENTIONED IN THE FACIAL
14 DESCRIPTION YOU SAW A TATTOO ON HIS FACE?

15 A YES.

16 Q WE ARE TALKING ABOUT THE PASSENGER?

17 A YES.

18 Q THIS WAS AT 1:30 A.M. IN THE MORNING,
19 WHICH WAS PRETTY DARK --

20 A YES.

21 Q -- YOU TESTIFIED.

22 AND THIS WAS FROM 30 FEET AWAY?

23 A CORRECT.

24 Q AND CAN YOU DESCRIBE TO US HOW BIG WAS
25 THIS TATTOO AND WHERE WAS THIS LOCATED EXACTLY ON THE
26 SUSPECT'S FACE?

27 A AT THE TIME OF THE STOP, THE KNOWLEDGE
28 THAT I HAD IS THAT TO ME IT JUST LOOKED LIKE A TEARDROP

1 TO ME. AND I OBSERVED IT. AS FAR AS SIZE-WISE, I WOULD
2 SAY MAYBE HALF AN INCH AT TOPS.

3 Q YOU SAW THAT FROM 30 FEET AWAY?

4 A CORRECT.

5 Q DID YOU TRY TO APPREHEND HIM, OFFICER?

6 A NO.

7 Q NOW, YOU MENTIONED THAT HE WAS WEARING A
8 SHORT-SLEEVE SHIRT?

9 A NO. IT WAS LONG SLEEVE.

10 Q LONG SLEEVE.

11 SO YOU DID NOT OBSERVE ANY KIND OF TATTOOS
12 ON HIS ARMS?

13 A NO, I DID NOT.

14 Q AND THE LONG-SLEEVE SHIRT HE WAS WEARING
15 WAS LIGHT BLUE?

16 A CORRECT, YES.

17 Q AND HIS HAIR WAS -- YOU MENTIONED IT WAS
18 BRAIDED?

19 A YES.

20 Q DOES THAT MEAN THAT IT WAS VERY SHORT
21 ALSO?

22 A YES.

23 Q ABOUT HALF AN INCH, ONE INCH?

24 A SOMEWHERE BETWEEN THERE.

25 Q NOW, SERGEANT, YOU MENTIONED THAT
26 EVENTUALLY YOU CONTACTED THE OFFICERS WHO WERE LOCATED
27 AT THE GAS STATION, THE 76 GAS STATION, A FEW MINUTES
28 AFTER THIS INCIDENT; IS THAT CORRECT?

1 A YES, I DID.

2 Q AND THEY MENTIONED ABOUT THE ROBBERY AND
3 CARJACKING THAT HAD TAKEN PLACE AT THAT GAS STATION?

4 A YES.

5 Q AND SHORTLY AFTER YOU ARRESTED OF THE
6 DRIVER OF THE CAMRY, YOU DROVE DOWN TO THE 76 GAS
7 STATION?

8 A NO. I PLACED MS. BROWN AND MR. PARRON
9 UNDER ARREST AND THEY WERE TRANSPORTED TO SOUTHWEST
10 STATION, POLICE STATION.

11 Q BUT YOU DID NOT TAKE THEM TO THE POLICE
12 STATION?

13 A NO, I DID NOT.

14 Q LET'S TALK ABOUT MR. PARRON.

15 HE WAS NOT IN THE VEHICLE THAT YOU
16 STOPPED, IN THE CAMRY, WAS HE?

17 A WHEN I OBSERVED THE VEHICLE, THERE WERE
18 ONLY TWO PASSENGERS.

19 Q HOW DID YOU -- WHEN WAS THE FIRST TIME YOU
20 SAW MR. PARRON?

21 A WHEN I HAD RETURNED TO THE GAS STATION
22 AFTER SPEAKING TO THE VICTIMS, I HAD DRIVEN BACK TO 45TH
23 STREET WHERE MS. BROWN WAS BEING DETAINED. AND THAT'S
24 WHEN ONE OF THE OFFICERS ADVISED ME THEY HAD DETAINED
25 MR. PARRON AND WANTED ME TO DETERMINE WHETHER THAT WAS
26 THE INDIVIDUAL THAT RAN FROM ME, FROM THE CAMRY.

27 Q WHAT DID YOU TELL THEM?

28 A I TOLD THEM THAT WAS NOT THE SAME

1 INDIVIDUAL.

2 Q DO YOU REMEMBER WHAT WAS THE COLOR OF HIS
3 SHIRT?

4 A WITHOUT REFRESHING MY MEMORY, NO, I DON'T.

5 Q WOULD YOU LIKE TO REFRESH YOUR
6 RECOLLECTION?

7 MR. BEHZADI: YOUR HONOR, MAY HE REFRESH HIS
8 RECOLLECTION?

9 THE COURT: YES.

10 THE WITNESS: OKAY.

11 BY MR. BEHZADI:

12 Q SERGEANT, CAN YOU TELL US WHAT WAS THE
13 COLOR OF MR. PARRON'S SHIRT?

14 A HE WAS WEARING A GRAY SWEATSHIRT, SO I
15 DON'T KNOW WHAT THE UNDERSHIRT WAS.

16 Q A FEW MINUTES LATER, YOU SPOKE WITH THE
17 VICTIMS AT THAT 76 GAS STATION; IS THAT CORRECT?

18 A YES, THAT'S CORRECT.

19 Q THAT WAS MR. FARMER AND MR. CHAPPELL?

20 A YES.

21 Q AND THEY GAVE YOU A DESCRIPTION OF THE
22 THREE SUSPECTS THAT WERE INVOLVED IN THE ROBBERY AND
23 CARJACKING?

24 A YES.

25 Q AND YOU MENTIONED THIS CARJACKED VEHICLE
26 WAS AN EQUINOX SUV?

27 A YES.

28 Q WHERE WAS THIS EVENTUALLY LOCATED?

1 A I DON'T RECALL THE EXACT STREET NUMBER,
2 BUT IT WAS A FEW BLOCKS FROM WHERE I HAD DETAINED
3 MS. BROWN AND MR. PARRON.

4 Q WERE THERE ANY FINGERPRINTS TAKEN FROM
5 THIS EQUINOX SUV?

6 A THERE SHOULD HAVE BEEN.

7 Q DO YOU KNOW THE RESULTS OF THAT?

8 A THAT, I DON'T.

9 Q YOU MENTIONED ON YOUR DIRECT THAT THE
10 VICTIMS MENTIONED THAT ONE OF THE SUSPECTS GOT INTO
11 THEIR SUV AND DROVE AWAY?

12 A CORRECT.

13 Q AND SUSPECT BROWN AND ANOTHER SUSPECT GOT
14 INTO THE CAMRY?

15 A THAT'S CORRECT.

16 Q AND IT WAS LATER DETERMINED BY YOU THAT
17 THE PERSON THAT GOT INTO THE CAMRY WITH MS. BROWN WAS
18 MR. PARRON?

19 A THAT IS CORRECT.

20 Q SO THE VEHICLE THAT WAS CARJACKED WAS
21 TAKEN BY A THIRD PERSON?

22 A YES.

23 Q BUT AT THE TIME THAT YOU HAD ARRESTED
24 MS. BROWN DRIVING THE TOYOTA CAMRY, SHE WAS NOT WITH
25 MR. PARRON?

26 A NO, SHE WAS NOT.

27 Q NOW, YOU ALSO TESTIFIED, SERGEANT, THAT
28 THE TOYOTA WAS REGISTERED TO SOMEBODY ELSE BESIDES

1 MS. BROWN; IS THAT CORRECT?

2 A YES.

3 Q WHAT WAS THE NAME OF THAT PERSON?

4 A TEQUILA RICHMOND.

5 Q AND LATER YOU INVESTIGATED THIS MATTER
6 FURTHER AND YOU SPOKE WITH MS. RICHMOND?

7 A I NEVER SPOKE TO HER PERSON TO PERSON.

8 Q CAN YOU TELL US AGAIN HOW DID YOU
9 IDENTIFY -- HOW DID YOU COME ABOUT TO SEE THE PICTURE OF
10 MR. RABB?

11 A THE TWO OFFICERS THAT I SENT OVER TO
12 MS. RICHMOND'S ADDRESS WAS ADVISED BY MS. RICHMOND THE
13 CAR WAS NOT STOLEN. SHE HAD LENT THE CAR TO HER
14 BOYFRIEND AND SHE GAVE THEM THE NAME OF DAMEN RABB.

15 WITH THAT INFORMATION, I HAD THE OFFICERS
16 AT THE STATION ACCESS THROUGH THE DEPARTMENT RESOURCES
17 WHAT IS BASICALLY A CRIMINAL HISTORY REPORT THAT HAS A
18 PICTURE ATTACHED TO IT.

19 Q AND THE INCIDENT OCCURRED ON
20 SEPTEMBER 19TH OF '05.

21 WHEN DID YOU GET TO SEE THE PICTURE OF
22 MR. RABB AS A RESULT OF THE OFFICERS' IDENTIFICATION OR
23 INVESTIGATION?

24 A TIMEWISE?

25 Q YES, SIR.

26 A I WOULD SAY APPROXIMATELY WITHIN THE HOUR
27 AFTER THE STOP.

28 Q NOW, WHEN YOU SPOKE WITH THE VICTIMS

1 FARMER AND CHAPPELL, SERGEANT, THEY GAVE YOU SOME
2 DESCRIPTIONS OF THE PERSON WHO ROBBED THEM; IS THAT
3 CORRECT?

4 A YES.

5 Q AND DID THEY MENTION TO YOU THAT THE
6 PERSON WHO ROBBED THEM WAS WEARING A LONG-SLEEVE OR
7 SHORT-SLEEVE SHIRT?

8 A I DON'T RECALL.

9 Q BUT YOU DO RECALL THEY HAD MENTIONED
10 SOMETHING ABOUT A TATTOO ON THE FOREARM?

11 A YES.

12 Q YET WHEN YOU STOPPED THAT GREEN CAMRY AT
13 1:30 IN THE MORNING, THE PASSENGER WAS NOT WEARING A
14 SHORT-SLEEVE SHIRT; IS THAT CORRECT?

15 A NO, HE WAS NOT.

16 Q NOW, YOU MENTIONED, SERGEANT, SOME TATTOO
17 THAT YOU OBSERVED ON THE SUSPECT'S FACE WHEN YOU STOPPED
18 THE CAMRY. I'M TALKING ABOUT THE PASSENGER.

19 YOU MENTIONED SOME TATTOO LIKE IN THE
20 SHAPE OF A TEARDROP?

21 A CORRECT.

22 Q ABOUT AN INCH OR HALF AN INCH?

23 A PROBABLY AN INCH.

24 Q YOU MENTIONED ALSO THAT THAT WAS ON THE
25 RIGHT CHEEK OF THE SUSPECT.

26 A CORRECT.

27 Q AND YOU DON'T SEE THAT ON THE RIGHT CHEEK
28 OF MR. RABB RIGHT NOW IN COURT TODAY?

1 A NO, I DON'T, NOT WITHOUT EXAMINING
2 CLOSELY, NO.

3 MR. BEHZADI: YOUR HONOR, I DON'T HAVE ANY
4 FURTHER QUESTIONS FOR THIS WITNESS.

5 THE COURT: MR. VON HELMOLT.
6

7 REDIRECT EXAMINATION =
8 BY MR. VON HELMOLT:

9 Q SERGEANT, YOU SAID THAT THE SPOTLIGHTS ON
10 YOUR BLACK-AND-WHITE WERE NOT AIMED DIRECTLY AT THE FACE
11 OF THE PASSENGER THAT GOT OUT AND ULTIMATELY FLED.

12 WOULD IT BE FAIR TO SAY THAT PERSON'S FACE
13 LOOKED BRIGHTLY ILLUMINATED?

14 A YES, IT WAS.

15 Q AND I'M SHOWING YOU WHAT'S BEEN MARKED
16 PEOPLE'S 17 FOR IDENTIFICATION.

17 DO YOU RECOGNIZE THE PERSON IN THAT
18 PHOTOGRAPH?

19 A YES.

20 Q AND WHO IS THAT?

21 A THE SAME INDIVIDUAL THAT IS SEATED AT THE
22 END OF COUNSEL TABLE, MR. RABB.

23 Q IS THAT THE SAME MAN THAT GOT OUT OF THE
24 CAMRY AND RAN AWAY FROM YOU THE MORNING OF SEPTEMBER 19,
25 2005?

26 A YES, IT IS.

27 Q YOU SEE THERE IS A TEARDROP TATTOO ON
28 MR. RABB'S FACE?

1 A CORRECT.

2 Q WHAT SIDE OF HIS FACE IS THAT ON?

3 A IT'S ACTUALLY ON HIS LEFT SIDE.

4 Q IS IT POSSIBLE THAT THAT'S THE TATTOO THAT
5 YOU SAW THAT EVENING, WHEN HE GOT OUT AND RAN AWAY FROM
6 THE CAMRY?

7 MR. BEHZADI: OBJECTION, CALLS FOR SPECULATION.

8 THE COURT: HE ASKED HIM IS IT POSSIBLE.

9 YOU MAY ANSWER, IF YOU HAVE AN ANSWER.

10 THE WITNESS: YES.

11 BY MR. VON HELMOLT:

12 Q IN FACT, YOU RECALL THE TATTOO BEING ON
13 THE LEFT SIDE OF THE FACE?

14 A NOW I DO, YES.

15 Q AND WHAT IS IT THAT -- WHEN HE GOT OUT OF
16 THE CAR, MR. RABB GOT OUT OF THE CAR, WAS HE LOOKING AT
17 YOU DEAD ON?

18 A FOR A SHORT PERIOD, YES.

19 Q WHICH WAY DID HE TURN, TO THE LEFT OR TO
20 THE RIGHT, TO RUN AWAY?

21 A I BELIEVE HE TURNED TO HIS RIGHT.

22 Q AT WHAT POINT DID YOU SEE THE TATTOO ON
23 HIS FACE?

24 A WHEN HE WAS FACING ME.

25 Q OKAY.

26 THANK YOU.

27 AND HE HAD A LONG-SLEEVE SHIRT ON, WHEN HE
28 GOT OUT OF THE CAMRY?

1 A YES.

2 Q SO YOU WERE NOT ABLE TO SEE HIS FOREARMS
3 OR ANY OTHER TATTOOS ON HIS BODY; IS THAT CORRECT?

4 A I DIDN'T SEE THE SKIN ON HIS FOREARMS, BUT
5 OBVIOUSLY THE FOREARMS WERE COVERED BY HIS SLEEVES.

6 Q YOU COULD NOT SEE THE SKIN OF THE
7 FOREARMS?

8 A THAT, I COULD NOT.

9 Q YOU PREPARED YOUR REPORT APPROXIMATELY
10 WHAT DATE?

11 A THE SAME DATE.

12 Q ON SEPTEMBER 19TH OR SEPTEMBER --
13 SEPTEMBER 19TH, THAT'S WHEN YOU INCLUDED IN YOUR REPORT
14 THE DESCRIPTION OF THE TATTOOS ON THE FOREARMS THAT WERE
15 DESCRIBED BY THE VICTIMS OF THIS CRIME?

16 A YES.

17 Q WHEN WAS IT THAT YOU SUBSEQUENTLY LEARNED
18 MR. RABB HAD SOME TATTOOS?

19 A I BELIEVE THE NEXT DAY WHEN I SPOKE TO THE
20 GANG OFFICERS.

21 Q DID YOU EVER SEE ANY PHOTOGRAPHS OF THE
22 TATTOOS?

23 A YES.

24 Q AND DID THEY MATCH THE DESCRIPTIONS GIVEN
25 BY THE VICTIMS?

26 A YES.

27 Q DID YOU EVER PERSONALLY LAY EYES ON A
28 VEHICLE THAT HAD BEEN CARJACKED THAT NIGHT, THE EQUINOX?

Petitioner's Appendix M

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Attorneys for Real Party in Interest

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

In re

DAMIEN RABB,

On Habeas Corpus.

Case No. BA290495-01

**INFORMAL RESPONSE
TO PETITION FOR WRIT
OF HABEAS CORPUS AND
EXHIBITS**

Department 106 Central

TO THE HONORABLE LARRY P. FIDLER, JUDGE OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL
DIVISION, DEPARTMENT 106, AND TO PETITIONER IN PROPRIA PERSONA:

On December 4, 2012, petitioner Damen Rabb (herein "petitioner") filed a
Petition For Writ of Habeas Corpus (herein "the Petition"). On January 9, 2013, the Court
requested an informal response thereto from the People of the State of California ("the
People"), real party in interest in the above-entitled action, by their counsel, Jackie Lacey,
District Attorney for Los Angeles County. The Court limited the informal response "solely
to the issue of whether the surveillance tape the defendant alleges would exonerate him
exists, and if so, who has possession of it." (Order dated January 9, 2013.)

1 The People respond that, at their request, the Los Angeles Police Department
2 ("LAPD") has searched for the gas station surveillance tape in this case but has been unable
3 to locate it. Records indicate that other property booked in this case was destroyed on or
4 about September 22, 2006. (See the Follow-Up Investigation Report of LAPD Detective
5 Joseph Chavez attached hereto as Exhibit 1; Exhibit 4 at pp. 160-161.)
6

7 Furthermore, it is clear that exculpatory evidence was not suppressed, and
8 that petitioner's rights were not violated, because the existence of the surveillance tape was
9 disclosed in the original LAPD arrest report. (See the Arrest Report at pp. 5 and 13,
10 attached hereto as Exhibit 2.) The investigating officer, Detective Theodore Williams,
11 documented, in his follow-up investigation report, that the tape was not exculpatory; to the
12 contrary, Detective Williams reported that, upon his review of the videotape the day after
13 the crime, he "was unable to see the carjacking" on the tape. (See the Follow-Up
14 Investigation Report at p. 1, attached hereto as Exhibit 3.)

15 At petitioner's trial, Detective Williams testified under oath that he reviewed
16 the gas station surveillance video and that the video was not clear. (See excerpts of the
17 Reporter's Transcript of Proceedings, Exhibit 4 hereto, at pp. 159-160.) Detective Williams
18 testified that he could not identify any particular vehicle in the video and that he could not
19 see faces or persons on the video clear enough to make an identification. (See *id.* at p. 160.)

20 Accordingly, petitioner has failed to meet his burden of stating facts
21 establishing a prima facie case for habeas relief, and this Court should summarily deny the
22 Petition without issuing an order to show cause.


23
24 Dated: March 8, 2013.

Respectfully submitted,

25 STEVE COOLEY
26 District Attorney of
27 Los Angeles County

28 IRENE WAKABAYASHI
29 Head Deputy District Attorney
30 Appellate Division

31 BRENTFORD J. FERREIRA
32 Deputy In Charge
33 Habeas Corpus Litigation Team

34 By 
35 JOANN LACH
36 Deputy District Attorney

Attorneys for Real Party in Interest

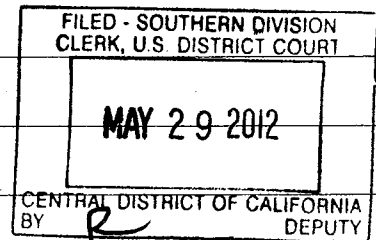
Petitioner's Appendix N

DAMEN RABO

*P.82951. JATF-CB-232

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COCORAN, CALIFORNIA 93212



United States District Court
Central District of California

DAMEN RABO
Petitioner.

Case NO. CV 11-5110-JAK (JPR)

✓

RAUL LOPEZ, Acting Warden
Respondent.

Petitioner's Request for Leave of

The Court to Request Motion for Evidentiary

Hearing 28 U.S.C. Section 2254
Fed. R. Civ. P. Local Rule 7.5 Local Rule 26-8.7.

Petitioner, DAMEN RABO, respectfully moves this Honorable Court to
here Petitioner's motion for leave of court to request and hold
an evidentiary hearing. 28 U.S.C. section 2254 (8).

This motion is made on the grounds that there are major
factual disputes in this case, including issues of ineffective assistance
of counsel, professional misconduct, and the trial court's rulings which
made the victims in this case available to testify in the instant
matter, and the trial court's ruling which precluded the defense
(Petitioner) from calling their expert witnesses.

The Petitioner has also filed the following with the
court, as follows:

1.) Petition for writ of HABEAS corpus.

2.) Motion for reconsideration.
3.)

This motion was filed with The Honorable court on or about the
of MAY 2012, and is still pending, as it relates to this
serious issue.

These factual disputes cannot be properly resolved without an
evidentiary hearing, and the merits of these factual disputes
have not been resolved by a state proceeding, fully, fairly, and
factually.

In Townsend v. Sain, 372 U.S. 313, 314 (1963), that the
Honorable court stated, we hold that a federal court must grant
an evidentiary hearing to a habeas applicant under the following
circumstances:

1.) The merits of the factual dispute were not resolved in
the state court hearing.

2.) The state factual determination is not fairly
supported by the record as a whole.

3.) The fact-finding procedure employed by the state
court was not adequate to afford a full and fair hearing.

4.) There is a substantial allegation of newly discovered
evidence.

5.) The material facts were not adequately developed
at the state-court hearings.

6.) For the reasons it appears that the state trier
of fact did not afford the habeas petitioner a full
and fair fact-finding hearing.

At p. 317, the court went further and stated that, where newly discovered evidence is alleged in a Habeas Application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing.

In this matter, petitioner was prejudiced by plain error and a miscarriage of justice mandates an evidentiary hearing pursuant to petitioner's fundamental actual innocence, and due to the substantial denial of petitioner's fundamental constitutional and substantial rights, resulted in cumulative prejudice.

In addition to the reasons stated in petitioner's Application for writ of Habeas corpus, an order for evidentiary hearing review should be issued because as follows:

A.) The Plaintiff for the people of the state of California, Deputy District Attorney Kenneth Jon Helms 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 JHS video tape into Police Property and later forward to the District Attorney's office, an assigned to the custody of Deputy D.A. Kenneth Jon Helms.

In this case petitioner's identity was a critical element of the prosecution's case. The circumstantial factors provided to the court by the prosecution was all based on description; although the victims were capable of providing the court with an in-court identification, 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

1 passionately ask this Honorable Judge/Court to grant his request for an
 2 evidentiary hearing and discovery motion in order to produce said VHS
 3 video tape.

4 Petitioner has been in custody for the instant matter for
 5 approximately six years, and have managed to remain poised and patient
 6 while this matter goes through the judicial procedures.

7 The production of the VHS video tape by the District Attorney or
 8 Attorney General's office will show proof to the people of the
 9 state of California and all presiding justices in this juncture
 10 that Petitioner, DAMEN D. RABO, is ACTUALLY innocent and relief
 11 should be granted in his favor in order to preserve his rights
 12 from incessant constitutional violations that has thus far undermined
 13 the confidence in the outcome of this matter.

14
 15 The Petitioner respectfully submits that where an unresolved factual
 16 dispute exists, demeanor evidence is a significant factor in adjudging
 17 credibility. And questions of credibility, of course are basic to resolution
 18 of conflicts in testimony, ineffective assistance of counsel, judicial and
 19 prosecutorial misconduct, and where there is plain error.

20 CONCLUSION:

21
 22 Petitioner, respectfully request and prays that for the foregoing reasons,
 23 this Honorable court will grant petitioner's motion, and order an
 24 evidentiary hearing in the instant proceeding and any further
 25 proceeding before this Honorable Judge/Court.

26 Date: May 22, 2012

27 Respectfully submitted,

28 Damen Rabo
DAMEN RABO

in pro per.

EXHIBIT “A”

Damen Fabb.
PLAINTIFF/PETITIONER

VS

PAUL LOPEZ Acting Warden.
DEFENDANT/RESPONDANT

CASE NO CJ-11-5110 JAK (JPR)

PROOF OF SERVICE BY MAIL

I the undersigned, hereby declare:

(1) I am a citizen of the United States; (2) I am over the age of 18 years. I am a residence of Kings County, in California.

My mailing address is Post Office Box 5242 Corcoran, California 93212-5242

On MAY 23, 20012, I served a true copy or original copy of the following; PETITIONERS REQUEST for ~~leave~~ of the court to request motion for Evidentiary hearing 28 U.S.C section 2254 Fed. R. Civ. P. LOCAL rule 7.5 LOCAL rule 26.8.7 / Exhibits.

by placing said document (s) in a sealed postage paid envelope into the CSATF/State Prison at Corcoran mail box for delivery to the United States Post Office at Corcoran, California, addressed as followed;

Damen Fabb
#P-82951 JAF-58/232
P.O. Box 5246
Corcoran, California 93212

by placing said document (s) in a sealed Interdepartmental envelope into the California CSATF Facility Legal Mailbox for inner-institutional delivery to the below listed person(s) at the following addresses;

clerk..
U.S. District court
312 N. Spring street
Los Angeles, CA 90012

And that this declaration was executed under the penalty of perjury at Corcoran, California 93212-5242, on MAY 23, 20012.

Damen Fabb
PRINTED NAME (DECLARANT)

Damen Fabb
SIGNATURE (DECLARANT)

Petitioner's Appendix O

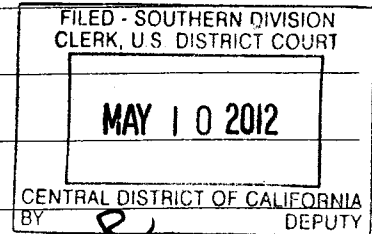
1 Damen Rabb

2 #P-82951. SATF-C8-232

3 Post office Box 5246

4 Corcoran, California 93212

5 : In propria persona.



6
7
8 In The United States District Court
9 For The Central District of California

10
11 Damen Rabb,
12 Petitioner.

CASE NO. CV-11-5110 JAK (JPR)

13 v.

14 RAUL Lopez, Acting Warden,
15 Respondent.

Motion for request for Appointment
of Counsel; Memorandum of Points
And Authorities Argument.

16
17 Petitioner Points out there is clear statutory Authority under which
18 The District Court may Appoint or Assign Counsel To Assist Pro se
19 Petitioner in Litigating civil Actions; (28 U.S.C, section 1915(d), in
20 relationship To 42 U.S.C, section 1983) Also see Norris J. Wainwright,
21 (1977) 588 F.2d 130, 133-134; ("Fundamental Fairness" is The Test
22 by which The decision To Appoint Assistance of counsel rests.)
23 Another primary consideration is The right of every Litigant, Rich
24 or poor, To equal consideration before The courts; (Coppedge v. U.S.
25 (1962) 369 U.S. 438, 456). Even without statutory Authority
26 federal courts, in A proper situation or prevailing circumstances
27 of A case, may Assign Counsel To Assist An indigent State
28 Prisoner Plaintiff under The court's supervisory powers and

1 sound discretion; (MCNABB v. UNITED STATES, 1943 318 U.S. 332, 346-
 2 347; ALSO see The SUPERVISORY POWER OF THE FEDERAL COURTS,
 3 76 HARV. L. 1656).

4 Some COURTS hold counsel is not necessary "UNLESS THE CIR-
 5 CUMSTANCES OF THE PARTICULAR CASE ARE SUCH THAT COUNSEL
 6 WOULD BE VITAL TO ATTAIN DUE PROCESS, OR ACCESS TO THE COURTS.
 7 (ESKRIDGE v. RHAY, (1965) 345 F.2d 778, 782; Anderson v. Heinze,
 8 (1958) 258 F.2d 479, 482, 484; Dillon v. UNITED STATES, (1962)
 9 307 F.2d 445, 447; Bounds v. Smith, (1977) 430 U.S. 817, 823-
 10 832.)

11 PETITIONER IS WELL AWARE THE UNITED STATES SUPREME COURT AND
 12 CONGRESS HAVE NEVER HELD A CIVIL LITIGANT HAS A RIGHT TO HAVE
 13 COUNSEL ASSIGNED FOR ASSISTANCE IN PURSUING CLAIMS IN THE
 14 COURTS. HOWEVER, THE QUESTION OF WHETHER OR NOT TO ASSIGN
 15 COUNSEL IS SOLELY WITHIN THE DISCRETION OF THE COURT AND
 16 THAT SOUND DISCRETION "REQUIRES THAT COUNSEL BE APPOINTED IN
 17 AT LEAST SOME CASES." (UNITED STATES v. WILKENS, (1964) 338,
 18 F.2d 404, 406; UNITED STATES v. WILKENS, (1966) 281 F.2d 707, 715.

19 MANY ENTANGLEMENTS AND UNNECESSARY DELAYS AND EXPENSE
 20 TO THE JUDICIARY AND PARTIES MAY BE AVOIDED BY ASSIGNMENT
 21 OF COUNSEL; TAYLOR v. PEGELON, 335 F.2d 147, 150). AT LEAST ONE
 22 DISTRICT COURT HAS VIEWED IN THE CONTEXT OF HABEAS CORPUS THAT
 23 UNLESS THE APPLICATION COULD BE DISMISSED "SUMMARILY", COUNSEL
 24 SHOULD BE ASSIGNED TO ASSIST THE IMPROVERISHED "LAYMAN
 25 PRISONER" (COLLINS v. CROUSE, (1965) 348 F.2d 887, 889.)

26 IN CIVIL RIGHTS ACTIONS UNDER 42 U.S.C, SECTION 1983, TO
 27 REDRESS INJURIES INFLICTED BY INDIVIDUAL "ACTING UNDER COLOR
 28 OF STATE LAW", COURTS HAVE CONSIDERED ASSIGNMENT OF

counsel to be of fundamental importance where the
 Petitioner (Prisoner civil Litigant) must conduct discovery
 to pursue the case and the petitioner cannot conduct the
 discovery himself; *Murrell v. Bennett*, 1280 (615 F.2d 306,
 309). Perhaps more importantly, "Summary Judgment"
 Proceedings Against A Prisoner Petitioner unable to secure
 discovery to ward off such judgment, cannot be permitted
 against as layman Prisoner Petitioner unaware of proper
 opposition to such proceeding; (*Ibid.* at 310-311).

In this case, as stated in the foregoing facts and forthcoming
 attached declaration, petitioner has clearly demonstrated he
 cannot proceed further in litigating this meritorious proceed-
 ing without assistance from someone knowledgeable in the
 intricacies entailed in pursuit of this type of proceeding.

conclusion

wherefore, the foregoing reasons and any others deemed
 appropriate by the court, ^{Petitioner} ~~Prisoner~~ prays the court assign
 counsel to pursue this action.

DATE: MAY 3, 2012

Respectfully submitted,

Damen Babul.

PETITIONER IN PRO SE.

1 DAMEN RABB

2 *P. 52951. SATF. CB. 232

3 Post office Box 5246

4 CORCORAN, CALIFORNIA 93212

5 In propria persona

6
7
8 In The UNITED STATES DISTRICT COURT
9 For The CENTRAL District of CALIFORNIA

10
11 DAMEN RABB,
12 PETITIONER.

CASE NO. CV 11-5110 JAK (JPR)

13 J.

14 Raul Lopez, Acting Warden
15 Respondent.

Motion For An evidentiary Hearing;
Memorandum of Points And Authorities.

16
17 comes now The Petitioner DAMEN RABB, To move in This Honorable
18 Court For The setting of An evidentiary Hearing.

19 The Petitioner is A STATE Prisoner, proceeding in propria persona
20 in This Habeas corpus Action. This motion is being filed in
21 conjunction with This brief type Traverse of The respondents
22 Answer To The order To show cause. Due To The issues raised
23 in The Petition, An evidentiary hearing is WARRANTED in This
24 Action.

25 The Petitioner raises grounds on constitutional violations AT
26 Trial, And on Appeal. Such grounds raise "mix questions" of Law And
27 Fact That require A De Novo review. moreover, The Trial And Appeal
28 counsel must be given The opportunity To Testify on Their own

1 behalf To ^{EXPLAIN} ~~justify~~ JUSTIFICATION For The Acts And or omissions
 2 complained of by The Petitioner.

3 AFTER An order To show CAUSE has been issued And responded To,
 4 The court must make A determination As To whether An evidentiary
 5 hearing is WARRANTED. 28 USC. SECTION 2254(e)(2) 2000.

6 The federal district court will generally order An evidentiary
 7 hearing if (1). The FACTS Underlying The claims show by clear And
 8 convincing evidence THAT "BUT for" CONSTITUTIONAL rights violations
 9 no reasonable jury would have found The Petitioner guilty; And
 10 (2.) Through no LACK of diligence on The Petitioner's part The
 11 FACTUAL basis of The CLAIM were not fully developed in The state
 12 courts.

13 Petitioner's "ACTUAL innocence" Allegations Are supported by
 14 The FACTS presented herein.

23 Date: MAY 3-2012

Respectfully submitted,

24 DAMEN D. RABB
 25 PETITIONER / IN PRO-PER

1 DAMEN RAAB

2 #P-82951. ATF. C8/232

3 Post office BOX 5246

4 CORCORAN, CALIFORNIA 93212

5 IN PRO P.S.

6
7 IN THE UNITED STATES DISTRICT COURT

8 FOR THE CENTRAL DISTRICT OF CALIFORNIA

9
10 DAMEN RAAB
11 PETITIONER

CASE NO: CJ 11-5110 JAK (JPR)

12 ↓

NOTICE OF MOTION AND MOTION

13 PAUL LOPEZ, Acting Warden,
14 Respondent

TO EXCEED THE (25) PAGE

LIMIT MANIFEST NEED.

15
16 NOTICE IS HEREBY GIVEN THAT PURSUANT TO THE PROVISIONS OF
17 LOCAL RULES AND RULES OF THE COURT OF THE UNITED STATES DISTRICT
18 COURT, CENTRAL DISTRICT OF THE STATE OF CALIFORNIA, PETITIONER MOVE
19 FOR LEAVE TO EXCEED THE (25) PAGE LIMIT TO FILE HIS COMPLETE
20 REPLY / TRAVERSE, WITHIN THE UNITED STATES DISTRICT COURT FOR THE
21 CENTRAL DISTRICT OF CALIFORNIA, IN THE INTEREST OF JUSTICE AND
22 JUDICIAL ECONOMY.

23 Accordingly, this motion is made in good FAITH, IT IS WITHIN
24 THE DISCRETION OF THE COURT TO GRANT PETITIONER'S MOTION TO EXCEED
25 THE (25) TWENTY-FIVE PAGE LIMIT.

26 DATE: MAY 3, 2012

RESPECTFULLY SUBMITTED,

27 DAMEN RAAB

DAMEN RAAB

IN PRO SE

Damen Rabb

PLAINTIFF/PETITIONER

CASE NO. Cv. 11-5110 JAK(JPR)

PAUL LOPEZ, Acting Warden

DEFENDANT/RESPONDENT

PROOF OF SERVICE BY MAIL

I the undersigned, hereby declare:

(1) I am a citizen of the United States; (2) I am over the age of 18 years. I am a residence of Kings County, in California.

My mailing address is Post Office Box 5242 Corcoran, California 93212-5242

On MAY 7, 20012, I served a true copy or original copy of the following;

Motion / Traverse

by placing said document (s) in a sealed postage paid envelope into the CSATF/State Prison at Corcoran mail box for delivery to the United States Post Office at Corcoran, California, addressed as followed;

~~XXXXXX~~

Damen D. Rabb
#P-82951 JATF-CB/232
Post office Box 5246
Corcoran, California 93212

United States District Court
Central District of California
312. N. Spring St
Los Angeles, California 90012

by placing said document (s) in a sealed Interdepartmental envelope into the California CSATF Facility Legal Mailbox for inner-institutional delivery to the below listed person(s) at the following addresses;

United States District Court
Central District of California
312. N. Spring St
Los Angeles, California 90012

Damen Rabb
#P-82951 JATF-CB/232
Post office Box 5246
Corcoran, CA 93212

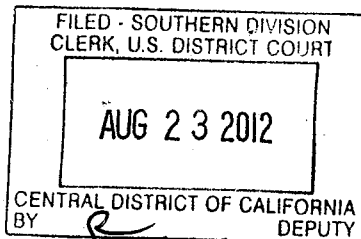
and that this declaration was executed under the penalty of perjury at Corcoran, California 93212-5242, on MAY 7, 20012.

Damen Rabb

Damen Rabb

Petitioner's Appendix P

Damen Rabb
 #P82951-JATF-CB/232
 Post Office Box 5246
 Concord, California 93212



In Pro Per:

RECEIVED
 ENTERED

AUG 23 2012

CLERK, U.S. DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

DEPUTY

United States District Court
 Central District of California

Damen Rabb

Petitioner

CASE NO. C.V. 11-5110 JAK (JPR)

BY

Petitioner's Request for Discovery.

Raul Lopez, Acting Warden
Respondent

COMES NOW: PETITIONER DAMEN RABB, pursuant to Fed. R. Civ. Proc. (Rule 26) seeking discovery of evidence relating to the investigation of this case.

I:

Petitioner's need for discovery

Introduction.

The discovery rules, as adopted in 1938, were striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experiences has shown them to apply an even larger role than was initially foreseen. Under rule 6. Discovery; This rule prescribes the procedures governing

discovery in habeas corpus cases. Subdivision (a) provides that any party may utilize the processes of discovery available under the Federal Rules of Civil Procedure (Rule 26-27) if, and to the extent that the Judge allows. Harris v. Nelson, 394 U.S. 286 (1969).

Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. Sec 1652.

394 U.S. At 299

discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing. Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

While requests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be instances in which discovery would be appropriate beforehand. See e.g., Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969).

Subdivision (b) provides for judicial consideration of all matters subject to discovery. A statement of the interrogatories, or requests for admission sought to be answered, and a list of documents sought to be produced, must accompany a request for discovery. This is to advise the Honorable Judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow.

1 Here, Petitioner contends that his request for discovery relates
 2 To statements or opinions of fact or of the application of
 3 Law as it applies to those facts. Petitioner contends that
 4 his allegations as set forth in his section 2254 petition, and
 5 traverse, are facially sufficient, to establish a prima facie
 6 due process claim entitling him to discovery sought, and
 7 if necessary an evidentiary.

8 Rule 6 (a)'s "good cause shown" standard permits the use
 9 of discovery to establish a prima facie case for relief.

10 See, e.g., *Bracy v. Gramley*, 117 S. Ct. at 1798-99 and n.10.

11 And, as in this case, the granting of the discovery, and the
 12 accompanying documents is necessary to fully develop the
 13 facts of the claims presented.

14
 15 DATED: ^{8.} ~~08/21~~ 21. 2012

16 Respectfully submitted,

17 Damen Ralch.

18 DAMEN RA06b. / P-82951
 19 PETITIONER / IN PRO PER.

Affidavit

I, DAMEN RABB, Am over 18 years of Age And A resident of Kings County California. If called As A witness, I would competently Testify To The following facts:

(1.) THAT I Am The PETITIONER in This present MATTER, case number

(2.) THAT The Respondent in The Above cited case is RAUL LOPEZ, ACTING WARDEN, And MATTHEW CATE, Director of California STATE Prison.

(3.) THAT I Am UNLAWFULLY in The custody of said respondent.

(4.) THAT PETITIONER'S conviction in The Superior court of The STATE of CALIFORNIA is violative of, And CONTRARY Too clearly establish Federal LAW As determined by The UNITED STATES Supreme COURT

(5.) PETITIONER would Testify To The existence of evidence

(surveillance footage) THAT WAS withheld by prosecutors, And provide documentation To support This fact (SEE Exhibit "A") and

(6.) THAT The PETITIONER'S request for discovery will help To establish A prima facie due process claim entitling him To An evidentiary hearing, And The relief sought.

I declare under The penalty of perjury, under The LAWS of The United States of America, THAT The foregoing is TRUE And correct of my own personal knowledge.

DATE: ~~08/21~~ 8/21/2012

Respectfully submitted,

Damen Rabb

DAMEN RABB / P.82451

PETITIONER / In pro per:

(4.)

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF Los Angeles

(C.C.P. SEC. 446 & 2015.5; 28 U.S.C. SEC. 1746)

I, Damen Rabb DECLARE UNDER THE PENALTY OF PERJURY
THAT: I AM THE Petitioner IN THE ABOVE ENTITLED ACTION;
I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS
TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND
BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 21 DAY OF August, 2012 AT Corcoran
STATE PRISON, CORCORAN, CALIFORNIA 93212.

Damen Rabb
(DECLARANT PRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC. 1013 (a) & 2015.5; 28 U.S.C. SEC. 1746)

I, Damen Rabb AM A RESIDENT OF CALIFORNIA STATE PRISON, IN THE COUNTY
OF Los Angeles, STATE OF CALIFORNIA; I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM AM
NOT A PARTY OF THE ABOVE ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 93212
Corcoran CALIFORNIA 93212

ON August 21, 2012 I SERVED THE FOREGOING:

PETITIONER'S REQUEST FOR DISCOVERY

(SET FORTH EXACT TITLE OF DOCUMENT(S) SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY(S) THEREOF, ENCLOSED IN A SEALED ENVELOPE
(S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO
PROVIDED AT CORCORAN STATE PRISON, CORCORAN, CALIFORNIA 93212

clerk
32. N. Spring St
Los Angeles, CA 90012

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS
REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO
ADDRESSED. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: August 21, 2012

Damen Rabb
(DECLARANT PRISONER)

EXHIBIT

A

VALERIE G. WASS

ATTORNEY AT LAW

556 S. FAIR OAKS AVENUE
SUITE 9
PASADENA, CALIFORNIA 91105

Telephone (626) 797-1099
crimappeals@aol.com

August 8, 2008

Damen D. Rabb, P-82951
Pelican Bay State Prison
Post Office Box 7500
Crescent City, CA 95531

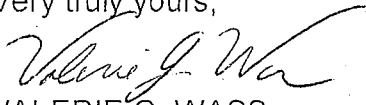
Dear Mr. Rabb:

Yesterday your trial counsel called me in regard to your request for a copy of your file. He and I discussed potential issues in your case, and at my suggestion he agreed to send me your file. I will review it and thereafter send it to you if that is what you want. Mr. Behzadi informed me that he does not have a copy of the surveillance tape, and that he never had it.

In response to your question, yes, I have received your letter wherein you quoted from some cases and requesting that I exhaust your remedies. I will raise whatever credible legal issues I can raise.

Please note that I will be out of my office on vacation from August 25th through September 5th.

Very truly yours,


VALERIE G. WASS

COPY.

CITY ATTORNEY DISCLOSURE STATEMENT

OFFICERS - FORM TO BE COMPLETED ON ALL FELONY AND MISDEMEANOR ARRESTS
 DETECTIVES - FORM TO BE FILED WITH CITY ATTORNEY ONLY
 Answer all questions to the best of your personal knowledge.

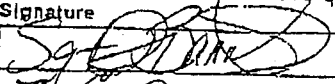
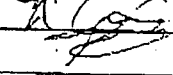
Type of Report	Booking No.	DR No.
CRIME AND ARREST	MULTI-2	0503-29134

1. Reports: To your knowledge, what reports (except personnel investigations) were prepared in relation to this investigation?
☒ Arrest ☒ Crime ☒ Property ☒ PCD ☐ Follow-up ☒ Vehicle (CHP180) ☐ CHP555
☐ DMV-DS367 Other: _____
2. The following items exist: Photographs (include C#) _____ Video tape SURVEILLANCE
 Audio tape (including officer's personal tape) ☐ YES ☒ NO Other: _____
3. Has there been or is there a pending Use of Force investigation? ☐ YES ☒ NO
 If YES, provide the name and serial number of supervisor conducting investigation.
 Name _____ Serial No. _____
4. List the NAME, ADDRESS, PHONE NUMBER and DATE OF BIRTH of all CIVILIAN WITNESSES not named in any report(s), whether interviewed or not.
- | Name | Address | Phone No. | DOB |
|------|---------|-----------|-----|
| | | | |
| | | | |
5. List the NAME, SERIAL NUMBER, ASSIGNMENT and ROLE of all OFFICERS not named in the report(s) who were percipient witnesses or otherwise involved in this incident:
- | Officer Name | Serial No. | Assignment | Officer's Role |
|--------------|------------|------------|----------------|
| | | | |
| | | | |
6. List the NAME, SERIAL NUMBER, DEPARTMENT/AGENCY and UNIT NUMBER of all FIRE DEPARTMENT and EMERGENCY MEDICAL PERSONNEL who responded to this incident, but were not named on the report(s):
- | Name | Serial No. | Department/Agency | Unit No. |
|------|------------|-------------------|----------|
| | | | |
| | | | |
7. List any SUSPECT(S) STATEMENT(S) not included in any report(s):

8. List any CIVILIAN WITNESS(ES) STATEMENT(S) not included in any report(s):

9. Are there any RETAINED OFFICER NOTES or DIAGRAMS not included in any report(s)? ☐ YES ☐ NO
 If YES, identify:
- | Officer | Serial No. | Assignment | Item |
|---------|------------|------------|------|
| | | | |
| | | | |
10. List any known facts not included in any report(s) that might be considered as favorable to the defense or damaging to the prosecution, or which might negatively reflect on the credibility of any prosecution witness:

All of the answers to the above questions are true to the best of my personal knowledge.

Signature	Serial No.	Div. of Assignment	Role in Arrest	Date
	31093	SW	ARREST	9-19-05
	34054	SOA	ARREST	9-19-05

Damen Rabb

PLAINTIFF/PETITIONER

CASE NO. CV-11-5110 JAK (JPR)

AJL LOPEZ, Acting Warden

DEFENDANT/RESPONDANT

PROOF OF SERVICE BY MAIL

I the undersigned, hereby declare:

(1) I am a citizen of the United States; (2) I am over the age of 18 years. I am a residence of Kings County, in California.

My mailing address is Post Office Box 5242 Corcoran, California 93212-5242

On ~~JUL 8~~ 21, 200 12, I served a true copy or original copy of the following:

PETITIONER Request for Discovery.

by placing said document (s) in a sealed postage paid envelope into the CSATF/State Prison at Corcoran mail box for delivery to the United States Post Office at Corcoran, California, addressed as followed;

Damen Rabb
#P.82951. JATF. CB/232
Post office Box 5246
CORCORAN, CALIFORNIA 93212

y placing said document (s) in a sealed Interdepartmental envelope into the California CSATF Facility Legal Mailbox for inner-institutional delivery to the below listed person(s) at the following addresses;

COURT CLERK.
U.S. District Court.
312. N. Spring St
LA. CA. 90012

d that this declaration was executed under the penalty of perjury Corcoran, California 93212-5242, on ~~JUL 8~~ 21, 200 12.

Damen Rabb

Damen Rabb

Pet. App. P-191

Damen Rabb

PLAINTIFF/PETITIONER

CASE NO. CJ-11-5110 JAK (JPR)

AUL LOPEZ, Acting Warden

DEFENDANT/RESPONDANT

PROOF OF SERVICE BY MAIL

I the undersigned, hereby declare:

(1) I am a citizen of the United States; (2) I am over the age of 18 years. I am a residence of Kings County, in California.

My mailing address is Post Office Box 5242 Corcoran, California 93212-5242

On August 21, 20012, I served a true copy or original copy of the following; PETITIONER'S Request for Discovery.

by placing said document (s) in a sealed postage paid envelope into the CSATF/State Prison at Corcoran mail box for delivery to the United States Post Office at Corcoran, California, addressed as followed;

Damen Rabb
#P-82951 JTF. CB/232
Post office Box 5246
CORCORAN, CALIFORNIA 93212

by placing said document (s) in a sealed Interdepartmental envelope into the California CSATF Facility Legal Mailbox for inner-institutional delivery to the below listed person(s) at the following addresses;

ATTORNEY GENERAL
STATE OF CALIFORNIA
300 S. Spring St
LOS ANGELES, CA 90013

and that this declaration was executed under the penalty of perjury at Corcoran, California 93212-5242, on Aug 21, 20012.

Damen Rabb

PRINTED NAME (DECLARANT)

Damen Rabb

SIGNATURE (DECLARANT)

Pet. App. P-192

Petitioner's Appendix Q

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. CV 11-5110-JAK (JPR)

Date: September 18, 2012

Title: Damen Rabb v. Raul Lopez, Acting Warden

=====

DOCKET ENTRY

=====

PRESENT:

HON. JEAN P. ROSENBLUTH, MAGISTRATE JUDGE

Joe Roper
Deputy Clerk

n/a
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None present

ATTORNEYS PRESENT FOR DEFENDANTS:

None present

PROCEEDINGS: (IN CHAMBERS)

On May 29, 2012, Petitioner filed a request for an evidentiary hearing, alluding to the existence of a surveillance tape that would prove his innocence of the crimes of which he was convicted. He attached to his request a property receipt showing that on September 19, 2005, at 2:30 in the morning, a video tape was received by the LAPD from a "Nahiel Diaz" at 1560 1/2 South Western Avenue. On August 23, 2012, Petitioner filed a Request for Discovery, again claiming that the surveillance tape would show that he was "actually innocent" and asking that the Court order Respondent to produce it. To this request he attached a letter from an attorney noting that Petitioner's trial counsel stated that he had never received the surveillance tape in discovery. Petitioner also attached a "City Attorney Disclosure Statement," dated September 19, 2005, and apparently bearing Petitioner's case number, noting that a "surveillance Video tape" "exist[s]."

Within 14 days of the service date of this Order, Respondent shall inform the Court of the following:

- (1) what the tape referenced in the documents attached by Petitioner is; and
- (2) whether it was produced to Petitioner's trial counsel in discovery and, if not, why not.

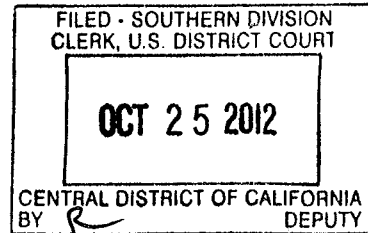
Petitioner's Appendix R

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

DATED: 10.25.12

DEPUTY CLERK

JS-6 / ENTERED



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB,

Petitioner,

vs.

RAUL LOPEZ, Acting Warden,

Respondent.

) Case No. CV 11-5110-JAK (JPR)

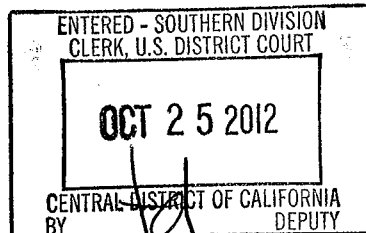
) J U D G M E N T

Pursuant to the Order Accepting Findings and Recommendations
of U.S. Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with
prejudice.

DATED: 10/24/2012

JOHN A. KRONSTADT
U.S. DISTRICT JUDGE



Petitioner's Appendix S

Mr. Damen Rabb, P-82951
POB 5244
Corcoran, CA. 93212
In Pro Per:

FILED

2013 JAN -8 PM 2:10

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

BY _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB
Petitioner,

No. CV 11-5110-JAK (JPR)

v.

PAUL LOPEZ, Acting Warden
Respondent.

NOTICE OF APPEAL

Notice is hereby given that DAMEN RABB, plaintiff in the above named case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from [erred] Order Denying Petitioner's Motion for Relief from JUDGMENT, entered 12/11/12. Petitioner reports court's failure to note "initial" court order against Respondents, entered 9/18/12.
Dated: December 31, 2012

Respectfully submitted,

Damen Rabb

Mr. Damen Rabb
Petitioner / In Pro Per

Court Clerk:

Please stamp file, return one (or) copy for personal files. Only one (or) copy sent due to "excusable neglect".

Enclosed is one (or) SAE (self addressed envelope), too facilitate titled request.

Thank you for all your time & understanding.

Respectfully submitted,

Thank You?

DAMEN RABO
PLAINTIFF/PETITIONER

VS

PAUL ZOPEZ, Acting Warden
DEFENDANT/RESPONDANT

CASE NO. CV 11-5110-SAK (SPR)

PROOF OF SERVICE BY MAIL

I the undersigned, hereby declare:

(1) I am a citizen of the United States; (2) I am over the age of 18 years. I am a residence of Kings County, in California.

My mailing address is Post Office Box 5242 Corcoran, California 93212-5242

On January 02, 2012, I served a true copy or original copy of the following;

NOTICE OF APPEAL

by placing said document (s) in a sealed postage paid envelope into the CSATF/State Prison at Corcoran mail box for delivery to the United States Post Office at Corcoran, California, addressed as followed;

Court Clerk
United States District Court
Central District of California
312 N. Spring Street
Los Angeles, CA 90012

by placing said document (s) in a sealed Interdepartmental envelope into the California CSATF Facility Legal Mailbox for inner-institutional delivery to the below listed person(s) at the following addresses;

And that this declaration was executed under the penalty of perjury at Corcoran, California 93212-5242, on January 02, 2012.

Damen Rabo
PRINTED NAME (DECLARANT)

Damen Rabo
SIGNATURE (DECLARANT)

STATE/STATE PRISON AT CORCORAN

P.O. 5244

CORCORAN, CA 93212

NAME Mr. Damien Lobb

NUMBER P-82951

HOUSING C8/232

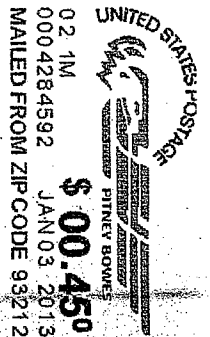
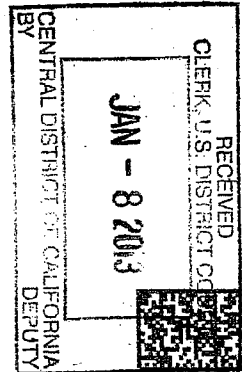
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STATE PRISON

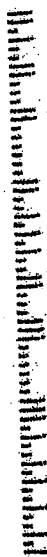
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Court Clerk
United States District Court
Central District of California
312 N. Spring St.
Los Angeles, CA 90012



1C-3-12 (LEGAL MAIL)

Miller

Petitioner's Appendix T

FILED

UNITED STATES COURT OF APPEALS

SEP 26 2014

FOR THE NINTH CIRCUIT

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

DAMEN RABB,

Petitioner - Appellant,

v.

STU SHERMAN,

Respondent - Appellee.

No. 13-55057

D.C. No. 2:11-cv-05110-JAK-JPR
Central District of California,
Los Angeles

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Appellant's request for judicial notice, contained in the June 20, 2014 filing, is granted.

Appellant's June 20, 2014 motion to stay this appeal and remand to the district court, including the July 24, 2014 addendum, is denied without prejudice to renewing the arguments in the opening brief.

Appellant's request to "appoint present counsel to represent appellant in the ancillary state court proceeding" is denied without prejudice to renewal in the event of a remand.

KK/MOATT

The briefing schedule for this appeal is reset as follows: the opening brief and excerpts of record are due October 31, 2014; the answering brief is due December 1, 2014; and the optional reply brief is due within 14 days after service of the answering brief.

Petitioner's Appendix U

CA No. 20-55204
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAMEN RABB,
Petitioner,
v.
JASON PICKETT, Warden,
Respondent.

REQUEST FOR CERTIFICATE OF APPEALABILITY

BRIAN M. POMERANTZ
CA Bar No. 214264
Habeas@protonmail.com
P.O. Box 853
Carrboro, NC 27510
Telephone: (323) 630-0049

Attorney for Petitioner
DAMEN RABB

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I. Immediate Procedural History

Appellant Damen Rabb, Sr. (“Mr. Rabb”) filed a Notice of Appeal (“NOA”) on February 24, 2020. (CACD Case No. 2:17-cv-09318-JAK-JPR (“DC”) Dkt. No. 48.) However, the Notice of Appeal was not docketed until February 25, 2020. (CA No. 20-55204 Dkt. No. 1.) Because the district court denied a Certificate of Appealability (“COA”) as to all issues, pursuant to Circuit Rule 22-1(d), Mr. Rabb is required to “file a request for a COA in the court of appeals within 35 days of the filing of a notice of appeal or amended notice of appeal, or the district court’s denial of a COA in full, whichever is later. . . .” Circuit Rule 22-1(d). The COA request was, therefore, initially due on March 31, 2020.

Following the filing of the NOA, Mr. Rabb timely filed a motion pursuant to Federal Rules of Civil Procedure Rule 59(e) in the district court on February 27, 2020. (*See* DC Dkt. No. 49.) Pursuant to Federal Rules of Civil Procedure Rule 4, the filing of the 59(e) motion stayed the appeal pending the resolution of the 59(e). *See* Fed. R. App. Proc. Rule 4(a)(4)(iv).

Although the filing of the 59(e) motion would stay the filing of the NOA, it is not clear to Mr. Rabb that once the NOA has been filed, the 35 day period to file a request for a COA in this Court pursuant to Circuit Rule 22-1(d) is stayed. While it logically seems appropriate to stay the requirement, Mr. Rabb is hereby filing his request both in an abundance of caution and because Mr. Rabb is innocent, has already served far too many years in prison, and he desires to have his case move forward as

expeditiously as possible once the 59(e) is resolved.¹

II. The Denial Of A COA By The District Court

Mr. Rabb initially requested a COA in the district court on three questions:

- I. Should a petitioner who made repeated efforts pursuant to *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862 (9th Cir. 1976) to stay a proceeding in order to further develop the record be subjected to the high standards of 28 U.S.C. § 2244(b)(2)(B) when those stays are denied in the prior case and the Ninth Circuit then finds that the petitioner has made a prima facie showing for authorization under 28 U.S.C. § 2244(b)(2)(B)?
- II. 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?
- III. Where the evidence in the record is competing and contradictory in nature, and where the court has not utilized any procedures to establish credibility or reliability, can jurists reasonably disagree as to the effect of that evidence in denying discovery and an evidentiary hearing?

The district court denied a COA on all three issues, holding that Mr. Rabb had not made the requisite showing. (DC Dkt. No. 47, at 2.) This Court therefore has jurisdiction over these three issues pursuant to

¹ Mr. Rabb may need to amend his request for a COA if the 59(e) is denied, in order to include any issues that may arise from that order that require appeal. If that is the case, he will inform the Court quickly and amend the COA with all deliberate speed.

Circuit Rule 22-1(a), as the district court has first ruled. The district court acknowledged in its Order Accepting Findings and Recommendations of U.S. Magistrate Judge (DC Dkt. No. 45) 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].” (DC Dkt. No. 45, at 2, quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam).) However, the court failed to follow the expectations of *Villa-Gonzalez*, where this Court 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* this Court 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). This Court 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 has alleged facts that present clear and convincing evidence that no reasonable factfinder would have found him guilty.

III. Mr. Rabb’s 59(e) Motion Requests A COA On Additional Issues

Mr. Rabb filed a 59(e) motion because he is innocent and the district court’s denial of a COA threatens to cause a manifest injustice. 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 (iv) whether Mr. Rabb was diligent; (v) whether the factual predicate for his claims could not have been discovered previously through the exercise of due diligence; and (vi) whether he has plead 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.

This Court does not yet have jurisdiction over these latter three issues, as the district court has not thus far ruled on the 59(e) pending before it. *See* Circuit Rule 22-1(a). Should that Court grant a COA on one or more issues, it will moot this request.

IV. Mr. Rabb Meets The Standard For Granting A COA

Mr. Rabb has made “a 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 v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). This Court has explained that Mr. Rabb need not show that he should prevail, “a COA should issue unless the claims are ‘utterly without merit.’” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (quoting *Jefferson v. Welborn*,

222 F.3d 286, 289 (7th Cir. 2000)). As explained in *Lambright*,

This general principle reflects the fact that the COA requirement constitutes a gatekeeping mechanism that prevents us from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade us through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit.

Lambright, 220 F.3d at 1025.

Mr. Rabb was not afforded an 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. If given the opportunity, Mr. Rabb could 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. Mr. Rabb is an innocent man who has already been imprisoned for over thirteen years and will not be parole eligible for twenty-three more years. He should be given the opportunity to fully brief and argue the potential merit of the issues to this Court in order to avoid a manifest injustice.

V. There Are Ample Grounds For This Court To Issue A COA

After being appointed counsel on appeal, Petitioner 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, Petitioner filed an Addendum to Motion for Stay. (*Id.*, Dkt. No. 34-1.) This Court denied the sought stay “without prejudice to renewing the arguments in the

opening brief.” (*Id.*, Dkt. No. 37.) The argument was again raised in the opening brief. (*Id.*, Dkt. No. 47-1.) Petitioner also sought 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 claims of ineffective assistance of counsel and prosecutorial misconduct, as they related to Mr. Rabb’s innocence.

Mr. Rabb flagged the possibility of the enormously prejudicial situation that he now finds himself in to this Court during his initial appeal. While the factual predicate did not yet exist, the threat of a successive petition was entirely foreseeable; indeed, Petitioner pled in his opening brief before this Court 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* 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.)

Because this Court explicitly permitted the stay issue to be raised in the opening brief and to continue throughout the appeal of Case No. 13-55057, it did not perfect until the Mandate issued on July 5, 2016, at the earliest.² That denial triggered the prejudice, as trial counsel’s

² Mr. Rabb argued in the court below that *Rudin v. Myles*, 781 F.3d 1043, 1054 n.13 (9th Cir. 2015) (citing *Hasan v. Galaza*, 254 F.3d 1150,

ineffectiveness and the prosecutorial misconduct only then were foreclosed from consideration. Thus the Successive Petition was timely filed well within the one-year statute of limitations; in fact, it was filed on March 1, 2017, just eight days after the petition for writ of certiorari was denied. Mr. Rabb could hardly have been more diligent.

Two of the questions that Mr. Rabb posed to the district court for a COA -- and were rejected by that court -- 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. Mr. Rabb's diligence is at least debatable; therefore, a COA should issue.

A. *Villa-Gonzalez* Supports The Issuance Of A COA

What *Villa-Gonzalez* makes clear is that both Mr. Rabb and the district court are expected to engage in a different level of 28 U.S.C. § 2244(b) inquiry at the district court level. *See Villa-Gonzalez*, 208 F.3d at 1164-65. Mr. Rabb is required to make more than a prima facie

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. Shomer's testimony because he was convicted based in part on identification testimony" (DC Dkt. No. 37, at 45 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 . . ." (DC Dkt. No. 45, at 2.)

showing, but the district court may be required to do more than simply rehash the existing record. *Villa-Gonzalez* is distinguishable because while it articulates the standard that is applied, Mr. Rabb's facts are distinct and more worthy of relief than those in *Villa-Gonzalez*. Mr. Villa-Gonzalez did not allege facts that presented clear and convincing evidence that no reasonable factfinder would have found him guilty; therefore, there was no point in holding an evidentiary hearing. That is not the case here.

Mr. Rabb has alleged that both of the crime victims have exonerated him and would do so in court if given the opportunity to testify. Moreover, he has alleged that the surveillance tape from the crime scene that has gone missing in police custody could independently exonerate him. The district court's response was not to conduct a hearing or even order discovery, but rather to hold on the same record that was before this Court 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." (DC Dkt. No. 45, at 11.) Setting aside trial counsel's ineffectiveness related to an eyewitness-identification expert, which is ably alleged in the petition, Mr. Rabb does not understand how the district court could not only discount an objective item of evidence like a surveillance video, but do so with such vitriolic criticism when this Court clearly found the same evidence

substantial enough to warrant a further inquiry.³

B. This Court Should Issue A COA On The First Two Issues

A large part of the district court’s reason for denying a COA on the first two questions was that they “were not raised in the Successive Petition or briefed by the parties.” (*Id.*) Mr. Rabb is not sure how he could have raised the issues in his petition. 28 U.S.C. § 2254(a) explains in part that, “a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . .” *Id.* Thus the petition was a place to raise claims of constitutional violations, not arguments regarding the procedural proprieties of the successive petition bar.

Supporting its denial of the COA, the district court cited *Allen v. Ornoski*, 435 F.3d 946, 960-61 (9th Cir. 2006), as “refusing to issue certificate of appealability on petitioner’s challenge to constitutionality of

³ The harsh tone of the district court’s order is evident in a number of places. For instance, in his Objections Mr. Rabb “object[ed] to the way the magistrate court approached its function. [Because the] court looked upon the evidence as though it were an appellate court, reviewing the record before it without utilizing the instruments available to the court to resolve differing factual claims or ambiguities. That was already done by the Ninth Circuit, which saw fit to send the case back.” (DC Dkt. No. 42, at 7.) The district court framed the objection thus: “[a]ccording to Petitioner, because the Ninth Circuit already ‘saw fit to send the case back’ to the district court (Objs. at 7), the Magistrate Judge had no business reviewing the record as if she were an ‘appellate court.’” (DC Dkt. No. 45, at 2.) Mr. Rabb raised a reasonable concern about the magistrate court’s approach, he never told the court it had “no business” doing something.

§ 2254(d) when claim was not raised in district court.” (DC Dkt. No. 47, at 2-3.) But *Allen* is unlike Mr. Rabb’s case and has no precedential value here because Mr. Rabb’s facts fall into one of *Allen*’s exceptions and Respondent does not face the same prejudice as was present in *Allen*.

In *Allen*, this Court took issue with the petitioner’s challenges to the constitutionality of the Antiterrorism and Effective Death Penalty Act of 1996’s (“AEDPA”) standards for federal court habeas review of state court judgments for the first time on appeal. But the Court did not say that such a challenge was expressly barred, it was merely such because “Allen offer[ed] no adequate explanation for his failure to raise his section 2254(d)(1) challenge in the district court,” thus depriving “the district court of an opportunity to address the merits of his claim.” *Allen*, 435 F.3d at 960. As the *Allen* court noted, “while issues not raised to the district court normally are deemed waived, [this Court has] recognized three narrow exceptions to this general rule.” *Id.*, citing *United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005) (This Court may exercise discretion to review newly presented issues if: “(1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arises while the appeal is pending because of a change in the law; or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court.”).

Mr. Allen did not satisfy any of these exceptions because his was a capital case seeking a last minute stay; therefore, even though this Court found that, “the constitutionality of section 2254(d)(1) is purely a question

of law, the prejudice to the State when a petitioner brings this claim on the eve of his execution is great.” *Allen*, 435 F.3d at 960. No such interest is present in this non-capital case. The only prejudice at issue here is the prejudice of keeping an innocent man imprisoned for the rest of his life. Surely the State has an interest in not having that be the case. Moreover, whereas Mr. Allen knew since the date of the AEDPA’s enactment that “any subsequent petition Allen filed would be governed by AEDPA’s provisions,” because a successive petition must be filed along with the application for a successor, Mr. Rabb had not even yet made the prima facie showing for authorization under 28 U.S.C. § 2244(b)(2)(B) when the petition was written. Essentially, the district court is faulting Mr. Rabb for attaching a petition to a successor application that did not argue very fact specific and detailed arguments against the application of the high standards of 28 U.S.C. § 2244(b)(2)(B). Not only does that seem to put the cart before the horse, it is not a constitutional violation. The difference between § 2244(b)(2)(B) and § 2254(d) is that § 2254(d) presents a standard which governs the review of each claim, whereas § 2244(b)(2)(B) provides a bar to the consideration of the petition as a whole; thus, one deals with claims specifically and is necessary to the discussion of those claims of constitutional violations, and the other has no effect on the claims individually and thus no place in the petition itself.

Moreover, Mr. Rabb did discuss his previous request pursuant to *Crateo* in both his opposition to the motion to dismiss and in his objections to the Report and Recommendation. (See DC Dkt. Nos. 29, at 18-19, and 42, at 21-22.) In reducing Mr. Rabb’s question to a challenge of 28 U.S.C.

§ 2244(b)(2)(B), the district court appears to have perhaps not fully understood the question. When Mr. Rabb asks whether his repeated efforts to stay his proceedings in order to further develop the record should exempt him from the high standards of 28 U.S.C. § 2244(b)(2)(B), he also is asking whether that action exemplifies his diligence.

C. This Court Should Issue A COA On The Third Issue

A COA should issue on question three because the evidence in the record is competing and contradictory in nature, and the district court did not utilize any procedures to establish credibility or reliability. Reasonable jurists would therefore disagree as to the effect of that evidence and the district court's decision to deny discovery and an evidentiary hearing.

Denying a COA on the third question, regarding competing and contradictory evidence, where the court has not utilized any procedures to establish credibility or reliability, runs counter to *Villa-Gonzalez*. 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

- 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 say that they 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.

D. If The District Court Denies The 59(e), This Court Should Issue A COA On Issues Four, Five, And Six

In his 59(e) motion, Mr. Rabb has sought a COA on (iv) whether Mr. Rabb was diligent; (v) whether the factual predicate for his claims could not have been discovered previously through the exercise of due diligence; and (vi) whether he has plead 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.

1. Mr. Rabb Was Diligent

According to the magistrate court and the district court, in order to be diligent, Mr. Rabb should have:

- I. asked counsel to follow up with Dr. Shomer to ask him if he would have accepted less. (DC Dkt. Nos. 37, at 44, and 45, at 6.)
- II. reached out to Messrs. Farmer and Chappell via "a family member or friend to contact them." (DC Dkt. No. 45, at 9 n.3.)

The district court assumes without basis that there were family members or friends available to help. There is no evidence supporting that 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 assumes 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. While some things may be accomplished from a prison cell, the matters cited by the district court could not have been. Mr. Rabb filed discovery requests for the videotape, he filed requests for counsel, and he wrote to the court expressing his concerns. Mr. Rabb tried as best as he could under unforgiving circumstances.

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? In this case, where the victims have sworn that Petitioner is innocent, it would seem that the competing harms weigh in favor of permitting Mr. Rabb the opportunity to, at the very least, posit this question to a panel of this Court.

2. The Factual Predicate For Mr. Rabb's Claims Could Not Have Been Discovered Previously Through The Exercise Of Due Diligence

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,”⁴ reveals substantial prejudicial information related to trial counsel’s failure to properly investigate. 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 (33) minutes after the conclusion of the read back of Sgt. Banuelos’ testimony. (CT⁵ 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,”⁶ a point which contradicts the very first point made by the prosecutor in his closing argument. (Augmented RT⁷ at 48.)

This is similar to *Hasan*, where this Court 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

⁴ DC Dkt. No. 29-3, at p. 5, ¶4.

⁵ “CT” refers to the Clerk’s Transcript of the trial court proceedings.

⁶ DC Dkt. No. 29-3, at p. 5, ¶4.

⁷ “RT” refers to the Reporter’s Transcript of the trial court proceedings.

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 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, how would he have conducted such an investigation? 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, how would he have gone about interviewing an incarcerated Mr. Farmer? For that matter, how would he even have known where Mr. Farmer was located? Of course, these questions are meaningless because he had no notice.

Sergeant Banuelos' testimony wrongly implicated Mr. Rabb, but that did not mean that Mr. Rabb could have known that he 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 (“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 is abjectly wrong when it says 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.

3. Mr. Rabb Has Plead Facts Sufficient To Entitle Him To Discovery And A Hearing

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

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.

(DC Dkt. No. 45, at 5-6.)

That is simply inaccurate. Only one question by trial counsel of 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 would expect the district court to have undertaken.

Mr. Rabb has plead 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. 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 plead are the only appropriate courses of action considering the facts that have been put forth and supported by sworn declarations.

VI. Conclusion

This Court, properly concerned that Mr. Rabb may be an innocent man serving a seventy-five-years-to-life sentence, found that he had 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 this Court, the district court held that Mr. Rabb was not diligent and that there was sufficient evidence of his guilt. While a district court may do that without further evidentiary inquiry, in this case the only two victims of the crimes, Maurice Farmer and De'Shawn Chappell, who have never testified, both 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 Mr. Rabb was the man who robbed and carjacked them. It is difficult to imagine a case where an evidentiary hearing could be more

necessary.

Accordingly, Mr. Rabb respectfully requests that this Court issue a certificate of appealability.

Respectfully submitted,

DATED: March 30, 2020

By: /S/ Brian M. Pomerantz
BRIAN M. POMERANTZ

Attorney for Petitioner
Damen Rabb

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /S/ *Brian M. Pomerantz*
BRIAN M. POMERANTZ

Petitioner's Appendix V

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DAMEN RABB

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DAMEN RABB,

Petitioner,

v.

M. ELIOT SPEARMAN, Warden,

Respondent.

NO. 2:17-cv-09318-JAK-JPR

**PETITIONER'S MOTION TO
ALTER, SET ASIDE, OR
VACATE THE JUDGMENT AND
ORDER DENYING A
CERTIFICATE OF
APPEALABILITY PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 59(e)**

1 The Ninth Circuit Court of Appeals has stated that, “[r]econsideration is
 2 appropriate if the district court (1) is presented with newly discovered evidence,
 3 (2) committed clear error or the initial decision was manifestly unjust, or (3) if there
 4 is an intervening change in controlling law.” *Sch. Dist. No. 1J v. ACandS, Inc.*, 5
 5 F.3d 1255, 1263 (9th Cir. 1993) (citing *All Hawaii Tours, Corp. v. Polynesian*
 6 *Cultural Center*, 116 F.R.D. 645, 648 (D. Hawaii 1987), rev’d on other grounds, 855
 7 F.2d 860 (9th Cir. 1988)). *See also Ghorbani v. Pac. Gas & Elec. Co.*, 1998 U.S.
 8 Dist. LEXIS 7789, at *3-4 (N.D. Cal. May 22, 1998) (“Courts have broad discretion
 9 to determine whether to grant a motion to amend a judgment under Rule 59(e). *See,*
 10 *e.g., In re Prince*, 85 F.3d 314, 324 (7th Cir. 1993). The grounds for amending a
 11 judgment pursuant to Rule 59(e) are (1) an intervening change in controlling law;
 12 (2) newly discovered evidence; (3) clear legal error; or (4) prevention of manifest
 13 injustice. *See, e.g., EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir.
 14 1995).”) As described in *Sch. Dist. No. 1J*, “[t]here may also be other, highly
 15 unusual, circumstances warranting reconsideration.” 5 F.3d at 1263. This Court may
 16 prevent a manifest injustice by altering its previous ruling and issuing a Certificate
 17 of Appealability (“COA”).

18 Although this Court held that Damen Rabb, Sr. was not diligent and that there
 19 was evidence sufficient to convince this Court of his guilt, none of that changes the
 20 fact that Maurice Farmer and De’Shawn Chappell say Mr. Rabb is innocent. They
 21 are the only victims of the crime, they are adamant and consistent in their exoneration
 22 of Mr. Rabb, and they have never identified him as their assailant, testified regarding
 23 his guilt, or as far as is known, even told anyone that Mr. Rabb was the man who
 24 robbed and carjacked them. Mr. Rabb is an innocent man serving a seventy-five-
 25 years-to-life sentence. Absent relief from the courts, he will not even be eligible for
 26 parole for twenty-three more years. Thus, reconsideration is appropriate to prevent
 27 a manifest injustice.

28 ///

1 The Ninth Circuit Court of Appeals found that Mr. Rabb established a prima
 2 facie case in his application for leave to file a second or successive petition. (*See*
 3 Ninth Circuit Case No. 17-70600, Dkt. No. 16-1.) This Court subsequently
 4 determined that Mr. Rabb is not innocent and was not diligent, and denied a COA.
 5 In order to receive a COA, Mr. Rabb must demonstrate “that reasonable jurists could
 6 debate whether (or, for that matter, agree that) the petition should have been resolved
 7 in a different manner or that the issues presented were ‘adequate to deserve
 8 encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
 9 (internal quotation marks and citation omitted). The Ninth Circuit has explained that
 10 Mr. Rabb need not show that he should prevail, “a COA should issue unless the
 11 claims are ‘utterly without merit.’” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th
 12 Cir. 2000) (quoting *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000)). As
 13 explained in *Lambright*,

14 This general principle reflects the fact that the COA
 15 requirement constitutes a gatekeeping mechanism that
 16 prevents us from devoting judicial resources on frivolous
 17 issues while at the same time affording habeas petitioners
 an opportunity to persuade us through full briefing and
 argument of the potential merit of issues that may appear,
 at first glance, to lack merit.

18 *Lambright*, 220 F.3d at 1025.

19 Mr. Rabb meets this modest burden. Not having been afforded an opportunity
 20 to prove his allegations and entitlement to a successive petition by fully developing
 21 the supporting evidence through discovery or at a hearing, Mr. Rabb’s claims that he
 22 was diligent and that he can, if given the opportunity, clearly and convincingly prove
 23 his innocence, are not frivolous and their merit is, at least, debatable, as is the issue
 24 of whether he meets the requirements of 28 U.S.C. § 2244(b)(2)(B).

25 Respectfully, Mr. Rabb contends that this Court erroneously granted
 26 Respondent’s motion to dismiss and he merely seeks to be given the opportunity to
 27 fully brief and argue the potential merit of the issues to the Ninth Circuit Court of
 28 Appeals.

1 For the foregoing reasons, Mr. Rabb requests that this Court reconsider its
2 judgment and order denying a certificate of appealability and issue a COA on the
3 issues of whether Mr. Rabb was diligent, whether the factual predicate for his claims
4 could not have been discovered previously through the exercise of due diligence, and
5 whether he has plead facts sufficient to entitle him to discovery and a hearing to
6 prove that the facts underlying the claim, when viewed in light of the evidence as a
7 whole, would be sufficient to establish by clear and convincing evidence that, but for
8 constitutional error, no reasonable factfinder would have found him guilty of the
9 underlying offenses.

10 For the reasons set forth herein, Mr. Rabb's request to alter, set aside, or vacate
11 the judgment and order denying a certificate of appealability pursuant to Federal Rule
12 of Civil Procedure 59(e) should be granted, and a COA should be issued.

13
14 DATED: February 27, 2020

Respectfully submitted,

15 By: /S/ Brian M. Pomerantz
16 BRIAN M. POMERANTZ

17 Attorney for Petitioner
18 Damen Rabb
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, in Los Angeles, California, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District of California by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /S/ Brian M. Pomerantz
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