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 III

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INDEX OF APPENDICES

page

VOLUME I

INDEX OF APPENDICES

page

VOLUME II

INDEX OF APPENDICES

page

VOLUME III

Petitioner’s Appendix W

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DAMEN RABB

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DAMEN RABB, Petitioner, v. M. ELIOT SPEARMAN, Warden, Respondent.	NO. CV_____ **SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS; EXHIBITS 1-17** PREVIOUSLY FILED, RELATED CASES IN THE DISTRICT COURT: 2:11-cv-05110-JAK-JPR

Petitioner, Damen Rabb, through his counsel Brian M. Pomerantz, files this Successive Petition for Writ of Habeas Corpus.

Respectfully submitted,

Dated: February 28, 2017

By: */S/ Brian M. Pomerantz*
BRIAN M. POMERANTZ
Attorney for Damen Rabb

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **page(s)**

TABLE OF AUTHORITIES

FEDERAL CASES **page(s)**

TABLE OF AUTHORITIES

FEDERAL CASES **page(s)**

TABLE OF AUTHORITIES

FEDERAL CASES **page(s)**

STATE CASES

TABLE OF AUTHORITIES

STATE CASES **page(s)**

STATE STATUTES

I. THE VICTIMS DIRECTLY EXONERATE MR. RABB[1]

On September 19, 2005, Maurice Farmer and his cousin De'Shawn Chappell were robbed and carjacked at gunpoint. Petitioner Damen Rabb ("Mr. Rabb" or "Petitioner") was convicted of those crimes and sentenced to 75 years-to-life in prison. There are at least three easy and very specific ways that Mr. Rabb's innocence may be affirmatively established: (1) through the testimony of victim-witness Maurice Farmer; (2) through the testimony of victim-witness De'Shawn Chappell; and/or (3) with access to the surveillance tape from the gas station where the carjacking occurred.

Visited on March 4, 2016, at Kern Valley State Prison, Mr. Farmer was questioned about the incidents of September 19, 2005. After examining a picture of Damen Rabb, Mr. Farmer wrote on the back of that photo, "he is not the guy that jacked me for the car." (Exh. 1.)

During that same visit, he swore in a declaration under penalty of perjury, that:

> I remember the guy that robbed me and gun point at the gas station because I was pumping the gas when the gunmen stuck his hand in my poket and stolen my cash and then proseeded to the driver side of the car were my cousin Deshawn Chappell was sitting in the car.
>
> I seen photos which I signed the ones that Brian Pomerantz has shown me today 3.4.16 at Kern Valley State Prison are not the person that robbed me that night I was car jacked.

(Exh. 2, Declaration of Maurice Farmer, at ¶¶2-3 [*sic*].)

Mr. Chappell can also exonerate Mr. Rabb. The only reason that they have not done so previously is that Messrs. Farmer and Chappell never testified, nor were they asked by the police or the prosecution to identify Mr. Rabb in a lineup or even a photographic six-pack.

Damen Rabb is innocent and can prove it in a hearing.

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[1] In lieu of using the standard form, Petitioner has recreated the standard petition format in a separate document due to Petitioner's necessity for more space.

II. THIS PETITION IS TIMELY PURSUANT TO THE GATEWAY ARTICULATED IN *SCHLUP v. DELO*

In *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), the Supreme Court was presented with a claim of actual innocence by a prisoner challenging his conviction and sentence of death in federal habeas corpus proceedings. Specifically, Mr. Schlup alleged "that constitutional error deprived the jury of critical evidence that would have established his innocence." *Schlup*, 513 U.S. at 301. Mr. Schlup's initial habeas petition, filed *pro se*, was dismissed. In his second habeas petition, with the benefit of counsel, Mr. Schlup raised several claims for relief, including claims of ineffective assistance of counsel, the failure of the State to disclose exculpatory evidence, and an actual innocence claim under the Eighth and Fourteenth Amendments. *Id.* at 307. The state argued that certain claims presented by Mr. Schlup were procedurally barred and without merit. *Id.*

Without holding a hearing, the district court dismissed Mr. Schlup's second habeas petition. The district court concluded that Mr. Schlup had failed to meet the standard set forth in *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992), for showing that a refusal to entertain those claims would result in a fundamental miscarriage of justice. *Schlup*, 513 U.S. at 309. The court noted that on appeal "Schlup argued that the District Court should have entertained his second habeas corpus petition, because he had supplemented his constitutional claim 'with a colorable claim of factual innocence.'" *Id.* at 311 (*citing* Justice Powell's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), *superseded by statute on other grounds*).

The Eighth Circuit Court of Appeals denied Mr. Schlup's actual innocence claim, and thus his request to bypass or excuse any procedural bar to reviewing his claims on the merits. *Schlup v. Delo*, 11 F.3d 738, 740 (8th Cir. 1993). In doing so, the court of appeals applied the standard in *Sawyer*, not the standard in *Kuhlmann*. The Supreme Court noted that a dissent from the court of appeals' denial of Mr.

Schlup's suggestion for rehearing en banc described the question of "whether the majority should have applied the standard announced in *Sawyer* v. *Whitley, supra*, rather than the *Kuhlmann* standard [was] a question of great importance in habeas corpus jurisprudence." *Schlup*, 513 U.S. at 313. The Supreme Court granted certiorari to address that issue. *Schlup v. Delo*, 511 U.S. 1003, 114 S. Ct. 1368, 128 L. Ed. 2d 45 (1994).

The Supreme Court first clarified that determining the type of actual innocence claim presented is critical to the analysis. The Court compared and contrasted Mr. Schlup's actual innocence claim to an actual innocence claim presented under *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). The Court noted that an actual innocence claim under *Herrera* is a substantive, constitutional claim for which relief may be granted standing alone. *See Schlup*, 513 U.S. at 315. In contrast, the actual innocence claim in *Schlup* was procedural and depended on the existence of a constitutional violation to justify relief. *Id.* at 314. The Court stated:

> [Mr. Schlup's] constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel, see *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and the withholding of evidence by the prosecution, see *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), denied him the full panoply of protections afforded to criminal defendants by the constitution.

Id.

The Supreme Court further noted that Mr. Schlup faced "procedural obstacles that he must overcome before a federal court may address the merits of those constitutional claims." *Schlup*, 513 U.S. at 314. Mr. Rabb faces the same hurdles to relief.

> Because Schlup has been unable to establish "cause and prejudice" sufficient to excuse his failure to present his evidence in support of his first federal petition, see *McCleskey v. Zant*, 499 U.S. 467, 493-494, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991), Schlup may obtain review of

> his constitutional claims only if he falls within the "narrow class of cases . . . implicating a fundamental miscarriage of justice," *id.*, at 494. Schlup's claim of innocence is offered only to bring him within this "narrow class of cases."

Id. at 314-15.

The Supreme Court also noted that a claim of actual innocence under *Schlup* would not be entitled to the same degree of respect as a stand-alone claim under *Herrera* because the challenged conviction under *Schlup* is not the product of an error-free trial, as is a conviction challenged under *Herrera*. The Court explained:

> Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner such as Schlup *presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial* unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Schlup, 513 U.S. at 316 (emphasis added).

The Court in *Schlup* concluded that in order to obtain relief a petitioner must present evidence to "establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial." *Id.* (Emphasis in original).[2] For cases in which a miscarriage of justice inquiry is necessary because "a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims," the *Schlup* court adopted the "probably resulted" standard of *Murray v. Carrier*, 477 U.S. 478, 487, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), instead of the more stringent standard in *Sawyer*. *Schlup*, 513 U.S. at 326-27.

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[2] *Schlup* is not limited to capital cases. *See Sistrunk v. Armenakis*, 292 F.3d 669, 672 n.3 (9th Cir. 2002) ("Neither party questions the applicability of *Schlup* to non-capital cases. We therefore assume that *Schlup* applies and apply it here, as we have in the past to such a case. *See Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997).) *See also Burks v. Dubois*, 55 F.3d 712, 717-18 (1st Cir. 1995); *McCoy v. Norris*, 125 F.3d 1186, 1189 n.3 (8th Cir. 1997).

Thus, Mr. Rabb seeks an opportunity to establish that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 327. His burden under *Schlup* to establish the requisite level of probability is to show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* Mr. Rabb should be granted the opportunity to meet the standard set forth in *Schlup*. To do so he requires a hearing so that he can present new evidence that establishes that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical accounts -- that was not presented at trial." *Schlup*, 513 U.S. at 324. Only through the presentation of sufficient, credible evidence of innocence, can Mr. Rabb establish that his case involves a miscarriage of justice.

A court does not make "an independent factual determination about what likely occurred," but instead assesses how the new evidence would have likely impacted a reasonable fact-finder. *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006). The standard requires this Court to make a probabilistic determination about what reasonable, properly instructed jurors would do if presented with the new evidence of innocence that Mr. Rabb has developed. To determine if his evidence is sufficiently reliable, an evidentiary hearing is essential. *Schlup* and its progeny require that Mr. Rabb be given the opportunity to make his case.

III. CASE OVERVIEW

At approximately 1:30 a.m. on September 19, 2005, Maurice Farmer and De'Shawn Chappell were carjacked. They never testified against Mr. Rabb, never identified him from a lineup or a six-pack, and both were shocked when Petitioner's counsel ("Habeas Counsel") informed them that he had been convicted of carjacking them. Given the opportunity, Messrs. Farmer and Chappell would welcome the

opportunity to right what they know to be a great wrong and tell this court that Mr. Rabb was not the man who carjacked them.

Short of a guilty plea, Damen Rabb's trial could not have been much less adversarial. As a result of grossly incompetent counsel,[3] Mr. Rabb has spent more than a decade -- almost the entirety of his son's[4] life -- in prison for a crime that he did not do. The prosecutor and the chief witness for the state misled the trial court and the jury with testimony that they knew to be false. Trial counsel, whose records indicate that he had information about Mr. Rabb's innocence, did an abysmal job "defending" Mr. Rabb in this case. Consequently, Mr. Rabb is serving 75 years-to-life in prison for a crime he can prove he did not commit.

The circumstantial evidence that condemned Mr. Rabb was his purported possession of the getaway car, Los Angeles Police Department ("LAPD") Sergeant Frank Banuelos' identification of Mr. Rabb as the person who fled from the passenger seat of that car after Sgt. Banuelos pulled it over, and the fact that Mr. Rabb had a tattoo evidencing his former membership in the "Rollin' 40's Crips." As explained below, those pieces of evidence are unreliable and should not be given deference.

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[3] Trial counsel was reportedly forced to resign from the Northern District of California Criminal Justice Act panel for claiming a false office address and was subsequently removed from the Central District of California Criminal Justice Act panel for failing to disclose that he had been disciplined by the Northern District. The CACD CJA considers such matters confidential and will not disclose details confirming or explaining the alleged discipline, but trial counsel is no longer on either panel.

[4] Exhibit 3 to this Petition is a photograph of Damen Rabb, Jr., Mr. Rabb's son. The young man is the victim of the malfeasance in Mr. Rabb's trial, as he has grown up without his father, having to try understand how his father can spend his life in prison for a crime that the crime's victims say he did not do. Mr. Rabb requested that the Court be made aware that what is at stake is more than just his personal freedom, and that it is more than just his life that is being ruined by this wrongful conviction.

The evidence available to Mr. Rabb's ineffective trial counsel was more than enough to present a strong defense case. Mr. Rabb was one of three individuals convicted of the carjackings and robberies. One alleged accomplice testified that he did not know Mr. Rabb and that he played no role in the carjacking and robbery (3 RT[5] 1209, 1211). The other alleged accomplice, who pled guilty in return for a plea deal, refused to testify pursuant to her Fifth Amendment right. (3 RT 1254.) When does a supposed co-defendant get a deal *not to testify*? The purpose of a plea deal is for the prosecution to gain an asset or advantage. With the exception of this case, Habeas Counsel is not aware of any other case where a witness got a deal for not testifying. Deals are reserved for co-defendants who help the prosecution obtain a conviction. Here, the deal came only after Kendra Brown invoked her Fifth Amendment right and refused to testify. That is nonsensical.

Mr. Rabb's fingerprints were not on the stolen car, the alleged getaway car, or any of the guns allegedly used in the crimes. (3 RT 1330.) Trial counsel failed to call Mr. Rabb's alibi witness and jettisoned the very highly regarded expert in eyewitness identification that he had contacted, when the trial court only gave him 90% of the funds the expert was requesting. Trial counsel never sought to ascertain whether the expert would work for $1,800 instead of $2,000. Habeas Counsel has obtained a declaration from the expert[6] that states that he absolutely would have worked for that amount and that his testimony would have been particularly effective when considering the details of this case. *See* Section VI(B)(4), *infra*. That testimony would likely have decimated Sgt. Banuelos' testimony.

Although the jury knew that Kendra Brown, not Mr. Rabb was driving the purported getaway car when it was pulled over, they did not know that Sgt. Banuelos withheld critical facts about the victim-witnesses and actively misled the jury. Sgt.

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

[6] Exhibit 4, Declaration of Dr. Robert Shomer, August 28, 2014.

Banuelos, the only person who tied Mr. Rabb to the crime, was simply not a credible witness. As a result of trial counsel's abandonment, the trial court and the jury were unaware of the critical impeachment evidence relating to the two victims and a videotape that could prove Mr. Rabb's innocence was never even viewed by the defense. Moreover, had the trial court made a proper inquiry of the two victim-witnesses: De'Shawn Chappell and Maurice Farmer, it would have learned that they were not agitated or nervous when speaking with Sgt. Banuelos and there is a reasonable probability that the trial court would have rejected the excited utterance exception's allowance of their statements into evidence following their Fifth Amendment invocations.

The newly discovered evidence -- statements by the victims absolving Mr. Rabb of responsibility for the crimes -- does not constitute a reversal of their previous contentions, as neither of the two carjacking/robbery victims have ever identified Mr. Rabb as their assailant. Not only does neither victim-witness recognize Mr. Rabb as their assailant, they emphatically and convincingly dispute the version of their statements introduced by the police at Mr. Rabb's trial.

The extended litigation of this case is ridiculous because there are two different routes to easily exonerating Mr. Rabb. Either the surveillance video collected by the police from the scene just an hour after the crimes, or the testimony of the two victims can concretely prove his innocence. Unfortunately, neither was before the district court in the original petition and the accounts of the witnesses could not have been obtained by Mr. Rabb who was incarcerated and *pro se*.

IV. PROCEDURAL HISTORY

A. Procedural Background In The State Court and The District Court

On June 13, 2007, a Los Angeles County Superior Court jury convicted Mr. Rabb of two counts of carjacking (counts 1 & 2; Pen. Code, § 215, subd. (a)) and two counts of second degree robbery (counts 3 & 4; § 211). (1 Clerk's Tr. ("CT") at 218-24.) The jury found that Mr. Rabb personally used a firearm during the offenses,

that a principal was armed with a firearm during the offenses, and that Mr. Rabb 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 (§§ 12022(a)(1), 12022.53(b), 186.22(b)(1)(C)). (*Id.*) In a separate proceeding, the trial court found that Mr. Rabb 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 Mr. Rabb had served a prior prison term (§ 667.5, subd. (b)). (1 CT 257-61.) Mr. Rabb received a sentence of 75 years to life and is currently serving his prison term at High Desert State Prison. (1 CT at 264-65.)

Mr. Rabb filed his direct appeal on March 13, 2009. It essentially made four arguments: (1) the trial court erred by sustaining each victim's claim of a Fifth Amendment privilege against self-incrimination without requiring them to be sworn and without asking them specific questions so that it could determine whether each victim had a valid Fifth Amendment privilege; (2) Mr. Rabb's Sixth Amendment confrontation clause right to confront the witnesses against him was violated by the trial court's rulings allowing Sgt. Banuelos to testify about the statements the victims made to him because the statements were testimonial and Mr. Rabb never had the opportunity to cross-examine the victims, and the statements were not admitted under any exception to the hearsay rule; (3) the trial court committed reversible error by denying the defense application for additional funds for their expert witness on eyewitness identification and by finding that the identification of Mr. Rabb by Sgt. Banuelos was not a key element of the case; and (4) the trial court erred by imposing a concurrent sentence on Count 3 because Cal. Pen. Code §§ 215(c) and 654 preclude multiple punishment for a carjacking and a robbery when both are based on the same act or course of conduct. (Appellant's Opening Brief, docketed March 16, 2009.)

On February 10, 2010, the California Court of Appeal affirmed Mr. Rabb's convictions, but noted that the trial court erred in permitting witness De'Shawn

Chappell to invoke the Fifth Amendment despite his attorney's advice that there was no need to do so. *People v. Rabb*, No. B206611, 2010 Cal. App. Unpub. LEXIS 1007, *34, 2010 WL 447744 (Cal. App. 2d Dist. Feb. 10, 2010). On February 26, 2010, Mr. Rabb filed a petition for review in the California Supreme Court. The petition for review challenged: (1) the victims' invocation of the Fifth Amendment without requiring them to be sworn and without allowing for specific questioning; and (2) the Sixth Amendment confrontation clause violation by allowing Sgt. Banuelos to testify about the statements the victims made to him in place of their actual testimony. The petition for review was denied on May 20, 2010.

On December 29, 2010, Mr. Rabb filed a *pro se* petition for a writ of habeas corpus in the California Supreme Court. That petition gave the state supreme court the opportunity to review two questions from the direct appeal that were not in the petition for review: (1) the trial court's denial of the defense application for additional funds for their expert witness on eyewitness identification; and (2) the trial court's error in punishing the carjacking and robbery separately even though they were based on the same act or course of conduct. The petition was denied on August 10, 2011.

Mr. Rabb filed a *pro se* petition for writ of habeas corpus in the federal district court on June 17, 2011. The petition contained four claims: (1) Petitioner's right to confront the witnesses against him was violated because the witnesses were not under oath or questioned in connection with their Fifth Amendment invocation; (2) Petitioner's right to confront the witnesses against him was violated because police officers were permitted to testify to testimonial statements by witnesses in place of the witnesses themselves; (3) the trial court unconstitutionally imposed multiple sentences out of the same course of conduct; and (4) Petitioner's constitutional rights were violated when the court refused proper expert funding for an identification expert. *Rabb v. Allison*, District Ct. case no. 2:11-cv-05110-JAK (JPR) (D.Ct. Dkt. No. 1).

On August 3, 2011, the magistrate court stayed the case while Mr. Rabb exhausted issues in the California courts. (D.Ct. Dkt. No. 8.) The stay was lifted on September 12, 2011. (D.Ct. Dkt. No. 10.) On October 6, 2011, the district court ordered Respondent to file a response to the Amended Petition. (D.Ct. Dkt. No. 13.) Respondent filed his Answer on February 14, 2012. (D.Ct. Dkt. No. 27.) Mr. Rabb filed his Traverse on May 10, 2012. (D.Ct. Dkt. No. 33.) On that same date, Mr. Rabb filed a motion requesting that counsel be appointed for him. (D.Ct. Dkt. No. 34.) Shortly thereafter, on May 29, 2012, Mr. Rabb requested leave of court to file a motion for evidentiary hearing. As part of that request, Mr. Rabb argued that an evidentiary hearing was necessary because prosecutor

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

(D.Ct. Dkt. No. 35, at p. 3.)

The motion for evidentiary hearing noted that,

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

(D.Ct. Dkt. No. 35, at pp. 3-4.) Attached to Mr. Rabb's motion as Exhibit A was a property receipt for the videotape that shows it was taken into custody one hour after the carjacking.

Five weeks later, the magistrate court issued its Report and Recommendation ("R&R") on July 2, 2012. (D.Ct. Dkt. No. 37.) The R&R recommended that the

district court issue an Order (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's requests for an evidentiary hearing and appointment of counsel; and (3) directing that Judgment be entered denying the Petition and dismissing the action with prejudice. (*Id.*) Just before filing his Objections to the R&R, Mr. Rabb again requested discovery related to the surveillance tape from the scene. (D.Ct. Dkt. No. 42, filed August 23, 2012.) The Objections to the R&R were filed on August 27, 2012. (D.Ct. Dkt. No. 43.)

Following Mr. Rabb's second request for the videotape, the magistrate court ordered Respondent to inform the court of what the tape referenced in the documents attached by Petitioner is; and whether it was produced to Petitioner's trial counsel in discovery and, if not, why not. (D.Ct. Dkt. No. 44.) Respondent replied with a motion for reconsideration and to vacate the court's September 18, 2012, Order because the videotape issue had not previously been presented to the state courts. (D.Ct. Dkt. No. 46.)

On October 5, 2012, the magistrate court issued its recommendation that the petition be denied. On October 25, 2012, the district court granted Respondent's Motion for Reconsideration and accepted the findings and recommendation of the magistrate court. (D.Ct. Dkt. No. 47.) The district court 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 the action with prejudice. (*Id.*) In its Order, the court suggested that Mr. Rabb return to state court: "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."[7] (*Id.*)

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[7] That action by the district court was the beginning of an arduous trek for Mr. Rabb towards this requested successive petition. Once the district court denied the petition rather than staying it pursuant to *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct.

The court entered the Judgment that same day, dismissing Mr. Rabb's case with prejudice. (D.Ct. Dkt. No. 48.) The court also denied a Certificate of Appealability. (D.Ct. Dkt. No. 49.)

Mr. Rabb filed a Motion for Relief from Judgment pursuant to Fed. R. Civ. Proc. R. 60(b) on November 28, 2012. (D.Ct. Dkt. No. 50.) On December 11, 2012, the district court denied both the Motion for Relief from Judgment and a Certificate of Appealability. (D.Ct. Dkt Nos. 51, 52.)

Following the district court's suggestion, Mr. Rabb filed a habeas petition in the Superior Court on December 6, 2012. On January 9, 2013, the Court ordered the district attorney to submit an informal response solely to the issue of whether the surveillance tape would exonerate Mr. Rabb, and if so, who has possession of it. On March 8, 2013, the district attorney's office filed its informal response. Included with its response was a follow-up investigation report prepared by LAPD Detective Chavez.

> During the week of February 4, 2013, I Detective Chavez # 26723 was contacted by District Attorney Lach concerning a carjacking case DR #0503-29136. A suspect was arrest [*sic*] and convicted in this case. The suspect/defendant was challenging his conviction and was requesting a video that was recovered by Detectives in the case. DA Lach was requesting my assistance in finding the video. [¶] On 2/07/2013, I completed a computer inquiry on the aforementioned case and the property booked as evidence. The inquiry revealed that all the property was booked at Southwest Station Property room. The video was recovered but was not booked into property. A further computer search revealed that all the property was destroyed on 9/22/2006. Again the video was not listed as being destroyed. [¶] During the week of February 26, 2013, I requested the files to be pulled from [*sic*] LAPD storage facility in an attempt to find the case package and video. I received the requested box that might contain the video. Upon searching the box it did not contain the listed case file or the video. My search returned with negative results. [¶] After an extensive search I was unable to locate the case package or the video for this case.

1528, 161 L. Ed. 2d 440 (2005), Mr. Rabb was going to be forced to request a successive petition following his return to state court.

(Exh. 5, LAPD follow-up investigation report, dated March 7, 2013.)

Mr. Rabb filed a reply on April 9, 2013. That same day, the trial court denied Mr. Rabb's petition, saying:

> The Defendant's claim that a surveillance tape would exonerate him does not hold up to a critical review. [¶] Although the tape is no longer in existence, it was reviewed the day after the crime by a detective, who documented that the tape provided no exculpatory evidence of the carjacking. The detective also testified in accordance at the Petitoner's [*sic*] preliminary hearing. [¶] Further, the defendant was positively identified as running from the vehicle used in the robbery and was identified as having possession of the car by the owner. Also, the Defendant's tatoos [*sic*] were a match for the individual identified as being one of the perpetrators. Finally, one of the Defendant's codefendants [*sic*] made statements identifying the Petitioner as the ring leader in committing the crimes. [¶] The evidence of Petitioner's guilt is clear.

(Exh. 6, April 9, 2013 Minute Order.)

Mr. Rabb subsequently filed a petition with the California Court of Appeal on December 6, 2013. That petition was summarily denied on April 1, 2014.

Mr. Rabb's appointed counsel in the Ninth Circuit filed a habeas petition in the trial court on September 9, 2014. The trial judge that sat on Mr. Rabb's case ordered an informal response, but retired before it was filed, and his replacement found the petition to be untimely despite the innocence allegations[8] and ignored the prima facia standard California courts are supposed to follow.

B. Ninth Circuit Proceedings

Mr. Rabb first filed a motion re: writ of mandate in the alternative motion for clearance in the district court on January 28, 2013. (*Rabb v. Sherman*, Ninth Circuit case no. 13-55057, Dkt. No. 6.) Next, on January 30, 2013, the Ninth Circuit received Mr. Rabb's opening brief. (9th Cir. Dkt. No. 4.) The brief was identified as deficient because Mr. Rabb neither yet had a certificate of appealability, nor had

[8] Those allegations did not have the solid support of the later obtained victim declarations.

he been approved to proceed in forma pauperis. (*Id.*) Mr. Rabb filed a motion to proceed in forma pauperis on February 4, 2013. (9th Cir. Dkt. No. 3.)

On November 25, 2013, the Ninth Circuit announced that it was construing Mr. Rabb's "writ of mandate" and opening brief together as a request for a certificate of appealability. "So construed, the request is granted with respect to the following issues: (1) whether the trial court violated Mr. Rabb's constitutional rights when it allowed the victims to invoke their Fifth Amendment privilege against self-incrimination and refuse to testify at Mr. Rabb's trial without first requiring them to be questioned under oath, and (2) whether the trial court violated Mr. Rabb's constitutional right to confront witnesses when it admitted victims' statements to Sergeant Banuelos. (9th Cir. Dkt. No. 11.) It also granted Mr. Rabb's motion for in forma pauperis status and motion for appointment of counsel. (*Id.*)

After the appointment of counsel on March 12, 2014 (9th Cir. Dkt. No. 21), the Ninth Circuit *sua sponte* reset the briefing schedule for the appeal. (9th Cir. Dkt. No. 25.) On April 15, 2014, the Ninth Circuit granted Mr. Rabb's motion for a sixty-day extension of time. Appellant's Opening Brief was due on June 20, 2014. (9th Cir. Dkt. No. 28.) After discovering what appeared to be a material violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), Habeas Counsel moved to stay the case in the Ninth Circuit so that he could exhaust the newly discovered evidence and issues ancillary to that before the trial court. (9th Cir. Dkt. No. 29.) Later finding that trial counsel actually had some of the *Brady* evidence, Habeas Counsel filed an Addendum to the Motion to Stay that added a claim of ineffective assistance of counsel. (9th Cir. Dkt. No. 34.).

After the Ninth Circuit denied the requested stay (9th Cir. Dkt. No. 37), Appellant's Opening Brief was filed on March 2, 2015. (9th Cir. Dkt. No. 47-1.) Appellee's Brief was filed on July 29, 2015 (9th Cir. Dkt. No. 57-1.), and Appellant's Reply was filed on January 16, 2016. (9th Cir. Dkt. No. 79.) Oral argument was scheduled for March 7, 2016, but cancelled by the panel just two business days before

argument. (9th Cir. Dkt. No. 86.) The Court's Opinion affirming the denial of relief was issued on March 29, 2016. (9th Cir. Dkt. No. 88-1.)

A petition for rehearing with suggestion for rehearing en banc was filed on May 23, 2016. (9th Cir. Dkt. No. 93-1.) The petition for panel rehearing was denied on June 23, 2016. (9th Cir. Dkt. No. 94.) The mandate issued the same day. (9th Cir. Dkt. No. 95.)

C. United States Supreme Court Proceedings

Petitioner filed a Petition for Writ of Certiorari on November 21, 2016. The Petition was denied on February 21, 2017.

This petition concerns a conviction and/or sentence.

V. STANDARD FORM QUESTIONS

1. Venue:

a. Place of detention: High Desert State Prison, Susanville, California.

b. Place of conviction and sentence: Superior Court of California, Los Angeles, California.

2. Conviction on which the petition is based:

a. Nature of offenses involved: two counts of carjacking and two counts of second degree robbery.

b. Penal or other code section or sections: Pen. Code §§ 211, 215(a), 12022(a)(1), 12022.53(b), 186.22(b)(1)(C), 1170.12(a)-(d), 667(b)-(I), 667(a)(1), and § 667.5(b).

c. Case number: BA290495.

d. Date of conviction: July 13, 2007.

e. Date of sentence: January 22, 2008.

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f. **Length of sentence on each count:** 50 indeterminate years and 25 determinate years, for a for a total of 75 years to life.

g. **Plea:** not guilty.

h. **Kind of trial:** Jury.

3. **Did you appeal to the California Court of Appeal from the judgment of conviction?** Yes.

a. **Case number:** B206611.

b. **Grounds raised:**

(1) The trial court erred by sustaining each victim's claim of a Fifth Amendment privilege against self-incrimination without requiring them to be sworn and without asking them specific questions so that it could determine whether each victim had a valid Fifth Amendment privilege.

(2) Mr. Rabb's Sixth Amendment confrontation clause right to confront the witnesses against him was violated by the trial court's rulings allowing Sgt. Banuelos to testify about the statements the victims made to him because the statements were testimonial and Mr. Rabb never had the opportunity to cross-examine the victims, and the statements were not admitted under any exception to the hearsay rule.

(3) The trial court committed reversible error by denying the defense application for additional funds for their expert witness on eyewitness identification and by finding that the identification of Mr. Rabb by Sgt. Banuelos was not a key element of the case.

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(4) The trial court erred by imposing a concurrent sentence on Count 3 because Cal. Pen. Code §§ 215(c) and 654 preclude multiple punishment for a carjacking and a robbery when both are based on the same act or course of conduct.

c. Date of decision: February 10, 2010.

d. Result: Denied.

4. <u>If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision?</u> Yes, on February 26, 2010.

If so give the following information (and attach copies of the Petition for Review and the Supreme Court ruling if available):[9]

a. Case number: S180644.

b. Grounds raised:

(1) The victims' invocation of the Fifth Amendment without requiring them to be sworn and without allowing for specific questioning.

(2) The Sixth Amendment confrontation clause violation by allowing Sgt. Banuelos to testify about the statements the victims made to him in place of their actual testimony.

c. Date of decision: May 20, 2010.

d. Result: Denied.

5. <u>If you did not appeal:</u>

a. State Your Reasons: N/A.

b. Did you seek permission to file a late appeal: N/A.

[9] Exhibits 7 and 8 hereto.

6. **Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?** Yes.

a. **(1)** **Name of court:** California Supreme Court.

(2) **Case number:** S190891.

(3) **Date filed:** December 29, 2010.

(4) **Grounds raised:**

(a) the Trial Court Erred by Imposing a Concurrent Sentence on Count Three Because Section 215. Subd. (c) and Section 654 Preclude Multiple Punishment for a Carjacking and a Robbery When Both Are Based on the Same Act or Course of Conduct. Conduct Violates Both the Eighth and Fourteenth Amendments of the United States Constitution. [*sic*]

(b) The trial court committed reversible error by denying the defense application for additional funds for their expert witness on eyewitness identification and by finding that the identification of appellant by Sergeant Banuelos was not a key element of the case and these rulings resulted in denying appellant his federal constitutional rights to due process, a fair trial, equal protection, and to the effective assistance of counsel.

(5) **Date of decision:** August 10, 2011.

(6) **Result:** Denied.

(7) **Was an evidentiary hearing held?** No.

c. **(1)** **Name of court:** Superior Court of the State of California for the County of Los Angeles.

(2) **Case number:** BA290495.

(3) Date filed: September 9, 2014.

(4) Grounds raised:

(a) Trial Counsel Was Ineffective.

(b) Appellate Counsel Was Ineffective.

(c) Damen Rabb Is Actually Innocent.

(d) Prosecution Intentionally Misled the Jury, the Court, and the Defense.

(e) Cumulative Error.

(5) Date of decision: August 11, 2015.

(6) Result: Denied.

(7) Was an evidentiary hearing held? No.

7. Did you file a petition for certiorari in the United States Supreme Court?

Not off the state case.

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States.

As shown in the claims that follow, the judgment against Mr. Rabb must be set aside because it is the result of a number of prejudicial constitutional errors.

VI. CLAIMS FOR RELIEF

In the interest of brevity and to avoid repetition, Mr. Rabb makes the following allegations for each of the enumerated claims below and incorporates these allegations into each claim:

The violation of Mr. Rabb's constitutional rights constitutes structural error and warrants the granting of this Petition without any determination of whether the error was harmless. However, even assuming that the harmless error doctrine applies, relief is nevertheless required because the error "had substantial and injurious effect

or influence" in determining Mr. Rabb's convictions and sentences. *Brecht v. Abrahamson*, 507 U.S. 619, 627, 631, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

The constitutional violations set forth in each individual claim alone mandate relief from the conviction and sentence. However, even if these violations do not mandate relief standing on their own, relief is required when the claim is considered together with the additional errors alleged in the other claims in the Petition. Cumulatively, these errors mandate relief from Mr. Rabb's conviction and sentence. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978); *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) ("The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."); *United States v. Smith*, 776 F.2d 892, 899 (10th Cir. 1985).

If any claim is found to be procedurally defaulted, federal review of the claim is nevertheless required because Mr. Rabb is actually innocent and therefore entitled to the gateway described in *Schlup v. Delo*, 513 U.S. 298. If necessary, Mr. Rabb can also establish cause and prejudice for the default and that the failure to consider the claim will result in a fundamental miscarriage of justice.

A. Ground One – Mr. Rabb Is Factually Innocent of Both the Carjacking and the Robbery

Mr. Rabb's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because Mr. Rabb's constitutional rights to due process and to be free from cruel and unusual punishment were denied by his wrongful incarceration despite his innocence. Because Mr. Rabb is innocent, he is entitled to the protections and benefits afforded by the innocence gateway described in *Schlup v. Delo*, 513 U.S. 298.

The exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as

though set forth in full.

The errors contributing to this fundamental miscarriage of justice include, but are not limited to (1) ineffective assistance of counsel; (2) prosecutorial misconduct; and (3) court error for failing to properly question the victims prior to allowing them to assert their Fifth Amendment rights. Mr. Rabb is not only factually innocent of the crimes, *Herrera v. Collins*, 506 U.S. 390, he is actually innocent under the standard set forth in *Schlup v. Delo*, 513 U.S. 298. Further, the evidence against Mr. Rabb regarding the allegations for which he was convicted was insufficient to convince a rational trier of fact beyond a reasonable doubt that he was guilty. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

1. Facts Currently Known in Support of this Claim

The best evidence on the matter unquestionably points to Mr. Rabb's innocence. As explained throughout this petition, the only two witnesses who truly know whether Mr. Rabb is guilty, say that he is not. The facts articulated throughout this Petition are incorporated by reference into this claim as though set forth in full.

Maurice Farmer and De'Shawn Chappell have consistently exonerated Mr. Rabb of being their assailant. When interviewed by defense investigator Daniel Mendoza in 2007, both Maurice Farmer and De'Shawn Chappell looked at photographs of Mr. Rabb and unequivocally stated that they did not recognize him as having been involved in the robbery and carjacking they experienced.

a. Maurice Farmer Told Daniel Mendoza That He Did Not Recognize Damen Rabb as His Assailant

Mr. Mendoza interviewed Maurice Farmer on April 18, 2007. As Mr. Mendoza recounted in his investigation report,

> Inmate Farmer was advised and shown the photo line-up and asked if he observed anyone in same that was involved in the carjacking incident he was a victim of. Maurice looked at the line-up for several seconds and could not identify anyone that looked like the person(s) that were involved.

> Investigator reviewed the police report with inmate Farmer and he said it was correct except for the following:
>
> Inmate 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 recalls the main suspect had a ponytail and not braids. Further, he could not remember if he had any tattoos. Maurice 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. . . .
>
> In closing, just before ending the interview this investigator placed the lineup on the glass window again for inmate Farmer to take a look at again. He was questioned if at anytime did the police show him any photographs of potential suspects and he replied no. It was learned that Maurice has never been to a live line-up and never testified in Court on the instant matter. Again investigator asked Maurice if he observed anyone in the line-up that was a suspect in the carjacking wherehe [*sic*] was listed as a victim and he replied no.

(Exh. 9, Mendoza investigation report re: Maurice Farmer.)

b. De'Shawn Chappell Told Daniel Mendoza That He Did Not Recognize Damen Rabb as His Assailant

Mr. Mendoza subsequently interviewed De'Shawn Chappell on April 24, 2007.

> This investigator explained the photo line-up to minor Chappell telling him that if he observed anyone in the line-up that looked like any of the suspects in the carjacking incident. Deshawn [*sic*] looked at the line-up for several seconds and said he could not identify anyone in the photographs. Investigator kept the line-up card on the table in front of DeShawn [*sic*] during the entire interview.
>
> . . .
>
> Investigator questioned minor Chappell if he could describe the suspect to me. DeShawn [*sic*] said the suspect with the gun had braided hair to the shoulders and a tattoo of an arm and hand with two fingers and a thumb sticking out. The tattoo was located on his inerarm [*sic*] area and it extended from his elbow to the wrist. DeShawn [*sic*] believes that this tattoo represents the suspect's gang which in his opinion is from the Neighborhood Crips.
>
> Minor Chappell continued stating that sometime later, he and Maurice were taken to the location of a traffic stop to try and identify possible suspects. On arrival Maurice [*sic*] [*recte* De'Shawn] said he wasn't sure if he identified the car or not. He did not identify the female but thinks he identified the male as the lookout.

> According to minor Chappell he was not interviewed by the police like this investigator is interviewing him. He doesn't recall the officers taking any notes, however they did ask him some questions about the incident. DeShawn [*sic*] advised he and Maurice are from the same gang; "5 Duce [*sic*] Broadway". [*sic*] He has been a gang member since he was ten years old.
>
> In conclusion, PI asked minor Chappell if he was scared when the suspect pointed the gun at him. DeShawn [*sic*] said he wasn't scared but thought he might get shot if he didn't do what he was told. Minor Chappell said he would not be testifying in the instant matter. At the termination of the interview this investigator picked up the six-pack from the table and asked minor Chappell if after looking at the line-up for the entire time of the interview if he now recalled anyone in the line-up being involved in the carjacking and he replied no.

(Exh. 10, Mendoza investigation report re: De'Shawn Chappell.)

c. Newly Discovered Evidence Not Only Backs the Victims' Prior Statements, it Goes Much Further, Confirming Their Veracity Under Penalty of Perjury

The victims' statements to the defense investigator are powerful evidence of Mr. Rabb's innocence, but there is now much more. Both men were interviewed by Habeas Counsel last year and their stories have not deviated from those told nearly a decade before. Moreover, when questioned on the matter, the two witnesses told matching stories regarding their demeanor and actions when dealing with the police at the crime scene. Those accounts categorically contradict the story told in court by the officers. If Mr. Farmer and Mr. Chappell are telling the truth -- and there is no benefit to them in not doing so -- then their statements to the police should never have been admitted under the excited utterance exception. In addition to having no reason to manufacture any story regarding the incident, the similarity of their stories has an additional level of reliability because we know that the two men have not communicated with one another in ten years.[10]

[10] This can be confirmed by their jailors at the California Department of Corrections and Rehabilitation ("CDCR").

Although Mr. Rabb has been proclaiming his innocence for a decade, he was only able to obtain a sworn declaration from Mr. Farmer within the last year. 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 counsel for his state habeas 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 in relevant part:

> 1. My cousin Deshawn Chappell and I Maurice Farmer were not car jacked by Damen Rabb.
>
> 2. I remember the guy that robbed me and gun point at the gas station because I was pumping the gas when the gunmen stuck his hand in my poket and stolen my cash and then proseeded to the driver side of the car were my cousin Deshawn Chappell was sitting in the car.
>
> 3. I seen photos which I signed the ones that Brian Pomerantz has shown me today 3.4.16 at Kern Valley State Prison are not the person that robbed me that 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 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 forty crip or anything about gangs.

(Exh. 2, Declaration of Maurice Farmer, March 4, 2016 [*sic*].)

Likewise, Mr. Chappell has stated that, "I am told the cops said we were under stress and acting excited, that is completely untrue. I had plenty of guns pulled on me before, that was not the first time. That was part of my lifestyle as a member of Broadway Crips." (Exh. 11, Declaration of De'Shawn Chappell, April 21, 2016.)

As evidenced by his repeated attempts to get a copy of the surveillance video (D.Ct. Dkt. Nos. 35, 42), Mr. Rabb was diligent in trying to obtain evidence of his innocence, but there are real concrete limitations that a *pro se* petitioner cannot

overcome on their own.

2. Legal Standard and Facts Regarding Mr. Rabb's Conviction

The legal standard expressed in Section II above is incorporated by reference into this claim as though set forth in full.

3. Actual Innocence

An evidentiary hearing is an appropriate venue for clarifying Mr. Rabb's innocence. At an evidentiary hearing, Mr. Farmer and Mr. Chappell will confirm that Mr. Rabb had nothing to do with the carjacking and the robbery that he was convicted of and for which he has now served a decade in prison.

4. Did you raise this claim on direct appeal to the California Court of Appeal? No.

5. Did you raise this claim in a Petition for Review to the California Supreme Court? No.

6. Did you raise this claim in a habeas petition to the California Supreme Court? Not yet, but Petitioner plans to file a Petition raising all the claims in this Petition soon.

B. Ground Two – Trial Counsel Was Ineffective Because He Failed to Put on a Defense Case

Mr. Rabb's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because Mr. Rabb's constitutional rights to due process and to be free from cruel and unusual punishment were denied by his trial counsel's ineffective assistance.

The exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

1. Supporting Facts

The defense case consisted of one witness, Daniel Mendoza, an investigator

hired by trial counsel. His testimony was limited to his meeting with Earl Parron (3 RT 1511-16), the alleged co-defendant. Trial counsel failed both in presenting only one witness, as there were other witnesses known to him that could have significantly assisted Mr. Rabb, and in limiting Mr. Mendoza to only his meeting with Earl Parron. As shown below, Mr. Mendoza could have been used to effectively counter the admission of Sgt. Banuelos's testimony or to impeach Sgt. Banuelos during trial.

Mr. Farmer and Mr. Chappell's statements to Mr. Mendoza could greatly have assisted the defense case. Mr. Farmer (1) did not identify Mr. Rabb as his assailant in the photo line-up shown to him; (2) recalled that his assailant had a ponytail and not braids; (3) he could not remember any tattoos; and (4) did not think that on the night of the crime he was able to identify the Green Camry that he was later alleged to have identified. (Exh. 9, Mendoza investigation report re: Maurice Farmer.)

Likewise, Mr. Chappell could greatly have assisted the defense case with (1) his inability to recognize Mr. Rabb; (2) his assertion that his assailant had a tattoo extending from his elbow to the wrist; (3) his uncertainty as to whether he identified the Camry or not; (4) the fact that he did not recall the officers taking any notes during their conversation with him about the incident; (5) his admission that he and Maurice were both members of the Five Deuce Broadway Gangster Crips; and (6) the fact that he was not scared when the suspect pointed a gun at him.

The significance of neither victim-witness identifying Mr. Rabb as their attacker cannot be overstated. If Mr. Rabb was not their attacker and they never said the things the police claimed they did, Mr. Rabb is entitled to relief.

Beyond the fact that neither victim-witness identified Mr. Rabb, Mr. Chappell's description of the tattoo does not match Mr. Rabb's tattoos. His statements about the field show up of the Camry mirror Mr. Farmer's in contradicting Officer Ashley's testimony. The officers' failure to take notes undermines the validity of their interviews, and the admission that he and Mr. Farmer are gang members directly contradicts both LAPD testimony and statements by the prosecutor during trial. That

admission constituted exculpatory impeachment evidence, as detailed more fully in Section VI(B)(2) and VI(E), *infra*, incorporated herein by reference as though set forth fully herein. Finally, his admission that he was not scared when the suspect pointed a gun at him makes the admission of his statements as excited utterances entirely inappropriate. (*See* Section VI(B)(2)(b), *infra*, incorporated herein by reference as though set forth fully herein.)

The multitude of uses for his testimony would be apparent to competent counsel, and trial counsel's failure to find a way to use any of Mr. Farmer's or Mr. Chappell's statements to Mr. Mendoza was just the beginning of his deficient performance.

a. Trial Counsel Did Not Know What to Do with the Evidence of Mr. Rabb's Innocence and Was Clueless as to What Was Happening in the Trial

Mr. Mendoza's interviews of Mr. Farmer and Mr. Chappell not only revealed that neither victim recognized Mr. Rabb as their assailant, it also undermined the testimony of Sgt. Banuelos, the prosecution's main witness. Trial counsel ineptly attempted to present Mr. Mendoza's testimony on the matter, but the incompetence exhibited in his argument is a stunning example of his ineffectiveness:

> [Prosecutor]: Mr. Behzadi has his investigator in court who interviewed Mr. Farmer, the victim, Mr. Farmer and the victim, Mr. Chappell in custody. And he wanted to offer Mr. Mendoza during the defense case to testify to statements by Mr. Farmer and Mr. Chappell as well as their failure to identify. And I don't believe they come in over hearsay objection. I wanted to address that before we got to that point.
>
> The Court: What's the exception?
>
> [Trial counsel]: All I'm asking, one of the victims testified in court, and I'm not asking for any testimonial statements by the victims. All I'm asking is that my investigator went and talked to him at some recent time on whether he was able to identify this six-pack photo containing a picture of my client.
>
> The Court: Let me repeat it back to you, okay. If I'm understanding correctly, your investigator showed a six-pack.

> [Trial counsel]: Asked him -- asked the victim whether you see a picture of the assailant or robber at the time of the incident in the six-pack, and the victim could not identify the robber.
>
> The Court: Which person are we talking about?
>
> [Trial counsel]: The victim who testified. One of them I believe did not testify.
>
> [Prosecutor]: No victims testified, your honor. Only Mr. Parron testified, a co-defendant.
>
> The Court: That's correct.

(3 RT 1501-02.)

Having just represented Mr. Rabb over the course of the preceding 1.5 days of the prosecution's case,[11] trial counsel did not know who had testified against Mr. Rabb. "*One of them I believe did not testify*." Trial counsel thinks maybe one of the victims did not testify? Is he unsure which one did not testify, or if one did not testify? It appears both. How can he not know that neither testified? Especially in a trial where the prosecution's entire case took little more than 1.5 days, and where the prosecution only put on a total of eight witnesses (the last of which had not testified at that point),[12] trial counsel should have been able to remember who they all were.

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[11] The discussion took place with only one minor witness left to testify for the prosecution.

[12] The eight prosecution witnesses were: (1) LAPD gang expert Brian Richardson to prove up the gang affiliation; (2) alleged co-defendant Earl Parron; (3) LAPD officer Eddie Martinez, who responded to a call for backup at the location of the Camry; (4) David Ashley, the officer who responded to the carjacking call at the gas station; (5) Roy Ceja, the officer who impounded the Camry; (6) Sergeant Frank Banuelos, the officer who initiated the stop of the Camry and testified that he saw Mr. Rabb exit the passenger side and flee; (7) officer Theodore Williams, and (8) Anabel Corden, the person who had rented the car that was carjacked.

It is unknown whether trial counsel was incapacitated in some manner or just could not be bothered to pay attention to the prosecution's case, but the record makes it clear that he was not mentally present in defending Mr. Rabb. Not only did he not know who had testified and who had not, and not only did he wrongly think that one of the victims had definitely testified and was unsure as to the other, but of the eight witnesses that did testify, he did not cross-examine three of them, including the alleged co-defendant and the lead officer at the scene of the carjacking.

Trial counsel was prevented from having his investigator testify to the exonerating information because the trial court determined that it was "an out-of-court statement, truth of the matter asserted. . . . I don't see an exception at this point why that would be permitted." (3 RT 1502-03.) But there was an exception, California Evidence Code section 1202:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. . . .

Cal. Evid. Code § 1202, Credibility of hearsay declarant.

This was not a situation where there was no valid hearsay exception, it was just that the court did not realize one and trial counsel never argued it. In a response to Mr. Rabb's 2014 habeas petition to the trial court, even the District Attorney's office admitted that, "[t]he subsequent inconsistent statements could arguably have been introduced as impeachment only pursuant to California Evidence Code section 1202 which permits impeachment of an unavailable declarant . . ." Informal Response at 29 n.12. This was impeachment because it directly questioned the declarant's statements as alleged by Sgt. Banuelos.

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So, first trial counsel did not know what happened in the trial he "defended" Mr. Rabb at, and second, he did not know how to get evidence of Mr. Rabb's innocence before the jury. Because the trial court also failed to recognize how this fit into the exception articulated by Cal. Evid. Code § 1202, there is trial court error as well.[13]

b. The Impeachment of Maurice Farmer (And by Extension the LAPD)

There are three major discrepancies between Mr. Farmer's version of events and those presented to the jury by Sgt. Banuelos and Officer Ashley. First, Mr. Farmer said his attacker had a ponytail, not braids. Second, Mr. Farmer did not recall seeing any tattoos on his assailant. Third, Mr. Farmer said that he recalled being taken to the location of a traffic stop, but did not think he could identify the suspect vehicle or anyone at the scene. Conversely, Sgt. Banuelos testified to the following:

> Q: Back at the scene, when you were speaking to Mr. Farmer and Mr. Chappell, did they give you any details of the -- identify the person that had robbed them, the man in the blue shirt?
>
> A: Yes.
>
> Q: What did they tell you?
>
> A: They told me about -- that the individual that had robbed them at gunpoint, they told me about the three braids in his hair, and also said something about the tattoos on his face as well as a distinctive tattoo on his forearm I believe, a tattoo of a hand making a gang sign.

(3 RT 1296-97.)

And Officer Ashley testified about the identification of the Camry:

> Q: What happened as you are approaching the scene where the Toyota is with the two victims in the back of your car?

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[13] Habeas counsel recognizes that the duty to present evidence is trial counsel's, but here he ineptly tried and the trial court shut him down by determining that there was no hearsay exception when there was one. Even if it is trial counsel's job to make the argument, it becomes trial court error when the trial court incorrectly excludes admissible evidence.

> A: As soon as it came inside [*sic*], they started yelling, that's the car, that's the car.
>
> Q: And this was a dark green four-door Camry?
>
> A: Correct.

(3 RT 1250-51.)

Because both Mr. Farmer and Mr. Chappell invoked their Fifth Amendment right[14] and refused to testify, and because the Court allowed their statements to come in via the LAPD officers, Mr. Farmer's and Mr. Chappell's statements to Mr. Mendoza could have been used to impeach the officers. But there was more than that, even before being improperly prevented from introducing the impeaching statements, trial counsel should and could have raised the discrepancy with the trial court in a hearing pursuant to Cal. Evid. Code § 402(b):

> § 402. Procedure for determining foundational and other preliminary facts.
>
> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

Cal. Evid. Code § 402(b).

Although there were initial 402 hearings for Officer Ashley and Sgt. Banuelos prior to the hearsay statements being filtered through them to the jury, trial counsel failed to utilize the victims' statements to his investigator as an argument against the hearsay statements' admission. Trial counsel raised the lack of identification early on, during a discussion about how the officer identified Mr. Rabb, but his reference to the lack of six-pack identification was mentioned in passing (2 RT 604) and not raised again until after the prosecution's case.

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[14] A right which Mr. Chappell did not in fact possess. *See Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *34 ("In sum, we conclude it was error for the trial court to allow Chappell to assert the Fifth Amendment without additional inquiry.")

Trial counsel had incredibly important information, but neither used it in the places where he should have, nor knew how to use it in the limited circumstances where he did try to introduce the evidence. Trial counsel should have prompted the trial court to consider the interview statements of the victims when considering the admission of the so-called excited utterances. Had trial counsel done a better job of that, it would have been trial court error to admit the statements claimed by the officers without more indicia of reliability.

c. Trial Counsel Also Failed to Present an Alibi Witness

Chanae Penn told Daniel Mendoza that she was with Damen Rabb in her home at the time the crime happened, but trial counsel failed to call Ms. Penn to the stand, despite her being Mr. Rabb's alibi witness. Interviewed by Mr. Mendoza on March 26, 2007, Ms. Penn, who was dating Mr. Rabb at the time, stated that on the evening before the crime, Mr. Rabb arrived at her house "at about 5:00 or 6:00 p.m. . . . with Kendra Brown and another friend only known as 'Baby S.' They had a little get together and Damen stayed the night and didn't leave until the next day (9-19-05) at around noon." (Exh. 12, Mendoza investigation report re: Chanae Penn, March 26, 2007.) Ms. Penn stated that Mr. Rabb arrived in "his baby momma's car" and that Kendra and "Baby S" left the house on foot at around midnight. (*Id.*) While that statement admittedly raises some questions, it also provided Mr. Rabb with an alibi and explains how Kendra Brown could have gained access to Tequilla Richmond's car. Both pieces of information warranted putting her on the stand.

2. Trial Counsel Was Ineffective in Failing to Use De'Shawn Chappell and Maurice Farmer's Gang Membership as Both Impeachment Evidence and to Inform the Trial Court's Fifth Amendment Analysis

a. The Prosecution's Use of the Victims' Statements

The victims, Maurice Farmer and De'Shawn Chappell, were facing murder charges at the time of Mr. Rabb's trial. Pursuant to Mr. Farmer's advice of counsel, but contrary to Mr. Chappell's advice of counsel, both witnesses invoked their Fifth

Amendment right not to testify. Faced with two victims that were invoking the Fifth Amendment, the trial court relied on *People v. Hill*, 3 Cal. 4th 959, 839 P.2d 984, 13 Cal. Rptr. 2d 475 (Cal. 1992), saying "basically that does not require a witness to invoke his privilege against self-incrimination in front of the triers of fact when in fact he has no intention of answering any questions." (2 RT 908.)

To Mr. Rabb's detriment, the trial court permitted the victims' alleged statements to police to come into evidence pursuant to California Evidence Code § 1240,[15] the excited utterance exception.

b. The Impeachment Evidence and the Conflicting Accounts Given to Investigator Mendoza, Necessarily Alter the Court's Admission Calculations

It is reasonably probable that had the trial court known of the impeachment evidence and the account of events given by the victim-witnesses to Investigator Mendoza, it would have altered the trial court's determination. While *Hill* may not require the answering of questions in front of the jury, it certainly does not prevent it, and there are instances where it is the best practice to require such questioning. Significant impeachment evidence is one of those instances. Unfortunately, the trial court was forced to make a ruling without full knowledge of the particulars of the two victims. Presented with the evidence, the trial court should have either refused to allow the prosecution to introduce the victims' statements without the opportunity for meaningful cross-examination, or put the victims on the stand to testify under oath on a question-by-question basis. In the latter situation, the trial court would have had a much greater opportunity to focus on the potential harm to the witness of answering the questions. When it is "perfectly clear, from a careful consideration of all the

[15] California Evidence Code § 1240: Spontaneous statement. Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

circumstances" that an "answer cannot possibly have such tendency to incriminate" the witness, the Fifth Amendment privilege may not be invoked. *Hoffman v. United States*, 341 U.S. 479, 488-89, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

Here, answers going to the identification of the assailant could not possibly have had a tendency to incriminate the victims; therefore, the trial court should not have found a valid Fifth Amendment privilege absolving them from answering basic questions such as:

- How many tattoos did your assailant have?
- What tattoos did you recognize?
- Where were those tattoos?
- Was the teardrop tattoo under his right or left eye?
- Do you recognize Mr. Rabb as the man who carjacked and robbed you?

While those questions are just a sampling of what could and should have been asked, it is especially difficult to fathom how a question like the last one could warrant a Fifth Amendment assertion. Had the impeachment evidence been known by the trial court and the victims made to take the stand, Mr. Rabb would properly have been exonerated a decade ago.

The failure to question the victims in front of the jury is made worse by the fact that their gang membership could have called the reliability of their statements into question in the eyes of the jury. Moreover, their differing statements from those presented by the LAPD could have called the reliability of the officers' accounts into question. Furthermore, had the trial court known that the victims were gang members, the trial court most assuredly would not have permitted the prosecutor to mislead the jury during opening argument.

Armed with the knowledge that they were gang members, competent trial counsel could have effectively cross-examined Sgt. Banuelos when he misled the jury with his testimony. Trial counsel's failure to use the information he had was

ineffective assistance of a magnitude properly evoking *Cronic*[16] rather than *Strickland*. There could be no reasonable strategy for not utilizing damning impeachment evidence. The failure to do anything with it signaled an abandonment of trial counsel's duty to Mr. Rabb. *See Maples v. Thomas*, 565 U.S. 266, 281, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012) ("A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative.")

Even were the trial court still inclined to permit the blanket invocation of the Fifth Amendment outside the presence of the jury, it might not have permitted the alleged statements of the victim-witnesses to come in pursuant to the excited utterance exception. The excited utterance exception is a subjective standard requiring the speaker to be under stress. While facing a gun might be stressful for the average person, it would not have been for the victims in this case, who not only took part in the senseless mid-day execution of a neighborhood ice cream man just three weeks before the carjacking (Exh. 13, Report and Recommendation from *Chappell v. McEwen*, CACD No. CV-12-3252-JSL (PLA), at 2-3), but were also not frightened by stopping off in rival gang territory at 1:30 a.m.[17]

Remarkably, trial counsel knew that, because victim De'Shawn Chappell told trial counsel's investigator that "he wasn't scared but thought he might get shot if he didn't do what he was told." (Exh. 10.) But even that knowledge did not prompt trial

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[16] *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[17] According to the website http://www.streetgangs.com/resources/los_angeles_gang_map#sthash.jAaJevTG.dpbs, last accessed on February 14, 2017, the gas station where the robbery occurred was in the southeastern corner of Rollin' 40's Crips territory. Diagonal from the station, just across the way, is Five Deuce Crips territory. The victims did not need to stop in enemy territory for gas, it was a choice.

counsel to properly challenge the excited utterance ruling with the information he had. Mr. Chappell's admission had significant value to Mr. Rabb in combating the introduction of the alleged statements pursuant to Cal. Evid. Code § 1240(b), and trial counsel's failure to even raise it or argue it is so incomprehensible that it is reasonable to question whether trial counsel ever read the investigative reports he received.

Mr. Chappell has not altered his statement. As noted above, ten years later he affirmed that he "had plenty of guns pulled on me before" and that he was not under stress at the time. (Exh. 11.) De'Shawn Chappell's admissions could have been used to counter the introduction of the excited utterance, but he and Maurice Farmer's statements to Mr. Mendoza had the ability to do far more than that.

3. Trial Counsel Was Ineffective For Failing to Highlight How and Why Sergeant Banuelos' Identification of Mr. Rabb Was Not Credible

Even without the victims testifying, the prosecution's case suffered from the fact that the witnesses' alleged description did not match what Sgt. Banuelos claimed to have seen of Mr. Rabb when he allegedly emerged from the Toyota Camry and fled. Sgt. Banuelos testified that he had no doubt whatsoever that Mr. Rabb was the man who exited the Camry and ran from him (3 RT 1317), despite having seen the fleeing suspect for only "two to five seconds" (3 RT 1305), from thirty feet away (3 RT 1306), at 1:30 in the morning (*id.*). Matching the description allegedly given by the victims to Officer Ashley (3 RT 1236, 1248), Sgt. Banuelos initially testified that the fleeing suspect had a teardrop tattoo under his right eye. (3 RT 1280.) In fact, as was later confirmed by Sgt. Banuelos in the trial court, Mr. Rabb actually has a teardrop tattoo under his left eye, not his right. (3 RT 1313-14.) While Sgt. Banuelos claimed to have seen that teardrop from thirty feet away, at night, in a high stress and action packed situation, he admitted that he could not see a teardrop tattoo on Mr. Rabb's right cheek in the trial court. (3 RT 1281.) Incredibly, on re-direct examination, under the leading questioning of the prosecutor, Sgt. Banuelos

completely changed his testimony to conform to Mr. Rabb's appearance.

> Q: You see there is a teardrop tattoo on Mr. Rabb's face?
>
> A: Correct.
>
> Q: What side of his face is that on?
>
> A: It's actually on his left side.
>
> Q: Is it possible that that's the tattoo that you saw that evening, when he got out and ran away from the Camry?
>
> Mr. Behzadi: Objection, calls for speculation.
>
> The Court: He asked him is it possible. You may answer, if you have an answer.
>
> The Witness: Yes.
>
> By Mr. Von Helmolt:
>
> Q: In fact, you recall the tattoo being on the left side of the face?
>
> A: Now I do, yes.

(3 RT 1313-14.)

Beyond this testimony being obviously contrived, it is even more suspect because Mr. Rabb not only does not have the tattoo Sgt. Banuelos initially reported having seen, but has many more prominent tattoos that neither Sgt. Banuelos reported seeing on the fleeing suspect, nor the witnesses reported having seen on their assailant. Sgt. Banuelos testified that when Mr. Rabb got out of the car, he "turned to his right" (3 RT 1314), but Sgt. Banuelos apparently did not see any tattoos other than the teardrop under Petitioner's eye. Considering the very large tattoo Mr. Rabb has on the left side of his neck (Exh. 14), it defies credulity to believe that Sgt. Banuelos would not have seen that tattoo if Mr. Rabb were the person he saw turn to his right and run from the Camry.

In fact, Sgt. Banuelos' evolving testimony was not limited to the teardrop tattoo moving from Mr. Rabb's right cheek to his left. Describing his interview of the carjacking victims, Sgt. Banuelos testified that,

> A: They told me about -- that the individual that had robbed them at gunpoint, they told me about the three braids in his hair, and also said something about the tattoos on his face as well as a distinctive tattoo on his forearm I believe, a tattoo of a hand making a gang sign.
>
> Q: Okay. And did their description match what you saw of Mr. Rabb when he got out and fled the Toyota Camry?
>
> A: Yes.
>
> Q: When Mr. Rabb got out and ran away from you, he had the same kind of braided hair they described?
>
> A: That's correct.
>
> Q: He had the blue shirt on they described?
>
> A: That's correct.
>
> Q: He had a tattoo on his face?
>
> A: Yes.
>
> Q: Did you see if he had a tattoo on his arm?
>
> A: No, I did not.
>
> Q: To this date, do you know whether or not Mr. Rabb has a tattoo on his arm?
>
> A: I learned from department resources that he does.
>
> Q: But at the time, you had no idea?
>
> A: No, I did not.

(3 RT 1296-97.)

That little bit of testimony is rife with inconsistencies and false conclusions. First, were Mr. Rabb the assailant, it is inconceivable that the victims would have only reported "a distinctive tattoo on [Petitioner's] forearm . . . a tattoo of a hand making a gang sign." (3 RT 1297.) Mr. Rabb's forearms are both covered with gang related tattoos. If Mr. Rabb were truly the assailant, the witnesses would not have simply seen "a distinctive tattoo," they would have seen dozens.

Second, Sgt. Banuelos testified that the man he saw run from the getaway car was wearing a long sleeve blue shirt (3 RT 1278, 1307), but according to Officer

Ashley, Maurice Farmer allegedly claimed they were carjacked by a man in a short sleeve light blue T-shirt. (3 RT 1248.) Moreover, in his sworn declaration, Mr. Chappell stated that, "[t]he person who carjacked me was wearing a white t-shirt." (Exh. 11.) Therefore, Sgt. Banuelos was at least misleading the jury when he agreed that the person he saw, "had the blue shirt on they described." (3 RT 1297.)

Whether the assailant was wearing a short sleeve shirt or not is material because the witnesses allegedly described a man with a forearm tattoo, but Sgt. Banuelos never saw the suspect's arms because of the long sleeve shirt. If the assailant was wearing a long sleeve shirt, then the victims could not see a tattoo, the police testimony supposedly relaying the victim statements are all the more incredible, and the "identification" of Mr. Rabb is all the more suspect. If the assailant was wearing a short sleeve T-shirt, then the man Sgt. Banuelos saw running from the Camry was not the perpetrator of the carjacking and robbery.

Beyond the major contradictions between Sgt. Banuelos' description of the fleeing suspect's tattoos and Mr. Rabb's actual tattoos, Sgt. Banuelos' identification suffers in other respects. For him to have been the carjacker and the person fleeing the Camry, he would have had to stop to change shirts in the narrow few minutes in which he allegedly raced off in the stolen vehicle, dumped the vehicle, hopped into the getaway car, and was stopped by Sgt. Banuelos. Even assuming the bizarre premise that Mr. Rabb changed shirts, where is the short sleeve T-shirt? Police recovered both the stolen vehicle and the getaway car, but neither car contained a short sleeve blue T-shirt. Ultimately, for purposes of what was presented to the jury, the only facet of the victim-witnesses' alleged statements to the police that match Sgt. Banuelos' description, is that they all agree they saw an African-American man.

In addition to the differences it might have made in the trial court's rulings, disclosure of the impeachment evidence raises credibility questions that the jury should have been able to consider about the victims, the testifying officers, and the story the prosecution was telling. For instance, during opening argument, the

prosecutor stated that "[t]he man who robbed them had a light blue shirt, braids, and a teardrop tattoo on his face. And they also describe a unique tattoo on the robber's forearm, something involving fingers and a gang sign." (2 RT 927.)

It is difficult to know whether the prosecution was being deliberately vague to cover inconsistencies between the described assailant and Mr. Rabb, or whether the witnesses were lying. What is known is that the victims' descriptions did not sync with Sgt. Banuelos' account or with how Mr. Rabb actually looks.

4. Trial Counsel Appeared to Recognize the Need for an Expert On Eyewitness Identification, but Failed to Hire One Despite Obtaining Sufficient Funding from the Court

The one area where trial counsel falsely appeared to put in some minimal effort was in trying to get an expert witness to challenge Sgt. Banuelos' identification. Trial counsel allegedly wanted an expert witness on eyewitness identification, but failed to make proper efforts to get one. Appellate counsel unsuccessfully challenged the trial court's failure to provide the funding requested by trial counsel, but the error was not the trial court's, it was trial counsel's.

a. Trial Counsel's Motion

On February 23, 2007, trial counsel filed an *ex parte* application for the appointment of an expert psychologist on eyewitness identification.[18] (MTA-A.) In the application, trial counsel requested the court appoint Dr. Robert Shomer, Ph.D.,

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[18] According to Appellant's Opening Brief in the California Court of Appeal, concurrent with its filing was a "Motion to Augment the Record" which contained an *Ex Parte* Application for Appointment of Psychologist in Eyewitness Investigation; Memorandum of Points and Authorities; Declaration of Counsel; and Order ("MTA A"); and an *Ex Parte* Application for Additional Funds for Expert Psychologist in Eyewitness Identification; Declaration of Counsel; and [Proposed] Order ("MTA B"). (AOB at 44-45 fn. 17.) Respondent did not lodge the Motion to Augment the Record with the Ninth Circuit, so Habeas Counsel does not have that Motion in his possession. All references thereto are from the AOB, which habeas counsel relies on for this section. While Habeas Counsel cannot vouch for the accuracy of the AOB, Respondent could be ordered to lodge the documents with this Court.

a licensed psychologist who is a highly regarded expert in the field of eyewitness identification. The proposed order stated, "[t]he sum of $2500.00 shall not be exceeded for expenses without further order of the trial court." (MTA-A, [Proposed] Order.) The application stated that in the instant case, "eyewitness identification of defendant is a crucial part of the prosecutor's case, and as such, jurors need to be educated and informed about observation, perception, memory, recall, the effects of stress, and other factors, such as crossracial [*sic*] identification that bear upon the accuracy of eyewitness identification." (MTA-A, Points and Authorities.)

On February 26, 2007, the court granted the application, but ordered the amount not to exceed $1,800 without further order of the court. (MTA-A, Order; CT 136.) In an *ex parte* application filed on May 18, 2007, trial counsel requested additional funds for a total of $2,000 for the expert. (MTA-B, Declaration of Counsel.) Trial counsel represented that the court had only approved $1,500 for Dr. Shomer, and in order to have Dr. Shomer testify, an additional $500 was required. (*Id.*) That representation was false. (*See* Exh. 4, Declaration of Dr. Robert Shomer, August 27, 2014, at ¶15.)

During the pretrial proceedings before the trial court on June 5, 2007, the following colloquy took place between trial counsel and the Court:

> Mr. Behzadi: One other issue. I want to put, for the record, I requested of Judge Marcus that an ID expert be appointed on this matter. I thought it was very crucial, Doctor Robert Shomer, and only a partial amount was approved, *and that caused Doctor Shomer not to be present in court today*.
>
> The Court: I think you need to go back to Judge Marcus and get that resolved, the appointment of experts. I assume he did it for a reason. I'm not saying I won't look at it, but I think it is more appropriate for Judge Marcus to look at. I have no reason why he did what he did. But I'm quite sure you brought it to his attention.
>
> Mr. Behzadi: I brought it to his attention and he declined it. I just wanted to put on the record it was denied, the amount that was requested for Doctor Shomer to testify in court. And we believe that is very crucial for Mr. Rabb's defense. That's it, your Honor.

The Court: Let me ask you one other question, if you know. And again I'm not going to debate the whole thing. Whatever Doctor Shomer was asking for, did it exceed the so-called guidelines for expert witnesses, because we have guidelines, and I'm not really sure. Again I have no basis. That's just a question I'm asking.

Mr. Behzadi: *I'm not familiar with the guidelines the court pays the experts*, but I have not had problems with any previous matters, with getting experts appointed, and the amount that Doctor Shomer requested to review the case and prepare and also testify in court was $2,000, which I do not think is unreasonable.

The Court: 2,000 to testify in court?

Mr. Behzadi: Not just to testify. To testify in court, $500 but $300 to review the case and prepare.

The Court: How much has he been paid to date?

Mr. Behzadi: He has been approved for only $1500.

The Court: $1500?

Mr. Behzadi: That's correct.

The Court: Have a seat, gentlemen, please.

The Court: The court has had just a brief opportunity to look at the file in this matter. It appears on February 26, 2007, Judge Marcus approved $1,800 for Doctor Shomer. Counsel has indicated he has been paid $1500 at this point. And I believe that this comes like, $800 [*sic*] would come to 12 hours of work. I'm not exactly sure.

Mr. Behzadi: If I may, I received a call from Judge Marcus saying that he made a mistake, and he should not have approved more than $1500 afer he approved it in court. He said that $1500 is the maximum he would approve.

The Court: I'm taking your word at this point. I have no idea. Judge Marcus has the ability I believe to set the amount he wants to pay in this matter. I'm not aware of the limitations on him. I'm just looking at what it says. That would be comparable to two hours. I believe an eyewitness expert merely testifies to factors that come into play in making an eyewitness identification. I'm not sure that 10 hours at this point would have been -- the court believes at this point there are at least two more hours available to Shomer for a total of $300, if he wishes to appear. I think, at this point, I understand the situation and the trial court believes that there is sufficient funds remaining from the original order for Doctor Shomer to come to court, if he wishes to testify. And that's the way the court sees it at

> this point. And Mr. Behzadi has made his record.
>
> Mr. Behzadi: Your honor, just for the record, the fees were not on an hourly basis, on a flat fee basis. The final approval was for only $1500 by Judge Marcus. He changed. Judge Marcus, shortly after approving $1,800, called my office and spoke with me personally, your Honor.
>
> The Court: The bottom line is, I don't know what Judge Marcus -- that is your representation. I know what he put in the file. I'm not aware of what it says here. Fees not to exceed $1,800. And I'm looking right now in February 2007, superior court panel of expert witnesses. I'm looking at Doctor Shomer where it says here the rate is $150 per hour, $150 per hour testimony. I'm not aware of anybody awarding a lump sum for someone to come aboard. Subject to looking at the Pace books, the Pace declaration itself, I would assume he is paid in an hourly fashion.
>
> Mr. Behzadi: The second declaration I filed with the court, clearly in my declaration mentions that the request allowance was short of $500 for Doctor Shomer to testify. That was my second ex-parte application for appointment of Doctor Shomer. As I mentioned before, there was never mention by Doctor Shomer that he is going to be paid on an hourly basis, but strictly on a flat fee basis, and $1500 would be his charge to review the case and prepare for the defense, and an extra $500 for him to testify in court.
>
> The Court: All right. Thank you, counsel. It's noted.

(2 RT 9-13; emphasis added.)

Prior to the voir dire proceedings the next day, the Court further addressed trial counsel's requested eyewitness expert. The court indicated it had done some legal research, and spoken with the chairman of the expert committee, Judge William Pounders, regarding matters raised during the court's prior discussion with counsel. (2 RT 601.) The Court then discussed *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (Cal. 1984):[19]

> the test in that case is when an eyewitness identification of the defendant is a key element of the prosecution's case, but not substantially corroborated by evidence giving it

[19] Ironically, Dr. Shomer, who represents the gold standard in eyewitness identification, was the expert in *McDonald.*

> independent liability [*sic*] [*recte* reliability] and the defendant offers qualified expert testimony on specific psychological factors shown by the record that it could have affected the accuracy of the identification, but are not likely to be fully known to the, to or understood by the jury who, which ordinarily would be err to exclude that testimony. [¶] It is my understanding, and I need to be corrected if I'm wrong, the identifications were not of Rabb. They were of a person they saw who had a tattoo or whatever it was. And the significance of that was when the vehicle was pulled over, the person ran who had a tattoo. Subsequently I presume this person was captured. [¶] Now I don't know. At this point, was Rabb thereafter identified by the people who were at the gas station as one of the persons who robbed them?

(2 RT 603.)

Trial counsel first attempted to respond to the Court's query (2 RT 603-05), but the Court was evidently confused by trial counsel's explanation ("give me the sequence again.") (2 RT 605.) The prosecution then explained the sequence of events in a more articulate manner than trial counsel had mustered. (2 RT 605-06.) However, the prosecutor misled the Court:

> In addition, there is substantial circumstantial evidence that makes Mr. Rabb the logical third party in this crime. The tattoos -- yesterday we did photograph Mr. Rabb's physical person, *and the tattoos matched the description given by the victims. It also matches the facial tattoo described by Sergeant Banuelos*. And there is also the matching car description. *And the co-defendants in this case also both identified Mr. Rabb out of a six-pack as the co-defendant in this case*.

(2 RT 606; emphasis added.)

Each of the emphasized statements was inaccurate and arguably intended to deceive the Court. Believing those misstatements to be true, the Court held that "there is substantial corroboration by other evidence, by other evidence giving independent reliability of this, of this defendant's identification in this matter." (3RT 607.) The Court reached that conclusion not just because the prosecution misled the trial court, but also because trial counsel did nothing to contest or correct the errors.

Moreover, appellate counsel missed the issue. The pertinent issue was not whether a defendant in a criminal proceeding has a right to an expert, it was whether

trial counsel has diligently worked to secure the necessary resources to support the defense case. Trial counsel here did not. Dr. Shomer explains:

> Despite the fact that I had reviewed the case file material and was ready to testify as an expert witness in Mr. Rabb's case, Mr. Behzadi did not call me to testify in the case, nor did he ever inform me as to why he did not call me when expert testimony would have been of substantial benefit to the defense.
>
> I only recently learned that the Court had in fact authorized the specific amount of $1,800 for all my services including trial. While $2,000 was my standard fee at the time, I have made exceptions in numerous cases. Sometimes the attorney themselves will cover a small shortfall, sometimes the family will, and sometimes I have simply taken less. Eyewitness identification was a significant piece of evidence in Mr. Rabb's case, and had Mr. Behzadi asked me to accept the $1,800 total for my services in Mr. Rabb's case, I would have done so. Mr. Behzadi never made any such request, and ultimately I only billed $999 to the Court for my review and evaluation. . . .

(Exh. 4, Shomer Decl., at ¶¶14-15.)

Finally, according to the direct appeal, "MTA-B, Declaration of Counsel" appears to include a statement from trial counsel Behzadi that Dr. Shomer could not or would not testify at trial for less than $2,000. If the declaration does in fact say that, it is strongly contested by Dr. Shomer, who has averred that he was available to testify and "would have done so" for the $1,800 the Court had approved. (Exh. 4, Shomer Decl., at ¶¶14-15.) If trial counsel's declaration states otherwise, then Ken Behzadi not only failed to secure an expert who was ready, willing, and able to assist Mr. Rabb, he perjured himself to the trial court.

b. Trial Counsel's Failure Was Prejudicial

The import of Sgt. Banuelos' eyewitness identification is evident from the record. First, the prosecutor emphasized Sgt. Banuelos' eyewitness identification during his closing argument. "We have an in-court ID and have the photo ID by Sergeant Banuelos. I asked Sergeant Banuelos, do you have any doubt, any doubt that the man in court, Mr. Rabb, is the guy that right ran away? [*sic*] Sergeant Banuelos said I have no doubt. I know that's the man." (Augmented RT 54.)

Second, the jury reached its verdicts thirty-three (33) minutes after the conclusion of the readback of Sgt. Banuelos' testimony. (CT 173, 223.)

Dr. Shomer could have put the unreliability of that testimony in the proper perspective for the jury. Dr. Shomer has testified in approximately one thousand trials and has been recognized by the California Supreme Court as "undoubtedly qualified." (Exh. 4, Shomer Decl., at ¶4; *McDonald*, 37 Cal. 3d at 375.) It is easy to say that if Dr. Shomer had testified as the defense expert, he would have provided important information regarding eyewitness identifications that is not commonly understood by lay persons and that could have had a tremendous effect on the weight the jury afforded Sgt. Banuelos' eyewitness testimony. As Dr. Shomer further explains:

> Had I testified in Mr. Rabb's case, I would have testified to the results of studies of relevant factors that appear to be either not widely known or not fully appreciated by most laypersons, such as the effects on perception of an eyewitness' personal or cultural expectations or beliefs, the effects on memory of the witness' exposure to subsequent information or suggestions, and the effects on recall of bias or cues in identification procedures or methods of questioning.
>
> Beyond the obvious problems with lighting, distance, and duration on eyewitness identification accuracy, I would have been able to explain to the jury the problems with cross-racial identification, which was a critical factor in this case, where Sgt. Banuelos and Damen Rabb are of different races.
>
> My understanding is that Sergeant Banuelos testified that he had no doubt whatsoever that Mr. Rabb was the man who got out of the Camry he stopped at 1:30 a.m. and witnessed from thirty feet away for two to five seconds. (3RT 1317, 1305-06.) My testimony would have established that accurate eyewitness identification of strangers has been found to be extremely difficult even under the best of circumstances. That is, circumstances with adequate distance and lighting, and sufficient time to take in the details of another person's face. While lighting and distance can be reconstructed after the fact, estimates of the time someone has had to make an observation of another person are completely subjective, are invariably overestimated in stressful situations, and are influenced by whether or not they have committed themselves to an identification, regardless of whether or not it is accurate.

> My testimony would have indicated that the largest source of error in eyewitness identification is that many people resemble each other, and because of that fact, detail in the initial description is associated with accurate identification of an [*sic*] stranger. Whereas descriptions from encounters in sudden stressful situations are usually very vague and could fit many individuals. In the context of a very short, and stressful observation, human observers are not operating at anywhere near an optimal level of accurate perception and the conversion of perceptual information into accurate memories that are essential for later accurate eyewitness identification.
>
> Of great significance for this case is that I would have testified about the substantial scientific data that shows that experienced police officers have not been found to be more accurate in eyewitness identification than civilians, and civilians have been found to be wrong about accurate identification of strangers at the same ratio as they are correct. Jurors often assume that whatever problems civilian eyewitnesses may have in making accurate identifications, police officers are not subject to the same problems. The large body of specific research about which I would have testified shows this is not true.
>
> My testimony could have significantly dealt with Sgt. Banuelos' testimony that he was highly confident in his identification because I could have explained that a lack of correlation between the degree of confidence an eyewitness expresses in his identification and the accuracy of that identification is a major and consistent finding of the scientific research. The majority of studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative -- i.e., the more certain the witness, the more likely he is mistaken. Because of the counterintuitive nature of the lack of relationship, most jurors will assign an inappropriate weight to an eyewitness's expression of confidence.
>
> My testimony also would have allowed the jury to consider the impact of the post-observation information Sgt. Banuelos obtained, which may have become blended with his own observations.

(Exh. 4, Shomer Decl., at ¶¶7-13.)

The eyewitness identification by Sgt. Banuelos was the key evidence against Mr. Rabb and it should and could have been properly challenged. It was all the more important because Mr. Rabb's conviction was not a foregone conclusion. The trial took place over the course of three days and the jury deliberated over the course of

two days. (CT 166-71, 222-23.) The "objective clues as to the jury's assessment of the case strongly suggest that the case was close." *See Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012) (finding *Strickland* prejudice in a case where the closeness of the issue was illustrated by the fact that "jury deliberated for almost five full days, even though it heard argument and evidence for only about six days.") (citing *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) ("[L]engthy deliberations suggest a difficult case.") (internal quotation marks omitted); *Daniels v. Woodford*, 428 F.3d 1181, 1209-10 (9th Cir. 2005) (holding that the fact that "[t]he jury deliberated for two days before returning a verdict . . . suggests that the jury may have been influenced by [additional] evidence had it been offered" and concluding that "[t]his alone is sufficient for a finding of prejudice"); *Dyas v. Poole*, 317 F.3d 934, 936-37 (9th Cir. 2003) (per curiam) (holding that "the evidence against Dyas was not overwhelming, a fact reflected in the length of the jury's deliberations," where "the jury took 3 1/2 days to deliberate following Dyas's 5-day trial")).

The jury also requested two readbacks. (CT 172-73.) This too was similar to *Thomas*, where "[t]he jury also requested several readbacks of testimony on three separate occasions, which is an indication that '[t]he jury was clearly struggling to reach a verdict.'" *Thomas*, 678 F.3d at 1103 (quoting *Gantt v. Roe*, 389 F.3d 908, 916 (9th Cir. 2004); citing *Merolillo v. Yates*, 663 F.3d 444, 457 (9th Cir. 2011) (holding that a request for a readback of testimony "illustrates the difficulty presented by" the case); *Merolillo*, 663 F.3d at 457 ("'[T]he jury asked for readbacks of [witnesses'] testimony while it was deliberating, so it evidently did not regard the case as an easy one.'" (second alteration in original) (quoting *United States v. Blueford*, 312 F.3d 962, 976 (9th Cir. 2002))).

After several hours of deliberations over the course of two days, the jury reached its verdicts just thirty-three (33) minutes after the conclusion of the readback of Sgt. Banuelos' testimony. (CT 223.) That is a strong indication that Sgt. Banuelos' identification was a significant factor in Mr. Rabb's conviction. Because

trial counsel never bothered to see if Dr. Shomer would accept the 90% of his quoted rate that the trial court authorized, Mr. Rabb failed to have expert testimony that he had available to him and that would have significantly crippled the prosecution's already frail case. (Exh. 4, Shomer Decl., at ¶¶14-15.)

5. Trial Counsel Was Ineffective in Failing to Object to Multiple Levels of Hearsay During Trial

a. Deficient Performance

Sgt. Banuelos' testimony was the only link between Mr. Rabb and the green Toyota Camry that was alleged to be the getaway car. The belief that the car had been loaned to Mr. Rabb was both a damning piece of circumstantial evidence at trial and a strong piece of evidence supporting the California Court of Appeal's conclusion that the error pertaining to De'Shawn Chappell's testimony was harmless. (*See* Section VI(B)(9)(b), incorporated herein by reference as though set forth fully herein.) Of particular significance to the trial court on habeas, that connection was a pillar in the court's conclusion that the "evidence of Petitioner's guilt is clear."[20] (Exh. 6.) But Sgt. Banuelos' testimony regarding Mr. Rabb's possession of the Camry was not reliable. It was double hearsay that was amazingly and incompetently never challenged as such by trial counsel.

> A: I was trying to verify if the Camry was stolen itself. So what I did is I had two officers respond to the registered owner's address on the registration and had them to [*sic*] determine if the car was stolen or not.
>
> Q: Do you know the name of the person who was the registered owner?
>
> A: I don't recall, no.

---

[20] The trial court denied relief in Mr. Rabb's first habeas petition, specifying that (1) Mr. Rabb was positively identified as running from the vehicle used in the robbery; (2) Mr. Rabb was identified as having possession of the car by the owner; (3) Mr. Rabb's tattoos were a match for the individual identified as being one of the perpetrators; and (4) One of Mr. Rabb's co-defendants made statements identifying him as the ring leader in committing the crimes. (Exh. 6.)

Q: Is it in your report?

A: It should be, yes.

Q: Would it refresh your recollection to review the report?

A: Yes, it would.

. . .

Q: Is your recollection refreshed, officer?

A: Yes.

Q: What was the name of the registered owner?

A: It was Tequila Richmond.

Q: Do you remember the name of the officers that had gone over to Ms. Richmond's house?

A: Officer Gontram and Officer Gonzalez.

Q: And after they had visited Ms. Richmond's house, did you speak to them on the radio or in person?

A: On the radio.

(3 RT 1299-1300.)

Trial counsel's failure to object to such obvious hearsay constitutes ineffective assistance[21] because but for counsel's unprofessional errors, the result of the proceeding would have been different. For Sgt. Banuelos' testimony regarding the

[21] Counsel is aware of the fact that California courts have held that a "failure to object rarely establishes ineffectiveness of counsel." *People v. Kelly*, 1 Cal. 4th 495, 540, 822 P.2d 385, 3 Cal. Rptr. 2d 677 (Cal. 1992). However, this case is the rare exception where there is no strategy and demonstrably significant prejudice. Trial counsel did not counter the prosecution argument with argument of his own (*see People v. Frierson*, 53 Cal. 3d 730, 749, 808 P.2d 1197, 280 Cal. Rptr. 440 (Cal. 1991), and there was no danger of highlighting the hearsay testimony. The testimony was significant and impactful, and there could be no rational strategy in failing to object. Nor need the court posit hypothetical strategies to defer to. Ken Behzadi cannot be given such deference because not only is no strategic purpose evident on the record herein, he has admitted that he cannot recall any strategy for failing to object. (*See* Exh. 15, Pomerantz Decl., at ¶13.)

borrowing of the car to have been admissible, it required not one, but two exceptions to the hearsay rule, one for each level of hearsay. *Padilla v. Terhune*, 309 F.3d 614, 621 (9th Cir. 2002) (Hearsay within hearsay is admissible so long as "each link in the hearsay chain conforms to a separate hearsay exception.") Not only were there not two exceptions, there was not even one. Had trial counsel objected, the jury would not have wrongly considered unreliable and deceptively hard evidence against Mr. Rabb.

b. Prejudice

Even with the hearsay evidence, the jury had serious concerns about Sgt. Banuelos' testimony, hence their request to have his testimony read back. (3 RT 1801-02.) If it had not led to an innocent man's life imprisonment, Sgt. Banuelos' identification testimony would be laughable. Even under the best conditions, outside in Los Angeles at high noon, it would be extremely difficult to see a tiny fading teardrop tattoo on the cheek of an African-American from thirty feet away. Yet incredibly, Sgt. Banuelos supposedly saw this at 1:30 in the morning, as Mr. Rabb allegedly ran from him. Sgt. Banuelos claimed he had no doubt whatsoever that he saw Mr. Rabb,[22] but his description was wrong. He had no doubt whatsoever as to what he saw, but he admitted in the trial court that Mr. Rabb did not have a tattoo where he said he did, and then suddenly -- on the basis of leading questioning -- claimed that he now remembered the tattoo being somewhere else. (3 RT 1313-14; *see* Section VI(B)(3), *supra*, incorporated herein by reference as though set forth fully herein.) How much more incredible must his testimony have been before it was disregarded?

The guns and the cars did not have Mr. Rabb's fingerprints. However, even with all of those pieces of exculpatory evidence, there was one strong piece of

[22] Q: Sergeant Banuelos, do you have any doubt at all that Mr. Rabb is the man that got out of that Camry and ran away from you that night? A. None whatsoever. (3 RT 1317.)

concrete and inculpatory evidence -- Tequilla Richmond's supposed lending of the car to Mr. Rabb. It is easy to see how a juror faced with that piece of evidence could set aside all the highly questionable identification evidence.

Had trial counsel objected, a significant component of the harmless error analysis would never have been admitted into evidence. The Court of Appeal placed significant weight on the fact that "the owner of the green Camry stated that she had loaned the vehicle to Mr. Rabb." *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *36. Nowhere in the record did she state that. Even if she said it to officers at her home, there are good reasons why the rules of evidence prevent its admission. The inherent unreliability of hearsay testimony is especially a concern in a case where we know for a fact that the main LAPD witness adjusted his testimony freely and misled the jury on facts.

Sgt. Banuelos stated that he was told by two officers that Tequilla Richmond told them that she loaned the car to Mr. Rabb. Two steps removed from the source, the statement is unreliable. The removal of that evidence alters the harmless error calculous that followed the finding that De'Shawn Chappell's failure to take the stand was error. *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *36. Not only is it reasonably probable that the jurors would have reached a different conclusion without that testimony, it is likewise probable that the Court of Appeal would have reversed.

Tequilla Richmond could have been called by the prosecution, but she was not, and there is no affidavit, declaration, or preliminary hearing testimony that indicates what she would have said.

6. Trial Counsel Was Ineffective in Failing to Ask For or View the Surveillance Videotape That Was Collected From the Scene of the Crime

On the morning of the carjacking, just one hour after the crime, the police took a VHS videotape into custody from the crime scene. (*See* Exh. 16.) Although the gas station where the carjacking and robbery occurred had surveillance cameras, the defense never viewed or even requested the videotape.

Trial counsel's failure to act is not necessarily subject to the performance and prejudice analysis mandated by *Strickland*. Prejudice is presumed when counsel violates the Sixth Amendment by failing to function as an adversary to the state's case against the accused. *Cronic*, 466 U.S. at 656-61 ("[M]ost obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*, at 659). The same principle is supported by *Maples*, 565 U.S. 281-83. Nevertheless, relief is appropriate even if analyzed under *Strickland*, because trial counsel's failure to request or view the surveillance tape constituted deficient performance and that failure prejudiced Mr. Rabb because the tape could very well have exonerated him.

Mr. Rabb has consistently proclaimed his innocence. The victims of the crime allegedly identified an assailant with a teardrop tattoo under his right eye and a tattoo on his forearm "of a hand displaying an unknown kind of gang sign," but Mr. Rabb was not actually identified by either victim, neither victim ever even identified him from a photo or a lineup, and both victims told Mr. Mendoza that they did not recognize a picture of Mr. Rabb. (CT 103-04; Exhs. 9 & 10.)

Mr. Farmer was once again given the opportunity to identify Mr. Rabb when Habeas Counsel put six inmate photographs in front of Mr. Farmer. As noted above, Mr. Farmer said he did not see his assailant among the photographs provided. (Exh. 2.) When later specifically pointed to Mr. Rabb, Mr. Farmer emphatically stated that Mr. Rabb was not his assailant. To assuage any uncertainty over Habeas Counsel's representation, Mr. Farmer then signed the photograph of Mr. Rabb that he was shown. "I seen [*sic*] photos which I signed the ones that Brian Pomerantz has shown me today 3.4.16 at Kern Valley State Prison [they] are not the person that robbed me

that night I was car jacked." (Exh. 2.) A copy of that photograph and Mr. Farmer's signature are provided as Exhibit 1.

Setting aside Sgt. Banuelos' questionable identification of Mr. Rabb as the person fleeing the Camry, even if that identification were solid, no participant or witness from the crime scene ever identified Mr. Rabb as having been there. (*See* CT 103, "Q: My client was not identified by Mr. Chappell or Mr. Farmer, was he? A: No, he was not.") With the dearth of eyewitness testimony in this case, the surveillance video was a critical piece of evidence.

Trial counsel's failure to collect that evidence very well may have wrongfully condemned Mr. Rabb. Sadly, because the tape has now allegedly gone missing (*see* Exh. 5), Mr. Rabb may be permanently denied the opportunity to prove his innocence via incontrovertible video evidence. Mr. Rabb's claim that the videotape is integral to his defense cannot reasonably be challenged. Without any witness identifying Mr. Rabb as the gas station carjacker, the surveillance video's importance is only magnified.

When Petitioner presented this issue to the state trial court, the court concluded that "[t]he defendant's claim that a surveillance tape would exonerate him does not hold up to a critical review." (Exh. 6.) But that court relied on the veracity of evidence that is now under credible attack. Section VI(B)(9), *infra*, incorporated herein by reference as though set forth fully herein, explains many of the problems with the evidence that Judge Fidler relied on in his Minute Order of April 9, 2013. (Exh. 6.) Judge Fidler did not go far enough in requesting an informal response by the district attorney. A hearing or a discovery order from this Court is necessary because there has been no critical examination of the conclusion that "the tape is no longer in existence." (Exh. 6.) Detective Chavez' follow-up investigation report stated that he "was unable to locate the case package or the video for this case." Contrary to Judge Fidler's conclusion, it did not state that the tape is no longer in existence. It stated that "all the property was destroyed on 9/22/2006. Again the

video was not listed as being destroyed." Thus, Det. Chavez specifically excepted the tape. (*See* sections IV(A) & VI(B)(7) generally, *supra*, incorporated herein by reference as though set forth fully herein.) One detective's search is not exhaustive and does not warrant a court's conclusion that the tape is no longer in existence.

The court further stated that "[a]lthough the tape is no longer in existence, it was reviewed the day after the crime by a detective, who documented that the tape provided no exculpatory evidence of the carjacking." (Exh. 6.) In fact, Detective Williams only concluded that the tape was not clear, not that it did not contain exculpatory evidence.

> Q: Now, did you review a surveillance video from the gas station that was obtained by the officers in this case?
>
> A: Yes, sir.
>
> Q: What, if anything, did you see?
>
> A: *It wasn't clear*. I went to SID to look at it, and we couldn't see anything that was clear, that was identifying anybody inside the video.
>
> Q: What is SID?
>
> A: Our scientific investigation division.
>
> Q: Could you generally see cars and vehicles at about the time the carjacking/robbery was supposed to have taken place?
>
> A: What do you mean, "generally"? I'm not sure what you mean.
>
> Q: Vehicles that roughly match the description of the vehicle involved in this case.
>
> A: It wasn't really clear. So I really couldn't identify any particular person or any particular vehicle inside the video.
>
> Q: You couldn't see faces or persons on the video clear enough to make any sort of identification?
>
> A: No, sir, I couldn't.

(3 RT 1328-29; emphasis added.)

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Being unable to make something out on the surveillance tape does not mean that it is not there. Even assuming that Detective Williams' testimony is true--which should reasonably be questioned in light of both the LAPD's failure to disclose the exculpatory impeachment material and the false testimony regarding the alleged statements of Mr. Farmer and Mr. Chappell -- it is entirely possible that with current technology the tape could be enhanced to see more clearly. Petitioner understands that the prejudice of trial counsel's failure to request the tape is difficult to ascertain without the tape, which is why a more thoroughly exhaustive search is necessary and warranted.

7. Trial Counsel Was Ineffective in Failing to Challenge the Destruction of the Evidence Against Petitioner and In Not Moving to Exclude It[23]

In the District Attorney's Informal Response relating to the surveillance video (Exh. 17), it was revealed that the "property booked in this case was destroyed on or about September 22, 2006." That is ten days after Mr. Rabb's arrest. The record only briefly touches on the destroyed evidence. The first time is when the prosecutor said in opening argument that, "the police originally find three revolvers, but as of today, we only have one of those guns. The police mistakenly destroyed two of the guns in the meantime since 2005." (2 RT 928.) The second reference is when Detective Williams was asked about the destruction of two guns during his direct examination by the prosecutor.

Q: And we only have how many guns left today?

A: We have one.

Q: What happened to the other two guns in this case?

A: The other two guns were disposed of.

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[23] When the alleged evidence related to this case was destroyed in bad faith in violation of *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), it also constituted prosecutorial misconduct for the reasons articulated herein.

> Q: And that was an accident basically?
>
> A: When you say, "accident," I don't know about accidents. The only thing I can tell you is that it was disposed of.
>
> Q: Okay. What's your understanding of why they were disposed of?
>
> A: Well, another detective that was responsible for it, the disposition of property, I guess he was following the protocol and disposed of it.
>
> Q: And the protocol being a certain amount of time passing?
>
> A: I think it would probably be best to ask that particular detective.

(3 RT 1329-30.)

Trial counsel did not even ask Det. Williams about the destruction of evidence. He failed to ask such obvious questions as: What else was destroyed? Whether it is normal to destroy evidence pre-trial in a pending case? Who is the detective that carried out the destruction of evidence? Did the order for destruction have to come from someone else? What does it mean to destroy evidence? Or any number of other questions that competent trial counsel should have asked. Even worse, trial counsel failed to call the detective who ordered the destruction of the guns to find out why they were destroyed, when they were destroyed, on whose orders they were destroyed, and whether anything else was destroyed. (3 RT 1333-38.)

Trial counsel's failure to make such inquiries constituted deficient performance that was prejudicial to Mr. Rabb because he failed to learn that the entire property file had been destroyed. The destruction of that property not only raises questions about the missing surveillance video and what other potentially exculpatory evidence was destroyed, but also raises concerns about the one gun that was not destroyed. What was the chain of custody on that gun that kept it from being included with the other property?

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Sgt. Banuelos claimed in his report (Exh. 18) that all three guns were booked into property, as was the videotape. That puts Sgt. Banuelos' report at odds with Detective Chavez' follow-up investigation. (Exh. 5.) Detective Chavez appears to be wholly unconnected to the original investigation and prosecution of Mr. Rabb's case, so he may be entitled to a presumption of credibility that should not be extended to Sgt. Banuelos, whose credibility is appropriately being repeatedly questioned herein. In addition to (1) misleading the jury regarding the victims' gang affiliation; (2) mistating the victims' demeanor at the scene; and (3) changing his eyewitness identification testimony to fit the man on trial, he claimed that he booked the videotape into evidence, but Detective Chavez said Sgt. Banuelos did not. Sgt. Banuelos also said all three guns were booked into evidence, but at least one must not have been or it too would have been destroyed.

In *Youngblood*, the United States Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58. Trial counsel's failure to follow-up prevented Petitioner from proving bad faith on the part of the police at trial. Trial counsel did not make proper inquiries even after Det. Williams indicated that something beyond policy might have led to the destruction of the evidence. (3 RT 1329-30.)

The bad faith and prosecutorial misconduct here is inferential because the destruction was so early. The only reason to destroy evidence after only a year is if there were a policy which called for the destruction of property after only one year. Where that is the law, it is contingent on the property being unclaimed, i.e. not related to an upcoming trial. Here that was not the case because the property was destroyed ten days after Mr. Rabb's arrest. Were there a policy which called for the destruction of property only a year after the incident, *and before a pending trial*, that would in itself constitute bad faith, as it would regularly deny defendants the opportunity to test the evidence. Because the destruction of the evidence was just ten days after Mr.

Rabb's arrest, six weeks before his preliminary hearing, and two months before the Information was filed against Mr. Rabb (CT 144), it cannot be disputed that Mr. Rabb had absolutely no opportunity to test or examine the evidence.

Moreover, the lab technicians who allegedly fingerprinted the guns did not testify, nor were their reports and bench notes admitted into evidence.[24] *See United States v. Primm*, 1996 U.S. App. LEXIS 14249, 11 (10th Cir. 1996) (excusing the destruction of the evidence because "[t]he lab chemist who performed the tests testified at trial about the lab results and was available for cross-examination. The original reports were admitted into evidence. The destruction of the evidence merely prevented [Appellant] from conducting his own independent test on the substances. Thus, the usefulness of the drug evidence to the defense was, at best, conjectural.")

While the destruction of the evidence arguably constituted bad faith, and its destruction does not benefit from some of the excuses that other courts have found, even if it fails the *Youngblood* test, trial counsel's ineffectiveness should not be excused. Trial counsel was ineffective in failing to raise the destruction as an issue and in failing to move to exclude any reference to the guns allegedly found in the Camry.

8. Trial Counsel Was Ineffective in Failing to Investigate Mr. Rabb's Innocence

Mr. Rabb has a teardrop tattoo and other gang tattoos, as do many hundreds (perhaps thousands) of men in Los Angeles gangs. Trial counsel was ineffective in failing to obtain the Rollin' 40's Crips gang book and searching for other individuals

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[24] Habeas Counsel does not believe that the reports and bench notes were turned over to the defense either, but is at a disadvantage in preparing this Petition because he has never had access to trial counsel's file. Trial counsel has refused to cooperate and the CDCR has interfered with Habeas Counsel's ability to obtain those portions of the file in Mr. Rabb's possession. Counsel's efforts to obtain the file are detailed in the declaration attached hereto as Exhibit 15. *See* Pomerantz Decl., at ¶¶2-10.

who better matched Sgt. Banuelos' description. How many Rollin' 40's Crips have teardrop tattoos? More importantly, how many Rollin' 40's Crips have teardrop tattoos under their right eye? Every one of those young men could have been the alleged assailant, but trial counsel failed to investigate, and as a result, we do not know how many better suspects there were than Mr. Rabb.

The failure to investigate constituted deficient performance and Mr. Rabb was prejudiced because the identification of him was garbage. Had trial counsel shown how many young African-American men fit the actual description, with the right tattoos in the proper places, there is a reasonable probability that the jury, which already had their doubts, would not have found Mr. Rabb guilty.

9. Mr. Rabb Was Prejudiced by Trial Counsel's Ineffective Assistance Because the Evidence Against Mr. Rabb Was Weak

There was no hard evidence linking Mr. Rabb to the crimes. Neither of the two carjacking/robbery victims identified Mr. Rabb as their assailant. Nonetheless, Mr. Rabb was one of three individuals convicted of the carjacking and robbery. One alleged accomplice refused to testify pursuant to her Fifth Amendment right (3 RT 1254), and the other testified that he did not know Mr. Rabb and that Mr. Rabb played no role in the carjacking and robbery. (3 RT 1209, 1211.) Mr. Rabb's fingerprints were not on the stolen car that he was alleged to have driven away from the crime scene, nor on the alleged getaway car that Sgt. Banuelos pulled over and that Petitioner was alleged to have climbed out of and fled on foot from, nor on any of the guns allegedly used in the heist. (3 RT 1330.)

The California Court of Appeal "conclude[d] 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." *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *34-35. The Court of Appeal concluded that the error was harmless because there was "overwhelming evidence of appellant's guilt." The Court of Appeal then enumerated five specific pieces of evidence that it deemed "ample

evidence from which the jury could have concluded that appellant was the assailant beyond a reasonable doubt." *Id.*, at 36. Those were:

1) Maurice Farmer's description of the assailant to Officer Ashley and Sgt. Banuelos, was almost identical to the observations that Sgt. Banuelos made of the passenger who fled from the green Camry;
2) The owner of the green Camry stated that she had loaned the vehicle to Mr. Rabb;
3) Mr. Rabb's booking photograph was identified by Sgt. Banuelos as the person he saw fleeing from the green Camry;
4) Mr. Farmer stated that the assailant was carrying a blue steel revolver and that same type of gun was found in the green Camry that Mr. Rabb was seen fleeing from; and
5) Earl Parron, Mr. Rabb's alleged accomplice in the matter, identified Mr. Rabb to Detective Williams as the person who took Mr. Farmer's vehicle at gunpoint.

Rabb, 2010 Cal. App. Unpub. LEXIS 1007, at *35-36.

The Court of Appeal was not in a position to fully understand the harm because it did not know the significant flaws endemic in each of those pieces of evidence.

a. Sgt. Banuelos' Description Did Not Match the Victims' Description

Explained in greater detail above, the witnesses' alleged description did not match what Sgt. Banuelos claimed to have seen of Mr. Rabb when he allegedly emerged from the Toyota Camry and fled. First, on re-direct examination, under the unobjected to leading questioning of the prosecutor, Sgt. Banuelos appreciably altered his testimony to conform to Mr. Rabb's appearance. (*See* Section VI(B)(3), *supra*, incorporated herein by reference as though set forth fully herein.) Second, according to Maurice Farmer, he gave a very different description than Officer Ashley and Sgt. Banuelos claimed in court. (*See* Section VI(A)(1)(a), *supra*,

incorporated herein by reference as though set forth fully herein; and Exh. 9 ("Inmate 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 recalls the main suspect had a ponytail and not braids. Further, he could not remember if he had any tattoos.").)

b. The Owner of the Green Camry Did Not Testify That She Had Loaned the Vehicle to Mr. Rabb

As noted above, the owner of the green Camry did not state in any reliable or admissible way that she had loaned the vehicle to Mr. Rabb. Sgt. Banuelos testified that he sent two officers to talk to Tequilla Richmond and they said that she said she had loaned the vehicle to Mr. Rabb. Ms. Richmond never testified and Sgt. Banuelos' testimony was hearsay within hearsay, neither level of which had an exception for admissibility. (*See* Section VI(B)(5), *supra*, incorporated herein by reference as though set forth fully herein.)

c. Sgt. Banuelos' Description of the Suspect He Observed Did Not Match Mr. Rabb

As previously explained, Sgt. Banuelos allegedly identified Mr. Rabb's booking photograph as the person he saw fleeing from the green Camry, but his description of the person he saw did not match Mr. Rabb. (*See* Section VI(B)(3), *supra*, incorporated herein by reference as though set forth fully herein.)

d. There Is Nothing Tying Mr. Rabb to the Blue Steel Revolvers Supposedly Found in the Camry

According to the LAPD testimony, Mr. Farmer allegedly stated that the assailant was carrying a blue steel revolver, the same type of gun the LAPD claimed they found in the green Camry that Mr. Rabb was supposed to have fled from. There are several problems with this evidence. First, Mr. Rabb's fingerprints were on none of the three guns allegedly found in the Camry -- or on the Camry for that matter. (3 RT 1330.) Second, by the time of trial, two of the guns had mysteriously been disposed of and the chain of custody on the third gun was specious. (3 RT 1329-30;

Exh. 2; *see* Section VI(B)(7) generally, *supra*, incorporated herein by reference as though set forth fully herein.) Third, because the guns were wrongfully destroyed, it is not even known whether the guns were tied to any other crimes that might have excluded Mr. Rabb as a suspect or identified the real assailant of the carjacking. Finally, the fact that the assailant had a blue steel gun and three blue steel guns were supposedly found in the Camry is of little probative value in a city where 70,000 guns are purchased legally each year and an untold number are illegally obtained.[25]

e. Earl Parron Testified That Mr. Rabb Was Not His Accomplice

Although Detective Williams testified that Earl Parron, Mr. Rabb's alleged accomplice, identified Mr. Rabb as the person who took Mr. Farmer's vehicle at gunpoint, Mr. Parron took the stand and testified that he did not know Mr. Rabb and that he played no role in the carjacking and robbery.[26] (3 RT 1209, 1211.) The trial court made no credibility findings on the record. Therefore, there is no reason to believe that the mannerisms or demeanor of Det. Williams made him any more credible than Mr. Parron.

Ultimately, there is no piece of evidence that is not reasonably subject to doubt. Without trial counsel challenging the evidence, the jury already indicated doubt when they required a read back of the star prosecution witness' testimony and when they engaged in a lengthy deliberation. (*See* Section VI(B)(4)(b), *supra*, incorporated herein by reference as though set forth fully herein.) What is now evident is that there was more than enough information for competent trial counsel to challenge the prosecution's case. All five pieces of critical inculpatory evidence identified by the

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[25] *See* http://www.dailynews.com/general-news/20130213/los-angeles-residents-buying-200-guns-a-day, last accessed on February 15, 2017.

[26] Based on Mr. Parron's testimony, it is entirely unclear how Judge Fidler concluded that "one of Mr. Rabb's co-defendants made statements identifying him as the ring leader in committing the crimes." (Exh. 6.)

California Court of Appeal are reasonably subject to significant doubt. Represented even by inadequate counsel, Mr. Rabb would have prevailed, but his appointed counsel was so incompetent as to effectively be absent.

Because ineffective assistance of counsel may result from the cumulative impact of multiple deficiencies by trial counsel, none of these issues can be viewed in a vacuum; rather, they must be considered in connection with the other instances of ineffective assistance of counsel which occurred during Mr. Rabb's trial, and which are summarized throughout this Petition.

2. Supporting Law

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) sets forth a two-part test for the ineffective assistance of counsel: (1) "the defendant must show that counsel's performance was deficient," and (2) "the defendant must show that the deficient performance prejudiced the defense." *Id.*, at 687. First, Mr. Rabb must show that counsel's performance was deficient. To do so, he must show that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Mr. Rabb must demonstrate that counsel's representation fell below "an objective standard of reasonableness," and must identify counsel's alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. *See Strickland*, 466 U.S. at 688; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

Second, Mr. Rabb "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694). Mr. Rabb must show that counsel's errors deprived him of a fair trial, one whose result was reliable. *Strickland*, 466 U.S. at 687. The trial court must evaluate whether the entire trial was fundamentally unfair or unreliable because of counsel's

ineffectiveness. *Id.*; *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995); *United States v. Palomba*, 31 F.3d 1456, 1461 (9th Cir. 1994).

"[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in a case . . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 693-94. "[R]easonable probability . . . is simply a probability sufficient to undermine confidence in the outcome of the case, a standard less than proof by a preponderance of the evidence." *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994) (internal quotations omitted). Reasonableness is judged by reference to prevailing professional norms at the time of counsel's action or omission. *Strickland*, 466 U.S. at 690.

While the ineffectiveness of trial counsel herein satisfies both prongs, it arguably need not do so because the abandonment here is so pronounced that prong two may be excused. Normally, since the petitioner must affirmatively prove prejudice, a deficiency that does not result in prejudice does not constitute ineffective assistance. However, there are some instances which are legally presumed to result in prejudice. One of those is where there has been an actual or constructive denial of the assistance of counsel. *Strickland*, 466 U.S. at 692; *See Cronic*, 466 U.S. at 659, & n.25 ("Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."); *Maples v. Thomas*, 565 U.S. 266.

3. Conclusion

Trial counsel Ken Behzadi has a well-deserved reputation for bad lawyering; yet, somehow he persists in practicing law as a "defense" attorney. No person should ever spend one day in jail when the victims have averred that that person is actually innocent, the main prosecution witness changed his identification testimony on the

stand to fit Petitioner, and the so-called defense counsel literally did not know what was going on at Petitioner's trial. But Mr. Rabb has unbelievably spent a decade incarcerated and threatens to spend the rest of his life imprisoned for a crime he clearly did not commit.

Both the prosecution and the trial court are far from blameless in this fiasco, but trial counsel not only did not do his job well, he did not do it at all. It is not hyperbole to say that a first year law student with appropriate supervision could have won Mr. Rabb's case. As shown above, trial counsel's deficient conduct altered the outcome in this case.

4. **Did you raise this claim on direct appeal to the California Court of Appeal?** No.

5. **Did you raise this claim in a Petition for Review to the California Supreme Court?** No.

6. **Did you raise this claim in a habeas petition to the California Supreme Court?** Not yet, but Petitioner plans to file a Petition raising all the claims in this Petition soon.

C. Ground Three – Appellate Counsel Was Ineffective

Mr. Rabb's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because Mr. Rabb's constitutional rights to due process and to be free from cruel and unusual punishment were denied by his appellate counsel's ineffective assistance.

The exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

1. Supporting Facts

Mr. Rabb is not likening appellate counsel to trial counsel. Indeed, appellate

counsel diligently worked to challenge the case and raised colorable claims -- one of which was found to be error by the California Court of Appeal. Conversely, trial counsel's abandonment is well documented in Ground Two.

Nonetheless, appellate counsel was deficient in two regards. First, appellate counsel failed to challenge the ineffective assistance of trial counsel.[27] Appellate counsel had trial counsel's file and was therefore on notice as to the things he knew, but failed to present. Appellate counsel had an obligation to challenge trial counsel's failures, yet she raised none of them in the appeal.

Second, because the ruling by the trial court to exclude investigator Mendoza's 2007 interviews of the two victims was part of the trial record and concerned an evidentiary issue, the error should have been, but was not raised on appeal. It is obvious from the trial record that the trial court erred in not admitting the impeachment evidence pursuant to Cal. Evid. Code § 1202, and that trial counsel was deficient in failing to make the proper argument, but appellate counsel did nothing with either.

2. Supporting Law

Appellate counsel has the same duties as trial counsel to perform effectively. *See Hurles v. Ryan*, 752 F.3d 768, 785 (9th Cir. 2014) ("A criminal defendant enjoys the right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 391-97, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). We consider claims of ineffective assistance of appellate counsel according to the standard set forth in *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. *Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989). [Petitioner] must show that appellate counsel's representation fell below an objective standard of reasonableness, and that, but for

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[27] Habeas Counsel is informed and believes that the appellate counsel who represented Mr. Rabb never brings ineffective assistance of counsel claims, as she mistakenly believes that they are only appropriate for habeas and not for direct appeal.

counsel's errors, a reasonable probability exists that he would have prevailed on appeal. *Id.* at 1434.").

3. Conclusion

Had appellate counsel provided the Court of Appeal with the appropriate arguments and supporting evidence of ineffective assistance of counsel and trial court error, the Court of Appeal would not have found harmless error on the error they recognized, and likely would have found trial counsel to have been ineffective and the trial court to have erred as well.

4. Did you raise this claim on direct appeal to the California Court of Appeal? No, appellate counsel did not raise their own ineffectiveness.

5. Did you raise this claim in a Petition for Review to the California Supreme Court? No, appellate counsel did not raise their own ineffectiveness.

6. Did you raise this claim in a habeas petition to the California Supreme Court? Not yet, but Petitioner plans to file a Petition raising all the claims in this Petition soon.

D. Ground Four – The Trial Court Violated Petitioner's Constitutional Right to Confront Witnesses When it Admitted The Victims' Alleged Statements Through Sergeant Banuelos

Mr. Rabb's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because Mr. Chappell was wrongfully permitted to assert a Fifth Amendment right not to testify.

The exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

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1. The California Court of Appeal Determined That Allowing Victim-Witness De'Shawn Chappell to Assert the Fifth Amendment Without Additional Inquiry Was Error

The California Court of Appeal "conclude[d] 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." *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *34-35.

The Court of Appeal concluded that the error was harmless because there was "overwhelming evidence of appellant's guilt," but as explained in great detail above in Section VI(B)(9), incorporated herein by reference as though set forth fully herein, there was not. The "evidence" against Mr. Rabb was generally incredible, and four[28] of those five pieces of evidence came in through the testimony of Sgt. Banuelos, who we now know affirmatively misled the jury in at least one material part of his testimony. The fifth item was disputed by Earl Parron himself, who took the stand and denied it.

Moreover, even though Mr. Farmer was advised by his attorney to assert his Fifth Amendment privilege, the trial court's failure to question him in camera deprived the trial court of critical information that should rightfully have impacted its decision to allow Sgt. Banuelos to testify as to his statement.

The California Court of Appeal claimed that Mr. Farmer's description of the assailant to Officer Ashley and Sgt. Banuelos, was "almost identical" to the observations that Sgt. Banuelos made of the passenger who fled from the green Camry. *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *35. If by "almost identical," the court of appeal means that both Mr. Farmer and Sgt. Banuelos saw African-American men, who were different in every other detail, then the court is right.

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[28] (1) Mr. Farmer's alleged description of the assailant; (2) The supposed statement of the owner of the green Camry; (3) The identification of Mr. Rabb as the person fleeing from the green Camry; (4) The connection between Mr. Rabb and the blue steel revolvers. *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *35-36.

As detailed above in Section VI(B)(3), hereby incorporated by reference into this claim as though set forth in full, Sgt. Banuelos' initial description of the individual who fled the Camry did not match Petitioner. On re-direct examination, following leading rehabilitation questioning by the prosecutor, Sgt. Banuelos completely changed his testimony to conform to Mr. Rabb's actual appearance. (3 RT 1313-14.)

The prejudice of Sgt. Banuelos' false testimony and his impact on the deliberations is discussed above in Section VI(B)(4), hereby incorporated by reference into this claim as though set forth in full.

All five of the "ample" pieces of evidence are not what they were portrayed to be. The supposedly most solid piece of evidence was the tie between Mr. Rabb and the green Camry, but the owner of the green Camry did not state in any reliable or admissible way that she had loaned the vehicle to Mr. Rabb. Sgt. Banuelos testified that he sent two officers to talk to Tequilla Richmond and they allegedly said that she said she had loaned the vehicle to Mr. Rabb. But because Ms. Richmond never testified, Sgt. Banuelos' already incredible testimony was the only link between Mr. Rabb and the green Toyota Camry that was alleged to be the getaway car. The belief that the car had been loaned to Mr. Rabb was both a damning piece of circumstantial evidence at trial and a strong piece of evidence supporting the California Court of Appeal's conclusion that the error pertaining to Mr. Chappell's testimony was harmless. But Sgt. Banuelos' testimony regarding Mr. Rabb's possession of the Camry was not reliable, it was double hearsay. The particular problems with this evidence were examined in depth above at Section VI(B)(5), *supra*, incorporated herein by reference as though set forth fully herein.

Next, Sgt. Banuelos allegedly identified Mr. Rabb's booking photograph as the person he saw fleeing from the green Camry, but as detailed above in Sections VI(B)(3) and VI(B)(9)(c), hereby incorporated by reference into this claim as though set forth in full, his description of the person he saw did not match Mr. Rabb.

Likewise, nothing tied Mr. Rabb to the blue steel revolvers supposedly found in the Camry. *See* Sections VI(B)(7) and VI(B)(9)(d), hereby incorporated by reference into this claim as though set forth in full.

Finally, Earl Parron testified that Mr. Rabb was not his accomplice. *See* Section VI(B)(9)(e), hereby incorporated by reference into this claim as though set forth in full.

2. Although the California Court of Appeal Determined That the Error Relating to Mr. Chappell Was Harmless, This Court Should Not

Ultimately, none of the five "ample" pieces of evidence supporting the California Court of Appeals' determination of harmless error, stands up to scrutiny. Each one of the five is reasonably subject to significant doubt. In fact, the jury indicated doubt when they required a read back of the star prosecution witness' testimony and when they engaged in a lengthy deliberation. *See* Section VI(B)(4)(b), hereby incorporated by reference into this claim as though set forth in full.

All five pieces of critical inculpatory evidence identified by the California Court of Appeal are either reasonably subject to doubt or should have been inadmissible because of their unreliability. *See* Section VI(B)(9), hereby incorporated by reference into this claim as though set forth in full.

Had the trial court not permitted the introduction of the victims' alleged statements through Sgt. Banuelos, there was no real evidence tying Mr. Rabb to the crimes. The California Court of Appeals was dead wrong in its conclusion that the error was harmless. State appellate courts conducting harmlessness review of trial court errors must find a constitutional error "harmless beyond a reasonable doubt" before affirming a conviction. [*See* ER 81; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)] However, on habeas review of state court convictions, federal courts apply *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Federal courts are permitted to overturn a state conviction when the constitutional violation "had substantial and injurious effect or

influence in determining the jury's verdict." *Id.* at 637. Accordingly, this Court must conduct its own independent harmless error review.

Mr. Chappell's statements via Sgt. Banuelos' (and by extension Mr. Farmer's as well), were not harmless because they had a "substantial and injurious effect" on the verdict. Without the statements of Mr. Chappell and Mr. Farmer, there was no other physical evidence corroborating Sgt. Banuelos' testimony. Not only did Mr. Chappell's alleged statements link Petitioner to the crime, they supported Sgt. Banuelos' story. Ironically, because Mr. Chappell's statement came via Sgt. Banuelos, it was Sgt. Banuelos who was essentially providing third party verification of his own incredible testimony.

Therefore, Sgt. Banuelos' credibility is critical because his testimony was not generally cumulative of other evidence. While the California Court of Appeal may reasonably view Mr. Chappell and Mr. Farmer's statements as similar, the court had no idea what their statements really were because they only came in through Sgt. Banuelos, who repeatedly proved himself incredible and has been confirmed to be such in the newly obtained declarations of Mr. Farmer and Mr. Chappell. (Exhs. 2 & 11.)

Because the error was not harmless, the trial court violated Petitioner's constitutional rights when it allowed Mr. Chappell to invoke his Fifth Amendment privilege against self-incrimination and refuse to testify at Petitioner's trial.

2. Did you raise this claim on direct appeal to the California Court of Appeal? Yes.

3. Did you raise this claim in a Petition for Review to the California Supreme Court? Yes.

4. Did you raise this claim in a habeas petition to the California Supreme Court? Not yet, but Petitioner plans to file a Petition raising all the claims in this Petition soon.

E. Ground Five – The Prosecution Intentionally Misled the Jury, the Court, and the Defense

Mr. Rabb's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because Mr. Rabb's constitutional rights to due process and to be free from cruel and unusual punishment were denied by the prosecution's misconduct.

The exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

1. Supporting Facts

The prosecution and police withheld critical information about the victims from the court, the jury, and the defense. At Mr. Rabb's trial, the jury and the trial court were affirmatively led to believe that the alleged victims were not gang members. Less than one minute into the prosecutor's opening argument, he told the jurors:

> Defendant Damen Rabb, wearing a light blue shirt, he gets out of the Camry, walks over to Maurice Farmer, produces a handgun, a revolver, points it at Maurice Farmer and says where are you from, which is how gang members ask what gang you belong to, what gang are you from.
>
> Maurice Farmer tells Mr. Rabb, me and Deshawn [*sic*] Chappell, we are not in a gang. We are not gang members.

(2 RT 925.)

They are gang members. At the very latest, police detectives knew on June 12, 2006, the day that De'Shawn Chappell was interviewed by Detectives Gersna and Fanning, that De'Shawn Chappell and Maurice Farmer were members of the "Five Deuce Crips." It was almost a full year later on June 8, 2007 (the same day that Messrs. Chappell and Farmer told the trial court that they would be invoking the Fifth Amendment and not testifying), that the prosecution led the jury to believe that they were not gang members. Petitioner was convicted five days later.

The evidence of gang membership is credible because it emanates from Mr. Chappell's confession, as recounted in the R&R in his case. (*See* Exh. 13, at 2-3.) Messrs. Farmer and Chappell were hardened gang members who, prior to the murder of Eliseo Reyes on August 27, 2005 -- three weeks before the September 19, 2005 carjacking at issue in this habeas -- had been riding around that day looking for trouble. (*Id.*) Mr. Reyes was not even their first victim.

> Near the intersection of 58th and Normandie, Farmer told Milligan to stop the car. Farmer put a gun in his pants, got out of the car, and confronted a man on the street. When the man said he was from the "five-eight" neighborhood, Farmer said, "Fuck that. Give me all your shit." Farmer took the man's phone and iPod and returned to the car.
>
> On their way back to [Chappell's] grandmother's house, they spotted Eliseo pushing his ice cream cart down the street. Farmer suggested robbing him, and [Chappell] said "All right." Milligan stopped the car and told Farmer to shoot Eliseo. Farmer refused, and Milligan threatened him, saying: "Fuck you then. I should shoot you." Milligan then hopped out of the car, walked up to Eliseo, said "What you got in your pocket?," and shot him before Eliseo could respond. Eliseo fell onto his back in the street.
>
> Farmer and [Chappell] got out of the car, ran over to Eliseo, and started going through his pockets. Farmer found money and credit cards in Eliseo's front pockets. [Chappell] lifted Eliseo's body up so he could look through his back pockets. Eliseo was making gasping or groaning sounds, but [Chappell] did not pay any attention because he just wanted to find something to steal and "get out of there." [Chappell] ran back to the car first, unlocked Farmer's door, and then called to his companions to "Come on." Milligan and Farmer returned to the car and they sped away.

(Exh. 13, at 2-3. Internal citations omitted.)

Based on the gang activities that Mr. Farmer and Mr. Chappell were involved in, it is highly unlikely that these men would have experienced the fear that the officers claimed in support of utilizing the excited utterance exception. Accordingly, their statements should not have been permitted under that hearsay exception.

Following the prosecutor's affirmative, uncorrected, false representation to the jury that the victims were not gang members, Sgt. Banuelos, the only testifying

witness tying Mr. Rabb to the carjacking and robbery, misled the jury in almost the exact same way.

> Q: What did Mr. Farmer tell you the man with the blue shirt did next?
>
> A: He asked them where they were from, which is street vernacular for asking somebody what gang they are from.
>
> Q: Then what happened?
>
> A: The victim stated that he was not a gang member.

(3 RT 1291.)

When the prosecutor and the only witness linking Mr. Rabb to the crime misled the jury in almost identical ways by failing to correct what they knew to be false, they violated *Mooney v. Holohan* and its progeny by deliberately deceiving the trial court and the jurors through the presentation of known false evidence. Moreover, "the false testimony could . . . [reasonably] . . . have affected the judgment of the jury." *Giglio*, 405 U.S. at 153-54; *Napue*, 360 U.S. at 271.

The victims' statements brought in through Sgt. Banuelos and Officer Ashley, accounted for two of the five pieces of evidence that the California Court of Appeal cited in their harmless error analysis. *Rabb*, 2010 Cal. App. Unpub. LEXIS 1007, at *34-36 (referencing Maurice Farmer's descriptions of the assailant and his statement that the assailant was carrying a blue steel revolver).

2. Supporting Law

Trial counsel's independent discovery of the gang membership does not absolve the prosecution of their legal duty to disclose impeachment evidence. In *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court stated:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112[, 55 S. Ct. 340, 79 L. Ed. 791] (1935), the trial court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213[, 63 S. Ct. 177, 87 L. Ed.

> 214] (1942). In *Napue v. Illinois*, 360 U.S. 264[, 79 S. Ct. 1173, 3 L. Ed 2d 1217] (1959), we said, "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269. Thereafter *Brady v. Maryland*, 373 U.S. [83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." . . . When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue*, *supra*, at 269. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." *United States v. Keogh*, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady*, *supra*, at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Napue*, *supra*, at 271.

Giglio, 405 U.S. at 153-54.

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.

Napue, 360 U.S. at 269-70.

Two decades ahead of *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the Court added, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 U.S. at 154. *Kyles* expanded the obligation. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437.

The duty to disclose impeachment evidence is ongoing and extends to all stages of the judicial process. *Smith v. Roberts*, 115 F. 3d 818, 820 (10th Cir. 1997), citing to *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S. Ct. 989, 94 L. Ed 2d 40 (1987). Furthermore, the district attorney's office was required to disclose the exculpatory material without a discovery request. The prosecution had a constitutional duty to

"disclose *Brady* material even when the accused does not specifically request it." *United States v. Johnson*, 581 F. 3d 320, 331 (6th Cir. 2009), citing to *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed 2d 342 (1976).

Where the prosecution is aware of exculpatory or impeaching material and the defense learns of the information independently, but fails to do anything with that critical knowledge, there is both prosecutorial misconduct and ineffective assistance of counsel. "The government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false. Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). The prosecution's duty to disclose *Brady* material stands independent of the defendant's knowledge. *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995).

Here, trial counsel knew that Mr. Chappell had admitted to being a gang member, but as documented above, could not competently figure out how to get his statements before the jury despite an applicable hearsay exception. Taking advantage of that fact, the prosecutor misled the jury and Sgt. Banuelos furthered the mispresentation. When "defense counsel is unable to present evidence to correct false testimony — whether because of ignorance of the true facts or a judicial limitation — the government's *Napue* obligations come to the forefront." *Longus v. United States*, 52 A.3d 836, 849 n.24 (D.C. 2012).

3. Conclusion

The prosecutor not only failed to fulfill his constitutional obligations, he actively misled the trial court and the jury by both directly saying in his opening argument that the victims were not gang members, and by eliciting false testimony that they were not from Sgt. Banuelos. (3 RT 1291.) Accordingly, the prosecution committed misconduct in violation of long standing United States Supreme Court precedent.

4. **Did you raise this claim on direct appeal to the California Court of Appeal?** No.

5. **Did you raise this claim in a Petition for Review to the California Supreme Court?** No.

6. **Did you raise this claim in a habeas petition to the California Supreme Court?** Not yet, but Petitioner plans to file a Petition raising all the claims in this Petition soon.

F. Ground Six – Cumulative Error

Mr. Rabb's conviction, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because Mr. Rabb's constitutional rights to due process and to be free from cruel and unusual punishment were denied by cumulative error.

The exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

1. Supporting Law

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). As explained in *Parle*, the "cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Id*. (citing *Chambers*, 410 U.S. at 290 n.3); *see also Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

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"[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." *Parle*, 505 F.3d at 927 (quoting *Chambers*, 410 U.S. at 294, 302-03).

In evaluating a due process challenge based on the cumulative effect of multiple trial errors, the trial court must determine the relative harm caused by the errors. If the evidence of guilt against Mr. Rabb were otherwise overwhelming, the errors would be considered "harmless" and the conviction would generally be affirmed; however, the evidence of guilt herein is not only far from overpowering, the evidence of actual innocence is substantial. (*See* Sections I, VI(A), and VI(B)(9), *supra*, incorporated herein by reference as though set forth fully herein.)

The failings of the State's case must be considered because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. *See also Glasser v. United States*, 315 U.S. 60, 67, 62 S. Ct. 457, 86 L. Ed. 680 (1942), *superseded by statute on other grounds* ("[Where] the scales of justice may be delicately poised between guilt and innocence . . . error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.").

As the Ninth Circuit held in *Thomas v. Hubbard*:

> in analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the trial court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.

273 F.3d 1164, 1178 (9th Cir. 2001) (overruled in part on other grounds) (internal quotation marks omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)); *see also Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000)

(noting that cumulative error applies on habeas review); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984), *cert. denied* 470 U.S. 1050, 105 S. Ct. 1747, 84 L. Ed. 2d 812 ("Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.").

Mr. Rabb's trial suffered from a host errors. While several of these errors merit relief on their own, taken together there can be no confidence in this verdict. As described in Sections VI(B)(4)(b) and VI(B)(9), incorporated herein by reference as though set forth fully herein, the case against Mr. Rabb was weak and the jury recognized that fact in the length of their deliberations and their requests for two readbacks. In a case which appears to have been a close call among the jurors, the effect of the errors cannot be harmless.

The combined effect of the errors compel a reversal of the conviction and sentence. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (reversing death judgment because of cumulative prejudicial effect of wrongful exclusion of evidence, faulty jury instruction, and counsel's failure to present mitigating evidence to humanize the defendant in a case where defendant murdered thirteen people). *Daniels v. Woodford*, 428 F.3d at 1214 (affirming penalty relief because of cumulative error).

2. Did you raise this claim on direct appeal to the California Court of Appeal? No.

3. Did you raise this claim in a Petition for Review to the California Supreme Court? No.

4. Did you raise this claim in a habeas petition to the California Supreme Court? Not yet, but Petitioner plans to file a Petition raising all the claims in this Petition soon.

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9. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons:

Grounds One, Two, Three, Five, and Six were not previously exhausted in the California Supreme Court because Mr. Rabb was operating *pro se* and was not able to obtain evidence of either his innocence or the misinformation spread by the witnesses and the prosecution at trial. Mr. Rabb intends to file an exhaustion petition containing all of these claims.

10. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction? Yes.

If so, give the following information for each such petition:

a. (1) Name of Court: United States District Court for the Central District of California;

(2) Case number: 2:11-cv-05110-JAK-JPR;

(3) Date filed: June 17, 2011;

(4) Grounds raised:

(a) The trial court violated Petitioner's constitutional right to confront the witnesses against him when it allowed the two victims of the robbery and carjacking to invoke their Fifth Amendment privilege against self-incrimination and refuse to testify at Petitioner's trial without first requiring them to be questioned about it under oath.

(b) The trial court violated Petitioner's right to confront witnesses when it allowed a police officer to testify to out-of-court statements made to him by the victims 15 minutes after the robbery and carjacking.

(c) Petitioner's Eighth and Fourteenth amendment rights were violated when the trial court sentenced Petitioner separately for one count of carjacking and one count of robbery, in violation of California Penal Code sections 215(c) (precluding multiple punishments for "the same act" constituting both robbery and carjacking) and 654 (precluding multiple punishments for the same act or course of conduct).

(d) Petitioner's Sixth and Fourteenth amendment rights were violated when the trial court denied the defense's request for additional funds for an eyewitness identification expert, thus precluding the expert from testifying at trial.

(5) Date of decision: October 25, 2012;

(6) Result: Dismissed with prejudice;

(7) Was an evidentiary hearing held? No.

11. <u>Do you have any petitions now pending (i.e. filed but not yet decided) in any state or federal court with respect to this judgement of conviction?</u>

No, but Mr. Rabb intends to file an exhaustion petition in state court.

12. <u>Are you represented by counsel?</u> Yes.

If so, provide name, address and telephone number:

Brian M. Pomerantz
6351 Owensmouth Ave., Ste. 203
Woodland Hills, California 91367
Telephone: (323) 630-0049
Brian@habeascounsel.com

PRAYER FOR RELIEF

WHEREFORE, Damen Rabb prays that the Court:

1. After full consideration of the issues raised in this Petition, issue a writ of habeas corpus to the end that Mr. Rabb might be discharged from his unconstitutional confinement and restraint and relieved of his unconstitutional convictions and sentences;

2. Order Respondent to answer this Petition by specifically admitting or denying each allegation and claim herein;

3. Permit Mr. Rabb, who is indigent, to proceed without prepayment of costs and fees and grant him authority to obtain subpoenas without fees for witnesses and documents necessary to prove the facts alleged in this Petition;

4. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this Petition or any affirmative defenses presented by Respondent;

5. Grant Mr. Rabb the authority to obtain subpoenas for witnesses and documents;

6. Grant Mr. Rabb the authority to conduct discovery;

7. Permit Mr. Rabb to amend this Petition, if necessary; and,

8. Grant such other and further relief as may be appropriate and necessary to dispose of the matter as justice may require.

WHEREFORE, Petitioner, Damen Rabb, prays that this Court grant Petitioner the relief to which he may be entitled in this proceeding.

Respectfully submitted,

Dated: February 28, 2017

By: */S/ Brian M. Pomerantz*
BRIAN M. POMERANTZ
Attorney for Damen Rabb

Petitioner’s Appendix X

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

28 USCS § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [*28 USCS § 2255*].

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

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

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

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

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

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

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

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

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

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.