No. _____

IN THE

Supreme Court of the United States

MARLON DARREL EVANS,

Petitioner,

v.

AMY MILLER, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARLON EVANS Petitioner-Appellant, v. AMY MILLER, Warden, Respondent-Appellee.	No. 13-55087 D.C. No. 2:98-cv-08536-WDK-MLG **MEMORANDUM**[*]

Appeal from the United States District Court
for the Central District of California
William D. Keller, Senior District Judge, Presiding

Argued and Submitted December 11, 2020
Pasadena, California

Before: N.R. SMITH and LEE, Circuit Judges, and KENNELLY,[**] District Judge.
Partial Concurrence and Partial Dissent by Judge KENNELLY

Marlon Evans appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas petition. He also asks us to remand his case to the district court for an evidentiary hearing on the viability of his "actual innocence" and *Brady* claims. We

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253. We affirm the judgment of the district court and deny Evans's motion for remand.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we review de novo a district court's denial of a habeas petition. *See Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). But de novo review of claims already adjudicated on the merits by a state court are permitted only where the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Here, the California Supreme Court summarily denied Evans's due-process and ineffective-assistance-of-counsel claims. Therefore, as to these issues, Evans "can satisfy the 'unreasonable application' prong of § 2254(d)(1) only by showing that 'there was no reasonable basis' for the California Supreme Court's [summary] decision." *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). Thus, we "must determine what arguments or theories could have supported the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]."

Id. The California Court of Appeal also denied Evans's misjoinder-of-charges claim in a reasoned opinion, after which the California Supreme Court denied review without comment. As to the misjoinder-of-charges claim, we "'look through' the [California Supreme Court's] unexplained decision and presume that the unexplained decision adopted the same reasoning" as the California Court of Appeal. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1992 (2018). Thus, absent a showing the California Supreme Court relied on different grounds, we review "the specific reasons given by the state court and defer[] to those reasons if they are reasonable." *Id*.

1. Due Process: The California Supreme Court summarily denied Evans's claim that identification procedures employed by the police and prosecution with witness Leroy Martin violated his due process rights. Evans argues that the identification procedures were unnecessarily suggestive because: (1) he was the only person in the arrays whose photo appeared twice; (2) the picture of him with a beanie was chosen to ensure an identification consistent with the witness's statement; and (3) only three of the "suspects" in the photo array wore beanies. He argues that this parallels the unconstitutionally suggestive identification procedures in *Foster v. California*, 394 U.S. 440, 442 (1969).

We cannot say that the "state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing

law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Unlike in this case, *Foster* involved two suggestive lineups – including one in which the petitioner stood out because of his height and clothing – and a one-on-one confrontation, which "made it all but inevitable that [the witness] would identify [the] petitioner. *Foster*. 394 U.S. at 442-43. *See also Stovall v. Denno*, 388 U.S. 293, 302 (1967) (describing one-on-one confrontations as "widely condemned"). Evans's photo arrays contained similar-looking individuals, and the lineup only contained men of similar height, build, and appearance. Evans's identification procedures do not resemble any of the examples provided by the Supreme Court in *United States v. Wade*, 388 U.S. 218, 233 (1967) or any of the Court's other decisions. Consequently, fairminded jurists, like the members of the California Supreme Court, could disagree as to the suggestiveness of the identification procedures.[1]

2. Ineffective assistance of counsel: The district court did not err in denying Evans's ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1983). To prevail, Evans must prove that the performance of his trial counsel was deficient, and that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687. He cannot demonstrate either. As noted, the California Supreme

[1] Because there is a reasonable basis to conclude that the identification procedures were not impermissibly suggestive, we need not address Evans's additional due process arguments.

Court's denial of Evans's suggestive identification claim was not unreasonable. Thus, the California Supreme Court's denial of Evans's ineffective assistance of counsel claim was also not unreasonable. The state court could have reasonably concluded that the trial counsel's decision not to object to the identification procedures (used by the police with Martin) was not unconstitutionally deficient, because the procedures were not "impermissibly suggestive" or that "under the totality of the circumstances, the identification was . . . reliable." *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (internal quotation marks omitted) (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). As this court put it, a lawyer's "failure to make a futile motion does not constitute ineffective assistance of counsel." *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994).

Additionally, both of the prosecution's witnesses, Leroy Martin and Clarence Lavan, inconsistently described the suspect, including at trial. At trial, Evans's counsel could have made the strategic choice to rely on these potential inconsistencies, rather than contest the identification process. A fairminded jurist could agree with the tactical merits of this approach, further undermining Evans's claim.

Inconsistences tend to create doubt, a defense lawyer's best friend. Certainly, counsel could have made the strategic choice to challenge the identification process. As the dissent notes, a good lawyer might have made a challenge. But counsel could

have instead decided to rely on the inconsistencies between Martin's and Lavan's accounts to introduce reasonable doubt about whether Evans was the shooter that the latter saw. Indeed, by introducing the two accounts, which shared only a description of the suspect's hat and pants, Evans's counsel gave the jury reason to second guess the credibility of the witnesses' identifications.

Ultimately, a habeas petition is not the appropriate vehicle to second-guess litigation strategy. Instead, we apply the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 688. Hence, the only question properly before us is whether declining to contest an identification process to introduce discreditable witnesses' testimony can be "the result of reasonable professional judgment." *Id*. at 690. We conclude that it can.

Finally, even if trial counsel's failure to object to the identification procedures was deficient, Evans failed to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694. Notably, Martin was one of two eyewitnesses to identify Evans at trial, and the other eyewitness, unlike Martin, identified Evans as the shooter. Thus, there is not a "reasonable probability" that the absence of Martin's testimony would have resulted in a different outcome. *See Harrington*, 562 U.S. at 104, 112 ("The likelihood of a different result must be

substantial, not just conceivable"). *See also Premo v. Moore*, 562 U.S. 115, 124, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) (identifying "the relevant question under *Strickland*" as whether a "competent attorney would think a motion . . . would have failed," and explaining that, if "suppression would have been futile . . . his representation was adequate under *Strickland*, or at least. . . it would have been reasonable for the state court to reach that conclusion").

3. Misjoinder of charges: The state court's rejection of Evans's misjoinder-of-charges claim was not contrary to, or an unreasonable application of, federal law. The California Court of Appeal considered, and rejected, Evans's misjoinder-of-charges claim in an opinion relying on state and federal law. *See also Collins v. Runnels*, 603 F.3d 1127, 1132 (9th Cir. 2010) (explaining that the Supreme Court has not clearly established that misjoinder could rise to the level of a constitutional violation" (citing *United States v. Lane*, 474 U.S. 438 (1986)). The Court of Appeal reasoned that, because the jury did not convict Evans for attempted murder, joinder did not prevent the jury from weighing the evidence separately.

The state court also applied the correct prejudice analysis under federal law. *See Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) ("There is no prejudicial constitutional violation unless 'simultaneous trial of more than one offense . . . actually render[ed] petitioner's state trial fundamentally unfair and hence, violative of due process"). Likewise, the California Court of Appeal considered the

appropriateness of the joinder at multiple phases of the trial. Nevertheless, it found no evidence of prejudice.

4. Motion for remand: Under 28 U.S.C. § 2106 a "court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." But a motion for indicative ruling and relief from judgment cannot be appealed. *See Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir. 2000) ("A district court order declining to entertain or grant a Rule 60(b) motion is a procedural ruling and not a final determination on the merits . . . [b]ecause there is no final judgment on the merits, the underlying issues raised by the 60(b) Motion are not reviewable on appeal") (citation omitted). Here, Evans filed a Rule 60(b) motion with the district court submitting new evidence and asserting his innocence. Evans's § 2601 motion is nothing more than an improper attempt to appeal the 60(b) ruling. Without an appealable final judgment on the merits, we lack jurisdiction to entertain Evans's motion.

Further, Evans cannot resort to the "actual innocence gateway" as established in *Schlup v. Delo*, 513 U.S. 298 (1995), because the district court already heard Evans's claims and evidence. *See Detrich v. Ryan*, 740 F.3d 1237, 1248 (9th Cir.

2013) (recognizing "[a] standard practice . . . to remand to the district court for a decision in the *first instance*") (emphasis added). *See also Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding because the district court "failed to address petitioner's actual innocence, perhaps because [he] failed to raise it initially in his § 2255 motion"); *Majoy v. Roe*, 296 F.3d 770, 775-76 (9th Cir. 2002) (remanding because the district court failed to consider petitioner's properly raised *Schlup* claim). There has been no change in controlling law, and, without one, Evans cannot relitigate his petition. *Id*. at 1242.

AFFIRMED.

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U.S. COURT OF APPEALS

Evans v. Miller, No 13-55087
KENNELLY, District Judge, concurring in part and dissenting in part:

Marlon Darrel Evans was sentenced to life imprisonment for a quadruple murder that there is a very good chance he did not commit. There was no confession or physical evidence connecting him with the crime. Evans's conviction was based in significant part on the testimony of an eyewitness who said he was "75 percent sure" that Evans was a person he saw at the crime scene—and not with a weapon. Despite this conceded uncertainty and evidence of suggestive tactics by the police, Evans's trial counsel did not move to exclude the witness's identification. The majority holds that the state court acted reasonably in rejecting Evans's claim of ineffective assistance of counsel based on this failure. I respectfully disagree. Any reasonable criminal defense attorney would have challenged the admissibility of this testimony. Because I believe that the California Supreme Court's rejection of this claim was unreasonable, I would reverse.

BACKGROUND

A. Offense conduct and police investigation[1]

[1] These facts are drawn from the opinion of the California Court of Appeal and from the state trial court transcripts, which are presumed correct. *See Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008).

On December 13, 1992, Henry Broomfield and Donta Bavis, members of the Six Eight faction of the Crips gang, drove into a Los Angeles gas station located in the territory of the Six Deuce faction, with which the Six Eights were feuding. Evans was a Six Deuce. Several "regulars" were at the gas station, including Leroy Martin and Clarence Lavan. Martin saw a man walking around before Broomfield and Bavis arrived; he said the man walked to the gas station from a nearby alley, stood in front of the cashier's window, surveyed the scene, and returned to the alley.

Lavan then saw a man with an AK-47 rifle begin to shoot at Bavis's car. Bavis got into the car and sped off with Bloomfield as the man continued shooting. Bavis was injured, and Bloomfield was killed, as were three bystanders. The man with the AK-47 fired at Lavan, but he was not injured. Lavan saw the man run from the gas station to a burgundy SUV that was in an alley.

Several hours after the shooting, Martin provided police an account of what he had seen. Weeks later, Martin was shown several photo arrays. Two of them (the first and sixth) included Evans's photo; Evans was the only person whose photo appeared twice. Martin did not identify Evans's photo from the first array. He did choose Evans's photo from the sixth array, which showed Evans wearing a beanie, saying he was "75 percent sure" that Evans was the person he had seen. Later, during a live lineup, Martin failed to identify Evans and, on his witness

admonition card, wrote "none" when asked for the position of the suspect. However, in the remarks section of the card, Martin wrote that "number five," Evans, "came the closest" to the man he observed at the gas station. At trial, Martin stated that he didn't identify Evans as the suspect because he didn't see Evans holding a gun.

Police interviewed Lavan and recorded the interview. Lavan was also shown photo arrays. In one of them, Evans was wearing a beanie (Lavan told officers that the shooter wore a hat of this type). After viewing the first array, Lavan identified Evans as the shooter, but then hedged, saying that he "looks like the guy." (Lavan has since recanted his identification of Evans.) He asked the detectives if they had "one with a beanie"; one detective said yes. After Lavan expressed concern for his and his family's safety, authorities agreed to relocate them and provide other assistance. Later in the same interview, officers showed Lavan another array in which all six of the men were wearing something on their heads, three (including Evans) with beanies. Lavan chose Evans's photo, saying that he didn't know if this photo and the earlier photo were of "the same people" and that he "couldn't identify him without the hat."

B. Evans's Trial

Lavan was unavailable to testify at Evans's trial, so his testimony from the preliminary hearing, in which he identified Evans as the shooter, was read into the

record. This included significant impeachment based on the circumstances recounted above.

Martin identified Evans as the man he had seen at the gas station (without a gun). He stated that he did not see the shooter and was only 75 percent sure that he saw Evans that evening. Martin testified that he wrote "none" on his lineup identification card because "I wasn't a hundred percent sure that that was him. I said he looked like him." "I seen someone that looked like him. I don't know if that was him or not." When trial counsel asked Martin if he ever saw a weapon in the defendant's hands, Martin repeated, "No, no, no. No, no, I didn't."

The jury found Evans guilty of two counts of first-degree murder, two counts of second-degree murder, and one count of possession of a short-barreled rifle. He was sentenced to life imprisonment without possibility of parole, plus 108 years.

C. Post-conviction history

Evans appealed his conviction to the California Court of Appeal, which affirmed his conviction. His petition for certiorari to the California Supreme Court was denied. State collateral review was similarly unhelpful to him. Next, Evans filed a petition for writ of habeas corpus with the California Supreme Court, which was denied.

In 1998, Evans filed a habeas petition in federal court, which a district judge dismissed because it contained both exhausted and unexhausted claims. His habeas petition was reinstated by the district court in October 2011 due to changes in Ninth Circuit precedent. The district court denied the petition with prejudice in late 2012. Regarding Evans's ineffective-assistance-of-counsel claim, the district court held that the trial counsel was not ineffective because Martin's in-court identifications weren't tainted and a motion to suppress them would have been futile. This court granted a certificate of appealability and appointed counsel to represent Evans. Counsel have thoroughly reinvestigated the case from top to bottom.

DISCUSSION

As the majority states, issuance of a writ of habeas corpus on a claim already adjudicated on the merits by a state court is allowed only where the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

I focus here on Evans's Sixth Amendment claim of ineffective assistance based on his trial counsel's failure to challenge the admission of Martin's

identification. On a § 2254 petition, judicial review of a claim under *Strickland* is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* (internal quotation marks omitted).

Because the California Supreme Court offered no reasons for denying Evans's claim, we must "conduct an independent review of the record to determine what arguments or theories could have supported" its decision. *See Bemore v. Chappell*, 788 F.3d 1151, 1161 (9th Cir. 2015) (alterations accepted) (internal quotation marks omitted). And because Evans argues that the state court's decision was an unreasonable application of Supreme Court precedent, we must also determine whether "the state court's application of Supreme Court precedent to the facts of his case was not only incorrect but objectively unreasonable." *Larson v. Palmateer*, 515 F.3d 1057, 1061 (9th Cir. 2008) (internal quotation marks omitted).

To establish an ineffective assistance claim, a habeas petitioner must demonstrate that the attorney's performance was deficient and that this prejudiced his defense. *Andrews v. Davis*, 944 F.3d 1092, 1108 (9th Cir. 2019). "The

ultimate focus . . . is the fundamental fairness of the proceeding whose result is being challenged." *Id.* (internal quotation marks omitted).

A. Ineffective Assistance—Counsel's Performance

To meet the performance element, the petitioner must establish that counsel's representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; . . . the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted).

The Supreme Court has long recognized that the Due Process Clause requires the exclusion of evidence of a pretrial identification of the defendant when, based on the totality of the circumstances, the identification procedures: (1) were both "suggestive and unnecessary"; and (2) "created a substantial likelihood of misidentification." *See Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012). (internal quotation marks omitted); *see also Neil v. Biggers*, 409 U.S. 188, 198 (1972) ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.").

This court has recognized that "[w]hen faced with a client who has been identified in an illegal line-up, most defense attorneys would challenge the admission of any evidence related to it." *Tomlin v. Myers*, 30 F.3d 1235, 1237–38 (9th Cir. 1994)[2]; *see also Thomas v. Varner*, 428 F.3d 491, 502 (3d Cir. 2005) (holding that trial counsel's failure to move to suppress pre-trial identification was unreasonable and lacking in sound trial strategy). "After all, a defendant arguably has everything to gain and nothing to lose in filing a motion to suppress, especially one involving an identification by the sole eyewitness to the crime." *Tomlin*, 30 F.3d at 1238 (alterations accepted) (citations and internal quotation marks omitted).

With the above framework in mind, even applying the "strong presumption" that *Strickland* requires, I cannot think of a single plausible strategic basis that could support Evans's counsel's failure to object to the admission of Martin's identification. This is especially so because the trial essentially "hinge[d] on an eyewitness's testimony." *See id.* I disagree with the majority's contrary conclusion because, in my view, it is premised upon a number of erroneous determinations.

[2] "While Supreme Court precedent is the only authority that is controlling under AEDPA, [this court views its] case law as persuasive authority for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law." *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) (internal quotations mark omitted).

To start with, the majority concludes that a motion by Evans's trial counsel to exclude Martin's pre-trial and in-court identifications would have been futile given that the state supreme court's summary rejection of the suggestive-identification claim was not unreasonable.[3] *See* Majority Op. 5, 7. This incorrectly elides two separate questions. The fact that there is room for fair-minded jurists to disagree about the admissibility of Martin's identification does not mean that a motion to exclude the identification was futile, doomed to fail, or anything of the kind. A federal court's determination that a state court decision was not unreasonable is *not* a determination of the merits; it's one step removed. Thus, the fact that we have rejected Evans's suggestive-identification-procedures claim cannot, on its own, provide the basis for rejecting the ineffective assistance claim.

Next, the majority posits that "Evans's counsel could have made the strategic choice to rely on [ ] potential inconsistencies [between Martin's and Lavan's] identifications rather than contest the identification process" and that "[i]nconsistencies tend to create doubt, a defense lawyer's best friend." Majority Op. 6. There are two problems with this, each of which in my view undermines the majority's point.

[3] The district court offered similar reasoning.

First, the majority's hypothesis that counsel could have made a strategic choice not to seek exclusion of Martin's identification in favor of pointing out inconsistencies between that identification and Lavan's does not withstand scrutiny. It is certainly true that in cases like this one, where the state court never held a hearing or actually engaged with the merits of an ineffective assistance claim, a federal court reviewing a habeas corpus petition may (or must) attempt to hypothesize plausible strategic reasons why trial counsel acted or failed to act. But one would expect a hypothetical strategic reason to have some basis in the record. Here there is none: Evans's trial counsel *did not* argue inconsistencies between the two witnesses' descriptions to the jury. There was no mention of this point—none—in counsel's closing argument. It cannot possibly make sense to uphold a state court's ruling based on a hypothesized strategic choice that is affirmatively contradicted by the record.

Second, even if one disregards what I have just stated, and assuming there were meaningful inconsistencies between the witnesses' descriptions of the shooter, the failure of Evans's trial counsel to seek to exclude Martin's identification could not possibly have been a strategic choice based on "the result of reasonable professional judgment." *See Strickland*, 466 U.S. at 690. Aside from Martin's identification, the only evidence implicating Evans was preliminary hearing testimony by Lavan that was read into the record along with its

impeachment, and Evans's membership in a gang. Evans's trial counsel plainly realized this; he acknowledged to the jury that this case was "one obviously of identity," and he argued to jurors that Martin was mistaken.

If Evans's defense at trial was that he was wrongly identified, what tactical basis could there be not to challenge the identification and testimony of Martin, the only live witness who identified him? There is no question that such a motion would have been colorable: (1) Martin was only 75 percent certain that Evans was the man he saw; (2) detectives placed Evans's photo, and only his photo, in two separate arrays—with Martin identifying him only in the second array; (3) the picture Martin chose was taken so that it would match a description of the shooter (who wore a beanie); and (4) at the lineup, when Martin was seeing Evans for the third time during an identification procedure, he was able to say only that Evans came closest to the man he had seen before the shooting. Evans and his counsel had "everything to gain and nothing to lose in filing a motion to suppress." *See Tomlin*, 30 F.3d at 1238 (alterations accepted) (citations and internal quotation marks omitted).

The majority says that "[i]nconsistencies tend to create doubt, a defense lawyer's best friend." Majority Op. 6. With respect, this misstates the point. The real issue is how doubt is shown. The majority seems to be saying that having two identification witnesses with some inconsistencies in their descriptions is somehow

better for a defendant than a single identification witness whose testimony, as in this case, can be impeached. I cannot imagine a reasonably competent defense lawyer who would agree with that. If defense lawyers have a best friend, it is less or no evidence on a critical point, not inconsistencies.

* * *

The *Strickland* reasonableness determination is case-specific. I do not believe there was or is a reasonable strategic basis *in Evans's case* for not challenging the admissibility of Martin's identification. Without this, "the failure to bring to the court's attention a major constitutional error in the prosecution's case is not the product of reasonable professional judgment." *See Tomlin*, 30 F.3d at 1239.

B. Ineffective Assistance—Prejudice

To prove prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

I believe there is a reasonable probability a motion to suppress would have prevailed had trial counsel filed one. An identification procedure is suggestive where it "[i]n effect . . . sa[ys] to the witness '*This* is the man.'" *Foster v.*

California, 394 U.S. 440, 443 (1969). At least two procedures would have supported a challenge to Martin's identification as impermissibly suggestive: (1) the detectives' placement of Evans's photo, and only his photo, in two separate arrays, and (2) the picture Martin chose was taken so that it would match a description of the shooter (who wore a beanie). Both of those procedures are arguably similar to tactics deemed impermissible in *Foster*. *See id.* at 442–43. The State argues that Martin's identification would survive a totality-of-the-circumstances inquiry, but two facts make that unlikely: (1) Martin was only ever 75 percent certain when he saw Evans's photo with the beanie and could not make a positive identification when he saw Evans in person at the lineup; and (2) the length of time between the commission of the crime and Martin's identification.

Of course, "reasonable probability" in this context is more than the likelihood that Evans would have succeeded on the motion to suppress Martin's identification; it also concerns the likelihood that the trial would have come out differently. Evans clears this bar too. Although Martin was not the prosecution's sole witness, this case arguably hinged on his identification and related testimony. Again, Lavan did not testify live at Evans's trial. It was Martin the jury saw questioned, Martin whose credibility they were able to evaluate based on first-hand observation, and Martin whose testimony was the only evidence to corroborate the cold transcript of Lavan's preliminary hearing testimony. And in addition to

hearing Lavan's testimony from the preliminary hearing, the jury heard his admission of doubts during his recorded interview and the promises authorities made to obtain his cooperation. With all this in mind, I agree with Evans that, absent Martin's corroborating testimony, there is a reasonable probability that one or more jurors would have had reasonable doubt of Evans's guilt.

CONCLUSION

For the foregoing reasons, I would hold that the California Supreme Court unreasonably applied clearly established federal law in concluding that Evans's counsel was constitutionally adequate. I concur with the majority in all other respects.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
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Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 28 2021

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

MARLON DARREL EVANS,

Petitioner - Appellant,

v.

AMY MILLER, Warden,

Respondent - Appellee.

No. 13-55087

D.C. No. 2:98-cv-08536-WDK-MLG
U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered April 06, 2021, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

FILED

MAY 30 2014

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARLON DARREL EVANS, Petitioner - Appellant, v. GEORGE GALAZA, Respondent - Appellee.	No. 13-55087 D.C. No. 2:98-cv-08536-WDK Central District of California, Los Angeles ORDER

Before: CANBY and BEA, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issues: (1) whether the identification procedures by which Leroy Martin identified appellant were unduly suggestive in violation of appellant's due process rights, (2) whether trial counsel was ineffective in failing to object to the aforementioned identification procedures, and (3) whether appellant's constitutional rights were violated when the trial court allowed consolidation of the charges stemming from three separate incidents. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the $455.00 filing and docketing fees for

this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed Form CJA 23. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of Form CJA 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due August 11, 2014; the answering brief is due September 10, 2014; the optional reply brief is due within 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

The Clerk shall serve on appellant a copy of the "After Opening a Case – Pro Se Appellants" document.

If George Galaza is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARLON DARRELL EVANS,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 98-08536-WDK (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records on file, including the Motion for Written Indication That the Court Would Grant or Entertain a Motion for Relief from Judgment, the Report and Recommendation ("Report") and Supplemental Report and Recommendation ("Supplemental Report") of the United States Magistrate Judge, and other records on file. Further, the Court has engaged in a *de novo* review of those portions of both the Report and the Supplemental Report to which objections have been made.

Petitioner's objections are overruled for the reasons stated in the Report and the Supplemental Report. In addition, with regard to petitioner's objection that Rule 60(b)(1) is inapplicable because that provision governs "mistakes" while his motion alleges an error of law (Objections at 2 citing *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 941 & n.7 (9th Cir. 2007)), the alleged error here is properly characterized as a

mistake of law raised under Rule 60(b)(1). *See Best v. Deutsche Bank Nat'l Tr. Co.*, 2017 WL 6514676, at *3 (C.D. Cal. July 13, 2017) (Rule 60(b)(1) motions premised upon mistake include consideration of a claim that the judge "made a substantive mistake of law or fact in the final judgment or order.") (internal quotation marks and citation omitted)), *aff'd*, 724 F. App'x 600 (9th Cir. 2018); *Kavalan v. Clark*, 2013 WL 1820087, at *1 (N.D. Cal. Apr. 30, 2013) (analyzing under Rule 60(b)(1) a claim that the court made a mistake of law when it granted motions to dismiss and denied leave to amend). Moreover, the Report thoroughly analyzes petitioner's allegations under Rule 60(b)(6) and concludes that petitioner has failed to demonstrate that extraordinary circumstances exist warranting relief, a conclusion with which the Court also agrees.

The Court accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that (1) the Report and the Supplemental Report of the Magistrate Judge are accepted and adopted; and (2) petitioner's motion for an indication that the Court would entertain a Rule 60(b) motion is **DENIED**.

DATED: 12/18/2018

WILLIAM D. KELLER
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARLON DARRELL EVANS,

Petitioner,

v.

STUART SHERMAN, Warden,

Respondent.

Case No. CV 98-08536-WDK (AFM)

SUPPLEMENTAL REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Petitioner has filed a motion seeking an indicative ruling from the Court as to whether it would grant or entertain a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. On July 13, 2018, a Report and Recommendation ("R&R") was issued recommending that petitioner's motion be denied. On October 9, 2018, the District Judge granted petitioner's application to augment the record with Exhibit 42, a document recently obtained from the Los Angeles County District Attorney's Office. The District Judge also referred the motion back to the undersigned Magistrate Judge for consideration in light of the augmented record.

Exhibit 42 is a handwritten note, with the name Schunk at the top. Clarence Lavan's name appears underneath, followed by what may be a phone number, and

then the following notation: "WIFE WAS THERE IN CAR – NOT HIS BROTHER. WIFE KNOWS SUSPECT." (ECF No. 158-1.) Petitioner argues that the note constitutes additional exculpatory evidence of his actual innocence because (a) it contradicts Lavan's testimony that he was with his brother at the gas station and therefore further impeaches his credibility and (b) there is no evidence that Lavan's wife knew petitioner. (ECF No. 158.)

The new exhibit does not warrant a change in the recommendation of the R&R that petitioner's motion be denied. As discussed in the R&R, to the extent that petitioner's Rule 60(b) motion is properly characterized as relying upon newly discovered evidence or "fraud," it is untimely. *See* Fed. R. Civ. P. 60(c) (motion based upon new evidence or fraud must be brought no more than one year after entry of judgment).

Furthermore, the new exhibit does not alter the result of the analysis of petitioner's actual innocence claim. Liberally construed in petitioner's favor, the exhibit appears to be a note by Detective Schunk reflecting a statement made by Lavan. So construed, the note suggests the possibility that an additional basis for impeaching Lavan existed, that is, a prior inconsistent account about who was with Lavan at the time of the shooting. Like petitioner's other new evidence undermining Lavan's credibility, this exhibit fails to demonstrate petitioner is actually innocent. That is, considering Lavan's testimony positively identifying petitioner as the shooter, new evidence that Lavan gave varying accounts of the incident is not sufficiently exculpatory to alter the actual innocence analysis. Thus, even considering the new exhibit in combination with the other evidence already discussed in the Report, petitioner has not met his burden under *Schlup v. Delo*, 513 U.S. 298 (1995). For the same reason, petitioner has not shown extraordinary circumstances warranting relief under Rule 60(b)(6).

Petitioner also asserts that if Exhibit 42 had been available to the defense, it supports his claim of ineffective assistance of trial counsel, and if the exhibit was

withheld from the defense, it supports his claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Regardless of the merits of these assertions, they are not relevant to the question presently before this Court – namely, whether petitioner is entitled to relief from judgment under Rule 60(b)(6).[1]

RECOMMENDATION

For the foregoing reasons and the reasons set forth in the Report and Recommendation issued on July 13, 2018, IT IS RECOMMENDED that petitioner's motion for indication that the Court would entertain a Rule 60(b) motion be denied.

DATED: 10/11/2018

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

[1] The Court notes that petitioner has filed an application for leave to file a second or successive petitioner raising a *Brady* claim, and that application remains pending in the Ninth Circuit. *See* Ninth Circuit Case No. 14-72470. The new exhibit may be relevant to that application.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARLON DARREL EVANS,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 98-08536-WDK (AFM)

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the Court is petitioner's motion seeking an indicative ruling from the Court as to whether it would grant or entertain a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. (ECF No. 114.) Respondent has filed an opposition to the motion (ECF No. 134) and petitioner has filed a reply. (ECF No. 148.)

Petitioner's motion is brought pursuant to Rule 62.1 of the Federal Rules of Civil Procedure, which provides:

> [i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

For the following reasons, petitioner's motion should be denied.

BACKGROUND[1]

In 1995, petitioner was convicted of multiple counts of murder and sentenced to state prison for a term of life without parole. Petitioner's conviction became final on March 23, 1997. Consequently, petitioner had until March 23, 1998 within which to file a federal habeas corpus petition. *See* 28 U.S.C. § 2244(d)(1)(A).

Petitioner timely filed a pro se habeas corpus petition in this Court on January 5, 1998. Case No. CV98-0047-WDK(RC). Magistrate Jude Chapman issued a report and recommendation finding that petitioner had not exhausted his state remedies with respect to two of the six claims raised in the petition, and recommending that the petition be dismissed without prejudice. On April 24, 1998, the Court adopted the recommendation and dismissed the petition without prejudice. By that date, however, the statute of limitation had expired, so any future federal habeas corpus petition already would be time-barred.

On April 16, 1998, petitioner filed a pro se habeas corpus petition in the California Supreme Court raising the two claims Magistrate Judge Chapman had identified as unexhausted. That petition was denied on August 26, 1998.

Petitioner returned to federal court on October 20, 1998, filing the pro se petition in the present case. The petition raised the same six claims that were raised in petitioner's first petition. Adopting the report and recommendation of Magistrate

[1] Many of the following facts are already found in the Court's October 11, 2011 Order Granting Petitioner's Motion for Relief From Judgment. (ECF No. 64.) In the interest of making a complete record and in light of the significant passage of time, the Court restates them here.

Judge Chapman, the Court dismissed the petition as untimely on March 11, 1999. (ECF No. 16.)

From 1999 to 2005, petitioner filed multiple motions challenging the dismissal of his petition pursuant to Rule 60(b), requests for a certificate of appealability ("COA"), and appeals therefrom, but all were denied. (*See* ECF Nos. 20, 21, 32, 34, 36, 37, 49, 53.) Petitioner argued that the Court erred by dismissing his original petition without affording him an opportunity to withdraw his unexhausted claims and that it erred again by dismissing his second petition as untimely. The Court eventually admonished petitioner that he would be sanctioned if he continued to file frivolous motions under Rule 60(b), and the Ninth Circuit informed petitioner that no further filings would be accepted in his closed case. (ECF Nos. 37, 60.)

Petitioner returned to state court, filing numerous pro se habeas corpus petitions from 2005 to 2011, all of which were denied. (*See* ECF No. 112; ECF Nos. 132-1, 132-2, 132-5.)

In June 2011, petitioner filed another Rule 60(b)(6) motion in this Court, making the same arguments he had in prior motions. On October 11, 2011, the Court granted petitioner's motion, explaining that in light of Ninth Circuit cases decided after the Court's dismissal of both of petitioner's habeas corpus petitions, it was clear that the those dismissals were erroneous. (*See* ECF No. 60 at 5-6 [discussing *Jefferson v. Budge*, 419 F.3d 1013, 1014 (9th Cir. 2005) among other cases].) As explained in the October 11, 2011 order, the Court's erroneous failure to allow petitioner to withdraw his unexhausted claims and seek a stay constituted an extraordinary circumstance that entitled petitioner to equitable tolling. In considering the factors relevant to granting relief under Rule 60(b)(6), the Court found that petitioner had "demonstrated great diligence by raising the issue in a number of successive motions for reconsideration pursuant to Rule 60(b) in this Court and in applications for a COA in this Court, as well as by filing applications for a COA and petitions for rehearing in the Ninth Circuit." (ECF No. 60 at 8.) Accordingly, the case

was reopened, respondent was directed to file an answer, and petitioner was provided sixty days thereafter to file a reply. (ECF No. 60 at 9.)

Respondent filed an answer on April 10, 2012. (ECF No. 79.) Sixteen days later, petitioner filed a reply together with a motion for leave to amend his petition. (ECF Nos. 81, 82.) The motion sought to amend the petition to include a claim of ineffective assistance of counsel based upon trial counsel's failure to call alibi witnesses. Petitioner explained that he had been delayed in presenting his claim because his appellate counsel (a) failed to raise this claim despite petitioner's request that he do so and (b) withheld petitioner's only copies of the investigator's reports which included defense witnesses' statements and contact information. Petitioner requested appointment of counsel and an evidentiary hearing. (ECF No. 82.)

Magistrate Judge Goldman issued a report and recommendation on October 2, 2012, recommending that the petition be denied. The report also recommended that petitioner's motion for leave to amend be denied because his proposed new claims were time-barred. The report concluded that petitioner was not entitled to delayed accrual, equitable tolling, or the actual innocence exception of *Schlup v. Delo*, 513 U.S. 298 (1995). (*See* ECF No. 89 at 14-22.) The Court adopted Magistrate Judge Goldman's recommendation, and on December 12, 2012, judgment was entered denying the petition with prejudice. (ECF No. 94.)

Petitioner appealed. The Ninth Circuit granted a COA with respect to three claims presented in the petition: (1) whether the identification procedures by which Leroy Martin identified petitioner were unduly suggestive in violation of petitioner's due process rights; (2) whether trial counsel provided ineffective assistance by failing to object to the identification procedures; and (3) whether petitioner's constitutional rights were violated when the trial court allowed consolidation of charges stemming from three separate incidents. (ECF No. 102.) On July 1, 2014, the Ninth Circuit appointed counsel. (ECF No. 104.)

Petitioner's counsel sought a stay to investigate new claims and present them to the state court. On August 13, 2015, the Ninth Circuit granted that request. (ECF No. 108.) After state proceedings were completed, petitioner's counsel sought a second stay in order to bring the present motion seeking an indication whether this Court would reopen the judgment. On April 10, 2017, the Ninth Circuit granted the motion, staying the appellate proceedings pending this Court's determination of petitioner's motion. (ECF No. 117.)

PETITIONER'S CONTENTIONS

Petitioner contends that he is entitled to relief from the Court's denial of leave to amend because (a) newly discovered evidence of actual innocence meets the *Schlup* gateway; (b) newly discovered evidence shows that petitioner's state appellate counsel failed to investigate potential alibi witnesses, thereby entitling petitioner to tolling based upon *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013); (c) the federal proceedings were defective because the Court failed to appoint counsel, permit discovery, or hold an evidentiary hearing despite credible evidence of actual innocence; and (d) the State committed fraud on the Court by suppressing material exculpatory evidence and by representing to the state trial court that eyewitness Clarence Lavan was unavailable to testify at petitioner's trial. (ECF No. 114 at 41- 46.)

DISCUSSION

Rule 60(b) of the Federal Rules of Civil Procedure provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

A Rule 60(b) motion must be made within a "reasonable time," and a motion under subsections (b)(1) through (3) must be brought no more than one year of entry of judgment. Fed. R. Civ. P. 60(c).

I. Petitioner's Rule 60(b) Motion Would Be Untimely

Petitioner attempts to bring his motion under Rule 60(b)(6). Respondent argues that petitioner may not do so because his allegations fall within Rules 60(b)(1), (2), and (3) and would therefore be untimely. (ECF No. 134 at 41-43.)

As the Supreme Court has explained, Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," so long as the motion "is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988).

Petitioner alleges that the December 12, 2012 order denying him leave to amend was erroneous because newly discovered evidence demonstrates he is actually innocent, and therefore federal review of the claims would not be barred by the statute of limitation. Such an argument, however, falls squarely within Rule 60(b)(2). *See Azkour v. Little Rest Twelve*, 2017 WL 1609125, at *5 (S.D.N.Y. Apr. 28, 2017) (motion under Rule 60(b)(6) was, "in effect, an untimely motion under Rule 60(b)(2)" because it was based on "newly discovered evidence"), *appeal dismissed*, 2017 WL 6764231 (2d Cir. Aug. 28, 2017). The same is true with regard to petitioner's allegation that new evidence that his state appellate counsel provided

deficient performance, thereby rendering his proposed claims timely. Petitioner's allegation that this Court erred in denying him leave to amend without allowing factual development is a "mistake" and therefore falls within Rule 60(b)(1). *See Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982) ("mistakes" include errors of law). Finally, petitioner's allegation that the State committed fraud is based upon new evidence and therefore falls within both Rule 60(b)(2) and Rule 60(b)(3).

Because petitioner's allegations raise claims covered by the specific provisions of Rule 60(b)(1), (2), and (3), he cannot invoke Rule 60(b)(6). *See, e.g., Adams v. Hedgpeth*, 2016 WL 4035607, at *4 (C.D. Cal. June 8, 2016) ("new facts are an improper basis on which to seek Rule 60(b)(6) relief; a motion for relief from judgment on the ground of newly discovered evidence must be filed only pursuant to the more specific provision, Rule 60(b)(2).") (citing *Lafarge Conseils et Etudes, SA v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986) ("A motion brought under 60(b)(6) must be based on grounds other than those listed in the preceding clauses."). So construed, the motion would be untimely.

II. Even If Petitioner Could Proceed Under Rule 60(b)(6), He Would Not Be Entitled To Relief

A habeas corpus petitioner may invoke Rule 60(b)(6) to correct a defect in his initial 2254 proceedings if he shows "extraordinary circumstances justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 534-535 (2005) (internal quotation marks omitted). Rule 60(b)(6) is to be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (quoting *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006)). "A party moving for relief under Rule 60(b)(6) must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the action in a proper fashion." *Harvest*, 530 F.3d at 749 (internal citation and quotation

marks omitted). In determining whether extraordinary circumstances are present, a court may consider a wide range of factors, including the interest in finality of judgments, change in intervening law, the petitioner's exercise of diligence, delay between the finality of the judgment and the Rule 60 motion, the connection between the extraordinary circumstance and the judgment the movant wants reopened, and comity with state courts. *See Buck v. Davis*, 137 S. Ct. 759, 777–778 (2017); *Liljeberg*, 486 U.S. at 863-864; *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017); *Phelps v. Alameida*, 569 F.3d 1120, 1133-1135 (9th Cir. 2009). Petitioner points to the following as constituting extraordinary circumstances.

a. Newly Discovered Evidence of Actual Innocence

Petitioner argues that newly discovered evidence of his innocence warrants an exception to the statute of limitation, and therefore, it was error to deny him leave to amend based upon the untimeliness of his claims.

Citing *Brooks v. Yates*, 818 F.3d 532 (9th Cir. 2016), respondent argues that actual innocence cannot amount to an extraordinary circumstance under Rule 60(b)(6). In *Brooks*, the Ninth Circuit remarked that the petitioner had "failed to cite any cases where actual innocence was held to constitute an 'extraordinary circumstance' for Rule 60(b)(6) purposes." *Brooks*, 818 F.3d at 534. As one court in this district has explained, "it is unclear how a habeas petitioner's innocence of state court charges would 'prevent' him from proceeding with a federal habeas action 'in a proper fashion.'" *Knisley v. Vasquez*, 2013 WL 2154010, at *6 (C.D. Cal. May 15, 2013) (quoting *Latshaw*, 452 F.3d at 1103). That is, the relevant extraordinary circumstances for purposes of Rule 60(b)(6) are circumstances that occurred during the federal proceedings, not in the state court case. *Knisley*, 2013 WL 2154010, at *6 (citing *Community Dental Servs. v. Tani*, 282 F.3d 1164, 1169–1171 (9th Cir. 2002) (Rule 60(b)(6) relief from default judgment in federal proceeding warranted where gross negligence of movant's attorney caused judgment's entry).

The foregoing decisions suggest that actual innocence, standing alone, does not constitute an extraordinary circumstance because it is not a circumstance that precluded petitioner from raising his argument in this proceeding in a timely fashion. Indeed, petitioner raised an actual innocence argument in 2012, and Judge Goldman rejected it. Prudential concerns caution against reopening a judgment each time new evidence might strengthen an argument previously rejected the court.

Nevertheless, despite noting the absence of authority for the proposition, the Ninth Circuit in *Brooks* assumed arguendo that an adequate *Schlup* showing could support Rule 60(b)(6) relief, and then proceeded to analyze the sufficiency of the petitioner's showing. *Brooks*, 818 F.3d at 534. Courts in this district also have followed this course. *See Guerra v. Uribe*, 2014 WL 5493880, at *6 (C.D. Cal. Aug. 8, 2014), *report and recommendation adopted*, 2014 WL 5512944 (C.D. Cal. Oct. 28, 2014); *Knisley*, 2013 WL 2154010, at *6; *see also Satterfield v. Dist. Attorney Philadelphia*, 872 F.3d 152, 162-163 (3d Cir. 2017) (concluding that a proper demonstration of actual innocence "should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction"). Accordingly, the Court considers whether petitioner has made the requisite showing.

As the Supreme Court has held, a credible showing of actual innocence may excuse untimeliness under the AEDPA's statute of limitation. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). To be excused from the bar of untimeliness, a "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. The petitioner must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup*, 513 U.S. at 324. The court then "consider[s] all the evidence, old and new, incriminating and exculpatory," admissible at trial or not and, on this complete record, makes a

"probabilistic determination about what reasonable, properly instructed jurors would do." *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup*, 513 U.S. at 329).

In order to evaluate the adequacy of petitioner's actual innocence showing, the Court considers the entire record, including the evidence presented at petitioner's trial as well as the evidence that was not presented, no matter when it was discovered.

1. The Mobil Gas Station Shooting

On December 13, 1992, Henry Broomfield ("June Bug") and Donte Davis[2] ("Little Owl"), two members of the Six-Eight faction of the East Coast Crips gang, were shot multiple times with an AK-47 while at a Mobil gas station in Los Angeles. Broomfield was killed, as were three other bystanders. Davis survived with wounds to his shoulder and upper back. (Reporter's Transcript on Appeal ["RT"] 397-399, 406, 414-445, 487-489, 555-563, 843-845.)[3]

2. The Police Investigation

Petitioner, a member of the Six-Deuce faction of the East Coast Crips gang, was arrested less than twenty-four hours after the shooting, apparently in connection with an incident involving a shooting at police officers one month earlier. The police interviewed eyewitnesses who were at the gas station at the time of the Mobil gas station shooting.

Donte Davis

Davis told police that he did not see who shot him. He was shown photographic lineups, but was unable to identify anyone. (ECF No. 112-31 at 194.)

Clarence Lavan

Lavan was with his brother James at the gas station on the night of the murders.

---

[2] Many of the exhibits refer to victim as Donte Bavis. Petitioner refers to the victim as Donta Bavis. The Court uses the spelling of the victim's name as it appears in the Reporter's Transcript. (*See* RT 838.)

[3] An electronic copy of the Reporter's Transcript may be found at ECF No. 132-9 through ECF No. 132-13.

James was pumping air into the back tire of his red and black Dodge Charger. Meanwhile, Lavan walked to the cashier window for change. When he was returning to his brother's car, Lavan saw a man run into the lot shooting an automatic weapon. Lavan held his brother down to protect him. (RT 546-550, 555, 563.)

Detectives Peter Schunk and Gil Herrera interviewed Lavan on January 4, 1992, and that interview was recorded. (RT 603, 619; ECF No. 112-33 at 5.) During the interview, Detective Herrera told Lavan, "we know that you know who these people are that did this. … But if, you know – if – if you're afraid we can move you, okay? We can relocate you." (ECF No. 112-34 at 3.) Lavan told the officers that he saw the shooter and recognized him as a "youngster" from "Deuce." (ECF No. 112-34 at 3.) He said that the shooter was wearing a beanie. (ECF No. 112-34 at 4-5.) Lavan had previously seen the shooter in Deuce territory "when I went over there to buy weed…." (ECF No. 112-34 at 5.)

The officers showed Lavan a series of photographic lineups (also referred to as six-packs). Petitioner was in position one of Card A. (ECF No. 112-32 at 7.) Herrera began by directing Lavan to "look at the face on this guy. Look at the face. Look at the features, okay. Look at that. That's card A there." (ECF No. 112-34 at 8.) Lavan said, "there he is." In response to Detective Herrera's question, "Number one, huh?" Lavan answered "Uh-huh." (ECF No. 112-34 at 8.) Detective Herrera asked, "That's the – the guy with a[n] A-K," and Lavan answered, "yeah, light skinned, high cheek bones. He had a – he had a goatee too." (ECF No. 112-34 at 8.) Detective Herrera asked again if the person in number one was the shooter, and Lavan said, "he looks like the guy," and "I think this is him." (ECF No. 112-34 at 9.) When Detective Herrera repeated, "so you saw this guy, number one in … card A. He was doing the shooting, right?" Lavan said, "Yeah," but later added, "seemed like his face was a little slimmer though." (ECF No. 112-34 at 12.) After looking through additional cards, Lavan referred back to petitioner's photograph and said, "I seen him, yeah. I seen him right there that's him, that's him." (ECF No. 112-34 at 13-14.)

Immediately after identifying petitioner, Lavan expressed concerns about his safety and the officers assured him that they would help relocate him. Lavan also repeated that he did not want to go to court. (ECF No. 112-34 at 9-11, 14-15, 19-23.)

In an effort to assuage Lavan's fears about retaliation, Detective Herrera informed him "Nobody's going to know this yet. Besides, this guy's in jail already." (ECF No. 112-34 at 15.) Lavan expressed surprise, stating, "He is? … He – he – I swear he looks just like him." (ECF No. 112-34 at 15-16.) Lavan also added, where's the guy with the – he had long hair though." (ECF No. 112-34 at 16.) Lavan asked to look at the picture again and then said, "This is the guy, man. He's in jail but I've seen him though." Detective Herrera clarified that petitioner was placed in jail right after the shooting. Lavan said, "He – he – he – I'm telling the truth man. I don't see how he can be in jail and I've seen him too, man." (ECF No. 112-34 at 17.)

Lavan then reaffirmed that he'd seen the person in photograph with an A-K on the night of the shooting. (ECF No. 112-34 at 18-22.) When he was asked to sign a statement identifying petitioner as the shooter, Lavan declined. He again inquired about the logistics of "protection." (ECF No. 112-34 at 19-25.) In response to Lavan's concerns about testifying, the officers told him they would relocate him to another city or another state, and that the state would pay his first and last months' rent as well as moving expenses. (ECF No 112-34 at 20-27.)

Lavan inquired further about the terms of the offer to help him, asking if the officers would get him "into an apartment." (ECF No. 112-35 at 2.) After Detective Schunk responded affirmatively, Lavan asked for help getting his car back. Lavan also asked for a written promise from the police. (ECF No. 112-35 at 2-3, 12-13.)

Detective Herrera told Lavan to find the place to which he wanted to move "and then we'll get the money from the DA and we'll move you down there." (ECF No. 112-35 at 5.) Detective Herrera asked Lavan again if he'd seen the person in Card A (petitioner) before. Lavan said that he'd seen him that night. Detective Herrera asked, "but before that night have you seen him?" Lavan answered "No,"

though he eventually agreed that he had seen the individual before and had bought marijuana from him. (ECF No. 112-35 at 6.)

While petitioner was in custody, Detectives Schunk and Herrera had taken a photograph of him wearing a black beanie similar to the one the gas station shooter reportedly wore. The beanie did not belong to petitioner. (RT 645.) The officers then showed Lavan Card F, a photographic six-pack in which all of the men were wearing "some kind of hat." Lavan identified the photograph in position three (petitioner) as the guy with the A-K, stating repeatedly "This is him! This is him!" (ECF No. 112-35 at 8-10.) Lavan then said he could not identify the shooter without the beanie. (ECF No. 112-36 at 2; *see* RT 836-837.)

Leroy Martin

Leroy Martin was at the gas station on the night of the crimes. Several hours after the shooting, Martin provided a written statement to police. Martin saw two men in a Cadillac (Broomfield and Davis). He saw another man exit a black and red car, walk to the pay window of the gas station, then return to his car. "Right after that," Martin heard gunshots. The Cadillac drove away; it looked like the back window had been shot out. The black and red car drove away slowly. Martin assumed that man was the shooter because there was nobody else in the lot. He described the man who had got out of the black and red car as a male, black, late twenties to early thirties, 5'9" to 6'0", medium build, medium complexion, wearing a dark blue knit cap. Martin heard a lot of shots but did not see a gun and did not see who was shooting because he had ducked down when the shooting started. (ECF No. 112-31 at 222-224.)

After they interviewed Lavan, Detectives Schunk and Herrera showed Martin the same photographic six-packs they had shown Lavan. Martin did not identify petitioner's photograph in Card A. (RT 508-511.) Martin chose the photograph of petitioner in Card F (the one with petitioner wearing the beanie provided by the police), indicating that it "looks a lot like the guy" he saw at the gas station on the

night of the shooting and that he was 75% sure it was the person. (RT 427-428, 511; ECF No. 112-33 at 1.) A few weeks later, Martin attended a live lineup. He wrote "none" in the space next to the question whom he identified, but reported that petitioner "came the closest" to the person that he had seen at the gas station. (RT 421-422, 433-436, 512.) After the live lineup, one of the detectives told Martin that petitioner had in fact been at the gas station. (RT 434.)

3. The Defense Investigation

Prior to trial, defense investigator Eldridge Moore interviewed multiple witnesses who provided consistent accounts of petitioner's whereabouts at the time of the Mobil gas station shooting. Larry Anderson, Ruben "Greedy" Jones, and Keenan "Kemo" Gardner each said that they were with petitioner caravanning in two cars on the night of the shooting. According to these witnesses, the police pulled Anderson's car over for a traffic stop, and both cars pulled over at 59th and Broadway, a short distance from the gas station. While the stop was in progress, gunshots rang out. The officers ended the traffic stop and headed toward the gunfire. The group decided to drive around see what happened. They came upon the shot-up Cadillac of the victims nearby. (ECF No. 112-31 at 123-125, 127.)

Calvin Dixon, the individual whom the record suggests was the confidential informant in this case, spoke with the defense investigator. Dixon denied being a confidential informant and told Moore that he saw the traffic stop in front of his house. (ECF No. 112-113 at 124.) Dixon was murdered before petitioner's trial.

Mia Dansby told the defense investigator that she heard about the shooting and went to the scene to see what happened. She came upon the Cadillac stopped on the corner. Shortly after she arrived, she saw petitioner arrive with several others. (ECF No. 112-31 at 125.)

Numerous witnesses, including the victim Davis, told the defense investigator that petitioner and the victims were friends and that petitioner had no reason to shoot them. (*See* ECF No. 112-31 at 9-10, 124-127.)

Ashwanto Ross told the defense investigator that two days after the shooting, he and several others, including Carlton "Chili Mo" Mosley, were on 62nd Street when Clarence Lavan approached. Lavan said that he saw who shot our "Home-Boys"; the shooter was short, stocky, with a dark complexion and long reddish braids; and the shooter was wearing a red shirt, driving a red Jeep, and was someone that Lavan knew from a "Blood Gang" neighborhood. Ross was willing to testify and to assist locating the other persons present when Lavan made the statements. (ECF No. 112-31 at 126.)

4. The Prosecution

Along with the Mobil gas station shooting, petitioner was tried on consolidated charges of attempted murder based upon an alleged shooting at police officers and a charge of unlawful possession of a short-barreled rifle at the time of his arrest. Petitioner admitted he unlawfully possessed the short-barreled rifle. (RT 264-271.) With respect to the charges stemming from shooting at police officers, the jury hung 11-1 in favor of a not guilty verdict. Those charges were ultimately dismissed. (RT 277, 347, 946.) Thus, the focus of petitioner's substantive claims and the present motion is on the gas station shooting.

The prosecution theory was that the shooting was the result of a rivalry between the Six-Deuce and Six-Eights. (RT 585-586, 732-733.)

Lavan did not appear for trial and after a hearing, the trial court found him unavailable. (RT 201-232, 544.) The jurors heard a playback of Lavan's recorded interview and his preliminary hearing testimony was read into the record. (RT 544-615, 621-622.)

At petitioner's preliminary hearing, Lavan testified that at approximately 9:45 p.m. on December 13, 1992, he was at the gas station with his brother. They were in his brother's red and black Charger. (RT 546.) Lavan walked to the cashier window to get change. (RT 549-550.) A turquoise Cadillac drove up and Lavan recognized June Bug and Little Owl. (RT 550, 552.) Lavan walked back toward his brother's car

and saw a man run from Grand Avenue shooting an automatic weapon. The man fired the weapon many times toward June Bug and Little Owl. (RT 557-558.) Little Owl, who had been outside of the car, ran back to it and drove away. (RT 560-561.) Petitioner shot at others in the parking lot and then ran out toward Grand where a burgundy car was waiting. (RT 565-569.) Petitioner was wearing a beanie. (RT 570-571.)

Lavan testified that he had seen petitioner a month or so prior to the shooting on 62nd Street in Six-Deuce territory. Lavan had gone to the area to buy marijuana. Petitioner was there in a crowd of people. (RT 571-572.)

According to Lavan, the lighting in the gas station was very bright. Lavan was able to get a full view of the front of the shooter face from about twenty feet away. (RT 586-587.) Lavan watched the shooter the entire time until the end of the incident when he got down on his stomach. While the culprit was shooting, Lavan had a side view of the shooter's face from about fifteen feet away. (RT 587-588.)

Lavan testified that after the incident he described the shooter to police as about 5'9" with a muscular build. (RT 590-591.) He estimated the shooter to be 24 or 25 years old. (RT 591.)

Lavan made an in-court identification of petitioner as the man he saw shooting an automatic weapon at the gas station. (RT 555-556.) He also testified that petitioner was the person he previously identified from the photographic line-ups shown to him. (RT 593-596.) Lavan said that he recognized a scar under the shooter's eye. (RT 596-597.) Lavan was asked what it was in Card F that "stuck in [his] mind" and led to him identifying petitioner as the shooter, and he answered "the beany, the beany that he is wearing." (RT 599.) Lavan further testified that he initially did not want to make an identification because he was worried about what would happen to him or to people he cared about. (RT 600.)

On cross-examination, Lavan denied that he had been promised anything in return for his testimony. (RT 601.) When petitioner's counsel asked whether the

police told him that in exchange for his testimony, they would pay to have him relocated, Lavan answered, "No." (RT 601.) When he was first asked, Lavan denied that the police told him that they would pay his first and last month's rent. When asked a second time, Lavan said that they did tell him they would do so. (RT 602.) Lavan denied that the police told him they would pay his moving expenses. (RT 602.) He also denied telling the police that he had previously bought weed from the person he identified as the shooter. (RT 608-609.) Lavan said that as of the date of the preliminary hearing, he had not been given any money for relocation or any other purpose. (RT 609-610.)

Martin testified at trial and also identified petitioner as the shooter. According to Martin, he saw petitioner enter the gas station from a nearby alley, stand in front of the cashier window and survey the scene, and then walk back toward the alley. (RT 395a-403, 409, 439.) Five minutes later, Martin saw gunfire coming from the alley, but he did not see the shooter. The Cadillac was "shot so many times until it didn't move." (RT 402-405, 417.) The red and black car that had been parked near the cashier window then pulled out of the gas station lot and the gunfire stopped, so Martin assumed that the shooter was in the red and black car. (RT 417.)

Martin was shown photographic lineup cards A through F. He did not identify petitioner's photograph in position one on Card A. He said that petitioner's photograph in Card F "looks a lot like the guy [he] saw near the cashier's window on the night that the shooting happened." (RT 509-511.) At the live line-up Martin did not choose a suspect, but said that the person in position number five (petitioner) came the closest to the person he saw at the gas station. (RT 420-421, 512.) Martin explained that he did not identify petitioner as the suspect when he saw him at the live line-up because he never saw the man from the red and black car holding a gun. (RT 421-422, 428-430.)

On cross-examination, Martin testified that his memory of the shooting was "more clear" at the time of trial than two years earlier when he testified at the

preliminary hearing. Martin explained that his memory was better because "I know more what all happened – what was behind the shooting," based upon information he obtained from "people in the area." (RT 425.)

The prosecution also called Davis, the surviving victim and driver of the Cadillac. Davis, however, testified favorably for the defense. Specifically, Davis testified that petitioner was a childhood friend whom he had known for many years and who had no motive to shoot him. (RT 838-852.) Further, and contrary to the gang expert's testimony, Davis denied that there was a war between the Six-Eight and Six-Deuce Crips at the time of the shooting. (RT 850-852.) Davis also testified that petitioner had always had short hair through the many years they knew each other. (RT 850.)

Los Angeles Police Department Officer Rafael Hechavarria testified that he and his partner were the first to respond to the gas station shooting. Officer Hechavarria testified that he and his partner had been conducting a traffic stop in the area when they heard gunshots, ended the traffic stop, and headed in the direction of the gunfire. (RT 473-474.)

The gun used in the shooting was never recovered. The casings from the gas station shooting matched casing from an unsolved homicide of Collet Yearwood and Darnell Davis ("the Yearwood Davis homicide") that had occurred on November 24, 1991. (RT 537-538, 752.) Petitioner was incarcerated in a youth facility at the time, and was not a suspect in that crime. (RT 752.)

The prosecution conceded that the casings from the December 1992 Mobil gas station shooting did not match the casings from the November 1992 shooting on police officers with which petitioner was charged. (RT 4, 65-66, 244.) Further, neither of the shootings were committed with the gun that petitioner possessed at the time of his arrest on December 14, 1992. (RT 4.)

5. The Defense

Petitioner's counsel called three witnesses to testify in petitioner's defense.

Jon Severin, a Six-Deuce member, testified that he lived within a block of the Mobil gas station at the time of the shooting. He was on his back porch with his son when he heard gunshots. Shortly thereafter, "Tank," another Six-Deuce member, arrived at Severin's back door holding an AK-47. Severin described Tank as "short, stocky, dark complexion." Severin did not let Tank inside because his son was home. Tank responded with an expletive and left. (RT 755-759.)

Mia Dansby testified that after hearing news of an incident, she walked to the scene where the Cadillac had stopped. Two or three minutes later, an ambulance arrived and shortly thereafter "a whole bunch of people" started to arrive on the scene, including petitioner, "Larry, Kimo, Greedy," and others. Petitioner and the others arrived in two cars. Dansby testified that she, the victims, and petitioner were all friends, and that everyone was trying to figure out what happened. Dansby had known petitioner since elementary school, and he had always had short hair. (RT 770-777.)

Petitioner testified in his own defense. He admitted being a Six-Deuce member most of his life. (RT 793, 800-801.) Trial counsel asked only a handful of questions about the Mobil gas station shooting, eliciting petitioner's testimony that he was "real good friends" with Broomfield and Davis, that he was not at the gas station on December 13, 1992, and that he did not have anything to do with the shooting. (RT 796, 826.) On cross-examination, petitioner testified that he had been with six of his friends on the night of the shooting. They had been riding in two separate cars when they came upon the turquoise Cadillac at the corner of San Pedro and Gage. Petitioner saw Broomfield and Davis being loaded into an ambulance. Petitioner and his friends exited the cars and joined the crowd of people that had formed around the Cadillac. (RT 825-826.)

6. Exculpatory Evidence Not Presented at Trial

In September 2004, while petitioner's federal case remained closed, petitioner obtained a sworn declaration from Ruben Jones. In November 2004, petitioner

obtained similar declarations from Keenan Gardener and Larry Anderson. All three declarations state that Gardner was driving a car with petitioner and Jones as passengers; Anderson was driving a second car; when he saw a police car, Gardner pulled his car over; Gardner watched as the police then stopped Anderson's car; gunshots were heard and the police abandoned the traffic stop and drove off toward the sound; later they discovered that Little Owl and June Bug had been shot. All three witnesses state that they would have testified to the foregoing facts if asked. These declarations were submitted as exhibits to petitioner's motion for leave to amend and were addressed in Judge Goldman's report and recommendation. (ECF No. 82 at 36-37, 39, 41; ECF No. 89 at 12-1.)

In August 2011, petitioner obtained a sworn declaration from Travon Mustin, an ex-member of the East Coast Crips. In his declaration, Mustin states that at approximately 10:00 p.m. on the night of the murders, he was walking down 59th Street between Main Street and Broadway Avenue when he saw a black Chevrolet Monte Carlo followed by a station wagon. A police car pulled the station wagon over. Two officers excited the police car and began a traffic stop. Soon after, Mustin heard about twenty gunshots. The officers immediately returned to their police car and drove away. Mustin approached the vehicles. He saw that Anderson was the driver of the station wagon. Petitioner, Jones, and Gardner were in the second car. Mustin was available to testify at trial. (ECF No. 112-31 at 18.)

After her appointment by the Ninth Circuit in July 2014, petitioner's counsel obtained additional exculpatory evidence:

- Lamont Devault, a former member of the Six-Deuce East Coast Crips, provided a declaration stating that on the night of the shooting, he was on 62nd and San Pedro when he heard 25 or more gunshots. He walked around the corner to Gage and San Pedro where he saw Davis and Broomfield in a Cadillac that had "a bunch of bullet holes in it." A few minutes later, Devault saw petitioner, Gardner, Jones, Anderson, and Mustin pull up in

two cars. Devault also saw Dansby walk up to the scene. Nobody from the defense contacted Devault prior to trial, but he would have testified if asked to do so. (ECF No. 112-31 at 116-7.)

- Anderson, Gardner, Jones, and Mustin provided new declarations reaffirming their previous statements. (ECF No. 112-31 at 9-11, 12-14, 18-20, 21-22.)
- Carlton Mosley and Arshawnto Ross provided declarations stating that they saw Lavan a couple days after the gas station shooting. Lavan described the shooter as short and stocky, and said that he recognized the shooter as a member of the Bloods (excluding petitioner, who was a Crips member). Mosley also states that he was a member of the Sixty-Six East Coast Crips in December 1992, and at that time there was no feud between the Six-Eights and the Six-Deuce. (ECF No. 112-31 at 29-30, 31.)
- Lavan provided a declaration recanting his identification of petitioner as the shooter. Lavan states that he is a devout Christian and he wants to correct the wrongful conviction of an innocent man. Lavan states that he is certain that petitioner is not the man he saw at the gas station on the night of December 13, 1992. Rather, he explains, he had recognized petitioner from seeing him in the neighborhood of 62nd Street. He reiterates that unlike petitioner in the photograph, the shooter had long hair. Furthermore, Lavan states that Detective Schunk knew where Lavan was living at all times. At the time of petitioner's trial, Lavan had moved back to Los Angeles and was living with his elderly mother. According to Lavan, police officers came to his mother's house and threatened to arrest her if he did not testify against petitioner. Lavan refused to testify because he did not want to testify against an innocent man. (ECF No. 112-31 at 23-24.)
- Gary L. Wells, Ph.D., an expert in eyewitness identification, reviewed the eyewitness identification evidence and the procedures used by law

enforcement leading to those identifications and opined that the identifications were unreliable. Dr. Wells opined that Lavan's identification of petitioner was inherently unreliable for numerous reasons, including Lavan's initial reserved identification because the gunman had long hair, but petitioner did not, and his confusion about how the shooter could be in jail when he'd seen him on the street. Furthermore, the police practices attending Lavan's identification were suggestive and improper because, among other things, the police cued Lavan that they were preparing a second photo line-up with petitioner wearing a beanie; petitioner was the only person that the police showed to Lavan twice; police informed Lavan that the person he picked in photo line-up A was already under arrest; and they discussed several benefits of Lavan's cooperation before showing him the second photo lineup with petitioner suggestively wearing a beanie. Thus, Dr. Wells concluded that Lavan's identification of petitioner was suggestive and unreliable. (ECF No. 112-31 at 38-50.)

With regard to eyewitness Martin, Dr. Wells explained that he was not an eyewitness to the actual shooting. Instead, Martin only observed a red and black car and a black male whom he assumed to be the shooter. Martin's observations, however, actually suggest that he had seen Lavan. Further, the police identification procedure was unduly suggestive. Martin clearly did not recognize petitioner when he was first shown the photographic lineup. Further, the six-pack in which petitioner is wearing the beanie includes only two others wearing similar caps and these two have dark complexions, whereas petitioner is the only one with a medium to light complexion, which fit Martin's description of the person he inferred was the shooter. Based upon all of the foregoing, Dr. Wells opined that the photo lineup procedure was suggestive and unreliable. (ECF No. 112-31 at 50-51.) Even so, Martin's response was equivocal – that is, he said that he

> was about 75% sure that petitioner was the man he saw at the gas station. Next, Martin was shown a live lineup including petitioner. This was the third time that Martin had been shown petitioner. "Despite the profound suggestiveness, Leroy Martin still did not identify Marlon Evans from the live lineup," but said that petitioner "came the closest" which does not amount to a statement of identity. Furthermore, Martin's exposure to petitioner's photographic image in the two previous photo lineups rendered the live lineup too suggestive to attach any significance to his response. The unreliability of Martin's in-court identification is increased by the fact that one of the detectives told Martin after the live lineup that petitioner was in fact at the gas station. "The effect of such a statement, which is a form of confirmatory feedback discussed earlier in the science section of this report, is to lead eyewitnesses to remove their own doubts in court." (ECF No. 11-31 at 51-52.)

The declarations of Devault, Anderson, Gardner, Jones, and Mustin corroborate petitioner's testimony that he was in a car with others at the time of the shooting. The alibi evidence is also corroborated by Danby's trial testimony. In addition, as petitioner points out, Officer Hechavarria's testimony regarding a traffic stop corroborates the aforementioned declarations to the extent that a traffic stop occurred.[4] The expert report provides support for the conclusion that that both Lavan's and Martin's identifications were scientifically unreliable. The declarations further undermine the reliability of Lavan's identification of petitioner because they indicate that Lavan made inconsistent statements to others regarding the identity of the shooter. Finally, Lavan has now recanted his identification of petitioner. Nevertheless, even considering all of petitioner's exculpatory evidence together, the Court cannot conclude that no reasonable juror would find him guilty.

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[4] Officer Hechavarria, of course, did not testify that he saw petitioner at the scene of the traffic stop.

With respect to the alibi evidence, petitioner obviously knew that he was with Anderson, Gardner, and Jones – among others – on the night of the shooting. He also knew that these witnesses failed to testify on his behalf. Yet, he did not complain about the absence of alibi witnesses until years after his conviction became final. Even assuming petitioner's appellate counsel was ineffective for failing to raise or investigate a claim regarding these alibi witnesses, once the California Supreme Court denied his petition for review, there was nothing preventing petitioner from including a claim regarding his alibi in a habeas corpus petition. Petitioner was not required to obtain the declarations prior to raising a claim about their absence at his trial. Indeed, petitioner raised other claims challenging his trial counsel's performance without presenting declarations supporting them. For example, in 1996, petitioner filed a habeas corpus petition in the California Supreme Court complaining that trial counsel failed to call an identification expert without first obtaining an expert's opinion. (*See* ECF No. 103-6 at 17 [Lodgment 9].) Given the significance of the evidence that petitioner was with others at the time of the shooting, petitioner's unexplained delay in raising this claim renders the declarations less reliable. *See McQuiggin*, 569 U.S. at 399 (unexplained delay in presenting evidence of innocence bears on the probable reliability of the evidence).

The weight of this proposed testimony is further diminished by the fact that it comes from petitioner's fellow gang members and close friends. *See, e.g., Gonzalez v. Wong*, 667 F.3d 965, 988 (9th Cir. 2011) (recognizing the limited value of exculpatory testimony where witnesses were "family or close friends" whose testimony was therefore "suspect based on their close relationship with [the petitioner]"); *Gomez v. Biter*, 2014 WL 4828939, at *12 (C.D. Cal. Sept. 29, 2014) (noting that a proposed witness's "credibility likely would have been subject to a successful attack given her close familial relationship with the defendant"); *Smith v. McEwen*, 2012 WL 4107806, at *8 (C.D. Cal. July 30, 2012) (finding declarations of five witnesses, all of whom were petitioner's relatives and friends, claiming that

petitioner was at a party at the time of the crimes were "not trustworthy eyewitness accounts because there is no reasonable explanation to account for the failure of these witnesses to offer their statements until almost three years after petitioner's trial began"), *report and recommendation adopted*, 2012 WL 4107821 (C.D. Cal. Sept. 17, 2012); *see generally*, *Barajas v. Lewis*, 2011 WL 665337, at *19 (C.D. Cal. Jan. 12, 2011) (stating that the reliability of witness's declaration was questionable given that it was not offered for several years and that witness apparently was an acquaintance or friend of the petitioner's gang), *report and recommendation adopted*, 2011 WL 662970 (C.D. Cal. Feb. 14, 2011). In addition, most of the witnesses are convicted felons, which further tends to undermine the credibility of these declarations. *See Coleman v. Diaz*, 2014 WL 1795157, at *6-7 (C.D. Cal. Mar. 11, 2014) ("recantation testimony by a now convicted felon proffered years after the fact does not qualify as 'reliable' evidence of petitioner's actual innocence, particularly in light of [witness's] unequivocal trial testimony identifying petitioner as the driver of the van during the shooting").

With regard to the expert opinion of Dr. Wells, no matter how thorough it may be, it does not constitute evidence of innocence. Rather, Dr. Wells's expert opinion, if credited by the jury, would, at most, cast doubt on the eyewitness testimony. *See Hale v. McDonald*, 2010 WL 4630268, at *16 (C.D. Cal. July 30, 2010), *report and recommendation adopted*, 2010 WL 4628056 (C.D. Cal. Nov. 8, 2010), *aff'd*, 530 F. App'x 636 (9th Cir. 2013). In addition, the trial court instructed the jury on factors relevant to determining witness credibility and weighing eyewitness testimony, such as a witness's ability to observe an event, inconsistencies in a witness's prior account, whether the defendant fits or does not fit the description given by the witness, and whether the witness was unable to identify the defendant at a photographic or live line-up. (*See* Clerk's Transcript ["CT"][5] 290-293, 301-302). The jury was also

[5] An electronic copy of the Clerk's Transcript is found at ECF No. 103-17 through 103-18.

instructed that the prosecution bore the burden of proving identity, and if a jury had reasonable doubt about identification, the jury must find petitioner not guilty. (CT 300.) Further, during closing argument, the jury was made aware of a number of discrepancies with, and the arguably suggestive procedures involved in, both Martin's and Lavan's identifications. (*See* RT 883-889.)

Finally, with respect to Lavan, recantation testimony such as that contained in his declaration is generally insufficient to affirmatively prove innocence. The Ninth Circuit has addressed the inherent problem with recantation testimony at length:

> As a general matter, "[r]ecantation testimony is properly viewed with great suspicion." *Dobbert v. Wainwright*, 468 U.S. 1231, 1233, 105 S.Ct. 34, 82 L.Ed.2d 925 (1984) (Brennan, J., dissenting from denial of certiorari); *see also Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005). "Recanting testimony is easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial." *Carriger [v. Lewis]*, 132 F.3d [463,] 483 [(9th Cir. 1997)] (Kozinski, J., dissenting). "It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives...." *Dobbert*, 468 U.S. at 1233–34, 105 S.Ct. 34. For these reasons, a witness' "later recantation of his trial testimony does not render his earlier testimony false." *Allen*, 395 F.3d at 994; *see also Christian v. Frank*, 595 F.3d 1076, 1084 n. 11 (9th Cir. 2010). Rather, a witness' recantation is considered in addition to his trial testimony and in the context in which he recanted when assessing the likely impact it would have on jurors. *See Christian*, 595 F.3d at 1084 n. 11 (considering the timing of the witness' recantation and the contents of his earlier testimony in assessing the weight of the recantation); *Graves v. Cockrell*, 351 F.3d 143, 153 (5th Cir. 2003) (noting that a recanting witness had given

numerous contradictory statements in assessing the weight to give to his new testimony).

Jones v. Taylor, 763 F.3d 1242, 1248 (9th Cir. 2014).

Here, Lavan's recantation is particularly unreliable for additional reasons. To begin with, Lavan says that if called to testify he would have "clarified" that his identification of petitioner during the interview with detectives was meant to convey that he had seen petitioner before, not that petitioner was the shooter. Lavan, however, does not attempt to explain why he unequivocally identified petitioner as the shooter during his preliminary hearing testimony. Second, although Lavan states that he is motivated by his religious desire to correct the wrongful conviction of an innocent man, his decision to submit his declaration can also be explained in light of his initial resistance to testifying against petitioner based upon his fear for his safety. In other words, Lavan's declaration is suspect because he did not come forward on his own accord to correct the conviction of an innocent man, but did so only after more than two decades and only after he was contacted by petitioner's current counsel. *See Christian*, 595 F.3d at 1084 n.11 ("[Witness's] recantation is especially unreliable given that it was made more than a decade after his original failure to identify Burkhart as the perpetrator and positive identification of [the petitioner] as the perpetrator.").

It is true that Lavan's recantation casts some doubt upon the prosecution's most critical piece of evidence. The insurmountable problem for petitioner, however, is that Lavan identified petitioner in the recorded interview and that he unequivocally identified petitioner when testifying at the preliminary hearing. Petitioner has not demonstrated that Lavan's declaration recanting his prior identification is any more likely to be true than his preliminary hearing testimony. Indeed, on the state of the record, the contrary is true. *See Rodriguez v. Jacquez*, 2012 WL 4829225, at *12 (C.D. Cal. Aug. 29, 2012) (a rational jury could infer that if a witness feared the petitioner because of his gang connections, the witness was less likely to fabricate

evidence against the petitioner), *report and recommendation adopted*, 2012 WL 4511410 (C.D. Cal. Oct. 2, 2012).

Consequently, there is no basis on which to conclude that reasonable jurors would credit Lavan's belated declaration over the identifications he made during his interview with the detectives and his preliminary hearing testimony.

A hypothetical jury would have had to weigh petitioner's "new reliable evidence" against the other evidence presented at trial. While there is some question about the reliability of the eyewitness identifications, it would remain within the province of the jury to credit those identifications. *See Jones*, 763 F.3d at 1250 (reversing the district court's judgment granting relief on an actual innocence claim, concluding that even the victim's recantation was insufficient to establish actual innocence because the court could not "say that every juror would credit her recantation testimony over her trial testimony"). In sum, considering all of the evidence, old and new, the Court cannot find that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 329.

b. Appellate Counsel's Alleged Ineffective Assistance and Petitioner's Reliance Upon *Martinez* and *Trevino*

Petitioner has submitted the declaration of his appellate counsel, Joseph P. Farnan, in which Mr. Farnan states that before he filed the petition for review in the California Supreme Court, petitioner asked him to contact witnesses at addresses he had provided. Mr. Farnan mailed two sets of letters to these individuals but received no response. He assumes that these witnesses were related to petitioner's alibi defense. (ECF No. 112-31 at 6-7.) Petitioner argues that Mr. Farnan provided ineffective assistance in failing to pursue these alibi witnesses.

As petitioner points out, in denying leave to amend, the Court held that petitioner could have raised his ineffective assistance of counsel claims pro se on state post-conviction review. According to petitioner, together with new evidence of appellate counsel's ineffective assistance, two Supreme Court decisions place his

equitable tolling argument "in an entirely new light, and demonstrate the error in the Court's denial of leave to amend." (ECF No. 114 at 44-45, 47-48.) Specifically, petitioner relies on the Supreme Court's holding in *Martinez*, that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 17. In addition, petitioner relies upon *Trevino*, decided after judgment was entered in this case, in which the Supreme Court applied *Martinez* to cases in which a state's procedural framework "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 569 U.S. at 429.

To start, "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). Furthermore, *Martinez* and *Thaler* provide a narrow exception for claims that have been procedurally defaulted in state court; they have no application in the context of the AEDPA's statute of limitation. *See Gant v. Barnes*, 2017 WL 3822063, at *8 (C.D. Cal. July 19, 2017), *report and recommendation adopted*, 2017 WL 3738384 (C.D. Cal. Aug. 28, 2017); *Landrum v. Swarthout*, 2015 WL 9701296, at *11 (C.D. Cal. Nov. 2, 2015), *report and recommendation adopted*, 2016 WL 164272 (C.D. Cal. Jan. 11, 2016); *Price v. Paramo*, 2014 WL 5486621, at *3 (E.D. Cal. Oct. 29, 2014).

Moreover, Mr. Farnan was not obligated to conduct research because state appellate counsel is limited to raising issues based solely upon the record. *See People v. Mendoza Tello*, 15 Cal. 4th 264, 266-267 (1997) (claims of ineffective assistance of counsel requiring consideration of matters outside the record should not be raised on direct appeal, but rather in a habeas corpus petition); *In re Carpenter*, 9 Cal. 4th 634, 646 (1995) ("Appellate jurisdiction is limited to the four corners of the record on appeal."). In addition, petitioner had no right to counsel in collateral proceedings.

Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Thus, Mr. Farnan's failure to investigate could not have deprived petitioner of any constitutionally protected right. *See Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (a defendant has no Sixth Amendment right to counsel during his state habeas proceedings even if that was the first forum in which he could challenge constitutional effectiveness on the part of trial counsel).

Finally, even if appellate counsel was deficient in 1996 or 1997 because he failed to investigate petitioner's alibi witnesses, this failure does not amount to extraordinary circumstances because it fails to account for petitioner's failure to present his arguments to the Court prior to entry of judgment in this case in 2012.

c. The Court's Failure to Appoint Counsel, Allow Discovery, or Hold Evidentiary Hearing

Petitioner argues that the proceedings in this case were defective because the Court failed to appoint counsel, permit discovery, or hold an evidentiary hearing despite credible evidence that (a) petitioner is actually innocent; (b) his trial counsel failed to properly investigate the case; and (c) the State failed to appoint post-conviction counsel, allow discovery, or conduct a hearing. (ECF No. 114 at 45.) This contention fails for several reasons.

To begin with, it arguably already has been found to lack merit by the Ninth Circuit. In his motion for a COA, petitioner raised a single claim challenging the Court's denial of leave to amend, including an argument that this Court erred by rejecting his *Schlup* argument without conducting an evidentiary hearing. (ECF No.101 at 10.) The Ninth Circuit granted a COA on three claims that had been rejected on their merits; it did not grant a COA on the Court's denial of leave to amend. (ECF No. 102.)

Furthermore, arguments that a court erred by failing to conduct discovery or an evidentiary hearing generally do not constitute extraordinary circumstances justifying relief under Rule 60(b)(6). *See Wood v. Ryan*, 759 F.3d 1117, 1120 (9th

Cir. 2014) (per curiam) (Rule 60(b) motion challenging failure to conduct evidentiary hearing on a habeas corpus claim was proper because such a challenge did not amount to a defect in integrity of proceedings but rather sought to develop new evidence in order to challenge to resolution of merits of claim); *United States v. Washington*, 653 F.3d 1057, 1064-1065 (9th Cir. 2011) (movant's argument that the court erred by failing to hold an evidentiary hearing on his actual innocence contention did not "constitute an allegation of a defect in the integrity of the proceedings; rather, such arguments are merely asking 'for a second chance to have the merits determined favorably'") (quoting *Gonzalez,* 545 U.S. at 532 n.5).

In addition, petitioner has not demonstrated that the Court erred by deciding the merits of his *Schlup* gateway claim without appointing counsel, ordering discovery, or conducting an evidentiary hearing. As a general matter, there is no right to either appointment of counsel or discovery in habeas corpus proceedings as a general matter. *See Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir. 1993). With respect to the Court's failure to conduct an evidentiary hearing, "no controlling legal standard exists regarding whether the credibility assessment contemplated in *Schlup* requires an evidentiary hearing, and if so, under what circumstances." *Stewart v. Cate*, 757 F.3d 929, 941 (9th Cir. 2014). Instead, *Schlup* implicitly assumed that a district court could make a determination of the likely effect of the new evidence, including assessing credibility, without conducting an evidentiary hearing. *Schlup*, 513 U.S. at 331-332 ("the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence"); *see Cotinola v. Gipson*, 2014 WL 562636, at *8 (C.D. Cal. Feb. 7, 2014) ("the Supreme Court clearly has contemplated that, in some instances, the determination of reliability can be made without the district court having to conduct an evidentiary hearing"); *Caldwell v. Clay*, 2012 WL 4511526, at *8, *21–22 (C.D. Cal. Mar.7, 2012) (district court may reject an actual innocence claim on the ground that the evidence lacks credibility or reliability without first conducting an evidentiary

hearing, and discussing cases in which courts rejected actual innocence claims without conducting an evidentiary hearing), *report and recommendation adopted*, 2012 WL 4553254 (C.D. Cal. Oct.1, 2012).

Finally, even if petitioner were able to make out a meritorious argument that the Court made a mistake in failing to appoint counsel, allow discovery, or conduct an evidentiary hearing, these claims are untimely because – as mentioned above – they fall within Rule 60(b)(1).

d. Fraud on the Court

Petitioner contends that relief from judgment is warranted because the State's suppression of material exculpatory evidence constituted a fraud on the Court. Specifically, petitioner contends that based upon Lavan's declaration, the prosecutor's representation at trial that Lavan was unavailable was false and that Lavan actually refused to testify because he "did not want to testify against an innocent man." (ECF No. 114 at 46.) Without support or explanation, petitioner then asserts that in the federal habeas corpus proceedings, the State "necessarily was aware of this fact, but did not bring it to the Court's attention." (ECF No. 114 at 46.)

Although Rule 60(d)(3) permits courts to set aside judgments for fraud on the court, the Ninth Circuit has "held that Rule 60(b)(6)'s 'extraordinary circumstances' doctrine encompasses the same acts." *Pizzuto v. Ramirez*, 783 F.3d 1171, 1180 (9th Cir. 2015). Assuming that petitioner can raise this contention under Rule 60(b)(6), it fails.

The moving party "bears a high burden in seeking to prove fraud on the court, which must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Pizzuto*, 783 F.3d at 1180 (citations and internal quotation marks omitted). In *Pizzuto*, the petitioner sought Rule 60(b) relief based upon allegations that during his state trial, his co-defendant entered a secret plea agreement and the prosecutor then elicited perjured testimony from that co-defendant. According to the petitioner, the State Attorney General's office knew

of and concealed these facts while defending Pizzuto's habeas corpus petition before the federal district court. *Pizzuto*, 783 F.3d at 1180. In rejecting the petitioner's Rule 60(b) motion, the Ninth Circuit assumed that fraud occurred in the state court proceedings but nevertheless explained:

> The burden of proof rests with petitioner to show the fraud by clear and convincing evidence, and it must consist of more than garden-variety nondisclosure. [*United States v. Estate of] Stonehill*, 660 F.3d [415,] 443, 445 [(9th Cir. 2011)]. Pizzuto has no specific evidence of any knowledge on the part of the lawyers representing the state before the federal courts of the various alleged trial improprieties that Pizzuto says took place, and he relies instead on a series of allegations and implications. It takes more than "say so" to transform routine advocacy by the state's lawyers of its position into a fraud on the court.
>
> Even if the allegations of improper behavior at the trial level were assumed to be truthful, Pizzuto has not offered evidence that the state's failure to disclose those events constitutes the kind of "unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Toscano [v. C.I.R.]*, 441 F.2d [930,] 934 [(9th Cir. 1971)].

Pizzuto, 783 F.3d at 1181.

Petitioner's claim is much like the one rejected in *Pizzuto*. That is, even if the Court assumes that the prosecutor misrepresented Lavan's status during petitioner's state court trial, there has been no showing of fraud on this Court during these habeas corpus proceedings. Other than a bare allegation, petitioner has not alleged any facts suggesting – let alone showing by clear and convincing evidence – that the Attorney General's Office engaged in a scheme designed to hide the facts from this Court during the federal habeas corpus proceedings.

For the foregoing reasons, petitioner has not demonstrated that extraordinary circumstances exist.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that petitioner's motion for indication that the Court would entertain a Rule 60(b) motion be denied.

DATED: July 13, 2018

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARLON DARREL EVANS,

Petitioner,

v.

GEORGE GALAZA, WARDEN,

Respondent.

Case No. CV 98-8536-WDK (MLG)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the Petition, the records on file and the Report and Recommendations of the United States Magistrate Judge. The Court has also conducted a *de novo* review of those portions of the Report and Recommendations to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

Dated: 12/6/12

William D. Keller
United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARLON DARREL EVANS, Petitioner, v. GEORGE GALAZA, Warden, Respondent.	Case No. CV 98-8536-WDK (MLG) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

I. Background

In May 1995, a Los Angeles County Superior Court jury found Petitioner guilty of two counts of first degree murder (Cal. Penal Code § 187(a)), two counts of second degree murder (Cal. Penal Code § 187(a)), and possession of a short-barreled rifle (Cal. Penal Code § 12020(a)). (Clerk's Transcript ("CT") at 336-41). The jury found true the allegations that Petitioner personally used a firearm in the commission of the murders and attempted murder (Cal. Penal Code § 12022.5(a)), and that he intended to and did inflict great bodily injury as to the attempted murder charge (Cal. Penal Code §

12022.7(a)). (CT at 336-40). The jury also found true the special circumstances allegation of multiple murders (Cal. Penal Code § 190.2(a)(3)). (CT at 342). Petitioner was sentenced to a prison term of life without the possibility of parole, plus 108 years. (CT at 350-53; Reporter's Transcript ("RT") at 956-57).

A. Mobil Gas Station Shooting[1]

1. Prosecution's Case

At about 9:45 p.m. on December 13, 1992, two gang members from the Six Eight faction of the East Coast Crips, Henry Broomfield ("June Bug") and Donte Davis ("Little Owl"), drove a turquoise Cadillac into a Mobil gas station located at the corner of Gage Avenue and South Grand Avenue in Los Angeles. (RT at 396, 400, 550, 838-41). The gas station was in the territory of the Six Deuce faction of the East Coast Crips. (RT at 741, 821, 841). At the time, Six Eight and Six Deuce were embroiled in a feud over territory. (RT at 585-86, 733). Petitioner was a member of Six Deuce. (RT at 800, 822).

There were several "regulars" hanging out at the station when Little Owl and June Bug arrived, including, Leroy Martin, Ronald Smith, Moses Hempstead ("Cowboy"), and Raymond Phillips ("the Jamaican"). (RT at 397-99). Customers Clarence La Van and his brother were also at the station putting air in the tires of a red and black Charger. (RT at 546-47). Suddenly, Petitioner came running into the

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[1] The underlying facts are taken from the trial transcript and the unpublished opinion of the California Court of Appeal. *People v. Marlon Darrel Evans*, No. B093828 (Cal. Ct. App., Sept. 18, 1996); (Lodgment 4). Unless rebutted by clear and convincing evidence, these facts are presumed correct. *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008), *cert. denied*, 555 U.S. 1112, 129 S.Ct. 926, 173 L.Ed.2d 132 (2009); *Diaz v. Hedgpeth*, No. 09-1402, 2011 WL 6109619, at *1 (C.D. Cal. Oct. 24, 2011); 28 U.S.C. §§ 2254 (e)(1).

gas station firing an automatic weapon. (RT at 555-56, 558). Petitioner pointed the gun at the Cadillac and fired repeatedly. (RT at 558). Little Owl got into the Cadillac and sped off with June Bug. (RT at 559, 561, 843). Petitioner continued firing, breaking all of the Cadillac's windows. (RT at 558-62, 845). Little Owl was wounded in the shoulder and upper back, but survived. (RT at 843-45). June Bug was shot in the chest and eventually died from his wounds. (RT at 487-89).

Others at the gas station were also hit by the gunfire. (RT at 562-63). Ronald Smith, Cowboy, and the Jamaican all died from gunshot wounds. (RT at 406, 414-45, 563; Lodgment 4 at 2). Petitioner fired his gun at La Van and his brother, but they were not hit. (RT at 563-66).

After the shooting, Petitioner fled the gas station. (RT at 568-69). A burgundy colored vehicle was in the alley. (RT at 568). The AK-47 used in the gas station shooting was never found.[2]

Eyewitness Leroy Martin testified that he saw Petitioner at the Mobil station before the shooting started. (RT at 402, 423, 453-54). Petitioner entered the gas station from the nearby alley, stood in front of the cashier window and surveyed the scene, and then walked back toward the alley. (RT at 401-03, 409, 439). About five minutes later, Martin saw gunfire coming from the alley. (RT at 403-04, 411). Martin did not see the shooter. (RT at 402-04). A few weeks after the shooting, police showed Martin several photographic arrays. (RT at 527). Petitioner's photo was included in two of these arrays. (RT at

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[2] The casings from the gas station shooting matched casings from an unsolved homicide which occurred on November 24, 1991. (RT at 537-38, 752). Petitioner was not a suspect in that homicide, as he had been incarcerated in a youth facility on that date. (RT at 752).

527). Martin chose one of Petitioner's photos, stating that he was "75 percent sure" that Petitioner was the person that he saw at the gas station. (RT at 427-28, 511). Martin also viewed a live lineup. (RT at 433). While Martin did not identify Petitioner as the "suspect," he wrote on a witness admonition card that Petitioner came "the closest" to the person that [he had] seen at the gas station." (RT at 421-22, 433, 512). Martin explained that he did not identify Petitioner as the "suspect," because he never saw Petitioner holding a gun. (RT at 421-22, 428-30, 512). After the live lineup, one of the detectives confirmed that Petitioner had, in fact, been at the gas station. (RT at 434).

Eyewitness Clarence La Van also placed Petitioner at the gas station at the time of the shooting. Police conducted a taped interview of La Van on January 4, 1993. (RT at 603). During the interview, La Van was shown several photographic arrays. (RT at 638-39). In one of the arrays, Petitioner was pictured wearing a beany. (RT at 598, 638-39). La Van recognized Petitioner as the shooter. (RT at 595-98). However, La Van was reluctant to make an identification, as he feared for his safety and the safety of his family. (RT at 514, 600, 614-15). La Van asked to be placed in a witness relocation program. (RT at 601-02). The Los Angeles County District Attorney's Office agreed to relocate La Van and his family, which included paying for La Van's first and last month's rent and helping La Van to get his car out of debt. (RT at 602-03, 610-11, 626).

In June 1993, after being relocated out of state, La Van returned to Los Angeles for Petitioner's preliminary hearing. (CT at 100-160). La Van identified Petitioner as the shooter. (CT at 108; RT at 555-56). At the time of trial, La Van was found to be

unavailable. Therefore, La Van's preliminary hearing testimony was read to the jury. (RT at 544-615).

2. Defense Case - Mobil Gas Station

Petitioner testified in his defense at trial. (RT at 785-828). He denied being at the gas station on the night of the shooting, denied having been the shooter, and stated that he did not know La Van or Martin. (RT at 796). Petitioner had known Little Owl and June Bug since elementary school. (RT at 796). He claimed that they had all been "real good friends." (RT at 796). Petitioner denied the rumors that Six Deuce and Six Eight had been involved in a war. (RT at 821).

On cross-examination, Petitioner testified that he had been with six of his friends on the night of the shooting. (RT at 825-26). They had been riding in two separate cars, when they came upon the turquoise Cadillac at the corner of San Pedro and Gage. (RT at 825-26). Little Owl and June Bug were being loaded into an ambulance. (RT at 825). Petitioner and his friends got out of their cars and joined the crowd of people that had formed around the Cadillac. (RT a 826). Later, they went across the street to a liquor store. (RT at 826). Petitioner testified that he never went to the Mobil gas station. (RT at 826).

Petitioner's fellow Six Deuce gang member, John Severin, also testified at trial. Severin lived less than a block from the Mobil gas station. (RT at 753-66). He stated that he was sitting on his back porch smoking a cigarette when the shooting occurred. (RT at 755). Immediately after the shots were fired, a Six Deuce gang member called "Tank" came to Severin's back door holding an AK-47. (RT at 755-56). Severin refused to let Tank into his home because Severin

had his young son with him. (RT at 755, 757).

Mia Dansby, a neighborhood resident, also testified for the defense. Dansby stated that she saw the turquoise Cadillac after the shooting. (RT at 772). It was filled with bullet holes and parked on Gage and San Pedro. (RT at 772-73). Little Owl and June Bug were sitting inside. (RT at 772). After the ambulance arrived, a number of people came by, including Petitioner and several of his friends, "Larry, Kimo, Greedy and Rodon." (RT at 774).

Finally, although called by the prosecution, Little Owl testified favorably for the defense. Little Owl stated that Petitioner was his friend, and that Six Eight and Six Deuce had not been in a war at the time of the shooting. (RT at 850-51). Little Owl never saw the shooter. (RT at 843, 847). At the time of trial, Little Owl was incarcerated on a drug charge. (RT at 848-49).

The jury rejected the defense theory of misidentification, and convicted Petitioner of two counts of first degree murder (counts 1, 2) two counts of second degree murder (counts 3, 4), and one count of attempted murder (count 5), and the jury found true the related gun enhancements and special circumstances allegations. (CT at 204-08).

B. Weapon Possession - December 14, 1992

On December 14, 1992, the day following the gas station shooting, police responded to a call that some gang members were on East 62nd Street with guns. (RT at 323-29, 348). When the officers arrived, they saw Petitioner and two other men. (RT at 349-50). Petitioner had a sawed-off .30 caliber Winchester M-1 carbine. (RT at 350). Petitioner's fellow gang member Damon Campbell (aka Fred Thomas) had an AK-47. (RT at 352, 362, 800). Petitioner dropped the

M-1 carbine and began to run, but was apprehended by police. (RT at 327-30, 350, 712-13). Campbell was also arrested.[3]

At trial, Petitioner admitted that he had been in possession of a sawed off M-1 carbine. (RT at 793-95, 800). The jury convicted Petitioner of possession of a short barreled rifle (count 8). (CT at 209, 341).

C. Attempted Murders of Police Officers - November 22, 1992

Petitioner was also charged with two counts of attempted murder (counts 6 and 7) arising from a shooting involving two police officers that occurred in Six Deuce territory on November 22, 1992. (CT at 208-09). Because the jury was unable to reach a verdict on counts 6 and 7, the trial court declared a mistrial with respect to those charges. (CT at 209, 277, 347, 349).

II. Procedural History

Petitioner appealed his conviction to the California Court of Appeal. (Lodgment 1). On September 18, 1996, the California Court of Appeal affirmed the judgment and sentence. (Lodgment 4). The California Supreme Court denied review on December 23, 1996. (Lodgment 6).

Meanwhile, Petitioner sought collateral review. A petition for writ of habeas corpus was denied by the California Court of Appeal on October 29, 1996. (Lodgments 7, 8). Next, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, Case. No. S057166. (Lodgment 9). In that petition, Petitioner raised the following claims for relief:

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[3] The casings from Campbell's AK-47 did not match those used in the gas station shooting. (Lodgment 4 at 2).

1. Leroy Martin's identification of Petitioner was tainted and unduly suggestive.
2. Trial counsel provided ineffective assistance by: failing to obtain the trial testimony of eyewitness Delphina Cruz; permitting Clarence La Van's tape recorded statements to be played at trial; failing to object to a police detective's hearsay statements; and failing to call an identification expert.

That petition was denied on January 23, 1997. (Lodgment 10).

On January 5, 1998, Petitioner filed his first Petition for Writ of Habeas Corpus ("Petition") in this Court alleging the following six grounds for relief:

1. The trial court's determination of "due diligence" should be reviewed de novo on appeal.
2. Petitioner was deprived of his right to confront witnesses against him when the trial counsel admitted the former testimony of eye witness Clarence La Van.
3. There was insufficient evidence that Petitioner committed two counts of first degree murder.
4. The consolidation of the criminal charges from the gas station shooting and the attempted murder of two police officers violated Petitioner's right to a fair trial and due process.
5. Admission of tainted, unduly suggestive identification evidence violated Petitioner's right to due process.
6. Defense counsel provided ineffective assistance by

> failing to object to the admission of unduly suggestive identification evidence.

(Lodgment 13). Respondent filed a motion to dismiss, alleging that Petitioner failed to exhaust his state remedies. On March 24, 1998, one day after the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") had expired, Magistrate Judge Chapman issued a Report and Recommendation finding that the Petition was mixed, as Petitioner had not exhausted his fifth and sixth grounds for relief. (Lodgment 15). Judge Chapman recommended that the Petition be dismissed without prejudice. On April 24, 1998, the Report and Recommendation was adopted and the petition was dismissed without prejudice.

Meanwhile, on April 16, 1998, Petitioner filed a second petition for writ of habeas corpus with the California Supreme Court, Case No. S069554, to exhaust his claims. (Lodgment 11). In that petition, Petitioner raised the following claim:

> Martin's in-court identifications of Petitioner were unreliable and violated due process.[4]

That petition was summarily denied on August 26, 1998. (Lodgment 12).

On October 20, 1998, Petitioner returned to this Court to file the current habeas corpus petition ("Petition"), reasserting the claims set forth in the first petition. (Lodgment 14). On February 3, 1999, Magistrate Judge Chapman issued a Report and Recommendation

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[4] The document lodged as Petitioner's second habeas corpus petition filed with the California Supreme Court, Case No. S069554, appears to be incomplete. (Lodgment 11). The lodged document does not reference the claim asserted in Ground Six of the Petition, i.e., trial counsel was deficient for failing to object to an unduly suggestive identification procedure (Ground Six). (Lodgment 11). Respondent, however, acknowledged that a claim of ineffective assistance of counsel was raised in that petition. (Lodgment 22 at 11).

recommending that judgment be entered dismissing the Petition as untimely filed, because Petitioner filed the Petition almost seven months after the one-year statute of limitations had expired. On March 11, 1999, the Report and Recommendation was adopted and the petition was dismissed as untimely filed.

Over the next several years, Petitioner repeatedly returned to this Court and the Ninth Circuit by filing requests for reconsideration, motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), and requests for certificates of appealability, challenging the dismissal of the October 1998 petition as untimely. All of these motions and requests were denied.

Petitioner also continued to seek collateral relief in the state appellate courts. In 2005, Petitioner filed a habeas corpus petition in the California Court of Appeal. (Lodgment 17). That petition was summarily denied in January 2006. (Lodgment 18). In March 2006, Petitioner filed his third petition for habeas corpus relief with the California Supreme Court, Case No. S141473. (Lodgments 19, 20). Petitioner asserted trial counsel was ineffective in failing to call several defense witnesses and failing to question Petitioner about his alibi. (Lodgment 19, 20). On February 21, 2007, the California Supreme Court denied the petition with citation to *In re Clark*, 5 Cal.4th 750 (1993), and *In re Robbins*, 18 Cal.4th 770, 780 (1998), both of which stand for the proposition that untimely petitions for post-conviction relief shall not be considered by the California courts when there is no explanation for the delay. *See Walker v. Martin*, ––– U.S. ––––, ––––, 131 S.Ct. 1120, 1126 (2011); *Vasquez*

v. Pliler, 220 Fed.Appx. 598, 600 (9th Cir. 2007).[5]

On June 13, 2011, Petitioner once again returned to this Court by filing a motion for relief from judgment. Petitioner asserted that this Court erred by dismissing the January 1998 Petition because it "failed to inform [P]etitioner of his options to either amend his petition to present only exhausted claims or move to strike the unexhausted claims and proceed only on the exhausted claims." He further argued that based upon the erroneous dismissal of the first section 2254 petition, he was entitled to equitable tolling with respect to the second petition.

On October 11, 2011, citing intervening changes in the Ninth Circuit precedent, District Judge Keller determined that Petitioner was entitled to equitable tolling of the limitations period from the date the first petition was dismissed as mixed, April 24, 1998, until the date the current Petition was filed, October 20, 1998.[6] (Lodgment 16 at 7 of 9). The Court then exercised its equitable powers under

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[5] While Petitioner's third habeas petition was still pending in the California Supreme Court, Petitioner filed a fourth habeas corpus petition in that court, Case No. S146039. The California Supreme Court denied that petition on the same day that it denied Petitioner's third habeas petition. Subsequently, on November 12, 2010, Petitioner filed a fifth habeas corpus petition, Case No. S188131, with the California Supreme Court. That petition was denied on May 18, 2011. Respondent has not lodged these petitions or the denials with the Court.

[6] It was found that the dismissal of the petition in 1998 was flawed as Petitioner had not been offered the options provided in *Rose v. Lundy*, 455 U.S. 509 (1982) (i.e., the option to amend the petition and proceed only on exhausted claims). While the law in the Ninth Circuit was somewhat unsettled with respect to dismissal of mixed petitions at the time of that decision, more recent case law establishes that it was error to dismiss the Petition as mixed without first offering Petitioner the option of amending the Petition and proceeding only on the exhausted claims. *See Jefferson v. Budge*, 419 F.3d 1013, 1014 (9th Cir. 2005). The erroneous dismissal of the 1998 petition entitled Petitioner equitable tolling of the limitations period up to the time he filed the current Petition. *See e.g., Nedds v. Calderon*, 678 F.3d 777, 780 (9th Cir. 2012).

Rule 60(b)(6) of the Federal Rules of Civil Procedure to grant Petitioner relief from judgment, and ordered that the Petition be decided on the merits.[7]

Respondent filed an Answer addressing the merits on April 10, 2012. On April 26, 2012, Petitioner filed a Reply. Along with his Reply, Petitioner also filed a Motion for Leave to Amend Based on Actual Innocence ("Motion to Amend"). Respondent filed an opposition to the motion to amend on June 8, 2012. Both the motion to amend and the merits of the petition will be addressed in this Report.

III. The Motion To Amend Should Be Denied

In the motion to amend, Petitioner seeks to add a new claim of "ineffective assistance of trial counsel based on actual-innocence which resulted in a fundamental miscarriage of justice." (Motion to Amend at v). Petitioner asserts that he was deprived of his right to effective assistance of counsel and the right to present a meritorious defense when trial counsel failed to call the following witnesses at trial: Kemo Gardner, Larry Anderson, Ruben (Greedy) Jones, Dimitrius Henson, Ashawnto Ross, and Delphina Cruz. (Motion to Amend at 10-12). Petitioner further asserts that counsel erred by failing to question Petitioner about his whereabouts at the time of the gas station shooting. (Motion to Amend at 12).

In support of his request to amend and his claim of actual innocence, Petitioner submits "new" evidence in support of the misidentification defense. Petitioner offers defense investigative reports containing statements from prospective defense witnesses

[7] Meanwhile, on February 21, 2012, Petitioner filed a sixth habeas corpus petition with the California Supreme Court, No. S200222. That petition, which was not lodged with Court, was denied on May 16, 2012.

Gardner, Anderson, Jones, Henson, Ross, and Cruz. (Motion to Amend, Exhs. A, B, C, D). Petitioner also submits an affidavit from Gardner and declarations from Anderson, and Jones. (Motion to Amend, Exhs. G, H, I). The defense investigative reports were prepared prior to trial, whereas the affidavit and declarations from Gardner, Anderson, and Jones were prepared in 2004. (Motion to Amend, Exhs. G, H, I).

Petitioner asserts that the new evidence establishes his innocence. The affidavit and declarations from Gardner, Jones, and Anderson allege that Petitioner was with Gardner and Jones in Gardner's car on 59th Place in Los Angeles at the time of the gas station shooting. At that time, Anderson was being detained in a traffic stop close by. (Motion to Amend, Exhs. A, B, G, H, I). Delphina Cruz reportedly witnessed the shooting, but never saw Petitioner at the gas station and did not identify him as the shooter. (Motion to Amend at 1, Exh. C). Henson observed a black Jeep drive toward the gas station a few moments before the shooting and drive away from the gas station after the shooting. (Motion to Amend at9, Exh. A). Henson stated that the driver of the Jeep did not fit Petitioner's description. (Motion to Amend at 9, Exh. A). Ross reportedly heard La Van give a description of the shooter that did not match Petitioner. Ross claimed that La Van came up to him two days after the shooting and said that he recognized the shooter as a member of a "Blood" gang, and described the shooter as a short, stocky, dark-skinned person, in a red shirt, with long reddish hair worn in braids. (Motion to Amend at 9, Exh. D). Petitioner contends that "[i]t is more likely than not, that in light of this new evidence, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt." (Motion to Amend at 12).

Respondent claims that the newly presented ineffective assistance of counsel claim is time-barred and does not relate back to the date of filing of the original petition. In addition, Respondent asserts that the new evidence submitted by Petitioner does not establish actual innocence, which might excuse the late filing of this claim.

As noted, the limitations period was tolled from the date the first Petition was dismissed, April 24, 1998, through the date the current federal habeas Petition was filed, October 20, 1998. *See Budge*, 419 F.3d at 1014; (Lodgment 16 at 7 of 9). However, Petitioner is not entitled to equitable tolling based upon the erroneous dismissal of the first Petition for any time past October 20, 1998. Thus, in order to permit amendment of the Petition to add new claims, those claims must relate back to the first Petition, there must be a basis for delaying the accrual date of those claims for relief, or there must be an independent basis to equitably toll the limitations period.

A. Relation Back

Petitioner asserts that the new claims of ineffective assistance of counsel should relate back to the date of the filing of the current Petition because they arose out of the same transaction or occurrence set forth in that Petition. (Motion to Amend at 4; *see* Fed. R. Civ. P. 15(c) (a petitioner's amendments made after the statute of limitations has run will relate back to the date of his original pleading only if the new claims arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading)). However, a review of Petitioner's pleadings reveals that the proposed new claims of ineffective assistance of

trial counsel do not arise out of the conduct, transaction, or occurrence set forth in the six grounds for relief contained in the current Petition, nor do they share a common core of operative facts with those timely submitted claims. *Mayle v. Felix,* 545 U.S. 644, 657 (2005); *King v. Ryan*, 564 F.3d 1133, 1141 (9th Cir. 2009) ("[A] new claim does not 'relate back' to the filing of an exhausted petition simply because it arises from 'the same trial, conviction, or sentence'") (quoting *Mayle*, 545 U.S. at 662-64). Petitioner's proposed new claims of ineffective assistance of counsel are based on independent facts, different in both time and type from the claims raised in the original Petition.[8] Accordingly, Petitioner's new claims for habeas relief do not relate back to his timely filed federal habeas petition and are barred by 28 U.S.C. § 2244(d)(1)(A).

B. Delayed Discovery of Factual Predicate

Petitioner contends that the statute of limitations should be tolled because he was diligent in bringing his new claim, but tht appellate counsel created circumstances beyond Petitioner's control which prevented a timely filing. (Motion to Amend at 1-3). This argument could also be construed as one in which Petitioner is alleging that the limitations period on this new claim should not be deemed to have commenced until 2004, when Petitioner received the trial attorney's investigative files and the declarations from his alibi witnesses.

The habeas corpus statutory scheme delays the running of the limitations period to the date on which the factual predicate of the claim or claims presented could have been discovered through the

[8] Although Petitioner asserted an ineffective assistance of counsel claim in Ground Six of the Petition, that claim was based on trial counsel's failure to object to a suggestive identification procedure.

exercise of due diligence. 28 U.S.C. § 2244(d)(1)(D). To obtain the benefit of section 2244(d)(1)(D), a petitioner must show that he did not have, or with the exercise of due diligence could not have had, knowledge of the factual predicate of his federal habeas claims until the date alleged. *Ford v. Gonzalez*, 683 F.3d 1230, 1234-35 (9th Cir. 2012); *Redd v. McGrath*, 343 F.3d 1077, 1084 (9th Cir. 2003); *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). The Ninth Circuit has stressed that the "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Hasan*, 254 F.3d at 1154 n.3 (quoting with approval *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000)); *see also Lee v. Subia*, 2008 WL 5233205, *5 (C.D. Cal. Dec. 12, 2008) (finding that section 2244(d)(1)(D) did not apply where the "factual predicate" of petitioner's claim was that he did not shoot a gun during the underlying robbery because petitioner knew this fact at the time of the crime).

Here, Petitioner explains that he was delayed in presenting his new claims of ineffective assistance of counsel because appellate counsel withheld the only copies of the investigator's reports containing the defense witnesses' statements and contact information, and because appellate counsel failed to raise a claim of ineffective assistance of trial counsel on direct appeal. (Motion to Amend at 1-3). Petitioner asserts that without the reports, he could not pursue his claims of ineffective assistance of trial counsel, as he was in prison and had no way of locating the witnesses. Petitioner asserts that it was only in 2004 that he came in contact with Jones, Gardner, and Anderson "by chance," and then was able to obtain their sworn statements. (Motion to Amend at 2). Also around that time, Petitioner

met a law library clerk who informed him that he was entitled to his "murder book." (Motion to Amend at 2). In August 2004, Petitioner's trial attorney sent Petitioner his "murder book," which contained the investigator's reports. (Motion to Amend at 2).

Petitioner is not entitled to a delayed accrual date. "[Petitioner] is confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim." *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998) (rejecting petitioner's argument that a lawyer's affidavit supporting his claim of ineffective assistance of counsel formed the factual predicate of his claim). Petitioner should have been aware of the factual basis for his ineffective assistance of counsel claims since the time of trial. *See Ford*, 683 F.3d at 1236. Petitioner would obviously have known the identity of the people that he claims he was with at the time of the shooting as of the date of his arrest, even if he did not have the investigators' statements or their contact information. Petitioner was also aware of Delphina Cruz's value as a defense witness, as Petitioner challenged her absence from trial in his first habeas corpus petition filed with the California Supreme Court in 1996. (Lodgment 9, 10). And, having sat through the trial, Petitioner was clearly aware that the persons who could allegedly establish his alibi were not called as witnesses. Under these circumstances, the factual predicates for the claims of ineffective assistance of counsel were known to Petitioner at the time of trial in 1995 through the date of filing this petition in 1998. A later start date for the limitations period is not warranted.

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C. Petitioner is Not Entitled to Equitable Tolling

AEDPA's limitations provision is subject to equitable tolling if a prisoner can demonstrate that "extraordinary circumstances" beyond his control stood in the way of filing a petition on time and he exercised reasonable diligence in attempting to timely file the petition. *Holland v. Florida*, --- U.S. --- , 130 S.Ct. 2549, 2560-62 (2010); *Lakey v. Hickman*, 633 F.3d 782, 786-87 (9th Cir. 2011) (applying *Holland*); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009); *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003). The determination of whether to apply the equitable tolling doctrine is highly fact specific, and the petitioner "bears the burden of showing that equitable tolling is appropriate." *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005) (quoting *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005)).[9]

"Equitable tolling may be warranted in instances of unprofessional attorney behavior; however, the AEDPA deadline will not be tolled for a garden variety claim of excusable attorney neglect or mistake." *Doe v. Busby*, 661 F.3d 1001, 1011 (9th Cir. 2011) (citing *Spitsyn*, 345 F.3d at 800–02; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect."). Accordingly, in cases where a petitioner claims his attorney was the cause of the untimeliness, a court "must examine if the claimed failure was one of mere

[9] In addition, the petitioner must demonstrate that he exercised "reasonable diligence" in attempting to file his habeas petition after the extraordinary circumstances began, lest the "link of causation between the extraordinary circumstances and the failure to file [be] broken." *Spitsyn*, 345 F.3d at 802 (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)). In light of the extraordinary circumstances in this case, in which no petition was pending between 1998 and 2011, the Court will not address the diligence issue.

negligence by the attorney, such as inadvertently miscalculating a filing deadline in a non-capital case, *see Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001), or a sufficiently egregious misdeed like malfeasance or failing to fulfill a basic duty of client representation, *see Spitsyn*, 345 F.3d at 801." *Busby*, 661 F.3d at 1012.

Petitioner has presented no evidence that shows either that his appellate counsel committed misconduct or that any alleged misconduct resulted in his being unable to timely bring his ineffective assistance claims to this Court. Petitioner merely alleges that his attorney failed to raise the ineffective assistance claim on appeal and did not send him the trial investigator's reports. This is not a basis for applying the tolling doctrine.

In addition, it must be noted that Petitioner's lack of education, legal knowledge and expertise would not entitle him to equitable tolling. It is well established that a prisoner's educational deficiencies, ignorance of the law, or lack of legal expertise is not an extraordinary circumstance and does not equitably toll the limitations period. *See Ford v. Pliler* 590 F.3d 782, 789 (9th Cir. 2009); *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling").

Equitable tolling is not available in this case. Petitioner has failed to demonstrate the required "extraordinary" impediment to timely raising his proposed new ineffective assistance of counsel claims.

D. Actual Innocence Exception

"Under *Schlup v. Delo*, 513 U.S. 298 (1995), a petitioner's 'otherwise-barred claims [may be] considered on the merits . . . if his claim of actual innocence is sufficient to bring him within the narrow class of cases ... implicating a fundamental miscarriage of justice.'" *Majoy v. Roe*, 296 F.3d 770, 775 (9th Cir. 2002) (quoting *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997) (en banc)). In *Lee v. Lampert*, 653 F.3d 929, 933 (9th Cir. 2011), the Ninth Circuit held that "a credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations period and a petitioner who makes such a showing may pass through the *Schlup* gateway and have his otherwise time-barred claims heard on the merits."

A petitioner's claim of actual innocence must be supported "with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324; *Lee*, 653 F.3d at 938. In order to pass through the *Schlup* gateway, and have an otherwise barred constitutional claim heard on the merits, a petitioner must show that, in light of all the evidence, including evidence not introduced at trial, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327; *Lee*, 653 F.3d at 938; *Majoy*, 296 F.3d 775–76.

Here, given the substantial evidence presented against Petitioner at trial, it cannot be said that it is more likely than not that no juror would have convicted Petitioner of the murders and attempted murder, despite the "new" defense witness evidence. *Schlup*, 513 U.S. at 327-28. Clarence La Van positively identified Petitioner

as the shooter from photographic a array. La Van also identified Petitioner at the preliminary hearing. (CT at 133-35). La Van testified that he had a clear view of Petitioner from all angles and got a full view of the front of Petitioner's face. (CT at 133-35). La Van's testimony identifying Petitioner as the shooter was sufficient, by itself, to support his convictions.

Moreover, relevant portions of La Van's testimony were corroborated by Leroy Martin. (RT at 408, 508-09, 527). At trial, Martin identified Petitioner as the person he had seen standing by the cashier window at the gas station just before the shooting. Martin paid special attention to Petitioner because he was a "new face," whereas Martin was at the station "on a regular basis." (RT at 400-03, 428). Martin lost sight of Petitioner when Petitioner walked toward the alley behind the station. Moments later, Martin saw gunfire coming from the alley. (RT at 403-04, 411). Martin's testimony provided further evidence that Petitioner had been the shooter at the gas station.

In addition to the eyewitness testimony, the prosecution established a motive for the shooting. Little Owl and June Bug were members of Six Eight. In December 1992, Petitioner's gang, Six Deuce, was at war with Six Eight. (RT at 585-86, 733). The gas station was located in Six Deuce territory. (RT at 731-33, 741, 821, 841). By shooting Little Owl and June Bug, Petitioner furthered his gang's objective to control the area.

Finally, the jury heard and rejected Petitioner's defense theory that he was not at the gas station at the time of the shooting. Petitioner testified that he had been with several of his homeboys when they heard the gunfire from the gas station. (RT at 825). They

drove to the corner of San Pedro and Gage, where they saw Little's Owl's Cadillac and an ambulance being loaded. (RT at 825-26). Petitioner and six of his homeboys got out of their cars and joined the crowd of people that had formed around the Cadillac. (RT at 826). A neighborhood resident, Mia Dansby, also testified that she saw Petitioner with several of his friends by the Cadillac before the ambulance arrived to take Little Owl and June Bug away. (RT at 774). Thus, even if the jury was presented with a record supplemented by Petitioner's newly presented evidence, this Court cannot conclude that "it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327.

Petitioner has failed to make the credible showing of "actual innocence" that would excuse him from AEDPA's limitations period. *Id.* Nor is there any other basis to toll or delay the running of the limitations period. Accordingly, Petitioner's Motion to Amend should be denied.

IV. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal habeas corpus relief is available to state prisoners who are in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). To establish a right to relief, a petitioner must show that the state's highest court rejected the petitioner's claim on the merits, and that this rejection was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the

State court proceeding." *Id.* § 2254(d); *Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, 783-84 (2011). These standards apply regardless of whether the state court explained its reasons for rejecting a prisoner's claim. *Richter*, 131 S.Ct. at 784 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

It is not enough that a federal court conclude "in its independent judgment" that the state court decision is incorrect or erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam)). "The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *see also Renico v. Lett*, --- U.S. ---, 130 S.Ct. 1855, 1865 (2010). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455 (2005) (internal citations and quotation marks omitted); *Vasquez v. Kirkland*, 572 F.3d 1029, 1035 (9th Cir. 2009).

Habeas relief is unavailable if "fairminded jurists could disagree" about the correctness of the state court decision. *Richter*, 131 S.Ct. at 786 (quoting *Yarborough*, 541 U.S. at 664)(internal quotation marks omitted). For habeas relief to be granted, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786-87.

In applying these standards, the Court looks to the last reasoned state court decision. *See Delgadillo v. Woodford*, 527 F.3d 919, 925 (9th Cir. 2008). "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S.Ct. at 784.

Here, Petitioner raised the claims in Grounds One, Two, Three, and Four in his direct appeal and petition for review filed in the state appellate courts. (Lodgments 1, 5). The California Court of Appeal rejected these claims in a reasoned decision, while the California Supreme Court denied review without comment. (Lodgments 4, 6). In these circumstances, the Court looks through the California Supreme Court's silent denial and reviews the California Court of Appeal's opinion under the AEDPA standards. *See Ylst*, 501 U.S. at 803. With respect to the denial of Petitioner's remaining claims, there is no reasoned decision. Therefore, this Court will conduct an independent review of the record to determine whether the California Supreme Court's decision was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d).

V. Discussion

A. Grounds One and Two: Due Diligence and the Right to Confrontation

In Grounds One and Two, Petitioner challenges the admission of the preliminary hearing testimony of Clarence La Van. (Petition at 6 of 10; Traverse at 2-4). In Ground One, Petitioner challenges the California Court of Appeal's refusal to conduct a de novo review of the trial court's ruling that the prosecutor exercised reasonable

diligence to procure La Van's attendance at trial.[10] (Petition at 6 of 10; Traverse at 2-3). In Ground Two, Petitioner alleges that the admission of La Van's preliminary hearing testimony violated his Sixth Amendment right to confrontation. (Petition at 6 of 10; Traverse at 3-4).

1. Factual Background

Petitioner's trial commenced on May 8, 1995, but eyewitness Clarence La Van could not be located. (CT at 260; RT at 200-01). The prosecutor moved to admit La Van's preliminary hearing testimony. (RT at 201-32; CT at 260); *see* California Evidence Code § 1291. Petitioner objected to the admission of La Van's testimony, claiming that the District Attorney's office had failed to exercise due diligence in securing La Van's attendance at trial. (RT at 201-32; CT at 260).

Before ruling on the admissibility of La Van's prior testimony, the trial court conducted a due diligence hearing. (CT at 260; RT at 201-32). Deputy District Attorney Linda Reisz testified at the hearing. Reisz had been the lead prosecuting attorney in Petitioner's case from the time it was first filed until some time in the summer or fall of 1994, when a new prosecuting attorney was assigned. (CT at 260; RT at 204). Reisz testified that La Van had been reluctant to identify Petitioner as the shooter since his initial contact with

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[10] To the extent Petitioner is alleging in Ground One that the California Court of Appeal erred by failing to conduct a de novo review of the trial court's ruling, he fails to raise a federal question and this Court lacks jurisdiction to consider such claims. *See* 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[i]t is not the province of a federal habeas court to reexamine state court determinations on state law questions"). Therefore, this Court interprets the claim in Ground One as challenging the trial court's finding that the prosecutor exercised due diligence in attempting to locate La Van before trial.

law enforcement, as he was in fear for his safety. (RT at 203). At La Van's request, the District Attorney's Office agreed to relocate La Van and his family outside of the Los Angeles area. (RT at 203).

In June 1993, the District Attorney's Office flew La Van back to Los Angeles for Petitioner's preliminary hearing. (RT at 203-04). La Van identified Petitioner as the shooter at the Mobil gas station. (CT at 118, 133-34). Defense counsel conducted a cross-examination directed toward discrediting La Van and exposing his motives for testifying. (CT at 146-58; RT at 600-14).

In the fall of 1993, La Van became estranged from his wife and decided to move back to Los Angeles. (RT at 212-13). La Van stayed with his mother and sister, and for a brief period, moved to the San Fernando Valley. (RT at 205). Reisz maintained frequent contact with La Van through the winter and spring of 1994. (RT at 213).

In 1994, La Van became increasingly concerned about his safety. (RT at 206). He told Reisz that he was "hot," and that the Crips were after him. (RT at 206, 214). La Van complained that the District Attorney's office was not doing enough to protect him, and asked Reisz to put him in a witness protection program. (RT at 206). La Van wanted a new job, a new identity and a new life. (RT at 206). Reisz explained to La Van that the District Attorney's Office only offered relocation services. (RT at 206). Although La Van told Reisz that he would not testify and no longer wished to be involved in the case, Reisz did not take La Van's warnings seriously. Reisz was able to keep in touch with La Van through La Van's mother and sister, with whom La Van was very close. (RT at 207-08, 214-15). Reisz explained, "unless [La Van] was going to hide out from us, I had no concerns about his coming to court." (RT at 208). Reisz's last contact with

La Van occurred in the summer of 1994. (RT at 214).

Doug Pattillo, an investigator from the District Attorney's office, also testified at the due diligence hearing. (RT at 217-26). Pattillo had been given the assignment of locating La Van on January 5, 1995. (RT at 217). Pattillo ran checks on La Van's DMV records, probation records and phone numbers, spoke with La Van's family members, and served a subpoena on La Van's mother. (RT at 218-24). On April 27, 1995, Petitioner called Pattillo. (RT at 222). La Van complained that his life was at risk, but the District Attorney's Office had not been fair to him. (RT at 223). La Van told Pattillo that he was going to return to the place where his family had been relocated and would never testify at Petitioner's trial. (RT at 222-23).

Petitioner stipulated that the District Attorney's Office had "exercised the ultimate in due diligence," once Pattillo began searching for La Van. (RT at 224). However, Petitioner claimed the prosecutor should have made earlier efforts to secure La Van's presence at trial, because the prosecutor knew La Van would not appear. (RT at 225, 229-30). Petitioner also argued that "cross-examination would have been more extensive," had he known that La Van would not be testifying at trial. (RT at 230).

The trial court found that the prosecutor exercised due diligence in attempting to locate and secure La Van's presence at trial. (RT at 231). Therefore, La Van's testimony from the preliminary hearing was read to the jury. (RT at 231-32; RT at 546-615).

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2. Federal Law

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. When the prosecution seeks to offer a declarant's out of court statement into evidence against the accused, the Confrontation Clause requires that the prosecutor either produce the declarant or demonstrate his unavailability. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), abrogated by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).[11]

A witness is not unavailable unless the prosecution has made a good faith effort to obtain his presence at trial. *Roberts*, 448 U.S. at 74 ("The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness."); *Barber v. Page*, 390 U.S. 719, 724-25 (1968); *Hardy v. Cross*, 132 S.Ct. 490, 494 (2011); *Windham v. Merkle*, 163 F.3d 1092, 1102 (9th Cir. 1998) (prosecutor made a good-faith effort to locate witness where he subpoenaed witness, met with witness to discuss proposed testimony after issuing subpoena, tried to call witness three times as trial date approached, contacted witness's parole officer, had a bench warrant issued for witness's arrest, and assigned a criminal investigator who searched at places witness was known to frequent).

If the declarant is determined to be unavailable, his statement

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[11] Petitioner's conviction became final before the Supreme Court issued its opinion in *Crawford*, so the Court will apply the clearly established pre-*Crawford* Supreme Court law. See *Whorton v. Bockting*, 549 U.S. 406, 421, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (holding that the new *Crawford* rule is applicable only to cases that are still on direct review and does not apply retroactively to cases on collateral review).

is admissible only if it bears "adequate indicia of reliability." *Roberts*, 448 U.S. at 66; *Bains,* 204 F.3d at 973. An out-of-court statement is deemed admissible if it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66; *Bains,* 204 F.3d at 973.

3. Prosecution's Efforts to Locate La Van

On direct review, the California Court of Appeal found that the prosecution had used due diligence in the attempts to locate La Van before trial. (Lodgment 4 at 5-8). In finding that the prosecution's efforts had been reasonable, the state court explained:

> [T]he People [do not] have an "obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set. Certainly, resort to the subpoena or 'material witness' processes would have been premature in this case."

(Lodgment 4 at 8 (quoting *People v. Hovey*, 44 Cal.3d 546, 564 (1988)). The state court's decision was not contrary to or an unreasonable application of clearly established law, nor was it an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

While La Van was clearly a reluctant witness, the record as a whole demonstrates that the prosecutor made a diligent and good faith effort to obtain La Van's presence at trial. From January 1993 through the summer of 1994, assistant district attorney Reisz

regularly communicated with La Van. (RT at 205, 213). La Van cooperated with the prosecution by testifying at the preliminary hearing and by providing contact information for himself and his close relatives after he moved back to Los Angeles. (RT at 205). Although communication with La Van dropped off in the latter half of 1994 when a new prosecutor was assigned to Petitioner's case, the prosecution's investigator began a thorough and diligent search for La Van in January 1995, more than four months before trial. (RT at 217, 224). That the prosecution did not attempt to locate La Van earlier or do more to locate him does not compel the conclusion that the prosecution's efforts were unreasonable or lacked good faith. *Roberts*, 448 U.S. at 74. While in hindsight, additional steps might have been taken to locate La Van, that does not render the prosecutors' conduct here unreasonable. *Hardy*, 132 S.Ct. at 494. Accordingly, the state court's finding in this respect was not objectively unreasonable, and Petitioner is not entitled to habeas relief on this claim.

4. Admission of La Van's Preliminary Hearing Testimony

Petitioner contends that the admission of La Van's preliminary hearing testimony at trial violated the Confrontation Clause. (Petition at 5 of 10; Traverse at 4). The California Court of Appeal held that the admission of La Van's prior testimony did not deprive Petitioner of the right to confrontation as, "La Van's testimony at the preliminary hearing was subject to effective cross-examination by defense counsel." (Lodgment 4 at 9). The state court's denial of Petitioner's Confrontation Clause claim was not contrary to or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the

evidence presented.

The Confrontation Clause guarantees only an opportunity for effective cross-examination — not "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (citation omitted). Preliminary-hearing testimony of an unavailable witness is presumptively admissible. *California v. Green*, 399 U.S. 149, 166 (1970) (Where a defendant's attorney was not "significantly limited in any way in the scope or nature of his cross-examination of the witness . . . at the preliminary hearing," "the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State."); *Barber*, 390 U.S. at 725–26.

Petitioner asserts that defense counsel did not fully cross-examine La Van at the preliminary hearing, as La Van "was an obvious hostile witness who was giving untruthful answers." (Petition at 5 of 10; Traverse at 4). Petitioner claims that jury was not given an adequate opportunity to evaluate La Van's credibility. (Traverse at 3-4). Petitioner has not identified any specific areas of inquiry or questioning that he would have pursued at trial had La Van appeared as a witness. Nor is there any evidence that cross-examination of La Van at the preliminary hearing was limited in any way. Indeed, defense counsel questioned La Van about the District Attorney's agreement to relocate him. La Van admitted that the District Attorney's Office paid for his first and last month's rent and helped him get his car out of debt. (CT at 146-48, 155; RT at 601-03, 609-12). Defense counsel also elicited testimony from La Van that he had

a felony conviction for selling marijuana and that his brother-in-law was a member of the Six Eight faction of the Crips. (CT at 156-57; RT at 601-02, 612). Thus, while defense counsel may have been frustrated by La Van's evasiveness and purported untruthfulness, [t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion." *United States v. Owens*, 484 U.S. 554, 559 (1988) (citation omitted). It was enough that the defense was "given a full and fair opportunity to probe and expose [the] infirmities" in La Van's testimony through cross-examination. *Id*. (citation omitted).

Accordingly, federal habeas relief is not warranted on this claim for relief.

B. Ground Three: Sufficiency of the Evidence

Petitioner contends there was insufficient evidence to support his convictions for the four counts of murder and one count of attempted murder arising from the Mobil station shooting, as the evidence failed to establish that he was the shooter. (Petition at 7 of 10; Traverse at 4). In the alternative, Petitioner asserts that there was insufficient evidence to support the jury's findings that two of the murders were in the first degree (counts 1, 2). (Petition at 7 of 10; Traverse at 4).

"[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). A reviewing court must first "consider the evidence presented at trial

in the light most favorable to the prosecution," and then determine whether any "rational trier of fact could have found proof of guilt beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (citing *Jackson*, 443 U.S. at 319). In evaluating an insufficiency of the evidence claim, this Court "may not substitute its judgment for that of the jury" and thus may be required to uphold a conviction that it "believes to be mistaken." *Cavazos v. Smith*, 565 U.S. ----, 132 S.Ct. 2 at * 4 (2011). This Court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995).

AEDPA imposes an additional layer of deference to the state court's decision. Habeas relief is not warranted unless "the state court's application of the *Jackson* standard [was] 'objectively unreasonable.'" *Juan H. v. Allen*, 408 F.3d 1262, 1275 n. 13 (9th Cir. 2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (200)).

1. Identity

Petitioner claims that there was insufficient evidence at trial to identify him as the perpetrator of the Mobil gas station crimes. Specifically, Petitioner contends: La Van's identification of Petitioner "was tentative and weakened further by his unreliable character;" Martin was unable to identify Petitioner as the shooter; and the surviving victim, Little Owl (Donte Davis), testified that he was friendly with Petitioner and that Petitioner "had no reason to shoot at the victims." (Petition at 7 of 10; Traverse at 4).

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The California Court of Appeal found that the jury was entitled to believe La Van's preliminary hearing testimony identifying Petitioner as the shooter as well as the identification made by Martin. (Lodgment 4 at 10). It concluded that substantial evidence supported the jury's finding that Petitioner was the person at the gas station who shot the victims. (Lodgment 4 at 9-10). The state court's decision was objectively reasonable.

Although La Van did not testify at trial, he positively identified Petitioner from a photographic lineup and at the preliminary hearing. (RT at 555, 598, 638-39). La Van testified that the lighting at the gas station was very bright and he was able to get a full view of the front and side of Petitioner's face from about 20 feet away. (RT at 586-87). The jury was well aware of the challenges to La Van's credibility, (including the financial assistance he received from the District Attorney's Office's through the relocation program, La Van's prior conviction for selling marijuana, and La Van's brother-in-law's membership in the Six Eight), but was not persuaded by such evidence.

Martin's testimony also connected Petitioner with the Mobil gas station shooting. While Martin did not identify Petitioner as the shooter, he recognized Petitioner from the gas station. Martin chose Petitioner's photo from a photographic array, picked Petitioner out of a live lineup, and testified at the preliminary hearing and at trial that Petitioner was the person who had been standing near the cashier's window at the gas station just before the shooting started. (RT at 408, 419-21, 423, 426-30, 511-12). Martin saw Petitioner walk toward the alley, from which gunfire erupted minutes later. (RT at 402-04, 409, 411). Martin's testimony provided compelling

circumstantial evidence that Petitioner had been the person who fired the shots at the Mobil gas station.

The jury found that the prosecution evidence was sufficient to establish Petitioner's identity as the shooter beyond a reasonable doubt. This Court may not reweigh the evidence or redetermine issues of credibility resolved by the jury. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review."); *Bruce v. Terhune*, 376 F.3d 950, 958 (9th Cir. 2004) ("A jury's credibility determinations are ... entitled to near-total deference under *Jackson*."); *United States v. Franklin*, 321 F.3d 1231, 1239-40 (9th Cir. 2003) (court does not "question a jury's assessment of witnesses' credibility" but rather presumes that the jury resolved conflicting inferences in favor of the prosecution); *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000) (although evidence was "almost entirely circumstantial and relatively weak," questions of credibility were for the jury, and prosecution evidence, if believed, sufficed to support conviction). Accordingly, Petitioner is not entitled to habeas relief on this claim.

2. First Degree Murder Convictions

Petitioner asserts that there was insufficient evidence of premeditation and deliberation to support the first degree murder convictions of June Bug (Henry Broomfield) and the Jamaican (Raymond Phillips), because there was no evidence that he planned the murders, had a motive for the murders, or that the manner of the killings pointed to a preconceived design to take life. (Petition at 7 of 10; Traverse at 4).

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Under California law, a "willful, deliberate, and premeditated" killing is murder in the first degree. Cal. Penal Code § 189. In this context, "willful" means intentional; "deliberate" means formed or determined upon as a result of careful thought and weighing of considerations for and against the action; and "premeditated" means considered beforehand. *People v. Perez*, 2 Cal.4th 1117, 1123 (1992) (quoting CALJIC No. 8.20). Premeditation is not measured in units of time, "but rather the extent of reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it included an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree." *Perez*, 2 Cal.4th at 1124.

The California Court of Appeal examined the evidence presented at trial and found that it was sufficient to support the jury's conviction of those two counts of first-degree murder. (Lodgment 4 at 10-11). It explained that the shooting was motivated by gang war, and that a jury could infer that the killings of June Bug and the Jamaican were premeditated and deliberate, given the unprovoked, brutal manner of the shooting. (Lodgment 4 at 10-11). Resolving all conflicting factual inferences in favor of the prosecution, the court of appeal's determination was not objectively unreasonable.

The evidence established that Petitioner was a member of the Six Deuce faction of the East Coast Crips, while June Bug and Little Owl were members of the Six Eight. (RT at 800, 838-39). A gang expert testified that, at the time of the shooting, a rivalry had developed between Six Deuce and Six Eight. (RT at 733). Six Eight spurred on the rivalry when it began selling drugs in Six Deuce territory, which

included the Mobil gas station. (RT at 731-33, 741, 841). The gang rivalry between Six Deuce and Six Eight established a motive that supported a finding of premeditation and deliberation for the murder of June Bug. *See, e.g., People v. Wells*, 199 Cal.App.3d 535, 541 (1988) (finding sufficient evidence of first degree murder based in part on motive of gang rivalry).

Petitioner's actions also demonstrated that the killing of the Jamaican was the product of reflection, which supported a finding of premeditation and deliberation. The Jamaican was hit by Petitioner's initial round of gunfire. (RT at 406). He was lying on the ground, yelling in pain, when Petitioner walked over and fired numerous bullets at him. (RT at 562-68). The Jamaican incurred bullet wounds in six parts of his face, left thigh, groin, buttock, left calf, back, and chest. (RT at 575, 581, 675-76, 679-85). From this evidence, a jury could reasonably infer that the Jamaican was not just the victim of random gunfire, but that Petitioner murdered him at point blank range with a deliberate and premeditated intent to kill. *See, e.g., Wells*, 199 Cal.App.3d at 541 (finding sufficient evidence of premeditation and deliberation when armed defendant fired three bullets into victim's back at point blank range). Thus, the state court's decision denying Petitioner's claim was not objectively unreasonable.

C. Ground Four: Joinder of Cases

Petitioner contends that his due process rights were violated by the joinder of the charges arising from the gas station shooting (Counts 1, 2, 3, 4, 5), together with the attempted murder of the police officer charges (Counts 6, 7) and the possession of a short

barreled rifle charge (Count 8).[12] (Petition at 7 of 10). Petitioner contends that the consolidation of charges was prejudicial because he was required to admit that he possessed an automatic weapon when he was arrested on December 14, 1992, and because the jury was permitted to hear "a superfluity of gang-related evidence." (Petition at 7 of 10; Traverse at 5). The California Court of Appeal held that the crimes charged were properly subject to joinder and that no prejudice resulted from the consolidation. (Lodgment 4 at 12).

The Ninth Circuit has held that there is no clearly established Supreme Court precedent holding that improper joinder of antagonistic defendants could result in a Constitutional violation. *Collins v. Runnels*, 603 F.3d 1127, 1132 (9th Cir. 2010)(interpreting *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)). This principle has been applied in this district to an allegation of improper joinder of charges. *Pacheco v. Busbe*, 2011 WL 2437480 at *6-7 (C.D. Cal. Mar. 22, 2011). Because there is no clearly established Supreme Court precedent regarding alleged mis-joinder of charges, the state court's decision cannot be deemed unreasonable and habeas relief is not warranted on this claim. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Wright v. Van Patten*, 522 U.S. 120, 122 (2008) (per curiam).

Finally, even assuming that the improper joinder of charges could be deemed a Constitutional violation, the improper joinder must actually render a petitioner's state trial fundamentally unfair, and therefore a violation of due process. *Featherstone v. Estelle*, 948

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[12] Prior to trial, the prosecution moved for joinder of the two cases, citing judicial economy. (CT at 54-59). Over Petitioner's objections, the trial court granted the motion to consolidate the cases. (CT at 61-66, 70).

F.2d 1497, 1503 (9th Cir. 1991); *Sandoval v. Calderon*, 241 F.3d 765, In this case, Petitioner was not unduly prejudiced by the consolidation of charges. The jury hung 11 to 1 on the charges of attempted murder of the police officers. (CT at 277, 345, 347; Lodgment 4 at 13). Generally, the failure of the jury to convict on all counts is "the best evidence of the jury's ability to compartmentalize the evidence." *United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987); *see Park*, 202 F.3d at 1150 (holding consolidation of two sets of crimes at petitioner's state trial did not violate his due process right where the jury acquitted on two of the counts and the cases were not weak). Thus, the jury's verdict indicates that it did not hold the Counts 6 and 7 against Petitioner when deciding the gas station charges.

The jury also displayed its ability to give separate consideration to each individual count, when it distinguished between the degrees of murder and found Petitioner guilty of two counts of first degree murder and two counts of second degree murder. (CT at 336-39; Lodgment 4 at 13). In addition, there was substantial evidence introduced at trial supporting Petitioner's convictions on the gas station charges as well as the possession of a short barreled rifle charge. (RT at 402, 423, 453-54, 555-56, 595-98, 793-95, 800). Given the strength of the evidence against Petitioner and the jury's inability to reach a verdict on the attempted murder of the police officer charges, Petitioner has not shown that he was prejudiced by the joinder, or that the consolidation rendered his trial fundamentally unfair.

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D. Ground Five: Suggestive Identification Procedures

Petitioner challenges the pretrial and in-court identifications of him made by Leroy Martin as a violation of his right to due process. Petitioner asserts that the identification procedures were unfair because he was the only person whose photo appeared twice in the photographic arrays that were shown to Martin, and because police told Martin that Petitioner had been at the Mobil gas station on the night of the shooting. (Traverse at 6).

In early January 1993, police detectives showed Martin six photographic arrays ("sixpacks"). (RT at 508-09, 527). Petitioner was the only person whose picture appeared twice in the sixpacks. (RT at 527). Martin chose Petitioner's photo from one of the cards, because Petitioner came closest to the person that he had seen at the gas station. (RT at 433, 511). Martin later explained that he had been "75 percent sure that the guy in [the] photo . . . is the guy I saw . . . that night." (RT at 427-29, 510-11).

On February 11, 1993, Martin viewed a live lineup, which included Petitioner in position number five. (RT at 429, 511-12). Martin did not identify Petitioner from the lineup. (RT at 511-13). On a witness admonition card, Martin wrote, "none" when asked for the position of the suspect. (RT at 421, 512). However, in the remarks section of the card, Martin explained, "number five came the closest" to the person he saw at the gas station on the night of the shooting. (RT at 421-22, 432-33, 512). There was testimony that after the live lineup, one of the police detectives informed Martin that Petitioner had been at the gas station on the night of the shooting. (RT at 434, 436). The detective who attended the live lineup denied making this statement. (RT at 522). At the preliminary hearing and at trial,

Martin identified Petitioner as the man he had seen at the gas station on the night of the shooting. (CT at 99, 177, 179, 181; RT at 402, 453-54).

The principles of due process prohibit the admission of eyewitness identifications obtained after police have arranged identification procedures so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Perry v. New Hampshire*, --- U.S. ----, 132 S.Ct. 716, 720 (2012); *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Moore v. Illinois*, 434 U.S. 220, 227 (1977). A two-part analysis is used to evaluate whether an in-court identification has been irreparably tainted by an impermissibly suggestive pretrial identification procedure in violation of due process. *See United States v. Love*, 746 F.2d 477, 478 (9th Cir. 1984); *Green v. Loggins*, 614 F.2d 219, 223 (9th Cir. 1980). The first step is to determine whether the pretrial identification was unduly suggestive. *Simmons*, 390 U.S. at 384; *Green*, 614 F.2d at 223. This may occur when a photographic identification procedure "emphasize[s] the focus upon a single individual," thereby increasing the likelihood of misidentification. *See United States v. Bagley*, 772 F.2d 482, 493 (9th Cir. 1985). For example, the danger of misidentification "will be increased if the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." *Simmons*, 390 U.S. at 383; *see Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (explaining that an identification procedure may be impermissibly suggestive where a special focus upon a suspect such that it appears to be suggested that a particular suspect is "the" person for a witness to identify,

or where a witness perceives pressure from police officers to "acquiesce" in identifying a particular individual such that the possibility is raised that the identification may have stemmed from suggestion and not from the witness's own recognition of the suspect); *see also Foster v. California*, 394 U.S. 440, 443 (1969) (An identification procedure is impermissibly suggestive if it "[i]n effect ... sa[ys] to the witness, 'This is the man.'" (citation omitted)). Whether an identification procedure was unduly suggestive is a fact specific determination, which may involve consideration of the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves. If the identification procedure was not unduly suggestive, the analysis ends.

If the identification procedure was unduly suggestive, the second step requires a determination of whether the totality of the circumstances surrounding the eyewitness's identification indicates that the identification was nonetheless reliable. *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Simmons*, 390 U.S. at 383; *Love*, 746 F.2d at 478. Factors considered in assessing reliability include: (1) the opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention (including any police training); (3) the accuracy of the prior description; (4) the witness's level of certainty at the confrontation; and (5) the length of time between the crime and the identification. *Biggers*, 409 U.S. at 199-200; *Manson v. Brathwaite,* 432 U.S. at 114. Where "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately

determine its worth." *Perry*, 132 S.Ct. at 720.

Here, assuming, *arguendo*, that the pretrial identification procedures were unduly suggestive, under the totality of the circumstances, Martin's in-court identifications of Petitioner were nevertheless reliable. *Biggers*, 409 U.S. at 199-200. The evidence showed that Martin had ample opportunity to observe the suspect at the gas station. He watched as the suspect walked from the direction of the alley to the cashier's window. (RT at 401). The suspect stood with his back to the cashier's window, folded his hands and observed the scene for about four minutes before walking back toward the alley. (RT at 401-02, 438-39). Martin paid special attention to the suspect because he was a "new face" at the gas station, whereas Martin was "there on a regular basis." (RT at 401, 428). Martin described the suspect as an African American male, who was wearing jeans, a beany, and a jean shirt. (RT at 402, 418). Later, Martin observed the suspect leave the gas station through the same alley which he entered. (RT at 402, 409, 428). When shown the photographic arrays by police, just a few weeks after the shooting, Martin chose Petitioner's photo as the person he had seen at the gas station. (RT at 511-12). Martin stated that Petitioner's picture "looks a lot like a guy I saw near the cashier's window on the night that the shooting happened. I didn't see him with a gun but I saw him near the black and red car and near the cashier's window. I am about 75 percent sure that the guy . . . is the guy that I saw that night." (RT at 427-29, 510-11). In sum, Martin's opportunity to view the suspect, his degree of attention, his level of certainty in the identifications, and the brief lapse of time between the shooting and his initial identification of Petitioner favors reliability.

Petitioner challenges Martin's identifications as unreliable because he gave police a description of the suspect that did not match Petitioner. According to Petitioner, Martin told police that the person he had seen at the gas station appeared to be in his late twenties, but Petitioner was actually only 19 years old at the time of the shooting. (Traverse at 6). Even if Martin did misjudge Petitioner's age by about ten years, the description that Martin gave to police was sufficiently detailed. (CT at 180-81; RT at 402). Any inconsistency between Martin's description of the suspect with Petitioner's actual age at the time of the shooting is insufficient to render the identifications unreliable. *See, e.g., United States v. Duran-Orozco*, 192 F.3d 1277, 1282 (9th Cir. 1999) (identification sufficiently reliable where witness' descriptions of defendants were "fairly, although not totally" accurate); *United States v. Jones*, 84 F.3d 1206, 1210 (9th Cir. 1996) (identifications reliable where witness's descriptions were "accurate, and with the exception of variations in their estimates of the robber's height, their descriptions were consistent").

Petitioner also challenges the certainty of the in-court identifications because Martin did not identify Petitioner as the "suspect" at the live lineup. (RT at 429). As discussed earlier, Martin never identified Petitioner as the shooter because he did not see Petitioner with a gun. (RT at 433-34). Martin did, however, consistently identify Petitioner as the person that he saw standing at the gas station cashier window just before the shooting began, and leaving in the direction of the alley, where the bullets were fired. (CT at 99, 177, 179, 181; RT at 402, 453-54). Based on the totality of the circumstances, Martin's identification of Petitioner was

sufficiently reliable to outweigh any alleged corrupting effect of the challenged pretrial identification procedures.

F. Ground Six: Ineffective Assistance of Counsel

Petitioner contends trial counsel provided ineffective assistance by failing to object to Martin's in-court identification testimony as it was based on unduly suggestive identification procedures. The California Supreme Court's denial of this claim on collateral review was not objectively unreasonable.

The Sixth Amendment entitles criminal defendants to the "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffective assistance of counsel, a petitioner must prove: (1) deficient performance, *Id.* at 687-91; and (2) prejudice. *Id.* at 694; *Mirzayance*, 556 U.S. at 122.

Trial counsel was not ineffective. As noted above, the in-court identification of Petitioner by Martin was not tainted. Therefore, any motion to suppress this evidence would have proved futile. Counsel's failure to make a futile motion or raise a meritless argument does not constitute ineffective assistance of counsel. *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *see also Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (finding that trial counsel committed no error by failing to file a meritless motion to suppress).

VI. Recommendation

For the reasons stated above, it is recommended that the Petition be **DENIED**.

DATED: October 2, 2012

Marc L. Goldman
United States Magistrate Judge

JS-6/ENTER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARLON DARREL EVANS,

Petitioner,

v.

GEORGE GALAZA, WARDEN,

Respondent.

Case No. CV 98-8536-WDK (MLG)

JUDGMENT

IT IS ADJUDGED that the petition is denied with prejudice.

Dated: 12/6/12

William D. Keller
United States District Judge

S069554

IN THE SUPREME COURT OF CALIFORNIA

IN RE MARLON DARREL EVANS

ON

HABEAS CORPUS

SUPREME COURT
FILED
AUG 26 1998
Robert Wandruff Clerk
DEPUTY

Petition for writ of habeas corpus is DENIED.

Mosk, J., is of the opinion an order to show cause should issue.

George
Chief Justice

EXHIBIT 31 - 320

EXHIBIT 31 - 324

14

SHERIFF'S DEPARTMENT - COUNTY OF LOS ANGELES

WITNESS CARD AND ADMONITION

LM 1. YOU ARE GOING TO VIEW A LINEUP OF SIX SIMILAR APPEARING INDIVIDUALS.

LM 2. THE SUSPECT(S) INVOLVED IN YOUR CRIME MAY OR MAY NOT BE IN THIS LINEUP.

LM 3. YOU ARE UNDER NO OBLIGATION TO IDENTIFY ANYONE AS A SUSPECT.

LM 4. THE PURPOSE OF THIS LINEUP IS TO ELIMINATE ANY INNOCENT PERSONS AS WELL AS IDENTIFYING THE PERSON(S) RESPONSIBLE.

LM 5. DO NOT TALK TO EACH OTHER DURING THE LINEUP.

LM 6. IF YOU HAVE A QUESTION AFTER THE LINEUP IS COMPLETED, RAISE YOUR HAND AND AN OFFICER WILL CONTACT YOU. OTHERWISE, PLEASE MARK YOUR DOCUMENT AS APPROPRIATE AND AN OFFICER WILL COLLECT IT.

LM 7. THERE MAY BE PROSECUTING ATTORNEYS PRESENT WHO WISH TO SPEAK TO YOU REGARDING YOUR CASE. IF SO, THEY WILL IDENTIFY THEMSELVES.

LM 8. THERE MAY ALSO BE ATTORNEYS REPRESENTING VARIOUS DEFENDANTS WHO MAY WISH TO SPEAK TO YOU REGARDING YOUR CASE. YOU ARE UNDER NO OBLIGATION TO SPEAK TO THEM OR ANSWER THEIR QUESTIONS. WHETHER YOU DO OR NOT IS ENTIRELY UP TO YOU.

PLEASE PRINT

LINEUP # 3 DATE: 2-11-93

YOUR NAME (PLEASE PRINT) Leroy Martin

POLICE DEPARTMENT HANDLING YOUR CASE: L.A.P.D.

I AM UNABLE TO MAKE AN IDENTIFICATION: _____

THE SUSPECT IN MY CASE IS NUMBER: Four — did he choose before or after the 8?

REMARKS: Number 5 was the one.

TYPE OF HEARING TRIAL
CASE NO. BA071499
EXH. NO. 14
ADMITTED IN EVIDENCE
DATE JUL 12 1996
BY: _____ DEPUTY

Leroy Martin
SIGNATURE OF WITNESS

EXHIBIT 31 - 325

PHOTO IDENTIFICATION REPORT

DETECTIVE: Schunk, D. Hareen, G.

LOCATION: 1126 W 65th Pl.

DATE: 1/5/93

COMMENTS OF WITNESS: I fully understand the admonition read to me regarding the

ADDITIONAL COMMENTS REGARDING PHOTOGRAPHS -

THE PERSON IN PHOTOGRAPH #3 [illegible]
4 F 11" LOOKS A LOT LIKE THE GUY I SAW NEAR
THE CASHIERS WINDOW ON THE NIGHT [illegible]
THE SHOOTING HAPPENED. I DID NOT SEE HIM
WITH THE GUN BUT I SAW HIM NEAR THE
BURGK AND RED CAR AND NEAR THE CASHIERS
WINDOW. I'm ABOUT 75% SURE THAT THE
GUY IN PHOTO #3 ON CARD #F [illegible] THE GUY
I SAW THAT ~~[illegible]~~ I SAW THAT NIGHT.

SIGNATURE OF WITNESS: Jerry Martin INITIALS: J.M DATE: 1-5-93 TIME: 10:55 AM

LAPD 15.50.4 (12-78)

TYPE OF HEARING: [illegible] CASE NO. B[illegible] EXH. NO.

ADMITTED IN EVID[illegible] DATE [illegible]

EXHIBIT 31 - 335

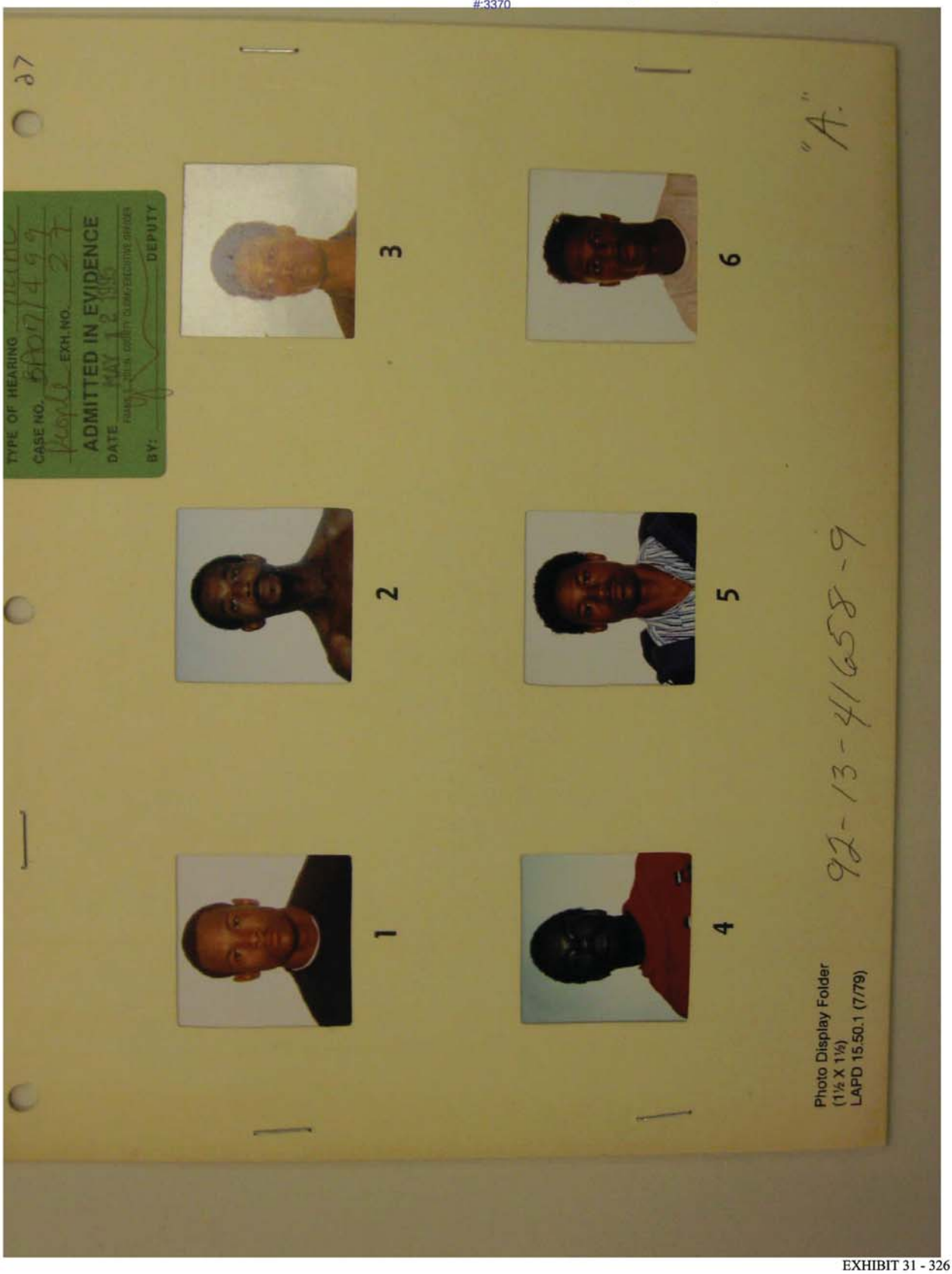

EXHIBIT 31 - 326

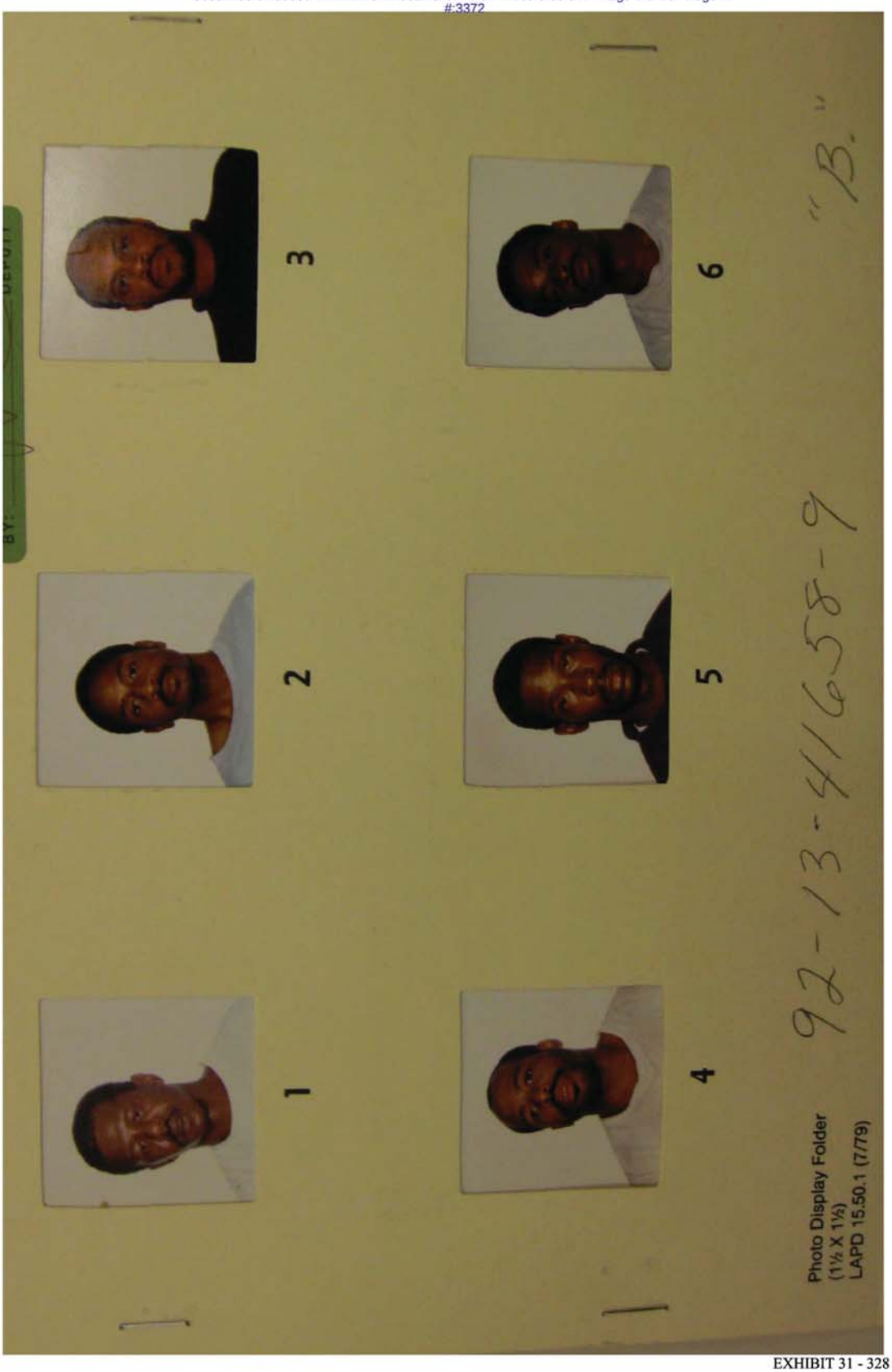

EXHIBIT 31 - 328

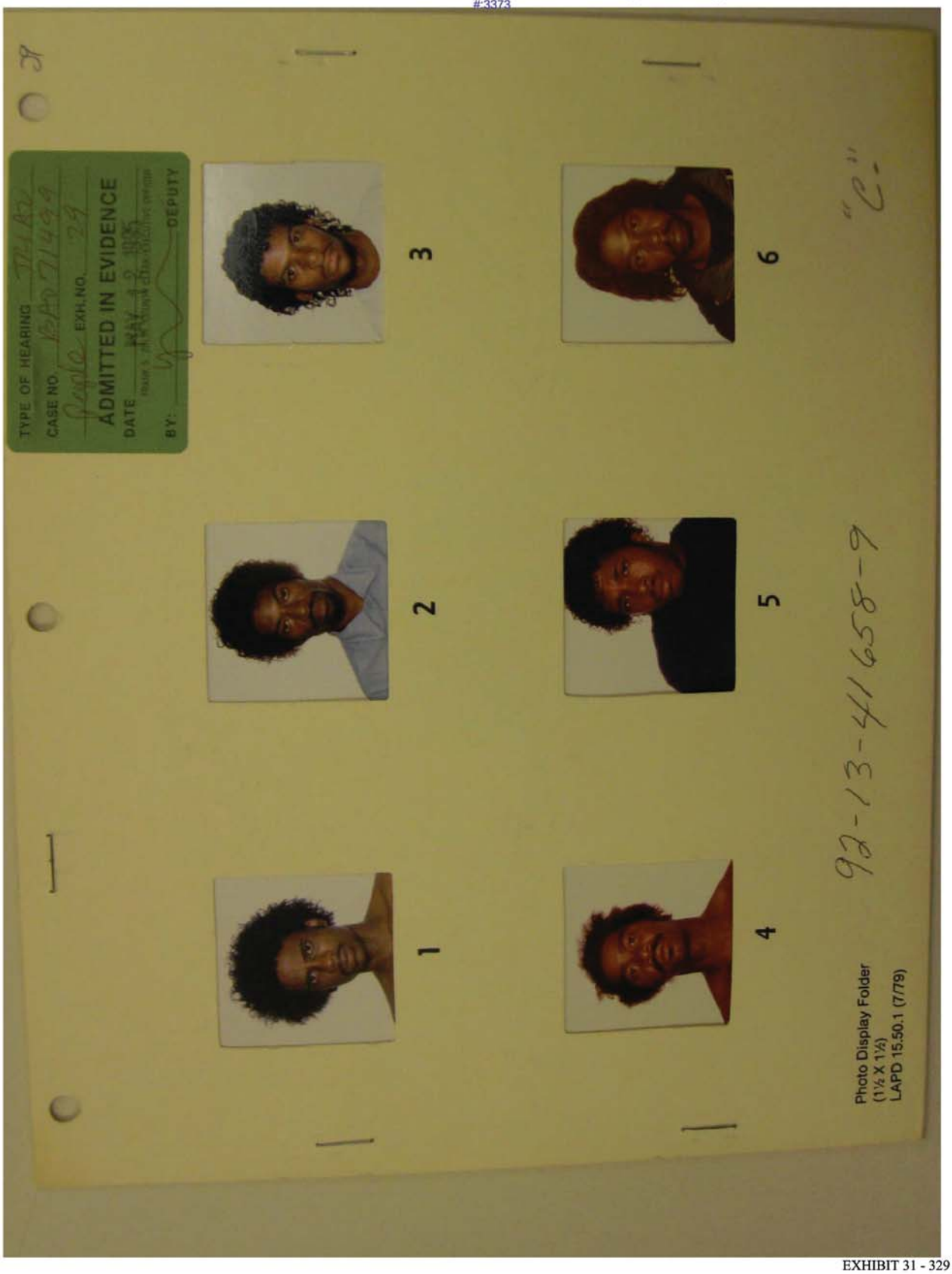

EXHIBIT 31 - 329

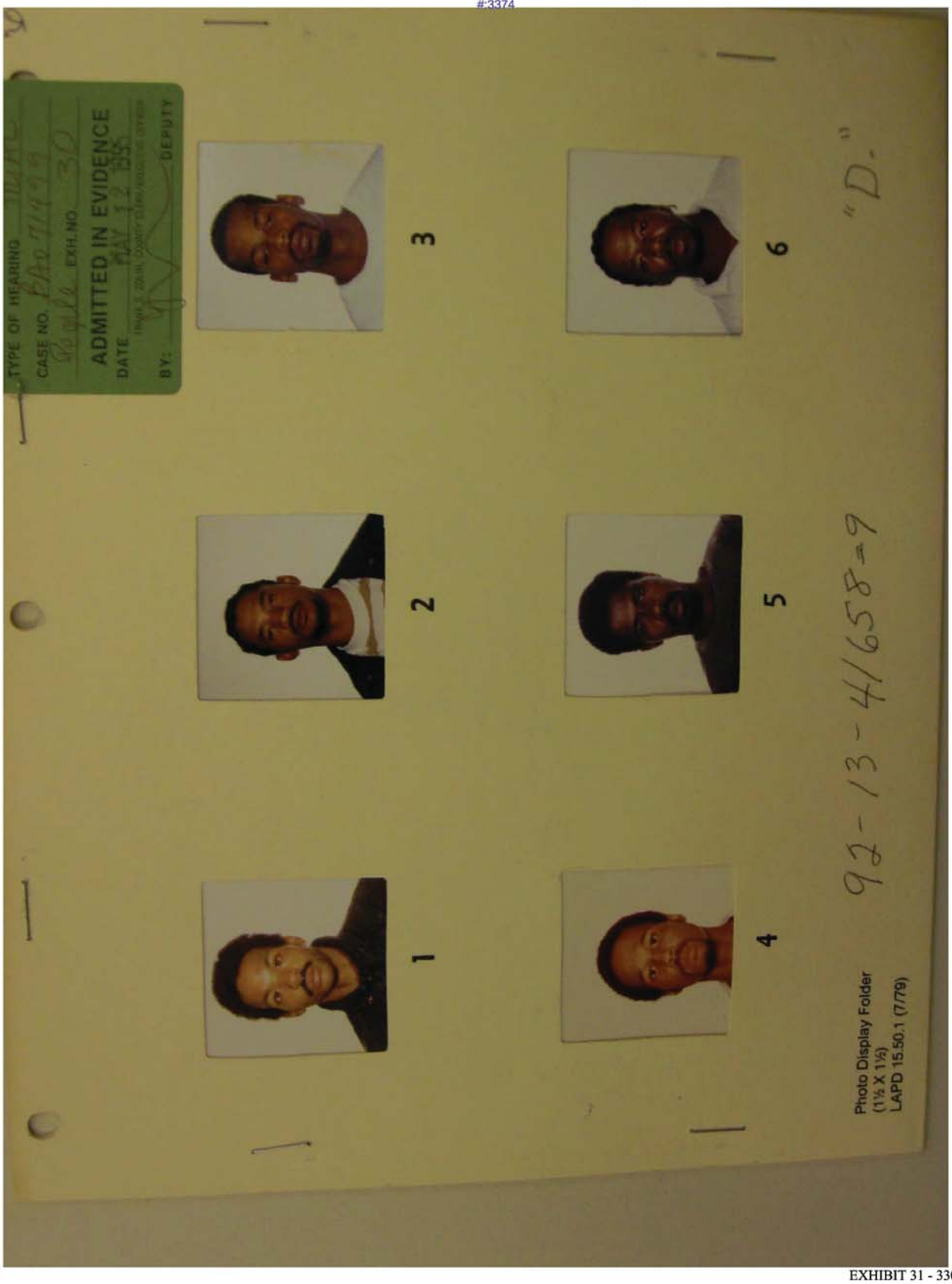

EXHIBIT 31 - 330

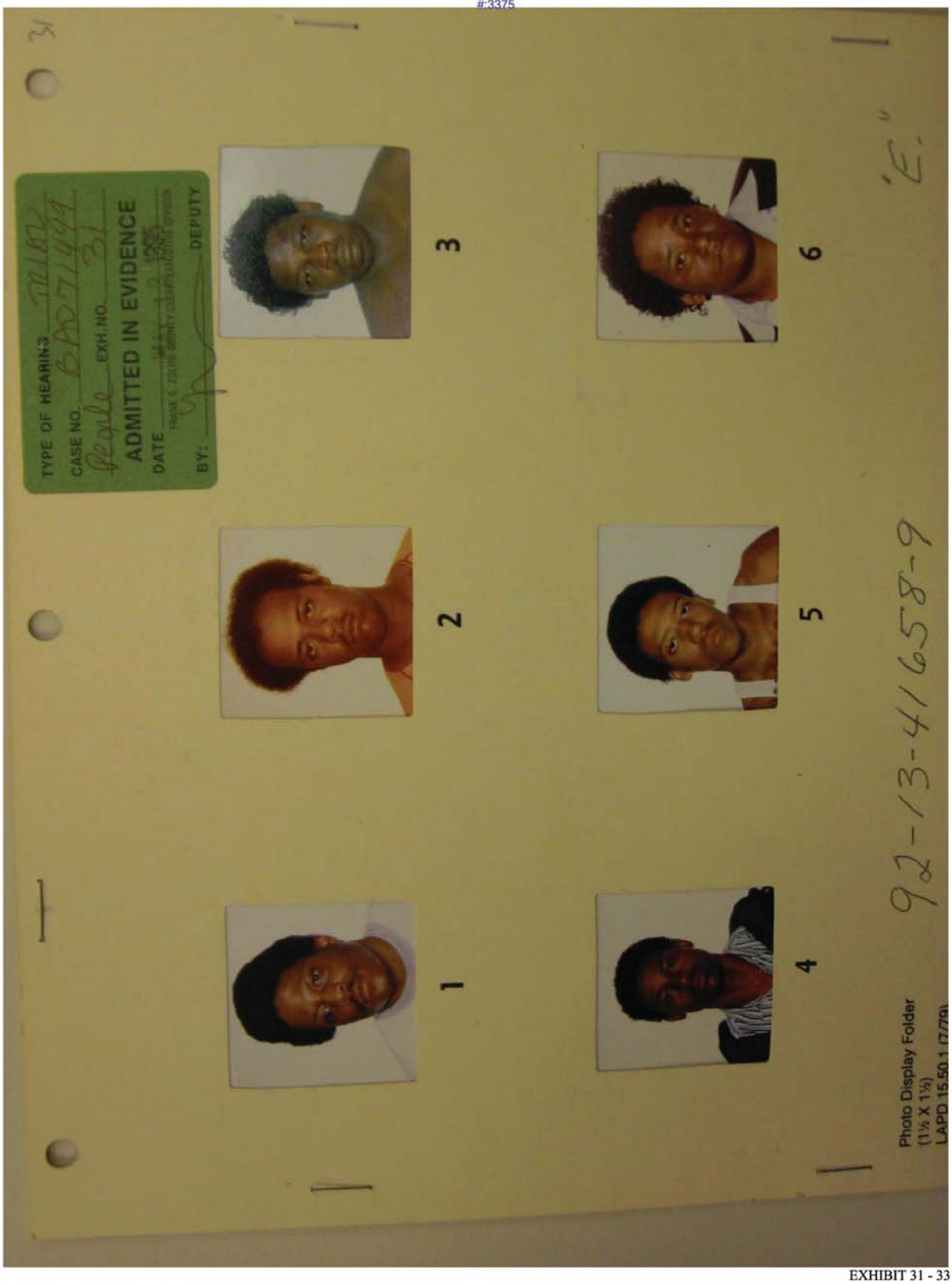

EXHIBIT 31 - 331

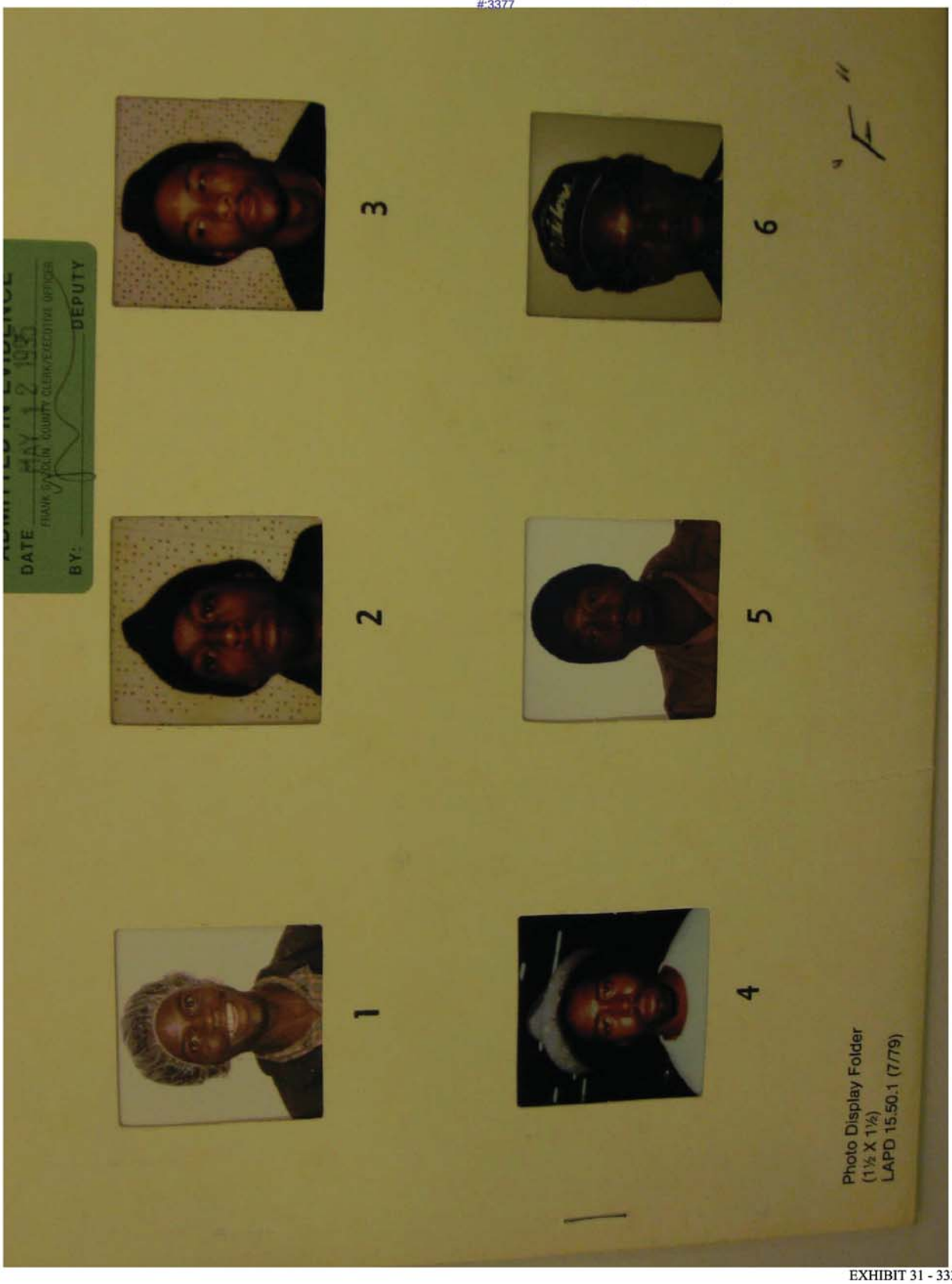

EXHIBIT 31 - 333

DECLARATION OF LARRY ANDERSON

I, LARRY ANDERSON, declare:

1. I am a friend of Marlon Evans. We grew up together in South Central Los Angeles and went to school together. One of the victims, Henry Broomfield ("Junebug") also went to school with us and we were all friends.

2. On the night of December 13, 1992, I was driving my 1978 Plymouth Station Wagon on 61st Street. Keenan Gardner was in front of me driving a black Monte Carlo, along with Ruben Jones and Marlon Evans. I knew who was in his car because we were caravanning together.

3. I continued following Keenan Gardner when he made a right turn on Main Street and a quick left on 59th Place. We were speeding. After we turned on 59th Place, the police pulled me over. I drove past Keenan Gardner's car which had pulled to the curb and had its lights off. The stop was on 59th Place between Main Street and Broadway.

4. Two officers got out of the police car. They asked me for my driver's license and had me step out of the car. Shortly after that, I heard gunfire that was obviously coming from an automatic weapon. It sounded like it was close by. The police officers immediately returned to their car and took off in the direction of the shooting heading west on 59th Place toward Broadway. The police left in such a hurry that they took my license with them. They did not even write me a ticket, which I was relieved about. The police ended up mailing my driver's license to my father's auto body shop, "New Superior Auto Body" on Florence and Broadway a couple of weeks later. My father and I have the same name.

5. The guys and I talked for a bit. Travon Mustin approached us from across the street by Calvin Dixon's house ("Crip Cal") which was another place we used to hang out often. We decided to patrol the neighborhood and see what had happened. Travon Mustin got in my

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EXHIBIT 2 - 6

car. As we approached Gage and San Pedro, I saw Donta Bavis's (Lil Owl's) Cadillac shot up and Lamont Devault standing by it on the street. Mia Dansby was also there. People were starting to gather around, and I knew something serious had happened. I hung around and saw them put Junebug in an ambulance that left without turning the siren on. They put Donta Bavis in another ambulance that left with a siren on.

6. After that I went to Fred's Liquor Store and then to the Name of the Game, a club in Los Angeles located at 120th Street and Western Avenue. I remember seeing Marlon Evans at the club, as well as Keenan Gardner, Ruben Jones, Travon Mustin, and Lamont Devault.

7. Marlon Evans was arrested shortly after the shooting, but I didn't think he would do time for the murders because I knew he was with us at the time of the shots. I figured once the district attorney heard that, they would let Marlon go.

8. While I was in Youth Authority in Ontario, California, Marlon's trial investigator came to see me, and I told him what I remembered that night. I was more than willing to testify at Marlon's trial if his attorney had asked me to. I would have testified to the contents of this declaration. I am willing and available to testify to the same today.

9. No one from law enforcement ever came to see me about the gas station shooting, and I did not hear again from Marlon's investigator or attorney.

10. There was no war between the Six-Deuce and Six-Eight factions of the East Coast Crips at the time of the shooting. Aside from the fact that I know Marlon could not have committed the crime because he was with me at the time of the shooting, I know that he would have no reason to shoot at our mutual friends.

//

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LA
LA

EXHIBIT 2 - 7

11. On July 7, 2016, Marlon's attorney, Deputy Federal Public Defender Michael Parente and investigator Deborah Crawford talked to me about what I remembered about the night of the shooting. I freely agreed to share what I knew.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

Executed this 7th day of July, 2016, in Covina, California.

LARRY ANDERSON

DECLARATION OF RUBEN JONES

I, RUBEN JONES, declare:

1. I am a friend of Marlon Evans and have known him since we were school children. I am currently incarcerated at Men's Colony in San Luis Obispo, California, where I am serving a life sentence. Lamont DeVault was my co-defendant. I am a former member of the Six Deuce East Coast Crips, which I joined when I was 12 or 13 years' old. I left the gang in my 20s after my daughter's mother was killed. I was 31 at the time of my trial in 2001. I am no longer gang affiliated.

2. On September 28, 2015, Marlon's attorney, Michael Parente, and his investigator, Deborah Crawford, visited me at Men's Colony to discuss whether I had any information about Marlon Evans's case. I agreed to share what I knew without any promises from Marlon or his legal team. On December 22, 2015, Marlon's investigator, Deborah Crawford, returned with a typed declaration, which was based on the information I provided during the first visit. I have carefully read each paragraph of this declaration for accuracy.

3. I know Marlon Evans is innocent because I was sitting in a car with him and Keenan Gardner at the time of the shooting at the Mobil gas station on December 13, 1992. Gardner was driving, and we were in a black Chevrolet Monte Carlo. Larry Anderson was caravanning behind us in a station wagon. We were driving west on ~~61st~~ 59th Street. RJ After we turned right on Main Street, we saw a police car behind us. It did not have its lights or siren on but none of us wanted to get pulled over. Gardner made a quick ~~left~~ Right RJ onto 59th Place and turned off the car lights hoping that the police car would pass us.

4. As we sat there with the lights off, Larry Anderson passed us and his car was pulled over by the police car not far in front of us. Marlon Evans, Keenan Gardner, and myself all watched the stop from our car. But shortly after the stop had started, we heard several

R.J. RJ

EXHIBIT 3 - 9

gunshots from an automatic weapon. The shots sounded like they came from the west of us. The officers appeared to hear the same shots because they immediately got back in their police car and headed west on 59th Place toward Broadway.

5. Later that night, we all went to a club called "Name of the Game," located at 120th and Western Avenue. I remember paying for us to have a group picture taken with a Polaroid camera. Marlon was definitely in the picture.

6. I remember visiting with Marlon's attorney or investigator sometime after he was arrested. On one occasion I went with Keenan Gardner to meet with the attorney or investigator at his office. I told him what I remembered that night about the traffic stop and gave him the Polaroid picture of us from the club. He did not contact me again or ask me if I was willing to testify. When it was time for Marlon's trial, I did not attend. I was willing and available to testify to the contents of this declaration, had I been asked to do so.

7. Law enforcement never interviewed me. My mother told me that officers had come by the house looking for me once when I was not home. They told my mom to have me come to the station to answer questions. I called them back from a phone booth and told them to ask me questions over the phone but they refused. I never did go to the police station and never heard from police again about Marlon's case.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

Dated this 22nd day of December, 2015, at San Luis Obispo, California.

Ruben Jones T-70635

RUBEN JONES

EXHIBIT 3 - 10

I Ruben Jones would like to add additional information to my declaration. After the police officiers heard the shots and left we continued on 59th PL to broadway and made a left turn. We then continued to 60th 61st, 62nd st and made another left turn. We then continued to san pedro and made a right turn and then continued to gage. When we arrived at gage we noticed responders to the right of us on gage. We all got out of the car to see what was going on. We were then told that owl and June bug had been shot in owl's car. The responders we still there onee we left to go to the club.

Ruben Jones
Ruben Jones
12-22-2015

C.M.C-East-3362
P.O. Box 8101
San Luis Obispo, CA.
93409-8101

EXHIBIT 3 - 11


S Flower St
S Grand Ave
Harbor Frwy and Transit Way
W Gage Ave
E Gage Ave
S Broadway
S Main St
S San Pedro St
W 67th St
W 66th St
W 65th St
W 64th St
W 63rd Pl
W 62nd St
W 61st St
W 60th St
W 59th Pl
E 67th St
E 66th St
E 65th St
E 64th St
E 62nd St
E 61st St
E 60th St
E 59th Pl
Hamilton United Methodist Church
61st Street Elementary School
Greater Tone Baptist
ARCO
Hercules Burgers
Iglesia Adventista Mid-City
Target Coin Laundry
Zacatecas Bar
Church's Chicken
WorkSource Center
Regal Inn
St. Columbkille Elementary School
Brown Pride Tattoos
Los Angeles Fire Dept. Station 33
Los Cunados
Las Islas Marias
Casa Noodle Teriyaki
Google
Map data ©2015 Google
Terms
Privacy
Send feedback
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EXHIBIT 3 - 12

DECLARATION OF LAMONT DEVAULT

I, LAMONT DEVAULT, declare as follows:

1. I have known Marlon Evans for more than thirty years. I am an ex-member of Six Duce East Coast Crips. My moniker was Lil Mont. I am currently incarcerated and serving a life sentence at Centinela State prison.

2. Marlon's attorney, Michael Parente, and his investigator, Deborah Crawford, came to visit me on September 11, 2015. They showed me their identifications and asked if I was willing to speak to them about my knowledge of the shooting at the Mobil gas station on Gage and Grand on December 13, 1992. I agreed to share my knowledge of the events on that night on my own free will without any promises from Marlon or his legal team. On December 11, 2015, Michael Parente and Deborah Crawford returned to see me with a typed declaration that was based on the information I provided them during the visit on September 11, 2015. I have independently reviewed each paragraph of this declaration for accuracy.

3. On December 13, 1992, at approximately 9:45 p.m., I was on 62nd Street and San Pedro when I heard around 25 or more gunshots coming from the direction of Broadway Avenue. When I walked around the corner to Gage and San Pedro, I saw Lil Owl (Donta Bavis) and Junebug (Henry Broomfield) both shot in the Cadillac. The car had a bunch of bullet holes in it.

4. I then saw Biscuit driving north on San Pedro in a black Buick Grand National. Biscuit ran from his car and said, "Junior, this wasn't meant for you." He then gave me a 9mm black handgun with an infrared beam on it and told me to watch our backs while we were out there.

5. A few minutes later, I saw Keenan Gardner, Marlon Evans, Ruben Jones, Larry Anderson, and Travon Mustin all pulled up together in two cars at Gage and San Pedro. They

L.D
I.D

EXHIBIT 4 - 13

said that they heard the shots while Larry was in a traffic stop and wanted to know what happened. I told them what I witnessed. Mia Dansby walked up and saw the car shot up as well. She called an ambulance.

6. Later that night I was with Marlon at a club called "The Name of the Game" which was located on 120th Street and Western Avenue in Los Angeles. Marlon was wearing black jeans and a white Pendleton long sleeve shirt with stripes on it. I remember making fun of his bright shirt. Marlon's hair was short, as has been the case throughout the time I have known him. At the club, Ruben Jones paid for us to have a group picture taken. I am certain that Marlon was in the picture with us.

7. I was never contacted by any attorney or investigator prior to Marlon's trial. If I had been called to testify, I would have been willing to testify to the contents of this declaration in court.

8. I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

Executed this 11th day of December, 2015 at Imperial, California.

LaMont DeVault

LAMONT DEVAULT

DECLARATION OF TRAVON MUSTIN

I, TRAVON MUSTIN, declare as follows:

1. I have known Marlon Evans for more than thirty years. I am an ex-member of the Six Duce East Coast Crips. I am no longer gang affiliated.

2. On December 3, 2015, I met with Marlon's attorney, Michael Parente, and his investigator, Deborah Crawford, at the Office of the Federal Public Defender. They told me who they were and showed me their identifications. They asked if I was willing to speak to them about my knowledge of the shooting at the Mobil gas station on Gage and Grand on December 13, 1992, and I agreed to share this information.

3. On December 13, 1992, at approximately 10:00 p.m., I was walking down 59th Place between Main Street and Broadway Avenue in Los Angeles, California, heading towards Main Street. My aunt lived on 59th Place and my mother lived on 62nd Street.

4. I saw a black Chevrolet Monte Carlo coming from Main Street turn down 59th Place and park across the street (about three houses from the corner of Main Street). Immediately after that, I saw a second car, a station wagon, turn down 59th Place from Main Street and park in front of the black Monte Carlo. A police car was following the station wagon and pulled it over. Two officers got out of the car and began a traffic stop on the driver of the station wagon.

5. Soon after the stop began, I heard about twenty gunshots which sounded like they were coming from nearby. The officers immediately got back in their police car, and took off west towards Broadway Avenue in the direction of the shots. I approached the station wagon and recognized Larry Anderson as the driver of the car that was stopped, and I saw Keenan Gardner, Marlon Evans, and Ruben Jones Jr. in the black Monte Carlo. These were all people I knew in the neighborhood.

TM

EXHIBIT 5 - 15

6. At the time I heard the gunshots, I was standing in front of Calvin Dixon's house, which is the first house on the corner on 59th Place between Main and Broadway. I was standing under a tree watching the traffic stop. Dixon was a friend of mine and he also came outside of his house because he heard the loud gunshots. Other people were coming out of their houses too, but I cannot recall their names.

7. After the police drove away, I got into the station wagon with Larry Anderson. Marlon Evans, Ruben Jones, and Keenan Gardner were still in the black Monte Carlo. The plan was for all of us to head to a club called "The Name of the Game" located at 120th and Western Avenue. We drove east on 59th Place and made a right on San Pedro and drove towards Gage. At the corner of Gage and San Pedro, I recognized Donta Bavis' car parked in front of an apartment building on Gage and San Pedro near the southwest corner. I recognized the car immediately because it was previously yellow and just had a new paint job. I saw Lamont Devault by the car and some other people gathering at the scene and red lights flashing from an ambulance.

8. Initially I did not know that June Bug (Henry Broomfield) was in the car, but I often saw June Bug and Lil Owl (Donta Bavis) together. I assumed one or the other had been shot. It was not unusual to learn that a friend in the hood had been shot. I hoped that whoever it was would be okay. We stayed at the scene briefly and continued to the club. I recall several pictures taken at the club, including pictures with Marlon. The next day I learned that June Bug had died.

9. I am certain that Marlon Evans was not at the Mobil gas station when June Bug and Little Owl got shot. At the time those shots were fired, I saw Marlon Evan in the car with Keenan Gardner and Ruben Jones on 59th Place. In addition, June Bug, Lil Owl and Marlon

TM

EXHIBIT 5 - 16

Evans were friends. There was no war at the time between the 62nd Street and 68th Street Crips. We were all crips in the same hood.

10. In January 1993, I was locked up and did not get released until May 1996. In 1994, I was in the Youth Authority facility in Paso Robles, California. I was never approached by Marlon's attorney or investigator at any time. If I had been called as a witness, I would have testified to the contents of this declaration.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

Executed this 3rd day of December, 2015 at Los Angeles, California.

Travon Mustin

TRAVON MUSTIN

DECLARATION OF KEENAN GARDNER

I, KEENAN GARDNER, declare:

1. I am a friend of Marlon Evans. I have known him since I was a young child. Our parents were friends before Marlon was born. I am several years older than Marlon. Although I was formerly a member of the Six Deuce gang, I am no longer gang affiliated. In 2009, I had tattoos on my face removed. I am currently employed at SAS Retail Merchandising as a merchandiser.

2. I was with Marlon at the time that the shooting occurred at the Mobil gas station on December 13, 1992. We spent most of the day together. That night around 10:00 p.m., we were headed to a club, 'The Name of the Game.' I was driving my black 1978 Chevrolet Monte Carlo. Marlon and Reuben Jones were in the car with me. We were driving west on 61st Street and Larry Anderson was following me.

3. When we stopped at a red light at Main Street, a police car headed south on Main Street passed through the intersection. I made a right on Main Street (heading in the opposite direction of the police car) and the police made a U-turn and followed me. I made a quick left on 59th Place and turned my lights off. Larry Anderson was still following me. He passed my car on 59th Place and was pulled over by the police car following us from behind. The stop occurred on 59th Place between Main Street and Broadway.

4. I watched the stop of Larry Anderson's car. During the stop, I heard repeated gunshots from an automatic weapon ring out from the general direction of Broadway to the west of us. The officers heard the same shots and immediately stopped talking to Larry. They rushed back to the police car and headed west on 59th Place toward Broadway. I made a U-turn on 59th and headed to San Pedro. Driving south on San Pedro, we saw Little Owl's Cadillac on Gage

K.G.

K.G.

EXHIBIT 6 - 18

and it looked like it had been wrecked. I saw Lamont Devault by the car. A firetruck was there, and other people were gathering at the scene.

5. We did not believe there was anything we could do to help. After watching briefly, we continued to the 'Name of the Game' located at 120th and Western Avenue. At the club, we had a group Polaroid picture taken. I am certain that Marlon was present in this picture.

6. After Marlon was arrested, I was contacted by Marlon's trial investigator, a black man, and met with him at an office near Olympic Blvd. and La Cienega in Los Angeles, California. This was in 1993, a few months after the crime. I explained to the investigator that I was with Marlon at the time of the crime, and I explained what happened during the traffic stop. I never saw the investigator again, nor did I receive any phone calls from him or from Marlon's attorney. No one other than the trial investigator talked to me about this case, and only that one time. I was never interviewed by detectives or police about this case.

7. I was willing and available to testify to the contents of this declaration at the time of Marlon's trial, and I remain willing to testify truthfully to the same facts today.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

DATED: 11·20·15

Keenan Gardner
KEENAN GARDNER

DECLARATION OF CLARENCE LAVAN

I, CLARENCE LAVAN, declare as follows:

1. I was at the Mobil gas station on Gage and Grand on December 13, 1992, the night of the shooting. I was a witness to the crime and testified at the preliminary hearing. I am currently 61 years old. I am not affiliated in any gang. I am a devout Christian, and I want to correct this wrongful conviction of an innocent man.

2. On October 28, 2015, Marlon's attorney, Michael Parente, and his investigator, Deborah Crawford, came to visit me. They showed me their identification and asked if I was willing to speak to them about my knowledge of the shooting at the Mobil gas station. I agreed to share my knowledge of the events on that night and the proceedings thereafter on my own free will without any promises from Marlon or his attorneys.

3. I did not see Marlon Evans at the Mobil gas station during the shooting I witnessed on December 13, 1992. Marlon's attorney and investigator showed me the photo six-packs A and F, which I recall as the photo six-packs shown to me by Detectives Schunk and Herrera. (These photo-sixpacks are attached to this declaration.) Although I had seen the person depicted in position one of photo-sixpack A and in position three of photo six-pack F in the neighborhood on 62nd street, I did not see this person at the gas station on the night of the shooting on December 13, 1992.

4. Further, Parente and Crawford showed me People's Exhibit 12, which is a close-up of Marlon Evans at his live line-up in which he is wearing a number 5. (This exhibit is also attached to this declaration). Reviewing this photo, I am certain that this man was not the shooter at the gas station on December 13, 1992. The shooter I witnessed had long hair. He was at least six feet tall. The person I saw on the streets and identified in photo sixpacks A and F is

C.L.

EXHIBIT 7 - 20

shorter and he has short hair. He is positively not the person I saw at the gas station on the night of the shooting.

5. I understand that the district attorney at Marlon's trial represented that I could not be found or was otherwise unavailable to testify at trial. This is false. Detective Schunk helped me relocate to Atlanta, Georgia in 1993. I was located at the Scottish Inn on Howell Mill Road by the I-20 freeway. Detectives paid my rent while I was in Atlanta, Georgia for at least six months. They also knew that I worked at Right Hand Man, a temporary employment agency. I told them that this was where I was working. I continued to work at Right Hand Man throughout the time I was in Atlanta for nearly two years. At the time of trial, I had moved back to Inglewood, California and was living with my mother who was in her 80s. Detectives Schunk and Herrera had paid for my flight from Atlanta, Georgia to Los Angeles, California.

6. Law enforcement later came to my mother's house on Sycamore Place in Inglewood, California and threatened to arrest her if I did not testify against Marlon. I refused. I did not want to testify against an innocent man. Had I been called to testify at Marlon's trial, I would have clarified my statement to Schunk and Herrera about having seen Marlon on the streets and made very clear that Marlon Evans was not the shooter I saw at the gas station on December 13, 1992.

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C.L.

EXHIBIT 7 - 21

7. I was not contacted by Marlon's trial lawyer or investigator at any time before or after trial. If I had been contacted by Marlon's trial lawyer, I would have testified on Marlon's behalf to the same facts contained in this declaration. I would testify to the same in court today.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

Executed this 28th day of October, 2015, in Los Angeles, California.

CLARENCE LAVAN

C.L.

EXHIBIT 7 - 22

DEPT 260

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date:	May 8, 1995				
HONORABLE:	ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk	
	J. CUMMINS	Deputy Sheriff	E. SMITH	Reporter	

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS

NATURE OF PROCEEDINGS

JURY TRIAL REM 07/13/93

Matter is called for trial. A pre-screened jury panel of seventy-five prospective jurors having been ordered on May 2nd is present at 8:30 a.m. This minute order is sent to jury services to document the order of the court for a pre-screened panel on this case as to fifteen days of jury duty.

OUTSIDE THE PRESENCE OF THE JURY PANEL: Court and counsel confer re jury instructions and voir dire.

The Court Reporter is ordered to provide the Court with an original only, excluding voir dire unless any Wheeler Motions are made, of all trial proceedings in this case.

IN THE PRESENCE OF THE JURY PANEL: The jury panel is affirmed re qualifications. Voir dire begins. Per order of the Court and stipulation of counsel, the following jurors are seated:

1. JANET ACQUIST
2. JOANNE HUSON
3. SHIRLEY GLADDEN
4. FELICIA WARREN
5. MARISSA PABLO
6. THOMAS B. LOW
7. CHRISTINE F. COX
8. PATRICIA MADRID
9. LE R. CHAMBERLAIN
10. NARGIS MERCHANT
11. SALLY A. CLARK
12. ROBERT L. SANCHEZ

All parties stipulate to have HAROLD BOYD, JOHN L. HOLMQUIST and EFRAIN MIRANDA seated as alternate jurors number one, two and three respectively. The remaining prospective jurors are dismissed from this case. THE JURY IS SEATED TO BE AFFIRMED ON MAY 9TH AT 10:00 A.M., AFTER PENDING DEFENSE MOTION FOR DILIGENCE.

The seated jury is admonished, thanked and excused to May 9, 1995 at 10:00 a.m. in Department 104 for trial proceedings.

OUTSIDE THE PRESENCE OF THE JURY: Defense Motion for Due Diligence as to Witness C. Lavan: LINDA REISZ and DOUG PATTILLO are called, sworn and testify. The matter is argued and the cause is submitted. The Court rules to allow the People to read portions of the preliminary hearing as to the missing witness and finds diligence proven.

The Defendant and counsel are ordered to return on the above date and time.

REMANDED

MINUTES ENTERED
5/8/95
COUNTY CLERK

MINUTE ORDER

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

261

Date: May 9, 1995			
HONORABLE: ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk
J. CUMMINS	Deputy Sheriff	E. SMITH	Reporter

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: R. HUNTER ✓

01 EVANS, MARLON ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 8, 1995 with the Defendant, counsel and all seated jurors present as heretofore.

OUTSIDE THE PRESENCE OF THE JURY PANEL: Court and counsel discuss the affirmation of the jury before opening statements.

At 3:50 p.m., Defense counsel's motion for all discovery is heard and discussed. People to allow counsel all access.

IN THE PRESENCE OF THE SEATED JURY PANEL: The seated jury panel is affirmed to try the cause per order of the Court and stipulation of counsel, as follows:

Deemed 05/10/95

HAROLD BOYD, JOHN L. HOLMQUIST and EFRAIN MIRANDA are affirmed as alternate jurors number one, two and three respectively.

Counsel make opening statements.

DEREK FELLOWS, JOHN BERDIN, RICHARD ARCINIEGA, DAMON CAMPBELL, and JOSEPH BIZCO are called, sworn and testify for the People.

People's exhibits 1 (a diagram), 2, 3 (each a board with photographs), 4 (cassette tape), 5 (transcript of cassette tape, exhibit 4); and Defense exhibits A, B, C, D, and E (each a photograph) are marked for identification only.

The jury is admonished, thanked and excused to May 10, 1995 at 9:30 a.m. in Department 104 for trial proceedings.

The Defendant and counsel are ordered to return on the above date and time.

REMANDED

MINUTES ENTERED
5/9/95
COUNTY CLERK

MINUTE ORDER

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date:	May 10, 1995				
HONORABLE:	ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk	
	J. CUMMINS	Deputy Sheriff	E. SMITH	Reporter	

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 9, 1995 with the Defendant, counsel and all jurors present as heretofore.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discuss scheduling.

People's motion to amend the transcript of witness C. Lavan's testimony is heard and granted, as better reflected in the notes of the Court Reporter.

IN THE PRESENCE OF THE JURY: LEROY MARTIN, RAFAEL HECHAVERRIA, RAY MENDOZA, and **PETER SCHUNK** are called, sworn and testify for the People. The testimony as stated on the preliminary hearing transcript is read on the record as to People's witness Clarence Lavan, by District Attorney Robert Grace.

People's exhibits 6, 34 (each a diagram), 7, 9, 22, 23, 25 (each a board with photographs), 8, 11, 12, 13, 17, 18, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 50, 51 (each a photograph), 10, 49 (each a photo identification report), 14 (witness card), 24 (large LAPD evidence envelope with yellow tag and its contents: 32 coin envelopes: numbers 1, 3-29, 31 and 32 containing a casing; number 2 containing an expanded slug; and number 30 containing a light), 27, 28, 29, 30, 31, 32 (each a six-pack folder), 15, 16, 43, 44, 45, 46, 47, 48 (each a xerox copy of six-pack), 26 (diagram in plastic casing), and 33 (photo identification report in plastic casing) are marked for identification only.

The jury is admonished, thanked and excused to May 11, 1995 at 9:00 a.m. in Department 104 for trial proceedings.

The Defendant and counsel are ordered to return on the above date and time.

REMANDED

NUNC PRO TUNC: It appearing to the court that by inadvertence, the minute order dated 05/09/95 on the above-entitled case does not properly reflect the true order of the court, said minute order is corrected nunc pro tunc as follows:

BY ADDING in the line of "In the presence of the jury:" the name of People's witness "LISA CRAWFORD..."

MINUTES ENTERED
5/10/95
COUNTY CLERK

MINUTE ORDER

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 265

Date:	May 11, 1995				
HONORABLE:	ROBERT J. PERRY J. CUMMINS	JUDGE Deputy Sheriff	Y. FRANCO E. SMITH	Deputy Clerk Reporter	

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 10, 1995 with the Defendant, counsel and all jurors present as heretofore.

OUTSIDE THE PRESENCE OF THE JURY: People's Writ of Habeas Corpus Ad Testificandum as to witness Donta Bavis is received, order is submitted, signed and granted.

IN THE PRESENCE OF THE JURY: **PETER SCHUNK**, previously sworn, resumes testifying. **PETER VASQUEZ, LISA SCHEINEN, PEDRO ORTIZ, STARR SACHS, DIANA PAUL, DAVID LOTT** are called, sworn and testify for the People.

People's exhibits 52 (a cassette tape), 53 (transcript of tape, exhibit 52), 54 (large photo on board), 55 (two photos on board), 56, 57 (each a large board with photos), and 58 (a diagram) are marked for identification only.

The jury is admonished, thanked and excused to May 12, 1995 at 9:30 a.m. in Department 104 for trial proceedings.

The Defendant and counsel are ordered to return on the above date and time.

REMANDED

MINUTES ENTERED
5/11/95
COUNTY CLERK

MINUTE ORDER

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

266

Date:	May 12, 1995				
HONORABLE:	ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk	
	J. CUMMINS	Deputy Sheriff	E. SMITH	Reporter	

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 11, 1995 with the Defendant, counsel and all jurors present as heretofore.

OUTSIDE THE PRESENCE OF THE JURY: People's motion per Evidence Code Section 402 is heard as to Defense witness J. Severin, argued and denied, as better reflected in the notes of the Court Reporter.

IN THE PRESENCE OF THE JURY: People rest. People's exhibits 1 through 58, previously marked for identification, are moved and admitted into evidence.

JOHN KENNETH SEVERIN and **MAYA DANSBY** are called, sworn and testify for the Defense. **MARLON EVANS** is called, sworn and testifies on his own behalf.

The jury is admonished, thanked and excused to May 16, 1995 at 8:30 a.m. in Department 104 for trial proceedings.

The Defendant and counsel are ordered to return on the above date and time.

REMANDED

MINUTES ENTERED
5/12/95
COUNTY CLERK

MINUTE ORDER

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 268

Date: May 16, 1995				
HONORABLE:	ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk
	J. CUMMINS	Deputy Sheriff	C. YOUNG	Reporter

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney E. HUNTER ✓

01 EVANS, MARLON ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 12, 1995 with the Defendant, counsel and all jurors present as heretofore.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel settle jury instructions on the record. The Court amends the transcript, exhibit number 53.

Defense motion to dismiss per Section 1118.1 of the Penal Code is heard, argued and denied.

The Defendant and counsel waive their presence in case of read-back requests by the jury.

IN THE PRESENCE OF THE JURY: DONTE BAVIS is called sworn and testifies for the People. People rest. Defense rests. All sides rest. Defense exhibits A through E, previously marked for identification, are moved and admitted into evidence.

Counsel make closing arguments. The Court instructs the jury. The Bailiff is affirmed to take charge of the jury. At 11:55 p.m. the jury leaves for lunch and begins deliberations at 1:30 p.m. Before leaving for lunch, the Court receives notice form juror number nine of a prior appointment. Counsel stipulate to letting the jury leave by 3:15 p.m. today.

At 3:15 p.m., the jury is deemed admonished, thanked and excused to May 17, 1995 at 9:30 a.m. in Department 104 for further deliberations.

The Defendant is ordered to return on the above date and time. Counsel are placed on call.

REMANDED

MINUTE ORDER

MINUTES ENTERED
5/16/95
COUNTY CLERK

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 272

Date:	May 17, 1995				
HONORABLE:	ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk	
	J. CUMMINS	Deputy Sheriff	E. SMITH	Reporter	

BA071499-01 (Parties and counsel checked if present)
People of the State of California Counsel for People:
vs. Deputy District Attorney: E. HUNTER (NP)

01 EVANS, MARLON DARREL (LOCK-UP) Counsel for Defendant: R. ROTHMAN, PVT(NP)

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 12, 1995 with the Defendant in lock-up, counsel on call, and all jurors present as heretofore.

At 9:35 a.m. the jury begins deliberations. At 9:40 a.m. juror number eight informs the Court of request to leave by 3:00 p.m. Counsel are notified via telephone and the request is granted.

At 10:30 a.m. the jury breaks for fifteen minutes.

At 11:15 a.m. they signal and request Defendant's testimony during trial be read-back. Counsel are notified. The jury breaks for lunch at noon and reconvenes at 1:30 p.m.

At 1:45 p.m. Court Reporter, E. Smith enters the juryroom to begin read-back and completes it by 2:40 p.m. The jury continues deliberations.

At 3:05 p.m., the jury is deemed admonished, thanked and excused to May 18, 1995 at 9:30 a.m. in Department 104 for further deliberations.

The Defendant is ordered to return on the above date and time. Counsel remain on call.

REMANDED

MINUTE ORDER

MINUTES ENTERED
5/17/95
COUNTY CLERK

15 | 5

273

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

People — PLAINTIFF(S)

vs.

Evans, M. — DEFENDANT(S)

CASE NUMBER

BA071499

FILED
LOS ANGELES SUPERIOR COURT
MAY 18 1995
EDWARD M. KRITZMAN, CLERK
BY _____ DEPUTY

We, the jury in the above entitled action, request the following:

MAY 18 1995

This _____ day of _____ 19 ____

_____ Foreman

Department 104

PJ 274/12-74

274

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

People
PLAINTIFF(S)

vs.

Marlon Evans.
DEFENDANT(S)

CASE NUMBER

BA071499-01

FILED
LOS ANGELES SUPERIOR COURT

MAY 18 1995

EDWARD M. KRITZMAN, CLERK
BY _____ DEPUTY

We, the jury in the above entitled action, request the following:

Leroy Martin testimony
date: 05/10/95

This 18 day of May 19 95

Foreman

Department 104

275

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

People
PLAINTIFF(S)

vs.

Marlon Evans.
DEFENDANT(S)

CASE NUMBER

BA071499-01

FILED

LOS [illegible] SUPERIOR COURT

MAY 18 1995

EDWARD M. KR[illegible] CLERK

BY [signature] DEPUTY

We, the jury in the above entitled action, request the following:

Clarification between first and second degree murder

This 18 day of May 19 95

[signature] Foreman

Department

PJ 274/12-74

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 276

Date:	May 18, 1995				
HONORABLE:	ROBERT J. PERRY J. CUMMINS	JUDGE Deputy Sheriff	Y. FRANCO E. SMITH	Deputy Clerk Reporter	

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON DARREL ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 17, 1995 with the Defendant in lock-up, counsel on call, and all jurors present as heretofore.

At 9:35 a.m. the jury begins deliberations. At 10:30 they break for fifteen minutes. Juror number eleven hands the Court request for leave by tomorrow. At 11:20 a.m. they signal and request clarification as to "first" vs. "second" degree murder. Counsel are notified and asked to be present in court at 1:30 p.m. The jury breaks for lunch at noon and reconvenes at 1:30 p.m.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discuss on the record the jury's notes.

At 1:45 p.m. Court and counsel speak with juror number eleven, Mrs. Clark, only as to her note. The Court finds the juror is only requesting Friday, May 19th afternoon off. The Court grants the request.

At 2:20 p.m. the jury signals and requests read-back as to Leroy Martin. Counsel are notified.

IN THE PRESENCE OF THE JURY: The Court instructs the jury as to the degrees of murder. They are asked to continue deliberations.

At 3:15 p.m. Court Reporter E. Smith begins read-back as to the testimony of Leroy Martin. Read-back is completed at 3:50 p.m.

At 4:00 p.m., the jury is deemed admonished, thanked and excused to May 19, 1995 at 9:30 a.m. in Department 104 for further deliberations.

The Defendant is ordered to return on the above date and time. Counsel remain on call.

REMANDED

MINUTES ENTERED
5/18/95
COUNTY CLERK

MINUTE ORDER

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 343

Date:	May 19, 1995			
HONORABLE:	ROBERT J. PERRY	JUDGE	Y. FRANCO	Deputy Clerk
	J. CUMMINS	Deputy Sheriff	M. PETERSON	Reporter

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON DARREL ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

Trial resumes from May 18, 1995 with the Defendant in lock-up, counsel on call, and all jurors present as heretofore. At 9:35 a.m. the jury begins deliberations. At 10:25 they signal and present the court with written notice of having reached some verdicts. They break for fifteen minutes while counsel are notified and asked to come to court.

OUTSIDE THE PRESENCE OF THE JURY: At 11:30 a.m., Court and counsel discuss on the record the jury's note. All parties stipulate to read the signed verdicts and further inquire from the foreperson as to the ones not reached.

IN THE PRESENCE OF THE JURY: At 11:37 a.m. the jury enters the courtroom with the following verdicts:

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the Defendant, MARLON EVANS, guilty of the crime of MURDER, in violation of Penal Code Section 187(a), a Felony, as charged in Count 1 of the Information.

We further find the crime of MURDER to be in the FIRST degree.

We further find the allegation that in the commission and attempted commission of the above offense, the said Defendant, MARLON EVANS, personally used a firearm, to wit, an AK-47, within the meaning of Penal Code Section 12022.5(a) to be TRUE.

This 18th day of May 1995, Shirley Gladden, Foreperson."

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the Defendant, MARLON EVANS, guilty of the crime of MURDER, in violation of Penal Code Section 187(a), a Felony, as charged in Count 2 of the Information.

We further find the crime of MURDER to be in the FIRST degree.

We further find the allegation that in the commission and attempted commission of the above offense, the said Defendant, MARLON EVANS, personally used a firearm, to wit, an AK-47, within the meaning of Penal Code Section 12022.5(a) to be TRUE.

This 18th day of May 1995, Shirley Gladden, Foreperson."

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the Defendant, MARLON EVANS, guilty of the crime of MURDER, in violation of Penal Code Section 187(a), a Felony, as charged in Count 3 of the Information.

We further find the crime of MURDER to be in the SECOND degree.

We further find the allegation that in the commission and attempted commission of the above offense, the said Defendant, MARLON EVANS, personally used a firearm, to wit, an AK-47, within the meaning of Penal Code Section 12022.5(a) to be TRUE.

This 18th day of May 1995, Shirley Gladden, Foreperson."

MINUTES ENTERED
5/19/95
COUNTY CLERK

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 344

Date:	May 19, 1995			
HONORABLE:	ROBERT J. PERRY J. CUMMINS	JUDGE Deputy Sheriff	Y. FRANCO M. PETERSON	Deputy Clerk Reporter

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON DARREL ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the Defendant, MARLON EVANS, guilty of the crime of MURDER, in violation of Penal Code Section 187(a), a Felony, as charged in Count 4 of the Information.

We further find the crime of MURDER to be in the SECOND degree.

We further find the allegation that in the commission and attempted commission of the above offense, the said Defendant, MARLON EVANS, personally used a firearm, to wit, an AK-47, within the meaning of Penal Code Section 12022.5(a) to be TRUE.

This 18th day of May 1995, Shirley Gladden, Foreperson."

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the Defendant, MARLON EVANS, guilty of the crime of ATTEMPTED MURDER, in violation of Penal Code Section 664/187(a), a Felony, as charged in Count 5 of the Information.

We further find the allegation that the crime of ATTEMPTED MURDER was WILLFUL, DELIBERATE AND PREMEDITATED to be TRUE.

We further find the allegation that in the commission and attempted commission of the above offense, the said Defendant, MARLON EVANS, personally used a firearm, to wit, an AK-47, within the meaning of Penal Code Section 12022.5(a) to be TRUE.

We further find the allegation that in the commission and attempted commission of the above offense the said Defendant, MARLON EVANS, with the intent to inflict such injury, personally inflicted GREAT BODILY INJURY upon DONTE BAVIS, within the meaning of Penal Code Section 12022.7(a) to be TRUE.

This 18th day of May 1995, Shirley Gladden, Foreperson."

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the Defendant, MARLON EVANS, guilty of the crime of POSSESSION OF A DEADLY WEAPON, in violation of Penal Code Section 12020(A), a Felony, as charged in Count 8 of the Information.

This 16th day of May 1995, Shirley Gladden, Foreperson."

"TITLE OF COURT AND CAUSE"

"We, the Jury in the above-entitled action, find the SPECIAL CIRCUMSTANCE of MULTIPLE MURDERS pursuant to Penal Code Section 190.2(a)(3) by the Defendant, MARLON EVANS, to be TRUE.

This 18th day of May 1995, Shirley Gladden, Foreperson."

MINUTE ORDER

MINUTES ENTERED
5/19/95
COUNTY CLERK

DEPT 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 345

Date:	May 19, 1995				
HONORABLE:	ROBERT J. PERRY J. CUMMINS	JUDGE Deputy Sheriff	Y. FRANCO M. PETERSON	Deputy Clerk Reporter	

BA071499-01
People of the State of California
vs.

(Parties and counsel checked if present)
Counsel for People:
Deputy District Attorney: E. HUNTER ✓

01 EVANS, MARLON DARREL ✓

Counsel for Defendant: R. ROTHMAN, PVT ✓

187.A 04 CTS; 664/187.A 03 CTS; 12020.A 01 CTS

NATURE OF PROCEEDINGS JURY TRIAL REM 07/13/93

The verdicts are read. The Court orders the jury polled and all answer in the affirmative. The verdicts are recorded.

The Court questions the foreperson as to the remaining counts six and seven. The Court and counsel are informed that further deliberations may possibly lead to a verdict on those charges. Upon stipulation of counsel, the jury is asked to continue deliberations.

Since juror Clark requested the afternoon off, the Court admonishes the jury. At 11:58 a.m., they are thanked and excused to May 22, 1995 at 9:30 a.m. for further deliberations on counts 6 and 7 only.

The jury instructions and other verdicts are not filed. Only those verdicts returned are filed today.

The Defendant is ordered to return on the above date and time. Counsel remain on call to the court.

MINUTE ORDER

MINUTES ENTERED
5/19/95
COUNTY CLERK