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 I

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FILED

JAN 14 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAMEN RABB, Petitioner-Appellant, v. M. ELIOT SPEARMAN, Warden, Respondent-Appellee.	No. 20-55204 D.C. No. 2:17-cv-09318-JAK-JPR Central District of California, Los Angeles ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

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

Any pending motions are denied as moot.

DENIED.

Petitioner’s Appendix B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB,

Petitioner,

v.

M. ELIOT SPEARMAN, Warden,

Respondent.

Case No. CV 17-9318-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 Respondent's motion to dismiss is granted and this action is dismissed with prejudice.

DATED: January 30, 2020

JOHN A. KRONSTADT
U.S. DISTRICT JUDGE

Petitioner's Appendix C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB, Petitioner, v. M. ELIOT SPEARMAN, Warden, Respondent.	Case No. CV 17-9318-JAK (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Successive Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that Respondent's motion to dismiss the Successive Petition be granted. Petitioner filed objections to the R. & R. through counsel on December 2, 2019, and two pro se letters asserting his innocence, on October 1 and December 11, 2019; Respondent did not reply. Having reviewed de novo those portions of the R. & R. to which Petitioner objects, see 28 U.S.C. § 636(b)(1)(C), the Court accepts the findings and recommendations of the Magistrate Judge.

Petitioner challenges the Magistrate Judge's analytical approach in determining that the Successive Petition should be dismissed because none of its claims meet the requirements of 28

U.S.C. 2244(b). According 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," drawing inferences from the record, assessing the strength of the evidence of his guilt, or "posit[ing] abstract doubts regarding the veracity or trustworthiness of the evidence [he] submitted" (id. at 4, 7).

But the Magistrate Judge's thorough examination of the record to determine whether Petitioner met § 2244(b)'s dictates was not just warranted but required. It is a "misnomer" to say that the Circuit "grants leave to file" a successive petition after it finds that an application makes a prima facie showing under § 2244(b). Edwards v. Koehn, No. CV 14-00390 VBF-SH, 2014 WL 11980006, at *2 n.1 (C.D. Cal. Apr. 14, 2014). A prima facie showing is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." Woratzeck v. Stewart, 118 F.3d 648, 650 (9th Cir. 1997) (per curiam) (citation omitted). The district court then "must," as the Magistrate Judge did here, "conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the [petition] meets the statutory requirements." United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam); see § 2244(b)(4) (providing that "district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the application satisfies the requirements of this section"). In doing so, it "must not defer

to [the circuit court's] preliminary determination." Case v. Hatch, 731 F.3d 1015, 1029 (10th Cir. 2013).

Petitioner's objections to the Magistrate Judge's findings, many of which simply reiterate arguments he raised in the Successive Petition and his opposition to the motion to dismiss, are not persuasive. Although he takes issue with practically all of the R. & R.'s footnotes — which by their nature are not critical to the analysis — he does not challenge many of the Magistrate Judge's key conclusions in finding that he has not acted diligently in bringing his claims and that the facts underlying those claims, even if true, would not establish his actual innocence. § 2244(b)(2)(B).

For instance, he does not anywhere dispute that the Successive Petition's fourth claim must be dismissed because it was already raised in his initial Petition. (See R. & R. at 28-30 (citing § 2244(b)(1)).) Nor does he address the Magistrate Judge's conclusion that many of his ineffective-assistance subclaims, including those concerning counsel's failure to object to hearsay testimony, move to prohibit reference to the guns recovered from the Camry, or seek to introduce Petitioner's girlfriend's 2007 statement to the defense investigator, must be dismissed because they are based on factual predicates that were known to him at the time of trial. (See id. at 31-38.)

Petitioner repeatedly references Farmer's and Chappell's 2016 statements that Petitioner was not the man who robbed them as new evidence supporting his actual innocence (see, e.g., Objs. at 1, 23-24, 29-31), but he does not convincingly object to the Magistrate Judge's finding that he "was or should have been

aware" much earlier of the substance of those statements (R. & R. at 35). He argues that they are not the same as their 2007 statements that they could not identify him as the robber in a photo lineup (see Objs. at 24), but he does not dispute that the 2007 statements, which were discussed during trial in his presence, put him on notice that Farmer and Chappell potentially had more exculpatory identification information to provide (see id. at 34-37).[1]

And although the Magistrate Judge pointed out in a footnote that the record was unclear on whether Petitioner's photograph was even included in the 2007 photo lineup (see Objs. at 8 (citing R. & R. at 16 n.4)), her analysis makes plain that she assumed it was – and that the lineup therefore put Petitioner on

[1] The Magistrate Judge also correctly observed that the victims' 2007 statements would not likely have been admitted at trial (see R. & R. at 50 n.22) and that it was unclear how counsel could have been ineffective for allegedly not obtaining the information shared by them in 2016 when he requested and received court authorization for an investigator and sent that investigator to speak to them back in 2007 (see id. at 46 n.20). Further, just as in Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2012) (as amended Jan. 15, 2013), Petitioner submitted evidence concerning trial counsel's strategy only on certain subclaims – here, in the form of habeas counsel's declaration conveying trial counsel's answers to questions habeas counsel asked him during several interviews (see Opp'n, Ex. 15) – but no evidence as to other subclaims, likely because habeas counsel didn't ask him about them. That may well bar those subclaims, as the Magistrate Judge noted. (See R. & R. at 32 n.12 (citing Gentry, 705 F.3d at 899-900), 34 n.14 (same).) Petitioner now asserts that unlike in Gentry, trial counsel refused to submit a declaration or to "speak with habeas counsel further about the case" (Objs. at 10), but that information is not in his declaration, and although trial counsel apparently could not recall many of the "strategies related to the issues . . . raised," he at least initially cooperated with habeas counsel (Opp'n, Ex. 15 at 5-7).

notice of any potential claims stemming from the victims' inability to identify him in it. Of course, as the Magistrate Judge pointed out (see R. & R. at 36), the best evidence that Petitioner was in fact on notice of those claims is that immediately after being appointed and years before the victims made their 2016 statements, habeas counsel filed a superior-court habeas petition raising most of the Successive Petition's claims (see generally Lodged Doc. 21).

Petitioner identifies three factual predicates that he claims the Magistrate Judge incorrectly determined he could have discovered before he filed the initial Petition. First, he asserts that he could not have earlier known that trial counsel allegedly failed to watch a surveillance videotape collected from the crime scene and so learned only several years after the initial Petition was filed, when habeas counsel interviewed trial counsel. (Objs. at 11-12.) But as Petitioner has acknowledged (see Opp'n, Ex. 15 at 6) and the Magistrate Judge outlined (see R. & R. at 33), 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. (See Opp'n, Ex. 15 ¶ 13 (habeas counsel noting that trial counsel said he could not remember much about Petitioner's trial).) In any event, Petitioner was clearly aware of the facts underlying this ineffective-assistance subclaim when he filed his initial Petition and yet failed to raise it, instead claiming that his counsel allegedly never watched the tape because the prosecution didn't produce it in discovery. (See Objs. at 12.)

Second, Petitioner claims the Magistrate Judge misapplied relevant law in finding that he could have earlier challenged trial counsel's failure to procure the testimony of an eyewitness-identification expert. (Id. at 19-23.) The Magistrate Judge did not "create[] a higher standard for [Petitioner]" or find that "a petitioner must instruct their counsel on how to do their job as counsel or they cannot have been diligent." (Id. at 20.) Rather, her analysis correctly noted that Petitioner's claim boiled down to counsel allegedly having been ineffective for failing to ask the expert whether he would have accepted less to testify. (See R. & R. at 42-44.) And she correctly concluded that Petitioner, who was present during the court's colloquies with counsel about the expert's fee and aware that counsel believed he would not be able to testify because his full fee had not been authorized, could have – just as habeas counsel did after being appointed – discovered, or at least tried to, that the expert would have accepted less and challenged counsel's effectiveness for not asking him to do so.[2]

[2] Petitioner has never cited any authority to support his (continued...)

(Id.)

The Magistrate Judge also properly distinguished Rudin v. Myles, 781 F.3d 1043 (9th Cir. 2015), on which Petitioner relies. (See Objs. at 20-22.) As an initial matter, Rudin has nothing to do with successive petitions or the standards governing them. Moreover, as the Magistrate Judge explained (see R. & R. at 44 n.19), the Ninth Circuit held in that case that the petitioner was entitled to equitable tolling of the AEDPA limitation period because she could have raised her ineffective-assistance claim only after learning of and being prejudiced by counsel's abandonment of her, 781 F.3d at 1054 n.13. That holding does not help Petitioner because he was prejudiced by counsel's alleged deficiencies when he was convicted and therefore could have raised his ineffective-assistance claim immediately thereafter. See Gimenez v. Ochoa, Civil No. 12-1137 LAB (BLM)., 2013 WL 8178829, at *5 (S.D. Cal. Nov. 22, 2013) (finding § 2244(b)'s due-diligence requirement not satisfied when petitioner had been aware since trial of counsel's failure to have radiologist testify concerning certain evidence), accepted by 2014 WL 1302463 (S.D. Cal. Mar. 28, 2014), aff'd, 821 F.3d 1136 (9th Cir. 2016).

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[2](...continued)
suggestion that trial counsel, who informed the court of the expert's fee but was not granted the full amount requested, performed deficiently in not negotiating with the expert to take less. Counsel's failure to do so, when no evidence shows that the expert had ever even suggested he would consider a lower fee, did not likely "f[a]ll below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984); see Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (finding that counsel's failure to consult with certain experts was not unreasonable when experts he did retain did not tell him to do so).

Petitioner claims the Magistrate Judge misconstrued Rudin because the case is not about "learning of prejudice, but experiencing it." (Objs. at 21.) The Court is not certain what semantic difference Petitioner seeks to draw, but in any event, he "experienced" prejudice when he was convicted after no identification expert testified at trial.

Finally, Petitioner claims the Magistrate Judge wrongly decided – based on Chappell's 2007 statement that he wasn't scared during the robbery – that he was on notice from before his conviction that police descriptions of the victims as being scared and agitated immediately after the robbery were allegedly inaccurate. (Id. at 12-13.) The Magistrate Judge rightly concluded that Chappell's 2007 denial of being scared during, as opposed to immediately after, the robbery should have alerted him to the claim. Indeed, Chappell himself spoke of one continuous time frame, claiming in 2016 that it was "completely untrue" that he was "under stress and acting excited" when talking to the police a few minutes after the robbery because he had had "plenty of guns pulled on [him] before." (Opp'n, Ex. 11 at 1.)

And if Chappell wasn't afraid during the robbery, as he said in 2007, he presumably would have had no reason to be right after it either, calling into question the officers' testimony to the contrary. As the Magistrate Judge pointed out (see R. & R. at 40), the best evidence that Chappell's 2007 statement put Petitioner on notice of his claim is habeas counsel's argument in a superior-court petition filed years before Farmer's and Chappell's 2016 statements that trial counsel should have used Chappell's statement about not being scared to prevent his crime-

scene statements to the police officers from being admitted into evidence as excited utterances.[3] (See Lodged Doc. 21 at 18, 21-22.)[4] Therefore, contrary to Petitioner's suggestion (Objs. at 14-15), the Magistrate Judge properly determined that Hasan v. Galaza, 254 F.3d 1150, 1154 (9th Cir. 2001), holding as to an initial, not a successive, petition that a petitioner could not have discovered an ineffective-assistance claim until he was aware of the prejudice he had allegedly suffered, was inapposite.

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[3] Petitioner claims, without any evidence or citation to supporting authority, that a "victim might experience psychological shock when facing a gun, but then deal with the flood of repressed emotions once the dangerous situation abated" and therefore "there was no reason to disbelieve [the officers'] testimony" that Chappell was "emotionally agitated" when he spoke to them despite his 2007 statement that during the robbery itself he wasn't scared. (Objs. at 14.) But Petitioner clearly was earlier aware of his claim because he raised it in the state petition years before his initial federal Petition and the victims' 2016 statements.

[4] Petitioner argues that the Magistrate Judge failed to appreciate that he was not in a position to conduct the sort of investigation necessary to uncover most of his claims. (Objs. at 16-18.) But as discussed, he possessed most of the information he needed to challenge counsel's effectiveness when he filed the initial Petition. Further, although his pro se status certainly hampered his ability to reach out to Farmer and Chappell, he was not without options. For example, he could have asked a family member or friend to contact them. Beyond that, courts have not excused the failure to exercise due diligence based on a petitioner's pro se status, including in cases when a petitioner has not timely obtained statements from codefendants or witnesses. See, e.g., Johnson v. Williams, 650 F. App'x 508, 511 (9th Cir. 2016) (holding that petitioner failed to make prima facie showing of diligence when he did not satisfactorily explain delay in obtaining codefendant's declaration); Gant v. Barnes, No. CV 14-2618-CJC (SP), 2017 WL 3822063, at *7 (C.D. Cal. July 19, 2017) ("Petitioner's inability to locate, rather than discover [alibi] witnesses due to his previous pro se litigant status does not undermine the conclusion that he knew the factual predicate for his IAC claim by the conclusion of his trial.").

(See R. & R. at 40-41); West v. Ryan, 652 F.3d 1071, 1078 (9th Cir. 2011) (denying application for leave to file successive petition because evidence of abuse was not "newly discovered" given that petitioner's counsel was aware "of at least some of the allegations" when petitioner filed his first state habeas petition).

Petitioner suggests he exercised due diligence in presenting his claims because habeas counsel filed an unsuccessful motion to stay the appellate proceedings based on newly discovered evidence, see Mot., Rabb v. Sherman, No. 13-55057 (9th Cir. June 20, 2014), ECF No. 29, and an unsuccessful motion under Crateo, Inc. v. Intermark, Inc., 536 F.2d 862 (9th Cir. 1976), asking this Court to indicate that it would "entertain or grant" a Rule 60(b) motion for relief from judgment based on newly discovered evidence in the event the Ninth Circuit remanded the case, see Mot., Rabb v. Lopez, No. CV 11-5110-JAK (JPR) (C.D. Cal. Dec. 21, 2014), ECF No. 63. (See Objs. at 21.) But those motions were filed after this Court had denied the initial Petition, and it is well settled that in those circumstances a petitioner seeking to "present newly discovered evidence" or "add a new ground for relief" must satisfy § 2244(b)'s requirements to file a successive petition and cannot raise the claim in a Rule 59(e) or 60(b) motion. Rishor v. Ferguson, 822 F.3d 482, 491 (9th Cir. 2016) (citing Gonzalez v. Crosby, 545 U.S. 524, 531 (2005)). Counsel's having filed stay motions that were almost certain to, and did, fail does not demonstrate diligence.

Even if any of Petitioner's claims could not have been discovered earlier, the Magistrate Judge correctly found that

"the facts underlying [them], if proven and viewed in light of the evidence as a whole," would be "[in]sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Petitioner] guilty of the underlying offense." (R. & R. at 46 (citing § 2244(b)(2)(B)(ii)).)[5] Petitioner cannot seriously contend that the surveillance video or the eyewitness-identification expert's testimony would have established that he was actually innocent. He presents no nonspeculative basis to question Detective Williams's testimony that no particular person or vehicle in the video could be identified. (See id. at 12 n.3, 33 (citing Lodged Doc. 2, 3 Rep.'s Tr. at 1328-29).) Indeed, he elsewhere proffers Williams's testimony as being truthful, noting that he specifically declined to label Petitioner a gang member. (Objs. at 39.) And although the expert's testimony would have served to undermine Banuelos's identification of Petitioner, that identification was already called into question by trial counsel's extensive cross-examination about its circumstances and the inconsistencies in it (see R. & R. at 55-56 (discussing counsel's cross-examination)), as Petitioner acknowledges (see Objs. at 44-49, 51-53), and nonetheless was credited by the jury.

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[5] The Magistrate Judge did not hold Petitioner to an improperly high "unquestionably" innocent standard. (See Objs. at 43-44.) She noted that standard – which governs a stand-alone actual-innocence claim in a successive petition (see R. & R. at 50 (citing Morales v. Ornoski, 439 F.3d 529, 533-34 (9th Cir. 2006) (per curiam))) – most likely because Petitioner in fact raised such a claim in the Successive Petition, although he later clarified that he did not seek relief on it (see Opp'n at 6). She elsewhere consistently applied § 2244(b)(2)(B)(ii)'s actual-innocence standard in recommending dismissal of Petitioner's claims. (See, e.g., R. & R. at 25-26, 46, 61.)

The crux of Petitioner's actual-innocence claim and his objections to the Magistrate Judge's analysis of it is that she undervalued the significance of the victims' 2016 statements that the police officers' testimony about their emotional state was untrue. According to Petitioner, that testimony would have prevented admission of their crime-scene statements to the officers as excited utterances and established that the officers were lying. (Objs. at 15.) But as the Magistrate Judge explained, that the victims claimed they were not scared would not likely have resulted in their descriptions of the suspects being excluded from evidence because the trial judge could have determined that they were acting scared or excited, as the officers perceived, even if they genuinely believed they hadn't felt those emotions. (See R. & R. at 39 n.17, 55.) Further, that the Magistrate Judge offered this insight was not improper "extrapolat[ion]" (Objs. at 14) but rather appropriate analysis of how a reasonable factfinder would consider that evidence. Beyond that, whether the victims' statements would have rendered certain parts of the officers' testimony inadmissible has no bearing on whether they establish Petitioner's factual innocence. Indeed, in assessing actual innocence the Court must consider "'all the evidence, old and new, incriminating and exculpatory,' admissible at trial or not." Lee v. Lampert, 653 F.3d 929, 938 (9th Cir. 2011) (en banc) (citation omitted) (assessing more lenient actual-innocence standard for equitable exception to time bar); see also King v. Trujillo, 638 F.3d 726, 732 (9th Cir. 2011) (finding that although counsel could have used new evidence to object to admission of certain evidence at trial, that was

"irrelevant as to [petitioner's] actual innocence").

The Magistrate Judge also correctly determined that the victims' statements about their demeanor the night of the crime would not have led any reasonable factfinder to conclude that each of the police officers was lying and that they had all conspired to frame Petitioner, which is what Petitioner essentially claims. (See Objs. at 42-43.) As noted, the officers' testimony and the victims' statements were not inconsistent; the jury could have believed that the officers saw the victims as excited while the victims themselves thought they were calm, at least from the vantage point of a decade later. More significantly, an impartial witness testified that shortly after the crimes the victims told her they had been scared (see Lodged Doc. 2, 3 Rep.'s Tr. at 1509), which corroborates the officers' accounts. And Petitioner's suggestion that the officers' testimony was perjured is undermined by his own extensive analysis of the contradictions and weaknesses in it. (See, e.g., Objs. at 45-48, 52-53.) If the officers were in fact lying and conspiring with one another to frame Petitioner, their accounts likely would have been more consistent and inculpatory. See United States v. Nacoechea, 986 F.2d 1273, 1279 (9th Cir. 1993) (noting that prosecutor's argument that witness "told the truth because, if she were lying, she would have done a better job" was proper "inference from evidence in the record").[6]

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[6] There is no merit to Petitioner's claim that the "Magistrate Court wrongly believes that perjury by the state's witnesses only matters if the prosecutor knowingly put on the testimony." (Objs. at 49.) That legal conclusion is nowhere in (continued...)

Nor did the victims' 2007 failure to identify Petitioner in a lineup as the man who robbed them and their 2016 statements that he was not the man who robbed them establish his actual innocence. Petitioner claims that the Magistrate Judge improperly rejected those statements as "incredible" (Objs. at 2) without holding a hearing. But although he is correct that the Magistrate Judge identified reasons to question their credibility and factors that undermined the exculpatory value of the statements, the R. & R. makes plain that she accepted for the purposes of her analysis that the victims genuinely believed what they said.

That does not mean, however, that the Magistrate Judge was precluded from considering how much weight those statements would carry with reasonable factfinders. Indeed, she was required to do so in assessing whether any newly discovered evidence was sufficient to establish clearly and convincingly that Petitioner was actually innocent. § 2244(b)(2)(B)(ii). She properly identified the many reasons why the victims' statements had limited exculpatory value and did not establish Petitioner's actual innocence. Likewise, she persuasively identified the

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[6](...continued)
the R. & R. In a footnote, the Magistrate Judge cited Hayes v. Brown, 399 F.3d 972, 974 (9th Cir. 2005) (en banc), to point out that Petitioner could not establish prosecutorial misconduct, a claim raised in ground five of the Successive Petition (see Successive Pet. at 74-78), without evidence that the prosecution knowingly acted improperly. (R. & R. at 54-55 n.24.) She did not decide that a petitioner convicted based on false evidence could not pursue a due-process claim unless the prosecutor him- or herself knew the evidence was false (see Objs. at 49-51) and had no reason to do so given that no such claim was raised by Petitioner.

ample evidence of Petitioner's guilt that blunted what little exculpatory value the victims' statements had. Indeed, contrary to Petitioner's assertion that "[n]ot one piece of tangible evidence points to [him]" (Objs. at 42), the R. & R. outlines the compelling proof of Petitioner's guilt that corroborates Banuelos's identification testimony, including convicted codefendants Parron and Brown both identifying him as their accomplice, a statement from his girlfriend that she lent him the car used during the robbery, and his resemblance to Chappell's and Farmer's crime-scene descriptions of the gunman and Banuelos's description of the man he saw that night. (R. & R. at 49-50.)

Although Petitioner points out various inaccuracies and inconsistencies in those descriptions, the jury heard all of them and nonetheless credited Banuelos's and the other officers' testimony. See Johnson, 650 F. App'x at 511 (finding that petitioner did not make prima facie showing that codefendant's declaration established his actual innocence even though it undermined some evidence of his guilt). And Petitioner fails to acknowledge that as the Magistrate Judge noted, in assessing his showing of actual innocence the Court must consider all the evidence – including Parron's and Brown's identifications of him as their accomplice – and not just the evidence admitted at trial. (See R. & R. at 27 (citing Lee, 653 F.3d at 938).)

Under these circumstances, the Magistrate Judge was not required to hold a hearing before recommending dismissal of the Successive Petition. Just as in Cox v. Powers, assuming that Farmer and Chappell were credible "in the sense that [they were]

stating what [they] believed [they] saw," that did not "'clear[ly] and convincing[ly]' show[] that no reasonable factfinder would find [Petitioner] guilty." 525 F. App'x 541, 543 (9th Cir. 2013) (citing § 2244(b)(2)(B)(ii)). Although "there would then be directly contradictory eyewitnesses, the jury could have continued to believe that the prosecution witness' testimony was more accurate than that of the defense witnesses." Id. Although Petitioner posits that "[s]imply by reading the transcript, it is obvious that Sgt. Banuelos presented false evidence" (Objs. at 51), apparently the jury did not think so. The R. & R. explains why any reasonable factfinder would have had ample reason to give little weight to Farmer's and Chappell's statements even if the witnesses believed them to be true and how what weight they did deserve was outweighed by the robust other evidence of guilt. See, e.g., McDermott v. Soto, No. CV 16-1888-GW (AGR), 2018 WL 4501170, at *8-9, *11 n.12 (C.D. Cal. Jan. 5, 2018) (dismissing successive petition without holding hearing because even assuming statements in exculpatory declaration were true, "they do not show, clearly and convincingly, that no reasonable jury would have convicted [p]etitioner"), accepted by 2018 WL 4471096 (C.D. Cal. Sept. 17, 2018); Bryant v. Gonzalez, No. CV 10-5137-CAS (SH)., 2012 WL 6012868, at *7 & n.8 (C.D. Cal. Nov. 28, 2012) (same when witness's recantation of identification testimony and allegations of police misconduct did not establish actual innocence), accepted by 2012 WL 6012862 (C.D. Cal. Nov. 30, 2012).

IT THEREFORE IS ORDERED that Respondent's motion to dismiss is granted and judgment be entered dismissing this action with prejudice.

DATED: January 30, 2020

JOHN A. KRONSTADT
U.S. DISTRICT JUDGE

Petitioner’s Appendix D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB, Petitioner, v. M. ELIOT SPEARMAN, Warden,[1] Respondent.	Case No. CV 17-9318-JAK (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

[1] Petitioner is incarcerated at High Desert State Prison, see Cal. Dep't Corr. & Rehab. Inmate Locator, https://inmatelocator.cdcr.ca.gov (search for "Damen" with "Rabb") (last visited Sept. 20, 2019), whose warden is M. Eliot Spearman. Spearman is therefore substituted in as the proper Respondent. See Fed. R. Civ. P. 25(d); see also R. 2(a), Rs. Governing § 2254 Cases in U.S. Dist. Cts.

PROCEEDINGS

On March 1, 2017, Petitioner, through counsel, submitted a Successive Petition for Writ of Habeas Corpus by a Person in State Custody, which the Ninth Circuit Court of Appeals subsequently gave him permission to file. On October 8, 2018, Respondent moved to dismiss the Successive Petition, arguing that it does not meet the requirements of 28 U.S.C. § 2244(b) and alternatively that it is untimely and raises mostly unexhausted claims. On February 1, 2019, Petitioner filed opposition; on May 2, Respondent filed a reply. For the reasons discussed below, the Court recommends that judgment be entered granting Respondent's motion to dismiss and dismissing the Successive Petition with prejudice.

BACKGROUND

On June 13, 2007, Petitioner was convicted by a Los Angeles County Superior Court jury of two counts each of carjacking and second-degree robbery. (Lodged Doc. 1, Clerk's Tr. at 198-201.) The jury further found true several firearm and gang enhancements. (Id.) The court found that Petitioner had suffered two prior "strike" convictions and sentenced him to prison for 75 years to life. (Id. at 237-41, 244-45.)

I. Summary of the Evidence at Trial

The factual summary in a state appellate-court decision is entitled to a "presumption of correctness" under § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010 (9th Cir. 2015). But see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (noting "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Nonetheless, because

Petitioner claims that newly discovered evidence establishes his innocence, the Court has independently reviewed the state-court record. Cf. Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017). Based on that review, the Court finds that the following statement of facts from the California Court of Appeal decision affirming his convictions fairly and accurately summarizes the relevant evidence.

> On September 19, 2005, at approximately 1:30 a.m., Los Angeles Police Department (LAPD) Officer David Ashley received a radio call broadcast that possible crimes had occurred at a gas station on the corner of Figueroa Street and Vernon Avenue. Within five minutes of receiving the radio call, Officer Ashley arrived at the location and was flagged down by Maurice Farmer (Farmer) and DeShawn Chappell (Chappell). Farmer, who appeared nervous and upset, told Officer Ashley that a man had pointed a gun at him, asked him where he was from, and then took his car. Farmer described the assailant as a Black male wearing a light blue T-shirt, medium build, five feet six inches tall, with light skin, braids in his hair, a tattoo of a teardrop under his right eye, and a tattoo of a hand and finger on his forearm. Farmer also told Officer Ashley that a green Toyota Camry was involved in the incident. Officer Ashley immediately broadcasted the information he received from Farmer to LAPD units and stayed at the gas station with Farmer and Chappell.

Around the same time, at approximately 1:30 a.m., LAPD Sergeant Frank Banuelos was on routine patrol. He saw a green Camry speeding with its lights off. After the green Camry failed to stop at a red light, Sergeant Banuelos initiated a traffic stop. The stop occurred on West 45th Street, approximately one mile away from the gas station where Farmer's car had been taken. Sergeant Banuelos parked approximately 30 feet away from the stopped Camry and illuminated the area with his police vehicle's overhead lights and spotlight.

The driver and a passenger exited the green Camry. The passenger stared at Sergeant Banuelos for two to four seconds and then ran away. Before the passenger fled, Sergeant Banuelos had the opportunity to observe that the passenger was a heavyset Black male wearing a light blue long sleeved shirt, and had light skin, braided hair, and a tattoo of a teardrop on his right cheek. Sergeant Banuelos radioed for assistance in setting up a perimeter and then detained the driver, who was later identified as Kendra Brown (Brown). As the sergeant was placing Brown into custody, Brown spontaneously asked him whether her detention was related to what happened "at the gas station." Sergeant Banuelos asked Brown what gas station she was referring to, and she identified the gas station on Figueroa Street and Vernon Avenue.

Sergeant Banuelos immediately called the LAPD communications division to inquire about whether there had been a request for service at a gas station on

Figueroa Street and Vernon Avenue and was connected through to Officer Ashley. Officer Ashley explained that he was at that location investigating a carjacking and that the suspect vehicle was a green Camry. Sergeant Banuelos left Brown with another unit at the 45th Street location and drove to the gas station. He arrived at the gas station approximately 15 minutes after the incident had occurred.

According to Sergeant Banuelos, both Farmer and Chappell appeared under "stress" from the incident. They were pacing back and forth and appeared "excited . . . mad, [and] physically shaken." Sergeant Banuelos testified that he had difficulty calming them down in order to speak with them. Sergeant Banuelos spoke with Farmer first, who told Sergeant Banuelos that he had been robbed of his vehicle and some personal property at gunpoint. Sergeant Banuelos testified that Farmer told him the following: Farmer was pumping gas into his Chevrolet Equinox when a green Camry, driven by a woman, approached him. A man (the assailant) exited the Camry, pointed a gun at Farmer, and asked Farmer where he was from. Meanwhile, another man carrying a gun[] exited the Camry from the rear right passenger door and acted as a lookout. Farmer told the assailant that he was not a gang member. The assailant pointed the gun at Farmer, said to Farmer "It's that 40's life," and then took $15 from Farmer's person. After the assailant took the $15 from Farmer, the assailant instructed Chappell to get out

of the Equinox. The assailant asked Chappell whether Chappell had any property and Chappell responded in the negative.

Chappell told Sergeant Banuelos that the assailant had pointed a gun at him and had instructed him to get out of the Equinox. Chappell complied and the assailant boarded the Equinox and drove off. The lookout reentered the green Camry and that car drove off as well. Chappell stated that during the incident, he was afraid that he would die.

According to Sergeant Banuelos, both Farmer and Chappell described the assailant as a Black male with a blue shirt, braids, a tattoo on his face, and a tattoo on his forearm of a hand making a gang sign.

Back at the 45th Street location, LAPD Officer Eddie Martinez was standing by with Brown in custody. A man, later identified as Earl Parron (Parron), walked up to the scene and asked the officers "what was going on." Parron, who is Black, had broken leaves on his sweater. Officer Martinez and his partner decided to detain Parron because Sergeant Banuelos had told them that a Black male had fled from the scene earlier and Parron appeared as though he might have been running or possibly hiding based on the broken leaves on his sweater. When Sergeant Banuelos returned to the 45th Street location, he indicated that Parron was not the man that he saw fleeing from him earlier when he pulled over the green Camry.

Around the same time, Officer Ashley transported Farmer and Chappell to the 45th Street location for a field showup. According to Officer Ashley, as soon as Farmer and Chappell approached the location, they saw the green Camry and yelled: "That's the car, that's the car." Farmer and Chappell also told Officer Ashley that they recognized Brown as the driver of the green Camry and Parron as the lookout. They further told Officer Ashley that Parron and the assailant were carrying blue steel revolvers. Officers searched the green Camry and found three loaded blue steel revolvers in the trunk.

That night, Sergeant Banuelos learned that the green Camry was registered to a person named Tequila Richmond (Richmond). He sent two officers to Richmond's home address. The officers asked her about the whereabouts of her vehicle and she told them that the green Camry belonged to her and that she had loaned it to "Damen Rabb," her boyfriend. Sergeant Richmond asked station officers to run a check on that name and they sent him a booking photograph of [Petitioner]. At trial, Sergeant Banuelos testified that the person in the booking photograph, i.e., [Petitioner], was the person that fled from him on the night of the incident.[2] [FN2]

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[2] The court of appeal's summary of the evidence does not explain how Petitioner could have been riding in the Camry with Brown when Sergeant Banuelos stopped the car, just a couple of minutes after the robbery, when only a few minutes earlier he was seen driving away in the Equinox. It appears from the evidence

(continued...)

> [FN2] The booking photograph depicts a teardrop tattoo on the left side of [Petitioner's] face, and not the right side as Sergeant Banuelos had originally recalled. At trial, Sergeant Banuelos was shown the booking photograph and testified that with the benefit of the photograph, he recalled that the tear drop was indeed on the left side of [Petitioner's] face.
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> On September 20, 2005, the next day, officers located the Equinox in an area where Brown had told them they would find it.

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[2] (...continued)
presented at trial that Petitioner would have had time to switch cars. The Equinox was found "a few blocks" from the intersection of Vernon and Van Buren, where Banuelos pulled over the Camry and saw Petitioner jump out and run away; that location in turn was less than a mile west of where the robbery and carjacking took place, at the gas station on Vernon and Figueroa. (See Lodged Doc. 2, 3 Rep.'s Tr. at 1282, 1284, 1310.) The victims observed both cars drive west on Vernon after the incident. (Id. at 1293.) Thus, it is plausible that as the prosecution argued at trial, Petitioner, Brown, and Parron had time to "swap drivers, swap passengers" and "give Mr. Parron a couple chances to move, park the Equinox a couple blocks away from his house" before coming back to meet Petitioner and Brown near the intersection of Vernon and Van Buren. (Id. at 1530.) Petitioner contends that other evidence — for instance, that when Banuelos first saw the Camry it was traveling back toward the gas station — shows that he hadn't been inside it. (See Opp'n at 41-42.) But the jury found otherwise, and on habeas review a court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). In any event, as discussed in Section II.B of the Discussion, ample evidence corroborates Petitioner's guilt.

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

At the time of trial, Farmer and Chappell were in custody on murder charges for unrelated incidents. Outside the presence of the jury, both individuals invoked their Fifth Amendment right against self-incrimination and the trial court ruled that they would not be required to take the witness stand at [Petitioner]'s trial. Brown, who was in custody pursuant

to a plea agreement, also invoked her Fifth Amendment right against self-incrimination outside the presence of the jury and refused to testify.

At trial, Parron testified that he did not recall who he was with on September 19, 2005, nor did he recall being at the gas station on Figueroa Street and Vernon Avenue on that date. Parron testified that he was not acquainted with [Petitioner] and did not recognize [him]. Parron denied ever speaking with Detective Williams and denied identifying [Petitioner] in a photographic display. Parron admitted to being a member of the Rolling 40's Neighborhood Crips gang.

LAPD Officer Brian Richardson, the prosecution's gang expert, testified that the Rolling 40's Neighborhood Crips is a criminal street gang whose primary activities include the commission of various crimes that are listed in section 186.22, subdivision (e). According to Officer Richardson, [Petitioner] was a member of the Rolling 40's Neighborhood Crips on September 19, 2005 . . . . The prosecution showed Officer Richardson photographs of tattoos on [Petitioner]'s face, torso, and arms. Officer Richardson confirmed that [Petitioner] had a tattoo of a teardrop underneath his left eye and a tattoo of a hand making a gang sign on his arm.

. . .

On behalf of the defense, private investigator Daniel Mendoza (Mendoza) testified that in May of 2007, he interviewed Parron while Parron was in custody.

> During the interview, Parron told Mendoza the following: On the night of September 19, 2005, Parron consumed two grams of marijuana, two ecstasy pills, and a bottle of vodka at a party. After Parron was detained, the police coerced him into making certain incriminating statements. Parron denied knowing [Petitioner] and stated that he did not recognize [Petitioner]'s photograph.

(Lodged Doc. 8 at 3-8 (some footnotes omitted).)

II. Original Proceedings in Federal Court

On June 17, 2011, Petitioner filed a federal habeas petition challenging his convictions. See Pet. & Traverse, Rabb v. Lopez, No. CV 11-5110-JAK (JPR) (C.D. Cal. June 17, 2011 & May 10, 2012), ECF Nos. 1 & 33. The Petition raised four grounds for relief: (1) the trial court violated Petitioner's constitutional right to confront the witnesses against him when it allowed the two victims to invoke their Fifth Amendment privilege against self-incrimination and refuse to testify without first requiring them to be questioned about it under oath (Pet. at 5; Traverse at 8, 18-20, 24-25); (2) the trial court violated his right to confront witnesses when it allowed Banuelos to testify to out-of-court statements made by the victims 15 minutes after the crimes (Pet. at 5; Traverse at 8, 18-20, 24-25); (3) the trial court violated his Eighth and 14th amendment rights when it sentenced him separately for carjacking and robbery (Pet. at 6; Traverse at 9-13, 28-29); and (4) the trial court violated his Sixth and 14th amendment rights when it denied the defense's request for additional funds for an eyewitness-identification

expert, thus precluding the expert from testifying at trial (Pet. at 6; Traverse at 15-17, 21-23, 26-27).

On May 29, 2012, Petitioner requested an evidentiary hearing to resolve "major factual disputes . . . including issues of ineffective assistance of counsel, professional misconduct, and the trial courts [sic] rulings." Req. for Evid. Hr'g at 1, Rabb v. Lopez, No. CV 11-5110-JAK (JPR) (C.D. Cal. May 29, 2012), ECF No. 35. He claimed that the prosecution had "maliciously withheld" a surveillance tape that would prove his innocence and requested that the Court order production of the tape, attaching to his request a property receipt for a tape received by the LAPD one hour after the crimes. Id. at 3-4, 6. On August 23, 2012, he followed up with a "Request for Discovery" of the tape. See Req. for Disc., id., ECF No. 42. On October 25, 2012, the Court denied both requests, finding that the tape pertained exclusively to unexhausted — albeit "serious" — claims of prosecutorial misconduct and actual innocence. Order at 2, id., ECF No. 47.[3]

Meanwhile, on July 2, 2012, the Court issued a Report and Recommendation, recommending that the Petition be denied on the merits; on October 25, the Honorable John A. Kronstadt, U.S.

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[3] On December 4, 2012, Petitioner filed a habeas petition in the superior court, claiming that the tape was wrongly withheld by the prosecution. (Lodged Doc. 16 at 3.) On March 8, 2013, the District Attorney's Office filed an informal response, reporting that "the [LAPD] ha[d] searched for the . . . surveillance tape . . . but ha[d] been unable to locate it." (Lodged Doc. 17 at 2.) The petition was denied on April 9, 2013. (Lodged Doc. 15 at 27.) On December 6, 2013, Petitioner raised the same claim in the court of appeal (see Lodged Doc. 19), which summarily denied it on April 1, 2014 (see Lodged Doc. 20). He does not appear to have raised it in the supreme court.

District Judge, accepted the Report and Recommendation. Rabb v. Lopez, No. CV 11-5110-JAK (JPR), 2012 WL 5289576 (C.D. Cal. July 2, 2012), accepted by 2012 WL 5289593 (C.D. Cal. Oct. 25, 2012), aff'd Rabb v. Sherman, 646 F. App'x 564 (9th Cir. 2016).

On November 28, 2012, Petitioner moved for relief from the Judgment under Federal Rule of Civil Procedure 60(b), claiming that the Petition was erroneously denied. See Nov. 28, 2012 Mot. Relief from J., id., ECF No. 50. On December 11, 2012, the Court denied the motion. See Order, id., ECF No. 52. Petitioner appealed, and on November 25, 2013, construing his filing as a request for a certificate of appealability, the Ninth Circuit granted the request as to his two Confrontation Clause claims. Order at 1, Rabb v. Sherman, No. 13-55057 (9th Cir. Nov. 25, 2013), ECF No. 11. It also granted his request that he be appointed counsel. Id. at 2. On March 29, 2016, it affirmed the Court's judgment. Rabb v. Sherman, 646 F. App'x 564, 565 (9th Cir. 2016).

III. Subsequent Developments

On September 9, 2014, while his appeal was pending, Petitioner, through his recently appointed counsel, filed a habeas petition in Los Angeles County Superior Court. (See Lodged Doc. 21.) He claimed that trial counsel was ineffective for failing to (1) introduce into evidence Farmer's and Chappell's pretrial statements to a defense investigator that they did not recognize Petitioner as the man who robbed them as well as an alibi witness's pretrial statement that Petitioner was with her the night of the crimes (id. at 13-18); (2) capitalize on Chappell's admission that he and Farmer were gang members and

that he was not scared during the crimes and on the inconsistencies between their statements to the investigator and Banuelos's account of their statements to him (id. at 18-26); (3) hire an eyewitness-identification expert despite obtaining sufficient funds from the court to do so (id. at 26-35); (4) object on hearsay grounds to Banuelos's testimony that Richmond told police officers that she had loaned him the Camry used during the crimes (id. at 35-38); (5) request or review the surveillance tape collected from the scene of the crime (id. at 38-41); (6) challenge the LAPD's destruction of the tape and of the guns recovered from the Camry and seek suppression of any reference to the guns at trial (id. at 41-44); and (7) investigate Petitioner's innocence by searching for other Rollin' 40's Crips members who matched the victims' description of the perpetrator (id. at 45). He raised four other claims as well: appellate counsel was ineffective for failing to challenge trial counsel's effectiveness (id. at 49-50); newly discovered evidence demonstrated that he was actually innocent (id. at 50-51); the prosecution engaged in misconduct (id. at 52-56); and the cumulative trial errors required that his convictions be overturned (id. at 56-59).

On August 11, 2015, the superior court denied the petition, finding that Petitioner's actual-innocence claim was not cognizable on habeas review because it was based on arguments that "either could have been . . . or were raised on appeal" and that the rest of his claims were procedurally barred because they relied exclusively on facts that "were known at the time of the conviction or shortly thereafter" and could have been raised in

his previous state habeas petitions. (Lodged Doc. 15 at 27-28.) Further, he "had failed to justify the significant delay in seeking habeas relief." (Id. at 27.) It also rejected his claims on their merits. (Id. at 27-28.) The Court's review of the California Appellate Courts Case Information website shows that the only state-court filing Petitioner has made since was a habeas petition in the supreme court on April 4, 2019; it is unclear what claims he raised in that petition, which is still pending. See Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/search.cfm?dist=0 (search for "Damen" with "Rabb") (last visited Sept. 20, 2019).

On December 21, 2014, Petitioner filed a second Rule 60(b) motion for relief from the Petition's denial. Dec. 21, 2014 Mot. Relief from J., Rabb v. Lopez, No. CV 11-5110-JAK (JPR) (C.D. Cal. Dec. 21, 2014), ECF No. 63. He argued that "information supporting [his] innocence" — Farmer's, Chappell's, and the alibi witness's pretrial statements to the defense investigator — had been in trial counsel's possession but "ha[d] not previously been presented" to any court and supported an "extremely strong ineffective assistance of counsel claim." Id. at 1, 7-13. He explained that he wished to "coalesce" the issues raised in the September 2 state habeas petition with those in the initial federal Petition "rather than being forced to pursue a successive petition." Id. at 1; see Reply to Supp. 60(b) Mot. at 4 & Add. A, id., ECF No. 70. On August 10, 2015, the Court denied the motion as a veiled successive petition. Order at 10-13, id., ECF No. 72.

On March 1, 2017, Petitioner sought the Ninth Circuit's permission to file the Successive Petition. Appl., Rabb v. Spearman, No. 17-70600 (9th Cir. Mar. 1, 2017), ECF No. 1. Respondent filed opposition on April 2, 2018, and Petitioner filed a reply on May 23. Opp'n & Reply, id., ECF Nos. 11 & 14. On July 13, 2018, the Ninth Circuit granted his motion, finding that he had made a "prima facie showing for authorization under § 2244(b)(2)(B)." Order, id., ECF No. 16. The court "express[ed] no opinion as to the merits of [his] claims or whether the procedural requirements of 28 U.S.C. §§ 2244(d) and 2254 are satisfied." Id.

IV. Relevant Record

A. Contemporaneous Evidence Not Presented at Trial

Before Petitioner's June 2007 trial, a defense investigator separately interviewed Farmer and Chappell, showing each of them a photo lineup to see whether they recognized anyone who was involved in the carjacking. (Opp'n, Exs. 9 at 1 & 10 at 1-2.) Neither man did.[4] (Id.)

Specifically, on April 18, 2007, the defense investigator met with Farmer at the Los Angeles County Jail, where he was in custody for charges stemming from an unrelated crime.[5] (Opp'n,

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[4] The record fails to establish that the lineup actually contained Petitioner's photograph. The lineup itself is not attached to the investigator's 2007 reports, which do not say that Petitioner's photo was included in it. (See Opp'n, Exs. 9-10; cf. id., Exs. 1-2 (Farmer's 2016 statement with photograph of Petitioner shown to him attached).)

[5] Farmer told the investigator that he was "in custody for PC 187." (Opp'n, Ex. 9 at 1.) California Penal Code section

(continued...)

Ex. 9 at 1.)[6] The investigator showed him the "photo line-up" and "asked if he observed anyone . . . that was involved in the carjacking incident." (Id.) He looked at it for "several seconds" and "could not identify anyone that looked like the person(s) that were involved." (Id.) Farmer also reviewed the police report and indicated that it was "correct" except as follows:

> Farmer related that at the gas station he didn't get a real good look at the main suspect because he was always behind him. He recall[ed] the main suspect had a ponytail and not braids. Further, he could not remember if he had any tattoos. [Farmer] said that he recalls being taken to the location of a traffic stop and doesn't think he could identify the suspect vehicle or anyone at the scene. . . . Regarding the second suspect, [Farmer] doesn't remember if he had a gun. The suspect was standing far away and it was dark and he didn't get a good look at him.

(Id.) The police never showed him photographs of suspects, and he did not view a lineup. (Id.) Farmer added that it had "been

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[5] (...continued)
187(a) defines murder.

[6] The Successive Petition references 18 exhibits. These were attached to the petition when it was filed in the Ninth Circuit but were not docketed when it was subsequently filed in this Court. Petitioner has filed them as attachments to his Opposition to the motion to dismiss, and the Court cites to them accordingly.

a long time since the incident took place and he [didn't] want to get anyone in trouble." (Id.)

Six days later, on April 24, 2007, the investigator met with Chappell, a minor at the time, at Sylmar Juvenile Hall. (Opp'n, Ex. 10 at 1.) Chappell was also "in custody for a PC 187" and identified Farmer as his codefendant in that case. (Id.) They were longtime friends and members of the same gang. (Id.) The investigator showed him the photo lineup, and he could not identify anyone who "looked like any of the suspects in the carjacking incident." (Id.) That night, he and Farmer had driven a friend's SUV to a gas station. (Id.) While Farmer was pumping gas into the SUV, Chappell noticed a man and woman standing by a Toyota Camry that was parked at an adjacent pump. (Id.) Subsequently, the SUV's door was opened by a man with "braided hair to the shoulders and a tattoo of an arm and hand with two fingers and a thumb sticking out" on his "inerarm [sic] area . . . extend[ing] from his elbow to the wrist"; Chappell believed the tattoo identified him as a member of the Neighborhood Crips. (Id.)

The man pointed a revolver at him and demanded money; when he responded that he did not have any, the man ordered him out of the SUV. (Id.) The man then got in the SUV and drove off; the man and woman standing by the Camry got back in that car and followed suit. (Id.) The investigator asked Chappell "if he was scared when the suspect pointed the gun at him." (Id. at 2.) He responded that "he wasn't scared but thought he might get shot if he didn't do what he was told." (Id.)

Subsequently, the police took Farmer and him "to the location of a traffic stop to try and identify possible suspects." (Id. at 1.) "On arrival Maurice[7] said he wasn't sure if he identified the car or not"; "[h]e did not identify the female but thinks he identified the male as the lookout." (Id.) He was "ask[ed] some questions about the incident" by officers, who did not "tak[e] any notes." (Id.)

Before trial, the defense investigator also interviewed Penn. (Opp'n, Ex. 12 at 1.) She stated that she was Petitioner's girlfriend[8] and that on September 18, 2005, at "about" 5 or 6 p.m., he "arrived at her house with Kendra Brown and another friend only known as 'Baby S'" in a "small" "burgundy" car. (Id.) At midnight, Brown and "Baby S" left on foot; Petitioner "stayed the night and didn't leave until the next day . . . at around noon." (Id.) The investigator asked Penn if she recalled Petitioner's car "being stolen or missing that night," presumably to support a claim that someone else was using the Camry the night of the crimes. (Id.) She responded that she "remember[ed] something like that happening but she [wa]s not sure if it was that night or a different night." (Id.)

At a pretrial proceeding at which Petitioner was present, counsel informed the court that his investigator had interviewed

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[7] Farmer's first name is Maurice and Chappell's is DeShawn. It's unclear whether the investigator was summarizing Chappell's statement about Farmer's observations or about his own and simply referred to him by the wrong name.

[8] Richmond, who told police officers that she had loaned the Camry used in the crimes to Petitioner that night, said she was Petitioner's girlfriend. (Lodged Doc. 2, 3 Rep.'s Tr. at 1311.)

Farmer and Chappell and that they "did not identify" Petitioner as the perpetrator of the carjacking and robbery "when a six-pack photo was shown to them." (Lodged Doc. 2, 2 Rep.'s Tr. at 7.) Petitioner was also present when counsel later reiterated that the victims had "not identified [Petitioner] through the six packs that were presented to them by [the] investigator." (Id. at 601, 604.) Later, during a break in the trial testimony, the prosecutor objected to the introduction into evidence of Farmer's and Chappell's statements or of their "failure to identify" Petitioner in a six-pack photo lineup. (Lodged Doc. 2, 3 Rep.'s Tr. at 1501.) Defense counsel responded that he wished to ask the "victim who testified" about his failure to identify Petitioner. (Id. at 1502.) The prosecutor pointed out that neither of the victims had testified, to which defense counsel responded, "This is not going to be any kind of testimonial statement" and "is for the purpose of whether any of the witnesses identified [Petitioner] from a six-pack photo." (Id.) The court denied the request, finding that the proposed testimony constituted inadmissible hearsay. (Id. at 1502-03.)

B. New Evidence

1. *Farmer's and Chappell's 2016 declarations*

Habeas counsel met with Farmer on March 4, 2016, and Chappell on April 21. (Opp'n, Exs. 2, 12.) He obtained declarations made under penalty of perjury from both men, who were each incarcerated: Farmer for involuntary manslaughter and robbery, see Farmer v. Biter, No. CV 16-589 DMG(JC), 2016 WL 447793, at *1 (C.D. Cal. Feb. 3, 2016), and Chappell for murder (a crime in which Farmer also participated) (see Opp'n, Ex. 13).

Farmer stated that he "remember[ed]" the man who robbed and carjacked him and that Petitioner — whose photograph habeas counsel showed him — was not that man.[9] (Opp'n, Ex. 2 at 1.) He recalled that he was "carrying a gun" when he spoke to police officers the night of the crimes. (Id.) Habeas counsel informed him that police officers had testified that he was "stress[ed]," "pacing back and forth," "acting excited," "mad," and "physically shaken." (Id.) Farmer stated that "none" of those things were "true" — "[he] was not scared" and "was calm." (Id.) The man who robbed him "never said this is Forty Crip or any thing [sic] about gangs." (Id.)

Chappell recounted that "[t]he person who carjacked [Farmer and him] had a tattoo on his right arm," and he "never saw one on his left arm"; he did not "recall the tattoo being of a hand making any kind of sign" and did not remember seeing any other tattoos. (Opp'n, Ex. 11 at 1.) The perpetrator was "wearing a white t-shirt." (Id.) Police officers "never took" Farmer and him "to see the Camry," and he "never identified any car." (Id.) He was "told" that officers claimed Farmer and he "were under stress and acting excited." (Id.) He stated that that was "completely untrue" — he had "had plenty of guns pulled on [him] before" as that was "part of [his] lifestyle as a member of Broadway Crips." (Id.)

[9] Nothing in the record indicates when the photo of Petitioner that Farmer was shown in 2016 was taken. It may have been taken as many as 10 years after the crimes.

2. *Dr. Shomer's 2014 declaration*

Habeas counsel also obtained a declaration from Dr. Robert Shomer, a practicing psychologist and professor of psychology previously qualified as an expert witness in eyewitness perception and identification. (Opp'n, Ex. 4 at 1.) In early 2007, he was contacted by trial counsel to "consider appointment as an expert witness in eyewitness identification" in Petitioner's case. (Id.) He quoted counsel his "usual and customary rate for Los Angeles local cases," which was then $2000 for "review, evaluation, consultation, and testimony." (Id. at 2.) He "reviewed the case file" and prepared an "evaluation" — services for which he billed $999 — and was "ready to testify" but was never asked to do so. (Id. at 3.) He "only recently learned" that the trial court had authorized $1800 for his services. (Id.) Although "$2000 was [his] standard fee[,] . . . [he] ha[d] made exceptions in numerous cases." (Id.) In some instances, trial counsel or a defendant's family would "cover a small shortfall"; sometimes he had "simply taken less." (Id.) If counsel had asked him to accept $1800 to testify in Petitioner's case, he "would have done so." (Id.)

He explained that "[e]yewitness identification was a significant piece of evidence in [Petitioner's] case." (Id.) His testimony would have addressed the weaknesses in Banuelos's identification of Petitioner as the man he saw flee from the Camry, including "problems with lighting, distance, and duration," "cross-racial identification[s]," and identifying strangers. (Id. at 2.) He would also have testified that Banuelos's identification may have been affected by

postobservation information he received, identifications made by experienced police officers are no more accurate than those by civilians, and a witness's confidence in an identification has no correlation to its accuracy. (Id. at 3.)

PETITIONER'S CLAIMS[10]

I. Newly discovered evidence demonstrates that Petitioner is "factually innocent." (Successive Pet. at 21-26.)

II. Petitioner's trial counsel was ineffective for failing to (1) introduce into evidence Farmer's, Chappell's, and Penn's pretrial statements to a defense investigator (id. at 26-33); (2) capitalize on Chappell's admission that he and Farmer were gang members and on the inconsistencies between their statements to the investigator and Banuelos's testimony (id. at 33-37); (3) "highlight" why Banuelos's testimony was not credible (id. at 37-41); (4) hire an eyewitness-identification expert despite obtaining sufficient funds from the trial court to do so (id. at 41-50); (5) object to testimony that Richmond loaned Petitioner the Toyota Camry as inadmissible hearsay (id. at 50-53); (6) request or review the surveillance tape collected from the scene of the crime (id. at 53-57); (7) challenge the LAPD's destruction

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[10] In his Opposition, Petitioner clarifies that the first claim of the Successive Petition, asserting his actual innocence (see Successive Pet. at 21-26), "is not intended to be the vehicle upon which [he] satisfies section 2244(b)'s constitutional error requirement" (Opp'n at 6). Rather, he relies on the arguments laid out in that claim to "explain[] the major flaws in the testimony of some of the officers at trial." (Id.) He also concedes that the third claim of the Successive Petition, which challenges appellate counsel's performance (see Successive Pet. at 67-69), should be dismissed (Opp'n at 19). Accordingly, the Court does not directly address either claim.

of the tape and of the guns recovered from the Camry and seek suppression of any reference to the guns during trial (id. at 57-60); and (8) investigate Petitioner's innocence by searching for other Rollin' 40's Crips members who matched the victims' descriptions of the perpetrator (id. at 60-61).

III. Appellate counsel was ineffective for failing to challenge trial counsel's effectiveness. (Id. at 67-69.)

IV. The trial court violated Petitioner's constitutional right to confront witnesses when it admitted Banuelos's testimony about the victims' statements to him. (Id. at 69-73.)

V. The prosecution intentionally misled the jury, the court, and the defense about the victims' gang membership. (Id. at 74-79.)

VI. The cumulative trial errors require that his convictions be overturned. (Id. at 79-83.)

STANDARD OF REVIEW

"The Antiterrorism and Effective Death Penalty Act ('AEDPA') instituted a 'gatekeeping' procedure for screening second or successive federal habeas corpus petitions." Henry v. Spearman, 899 F.3d 703, 705 (9th Cir. 2018) (quoting Felker v. Turpin, 518 U.S. 651, 657 (1996)).

AEDPA "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." Tyler v. Cain, 533 U.S. 656, 661 (2001). Specifically, § 2244(b), which governs second or successive habeas petitions, provides:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Thus, under § 2244(b)(1), a claim raised in a successive petition that was "presented in a previous federal habeas petition . . . must be dismissed." Tyler, 533 U.S. at 661. A claim was "previously presented" if "the basic thrust or gravamen of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments . . . [or] proved by different factual allegations." Babbitt v. Woodford, 177 F.3d 744, 746 (9th Cir. 1999) (per curiam)

(citation omitted). Under § 2244(b)(2), "absent a showing of intervening constitutional law, a successive habeas petitioner must overcome two obstacles to invoke the district court's jurisdiction." Brown v. Muniz, 889 F.3d 661, 668 (9th Cir. 2018), cert. denied sub nom. Brown v. Hatton, 139 S. Ct. 841 (2019). First, he must show that the factual predicate for his habeas claim "could not have been discovered at the time of his initial habeas petition" through the "exercise of due diligence." Id. at 667-68 (citation omitted). "A petitioner must exercise due diligence in investigating new facts where he is on notice that new evidence might exist" and does not satisfy the due-diligence requirement "simply by showing he did not know of the new evidence earlier." Solorio v. Muniz, 896 F.3d 914, 920 (9th Cir.) (as amended) (emphasis in original), cert. denied, 139 S. Ct. 608 (2018). Thus, the due-diligence inquiry "turns on two factors: (1) whether the petitioner was on inquiry notice to investigate further, and, if so, (2) whether the petitioner took reasonable steps to conduct such an investigation." Id. at 921.

If the first requirement is satisfied, a petitioner must then demonstrate that the previously undiscovered facts, if shown to be true, suffice to prove his "actual innocence by clear and convincing evidence." Id. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). "The evidence of innocence must be 'so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" Lee v. Lampert, 653 F.3d 929, 937-38 (9th Cir. 2011) (en banc) (quoting

Schlup v. Delo, 513 U.S. 298, 316 (1995)). The court must consider "'all the evidence, old and new, incriminating and exculpatory,' admissible at trial or not." Lee, 653 F.3d at 938 (quoting House v. Bell, 547 U.S. 518, 538 (2006)).

These requirements are conjunctive, so if either is not satisfied the claim must be dismissed. West v. Ryan, 652 F.3d 1071, 1078 (9th Cir. 2011) (per curiam). Satisfying the test in § 2244(b)(2) is the only avenue to prosecute a claim of trial error in a successive petition. See Gage v. Chappell, 793 F.3d 1159, 1168-69 (9th Cir. 2015) (holding that miscarriage-of-justice gateway from Schlup, 513 U.S. at 315, does not apply under § 2244(b)(2) (citing McQuiggin v. Perkins, 569 U.S. 383, 394-400 (2013))).

Obtaining the appellate court's permission to file a successive petition, as Petitioner did here, does not automatically entitle the petitioner to merits review of the claims in it. Instead, the district court must independently determine if each claim in fact satisfies § 2244(b); this requires a petitioner to make more than a prima facie showing. See Tyler, 533 U.S. at 661 n.3 (court of appeals may authorize filing of second or successive petition upon prima facie showing, "[b]ut to survive dismissal in district court, the applicant must actually 'sho[w]' that the claim satisfies the standard"). If the petitioner does not make such a showing, the district court must dismiss the claim. See § 2244(b)(4). For the reasons discussed below, Petitioner has failed to make the necessary showing as to any of his claims.

DISCUSSION

I. Petitioner's Confrontation Clause Claim Must Be Dismissed Because It Was Presented in the Initial Petition

The Successive Petition's fourth claim is an amalgamation of the initial Petition's first two claims: the trial court erred in permitting Farmer and Chappell to invoke their Fifth Amendment privilege and violated Petitioner's right to confront them by permitting Banuelos to testify to their statements the night of the crimes. The claim's heading reads, "The Trial Court Violated Petitioner's Constitutional Right to Confront Witnesses When it Admitted the Victims' Alleged Statements Through Sergeant Banuelos" (Successive Pet. at 69), and Petitioner repeats that assertion in the claim's body (id. at 72). But he also argues throughout the claim that Farmer and Chappell were erroneously permitted to invoke their Fifth Amendment privilege. (Id. at 69-70, 73 (Chappell); id. at 70, 73 (Farmer).)

To the extent Petitioner challenges admission of the victims' statements through Banuelos's trial testimony, that claim is identical to the second claim of the initial Petition. (See Pet. at 5; Traverse at 8, 18-20, 24-25.) The Court rejected it, finding that the victims' statements were nontestimonial and therefore Banuelos's testimony relaying them did not violate Petitioner's Confrontation Clause rights, see Rabb, 2012 WL 5289576, at *13-16, and the Ninth Circuit affirmed, see 646 F. App'x at 564-65. Similarly, his claim that the trial court should have questioned the victims under oath before permitting them to invoke their Fifth Amendment privilege was presented in the first claim of the initial Petition. (See Pet. at 5;

Traverse at 8, 18-20, 24-25.) The Court rejected that challenge as well, finding that Farmer was properly permitted to invoke the privilege and that even if Chappell should have been questioned further, any error was harmless, see Rabb, 2012 WL 5289576, at *12-13, and the Ninth Circuit again affirmed, see 646 F. App'x at 564. Because these claims were presented in a prior petition, they must be dismissed under § 2244(b)(1). See Gonzalez v. Crosby, 545 U.S. 524, 529-30 (2005); Babbitt, 177 F.3d at 746.

Petitioner acknowledges that he raised the claims in the initial Petition but attempts to get around § 2244(b)(1) by contending that newly discovered evidence undermines the courts' harmlessness finding. (See Successive Pet. at 71; Opp'n at 20-21.) As noted above, the denial of Petitioner's Confrontation Clause claims relating to Banuelos and to Farmer's invocation of the Fifth Amendment did not rely on a harmlessness analysis. And even though the privilege-invocation claim as to Chappell was denied on that basis, any potential impact the newly discovered evidence might have had on the state court's, this Court's, and the Ninth Circuit's harmless-error analysis does not render the claim new for purposes of § 2244(b)(1). See Cooper v. Brown, 510 F.3d 870, 931 (9th Cir. 2007) ("New factual grounds in support of a legal claim that has already been presented . . . are not sufficient to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b)."). The reason a claim was denied is irrelevant to the § 2244(b)(1) analysis; indeed, even one denied on procedural grounds may not be repeated in a successive petition despite being bolstered by new factual or legal arguments. See Pizzuto v. Blades, 673 F.3d 1003, 1007–08 (9th Cir. 2012).

Petitioner may not use new evidence to collaterally attack the record previous courts relied on in resolving his old claims. See Gimenez v. Ochoa, 821 F.3d 1136, 1141 (9th Cir. 2016) (dismissing previously raised ineffective-assistance claim under § 2244(b)(1) even though petitioner may have obtained "additional documents supporting his argument" when "basic thrust or gravamen" is "same" as before (citation omitted)); see also LePage v. Idaho, No. CV 04-0261-E-BLW., 2005 WL 2152882, at *6 (D. Idaho Sept. 7, 2005) (rejecting petitioner's argument that ineffective-assistance claims were not successive because "newly discovered evidence alter[ed] the legal analysis of those claims").

Accordingly, ground four of the Successive Petition must be dismissed.

II. Petitioner's Remaining Claims Fail Because He Can't Satisfy Either of § 2244(b)(2)(B)'s Requirements

A. Petitioner Has Failed to Meet the Due-Diligence Standard of § 2244(b)(2)(B)(i)

The Successive Petition's claims rest on evidence that was available but never presented at Petitioner's 2007 trial as well as on "new evidence" of his innocence and trial counsel's ineffectiveness. For the reasons discussed below, Petitioner has failed to show that "the factual predicate[s] for [his] claim[s] could not have been discovered previously through the exercise of due diligence." § 2244(b)(2)(B)(i).

1. *Ineffective assistance of counsel*

Petitioner's ineffective-assistance claim is divided into eight subclaims. As a threshold matter, several of these

subclaims are not based on new factual predicates. As the superior court found in denying virtually identical claims in Petitioner's 2014 state habeas petition, they are based entirely on facts "known at the time of [his] conviction or shortly thereafter." (Lodged Doc. 15 at 27-28.)

a. Old evidence

Petitioner claims that trial counsel was ineffective for failing to object to Banuelos's testimony that Richmond — the registered owner of the Camry used during the crimes — told two police officers she had loaned the car to Petitioner. (See Successive Pet. at 50-53.) According to Petitioner, counsel should have objected because neither Richmond nor the police officers to whom she spoke testified at trial, and Banuelos's testimony was therefore inadmissible double hearsay. (See id.) That his hearsay analysis may be correct, and that counsel may have performed deficiently in not objecting, doesn't change that Petitioner was aware of the factual predicate for this subclaim from the moment counsel failed to object.[11]

Likewise, his claim that "trial counsel was ineffective in failing to investigate [his] innocence" because he didn't "obtain the Rollin' 40's Crips gang book and search[] for other individuals who better matched" Banuelos's description of the suspect (Successive Pet. at 60-61) could have been raised at any

[11] When habeas counsel asked trial counsel in 2014 about his "failure to object to double hearsay," counsel apparently stated that he could not "recall any strategies" for not objecting because "the case was a long time ago." (Opp'n, Ex. 15 ¶ 13.) But as discussed on page 59 below, at least one such strategy is apparent on the face of the record.

point since trial.[12] See Jones v. Ryan, 733 F.3d 825, 844-45 (9th Cir. 2013) (holding that ineffective-assistance claim did not satisfy § 2244(b)(2)(B)(i) when petitioner "offered no indication that the factual predicate," which "occurred . . . at [petitioner's] trial and sentencing" and "was known to him . . . and could have been raised then," could not have been discovered previously through exercise of due diligence).

Petitioner's claim that counsel was ineffective for allegedly failing to request or watch the surveillance tape collected from the scene of the crimes (see Successive Pet. at 53-57) and for failing to move to suppress any reference to the guns recovered from the Camry (see id. at 57-60) must be dismissed for the same reason.

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[12] Petitioner's suggestion that this subclaim encompasses his argument that trial counsel deficiently failed to uncover the substance of the victims' 2016 statements, which he claims established that Banuelos and Ashley lied in their trial testimony, is unavailing. (See Opp'n at 12-14.) It's not clear that habeas counsel even asked trial counsel about his strategy behind this subclaim. (See id., Ex. 15 ¶¶ 11-13 (listing other claims he asked counsel about and stating that they also discussed "other matters")). That alone would be reason to deny the claim and demonstrates that Petitioner still has not acted diligently. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2012) (as amended Jan. 15, 2013) (holding that state court was not unreasonable in finding counsel's performance not deficient as to particular ineffective-assistance-of-counsel claim when petitioner presented counsel's affidavit only to "support claims of deficient performance for other ineffective assistance claims"). In any event, the subclaim is plainly limited to counsel's failure to search for other suspects. Petitioner may not amend his Petition at this stage to blunt the force of Respondent's arguments. Cf. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (without court's permission, new habeas claims are not properly raised outside of petition).

As to the tape, during trial, Detective Williams testified that he had "review[ed] a surveillance video from the gas station." (Lodged Doc. 2, 3 Rep.'s Tr. at 1328.) The video was not "clear," and he "couldn't identify any particular person or any particular vehicle" in it. (Id. at 1329.) On cross-examination, Petitioner's counsel implied that he had watched the tape and it was indeed unclear; in a line of questioning designed to show that the police had pressured Parron into identifying Petitioner as his fellow carjacker, he asked Williams about officers allegedly lying to Parron by telling him that "everybody [was] on tape, and they knew who had done this robbery and carjacking." (Id. at 1335.) Nonetheless, on May 29, 2012, less than a year after he filed the initial Petition, Petitioner requested that the Court hold an "evidentiary hearing" to determine whether the prosecution "maliciously withheld" the tape.[13] See Req. for Evid. Hr'g at 1, 3-4, 6, Rabb v. Lopez, No. CV 11-5110-JAK (JPR) (C.D. Cal. May 29, 2012), ECF No. 35. At least as of that time, then, and almost certainly before, Petitioner knew of the factual predicate for this claim.

Petitioner also knew at the time of trial that two of the three guns recovered from the Camry had been accidently destroyed because the prosecutor said so in his opening statement (Lodged Doc. 2, 2 Rep.'s Tr. at 928), and Detective Williams testified to

[13] When asked about the tape, trial counsel apparently said that "he was not aware of any surveillance tape and . . . never viewed it or sought to view it." (Opp'n, Ex. 15 ¶ 11.) But as habeas counsel acknowledges, the record "makes . . . clear that he was aware of the surveillance tape" at the time of trial. (Id.) Thus, trial counsel's memory had apparently simply faded.

that effect (Lodged Doc. 2, 3 Rep.'s Tr. at 1329-30). He also knew that counsel did not object to any references to the three guns.[14] Thus, Petitioner knew of these issues years ago, that counsel was in a position to raise them, and that he failed to do so. Accordingly, he was aware of the factual predicates for these subclaims well before he filed the initial Petition and has not exercised due diligence in bringing them. See Hernandez v. Tampkins, No. SACV 14-764 JLS (FFM), 2015 WL 304794, at *7 (C.D. Cal. Jan. 20, 2015) (finding petition successive when "alleged failings of petitioner's trial counsel would have been apparent to petitioner at the time of his trial").

Finally, the first two subclaims of Petitioner's ineffective-assistance claim focus on counsel's failure to offer into evidence and effectively use the victims' and Penn's 2007 pretrial statements to the defense investigator.[15] (See

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[14] Nothing demonstrates that habeas counsel asked trial counsel about his decision not to object to the sole nondestroyed gun being admitted into evidence or to references to the other two guns. (Opp'n, Ex. 15 ¶¶ 11-13 (listing claims he asked counsel about and stating that they also discussed "other matters").) A reasonable attorney could have believed that any objection would be pointless because ample testimony from multiple witnesses established that all three guns were recovered from the Camry, that they matched the descriptions of the guns used by the perpetrators, and that one of the guns had been preserved for trial. (See Lodged Doc. 2, 3 Rep.'s Tr. at 1230-31, 1251, 1263-65, 1298-99, 1329, 1335-36); Strickland v. Washington, 466 U.S. 668, 690 (1984) ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). The absence of a declaration from counsel concerning the decision not to object would again be reason enough to deny the claim. Gentry, 705 F.3d at 899-900.

[15] When habeas counsel inquired why trial counsel did not

(continued...)

Successive Pet. at 26-37.) Particularly, Petitioner claims that those statements established his innocence and could have been used to impeach the police witnesses. (Id. at 28-33.) He also asserts that Chappell's admission that he and Farmer were gang members could have impacted the trial court's Fifth Amendment analysis. (Id. at 35-37.) Even though the statements were not presented at trial, Petitioner was or should have been aware of them and could have used them to mount an ineffective-assistance claim in the initial Petition.

Indeed, Petitioner concedes that counsel possessed the defense investigator's pretrial summaries of Chappell's, Farmer's, and Penn's 2007 statements. (See Successive Pet. at 6.) Notably, he does not claim that he was ignorant of the statements at the time of trial or deny that he gained possession of them sometime ago. See Cooper v. Calderon, 274 F.3d 1270, 1275 (9th Cir. 2001) (per curiam) (finding § 2244(b)(2)(B)(i) not satisfied when allegedly new evidence was "presented to [petitioner's] trial counsel during trial" and petitioner did not claim "he recently became aware of trial counsel's failure to investigate it"). After all, he was present in court during trial when counsel repeatedly alluded to the victims' statements to the investigator, emphasizing that they had not identified Petitioner when shown a photo lineup. (See Lodged Doc. 2, 2 Rep.'s Tr. at 1, 7, 601-04, 3 Rep.'s Tr. at 1501-03.) Moreover,

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[15] (...continued)
"present evidence of [Petitioner's] innocence" — presumably the victims' and Penn's statements to the investigator — trial counsel stated that he could not remember because "the case was a long time ago." (Opp'n, Ex. 15 ¶ 13.)

after he was convicted, he obtained trial counsel's file, which he does not dispute contained copies of their and Penn's statements. (See Opp'n, Ex. 15 ¶ 2 (explaining that in his efforts to obtain "trial counsel's file," habeas counsel learned that it had been passed along to Petitioner).)

And because Petitioner was present during trial, he also was aware that counsel tried but failed to introduce the victims' statements into evidence and did not call Penn as an alibi witness. Therefore, he was in a position to challenge counsel's effectiveness on these grounds long before he filed even the initial Petition. Tellingly, almost immediately after obtaining the trial file from Petitioner, habeas counsel raised the claims Petitioner presses in these two subclaims in his 2014 state habeas petition (see Lodged Doc. 21), thereby erasing any doubt that they could have been raised earlier in this Court. See Williams v. Soto, No. CV 15-1275-MWF (FFM), 2018 WL 2208041, at *11 (C.D. Cal. Feb. 20, 2018) (dismissing petitioner's successive petition challenging counsel's failure to interview and present testimony of two exculpatory witnesses when "years before he filed his first federal habeas petition" he "knew the facts to which they purportedly would have testified" and "knew that, in fact, neither of the proposed witnesses testified at trial"), accepted by 2018 WL 2215977 (C.D. Cal. May 10, 2018), certificate of appealability denied by 2018 WL 6041663 (9th Cir. Sept. 25, 2018); Gant v. Barnes, No. CV 14-2618-CJC (SP), 2017 WL 3822063, at *7 (C.D. Cal. July 19, 2017) ("[P]etitioner should have been aware that his trial counsel attempted to have one of his alibi witnesses . . . testify" because he "was present when his

attorney explained her efforts"), accepted by 2017 WL 3738384 (C.D. Cal. Aug. 28, 2017); Evans v. Galaza, No. CV 98-8536-WDK (MLG)., 2012 WL 6193859, at *8 (C.D. Cal. Oct. 2, 2012) ("[H]aving sat through the trial, Petitioner was clearly aware that the persons who could allegedly establish his alibi were not called as witnesses."), accepted by 2012 WL 6201209 (C.D. Cal. Dec. 12, 2012).

Under these circumstances, it is irrelevant that the statements were "never presented" to the jury. (See Opp'n at 1, 35-36); Sims v. Subia, No. CV 08-3295-JLS (MAN), 2015 WL 3750450, at *24 (C.D. Cal. June 14, 2015) (petitioner "confuses the act of acquiring evidentiary support for a known claim with the act of discovering the factual predicate for a new claim" (emphasis in original)); Taylor v. Scribner, No. CV 12-7409-CAS (PJW), 2014 WL 6609299, at *3 (C.D. Cal. Oct. 20, 2014) (holding that petitioner's "proffer[] [of] affidavit to support" successive petition's claim "does not change the fact that the underlying factual premise of [his] argument is not new"), accepted by 2014 WL 6609316 (C.D. Cal. 2014).[16] Section 2244(b)(2)(B)(i) requires the exercise of diligence in discovering "the factual predicate" of a claim and not simply particular evidence to support it or a lawyer to ferret it out. Cf. Gant, 2017 WL 3822063, at *7

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[16] Notably, Petitioner's now-abandoned argument that appellate counsel had "trial counsel's file and was therefore on notice as to the things he knew" and was thus in a position to challenge his effectiveness (Successive Pet. at 67-69) betrays that the factual predicate for this subclaim could have been discovered with due diligence well before Petitioner filed the initial Petition and even more so the successive one at issue here.

("Petitioner's inability to locate, rather than discover, . . . witnesses due to his previous pro se litigant status does not undermine the conclusion that he knew the factual predicate for his IAC claim by the conclusion of his trial.").

Thus, Petitioner did not act diligently in bringing any of his ineffective-assistance-of-counsel claims based on old evidence.

b. "New" evidence

The Successive Petition's third ineffective-assistance subclaim is ostensibly about trial counsel's inadequate efforts to undermine Banuelos's testimony. (See Successive Pet. at 37-41.) Petitioner claims that counsel failed to explore myriad factors undermining Banuelos's identification of him as the man who fled the Camry, relying primarily on the victims' 2016 statements. (Id. at 37, 39-40.) But trial counsel's allegedly ineffective cross-examination of Banuelos could have been challenged from immediately after trial. Indeed, Petitioner raised almost all the same arguments he now makes in his 2014 state habeas petition, well before the 2016 declarations even existed. (See Lodged Doc. 21 at 22-26.)

Petitioner suggests that Farmer's and Chappell's 2016 declarations contained information that would have helped counsel undermine Banuelos's testimony had he elicited it from them earlier. For example, he points out that Banuelos described the suspect who fled from him as wearing a long-sleeved blue t-shirt but that Chappell stated in 2016 that the perpetrator was wearing a white t-shirt. (Successive Pet. at 40.) Elsewhere in the Successive Petition, he claims that the victims' 2016 statements

that they were not scared and thus that the police officers' testimony about their demeanor wasn't true would have impeached Ashley and Banuelos and potentially prevented the victims' statements to them from being introduced into evidence as excited utterances. (Id. at 8, 24-26.) But the 2016 statements do not constitute a new factual predicate for purposes of § 2244(b)(1) because they do not contain any information that could not have been — and indeed for the most part was — "discovered previously through the exercise of due diligence."[17] § 2244(b)(2)(B)(i).

Petitioner knew all along that the victims had seen the real perpetrator — presumably the same person Banuelos saw flee from the Camry — and could be ripe sources of additional information. He also was aware at least as of 2007 of what information the investigator had managed to extract from them. Thus, if Petitioner felt that counsel was not diligent in obtaining additional information from them, or that the victims had more to offer than what they shared with the investigator, he had ample notice to raise those concerns earlier. See King v. Trujillo, 638 F.3d 726, 728, 730-31 (9th Cir. 2011) (per curiam) (finding that recantation was not "new" factual predicate or newly discovered evidence because it merely corroborated matters addressed at trial); Babbitt, 177 F.3d at 747 (disallowing successive petition because black petitioner had not exercised

[17] As Respondent points out (see Reply at 14), the victims' statements concerning their demeanor are not even necessarily inconsistent with the officers' testimony in that regard. As discussed below, Farmer and Chappell may not have felt scared but may have appeared so, or the officers could have interpreted excitement and agitation as fear.

due diligence when his white counsel's failure to question all-white jury about potential race bias had put him on notice that counsel might himself harbor racial animus).

In any event, most of the information in the 2016 declarations was not new. Chappell told the defense investigator in 2007 that he "wasn't scared" when the perpetrator "pointed the gun at him." (Opp'n, Ex. 10 at 2.) Petitioner acknowledges that "trial counsel knew" this and faults him for not using the statement to "challenge the excited utterance ruling." (Successive Pet. at 36-37.) Indeed, Petitioner raised counsel's failure to capitalize on this statement in 2014, two years before he obtained Chappell's 2016 statement to the same effect. (See Lodged Doc. 21 at 17-18.) To be sure, Farmer's 2007 statement did not mention his demeanor after the crimes. But Petitioner did not need to be "present at the crime scene" (Opp'n at 10) to know that if Banuelos's assessment of Chappell's demeanor was inaccurate, his assessment of Farmer's may have been as well. Further, during trial, counsel twice sought to exclude the victims' statements on the basis that they did not qualify as excited utterances, further alerting Petitioner to the issue. Thus, to the extent Petitioner now claims that evidence of the victims' account of their demeanor the night of the crimes demonstrated that Banuelos was exaggerating or fabricating testimony to get their statements admitted into evidence, Chappell's 2007 statement put Petitioner on notice way back then that he could raise that claim.

Accordingly, this case is not like Hasan v. Galaza, 254 F.3d 1150 (9th Cir. 2001), to which Petitioner attempts to analogize.

(Opp'n at 8-9.) In Hasan, although petitioner "knew . . . that there may have been jury tampering and that his counsel did not properly investigate it," 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," which established that he was prejudiced by counsel's ineffective assistance. Id. at 1154. Here, Petitioner was aware of all the pertinent facts needed to challenge counsel's effectiveness for failing to investigate whether the police accounts of the victims' demeanor and descriptions of the perpetrator were accurate. And he knew that he was prejudiced by counsel's purported ineffectiveness because he was found guilty.

Given Farmer's and Chappell's willingness to speak to the defense investigator in 2007 and again to habeas counsel in 2016, it appears that they were prepared to assist Petitioner from shortly after the crimes occurred. See Walton v. Ryan, No. CV-11-00578-PHX-ROS (SPL), 2014 WL 1713625, at *3 (D. Ariz. May 1, 2014) (finding that petitioner failed to exercise due diligence in presenting witness recantations because although "it is difficult to determine when they could have been first uncovered, . . . they could have been uncovered earlier than twenty years after trial"). He doesn't dispute that he didn't attempt to contact either victim in between the two sets of statements, or have a surrogate do so, but claims that any effort would have been futile. (See Opp'n at 10.) But a petitioner's pro se status does not alter § 2241(b)(2)'s due-diligence requirement. Cf. Mays v. Madden, No. CV 18-10678 PSG (SS), 2019 WL 2424539, at *6 (C.D. Cal. May 16, 2019) (holding that petitioner was not

entitled to later start date for limitation period under § 2254(d)(1)(D) because his "lack of legal sophistication does not explain his failure to recognize false evidence and seek a legal remedy until decades later"), accepted by 2019 WL 2424104 (C.D. Cal. June 6, 2019); Gant, 2017 WL 3822063, at *7; see also Johnson v. United States, 544 U.S. 295, 311 (2005) ("[W]e have never accepted pro se representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness.").

Petitioner also challenges counsel's failure to procure the testimony of an eyewitness-identification expert despite allegedly obtaining sufficient funds from the court to do so. (See Successive Pet. at 41-50.)[18]

In order to distinguish this claim from the one he raised in the initial Petition — that the trial court failed to provide funding for an expert witness (see Pet. at 6; Traverse at 15-17, 21-23, 26-27) — Petitioner now points the finger at counsel for not adequately deploying the funds that were authorized by the trial court. Specifically, he claims that counsel incorrectly represented to the trial court that another judge had approved only $1500 for the witness when in fact $1800 had been approved (Successive Pet. at 42), did "nothing to contest or correct the errors" made by the prosecutor in arguing that an eyewitness

[18] When asked about his "attempt to hire" Dr. Shomer, trial counsel apparently "explained his frustration at not receiving the $2000 he had requested from the Court," "said that he thought Dr. Shomer would have made a difference in the outcome of the case," and explained that he had not approached him about testifying for less money because "his price was $2,000." (Opp'n, Ex. 15 ¶ 12.)

expert was not necessary in the case (id. at 45), and did not effectively advocate for more funds (id. at 45-46). Further, relying on the 2014 affidavit from Dr. Shomer, Petitioner claims that trial counsel was ineffective for failing to ask the expert to accept $1800 to testify, a request Dr. Shomer states he would have granted. (Id.)

To start, Petitioner was present for each of the colloquies between counsel and the trial court about securing Dr. Shomer's testimony. In one such instance, counsel explained to the court that Dr. Shomer had requested $2000 to review the case and testify in court but that only $1500 was approved. (Lodged Doc. 2, 2 Rep.'s Tr. at 9-10.) The court noted that $1800 had been approved, but counsel maintained that the judge who had ordered that amount had made a mistake and had called him to clarify that the authorized amount was just $1500. (Id. at 11-12.) Counsel stressed that "it was very crucial" for Dr. Shomer to testify but that the court had approved only "a partial amount" of his fee, "caus[ing] Doctor Shomer not to be present in court today." (Lodged Doc. 2, 2 Rep.'s Tr. at 9-10.) Petitioner was also present when the issue was revisited, when the parties discussed whether an identification expert was necessary. (Id. at 601, 607.)

As an initial matter, Petitioner has presented no evidence that trial counsel was incorrect when he asserted that the $1800 initially authorized was a mistake and that only $1500 would be approved, and no evidence that Dr. Shomer would have accepted that lower amount. He thus has still not exercised diligence in presenting this claim. But in any event, he clearly long ago

understood counsel's discussions with the prosecution and judge about the funds available for Dr. Shomer's testimony given that he detailed each of these exchanges in his Traverse in support of the initial Petition, in 2012. (See Traverse at 26-27.) And he possessed the two ex parte applications trial counsel filed, to obtain funds to retain an expert witness and then to secure additional funds to cover Dr. Shomer's fee. See Objs. to July 2, 2012 R. & R., Rabb v. Lopez, No. CV 11-5110-JAK (JPR) (C.D. Cal. Aug. 27, 2012), ECF No. 43 (attaching applications).

Accordingly, to the extent "trial counsel failed to diligently work to secure the necessary resources to support the defense case" (Opp'n at 17), Petitioner was aware of counsel's efforts and could have challenged them sooner if he felt they were inadequate. Likewise, if he believed that counsel should have done more to convince Dr. Shomer to accept a smaller payment, he was on notice of what the numbers being discussed were and could have asked counsel to follow up with Dr. Shomer to ask him if he would have accepted less; he does not claim that he did so. That habeas counsel in 2014 reached out to Dr. Shomer, who was forthcoming, further shows that Petitioner could have discovered the factual predicate for the claim earlier. See Johnson, 544 U.S. at 311.[19]

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[19] Petitioner's attempt to analogize to Rudin v. Myles, 781 F.3d 1043 (9th Cir. 2015), to demonstrate that he only recently learned of the factual predicate for this subclaim is unavailing. (See Opp'n at 18-19.) In Rudin, the petitioner claimed ineffective assistance of habeas counsel stemming from his failure to timely file a state habeas petition. 781 F.3d at 1054 n.13. The Ninth Circuit noted that, assuming petitioner had a (continued...)

Thus, Petitioner's "newly discovered" evidence could have been uncovered and presented far earlier through the exercise of due diligence.

2. *Petitioner's remaining claims*

Petitioner acknowledges that the factual predicates underlying his Confrontation Clause and prosecutorial-misconduct claims (see Successive Pet. at 69-72, 74-78) are the same as those girding the ineffective-assistance claim (see Opp'n 20-21). Thus, they too must be dismissed because they could have been discovered and raised earlier through the exercise of due diligence. And because Petitioner could have discovered the factual predicates for all those claims through the exercise of due diligence, his cumulative-error claim fails for the same reason.

B. Petitioner Has Failed to Meet the Actual-Innocence Standard of § 2244(b)(2)(B)(ii)

The Successive Petition's reliance on factual predicates that could have been (and in most cases were) discovered well before Petitioner filed the initial Petition compels its dismissal. But even if they could not have been raised earlier, Petitioner's claims must still be dismissed because he has not

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[19] (...continued)
constitutional right to effective postconviction counsel, her claim was not time barred because she learned about the prejudice resulting from counsel's mistake only when the state court denied her petition as untimely. Id. Here, 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. At that point, he knew the factual predicate for this subclaim.

shown that "the facts underlying [them], if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." § 2244(b)(2)(B)(ii).

The main thrust of the Successive Petition is that Petitioner would have been acquitted had trial counsel presented to the jury the victims' 2007 statements and discovered and presented the contents of their 2016 statements.[20] But neither set of statements satisfies § 2244(b)(2)(B)(ii)'s stringent actual-innocence standard.

Petitioner argues that "[w]hat sets this case apart" is that Farmer and Chappell did not testify at trial. (Opp'n at 16.) But both trial counsel and the prosecutor told the jury that Petitioner was never identified by the victims as the perpetrator in any kind of lineup or photo array. (See, e.g., Lodged Doc. 2, 3 Rep.'s Tr. at 1523, 1529.) The jury convicted Petitioner knowing that he was never identified by the victims. Therefore, that they were unable (or unwilling) to identify him in a photo lineup before or 10 years after trial does not carry the same impeachment weight as it would have had they took the stand and identified him at trial. Moreover, Farmer told the investigator in 2007 that "he didn't get a real good look" at the perpetrator and "[didn't] want to get anyone in trouble." (Opp'n, Ex. 9 at

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[20] It's unclear how counsel could have been ineffective for not obtaining the information shared by the victims in 2016 when before trial he obtained court authorization for an investigator (see Lodged Doc. 1, Clerk's Tr. at 130) and sent that investigator to speak to them.

1.) Thus, even if the jury had heard testimony about the 2007 photo lineup or been told of his 2016 statement that the person depicted in an undated photo of Petitioner was not the carjacker, his failure to identify Petitioner would have been easy for the prosecution to explain.

There was also ample reason to doubt the veracity of the 2007 statements. After all, both Farmer and Chappell were in custody when they made them and stood to gain from letting their fellow inmates know that they were not cooperating with the prosecution. See Cano v. Beard, No. CV 14-5677 (JLS) (FFM), 2015 WL 4940406, at *6 (C.D. Cal. Apr. 27, 2015) ("[A] juror could rationally and reasonably conclude that [declarant] had nothing to lose in exculpating [p]etitioner and that he could, indeed, enhance his status among his fellow prison inmates by doing so."), accepted by 2015 WL 4932816 (C.D. Cal. Aug. 17, 2015). And Farmer's admission to the defense investigator that he didn't "want to get anyone in trouble" casts doubt on the veracity of both his 2007 and 2016 statements. (Opp'n, Ex. 9 at 1); see generally House, 547 U.S. at 552 (eyewitness testimony by disinterested witness with no motive to lie "has more probative value" than "testimony from inmates, suspects, or friends or relations of the accused").

Critically, as the Court recognized in denying the initial Petition, even if the victims' testimony would have been exculpatory, "the other evidence against Petitioner was so strong as to outweigh its impact." Rabb, 2012 WL 5289576, at *13. Before Banuelos was even involved, Farmer described the perpetrator to Ashley as a light-skinned black man wearing a

light blue t-shirt, about five feet six inches tall, with braided hair, a teardrop tattoo under his right eye, and a hand-and-finger tattoo on his forearm. (Lodged Doc. 2, 3 Rep.'s Tr. at 1248.) Farmer further described the suspects' vehicle as a dark green 1990s Toyota Camry and the gunman's weapon as a blue-steel revolver. (Id. at 1249, 1251.) Notably, although Farmer claimed in his 2007 statement that the suspect had a "ponytail and not braids" and that he "could not remember if he had any tattoos" (Opp'n, Ex. 9), he did not deny supplying Ashley with the above-described contemporaneous description of the perpetrator, his car, and his gun. And Chappell's 2007 statement confirmed that the perpetrator had "braided hair" and a "tattoo of an arm and hand with two fingers and a thumb sticking out" on his "i[n]nerarm area." (Id., Ex. 10 at 1.)

While Ashley was with the victims taking their accounts of the crimes and descriptions of the perpetrators, Banuelos apprehended a green Camry traveling at high speed near the scene of the carjacking, after it had run a red light. (Lodged Doc 2, 3 Rep.'s Tr. at 1277, 1279, 1285.) That was clearly the same car that had been at the gas station minutes earlier because the driver — later identified as Brown — asked Banuelos whether the stop had "anything to do with what transpired at the gas station" at "Vernon and Figueroa" (id. at 1282), and three blue-steel revolvers were found in the trunk (id. at 1230-31, 1298-99, 1329).[21] Further, the man whom Banuelos saw flee from the Camry —

[21] That Banuelos immediately contacted dispatch to inquire whether there had been a request for service at that gas station (continued...)

whom he described as a heavyset light-skinned black man with braided hair, a light-blue long-sleeved t-shirt, and a teardrop tattoo on his right cheek (id. at 1278, 1307, 314-15) — mostly matched the description Farmer gave Ashley.

Of course, Banuelos ultimately identified that man as Petitioner (id. at 1299-301), which was corroborated by Richmond's statement to police officers that she had lent Petitioner the Camry that night (id. at 1300-01, 1311). Further, Parron, who pleaded no contest to carjacking in connection with the case and identified Petitioner in a photo lineup by circling, dating, and signing his photo, told Williams that he and Brown were with Petitioner when he committed the armed carjacking (id. at 1207, 1322–28, 1334). On top of that, the tattoo on Petitioner's forearm generally matched the description of the tattoo supplied to Ashley by Farmer and confirmed by Chappell in his 2007 statement. (Id. at 1315.) Further, although Brown did not testify at trial, according to a police report attached to the prosecution's response to Petitioner's 2014 state habeas petition, at one point during the investigation she apparently identified Petitioner in a photo lineup as the person who was in the Camry with her when Banuelos stopped it and had committed the carjacking with Parron. (Lodged Doc. 17 at 23); see Lee, 653 F.3d at 938 (in determining whether petitioner has established his actual innocence, court must consider "'all the evidence,'

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[21] (...continued)
(Lodged Doc. 2, 3 Rep.'s Tr. at 1286) confirms that Brown implicated herself in the robbery and that the Camry she was stopped in was the perpetrators' car.

. . . admissible at trial or not" (citation omitted)). Lastly, Parron, Brown, and Petitioner were all known members of the Rolling 40's Crips and thus likely to have worked together to commit a crime. (See Lodged Doc. 2, 2 Rep.'s Tr. at 938-39, 941-42.)

Under these circumstances, even if Farmer's and Chappell's statements bolstered Petitioner's misidentification claim, they do not "unquestionably" establish his actual innocence. Morales v. Ornoski, 439 F.3d 529, 533-34 (9th Cir. 2006) (per curiam) (holding that to be successful in second or successive habeas petition based on factual innocence, petitioner must convince court that new facts "unquestionably" establish his innocence (citation omitted)); see Cox v. Powers, 525 F. App'x 541, 543 (9th Cir. 2013) (finding that although petitioner's new evidence might have bolstered defense theory, it was insufficient to satisfy § 2244(b)(2)(B)(ii) because he did not establish that "no reasonable factfinder would find him guilty," as "jury could have continued to believe that the prosecution witnesses' testimony was more accurate than that of the defense witnesses").[22]

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[22] Although the Court assumes for purposes of its analysis that the victims' 2007 interviews would have been admissible at trial, it is doubtful that their statements that neither of them recognized Petitioner as the perpetrator would have been admitted, let alone for the truth of the matter asserted. Petitioner argues that they should have been admitted under Evidence Code section 1202. (See Opp'n at 11-12 n.8.) Under that section, "[e]vidence of a statement or other conduct by a[n unavailable] declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence" is admissible but only "for the purpose of attacking the credibility of the declarant." § 1202. Here, the unavailable declarants in

(continued...)

Petitioner maintains that those portions of the above-referenced evidence of his guilt that came in through Banuelos's or Ashley's testimony are undermined by Chappell's 2016 denial that Farmer and he were "under stress and acting excited" when they spoke to police officers (Opp'n, Ex. 11 at 1) and Farmer's 2016 statement that Banuelos's testimony about his demeanor when they spoke — that he was "stress[ed], pacing back and forth, acting excited, mad, and physically shaken" — was not true (id., Ex. 2 at 1). Petitioner asserts that the 2016 statements, which contradict the officers' testimony about the victims' demeanor when they spoke to them five and then 15 minutes after the crimes (see Lodged Doc. 2, 3 Rep.'s Tr. at 1247-48, 1288), are proof that the officers lied to enable the victims' statements to be introduced into evidence as excited utterances and call the veracity of the rest of their testimony into question (see Opp'n at 1, 10, 12, 20-21).

But their 2016 statements are even less credible than their 2007 ones. By 2016, 11 years had passed since the underlying crimes. The notion that the victims still had a vivid recollection of their emotional state and the perpetrator's appearance is not persuasive, particularly when both of them had

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[22] (...continued)
question were the two victims, and their 2007 statements that they did not recognize Petitioner did not contradict or undermine any of the statements they made to Banuelos. Moreover, Petitioner sought to introduce the statements to bolster their credibility, not to attack it.

trouble remembering details of the crimes even in 2007.[23] See Perkins, 569 U.S. at 39 ("[u]nexplained delay in presenting new evidence" of actual innocence "bears on the determination whether the petitioner has made the requisite showing"); Schlup, 513 U.S. at 332 (when deciding actual-innocence claim "court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence"); see also Christian v. Frank, 595 F.3d 1076, 1084 n.11 (9th Cir. 2010) (recantation found "especially unreliable" because it was made more than a decade after witness testified at trial).

There are also significant discrepancies between the 2007 and 2016 statements, both of which Petitioner wants us to believe. For instance, whereas in his 2007 statement Farmer claimed that he did not get a "good look" at the perpetrator (Opp'n, Ex. 9 at 1), he reversed course in his 2016 statement, stating that he recalled the man who robbed him and that Petitioner was not that man (see id., Ex. 2 at 1; cf. Opp'n at 2 (asserting, based on Farmer's 2016 statement, that "[n]o one got a better look at the perpetrator of the crimes than [Farmer]")). Additionally, Chappell admitted in 2007 that police officers brought him and Farmer to a field showup, where at least one of them identified Parron as being involved in the crimes (id., Ex. 10 at 1); Farmer too "recall[ed] being taken to the location of [the] traffic stop" for a field showup (id., Ex. 9 at

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[23] On top of that, Chappell was 14 years old in 2007. Not surprisingly, then, as Petitioner advises the Court, habeas counsel "has uncorroborated information that indicates that Mr. Chappell's memory of the events may not be as sharp as Mr. Farmer's." (Opp'n at 3 n.2.)

1). But in 2016 Chappell denied being taken anywhere by the police, let alone that either Farmer or he identified Parron. (Id., Ex. 11 at 1.) Chappell's 2016 statement was even inconsistent with Farmer's account of the crimes: in 2016 Chappell stated that the perpetrator wore a white t-shirt (id.), but in 2007 Farmer did not deny that he described the perpetrator as having worn a light blue t-shirt. (Id., Ex. 9 at 1). These significant contradictions cast doubt on both sets of accounts but particularly on the statements from 11 years after the crimes.

And although the 2016 statements were made under penalty of perjury, it's relevant that by then both victims were incarcerated for serious crimes. Even if Farmer will soon be eligible for parole (see Opp'n at 23), any concern about potential penal exposure as a result of lying in their declarations was blunted (not to mention the impracticality, which they surely recognized, of anyone proving that they were lying about their recollections of their emotional state or what they saw). See Williams, 2018 WL 2208041, at *12, *23 (potential exculpatory witness's testimony "would be open to credibility attacks" because he was "serving a life sentence for committing a felony and, as such, would not be as credible as an objective witness").

Moreover, it's not surprising that Farmer and Chappell, both longtime incarcerated gang members, would deny being and acting scared after having been confronted by rival gang members. But any reasonable juror would have questioned the suggestion that they did not experience fear, stress, or excitement after being

robbed at gunpoint. In fact, within five minutes of receiving a radio call about the crimes (Lodged Doc. 3 Rep.'s Tr. at 1247) — presumably triggered by the victims reporting them — Ashley responded to the scene, where they "flagged [him] down" (id. at 1245). With barely any time having passed between the robbery and the officer's response, some level of anxiety and stress was not only natural but expected. And that the victims apparently called the police about the robbery further undermines the suggestion that they were unfazed. That inference is supported by evidence from Anabel Cordon — the individual who lent Farmer and Chappell the SUV they were driving — who testified that they told her they were "scared" during the crimes (id. at 1509); and Farmer's 2016 claim to have been armed during his encounters with Ashley and Banuelos (see Opp'n, Ex. 2 at 1), if true, likely amplified the stress he was under because police officers could have arrested him on that basis. See Allen v. Woodford, 395 F.3d 979, 994 (9th Cir. 2005) (recantation unreliable when "trial testimony implicating [petitioner] is consistent with the other evidence, while [the] recantation is not").[24]

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[24] Petitioner's claim that the prosecution withheld evidence of the victims' gang membership to avoid undermining testimony that they were scared or excited during the encounter is meritless. (See Successive Pet. at 74-78.) The prosecution did not keep the victims' gang membership secret from the judge deciding whether their statements could be introduced as excited utterances. For instance, in contending that they should not be permitted to invoke their Fifth Amendment privilege, the prosecutor provided the judge with cases in which the witnesses in question were "also" gang members. (Lodged Doc. 2, 3 Rep.'s Tr. at 1201-02.) In his Opposition, Petitioner recasts his prosecutorial-misconduct claim as the prosecutor suborning

(continued...)

But even if both men believed they were telling the truth about their state of mind and demeanor on a particular night more than a decade prior, that hardly suggests that the officers lied. (See Opp'n at 1, 10.) As Respondent points out (see Reply at 14), both versions may be true: the officers may have truthfully testified about their perception of the victims' demeanor and the victims may have honestly remembered their response to the crime as being more stoic. Or the officers may reasonably have interpreted excitement and agitation as fear.[25]

In any event, that the officers' testimony about the victims' demeanor may have been impeached by the divergent

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[24] (...continued)
Banuelos's alleged perjury about the victims' demeanor. (See Opp'n at 21-25.) Even if Banuelos testified falsely, Petitioner does not point to any evidence that the prosecutor knew that to be the case. See generally Hayes v. Brown, 399 F.3d 972, 974 (9th Cir. 2005) (en banc) (holding that prosecutor's "knowing" presentation of false evidence violates Due Process Clause).

[25] Even if the trial court had been aware of and credited the victims' later version of events, Petitioner is wrong that that would necessarily have prevented admission of the earlier statements as excited utterances under Evidence Code section 1240. (See Opp'n at 12); People v. Poggi, 45 Cal. 3d 306, 319 (1988) (statements spontaneous even though declarant "had been calmed down sufficiently to be able to speak coherently"); People v. Jones, 155 Cal. App. 3d 653, 662 (1984) (statement made by burn victim 30 to 40 minutes after his injury while he appeared calm but "dazed" and after he had been given painkiller was admissible as excited utterance); cf. People v. Lynch, 50 Cal. 4th 693, 754 (2010) (finding that "comprehensive" account made "hour or two" after crime was not "spontaneous" when victim was not "excited or frightened" and her "physical condition at the time" did not "preclude[] deliberation"), abrogated on other grounds by People v. McKinnon, 52 Cal. 4th 610 (2012). Assuming the victims here were not and had never been "afraid," they — particularly Farmer, who claims to have been armed — may nonetheless have been excited or agitated when they spoke to the police.

accounts is a far cry from proof that the officers fabricated the entirety of their testimony to frame Petitioner. (See Opp'n at 10.) The jury apparently credited Banuelos's testimony, including his identification of Petitioner as the man who fled from the Camry, despite counsel's vigorous efforts to undermine his testimony, particularly the accuracy of his identification. Specifically, during cross-examination counsel pressed that the identification was made after only a secondslong glimpse in the dark and from 30 feet away. (Lodged Doc. 2, 3 Rep.'s Tr. at 1303-07.) Counsel also pointed out that Banuelos reported seeing a teardrop tattoo on the right side of Petitioner's face when it was actually on the left and that he was wearing a long-sleeved shirt even though both victims said it was a t-shirt revealing tattoos on the perpetrator's forearms. (Id. at 1311-13.)[26] Subsequently, in summation, counsel highlighted these weaknesses and errors, suggesting that it was "quite impossible" for Banuelos to have identified Petitioner under the circumstances and characterizing his testimony as "clearly mistaken, erroneous and doubtful." (Id. at 1518-20, 1523-24.)

Plainly, after hearing Banuelos and observing his demeanor, the jury credited his testimony. That's not surprising because his purported mistake about what side of Petitioner's face the tattoo was on paled in comparison to his correct recollection

[26] On redirect examination, when shown a photograph of Petitioner's face with a teardrop tattoo on the left cheek, Banuelos testified it "was possible" that it was on the left side (Lodged Doc. 2, 3 Rep.'s Tr. at 1314), and then followed up that he in fact recalled the tattoo being on the left cheek (id.). Notably, Farmer too apparently initially told Ashley the teardrop tattoo was on the right. (Id. at 1248.)

that he had a teardrop tattoo on his face at all. Similarly, his testimony that Petitioner was wearing a long-sleeved shirt was not necessarily inconsistent with the victims' testimony that they saw tattoos on his forearms; after all, Petitioner may have rolled down his sleeves before Banuelos saw him. And to the extent Banuelos was mistaken, his insistence that Petitioner was wearing a long-sleeved shirt when he knew the victims had told Ashley otherwise and that the teardrop was the only tattoo he saw despite photographic evidence of Petitioner's other tattoos (see Opp'n at 39) undercuts Petitioner's suggestion that his testimony was perjured or that he improperly altered his testimony on redirect examination. After all, if Banuelos had been lying, he presumably would have conformed his descriptions of Petitioner to match the evidence from the outset. See Sawyer v. Whitley, 505 U.S. 333, 349 (1992) ("[L]atter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of petitioner's actions.").

Under these circumstances, it can't be said that no reasonable factfinder would have credited Banuelos's identification testimony even if Dr. Shomer had testified and emphasized many of the same weaknesses pointed out by trial counsel. (See Opp'n at 18.) Indeed, Finch v. McKoy, 914 F.3d 292 (4th Cir. 2019), cited by Petitioner, illustrates this point. There, the Fourth Circuit found that Schlup's more lenient actual-innocence standard was satisfied when postconviction evidence from an eyewitness-identification expert established

that the sole eyewitness's identification of the petitioner was the result of an unduly suggestive lineup. Id. at 297-98. But Finch's holding was buttressed by newly discovered evidence that the eyewitness had admitted being uncertain of his identification and had "cognitive issues, memory trouble, and problems with short-term recall." Id. at 300. Moreover, the only evidence corroborating the identification was undermined by a postconviction recantation that expressly inculpated a police witness in suborning perjury. Id. Here, despite potential weaknesses in his testimony, Banuelos's identification of Petitioner, from which he never wavered, was corroborated by significant proof of Petitioner's guilt that he has failed to undermine on multiple rounds of state and federal habeas review. See Pizzuto, 673 F.3d at 1009 (even if "[n]o reasonable juror . . . would have found [prosecution witness] credible, had the newly discovered evidence been available and presented at trial," other unchallenged evidence provided sufficient basis on which reasonable factfinder could find petitioner guilty).

The other evidence of Petitioner's purported actual innocence advanced in the Successive Petition is similarly unavailing. For instance, Petitioner claims that counsel failed to present the testimony of Penn, his girlfriend, who could have provided an alibi. But Penn's credibility was susceptible to attack given that she identified herself as his girlfriend. (Opp'n, Ex. 12 at 1); see Rowland v. Baca, No. CV 11-6055-AG (OP)., 2013 WL 1858883, at *6-7, *10 (C.D. Cal. Jan. 3, 2013) (holding that counsel may have made "tactical decision not to present" "biased" and "less persuasive" testimony of petitioner's

girlfriend and that her alibi testimony did not establish petitioner's actual innocence), accepted by 2013 WL 1858627 (C.D. Cal. Apr. 28, 2013). More importantly, her testimony would have been potentially devastating for the defense — her statement placed Petitioner with codefendant Brown the night of the crimes (Opp'n, Ex. 12 at 1), a revelation that would have severely undermined the defense's misidentification theory given that she admitted her guilt and pleaded guilty to the crimes. (See Lodged Doc. 2, 2 Rep.'s Tr. at 5); Strickland, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").[27]

None of the other arguments Petitioner raises about the strength of the evidence, all of which indisputably could have been raised before he filed the initial Petition, change the actual-innocence calculus. For instance, the loss or destruction of the surveillance tape collected from the gas station is unfortunate, but Detective Williams testified at both the preliminary hearing and trial that he watched it and was unable to "identify any particular person or any particular vehicle" in it (Lodged Doc. 2, 3 Rep.'s Tr. at 1329), and there is no basis to believe that he was lying or that the tape would have been exculpatory. To the contrary, defense counsel's cross-

[27] Likewise, it was likely strategic for counsel not to object on hearsay grounds to Banuelos's testimony that Richmond had told police officers she had lent the Camry to Petitioner. (See Lodged Doc. 2, 3 Rep.'s Tr. at 1311.) If counsel had objected, the prosecution would likely have called Richmond or those officers to testify, thereby highlighting a critical piece of evidence against Petitioner.

examination of Williams seemed to imply that he had viewed the tape and agreed that it was impossible to identify anyone on it. (Id. at 1335.) Similarly, multiple witnesses testified that three blue-steel revolvers were recovered from the Camry's trunk. (Id. at 1230-31, 1298-99, 1329.) That two of them were destroyed before trial does not undermine the strength of that evidence. And although Parron testified and denied ever identifying Petitioner as his accomplice, as the trial court recognized, it would have been apparent to any reasonable juror that his testimony, including his assertions that he never spoke to the police and did not remember anything about the crimes even though he had pleaded guilty to them, was obviously incredible and "tantamount" to invoking his Fifth Amendment privilege against self-incrimination.[28] (See id. at 1258.)[29] Indeed, had Farmer and Chappell testified consistent with their 2007 and 2016

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[28] In an obvious attempt to exculpate Petitioner, the only thing Parron professed to remember about the crimes was that he had committed them with "some females" (one of whom was Brown), not a male and a female (Lodged Doc. 2, 3 Rep.'s Tr. at 1209) — this despite both victims saying that the perpetrators were two males and a female.

[29] Petitioner's related suggestion that Brown was given a plea deal not to testify (see Opp'n at 45 n.28) is baseless. As the prosecutor explained, she pleaded guilty soon after she was arrested for a "very minimal sentence[]" because the victims were "absolutely noncooperative in this case," and she was already serving her sentence at the time of Petitioner's trial. (Lodged Doc. 2, 2 Rep.'s Tr. at 5-6.) And as noted, Petitioner in fact benefited from her invocation of the Fifth Amendment because she had apparently identified Petitioner in a photo lineup as the person who was in the Camry with her that night and had committed the carjacking, evidence that was never admitted when she refused to testify. (Lodged Doc. 17 at 23.)

statements, the jury may well have concluded the same thing about them.

Given the considerable inculpatory evidence and the relatively gossamer allegedly exculpatory and impeachment evidence, Petitioner fails to show by clear and convincing evidence that "no reasonable factfinder" would have found him guilty had the new evidence been known at trial. § 2244(b)(2)(B)(ii).[30]

RECOMMENDATION[31]

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation, grant Respondent's motion to dismiss, and direct that judgment be entered denying the Successive Petition and dismissing this action with prejudice.

DATED: September 24, 2019

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[30] An evidentiary hearing is not necessary to resolve Respondent's motion. (See Opp'n at 27-28.) The Ninth Circuit has routinely found that when, as here, "the files and records of the case conclusively show" that a successive petition "does not meet the second or successive [petition] requirement[]," dismissal without an evidentiary hearing is proper. United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam). Here, the Court has accepted the allegations in the three new declarations as true and still found that relief is unavailable. Thus, no evidentiary hearing is warranted. See Cox, 525 F. App'x at 543 (holding that evidentiary hearing was unnecessary when, assuming eyewitness's proffered testimony was newly discovered and credible and that he "told the truth as he perceived it," standard for second or successive petition was not met).

[31] Because Petitioner has failed to satisfy § 2244(b), the Court need not address Respondent's timeliness and exhaustion arguments.

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

Petitioner’s Appendix E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB, Petitioner, v. M. ELIOT SPEARMAN, Warden, Respondent.	Case No. CV 17-9318-JAK (JPR) ORDER DENYING MOTION FOR RECONSIDERATION

On January 30, 2020, the Court granted Respondent's motion to dismiss Petitioner's authorized Successive Petition and dismissed this action with prejudice; it also denied a certificate of appealability. On February 27, Petitioner moved for reconsideration of both rulings.

Petitioner recognizes that reconsideration requires newly discovered evidence, an intervening change in controlling law, or a demonstration that the Court committed "clear error" such that its ruling was "manifestly unjust." (See Mot. at 1.) He appears to rely on the third factor, arguing that "reconsideration is appropriate to prevent a manifest injustice." (Id.) But the only argument he makes in an effort to show that the Court

clearly erred is that "Maurice Farmer and De'Shawn Chappell" — Petitioner's crimes' two victims — "say that Mr. Rabb is innocent." (Id.) That is not exactly what happened; rather, in 2016, more than 10 years after the crimes, Farmer said when shown an undated photograph of Petitioner that that was not the man who robbed him, and Chappell said things that conflicted with officers' accounts of his statements and demeanor right after the carjacking. (R. & R. at 21.) But as the Court explained, even accepting that the victims believed what they were saying, a jury would be unlikely to credit their after-the-fact accounts for a variety of reasons. (See id. at 46-61 (analyzing actual-innocence claim).) The Court did not clearly err.

The rest of the motion is devoted to arguing that Petitioner should receive a certificate of appealability

> on the issues of whether [Petitioner] was diligent, whether the factual predicate for his claims could not have been discovered previously through the exercise of due diligence, and whether he had plead [sic] 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.

(Mot. at 3.)

As an initial matter, in his original request, Petitioner asked for a COA on two issues he does not mention in his motion for reconsideration. (Objs. at 54-55.) As the Court pointed

out, he had not previously raised those issues and thus a COA for them was not appropriate (Order Denying COA at 2-3), and he has apparently now abandoned them. Beyond those two abandoned issues, he originally sought a COA only on whether a hearing and discovery were necessary before his claims could be denied. (Objs. at 55.) Thus, the Court declines to consider whether he should receive a COA on questions concerning his diligence (see Mot. at 3) because he never previously requested one. See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (holding that reconsideration is not appropriate when parties "raise arguments . . . for the first time when they could reasonably have been raised earlier in the litigation" (citation omitted)).

Petitioner quotes Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000), for the proposition that a COA should issue unless a claim is "utterly without merit." (Mot. at 2.) As he recognizes (see id.), Lambright, in a parenthetical, simply quoted a Seventh Circuit case that so held. The holding of Lambright is no different than the standard set by the Supreme Court: a petitioner must make a "substantial" showing of the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 483 (2000) (citation omitted); see Lambright, 220 F.3d at 1024. Nothing Petitioner says in his motion for reconsideration (or in his Successive Petition or opposition to the motion to dismiss, for that matter) meets that standard.

The motion for reconsideration is therefore DENIED.

DATED: April 1, 2020

JOHN A. KRONSTADT
U.S. DISTRICT JUDGE

Presented by:

Jean Rosenbluth
U.S. Magistrate Judge

Petitioner’s Appendix F

DATE

I Maurice Farmer meet with Brian M. Pomerantz at Kern Valley State prison on march 4th 2016 and I would testify to the following,

1. My cousin Deshawn Chappell and I Maurice Farmer were not car Jacked by Damen Robb.

2. I remember the guy that Robbed me and gun point at the gas station because I was pumping the ~~the~~ gas when the gun men stuck His hand in my poket and ~~stole~~ stolen my cash and then proseeded to the driver side of the car were my cousin Deshawn Chappell was sitting in the car.

3. I seen photos which I ~~sign~~ signed, the ones that Brian Pomerantz has shown me to day 3-4-16 at Kern Valley state Prison are not ~~the~~ the perison that Robbed me the night I was car Jacked.

4. the night of the car Jacking I was carrying a gun when the police were talking to me and my cousin. ~~I~~ I was not scared, I was calm. MR pomerantz told me officers testified I was stress, pacing back and forth, acting excited, Mad, and physically shaken, none of this is true. the guy that Robbed me never said this is foety CRIP or any thing about gangs

I Swear under penalty of pecjury and the Laws of the State of California and the United States of America that the foregoing is true and correct. March 4. 2016

Maurice Farmer

PREPARED BY

DATE

I, De'SHAWN CHAPPELL, MET WITH BRIAN POMERANTZ AT CALIPATRIA STATE PRISON ON APRIL 21, 2016 AND WOULD TESTIFY TO THE FOLLOWING IF GIVEN THE OPPORTUNITY.

1. THE PERSON WHO CARJACKED ME AND MAURICE FARMER HAD A TATTOO ON HIS RIGHT ARM, I NEVER SAW ONE ON HIS LEFT ARM. I DO NOT RECALL THE TATTOO BEING OF A HAND MAKING ANY KIND OF SIGN. I DO NOT REMEMBER SEEING ANY OTHER TATTOOS.

2. THE PERSON WHO CARJACKED ME WAS WEARING A WHITE T-SHIRT.

3. I AM TOLD THE POLICE SAID THEY TOOK MAURICE AND ME TO SEE THE CAMRY AND THAT WE IDENTIFIED IT. THE POLICE NEVER TOOK US ANYWHERE AND I NEVER IDENTIFIED ANY CA

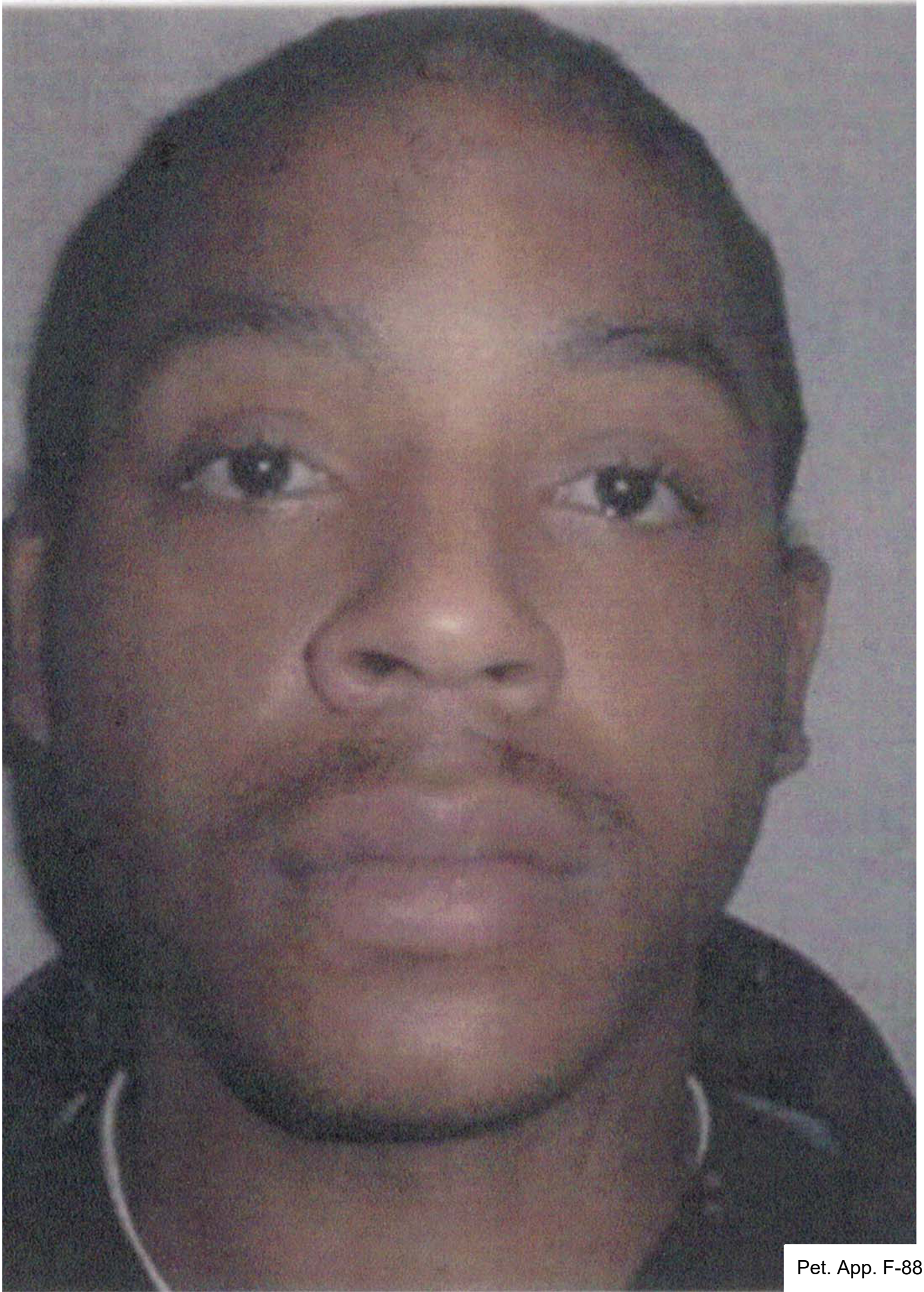
4. I AM TOLD THE COPS SAID WE WERE UNDER STRESS AND ACTING EXCITED, THAT IS COMPLETELY UNTRUE. I HAD PLENTY OF GUNS POLLED ON ME BEFORE, THAT WAS NOT THE FIRST TIME. THAT WAS PART OF MY LIFESTYLE AS A MEMBER OF BROAD WAY CRIPS.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA, AND THE UNITED STATES OF AMERICA, THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

EXECUTED ON THIS 21ST DAY OF APRIL, 2016, AT CALIPATRIA STATE PRISON.

BY: De'Shawn Chappell

PREPARED BY



He is not the guy that Jacked me for the car

Maurice Farmer March 4 2016


Teardrop tattoo

Petitioner's Appendix G

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

DATED: 10.25.12

DEPUTY CLERK

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT

OCT 25 2012

CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMEN RABB, Petitioner, vs. RAUL LOPEZ, Acting Warden, Respondent.	Case No. CV 11-5110-JAK (JPR) ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION; ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed de novo the Petition, records on file, and Report and Recommendation of the U.S. Magistrate Judge. On August 23, 2012, Petitioner filed "Request for Discovery," to which he attached documents purporting to show that a surveillance tape of the robbery and carjacking of which he was convicted exists and that it was never provided to his trial counsel. He claimed that it would show that he was actually innocent of the crimes. On August 27, 2012, Petitioner filed Objections to the Report and Recommendation.

On September 18, 2012, the Magistrate Judge issued a minute order noting that Petitioner had referred obliquely to the surveillance tape in earlier filings but had not previously supplied any documentation to support his claim that such a tape exists and that it was suppressed from the defense during his

trial. The Magistrate Judge inquired of Respondent "what the tape referenced in the documents . . . is" and "whether it was produced to Petitioner's trial counsel in discovery and, if not, why not." The Magistrate Judge did not order Respondent to actually produce the tape.

On September 27, 2012, Respondent filed a Motion for Reconsideration and to Vacate the September 18, 2012 Order. Respondent is correct, as he argues in that motion, that Petitioner has no right at this stage of the proceedings to any such information. To the extent Petitioner argues that he is actually innocent or attempts to raise a Brady claim, he has not exhausted either of those claims in state court. For these reasons, Respondent's reconsideration motion is granted. Petitioner's allegation that potentially exculpatory evidence was withheld from him at trial is a serious one, but Petitioner may return to the Superior Court to attempt to raise any actual-innocence or Brady claims.

Petitioner's Objections to the Report and Recommendation are reargruments of the Petition and Traverse. He attached to the Objections numerous documents supporting his claim that the trial court violated his constitutional rights by denying him additional funds for an eyewitness-identification expert. Those documents appear to be the same ones that were attached to the Petition; the Court already has taken them into consideration in denying the claim.

Having made a de novo determination of those portions of the Report and Recommendation to which Petitioner has filed Objections, the Court accepts the findings and recommendations of

the Magistrate Judge.

IT THEREFORE IS ORDERED that (1) Respondent's Motion for Reconsideration is GRANTED; (2) Petitioner's requests for an evidentiary hearing, appointment of counsel, and discovery are DENIED; (3) the Petition is DENIED without leave to amend; and (4) Judgment be entered dismissing this action with prejudice.

DATED: 10/24/2012

JOHN A. KRONSTADT
U.S. DISTRICT JUDGE

Petitioner’s Appendix H

FILED

MAR 29 2016

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAMEN RABB, Petitioner - Appellant, v. STU SHERMAN, Respondent - Appellee.	No. 13-55057 D.C. No. 2:11-cv-05110-JAK-JPR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Submitted March 7, 2016**
Pasadena, California

Before: PREGERSON, PAEZ, and NGUYEN, Circuit Judges.

Damen Rabb appeals from the district court's order denying his habeas corpus petition after he was convicted of two counts of carjacking and two counts

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of second degree robbery. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Rabb claims that the state trial court violated his right to confront two witnesses by improperly allowing them to assert the privilege against self-incrimination. The California Court of Appeal denied this claim, determining that one witness's invocation of the privilege was adequately supported by concerns over an unrelated murder case, and that the other's invocation of the privilege, although inadequately supported by the record, was nonetheless harmless given the strength of the evidence against Rabb. In both instances, the California Court of Appeal reasonably applied clearly established law. 28 U.S.C. § 2254(d). As for the first witness, it was reasonable for the Court of Appeal to uphold the trial court's decision on the grounds that the witness's testimony could be used against him in the penalty phase of his murder trial. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951). As for the second witness, there was ample evidence against Rabb such that any error in allowing the witness to invoke the privilege did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). This evidence included a statement by a co-perpetrator implicating Rabb, an officer's testimony identifying Rabb as a suspect who fled from him after he pulled over the vehicle

used to commit the crime, and a statement from Rabb's girlfriend that Rabb had borrowed the car used to commit the crime.

The California Court of Appeal also reasonably concluded that Sergeant Banuelos's testimony about statements made by the two witnesses did not violate Rabb's Confrontation Clause rights. The right to confront non-testifying witnesses is triggered when the court admits hearsay statements that are testimonial in nature. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Here, the trial court admitted statements made by the victims just fifteen minutes after the carjacking, while some perpetrators were still potentially armed and fleeing in a stolen car. The California Court of Appeal reasonably determined that the statements were directed to an ongoing emergency, not to a future prosecution, and thus they were nontestimonial. *See, e.g.*, *Michigan v. Bryant*, 562 U.S. 344, 377-78 (2011). Because the Confrontation Clause only guarantees defendants the right to confront witnesses when testimonial hearsay is introduced, Rabb's claim fails.

We decline to address the two uncertified questions presented in Rabb's opening brief as Rabb has not shown that those issues were properly raised below. Ninth Circuit Rule 22-1(e).

AFFIRMED.

Petitioner's Appendix I

Form 12. Application for Leave to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255 *(New, 7/1/02; Rev. 7/1/16)*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
P.O. Box 193939
San Francisco, California 94119-3939

Docket Number (to be provided by Court) _____

Applicant Name Damen D. Rabb

Prisoner Registration Number P82951

Address High Desert State Prison, cell D6-224, P.O. Box 3030, Susanville, CA 96127

Name of Respondent (Warden) M. Eliot Spearman

Instructions - Read Carefully

(1) This application, whether handwritten or typewritten, must be legible and signed by the applicant under penalty of perjury. An original must be provided to the Clerk of the Ninth Circuit. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.

(2) All questions must be answered concisely. Add separate sheets if necessary.

(3) If this is a capital case, the applicant shall serve a copy of this application and any attachments on respondent and must complete and file the proof of service that accompanies this form. If this is not a capital case, service on the respondent is not required.

(4) The proposed 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion that applicant seeks to file in the district court must be included with this form.

(5) Applicants seeking authorization to file a second or successive section 2254 habeas corpus petition shall include copies of all relevant state court decisions if reasonably available.

You *Must* Answer the Following Questions:

(1) What conviction(s) are you challenging?

Carjacking and Robbery (§215(a); §211; §12022(a)(1); §12022.53(b); §186.22(b)(1)(C); §1170.12(a)-(d); §667(b)-(i); §667(a)(1); §667.5(b)).

(2) In what court(s) were you convicted of these crime(s)?

Los Angeles Superior Court - Criminal Justice Center Dept. 105

210 West Temple Street Los Angeles, CA 90012-3210

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

June 13, 2007 - 75 years to life

For questions (4) through (10), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

(4) Has the judgment of your conviction or sentence been modified or amended? If yes, when and by what court?

No.

(5) With respect to **each** conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under **28 U.S.C. § 2254** or **§ 2255**?

Yes ☒ No ☐

(a) In which federal district court did you file a petition or motion?

Central District of California

(b) What was the docket number?

2:11-cv-05110-JAK-JPR

(c) On what date did you file the petition/motion?

June 17, 2011

(6) What grounds were raised in your previous habeas proceeding?
(list all grounds and issues previously raised in that petition/ motion)

Fifth Amendment right to confront witnesses was violated when witnesses were permitted not to testify; Confrontation right was violated by the introduction of police testimony of the alleged statements of the non-appearing witnesses; 8th and 14th Am. violations by imposition of multiple sentences; Unconstitutional denial of funds for expert.

(7) Did the district court hold an evidentiary hearing? Yes ☐ No ☒

(8) How did the district court rule on your petition/motion?

☐ District court **dismissed** petition/motion? If yes, on what grounds?

☒ District court **denied** petition/motion;

☐ District court **granted** relief; if yes, on what claims and what was the relief?

(9) On what date did the district court decide your petition/motion?

October 24, 2012

(10) Did you file an appeal from that disposition? Yes ☒ No ☐

(a) What was the docket number of your appeal?

13-55057

(b) How did the court of appeals decide your appeal?

Affirmed the denial of relief.

(11) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

(1) Petitioner is innocent of the crime: A sworn declaration from the primary victim clears Mr. Rabb of involvement in the carjacking and robbery. (2) Trial Counsel Was Ineffective Because He Failed to Put on a Defense Case: Trial counsel failed to present evidence of Petitioner's innocence, failed to put on critical witnesses, and was not mentally present during the presentation of the prosecution's case. (3) Appellate Counsel Was Ineffective: Appellate counsel failed to challenge the ineffective assistance of trial counsel and failed to raise the wrongful exclusion of investigator Mendoza's 2007 interviews of the two victims; (4) The Trial Court Violated Petitioner's Constitutional Right to Confront Witnesses When it Admitted The Victims' Statements Through Police Officers: De'Shawn Chappell's Fifth Amendment invocation was impermissible. (5) The Prosecution Intentionally Misled the Jury, the Court, and the Defense: The prosecution misled the jury to believe that the victims were not gang members. (6) Cumulative error.

(12) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when? (Attach a copy of all relevant state court decisions, if available)

Claim three was raised in the California Court of Appeal on direct appeal and in the California Supreme Court in a Petition for Review. The other claims were not raised in the state courts.

(13) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (list each ground separately)

Claim three was raised in Mr. Rabb's federal petition.

(14) For each ground/issue raised, does this claim rely on a new rule of constitutional law? (list each ground separately and give case name and citation for each new rule of law)

No.

(15) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (list each ground separately)

The short answer to the questions are found in the attachment, but the newly discovered evidence is described in detail in the attached Petition at Sections I and II, incorporated by reference as though set forth fully herein.

(16) For each ground/issue raised, does the newly discovered evidence establish your innocence? How?

The new evidence absolutely establishes Petitioner's innocence. (See Petition Sections I and II.) Mr. Farmer stood face to face with his assailant as the man reached into Mr. Farmer's pocket to take his money before taking the car he was driving. There is no better eyewitness than Mr. Farmer, and only now has Petitioner had the means to collect a sworn statement under penalty of perjury from Mr. Farmer that Mr. Rabb was not the man who robbed him. This is the absolute best evidence on the question of Mr. Rabb's innocence.

(17) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

See attachment.

(18) Provide any other basis for your application not previously stated.

After appointment in the Ninth Circuit, undersigned counsel repeatedly begged this Court to stay and remand pursuant to Crateo. Counsel twice filed motions and re-raised Mr. Rabb's innocence in the Opening Brief, the Reply and a petition for rehearing. Mr. Rabb is actually innocent and this is his last chance at spending his life in prison for a crime he did not commit. It would be the truest travesty of justice for him never to have any court review the evidence of his innocence and the plethora of constitutional violations that the evidence proves. This application should be granted because this case represents the exact type of extraordinary circumstance that merits a successive petition.

Date: February 28, 2017 **Signature:** /S/ Brian M. Pomerantz

In capital cases only, proof of service on respondent MUST be attached. A sample proof of service is attached to this form.

Attach proposed section 2254 petition or section 2255 motion to this application.

15. Grounds 1, 2, 4, 5, and 6 all rely on the same newly discovered evidence. Although Mr. Rabb has been proclaiming his innocence for a decade, he was only able to obtain a sworn declaration from the victim (Mr. Farmer) on March 4, 2016 when Habeas Counsel was able to obtain the newly discovered evidence. (See Pet. Exh. 2.) Because both Mr. Rabb and Mr. Farmer are and have been incarcerated for the pendency of Mr. Rabb's incarceration, and because Mr. Rabb did not have state habeas counsel or funds to hire an investigator, he had no way to previously obtain a declaration from Mr. Farmer. In the newly obtained declaration, the first sworn statement from Mr. Farmer on the matter, he states that he remembers the man that robbed and carjacked him at gun point, and that after looking at a photograph of Mr. Rabb (Pet. Exh. 1), that is not the person that robbed and carjacked him. Mr. Farmer further stated that the police lied when they said that he was scared and not calm and that he was not stressed, excited, mad, or physically shaken. (Therefore his alleged statements should not have qualified as excited utterances - which is how they were admitted.) He also said that the assailant never said anything about gangs.

17. The newly discovered proof of Mr. Rabb's innocence establishes federal constitutional error in Grounds 1, 2, 4, 5, and 6. Ground One: Mr. Rabb Is Factually Innocent - Mr. Rabb's wrongful conviction was the result of violations of the 5th, 6th, 8th, and 14th Amendments of the U.S. Constitution because Mr. Rabb's constitutional rights to due process, to the effective assistance of counsel, to equal protection, and to be free from cruel and unusual punishment, were all violated by his incarceration for crimes that he did not commit. Ground Two – Trial Counsel Was Ineffective - Mr. Rabb's 5th, 6th, 8th, and 14th Amendment rights to due process, to the effective assistance of counsel, to equal protection, and to be free from cruel and unusual punishment, were all violated by trial counsel's ineffectiveness in obtaining proof of his innocence and getting it admitted at trial. Ground Four: the Trial Court Violated Mr. Rabb's Constitutional Right to Confront Witnesses When it Admitted the Victims' Alleged Statements Through Sergeant Banuelos - Mr. Rabb's 5th and 14th Amendment rights to due process and equal protection, the 6th Amendment's right to confrontation, and the 8th Amendment's right to be free from cruel and unusual punishment, were all violated by the trial court's improper admission of witness statements through Sgt. Banuelos. Ground Five: The Prosecution Intentionally Misled the Jury, the Court, and the Defense - Mr. Rabb's 5th, 6th, 8th, and 14th Amendment rights to due process, to the effective

assistance of counsel, to equal protection, and to be free from cruel and unusual punishment, were all violated by the prosecutorial misconduct. Ground Six: Cumulative Error encompasses all of the above referenced violations.

Petitioner’s Appendix J

FILED

JUL 13 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAMEN RABB, Applicant, v. M. ELIOT SPEARMAN, Respondent.	No. 17-70600 ORDER

Before: CANBY, W. FLETCHER, and CALLAHAN, Circuit Judges.

We have reviewed the application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition, the response, and the reply. The application makes a prima facie showing for authorization under 28 U.S.C. § 2244(b)(2)(B), and is granted.

We express no opinion as to the merits of the applicant's claims or whether the procedural requirements of 28 U.S.C. §§ 2244(d) and 2254 are satisfied.

The Clerk shall transfer the proposed section 2254 petition filed at Docket Entry No. 1, to the United States District Court for the Central District of California. The proposed petition shall be deemed filed in the district court on March 1, 2017, the date on which it was filed in this court. *See Orona v. United States*, 826 F.3d 1196, 1198-99 (9th Cir. 2016) (AEDPA's statute of limitations period is tolled during pendency of an application).

The Clerk shall also serve on the district court this order and the application, response, and reply filed at Docket Entry Nos. 1, 11, and 14.

Upon transfer of the proposed petition, the Clerk shall close this original action.

No further filings will be entertained in this case.

GRANTED; PROPOSED PETITION TRANSFERRED to the district court.

Petitioner's Appendix K

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAMEN RABB, Defendant and Appellant.	B206611 (Los Angeles County Super. Ct. No. BA290495)

COURT OF APPEAL - SECOND DIS
FILED
FEB 10 2010
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert S. Bowers, Jr., Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

LODGED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
FEB 15 2012
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

A jury convicted Damen Rabb also known as Damon Rabb (appellant) of two counts of carjacking (counts 1 & 2; Pen. Code, § 215, subd. (a))[1] and two counts of second degree robbery (counts 3 & 4; § 211). The jury found that appellant personally used a firearm during the offenses, that a principal was armed with a firearm during the offenses, and that appellant committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members.

In a separate proceeding, the trial court found that appellant had suffered two prior felony convictions that qualified as strikes under the Three Strikes Law (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)) and as serious felonies under section 667, subdivision (a)(1), and that appellant had served a prior prison term (§ 667.5, subd. (b)). On each count, the trial court sentenced appellant to 25 years to life for the substantive offense plus 10 years for the personal firearm use enhancement. The trial court ordered counts 1 and 2 to run consecutively, ordered count 3 to run concurrently with counts 1 and 2, and stayed count 4 pursuant to section 654. Additionally, the trial court imposed a five-year term for the serious felony enhancement and struck sentences on the remaining enhancements.

At the time of appellant's trial, the victims of the carjacking and robbery were in custody on unrelated charges. They invoked their Fifth Amendment right against self-incrimination and refused to testify at appellant's trial. On appeal, appellant contends the trial court committed reversible error by: (1) admitting statements made by the victims to a police officer shortly after the charged crimes took place as "spontaneous statements" under Evidence Code section 1240; (2) not determining whether the victims had a valid Fifth Amendment right before allowing the victims to avoid testifying at trial; (3) denying appellant's request for additional funds to secure expert testimony on

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1 All further statutory references are to the Penal Code unless otherwise indicated.

psychological factors affecting eyewitness identifications; and (4) not staying punishment on count 3 pursuant to section 654. We affirm.

FACTUAL BACKGROUND

On September 19, 2005, at approximately 1:30 a.m., Los Angeles Police Department (LAPD) Officer David Ashley received a radio call broadcast that possible crimes had occurred at a gas station on the corner of Figueroa Street and Vernon Avenue. Within five minutes of receiving the radio call, Officer Ashley arrived at the location and was flagged down by Maurice Farmer (Farmer) and DeShawn Chappell (Chappell). Farmer, who appeared nervous and upset, told Officer Ashley that a man had pointed a gun at him, asked him where he was from, and then took his car. Farmer described the assailant as a Black male wearing a light blue T-shirt, medium build, five feet six inches tall, with light skin, braids in his hair, a tattoo of a teardrop under his right eye, and a tattoo of a hand and finger on his forearm. Farmer also told Officer Ashley that a green Toyota Camry was involved in the incident. Officer Ashley immediately broadcasted the information he received from Farmer to LAPD units and stayed at the gas station with Farmer and Chappell.

Around the same time, at approximately 1:30 a.m., LAPD Sergeant Frank Banuelos was on routine patrol. He saw a green Camry speeding with its lights off. After the green Camry failed to stop at a red light, Sergeant Banuelos initiated a traffic stop. The stop occurred on West 45th Street, approximately one mile away from the gas station where Farmer's car had been taken. Sergeant Banuelos parked approximately 30 feet away from the stopped Camry and illuminated the area with his police vehicle's overhead lights and spotlight.

The driver and a passenger exited the green Camry. The passenger stared at Sergeant Banuelos for two to four seconds and then ran away. Before the passenger fled, Sergeant Banuelos had the opportunity to observe that the passenger was a heavyset Black male wearing a light blue long sleeved shirt, and had light skin, braided hair, and a tattoo of a teardrop on his right cheek. Sergeant Banuelos radioed for assistance in

setting up a perimeter and then detained the driver, who was later identified as Kendra Brown (Brown). As the sergeant was placing Brown into custody, Brown spontaneously asked him whether her detention was related to what happened "at the gas station." Sergeant Banuelos asked Brown what gas station she was referring to, and she identified the gas station on Figueroa Street and Vernon Avenue.

Sergeant Banuelos immediately called the LAPD communications division to inquire about whether there had been a request for service at a gas station on Figueroa Street and Vernon Avenue and was connected through to Officer Ashley. Officer Ashley explained that he was at that location investigating a carjacking and that the suspect vehicle was a green Camry. Sergeant Banuelos left Brown with another unit at the 45th Street location and drove to the gas station. He arrived at the gas station approximately 15 minutes after the incident had occurred.

According to Sergeant Banuelos, both Farmer and Chappell appeared under "stress" from the incident. They were pacing back and forth and appeared "excited . . . mad, [and] physically shaken." Sergeant Banuelos testified that he had difficulty calming them down in order to speak with them. Sergeant Banuelos spoke with Farmer first, who told Sergeant Banuelos that he had been robbed of his vehicle and some personal property at gunpoint. Sergeant Banuelos testified that Farmer told him the following: Farmer was pumping gas into his Chevrolet Equinox when a green Camry, driven by a woman, approached him. A man (the assailant) exited the Camry, pointed a gun at Farmer, and asked Farmer where he was from. Meanwhile, another man carrying a gun, exited the Camry from the rear right passenger door and acted as a lookout. Farmer told the assailant that he was not a gang member. The assailant pointed the gun at Farmer, said to Farmer "It's that 40's life," and then took $15 from Farmer's person. After the assailant took the $15 from Farmer, the assailant instructed Chappell to get out of the Equinox. The assailant asked Chappell whether Chappell had any property and Chappell responded in the negative.

Chappell told Sergeant Banuelos that the assailant had pointed a gun at him and had instructed him to get out of the Equinox. Chappell complied and the assailant boarded the Equinox and drove off. The lookout reentered the green Camry and that car drove off as well. Chappell stated that during the incident, he was afraid that he would die.

According to Sergeant Banuelos, both Farmer and Chappell described the assailant as a Black male with a blue shirt, braids, a tattoo on his face, and a tattoo on his forearm of a hand making a gang sign.

Back at the 45th Street location, LAPD Officer Eddie Martinez was standing by with Brown in custody. A man, later identified as Earl Parron (Parron), walked up to the scene and asked the officers "what was going on." Parron, who is Black, had broken leaves on his sweater. Officer Martinez and his partner decided to detain Parron because Sergeant Banuelos had told them that a Black male had fled from the scene earlier and Parron appeared as though he might have been running or possibly hiding based on the broken leaves on his sweater. When Sergeant Banuelos returned to the 45th Street location, he indicated that Parron was not the man that he saw fleeing from him earlier when he pulled over the green Camry.

Around the same time, Officer Ashley transported Farmer and Chappell to the 45th Street location for a field showup. According to Officer Ashley, as soon as Farmer and Chappell approached the location, they saw the green Camry and yelled: "That's the car, that's the car." Farmer and Chappell also told Officer Ashley that they recognized Brown as the driver of the green Camry and Parron as the lookout. They further told Officer Ashley that Parron and the assailant were carrying blue steel revolvers. Officers searched the green Camry and found three loaded blue steel revolvers in the trunk.

That night, Sergeant Banuelos learned that the green Camry was registered to a person named Tequila Richmond (Richmond). He sent two officers to Richmond's home address. The officers asked her about the whereabouts of her vehicle and she told them that the green Camry belonged to her and that she had loaned it to "Damen Rabb," her

boyfriend. Sergeant Richmond asked station officers to run a check on that name and they sent him a booking photograph of appellant. At trial, Sergeant Banuelos testified that the person in the booking photograph, i.e., appellant, was the person that fled from him on the night of the incident.[2]

On September 20, 2005, the next day, officers located the Equinox in an area where Brown had told them they would find it.

Also, on that day, LAPD Detective Theodore Williams interviewed Parron, who was in custody, after Parron had waived his *Miranda*[3] rights. According to Detective Williams, Parron told him the following: On the day of the incident, Parron, Brown, and appellant were at the gas station on Figueroa Street and Vernon Avenue when they saw Farmer and Chappell. Appellant stated that he wanted to talk with Farmer and Chappell, and instructed Parron to act as his "backup" in case problems arose. Both appellant and Parron were carrying handguns at the time. Parron saw appellant approach Farmer and Chappell, board the Equinox, and drive off. Detective Williams prepared a six-pack photographic display that contained appellant's photograph and presented it to Parron. Parron circled appellant's photograph and identified appellant as the individual who took Farmer's Equinox at gunpoint. During the interview with Detective Williams, Parron appeared nervous and scared. Parron subsequently entered a plea of no contest to one count of carjacking. Appellant was arrested sometime after the incident in question.

At the time of trial, Farmer and Chappell were in custody on murder charges for unrelated incidents. Outside the presence of the jury, both individuals invoked their Fifth Amendment right against self-incrimination and the trial court ruled that they would not

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2 The booking photograph depicts a teardrop tattoo on the left side of appellant's face, and not the right side as Sergeant Banuelos had originally recalled. At trial, Sergeant Banuelos was shown the booking photograph and testified that with the benefit of the photograph, he recalled that the teardrop tattoo was indeed on the left side of appellant's face.

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

be required to take the witness stand at appellant's trial. Brown, who was in custody pursuant to a plea agreement, also invoked her Fifth Amendment right against self-incrimination outside the presence of the jury and refused to testify.

At trial, Parron testified that he did not recall who he was with on September 19, 2005, nor did he recall being at the gas station on Figueroa Street and Vernon Avenue on that date. Parron testified that he was not acquainted with appellant and did not recognize appellant. Parron denied ever speaking with Detective Williams and denied identifying appellant in a photographic display. Parron admitted to being a member of the Rolling 40's Neighborhood Crips gang.

LAPD Officer Brian Richardson, the prosecution's gang expert, testified that the Rolling 40's Neighborhood Crips is a criminal street gang whose primary activities include the commission of various crimes that are listed in section 186.22, subdivision (e). According to Officer Richardson, appellant was a member of the Rolling 40's Neighborhood Crips on September 19, 2005, and his acts of carjacking and robbery benefitted that gang because the stolen car would have assisted in other gang shootings and homicides, and the stolen money would have furthered the purchase of weapons and drugs. The prosecution showed Officer Richardson photographs of tattoos on appellant's face, torso, and arms. Officer Richardson confirmed that appellant had a tattoo of a teardrop underneath his left eye and a tattoo of a hand making a gang sign on his arm.

During the prosecution's case, the trial court read the following instructions to the jury: "The court is taking judicial notice and hereby advising the jury that Maurice Farmer was called as a witness in this case outside the presence of the jury, and that Maurice Farmer, with the advice of his counsel, refused to testify, basing his refusal on his constitutional privilege against self-incrimination.

"The court is taking judicial notice of and is hereby advising the jury that DeShawn Chappell was called as a witness in this case outside the presence of the jury,

and that DeShawn Chappell, with the advice of counsel, refused to testify, basing his refusal on self-incrimination."[4]

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

DISCUSSION

I. Spontaneous Statements

A. Appellant's Argument

Appellant concedes that the statements made by Farmer and Chappell to Officer Ashley five minutes after the incident were admissible as "spontaneous statements" under Evidence Code section 1240. He contends, however, that the statements Farmer and Chappell made to Sergeant Banuelos were not admissible as spontaneous statements because the declarants made the statements 15 minutes after the incident when there was no longer an ongoing emergency.

B. Relevant Authority

"A statement may be admitted, though hearsay, if it describes an act witnessed by the declarant and '[w]as made spontaneously while the declarant was under the stress of excitement caused by' witnessing the event. (Evid. Code, § 1240.)" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809 (*Gutierrez*).) "'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous

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4 The trial court gave a similar instruction with regard to Brown's refusal to testify. Appellant does not contend that the trial court's decision to allow Brown not to testify was erroneous.

and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*).)

"The word 'spontaneous' as used in Evidence Code section 1240 means 'actions undertaken without deliberation or reflection. . . . [T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.' (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)" (*Gutierrez*, *supra*, 45 Cal.4th at p. 811.)

"The crucial element in determining whether an out-of-court statement is admissible as a spontaneous statement is the mental state of the speaker." (*Gutierrez*, *supra*, 45 Cal.4th at p. 811.) "The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer*, *supra*, 47 Cal.3d at p. 903.)

C. Analysis

When the record is viewed in light of the factors articulated by the Supreme Court in *Poggi*, we conclude that the statements made by Farmer and Chappell to Sergeant Banuelos 15 minutes after the charged crimes occurred were properly admitted as "spontaneous statements" under Evidence Code section 1240. The parties dispute whether the trial court admitted the statements in question under Evidence Code section 1240 or some other ground. However, because we conclude the statements qualify as "spontaneous statements" under Evidence Code section 1240 and were admissible for this reason, the trial court's reasoning for admitting the statements is beside the point at

this juncture. (*People v. Geier* (2007) 41 Cal.4th 555, 582 ["we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm"].)

First, there was certainly an "occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting." (*Poggi*, *supra*, 45 Cal.3d at p. 318.) Farmer and Chappell were held up at gunpoint and both believed that their lives were at risk. Second, they made their statements to Sergeant Banuelos just 15 minutes after they had been held up when their "nervous excitement" undoubtedly still dominated their reflective powers. (*Ibid.*) Farmer and Chappell appeared under "stress" from the incident, were pacing back and forth, and acted "excited . . . mad, [and] physically shaken." According to Sergeant Banuelos, "it was difficult for [him] to actually calm them down and talk to them." Third, their statements described what occurred, provided a physical description of the assailant, and related directly to the circumstances that led to their call for police help. (*Poggi*, *supra,* at p. 318 [""the utterance must relate to the circumstance of the occurrence preceding it""].)

Appellant argues that too much time, i.e., 15 minutes, elapsed between when the incident occurred and when Farmer and Chappell spoke to Sergeant Banuelos to qualify their statements as spontaneous. As the Supreme Court explained in *Gutierrez*, however, "[t]he crucial element in determining whether an out-of-court statement is admissible as a spontaneous statement is the mental state of the speaker" and not necessarily the time between the statement and the incident it describes. (*Gutierrez*, *supra,* 45 Cal.4th at p. 811.) As discussed above, both Farmer and Chappell were still nervous and excited by the time Sergeant Banuelos arrived at the gas station and he had difficulty calming them down before he spoke to them. In any event, the time that elapsed in this case, 15 minutes, is less than other periods of time that have still resulted in spontaneous statements. (See, e.g., *Poggi*, *supra*, 45 Cal.3d at p. 319 [witness's statements made 30 minutes after attack held spontaneous]; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1589 ["no more than about 30 minutes had gone by" between the underlying incident and the witness's statement; court held statement was "spontaneous" and noted

that "[m]uch longer periods of time have been found not to preclude application of the spontaneous utterance hearsay exception"].)

Appellant also argues that by the time Farmer and Chappell spoke to Banuelos, Brown and Parron were already in custody and thus there was no ongoing emergency. There is nothing in the record, however, that indicates Farmer and Chappell knew Brown and Parron were in custody at the time they spoke with Sergeant Banuelos. What matters is the mental state of the declarant, and here Farmer and Chappell were likely under the impression that the individual who threatened their lives, as well as his cohorts, were at large when they spoke to Sergeant Banuelos 15 minutes after the incident had occurred.

In sum, we conclude the trial court properly admitted the statements made by Farmer and Chappell to Sergeant Banuelos as spontaneous statements under Evidence Code section 1240.

II. *Crawford*[5] Issue

A. Appellant's Argument

Appellant contends that even if the statements made by Farmer and Chappell to Sergeant Banuelos fell within the hearsay exception for spontaneous statements, their admission nonetheless violated his Sixth Amendment rights under the Confrontation Clause.

B. Relevant Authority

In *Ohio v. Roberts* (1980) 448 U.S. 56, 66, the Supreme Court held that an unavailable witness's hearsay statement could be admitted without violating the Sixth Amendment's Confrontation Clause if the statement bore "adequate 'indicia of reliability,'" such as if it fell "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."

In *Crawford, supra,* 541 U.S. at p. 59 the Supreme Court reconsidered its ruling in *Ohio v. Roberts* and held that if a hearsay statement is testimonial in nature, it is

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5 *Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*).

admissible only "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" the declarant. The Supreme Court was careful to note that its decision implicated only testimonial hearsay and "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford*, *supra,* at p. 68.) The Supreme Court declined to spell out a comprehensive definition of "'testimonial'" but noted that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Supreme Court explained further what it considered to be nontestimonial and testimonial statements. It held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Id.* at p. 822.) On the other hand, "[t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid.*)

Building on the United States Supreme Court's decisions in *Crawford* and *Davis*, our Supreme Court in *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*) identified several "basic principles" to assist courts in determining whether a particular statement is testimonial. The court explained that a testimonial statement need not be given under oath, but it must have some "formality and solemnity characteristic of testimony" and "must have been given and taken *primarily* . . . to establish or prove some past fact for possible use in a criminal trial." (*Id.* at p. 984.) On the other hand, "statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce

evidence about past events for possible use at a criminal trial." (*Ibid.*) "[T]he primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*Ibid.*)

C. Analysis

With this background in mind, we turn to the issue presented in this appeal, whether the spontaneous statements made by Farmer and Chappell to Sergeant Banuelos were testimonial in nature. If they were testimonial, then they were subject to the requirements of *Crawford.* If they were not testimonial, then their admissibility was governed by "hearsay law . . . and . . . exempted . . . from Confrontation Clause scrutiny altogether." (*Crawford*, *supra*, 541 U.S. at p. 68.)

People v. Corella (2004) 122 Cal.App.4th 461 (*Corella*) is instructive. In that case, the victim called 9-1-1 immediately after the defendant had hit her. Sometime later (the opinion does not specify the time elapse), a police officer responded to the scene. (*Id.* at p. 465.) The victim, who was crying and distraught, told the officer that the defendant had punched her several times on various parts of her body. (*Ibid.*) The trial court admitted the victim's statements to the officer as spontaneous statements under Evidence Code section 1240. (*Corella*, *supra,* at p. 464.) On appeal, defendant argued that the admission of the victim's statements violated his Sixth Amendment right to confrontation as interpreted by *Crawford.* (*Corella*, *supra,* at p. 465.) The Court of Appeal rejected the defendant's argument. It reasoned that even though *Crawford* included responses to "police interrogation" in its definition of testimonial statements, the "spontaneous statements [made by the victim] describing what had just happened did not become part of a police interrogation merely because Officer Diaz was an officer and obtained information from [her]." (*Corella*, *supra,* at p. 469.) The court explained that "[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation'" and that "[s]uch an unstructured interaction

between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*." (*Ibid.*)

Turning to the nature of spontaneous statements generally, the *Corella* court stated that "it is difficult to identify any circumstances under which [an Evidence Code] section 1240 spontaneous statement would be 'testimonial'" because "statements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." (*Corella*, *supra*, 122 Cal.App.4th at p. 469; see also *People v. Brenn* (2007) 152 Cal.App.4th 166, 178 [statements made by stabbing victim to responding officer while assailant was still at large were spontaneous statements under Evidence Code section 1240 and nontestimonial because the officer was there to assist the victim and not to prepare for trial, and questioning was informal, brief, and unstructured].)

In *People v. Pedroza* (2007) 147 Cal.App.4th 784 (*Pedroza*), another instructive case, the victim told three different responding officers that her husband had burned her. The Court of Appeal held that her statements to the officers were spontaneous statements and nontestimonial because the primary purpose of the officers' inquiries were to meet an ongoing emergency and "the statements were hardly taken under the calm circumstances of a formal interrogation." (*Id.* at p. 794.) "They were not the result of a tape-recorded statement taken at a police station, as in *Crawford*, or a handwritten account prepared in a room with an officer nearby, as in *Hammon* [*v. Indiana* (2006) 547 U.S. 813]. Nor did the statements purport to describe past events that occurred some time ago." (*Ibid.*)

Like the statements made by the victims in *Corella* and *Pedroza*, the primary purpose of the statements made by Farmer and Chappell to Sergeant Banuelos were to assist him in responding to an ongoing emergency. When Sergeant Banuelos arrived at the gas station, which was just 15 minutes after Farmer and Chappell had been held up at gunpoint, the assailant, who was armed and driving a stolen vehicle, was at large. Farmer and Chappell, who feared for their lives when the incident occurred, were undoubtedly still afraid that the assailant would return. They were nervous, agitated, and hard to calm down. Their descriptions of what occurred and the physical appearance of the assailant

"were hardly taken under the calm circumstances of a formal interrogation." (*Pedroza, supra,* 147 Cal.App.4th at p. 794.) Moreover, unlike the interrogation in *Crawford*, which took place at the police station some time after the incident, the responses elicited by Sergeant Banuelos occurred at a gas station when Farmer and Chappell were still under the stress of what had happened to them.

In sum, when we "'objectively'" consider "all the circumstances that might reasonably bear on the intent of the participants in the conversation," it is clear that the "primary purpose in giving and receiving [the statements by Farmer and Chappell was] to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Cage, supra,* 40 Cal.4th at p. 984.) Accordingly, the statements were not testimonial in nature and thus not subject to the requirements of *Crawford*.

III. Victims' Invocation of the Fifth Amendment

A. Appellant's Argument

Appellant argues "the trial court committed reversible error by allowing the victims to assert a blanket privilege against self-incrimination without requiring them to be sworn and respond to questions so that it could determine whether each victim had a valid Fifth Amendment privilege."

B. Summary of Proceedings Below

Before trial commenced, the prosecution explained to the trial court that both Farmer and Chappell were in custody on unrelated "murder charges[.]" The prosecution stated its intention to call Farmer and Chappell as witnesses but warned the trial court that both witnesses had indicated an unwillingness to cooperate. The trial court stated that it wanted to hear from the victims and their counsel to determine whether they would be testifying at appellant's trial.

Chappell appeared first before the trial court. Chappell's counsel was present, but the prosecution was not. Chappell's counsel stated that he was "fully aware of the circumstances of Mr. Chappell's murder case" and in his assessment, Chappell's

testimony in appellant's case would not "in any way" incriminate Chappell. When asked by the trial court whether he intended to testify, Chappell maintained, despite his counsel's advice: "No. I'm not going to testify. I'm not going to testify." The trial court adjourned the proceeding, stating that the prosecution should be present before any formal invocation of the Fifth Amendment by Chappell.

Farmer then appeared before the trial court represented by counsel, this time with the prosecution present. Farmer's counsel stated that Farmer was currently awaiting "a district attorney decision on a special circumstance case" and that Farmer's possible testimony at appellant's trial "raise[d] some rather sensitive issues." Farmer's counsel went on to explain that he did not know whether the prosecution in Farmer's case would seek the death penalty and thus the defense had to deal with "potential penalty phase" issues if Farmer were to testify in appellant's case. Counsel maintained that there were "issues" related to appellant's case "that would pose a problem for [Farmer], if he were to testify[.]" For these reasons, counsel had advised Farmer not to testify at appellant's trial.

The prosecution argued that it had a right to call Farmer as a witness and that Farmer could then assert his Fifth Amendment guarantee "on a question by question basis" while on the witness stand. The prosecution also made clear that it would not seek to obtain immunity for either Farmer or Chappell in exchange for their testimony at appellant's trial. The trial court then asked Farmer: "Mr. Farmer, I have to ask this for the record. The bottom line is this. Rather than have you come into open court in front of the jury, at this point in time, it is my understanding that if called to testify as a witness in this matter, you would take the oath to tell the truth, but thereafter questions posed to you, you would refuse to answer on the basis you believe those answers might tend to incriminate you; is that accurate?" Farmer replied: "Yes." The trial court accepted Farmer's invocation of the Fifth Amendment based on his counsel's representations that testifying at appellant's trial might possibly incriminate him.

Chappell later appeared before the trial court, this time with the prosecution present. The trial court asked Chappell: "Is it accurate to say, if called to testify in this matter, you would take the oath and if questions were put to you, you would thereafter refuse to answer the questions? Is that a fair statement, sir?" Chappell replied: "Yeah." With that response, the trial court made a finding that "Mr. Chappell, if called to testify as a witness in this matter, would in fact invoke his Fifth Amendment right against self-incrimination." The trial court indicated that its decision was based on the same reasoning that it had applied in Farmer's case.

The trial court then declared both Farmer and Chappell unavailable for trial and indicated to the prosecution that it was free to read prior statements by Farmer and Chappell into the record. The prosecution clarified that Farmer and Chappell did not testify at the preliminary hearing and that the prosecution intended to admit the statements Farmer and Chappell made to both Officer Ashley and Sergeant Banuelos as spontaneous statements.

C. Relevant Authority

The Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee the privilege against self-incrimination. (*People v. Seijas* (2005) 36 Cal.4th 291, 304 (*Seijas*) ["It is a bedrock principle of American (and California) law, embedded in various state and federal constitutional and statutory provisions, that witnesses may not be compelled to incriminate themselves"].) The privilege against self-incrimination consists of "two separate and distinct testimonial privileges . . . . In a *criminal* matter a defendant has an absolute right not to be called as a witness and not to testify. [Citations.] Further, in any proceeding, *civil or criminal*, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity [citation]." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137.)

The privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." (*Hoffman v. United States* (1951) 341 U.S. 479, 486.) "California's Evidence Code states the test broadly in favor of the privilege:

'Whenever the proffered evidence is claimed to be privileged under Section 940 [the privilege against self-incrimination], the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered evidence *cannot possibly have a tendency* to incriminate the person claiming the privilege.' (Evid. Code, § 404, italics added.)" (*Seijas*, *supra*, 36 Cal.4th at p. 305.)

"It is 'the duty of [the] court to determine the legitimacy of a witness'[s] reliance upon the Fifth Amendment. [Citation.]' (*Roberts v. United States* (1980) 445 U.S. 552, 560, fn. 7.)" (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 (*Lopez*).) "To avoid the potentially prejudicial impact of having a witness assert the privilege against self-incrimination before the jury, we have in the past recommended that, in determining the propriety of the witness's invocation of the privilege, the trial court hold a pretestimonial hearing outside the jury's presence." (*People v. Mincey* (1992) 2 Cal.4th 408, 441; see also *Lopez*, *supra*, at p. 1555 ["Initial inquiries intended to test the validity of the claim should be conducted outside the presence of the jury"].) While recommended, such a pretestimonial hearing is not "required." (*People v. Hill* (1992) 3 Cal.4th 959, 992.) In determining whether a valid privilege exists, the court should "consider the context and circumstances in which [the privilege] is claimed." (*People v. Ford* (1988) 45 Cal.3d 431, 441 (*Ford*).)

"If the court finds a valid privilege exists, it can either limit the questions the parties may ask before the jury or excuse the witness, if it becomes clear that any testimony would implicate the privilege." (*Lopez*, *supra*, 71 Cal.App.4th at p. 1555.) "Once a court determines a witness has a valid Fifth Amendment right not to testify, it is, of course, improper to require him to invoke the privilege in front of a jury; such a procedure encourages inappropriate speculation on the part of jurors about the reasons for the invocation." (*Id.* at p. 1554.)

D. Analysis

At the outset we note that the People argue that appellant has waived this issue by failing to object to the trial court's ruling below. While it is true that appellant did not object below, the prosecution did object to the trial court's ruling and this was sufficient to make an adequate appellate record and preserve the issue for review. (*People v. Brenn, supra,* 152 Cal.App.4th at p. 174.)

We turn now to the trial court's acceptance of Farmer's invocation of the Fifth Amendment privilege.

Outside the presence of the jury, Farmer's counsel explained in a pretestimonial hearing that Farmer was in custody for murder and was possibly facing the death penalty. Counsel represented to the trial court that if Farmer were to testify in appellant's case, Farmer's testimony might "raise some rather sensitive issues" and could "pose a problem" for Farmer in the penalty phase of his murder prosecution. The prosecution also made clear that it had no intention of seeking immunity for Farmer in exchange for his testimony at appellant's trial. Although Farmer's counsel did not provide significant detail on how Farmer's testimony might incriminate Farmer, he did specify that if Farmer were to testify, Farmer's testimony could detrimentally affect the penalty phase of Farmer's murder prosecution. Given that a trial court should reject a witness's invocation of the Fifth Amendment only when it "'*clearly appears* to the court that the proffered evidence *cannot possibly have a tendency* to incriminate the person claiming the privilege,'" the trial court properly accepted Farmer's invocation of the Fifth Amendment under these circumstances. (*Seijas*, *supra*, 36 Cal.4th at p. 305.)

Appellant criticizes the trial court for failing to place Farmer under oath and asking Farmer specific questions to determine whether Farmer's invocation of the Fifth Amendment was valid. Although examining a witness under oath is certainly advisable (see, e.g., *Ford*, *supra*, 45 Cal.3d at p. 441), our research reveals no case, and appellant cites no such case, that holds it is *reversible error* if a trial court fails to examine the witness under oath. The trial court has the duty to determine the validity of the witness's

invocation of the Fifth Amendment (*Roberts v. United States, supra,* 445 U.S. at p. 560, fn. 7), and as explained above, the trial court did so in Farmer's case.

Chappell's invocation of the Fifth Amendment, however, poses a different situation. Neither Chappell nor his counsel made any representations that Chappell's testimony at appellant's trial would prove possibly prejudicial or incriminating for Chappell. In fact, Chappell's counsel stated that he was fully aware of the circumstances of the murder charge against Chappell and he could not see "in any way" how Chappell's testimony at appellant's trial could be harmful. After Chappell indicated that he would not testify at appellant's trial, the trial court made no further inquiry as to the context and circumstances under which Chappell was invoking the Fifth Amendment. (*Ford, supra,* 45 Cal.3d at p. 441.)

The People contend that "inasmuch as Chappell and Farmer faced the same charges and possible penalty, the trial court could fairly conclude that issues related to appellant's case would be equally problematic for Chappell." The record, however, merely indicates that both Chappell and Farmer were in custody on "murder charges" and that Farmer possibly faced the death penalty. We have found nothing in the record to suggest that Farmer and Chappell were charged with the same murder or murders, or that their respective murder charges were related.

In sum, we conclude it was error for the trial court to allow Chappell to assert the Fifth Amendment without additional inquiry.

The error, however, was harmless beyond a reasonable doubt. Had the trial court conducted additional inquiry into the reasons for Chappell's invocation and determined that Chappell had a valid Fifth Amendment privilege, then it would have allowed Chappell to avoid invoking that privilege before the jury. (*Lopez, supra,* 71 Cal.App.4th at p. 1554 ["Once a court determines a witness has a valid Fifth amendment right not to testify, it is, of course, improper to require him to invoke the privilege in front of a jury"].) Had the trial court determined that Chappell did not have a valid privilege, then it would have compelled Chappell to take the witness stand. Once on the witness stand,

if Chappell refused to testify, the trial court could have declared him in contempt of court, and the jury could have drawn a "negative inference" from his refusal to testify. (*Ibid.*) There was, however, overwhelming evidence of appellant's guilt to overcome any negative inference from Chappell's refusal to testify. Specifically, Farmer's descriptions of the assailant to Officers Ashley and Sergeant Banuelos, which were properly admitted, was almost identical to the observations that Sergeant Banuelos made of the passenger who fled from the green Camry. The owner of the green Camry stated that she had loaned the vehicle to appellant, and appellant's booking photograph was identified by Sergeant Banuelos as the person he saw fleeing from the green Camry. Moreover, Farmer stated that the assailant was carrying a blue steel revolver and that same type of gun was found in the green Camry that appellant was seen fleeing from. Finally, Parron, appellant's accomplice in the matter, identified appellant to Detective Williams as the person who took Farmer's Equinox at gunpoint. Thus, whatever "negative inference" the jury would have drawn from Chappell's refusal to testify, there was ample evidence from which the jury could have concluded that appellant was the assailant beyond a reasonable doubt.

IV. Funds for Expert Witness

A. Appellant's Argument

Appellant contends the trial court committed reversible error by denying his request for additional funds to hire an expert on the psychological factors affecting eyewitness identification.

B. Summary of Proceedings Blow

Several months before the start of trial, appellant filed an application for the appointment of an expert psychologist. In support of that application, defense counsel averred that he had consulted with a psychologist, Dr. Robert Shomer, and that Dr. Shomer, if called as a witness, would testify generally about the psychological factors that likely affect the reliability of eyewitness identification. The trial court, presided over

by Judge Stephen Marcus, granted appellant's application and approved $1,800 in expenses to retain Dr. Shomer.

Approximately a month before trial, appellant filed an application for additional funds to retain the services of Dr. Shomer. In support of the application, defense counsel averred that the trial court had approved only $1,500[6] in expenses and Dr. Shomer required an additional $500 to testify at trial. Judge Marcus denied appellant's application for additional funds.

The day before jury selection began, defense counsel explained that he "wanted to put on the record" the fact that Dr. Shomer would not be testifying at appellant's trial because Judge Marcus denied the request for an additional $500. The trial court (now presided over by Judge Bob Bowers) noted that the Superior Court's panel of expert witnesses publication listed Dr. Shomer's hourly rate at $150 per hour. In the trial court's view, it was reasonable for Judge Marcus to approve $1,500, which was sufficient to cover the costs of Dr. Shomer reviewing the case and testifying at trial. Defense counsel maintained that Dr. Shomer worked on a flat-fee basis and would not testify unless the trial court approved an extra $500.

Two days later, while jury selection was still taking place, the trial court announced it had done more research on the issue of appellant's request for additional funds and had discussed the matter with Judge William Pounders, the chair of the Expert Witness Committee. After clarifying that appellant intended to use Dr. Shomer's expert testimony to challenge Sergeant Banuelos's identification of appellant's booking photograph as the person he saw fleeing from the green Camry, the trial court concluded that appellant was not entitled to expert services at all under *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*). The trial court reasoned that although the officer's identification was an element of the prosecution's case, it was not the "key" element of

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6 Defense counsel explained that Judge Marcus had approved $1,800 in expenses in court. However, according to counsel, Judge Marcus called counsel the next day and informed him that the approval of $1,800 was a "mistake" and that the proper amount was $1,500.

the case and there was other evidence that gave independent reliability to the identification.

C. Relevant Authority

Evidence Code section 730 provides: "When it appears to the court . . . that expert evidence is or may be required by the court or by any party to the action, the court . . . may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court."

"[C]ourt-ordered defense services may be required in order to assure a defendant his constitutional right not only to counsel, but to the effective assistance of counsel." (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319.) "[I]t is only *necessary* services to which the indigent defendant is entitled," however, "and the burden is on the defendant to show that the expert's services are necessary to his defense." (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1304.) "The decision on the need for the appointment of an expert lies within the discretion of the trial court and the trial court's decision will not be set aside absent an abuse of that discretion." (*Ibid*; *People v. Hurley* (1979) 95 Cal.App.3d 895, 899 ["However, the decision to grant a defendant's request for the appointment of such an expert remains within the sound discretion of the trial court"].)

D. Analysis

Appellant argues that it was an abuse of discretion for the trial court to deny his request for additional funds to secure the testimony of Dr. Shomer. According to appellant, "here, as in *McDonald*, the eyewitness identification was critical because it was the foundation of the prosecution's case against appellant." The error was prejudicial, according to appellant, because it "prevented the defense from presenting

evidence that may have cast reasonable doubt on the accuracy of Banuelos's identification of appellant as portrayed in the prosecution's case."

Appellant's attempt to analogize his case with *McDonald*, *supra,* 37 Cal.3d at p. 377, is misguided. In *McDonald*, the *only* evidence linking the defendant to the charged crimes of murder and robbery was eyewitness testimony. Six eyewitnesses identified the defendant as the assailant with varying degrees of equivocation, and one eyewitness categorically testified that defendant was not the assailant. (*Id.* at p. 355.) The defendant had a strong alibi—six witnesses testified that he was not in the state on the day the crimes were committed. (*Ibid.*) Under these circumstances, the Supreme Court held that it was an abuse of discretion for the trial court to preclude expert testimony on the psychological factors that could affect the accuracy of eyewitness testimony. (*Ibid.*)

In doing so, the Supreme Court emphasized "that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion" and that "such evidence will not often be needed." (*McDonald*, *supra,* 37 Cal.3d at p. 377.) Only in circumstances where "an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability," would it be error for the trial court to exclude qualified expert testimony on psychological factors that could affect the accuracy of the identification. (*Ibid.*)

The Supreme Court revisited the issue of expert testimony on eyewitness identification some years later in *People v. Sanders* (1995) 11 Cal.4th 475 (*Sanders*). In that case, the defendant was convicted of multiple murders that occurred during the robbery of a fast food outlet. On appeal, the defendant, citing to *McDonald*, argued that it was an abuse of discretion for the trial court to exclude expert testimony on psychological factors affecting eyewitness testimony. (*Sanders*, *supra,* at p. 508.) Rejecting the defendant's argument, the Supreme Court explained that the defendant's case differed from *McDonald* in several significant respects: First, the eyewitness

testimony in the defendant's case, unlike in *McDonald*, was "strong and unequivocal." (*Sanders*, *supra,* at p. 509.) Second, unlike in *McDonald*, the eyewitness identification was "corroborated by other independent evidence of the crime," such as evidence that the defendant was in possession of a weapon that was consistent with the weapon used in the crime and evidence that the defendant had solicited help with robbing the fast food outlet in the past. (*Sanders*, *supra,* at p. 509.) Third, the defendant, unlike in *McDonald*, presented no alibi defense. (*Sanders, supra,* at p. 509.)

Here, as in *Sanders* and unlike in *McDonald*, the eyewitness testimony was certain and unequivocal. Sergeant Banuelos identified appellant as the man he saw running from the green Camry without hesitation. Furthermore, there was independent evidence that appellant had committed the charged crimes. Farmer described the assailant as having tattoos of a teardrop on his face and a hand making a gang sign on his arm. Appellant had both these tattoos at the time of his arrest. During the field showup, Farmer and Chappell identified a specific vehicle (the green Camry) as the vehicle that was involved in the incident. The registered owner of that vehicle told officers that she had loaned the vehicle to appellant. Once in custody, Parron waived his *Miranda* rights and told Detective Williams that he was the lookout and that appellant was the person who took Farmer's vehicle and property at gunpoint. Parron even circled a photograph of appellant in a six-pack display. Finally, appellant presented no alibi defense. Under these circumstances, it was not an abuse of discretion for the trial court to refuse additional funds to secure the testimony of Dr. Shomer.

Even if erroneous, the trial court's ruling was not prejudicial. It is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the ruling. (*Sanders*, *supra*, 11 Cal.4th at p. 510; *People v. Watson* (1956) 46 Cal.2d 818, 836.) During trial, defense counsel vigorously cross-examined Sergeant Banuelos about his ability to observe appellant from a distance of 30 feet with limited lighting provided by the police vehicle. During his closing argument, defense counsel argued that "it is quite impossible to positively identify the facial features of the suspect and more so

to see, to identify that the suspect has a teardrop, the size, one-eighth of an inch on his cheek, from 30 feet away, dark at night. Even though there were some lights illuminated, it is pretty much impossible." Counsel went on to argue that Sergeant Banuelos's concern with his own safety likely affected his ability to observe the fleeing passenger and that ultimately, "that identification by Sergeant Banuelos [was] very, very doubtful, and it's clearly erroneous." Furthermore, the trial court instructed the jury that in assessing eyewitness testimony, it should consider numerous factors that affect the accuracy of the identification, such as "the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation[,]" and whether the witness was "under stress" at the time. In sum, given defense counsel's argument and cross-examination, and the trial court's instruction, it is not reasonably probable that appellant would have received a more favorable result had Dr. Shomer testified about the reliability of eyewitness identification.

V. Section 654

In relevant part, section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm." (*People v. Felix* (2001) 92 Cal.App.4th 905, 915.) "'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant

may be found to have harbored a single intent and therefore may be punished only once. [Citation.]' [Citation.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

A defendant's intent and objective are questions of fact for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Consistent with that, case law establishes that "'there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' [Citation.]" (*Ibid.*) Our task is to review factual determinations under the substantial evidence test. (*Kennedy/Jenks Consultants, Inc. v. Superior Court* (2000) 80 Cal.App.4th 948, 959.) If the trial court did not make any express findings regarding the defendant's intent, the judgment still must be upheld if it is supported by the evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

Appellant argues that the trial court should have stayed execution of the sentence on count 3 (the robbery of Farmer) "because appellant committed the robbery and carjacking during an indivisible course of conduct, in which he harbored only a single intent and objective."

Substantial evidence supports the trial court's finding that appellant harbored two different intents and objectives when he committed the crimes of carjacking (count 1) and robbery (count 3) against Farmer. Appellant approached Farmer while he was pumping gas. He pointed a gun at Farmer and asked Farmer where he was from. After Farmer replied that he did belong to a gang, appellant began searching Farmer's person for property. Appellant stated "It's that 40's life" and then took $15 from Farmer's person. Appellant went on to tell Farmer to step away from the Equinox and then instructed Chappell at gunpoint to exit the vehicle as well. This evidence supports a finding that appellant had two separate intents and objectives in committing the crimes in question. The first was to take cash from Farmer; the second was to take Farmer's vehicle. The act of taking Farmer's cash was extraneous to and independent of the act of taking Farmer's vehicle, and neither was incidental to the other.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD