APPENDIX A

NOT FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAVIN MAURICE RHODES, Petitioner-Appellant, v. CHRISTIAN PFEIFFER, Warden, in individual capacity, Respondent-Appellee.	No. 21-55870 D.C. No. 2:14-cv-07687-JGB-KK Central District of California, Los Angeles MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Submitted October 6, 2022**
Pasadena, California

Before: LEE and H.A. THOMAS, Circuit Judges, and BENNETT,*** Senior District Judge.

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

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

*** The Honorable Richard D. Bennett, Senior United States District Judge for the District of Maryland, sitting by designation.

Kavin Rhodes, who was convicted of first-degree murder and attempted second-degree robbery, appeals the dismissal of his 28 U.S.C. § 2254 habeas petition. In his petition, Rhodes argued that newly discovered evidence undermines the credibility of trial witnesses and thus supports his innocence. The district court held that he did not timely present these claims and that he could not meet the "actual innocence" standard under *Schlup v. Delo* for time-barred claims. 513 U.S. 298 (1995). We affirm the district court's dismissal.

1. Timeliness of claims: Rhodes first challenges the district court's finding that Claims One through Five in his habeas petition were not timely. Even though this issue was not expressly certified for appeal, we review it because the timeliness of these claims determines whether the district court properly analyzed them under *Schlup*. *See Tillema v. Long*, 253 F.3d 494, 502–03 n.11 (9th Cir. 2001) (considering a question that "clearly [was] comprehended" within the claim certified for appeal even though that question was not expressly certified), *overruled on other grounds by Pliler v. Ford*, 542 U.S. 225 (2004); *Jones v. Smith*, 231 F.3d 1227, 1231 (9th Cir. 2000) ("Absent an explicit statement by the district court . . . we will assume that the [certificate of appealability] also encompasses any procedural claims that must be addressed on appeal.").

The district court correctly concluded that Claims One through Five of Rhodes's habeas petition are untimely. Under the Antiterrorism and Effective Death

Penalty Act (AEDPA), habeas claims based on newly discovered evidence must be brought within one year of discovery of the evidence, not counting periods "during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d). Rhodes claims that he timely raised his claims because they were referenced in post-conviction discovery motions. But a post-conviction discovery motion does not qualify as a collateral review motion because it does not allow a court to grant relief from a judgment or to grant a reduction in sentence. Rhodes's post-conviction discovery motions and discovery appeals thus did not toll AEDPA's statute of limitations. Nor did Rhodes's inclusion of a request to remand for resentencing in his discovery appeal convert the appeal into a motion for collateral review, because the resentencing request was procedurally improper. California's post-conviction discovery statute does not allow a court to grant a petitioner relief from a sentence. *See* Cal. Penal Code § 1054.9.

Rhodes argues in the alternative that he is entitled to equitable tolling of AEDPA's statute of limitations. This argument fails under *Holland v. Florida*, 560 U.S. 631 (2010), because Rhodes does not contend that an extraordinary circumstance prevented his timely filing. *See id.* at 649.

2. *Schlup* "actual innocence": Because Claims One through Five of Rhodes's habeas petition are untimely, the district court appropriately analyzed them under *Schlup*'s "actual innocence" standard. *Schlup* allows a habeas petitioner

whose claims would otherwise be procedurally barred to proceed only if the petitioner can "show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." 513 U.S. at 327.

The district court certified for appeal the question whether Rhodes can meet the "actual innocence" standard on Claims One through Five in his habeas petition "solely by undermining or impeaching the credibility of witnesses." When new evidence undermines the credibility of witnesses who testified against a petitioner, *Schlup* requires that the evidence do more than merely "provide[] a basis for some degree of impeachment" of those witnesses. *Sistrunk v. Armenakis*, 292 F.3d 669, 677 (9th Cir. 2002). Instead, the evidence must "fundamentally call into question the reliability of [the petitioner's] conviction." *Id.* While it is possible that a witness's credibility can be so undermined as to fundamentally call a petitioner's conviction into question, Rhodes is unable to meet that standard here.

The evidence supporting Claims One through Five of Rhodes's habeas petition raises potentially troubling questions about the prosecution's conduct. It does not, however, meet the high bar for "actual innocence" under *Schlup*. Claims One and Two center on evidence of payments by law enforcement to Hyron Tucker, a main witness who testified against Rhodes. This evidence does not satisfy *Schlup* because Tucker disclosed at trial that he benefited in his own criminal case by acting as a cooperative witness against Rhodes. Evidence that Tucker also benefited

financially from testifying against Rhodes is cumulative. In addition, the evidence does not conclusively establish that Tucker lied under oath about receiving payments from police, as the payments may have been included with the witness protection program that Tucker admitted that he was placed in. And Tucker's trial testimony was generally corroborated by two other witnesses, reducing the impact of any impeachment of his credibility. Finally, though this evidence may demonstrate that a detective testified falsely about payments to Tucker, it does not satisfy *Schlup* because the detective's testimony was of limited value in securing Rhodes's conviction.

Claim Three of Rhodes's habeas petition focuses on evidence of criminal charges against Yvette Comeaux, another witness who testified against Rhodes. This evidence also does not satisfy *Schlup*. First, it is cumulative to Comeaux's trial testimony disclosing that she engaged in criminal activity. Second, a reasonable juror would not credit Rhodes's purely speculative argument that Comeaux testified falsely because of pressure from law enforcement arising out of these criminal charges. In any event, Comeaux testified at trial that police promised not to revoke her probation if she testified against Rhodes, so any additional evidence of law enforcement leverage over her is cumulative.

Claim Four of Rhodes's habeas petition centers on evidence that the same prosecutor appeared both in Rhodes's case and in a criminal case against Tucker, as

well as evidence of Tucker's criminal history. This evidence does not satisfy *Schlup* because Tucker disclosed at trial that Rhodes's prosecutor advocated for him in a criminal case because he was acting as a cooperative witness against Rhodes, so Rhodes's speculative argument that Tucker received still other benefits from law enforcement would be cumulative even if it were true. And evidence of Tucker's criminal past is cumulative to Tucker's trial testimony that he engaged in criminal behavior. Finally, even if the evidence proves that Tucker lied under oath that he had no prior felony convictions, the fact that his testimony was generally corroborated by other witnesses would maintain his credibility before a reasonable juror.

Claim Five of Rhodes's habeas petition relies on an eyewitness statement that contradicts the trial testimony of Shashawn Green, another witness against Rhodes. This evidence does not satisfy *Schlup* because Green's testimony was of limited value in securing Rhodes's conviction.

3. Other claims: Rhodes makes several additional arguments based on newly discovered evidence, but these arguments fall outside of the claims certified for appeal. We thus do not consider them. *Beaty v. Stewart*, 303 F.3d 975, 984 (9th Cir. 2002) ("Courts of Appeals lack jurisdiction to resolve the merits of any claim for which a [certificate of appealability] is not granted.").

AFFIRMED.

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.
- A response, 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 response 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.*

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- 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

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
  - 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

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES, Petitioner, v. CHRISTIAN PFEIFFER, Acting Warden, Respondent.	Case No. CV 14-7687-JGB (KK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES, Petitioner, v. CHRISTIAN PFEIFFER, Acting Warden, Respondent.	Case No. CV 14-7687-JGB (KK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to United States District Judge Jesus G. Bernal, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

Kavin Maurice Rhodes ("Petitioner") has filed a First Amended Petition for Writ of Habeas Corpus ("FAP") pursuant to 28 U.S.C. § 2254 ("Section 2254"), challenging his 1989 state convictions for murder and attempted robbery. ECF Docket No. ("Dkt.") 53, FAP. In the remaining seven claims of the FAP, Petitioner asserts his due process rights were violated through various acts of prosecutorial misconduct. For the reasons set forth below, the Court recommends finding (1) Claims One through Five untimely; (2) Claims Nine and Eleven fail on the merits; and

(3) Petitioner fails to establish "actual innocence" to obtain judicial review of an otherwise time-barred petition. The Court, therefore, recommends DENYING the FAP and DISMISSING the action with prejudice.

II.

BACKGROUND

A. PETITIONER'S CONVICTION

On October 31, 1989, following a jury trial in the Los Angeles County Superior Court, Petitioner was convicted of one count of first degree murder, with the special circumstance finding that the murder was committed during an attempted robbery, and one count of attempted second degree robbery. CT 254-58.[1] The jury also found

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[1] The Court's citations to Lodged Documents refer to documents lodged in support of Respondent's Motion to Dismiss the Petition, Motion to Dismiss the FAP, Respondent's Answer, and Petitioner's Traverse, see dkts. 19, 59, 108, 116, and documents lodged in response to the Court's November 18, 2020 order, see dkt. 296. The Lodged Documents are identified as follows:

1. Clerk's Transcript of Los Angeles County Superior Court case number A968415, volume one of one ("CT")
2. Reporter's Transcript of Los Angeles County Superior Court case number A968415, supplemental volume one ("1 Suppl. RT")
3. Reporter's Transcript of Los Angeles County Superior Court case number A968415, volumes one through two ("1 RT" and "2 RT")
4. Appellant's Opening Brief in California Court of Appeal case number B046477 ("Lodg. 4")
5. Respondent's Brief in California Court of Appeal case number B046477 ("Lodg. 5")
6. Appellant's Reply Brief in California Court of Appeal case number B046477 ("Lodg. 6")
7. California Court of Appeal Opinion case number B046477 ("Lodg. 7")
8. Petition for Review in California Supreme Court case number S024971 ("Lodg. 8")
9. California Supreme Court Order denying review case number S024971 ("Lodg. 9")
10. California Supreme Court Docket case number S059894 ("Lodg. 10")
11. United States District Court for the Central District of California Docket in case number CV 97-7416-LGB-AJW ("Lodg. 11")
12. Petitioner's Second Amended Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California case number CV 97-7416-LGB-AJW ("Lodg. 12")

13. May 12, 1999 Order of Magistrate Judge of the United States District Court for the Central District of California in case number CV 97-7416-LGB-AJW ("Lodg. 13")

14. September 15, 2000 Report and Recommendation of Magistrate Judge of the United States District Court for the Central District of California in case number CV 97-7416-LGB-AJW ("Lodg. 14")

15. November 8, 2000 Order of United States District Court for the Central District of California adopting Report and Recommendation in case number CV 97-7416-LGB-AJW ("Lodg. 15")

16. Ninth Circuit Court of Appeals Order affirming district court case number 01-55138 ("Lodg. 16")

17. United States Supreme Court Docket case number 03-5331 ("Lodg. 17")

18. Letters from Los Angeles County Superior Court judges to Petitioner, dated July 14, 2009 and March 1, 2010 ("Lodg. 18")

19. Letter from post-conviction discovery counsel to Petitioner, dated November 9, 2009 ("Lodg. 19")

20. Letter from post-conviction discovery counsel to Petitioner, dated June 8, 2010 ("Lodg. 20")

21. Letter from post-conviction discovery counsel to Petitioner, dated July 20, 2011 ("Lodg. 21")

22. Los Angeles County Superior Court Order denying Petitioner further post-conviction discovery, June 22, 2012 ("Lodg. 22")

23. California Court of Appeal Dockets case numbers B242690 and B254272 and California Supreme Court Docket case number S217442 ("Lodg. 23")

24. Petition for Writ of Habeas Corpus in Los Angeles County Superior Court case number A968415 ("Lodg. 24")

25. Petition for Writ of Habeas Corpus in California Court of Appeal case number B243869 ("Lodg. 25")

26. California Court of Appeal Order denying Petition for Writ of Habeas Corpus case number B243869 ("Lodg. 26")

27. Petition for Writ of Habeas Corpus in California Supreme Court case number S206706 ("Lodg. 27")

28. California Supreme Court Order denying Petition for Writ of Habeas Corpus case number S206706 ("Lodg. 28")

29. Pages 7-10 of Appendix I of Petitioner's "Supplemental Documentation In Support of Application To File a Second or Successive Petition For Writ of Habeas Corpus," filed in Ninth Circuit Court of Appeals case number 14-70204 ("Lodg. 29")

30. Petition for Writ of Habeas Corpus in California Supreme Court case number S223839 ("Lodg. 30")

31. Petitioner's Request to Amend Petition in California Supreme Court case number S223839 ("Lodg. 31")

32. Petitioner's Request for Leave to File a Second Amended Supplemental Petition in California Supreme Court case number S223839 ("Lodg. 32")

true an allegation that Petitioner had personally used a firearm during the commission of both offenses. Id. On November 14, 1989, the trial court sentenced Petitioner to life in prison without the possibility of parole, plus five years. Id. at 260-61.

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33. California Supreme Court Docket indicating denial of Petition for Writ of Habeas Corpus case number S223839 ("Lodg. 33")
34. Petitioner's Prison Mail Logs from January 3, 2013 to July 23, 2015 ("Lodg. 34")
35. Declaration from Custodian of Records authenticating Petitioner's mail logs ("Lodg. 35")
36. Petition for Writ of Habeas Corpus in California Supreme Court case number S179387 ("Lodg. 36")
37. California Supreme Court Docket indicating denial of Petition for Writ of Habeas Corpus case number S179387 ("Lodg. 37")
38. Petition for Writ of Mandate in California Court of Appeal case number B239103 ("Lodg. 38")
39. California Court of Appeal Order denying Petition for Writ of Mandate case number B239103 ("Lodg. 39")
40. Petition for Writ of Mandate in California Court of Appeal case number B242249 ("Lodg. 40")
41. California Court of Appeal Oder denying Petition for Writ of Mandate case number B242249 ("Lodg. 41")
42. REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY, INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY (1990) ("Lodg. 42")
43. Petition for Writ of Habeas Corpus in California Court of Appeal case number B243869 ("Lodg. 43")
44. Request for Judicial Notice in California Court of Appeal case number B243869 ("Lodg. 44")
45. "Motion and Notice of Motion for Order" regarding Pitchess discovery filed by attorney Ralph Novotney in Los Angeles County Superior Court case number A968415 ("Lodg. 44a")
46. "Request for Ruling on Defendant's Post Conviction Discovery Motions" filed by attorney Ralph Novotney in Los Angeles County Superior Court case number A968415 ("Lodg. 45")
47. Reporter's Transcript of June 22, 2012 Proceedings in Los Angeles County Superior Court case number A968415 ("Lodg. 46").

B. SUBSEQUENT STATE COURT PROCEEDINGS

Petitioner appealed his conviction and sentence to the California Court of Appeal. CT 263; lodgs. 4, 5, 6. On December 24, 1991, the Court of Appeal affirmed the judgment. Lodg. 7.

Petitioner then filed a petition for review in the California Supreme Court. Lodg. 8. On March 19, 1992, the California Supreme Court summarily denied the petition for review. Lodg. 9.

On March 21, 1997, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. Lodg. 10. On August 27, 1997, the California Supreme Court summarily denied the petition. Id.

C. FIRST FEDERAL HABEAS PETITION

On October 7, 1997, Petitioner filed a petition for writ of habeas corpus in the Central District of California in case no. CV 97-7416-LGB (AJW), which was later amended by a First and Second Amended Petition. Lodgs. 11, 12. Petitioner raised the following twelve claims for relief: (1) newly discovered evidence; (2) denial of Petitioner's Marsden[2] motions and refusal to appoint substitute counsel violated his Sixth Amendment right to counsel; (3) denial of rights to confront and cross-examine witnesses; (4) "the trial court and appointed counsel acted in concert to infringe upon both Petitioner's [Sixth Amendment] right to counsel and Petitioner's [Sixth Amendment] right to legal assistance/access to the courts, with regards to his Civil Rights"; (5) no voluntary and intelligent waiver of right to counsel; (6) denial of Petitioner's request for a transcript of co-defendant Vincent Denis's[3] ("Vincent") separate trial violated Petitioner's due process and equal protection rights to prepare an effective defense; (7) denial of Petitioner's Sixth Amendment right to compulsory process for witnesses to testify on his behalf; (8) ineffective assistance of appellate

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[2] People v. Marsden, 2 Cal. 3d 118 (1970).

[3] The Court refers to Vincent Denis and Veronica Denis by their first names for clarity.

counsel; (9) denial of Petitioner's right to testify on his own behalf; (10) trial court's refusal to permit Petitioner to show bias of a prosecution witness denied him due process; (11) insufficient evidence of attempted robbery or the special circumstance allegation; and (12) instructional error for failure to sua sponte instruct on "unpremeditated murder in the second degree." Lodg. 12.

On November 8, 2000, the District Court denied the habeas petition with prejudice. Lodgs. 14, 15. On December 27, 2000, the District Court denied Petitioner's request for a certificate of appealability. Lodg. 11.

On November 15, 2001, the Ninth Circuit granted Petitioner's request for a certificate of appealability. Id. On April 4, 2003, in case no. 01-55138, the Ninth Circuit affirmed the judgment of the District Court. Lodg. 16. Petitioner then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 6, 2003. Lodg. 17.

D. POST-CONVICTION DISCOVERY AND PROCEEDINGS IN STATE COURT

On June 12, 2009, Petitioner filed a motion for post-conviction discovery in Los Angeles County Superior Court, pursuant to Section 1054.9 of the California Penal Code. Lodg. 18; dkt. 43, Ex. 1. The superior court appointed counsel Ralph Novotney ("Novotney") to assist Petitioner in obtaining discovery. Lodgs. 18, 19.

On July 20, 2011, Novotney provided Petitioner with certain documents as part of the post-conviction discovery, including (1) a version of the investigative materials known as the "murder book" maintained by the Los Angeles Police Department ("LAPD") (the "LAPD murder book") that was distinct from a version of the murder book maintained by Petitioner ("Petitioner's murder book"), see dkts. 279-5 at 78;

279-6 at 15-18, 21;[4] and (2) transcripts from co-defendant Vincent's separate trial. Lodg. 21.[5]

On February 15, 2012, Petitioner filed a petition for writ of habeas corpus in Los Angeles County Superior Court, raising the first seven claims included in the instant FAP, set forth below. Lodg. 24 at 28-75.

On May 22, 2012, Petitioner filed a motion for ruling by the superior court on the unresolved issues raised in his post-conviction discovery motions, including a motion for peace officer personnel records pursuant to Pitchess v. Superior Ct., 11 Cal. 3d 531 (1974). Lodgs. 44a-45.[6]

On June 22, 2012, the superior court denied Petitioner's additional post-conviction discovery requests, including his Pitchess motion. Lodg. 22; dkts. 50 at 44-50; 50-1 at 1-32; 296-3 at 6-13, 22.

On July 16, 2012, Petitioner filed an appeal of the superior court's denial of his additional post-conviction discovery requests in the California Court of Appeal. Dkt. 43, Exs. 5, 6; lodg. 23.

On August 14, 2012, the superior court denied Petitioner's habeas petition in a reasoned opinion on the merits. Dkt. 43, Ex. 11.

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[4] The LAPD murder book was obtained through the post-conviction discovery proceedings at least as early as March 30, 2010. Dkt. 279-5 at 78. However, it is unclear whether Petitioner received a copy of that book prior to July 2011. Dkt. 279-6 at 15-18.

[5] Respondent's objections to the July 20, 2011 letter on the grounds of relevance and hearsay, dkt. 264-2 at 32, are OVERRULED. First, Respondent relied on the truth of the statements in the letter in his Motion to Dismiss the FAP. See, e.g., dkt. 57 at 6, 18. Second, Novotney's declaration filed in support of a Pitchess motion in the superior court stating he provided these documents to Petitioner on July 20, 2011 is now lodged in the record as well. Dkt. 296-2 at 8-14.

[6] The forty-fourth document Respondent lodged is a Request for Judicial Notice in California Court of Appeal case number B243869. As identified above, the Court refers to this lodgment as "Lodgment 44" or "Lodg. 44." However, when Respondent lodged a copy of the May 22, 2012 motion for ruling by the superior court, Respondent identified the document as "Lodgment 44." Dkt. 296 at 2. To distinguish between these two documents, the Court refers to the May 22, 2012 motion as "Lodgment 44a" or "Lodg. 44a."

On September 4, 2012, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, again raising the first seven claims in the instant FAP. Lodg. 25. On October 16, 2012, the California Court of Appeal denied the habeas petition, explaining "there is no basis for further consideration of issues previously found meritless." Lodg. 26.

On October 29, 2012, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, again raising the first seven claims in the instant FAP. Lodg. 27. On February 13, 2013, the California Supreme Court summarily denied the habeas petition without comment or citation to authority. Lodg. 28.

On October 17, 2013, the California Court of Appeal denied Petitioner's appeal of the superior court's denial of his post-conviction discovery requests. Dkt. 43, Exs. 5, 6; lodg. 23.

On November 18, 2013, Petitioner filed a petition for review of the denial of his appeal regarding his post-conviction discovery requests, which was denied by the California Supreme Court on January 29, 2014. Dkt. 43, Ex. 5; lodg. 23.

On March 4, 2014, Petitioner filed a second petition for writ of habeas corpus in the California Supreme Court. Lodg. 30. Petitioner sought to amend this petition twice. Lodgs. 31, 32. On April 1, 2015, the California Supreme Court denied the petition, which included Claims Nine and Eleven of the instant FAP. Lodg. 33; see also dkt. 53.

E. THE INSTANT FEDERAL HABEAS PETITION

On January 10, 2014,[7] with leave from the Ninth Circuit to file a successive petition, Petitioner constructively filed a Petition for Writ of Habeas Corpus pursuant

[7] Although the Ninth Circuit directed that the Petition "be deemed filed in the district court on January 22, 2014," see Rhodes v. Biter, case no. 14-70204, dkt. 26, Petitioner signed the Petition on January 10, 2014. Hence, pursuant to Rules Governing Section 2254 Cases in the United States District Courts, Rule 3(d), the Court deems the Petition constructively filed on January 10, 2014. See Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (holding under the "mailbox rule," when a pro se prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed).

to Section 2254 ("Petition") in this Court challenging his 1989 convictions. See dkt. 1.

On April 6, 2015, Petitioner constructively filed the instant FAP setting forth a total of thirteen claims for relief, including seven exhausted claims from the Petition, two newly exhausted claims, which relate to Petitioner's stay request,[8] and four additional claims. Dkt. 53.

On August 4, 2015, Respondent filed a Motion to Dismiss, arguing the FAP was untimely and the Court lacked jurisdiction to consider Claims Ten through Thirteen. Dkt. 57.

On March 24, 2016, the assigned United States Magistrate Judge issued a Report and Recommendation recommending granting in part and denying in part Respondent's Motion to Dismiss. Dkt. 76. On that same day, the Magistrate Judge also issued an order appointing the Federal Public Defender's office as counsel[9] and finding good cause for discovery under Rule 6(a) of the Habeas Rules regarding the claims that he had not recommended dismissing (the "Discovery Order"). Dkt. 75.

On June 21, 2016, the Court accepted in part the Report and Recommendation and ordered Claims Six through Eight of the FAP be dismissed with prejudice as untimely and Claims Ten, Twelve, and Thirteen of the FAP be dismissed without prejudice for lack of jurisdiction. Dkt. 94.

Accordingly, the following claims remain in the operative FAP:

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[8] On October 30, 2014, Petitioner filed a motion to stay these proceedings and hold them in abeyance pending the exhaustion of his claims in state court, dkt. 10, followed by a supplemental motion for a stay on March 23, 2015, dkt. 44. On May 7, 2015, the Court granted Petitioner's motion and stayed these proceedings. Dkt. 45. By that time, however, Petitioner had exhausted his claims and submitted the FAP. Dkts. 50-53.

[9] The Federal Public Defender's office was appointed as counsel in this matter on March 24, 2014, dkt. 75, and was relieved as counsel on June 21, 2018, dkt. 179. On September 27, 2018 following a hearing, the Court granted Petitioner's request to proceed pro se. Dkt. 206.

- Claim One: The prosecution suppressed evidence that it provided monetary benefits to witness Hyron Tucker ("Tucker") in exchange for his perjured testimony.
- Claim Two: The prosecution knowingly used the perjured testimony of witnesses Tucker and Detective William Baird ("Baird") to secure Petitioner's conviction.
- Claim Three: The prosecution failed to disclose pending criminal charges against witness Yvette Comeaux ("Comeaux").
- Claim Four: The trial prosecutor, Howard Thomas Holmes, III ("Holmes"), committed misconduct by failing to disclose his status as counsel of record in Tucker's drug case, failing to disclose Tucker's prior felony convictions (including those under the aliases "Manual Evans" and "Rolando Sanchez"), and obtaining dismissal of all charges against Tucker after Petitioner's trial ended.
- Claim Five: The prosecution knowingly used the perjured testimony of witnesses Tucker and Shashawn Green ("Green") to secure Petitioner's conviction.
- Claim Nine: The prosecution failed to disclose impeachment evidence regarding misconduct by LAPD Officer Anthony Smith, Jr. ("Officer Smith"), the officer who apprehended Petitioner and testified at his trial.
- Claim Eleven: The prosecution suppressed evidence that it provided monetary benefits to Green in exchange for perjured testimony.

Dkt. 53, FAP.

On October 11, 2016, Respondent filed an Answer to the FAP. Dkt. 107. Respondent argues all remaining claims in the FAP are untimely and fail to warrant habeas relief, and Claims One through Five are procedurally barred. Id. Specifically, as to the merits, Respondent argues Petitioner's claims are speculative and lack

evidentiary support; Petitioner has not proven the evidence at issue was suppressed; and, in any event, cannot prove the evidence at issue was material. Id. at 37-76.

On December 9, 2016, Petitioner filed a Traverse, arguing Claims One through Five are not procedurally barred and the remaining claims in the FAP are not untimely for the reasons set forth in Petitioner's Opposition to the Motion to Dismiss the FAP and his Objections to the March 24, 2016 Report and Recommendation. Dkt. 115.

On June 8, 2017, the case was transferred to the undersigned United States Magistrate Judge. Dkt. 135.

On July 10, 2017, the California Attorney General's Office, as counsel for Respondent, contacted retired prosecutor Holmes about the location of the murder book from Petitioner's case. Dkt. 298 at 57. Holmes subsequently located in his private home a copy of the murder book he believed to be the one he used at Petitioner's trial (the "Holmes murder book"). Id. at 58, 105-06; dkt. 265-10 at 2. Holmes provided the Holmes murder book to a representative of either the Los Angeles County District Attorney's Office or the California Attorney General's Office. Dkt. 298 at 58, 66, 77-78, 82, 106.

On January 18, 2018, an attorney for the Los Angeles County District Attorney's office served counsel for Petitioner and Respondent with a copy of the Holmes murder book. Dkt. 265-3.

On September 27, 2018, the Court held a hearing in this matter and granted Petitioner's motion to proceed pro se. Dkt. 206.

On September 24, 2019, Petitioner and Respondent filed witness and exhibit lists in anticipation of an evidentiary hearing. Dkts. 253, 254.

On October 17, 2019, Petitioner constructively filed a Pre-Hearing Brief outlining his claims and the issues in dispute, dkt. 257, and Objections to Respondent's exhibit list, dkt. 258.

On December 20, 2019, Respondent filed a Pre-Hearing Brief, dkt. 265-16, and Objections to Petitioner's witness and exhibit lists, dkt. 265-1, under seal. In addition,

Respondent filed copies of the documents identified by Petitioner in his exhibit list that were in Respondent's possession, as well as all discovery produced in the instant action. Dkts. 265-2 through 265-16.[10]

On January 29, 2020, Petitioner constructively filed a response to Respondent's Objections. Dkt. 269.

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[10] Respondent identifies the exhibits as follows:

1. Resp. Ex. 1 – Los Angeles County District Attorney's Discovery Production of June 15, 2017, containing criminal records pertaining to Hyron Tucker
2. Resp. Ex. 2 – Murder Book pertaining to the investigation into the death of Johnny Johnson discovered in the home of retired Deputy District Attorney Howard Thomas Holmes, III
3. Resp. Ex. 3 – Los Angeles County District Attorney's Office Discovery Production of July 28, 2017, including Tucker's witness protection documents, LAPD notes regarding the Johnson murder, and witness statements
4. Resp. Ex. 4 – LAPD Discovery Production of August 30, 2017, including arrest report for Tucker of April 11, 1988
5. Resp. Ex. 5 – Los Angeles County District Attorney's Office Discovery Production of September 8, 2017, including investigatory documents pertaining to LAPD Officer Anthony Smith, Jr.'s perpetration of a will forgery
6. Resp. Ex. 6 – LAPD Discovery Production of September 15, 2017, including LAPD Internal Affairs investigation into Officer Smith and the will forgery matter
7. Resp. Ex. 7 – Los Angeles County District Attorney's Office Discovery Production of September 25, 2017, including Probation Officer Reports and "rap sheets" for Tucker, Officer Smith, and other witnesses
8. Resp. Ex. 8 – Los Angeles County District Attorney's Office Discovery Production of October 4, 2017, including a document indicating dismissal of Officer Smith from LAPD
9. Resp. Ex. 9 – Declaration of Holmes, dated August 2, 2017
10. Resp. Ex. 10 – Declaration of David P. Carleton, dated July 19, 2017
11. Resp. Ex. 11 – Reporter's transcript of Petitioner's trial in Los Angeles County Superior Court case no. A968415, Volumes 1-2
12. Deposition of William Baird
13. Deposition of J.D. Furr
14. Deposition of Luis Osollo

See dkt. 265-1 at 62-64.

On July 27, 2020, Petitioner constructively filed copies of his remaining exhibits in anticipation of an evidentiary hearing. Dkt. 279.

On November 16, 2020, the Court held an evidentiary hearing and heard testimony from a number of witnesses. Dkt. 293. As discussed in more detail below, the testimony of Petitioner's additional proposed witnesses is unnecessary to deciding the issues presented in the remaining claims in the FAP.

The matter thus stands submitted.

III.

TRIAL TESTIMONY

At trial, Petitioner proceeded pro per, 1 RT 1, and the following relevant testimony was given:

A. SHOOTING OF VICTIM JOHNSON

At Petitioner's trial, the prosecution presented evidence that during the late night hours between April 5 and April 6, 1988, the victim, Johnnie Johnson, was shot while driving his cab in the City of Los Angeles. 1 RT 50-51, 76-77, 79, 88, 90-91, 95-97, 119, 141, 157. The victim drove his cab away from the shooting scene and ultimately crashed into a power pole, where he was assisted by medical personnel. Id. at 69-70, 73, 81-82, 120-21, 128, 141, 143, 146-47, 149-50. He was later taken to the hospital and died as a result of a gunshot wound to the chest. Id. at 75, 96-97, 99-100.

B. COMEAUX

Comeaux, a witness for the prosecution, testified that on the night of the shooting, she was standing on 47th Street between Central Avenue and Hooper Street with Petitioner, Vincent, Veronica Denis ("Veronica"), Green, and Tucker. Id. at 110-11. Comeaux was selling cocaine. Id. at 111. The victim arrived in his cab and wanted to buy a $20 rock of cocaine. Id. at 113. When Comeaux approached the cab to sell cocaine to the victim, Petitioner and Vincent followed her. Id. at 114-15.

On direct examination, Comeaux testified Petitioner demanded money from the victim and "stuck his hand up under [Comeauex's] arm." Id. at 117-18. Comeaux

then heard a gunshot she believed came from where Petitioner was standing. Id. at 118-19, 133. Comeaux did not look at Petitioner after hearing the shot because she was in shock. Id. at 122. The victim started his engine and drove away as Vincent was hanging onto the cab with his head and arms inside the vehicle. Id. at 120-21, 128. Comeaux testified she had not seen Petitioner or Vincent with a gun that day. Id. at 119.

On cross-examination, Comeaux testified she had been high on cocaine when she first gave her statement to the police and she was not sure whether Petitioner was the individual who demanded money from the victim. Id. at 127-28. Comeaux testified that the police told her if she testified against Petitioner, she would not have her probation revoked, but that the police did not offer her money. Id. at 129-30. In addition, Comeaux testified on cross-examination that (1) Vincent's family threatened her with violence if she did not say Petitioner was the "perpetrator;" (2) she saw Vincent shoot the victim; and (3) it was not true that Petitioner perpetrated the shooting. Id. at 130.

On re-direct examination, Comeaux testified she did not see Vincent shoot the victim and that the gunshot came from the area where Petitioner was standing. Id. at 133.

LAPD Detective William Baird ("Detective Baird") testified that he interviewed Comeaux after the shooting. 2 RT 250. Detective Baird testified that Comeaux told him that after the shot was fired, she turned around and saw Petitioner with a gun in his hand. Id. at 251. Detective Baird further testified he saw Comeaux smoking from a cocaine pipe before the interview. 1 RT 65; 2 RT 409.

C. GREEN

Green testified she was near the scene at the time of the shooting, sitting in a car with Veronica. 1 RT 139. Green saw Petitioner, Vincent, and Tucker on the sidewalk. Id. at 139-40. Green further testified she saw Petitioner and Vincent, but not Comeaux, approach the victim's cab. Id. at 140-41. Upon hearing a gunshot,

Green looked up to see the cab driving away and Vincent on the ground. Id. at 141, 143. Green testified that Vincent told Green and Veronica that the victim took his money, so the women followed the cab, but lost track of it before the collision. Id. at 146-47, 149-50. Green also testified she had seen Petitioner with a gun in his back pocket earlier in the day, but did not see anyone with a gun at the time of the shooting. Id. at 141-43.

On cross-examination, Green testified she told a defense investigator that Petitioner was "across the street" when she looked up after the gunshot and again stated she did not see Petitioner with a gun. Id. at 145, 150. Green testified she did not see Petitioner shoot the victim. Id. at 148.

During the defense's case, Petitioner called his defense investigator, who testified Green told her that Petitioner was across the street at the time of the shooting and Vincent was by the cab before falling to the ground. 2 RT 295-97, 299, 302-03. According to the defense investigator, Green also told the investigator she never saw Petitioner with a gun. Id. at 295-96, 299.

D. TUCKER

Tucker testified at trial that he was with Petitioner, Vincent, Comeaux, Veronica, and Green selling drugs near the scene at the time of the shooting. 1 RT 153. "Seconds" before the victim arrived in his cab, Vincent told Tucker he was going to "jack[] every motherfuckin' thing that moves." Id. at 169, 171-72, 177, 190-91. Petitioner was not around when Vincent made this statement. Id. at 191.

Before the shooting, Tucker saw Comeaux and then Petitioner and Vincent approach the victim's cab. Id. at 156, 164, 175, 177. Comeaux attempted to sell cocaine to the victim, but Petitioner and Vincent told her, "Bitch, step back," and began to tussle with the victim. Id. at 156-57. Tucker heard a gunshot and saw Petitioner holding a gun as Petitioner moved his hand down toward his leg. Id. at 157, 159, 172-73, 191. Tucker also saw Vincent hanging onto the cab as it drove away until he eventually fell off. Id. at 159-62, 171. Tucker picked Vincent up and put him

in Veronica's car. Id. at 160, 162, 171. Tucker asked Petitioner if he shot the victim, and Petitioner shrugged his shoulders, as if to indicate "he didn't know." Id. at 162-63. Contrary to Green, Tucker testified Veronica and Green were standing with him at the time of the shooting and were not in a car. Id. at 170-71, 175.

Tucker admitted he had consumed a small amount of beer and cocaine on the day of the shooting. Id. at 153-54. Tucker testified that although he was under the influence at the time of the shooting, witnessing the shooting and seeing Petitioner in possession of a gun "was something that you don't forget." Id. at 173, 177-78. Tucker did not see anyone with a gun at any other time that day. Id. at 159, 162-63, 172, 174, 191.

Tucker further testified that after Vincent was tried and convicted for the victim's murder, Petitioner called Tucker and offered him money and cocaine to "change [his] testimony." Id. at 166-68. Specifically, Petitioner wanted Tucker to offer testimony at Petitioner's trial that was different from the testimony Tucker offered at the preliminary hearing and at Vincent's trial. Id. at 167.

In addition, Tucker testified that his first contact with police regarding the shooting occurred when he was in custody on separate charges and that the police initiated that contact. Id. at 168, 182-84. According to Tucker's testimony, he was not offered leniency in exchange for his statements. Id. at 173-74. Tucker, however, testified that the prosecutor on Petitioner's case accompanied Tucker to court to secure his release on his own recognizance and prevent his placement in county jail because Tucker previously had been beaten by Petitioner's brother, Donnell Dunn ("Dunn"), in jail and remained "fearful for [his] safety." Id. at 179-80. The police then placed Tucker into protective custody. Id. at 180, 187.

Detective Baird testified he "did not promise Mr. Tucker anything in connection with his being cooperative or testifying in this case" and "the police department or any police officer" did not "ever pay Mr. Tucker for his testimony in this case." 1 RT 257; 2 RT 404. Detective Baird further testified that Tucker's

multiple statements to him during the investigation were consistent with Tucker's testimony at Vincent's trial. 1 RT 258.

E. PETITIONER'S FLIGHT FROM ARREST

LAPD Officer Patricia Strong ("Officer Strong") and her partner Officer Ruben Delatorre ("Officer Delatorre") also testified at Petitioner's trial. Id. at 194, 212. On the morning of May 3, 1988, Officers Strong and Delatorre responded to an "unknown" 911 call. Id. at 195-96, 214. In response to the call, the officers entered a house where they found Petitioner asleep in a bedroom. Id. at 201-02, 210, 214-16. While Officer Strong positioned herself near the bedroom's doorway, Officer Delatorre approached Petitioner and ordered him to stand up and put his hands up. Id. at 202-03, 216. Petitioner got up and began walking out of the room. Id. at 203-04, 217. Officer Strong ordered Petitioner to put his hands up and Petitioner fled the house, knocking Officer Strong to the floor on his way out. Id. at 204-05, 217-18, 224. Officers Strong and Delatorre started to chase Petitioner, and Officer Strong radioed for help, indicating Petitioner had fled and was carrying "something shiny in his hand." Id. at 205-06, 211-12.

Officer Smith testified at trial that he responded to the search for Petitioner. Id. at 231-33. Officer Smith confronted Petitioner from his position in an alley, as Petitioner attempted to climb over a fence. Id. at 238-39. With his gun drawn, Officer Smith ordered Petitioner to stop. Id. Petitioner did not stop but, instead, dropped back down to the other side of the fence. Id. at 239-40. Petitioner then attempted to climb a different section of the fence, and as he did so, Officer Smith saw what he believed to be a "shiny object in his waistband" and ordered Petitioner to stop. Id. at 241. LAPD Officer Jerry Mayeda ("Officer Mayeda") testified that, at the same time, he was on the other side of the fence striking Petitioner's legs and knees with a baton. Id. at 278-79. Petitioner continued moving, and Officer Smith shot him in the abdomen. Id. at 240-41, 245. Petitioner fell from the fence, and Officer Smith took him into custody. Id. at 241, 245. After Petitioner was shot, it was

determined the "shiny object" Officer Smith saw around Petitioner's waistband was a belt buckle. Id. at 246.

F. DETECTIVE BAIRD

At trial, Detective Baird testified that officers recovered a wallet from Petitioner's pocket at the time of his arrest. Id. at 254, 276. The wallet contained two Greyhound bus tickets purchased the day before Petitioner's arrest. Id. at 254-56. The tickets were signed in the name of David White with a destination of Brookhaven, Mississippi. Id. at 256, 260. The tickets were valid for 60 days from the date of purchase. Id. at 256.

Detective Baird further testified that copies of his investigative materials, i.e. the murder book, were made available to the prosecution and defense. Id. at 259.

G. PETITIONER'S DEFENSE CASE

Petitioner called several witnesses in his defense. Petitioner's friend, Rosemarie Wilson, testified she was listening on a phone call between Petitioner and Tucker when Tucker said officers wanted him to testify against Petitioner in exchange for them "tak[ing] care of [Tucker's] charges." 2 RT 286-87. Tucker then asked if Petitioner's family could give him $500. Id. at 287.

Petitioner's cousin, LeRoy Berry ("Berry"), testified Tucker left a message for him at his business. Id. at 311-12, 314, 324-25. The note read, "Get in touch with me about going to court about Kavin." Id. at 314. Berry further testified police had been harassing his family. Id. at 327-32.

Petitioner also called Tucker as a defense witness. Tucker's testimony reiterated Tucker's previous testimony during the prosecution's case. For example, Tucker again testified that on the night of the shooting, Vincent said he was going to "jack[] every motherfuckin' thing that moves." Id. at 361. Tucker confirmed Veronica and Green were standing with him at the time of the shooting and were not in a car, as Green had testified. Id. at 359, 362. Tucker testified again that Petitioner's brother Dunn had beaten him up, and as a result, the police took Tucker into

protective custody. Id. at 389-91. Consistent with his prior testimony, Tucker testified that Petitioner offered him drugs and money in exchange for his favorable testimony. Id. at 391-93.

On cross-examination by the prosecutor, the prosecutor engaged Tucker in the following exchange:

> Q. All right. Did [the detectives] promise you anything, any kind of reward, in connection with your cooperation?
>
> A. No one promised me anything.
>
> Q. Did anybody ever pay you any money for testifying in this case?
>
> A. No one paid me any money for testifying or anything.

Id. at 387.

IV.

EVIDENTIARY HEARING

A. MURDER BOOKS

Prior to the evidentiary hearing, through the course of state and federal proceedings, the parties established the existence of three different copies of the murder book.

First, as discussed above, when Petitioner began representing himself at his trial, former trial counsel turned over discovery materials to the trial court to be provided to Petitioner. Dkt. 298 at 15-16, 18-22, 39-41, 43-44, 51. These discovery materials included the distinct copy of the murder book kept by Petitioner until it was lost during a prison transfer in 2017, i.e. Petitioner's murder book. Dkt. 298 at 19, 39-40, 43-44, 51, 127, 139-40, 144.

Second, as discussed above, the LAPD murder book was retrieved from storage during the litigation of Petitioner's post-conviction discovery motion, turned over to the district attorney's office, and forwarded to Petitioner via Ralph Novotney in July 2011. Dkts. 279-5 at 78; 279-6 at 21; 296-2 at 10-13; 298 at 123.

Third, also discussed above, the Holmes murder book was a distinct copy maintained by Holmes during the trial court proceedings and kept in his personal possession until he turned it over to the district attorney's office or the attorney general's office in 2017 during the course of the instant habeas proceedings. Dkts. 265-3 at 3; 265-10 at 2; 298 at 57-58, 66, 77-79, 105-06.

As relevant here, the LAPD murder book included documentation of payments made by the LAPD to prosecution witness Tucker. Dkts. 279-4 at 52-70, 72; 279-7 at 60; 296-2 at 11, 13; 303-2 at 20; 303-4 at 9-28. These pages were not included in the Holmes murder book or Petitioner's murder book. Dkts. 265-3 at 6-296; 265-13 at 178-79; 298 at 43, 140, 142.

B. WITNESS TESTIMONY

On November 16, 2020, the Court held an evidentiary hearing. Dkt. 293. The following individuals appeared and testified at the hearing: (1) Brentford Ferreira ("Ferreira"), the deputy district attorney who handled Petitioner's post-conviction discovery matter in the Los Angeles County Superior Court; (2) David Carleton ("Carleton"), Petitioner's trial counsel; (3) Holmes, the trial prosecutor; and (4) Petitioner. Dkt. 298.

1. Ferreira

Ferreira testified he had no recollection of the matter. See id. at 8-12.

2. Carleton

Carleton, the deputy public defender initially appointed to represent Petitioner, testified he turned over to Petitioner everything he had received from the district attorney's office in Petitioner's case to which Petitioner was "legally entitled." Id. at 43-44, 51. The material he provided Petitioner would have included the murder book that had been provided to the defense by the prosecutor before trial. See id. at 36, 43.

Finally, Carleton testified that he did not remember ever seeing evidence of payments made to witnesses in Petitioner's case. Id. at 43.[11]

3. Holmes

Holmes testified at the evidentiary hearing that the copy of the murder book he had in his possession was the book provided to him by the detectives assigned to Petitioner's case. Id. at 77. He further testified that if detectives later updated the murder book with additional documents, "generally" that new material would be provided to the district attorney's office. Id. at 78-79. He testified that he turned over the entire contents of the murder book in his possession to the attorney general's office in 2017 during the course of the instant federal habeas corpus proceedings. Id. at 77. Holmes testified he was "certain" the murder book he gave to the attorney general's office was in the same condition it had been in when he placed it in the storage box he brought home from the district attorney's office. Id. at 106.

Holmes further testified that to his knowledge, there would not have been different versions of the murder book containing different material. Id. at 57. Rather, it was his understanding that any separate copies of the murder book would have been mere duplicates of the original. Id. Holmes confirmed that if additional reports came in after the defense was given a copy of the murder book, he would have "distribute[d] those." Id. at 103. However, he did not remember adding anything to the murder book in Petitioner's case and believed the murder book was "pretty complete" when he obtained it. Id.

Holmes testified he did not have any recollection of the police giving money to Tucker. Id. at 96.

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[11] Carleton testified he did not "recall ever seeing" documents regarding payments to witnesses in any case he had handled involving documents produced by the LAPD. Dkt. 298 at 43. This is consistent with Detective Baird's deposition testimony that this was not something the LAPD would have included in a murder book during that era. Dkt. 265-13 at 178.

Finally, Holmes testified he believed he had a complete copy of the autopsy report, which would have been the report he used at trial. Id. at 94.

4. Petitioner

Petitioner testified that Petitioner's murder book was incomplete. Among other things, Petitioner testified his murder book contained only a partial copy of the investigation chronology, as it was missing the second page of notes authored on April 25, 1988, id. at 125-26, 130, 139, and did not contain reports of certain witness interviews or a complete copy of the autopsy report, id. at 123, 125-26. Petitioner further testified his copy of the murder book received before trial did not contain any records regarding payments from the LAPD to any witnesses, including Tucker. Id. at 140-42. Petitioner testified he did not learn the LAPD made payments to Tucker until July 20, 2011, when he received the LAPD murder book through post-conviction discovery. Id. at 141.

C. PETITIONER'S OTHER PROPOSED WITNESSES

The evidentiary hearing proceeded with only the testimony of the witnesses detailed above. Petitioner, however, requested a number of additional witnesses in his pre-hearing briefing. Dkt. 279 at 11-14. As explained below, the Court finds the testimony of the proposed witnesses unnecessary to deciding the issues presented in the remaining claims in the FAP.

1. Novotney

Petitioner sought the testimony of Novotney, who represented Petitioner during his post-conviction discovery proceedings in the Los Angeles County Superior Court. Id. at 13. Petitioner anticipated Novotney testifying that he delivered to Petitioner the "original" murder book, i.e., the LAPD murder book, from Ferreira. Id. Novotney previously filed a declaration which lists the contents of the documents he produced to Petitioner. Dkt. 296-2 at 8-14. Accordingly, Novotney's testimony is unnecessary.

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2. Shear

Petitioner sought the testimony of Sylvia Shear ("Shear"), the court reporter from Petitioner's preliminary hearing in Los Angeles County Superior Court. Dkt. 279 at 13. Petitioner anticipated Shear would testify to the alteration of the preliminary hearing transcript from July 22, 1988 to omit Form 3 of the autopsy report. Id. Shear's testimony is unnecessary because (1) there is no evidence the preliminary hearing transcript was altered; (2) Shear signed a certification of the transcript; and (3) as explained herein, even assuming Form 3 of the autopsy report was omitted, Petitioner is not entitled to relief.

3. Fuentes

Petitioner sought the testimony of Raymond J. Fuentes ("Fuentes"), an attorney who made a special appearance on behalf of the district attorney's office during Petitioner's post-conviction discovery proceedings, dkt. 265-3 at 2. Dkt. 279 at 14. Petitioner anticipated Fuentes would testify consistently with a superior court filing he wrote in which Fuentes stated the copy of the murder book found at Holmes's home cannot be authenticated, see dkt. 265-3 at 3. Dkt. 279 at 14. Holmes himself authenticated the murder book found at his home by asserting in his declaration and at the evidentiary hearing, that the version of the murder book he turned over in this case was the complete, unaltered copy of the book he possessed at the time of trial and that would have been the same version produced to the defense at trial. See dkts. 265-10 at 2; 298 at 57-58, 66, 77-79, 101-03, 106. Accordingly, Fuentes's testimony is unnecessary.

Moreover, the critical issue was whether the murder book produced at Petitioner's trial contained receipts, or any other evidence, documenting monetary payments made to Tucker. Notably, the Holmes murder book did not contain any such evidence.

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4. Dunn

Petitioner sought the testimony of his brother, Dunn, who would testify that (1) Dunn did not beat up Tucker; and (2) Tucker told Dunn that Vincent shot the victim. Dkt. 279 at 14. The Court assumes Dunn would have testified consistently with the declaration he submitted in this matter, which states that, while Dunn and Tucker were incarcerated in the same facility, Tucker informed Dunn that Vincent was responsible for the murder in this case and that after this brief period of incarceration, Dunn never again had contact with Tucker. Dkt. 279-4 at 43. Accordingly, Dunn's testimony is unnecessary.

5. Detective Furr

Petitioner sought the testimony of LAPD Detective J.D. Furr ("Detective Furr"). Dkt. 279 at 13. Specifically, Petitioner sought testimony that (1) Detective Furr did not direct the creation of a second murder book; (2) district attorney funds and police funds are from different sources; and (3) the Holmes murder book was incomplete. Id. at 13-14.

Detective Furr was deposed by counsel from the Federal Public Defender's office when the office represented Petitioner in this matter between March 24, 2016 and June 21, 2018. Dkt. 265-14. Detective Furr testified that at the time of Petitioner's investigation, the LAPD detectives assigned to a particular murder case would compose a murder book and make copies of that book for the prosecutor and defense, dkt. 265-14 at 30, but materials were not removed from murder books before copies were made, id. at 32. He further testified that he had no independent recollection of what would have been included in the murder book in Petitioner's case or whether the LAPD murder book in this case was complete, id. at 193-94, 210, 213, but that nothing seemed "amiss" or "inauthentic" in the LAPD murder book, id. at 197-98. Finally, Detective Furr testified that payments of $420 and $495 to Tucker by a district attorney investigator would have come out of district attorney funds rather than LAPD funds, id. at 202-06, and those payments to Tucker would have been

"separate and apart" from any money paid to Tucker out of LAPD funds, id. at 208. The Court assumes Detective Furr would have testified consistently with his deposition, and therefore, his testimony is unnecessary.

6. Detective Baird

Petitioner sought the testimony of Detective Baird, the lead detective in his case, regarding the legitimacy of the LAPD murder book and the fact that documentation regarding payments to Tucker was not included in the Holmes murder book or in Petitioner's murder book. Dkt. 279 at 14.

Detective Baird was previously deposed by counsel from the Federal Public Defender's office in this matter. Dkt. 265-13. Detective Baird testified he had no independent recollection of the investigation, murder book, or prosecution of Petitioner's case, id. at 223-38, but he would not have expected receipts for payments like the ones given to Tucker to be included in the murder book, id. at 178-79. Detective Baird did not have any independent knowledge of where the murder book referenced during his deposition came from or whether it was a complete copy of the murder book he compiled during the investigation of Petitioner's case. Id. at 224-38. The Court assumes Detective Baird would have testified consistently with his deposition, and therefore, his testimony is unnecessary.

7. Detective Osollo

Petitioner sought the testimony of LAPD Detective Luis Osollo ("Detective Osollo") regarding "involvement in the filing of criminal charges against every prosecution witness" that testified at Petitioner's trial. Dkt. 279 at 14.

Detective Osollo was previously deposed by counsel from the Federal Public Defender's office in this matter. Dkt. 265-15. Presented with copies of felony complaints, Detective Osollo testified he did not remember the cases. Id. at 59, 66-68. The only portion of the complaints he recognized was his signature, although he did not know why his signature would appear on the complaints. Id. at 43, 46-54, 68. Detective Osollo did not recall ever seeing, reading, or reviewing the documents he

was shown during the deposition, and at least one of the complaints had been filed after Detective Osollo retired from the LAPD. Id. at 51, 61-63, 67-69. The Court assumes Detective Osollo would have testified consistently with his deposition and therefore finds his testimony unnecessary.

8. Kessler

Petitioner also sought the testimony of Marrisa Kessler ("Kessler"), an LAPD custodian of records, regarding the disclosure of the personnel file of Officer Smith and other discovery material. Dkt. 279 at 14. Kessler submitted a declaration regarding her production of documents. Dkt. 265-7 at 2-3. The Court assumes Kessler would have testified consistently with her declaration, and therefore, Kessler's testimony is unnecessary.

9. Choi

Petitioner sought the testimony of Los Angeles Deputy County Counsel Lana Choi ("Choi") regarding the disclosure of the personnel file of Officer Smith and other discovery material. Dkt. 279 at 14. Choi submitted a declaration regarding her production of documents. Dkt. 284. The Court assumes Choi would have testified consistently with her declaration, and therefore, Choi's testimony is unnecessary.

10. Expert witnesses

In addition to seeking the testimony of these specific witnesses, Petitioner filed an application for the appointment of several experts. Dkt. 263. Specifically, Petitioner sought the appointment of handwriting expert Linda C. Mitchell regarding the authentication of handwriting found in the murder book. Id. at 2, 5-6. Petitioner also sought the appointment of a forensic pathologist "to assist the Court in appreciating the materiality of the documents created by Dr. [E]va [Heuser]," specifically as it relates to the trajectory of the bullet in the victim. Id. at 2, 7. Finally, Petitioner requested the appointment of an expert on the policies and procedures of the LAPD during the relevant time period to "assist[] the Court in understanding the creation of two [m]u[r]der [b]ooks," one kept by the LAPD and one given to the

district attorney's office. Id. at 2, 6. Petitioner's proposed experts are unnecessary to the adjudication of this matter, and therefore, Petitioner's request for the appointment of these experts is denied.

The matter thus stands submitted and ready for decision.

V.

ALL CLAIMS IN THE FAP RELATE BACK TO THE ORIGINAL FILING DATE; HOWEVER, CLAIMS ONE THROUGH FIVE ARE UNTIMELY

A. JANUARY 10, 2014 IS THE DEEMED FILING DATE FOR THE REMAINING CLAIMS IN THE FAP

Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure states an "amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." FED. R. CIV. P. 15(c)(1)(B). In Mayle v. Felix, the United States Supreme Court addressed the issue of whether an amended habeas petition relates back to the filing date of the original petition. 545 U.S. 644 (2005). The Court found newly asserted claims in an amended habeas petition do not relate back to the original petition merely because the new claims stem from the habeas petitioner's same trial, conviction, or sentence. Id. at 662. Rather, claims relate back when there is a "common core of operative facts" uniting the previously asserted claim with the newly asserted claim. Id. at 664. The Ninth Circuit has found new claims under Brady v. Maryland, 373 U.S. 83 (1963) that the prosecution withheld evidence relate back to originally filed Brady claims where all of the claims allege the withholding by the prosecution of exculpatory evidence acquired during the same police investigation. Valdovinos v. McGrath, 598 F.3d 568, 575 (9th Cir. 2010), judgment vacated on other grounds by Horel v. Valdovinos, 562 U.S. 1196 (2011).

Petitioner included Claims One through Five in his original Petition, which he constructively filed on January 10, 2014. Dkt. 1. Accordingly, January 10, 2014 is the operative filing date for consideration of the timeliness of Claims One through Five.

While Petitioner raised Claims Nine and Eleven for the first time in the FAP, dkt. 53, FAP, these claims relate back to the original Petition and should therefore be considered filed as of January 10, 2014. Specifically, in Claims Nine and Eleven, Petitioner alleges the prosecution withheld evidence arising from the same investigation at issue in Claims One, Three, and Four. Id. at 20-21, 25. Hence, Claims Nine and Eleven relate back to the original Petition constructively filed on January 10, 2014. Valdovinos, 598 F.3d at 575.

Accordingly, January 10, 2014 is the filing date for the remaining claims in the FAP.

B. THE PETITION WAS FILED AFTER AEDPA'S ONE-YEAR LIMITATIONS PERIOD

Petitioner filed the Petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Dkt. 1. Therefore, the requirements for habeas relief set forth in AEDPA apply. See Soto v. Ryan, 760 F.3d 947, 957 (9th Cir. 2014).

AEDPA "sets a one-year limitations period in which a state prisoner must file a federal habeas corpus petition." Thompson v. Lea, 681 F.3d 1093, 1093 (9th Cir. 2012). Ordinarily, the limitations period runs from the date on which the prisoner's judgment of conviction "became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1) ("Section 2244(d)(1)"). "When, on direct appeal, review is sought in the state's highest court but no petition for certiorari to the United States Supreme Court is filed, direct review is considered to be final when the certiorari petition would have been due, which is 90 days after the decision of the state's highest court." Porter v. Ollison, 620 F.3d 952, 958-59 (9th Cir. 2010) (citations omitted).

Here, Petitioner's conviction became final on June 17, 1992, i.e., 90 days after the March 19, 1992 California Supreme Court order denying Petitioner's petition for review on direct appeal. Lodgs. 8, 9; see also Porter, 620 F.3d at 958-59. Since Petitioner's judgment of conviction became final on June 17, 1992, a date before AEDPA was enacted, the statute of limitations commenced the day after AEDPA's effective date of April 24, 1996 and expired one year later, on April 24, 1997. See Bryant v. Arizona Att'y Gen., 499 F.3d 1056, 1058 (9th Cir. 2007); Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

The Petition, however, was not filed until January 10, 2014. Dkt. 1. Therefore, in the absence of a later trigger date or any applicable tolling, the Petition is untimely by over sixteen and a half years under Section 2244(d)(1). See Thompson, 681 F.3d at 1093.

C. NO STATE ACTION PREVENTED PETITIONER FROM FILING THE PETITION

The burden of demonstrating AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with Petitioner. See, e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Zepeda v. Walker, 581 F.3d 1013, 1019 (9th Cir. 2009); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2244(d)(1)(B) ("Section 2244(d)(1)(B)"), a petitioner may be entitled to a later trigger date of the one-year limitation period beyond the date his conviction became final if a state action prevented the petitioner from filing a federal habeas claim in violation of the Constitution or laws of the United States. 28 U.S.C. § 2244(d)(1)(B). In such a case, the limitations period begins to run on "the date on which the impediment to filing an application created by State action . . . is removed." Id. On its face, Section 2244(d)(1)(B) applies only to impediments created by state action that violate the Constitution or laws of the United States. Shannon v. Newland, 410 F.3d 1083, 1088 n.4 (9th Cir. 2005). "To obtain relief under [Section] 2244(d)(1)(B), the petitioner must show a causal connection between the unlawful

impediment and his failure to file a timely habeas petition." Bryant, 499 F.3d at 1060 (citations omitted). Moreover, a claim under this provision "must satisfy a far higher bar than that for equitable tolling." Ramirez v. Yates, 571 F.3d 993, 1000 (9th Cir. 2009). A petitioner will be entitled to the commencement of a new limitations period under Section 2244(d)(1)(B) only if the impediment "altogether prevented him from presenting his claims in **any** form, to **any** court." Id. at 1001 (emphasis in original).

Petitioner contends "the State's suppression of each of the vital factual predicates of the claims in the FAP, under the creation of state laws that prohibit pro per defendants from possessing witness criminal histories, is a State Created impediment, resulting in Brady violation." Dkt. 74-1 at 2, MTD FAP Opp. (emphasis in original). The Court is not convinced that the Brady violations alleged in the claims in the FAP or any state law preventing pro per defendants from obtaining witness criminal histories presented an "impediment" to Petitioner's filing of a habeas petition sufficient to trigger a new one-year statute of limitations under Section 2244(d)(1)(B), within the meaning of the statute. Cf. Shannon, 410 F.3d at 1087 (holding state appellate court's rejection of the petitioner's appeal and state supreme court's refusal to review that decision were not state-created impediments). "The limited case law [in this circuit] applying § 2244(d)(1)(B) has dealt almost entirely with the conduct of state prison officials who interfere with inmates' ability to prepare and to file habeas petitions by denying access to legal materials." Id. (citing Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc)). "These cases comport with the plain meaning of the provision, which applies when a petitioner has been impeded from **filing** a habeas petition." Id. at 1088 (emphasis in original).

Here, in fact, Petitioner has made numerous filings in the state courts, thereby demonstrating that no state-created impediment interfered with his ability to file a federal habeas petition. Lodgs. 10, 18, 23-25, 27, 30, 43; see, e.g., Gaston v. Palmer, 417 F.3d 1030, 1035 (9th Cir. 2005) (rejecting claim that alleged insufficient accessibility to law library constituted state-created impediment given prisoner's ability

to file state habeas petitions before and after the limitation period expired), modified on other grounds, 447 F.3d 1165 (9th Cir. 2006).[12]

Accordingly, Petitioner fails to demonstrate a state-created impediment interfered with the filing of his federal habeas petition.

D. EVEN IF PETITIONER IS ENTITLED TO A LATER TRIGGER DATE, CLAIMS ONE THROUGH FIVE ARE STILL UNTIMELY

1. The Factual Predicate of Claims One through Five Could Not Have Been Discovered through Reasonable Diligence until July 20, 2011; However, Petitioner Did Not File within the One-Year Limitations Period of this Later Trigger Date

Pursuant to 28 U.S.C. § 2244(d)(1)(D) ("Section 2244(d)(1)(D)"), if a petitioner brings newly discovered claims, the limitations period begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). However, "AEDPA's one-year statute of limitations in [Section] 2244(d)(1) applies to each claim in a habeas application on an individual basis." Mardesich v. Cate, 668 F.3d 1164, 1171 (9th Cir. 2012). Therefore, a different triggering date may apply to each claim in a petition. See id.

"The statute of limitations begins to run under § 2244(d)(1)(D) when the factual predicate of a claim '**could have been** discovered through the exercise of due diligence,' not when it **actually** was discovered." Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012) (emphasis added) (citing 28 U.S.C. § 2244(d)(1)(D)). "Due

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[12] Despite this landscape of Ninth Circuit precedent, the Court recognizes other circuits "have entertained the possibility that section 2244(d)(1)(B) might encompass Brady violations." Wood v. Spencer, 487 F.3d 1, 6 (1st Cir. 2007) (citing Williams v. Sims, 390 F.3d 958, 960 (7th Cir. 2004)); Green v. Cain, 254 F.3d 71, 2001 WL 502806, at *1 (5th Cir. 2001) (per curiam) (unpublished)). However, the Court does not need to reconsider Ninth Circuit precedent or consider what persuasive weight, if any, out-of-circuit precedent may have on this issue. Rather, as set forth in Sections V and VI, even assuming a later trigger date under section 2244(d)(1)(B), Petitioner's claims are nonetheless untimely or fail on the merits.

diligence does not require the maximum feasible diligence, but it does require reasonable diligence in the circumstances." Id. (citing Schlueter v. Varner, 384 F.3d 69, 74 (3d. Cir. 2004)) (internal quotation marks omitted); see also Quezada v. Scribner, 611 F.3d 1165, 1168 (9th Cir. 2010) (using reasonable diligence standard in evaluating commencement of statute of limitations under Section 2244(d)(1)(D)). "Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001).

Petitioner argues he is entitled to delayed commencement of the statute of limitations because the factual predicate of Claims One through Five could not have been discovered until July 20, 2011, when he obtained post-conviction discovery by filing a discovery request in the Los Angeles County Superior Court. Dkt. 74 at 22, 48. Petitioner sought this discovery after hearing "through the prison's rumor mill, that his name had been spotted by a fellow prisoner 'Shawn Garland,' attached to some sort of document with respect[] to the 1989-90 Los Angeles County Investigations into the use of Jailhouse Informants in Criminal Cases[.]" Id. at 22. Petitioner asserts that through post-conviction discovery, he obtained the case files of co-defendant Vincent and a "version" of the murder book not previously seen by him – the LAPD murder book. Id. at 24; FAP at 8; dkt. 298 at 123, 126, 130, 139-42.

Here, Petitioner could not have discovered the basis for Claims One through Five before July 20, 2011 because Petitioner was not provided with a copy of the murder book containing evidence of payments to Tucker at the time of trial. Dkts. 265-13 at 178-79; 298 at 43, 140. Such evidence was only disclosed during post-conviction discovery. Dkts. 279-5 at 78; 279-6 at 15-18, 21; 298 at 141-42. It is less clear whether other evidence, such as evidence of criminal charges pending against Comeaux and Tucker at the time of Petitioner's trial, was also omitted from the version of the murder book disclosed to Petitioner at trial.

Nonetheless, even if Petitioner is entitled to a later trigger date of July 20, 2011 under Section 2244(d)(1)(D) for Claims One through Five, these claims are still untimely. AEDPA's one-year limitations period commenced the next day, July 21, 2011, and expired on July 21, 2012. 28 U.S.C. § 2244(d)(1). Petitioner constructively filed the Petition on January 10, 2014. Therefore, in the absence of any applicable tolling, the claims are untimely by over one year and five months under Section 2244(d)(1). See Thompson, 681 F.3d at 1093.

2. Statutory Tolling Does Not Render Claims One through Five Timely

"A habeas petitioner is entitled to statutory tolling of AEDPA's one-year statute of limitations while a 'properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.'" Nedds v. Calderon, 678 F.3d 777, 780 (9th Cir. 2012) (quoting 28 U.S.C. § 2244(d)(2) ("Section 2244(d)(2)")). Statutory tolling does not extend to the time between the date on which a judgment becomes final and the date on which the petitioner files his first state collateral challenge because, during that time, there is no case "pending." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). A petitioner, however, is entitled to statutory tolling (i.e. gap tolling) for reasonable periods between the filing of properly filed applications for state post-conviction or other collateral review. Nedds, 678 F.3d at 781. Nevertheless, "[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed." Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (citation omitted).

Here, AEDPA's one-year statute of limitations commenced on July 21, 2011 and ran for 209 days before Petitioner filed his first state habeas petition on February 15, 2012, see lodg. 24. 28 U.S.C. § 2244(d)(1). Statutory tolling applied from the date Petitioner filed his state habeas petition in the superior court on February 15, 2012 until Petitioner's subsequent state habeas petition was denied by the California Supreme Court on February 13, 2013, see lodg. 28. Nedds, 678 F.3d at 780.

Petitioner argues he is entitled to statutory tolling for the time he was pursuing post-conviction discovery and for his appeal of the trial court's denial of his post-conviction discovery requests. See dkt. 257-1 at 7-16. These filings, however, do not qualify as a post-conviction application for collateral review within the meaning of 28 U.S.C. § 2244(d)(2). See Ramirez, 571 F.3d at 999-1000 (holding petitioner is not entitled to statutory tolling for discovery motions that did not challenge the conviction, but simply sought material the petitioner claimed might be of help in later state proceedings); Wall v. Kholi, 562 U.S. 545, 556 n.4 (2011) (noting in the context of Section 2244(d)(2), "a motion for post-conviction discovery or a motion for appointment of counsel [] generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment").

Relatedly, Petitioner argues his Section 1054.9 discovery motion was consolidated with his habeas corpus petition. Dkt. 257-1 at 8. However, after both were denied, he necessarily pursued relief separately by filing a habeas petition with the California Court of Appeal and appealing the denial of the discovery motion to the California Court of Appeal. Dkt. 43, Exs. 5, 6; lodgs. 23, 25-26. These were not separate "rounds" of state collateral review. See Wall, 562 U.S. at 553 (finding that within the context of § 2244(d)(2), "'collateral review' of a judgment or claim means a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process").

Accordingly, AEDPA's one-year statute of limitations recommenced on February 14, 2013, the day after the California Supreme Court denied Petitioner's habeas petition, and expired 156 days later on July 20, 2013. Petitioner did not file the instant Petition until January 10, 2014. Therefore, statutory tolling does not render the Petition timely.

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3. Equitable Tolling Does Not Render Claims One through Five Timely

In addition to the statutory tolling provided for by Section 2244(d)(2), the "AEDPA limitations period may be tolled" when it is "equitably required." Doe v. Busby, 661 F.3d 1001, 1011 (9th Cir. 2011). The "threshold necessary to trigger equitable tolling [under AEDPA] is very high." Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010) (alteration in original) (citation and internal quotation marks omitted). A court may grant equitable tolling only where "'extraordinary circumstances' prevented an otherwise diligent petitioner from filing on time." Forbess v. Franke, 749 F.3d 837, 839 (9th Cir. 2014) (citation omitted). The petitioner "bears a heavy burden to show that [he] is entitled to equitable tolling, 'lest the exceptions swallow the rule.'" Rudin v. Myles, 781 F.3d 1043, 1055 (9th Cir. 2015) (citing Bills, 628 F.3d at 1097). Petitioner must prove that the alleged extraordinary circumstance was a proximate cause of his untimeliness and that the extraordinary circumstance made it impossible to file a petition on time. Ramirez, 571 F.3d at 997; Roy v. Lampert, 465 F.3d 964, 973 (9th Cir. 2006) (citing Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003)).

Here, Petitioner fails to satisfy this exacting standard for equitable tolling. Petitioner has not alleged any wrongful conduct, nor has he claimed the existence of any extraordinary circumstances beyond his control which made it impossible for him to file a timely habeas petition after July 20, 2011. See generally dkt. 74. Accordingly, Petitioner has failed to demonstrate any basis for equitable tolling.

Accordingly, the statute of limitations for Claims One through Five began running on July 20, 2011, however, the Petition was not filed until January 10, 2014. Hence, because the Petition was filed outside of AEDPA's one year limitations period and statutory and equitable tolling do not render them timely, Claims One through Five are untimely.

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VI.

EVEN IF CLAIMS NINE AND ELEVEN ARE TIMELY, THEY FAIL ON THEIR MERITS

A. APPLICABLE LAW

Under Brady, a prosecutor violates due process by suppressing evidence favorable to an accused and material to either guilt or punishment. Brady, 373 U.S. at 87; Sanders v. Cullen, 873 F.3d 778, 801 (9th Cir. 2017). To constitute a Brady violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

As to Brady's requirement that the evidence be favorable to the accused, "[a]ny evidence that would tend to call the government's case into doubt is favorable for Brady purposes." Milke v. Ryan, 711 F.3d 998, 1012 (9th Cir. 2013) (citing Strickler, 527 U.S. at 281-82). This includes evidence affecting witness credibility when the witness's reliability likely is "determinative of guilt or innocence." Giglio v. United States, 405 U.S. 150, 154 (1972); Sanders, 873 F.3d at 801-02.

As for Brady's suppression prong, the due process clause obligates the prosecution to disclose material exculpatory evidence on its own motion regardless of whether there is a defense request. Kyles v. Whitley, 514 U.S. 419, 433 (1995). In addition, the prosecutor is obligated not only to turn over evidence in her personal possession but also "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." Id. at 438.

Finally, in making a materiality determination, courts must evaluate the withheld evidence in the context of the entire record. Turner v. United States, 137 S. Ct. 1885, 1893 (2017). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A

reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" Smith v. Cain, 565 U.S. 73, 75-76 (2012) (alterations in original) (quoting Kyles, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.")).

B. CLAIM NINE

In Claim Nine, Petitioner alleges the prosecution's "suppression of exculpatory and/or impeachment evidence" that Officer Smith, the arresting officer and a testifying witness, had pending criminal charges against him for perjury and conspiracy to defraud at the time of Petitioner's trial deprived Petitioner of due process and equal protection in violation of the Fourteenth Amendment. FAP at 20. Petitioner alleges Officer Smith eventually pleaded guilty to those charges in 1991, after Petitioner's trial. Id. at 21. Petitioner argues the prosecution's failure to disclose the pending charges[13] was material and prejudicial "because the trial court admitted Officer Smith's p[er]jured testimony, to establish a false form of consciousness of guilt, claimed to have been exhibited by Petitioner on the theory of flight from the officers upon his arrest." Id.

Petitioner claims he was made aware of the factual predicate for Claim Nine on January 10, 2014 when "pro bono investigator Mich[ael] L[a]mere, recruited to assist Petitioner," discovered the facts underlying this claim. Dkt. 74 at 48. The Court is not convinced that Petitioner, an indigent, incarcerated pro se petitioner, should have

[13] Respondent relies on hearsay to argue the charges were not actually pending at the time of Petitioner's trial. Dkt. 265-16 at 34-37. Nevertheless, even if Respondent could show the charges were not pending at the time of Petitioner's trial and were not filed until after the trial, the Court will consider Petitioner's allegations on the face of the FAP as true to determine whether he has stated a claim for relief.

discovered this information any earlier than he did. The Court, therefore, declines to find Claim Nine untimely.

Turning to the merits of Claim Nine, however, Petitioner fails to show the suppression of a pending investigation against Officer Smith was material under Brady. Officer Smith was not a witness to the Johnson shooting on April 6, 1988, nor is there any allegation he was involved in the investigation that followed. See 1 RT 231-46. Officer Smith's sole involvement in Petitioner's case occurred when he shot and arrested Petitioner on May 3, 1988. Id. Officer Smith's testimony regarding Petitioner's attempt to flee was relevant only to demonstrate Petitioner showed consciousness of guilt. Id.

More importantly, Officers Strong and Delatorre gave independent, corroborating accounts of how Petitioner fled from them on May 3, 1988. According to these officers, Petitioner saw them, disobeyed their commands, and ran away with a shiny object in his hands. 1 RT 197, 200, 204-05, 217-19. Officer Delatorre later saw Petitioner attempting to evade officers by running along the roof of a nearby house. Id. at 221. Officer Mayeda also saw Petitioner fleeing and tried to prevent his escape. Id. at 273, 278. Accordingly, considering the entire record, there is no "reasonable probability" the result at trial would have been different had the impeachment evidence regarding Officer Smith, whose testimony only corroborated the testimony of other officers regarding Petitioner's consciousness of guilt, been disclosed. See Bagley, 473 U.S. at 682.

To the extent Petitioner argues he was prosecuted in bad faith to cover up or misdirect attention away from the fact he was unjustifiably shot by Officer Smith during his arrest, see FAP at 21-22, 27, there is no "reasonable probability" that impeaching Officer Smith about a pending investigation against him would have convinced the jury the prosecution was sought in bad faith. See Bagley, 473 U.S. at 682. In fact, the evidence demonstrates the decision to arrest and charge Petitioner for the Johnson murder was made prior to Petitioner being shot by Officer Smith.

Specifically, Detective Baird sought to arrest Petitioner for the Johnson murder and created "wanted" notices with Petitioner's photograph. 1 RT 252-53. Those notices and information that Petitioner was a suspect were distributed to officers at roll call prior to Petitioner's encounter with Officer Smith. Id. at 197, 207, 217, 253. In addition, Detective Baird was at the district attorney's office seeking a criminal complaint against Petitioner at the time Petitioner was arrested. Id. at 253-54. Hence, Petitioner cannot show that impeaching Officer Smith would have shown Petitioner was prosecuted in bad faith to cover up or misdirect attention from Officer Smith shooting him. Petitioner, therefore, cannot demonstrate a reasonable probability that, had this evidence been disclosed, the result of the proceeding would have been different.

To the extent Petitioner now alleges LAPD Detective Becerra ("Detective Becerra") "framed" Petitioner because he was simultaneously investigating Officer Smith and "suppressing exculpatory evidence, that proves Petitioner's innocence," dkt. 257 at 45-46, this argument also fails. Petitioner argues the "exculpatory evidence" suppressed was Detective Becerra's statement to the coroner investigator, as reflected on Form 3 of the autopsy report, that he did not believe this case involved a robbery.[14] Id. at 47. First, the document Petitioner cites does not suggest Detective Becerra had concluded the crime did not involve a robbery; rather Detective Becerra indicated "[t]he incident **apparently** did not involve an attempted robbery." Dkt. 257-2 at 57 (emphasis added). More importantly, Detective Becerra's impressions were made only two days after the shooting, before significant investigation and any eyewitness interviews. See 1 RT 250. Hence, Detective Becerra's preliminary statement fails to show, as Petitioner alleges, that Detective Becerra "knew from the very outset of his investigation, that the crime was not a robbery[.]" Dkt. 257 at 47.

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[14] It appears from the evidence currently before the Court after the evidentiary hearing that Form 3 was included in the autopsy report provided to Petitioner at trial. See CT 117. The Court, however, will assume the truth of Petitioner's allegations and testimony that he did not receive Form 3 at the time of trial.

Accordingly, Petitioner is not entitled to habeas relief on Claim Nine.

C. CLAIM ELEVEN

In Claim Eleven, Petitioner alleges the prosecutor suppressed evidence of payments made by the prosecutor to prosecution witness Green for perjured testimony that she had "seen a gun sticking out of Petitioner's back[ ] pocket the day before the shooting" in violation of the Fourteenth Amendment. FAP at 25. Petitioner bases this allegation on a criminal charging document "dated July 21, and August 3, and August 9, 1988" with an "inscription[] by the district attorney 'Rent P.H. 8/3/88.'" Id.; dkt 279-6 at 69. Petitioner alleges that in a March 4, 2014 letter, his private investigator explained he located the charging document while "going through the Courts files" and that "P.H." stands for "Produce Hotel," where the Newton Division of the LAPD had paid rent for Tucker, Green's boyfriend, as part of Tucker's witness protection. FAP at 25; see also dkt. 265-13 at 187-88. Petitioner does not allege that he has discovered new direct evidence of payments made to Green, but bases his argument on an inference made from information he received from his private investigator in 2014. See FAP at 25; dkts. 265-13 at 187-88; 279-6 at 69.

Petitioner claims that he was made aware of the factual predicate for Claim Eleven on March 17, 2015 when "pro bono investigator Mich[ae]l L[a]mere, recruited to assist Petitioner," discovered the facts underlying this claim. Dkt. 74 at 48. The Court is not convinced that Petitioner, an indigent, incarcerated pro se petitioner, should have discovered this information any earlier than he did. The Court, therefore, declines to find Claim Eleven untimely.

Turning to the merits of Claim Eleven, however, it is too speculative to assume that based on the single, vague notation "Rent P.H. 8/3/88" that the prosecutor, or LAPD, actually paid Green's rent. No further evidence has been produced in this action that would indicate Green was paid for her testimony. Petitioner now argues he should be entitled to an adverse inference because Respondent has refused to

produce Green's criminal file or disclose the name of the district attorney who made the notation. Dkt. 257-1 at 1. However, despite Petitioner's testimony at the evidentiary hearing, there is no evidence that Green's testimony stating she saw Petitioner with a gun earlier in the day was false. It is, therefore, too speculative to infer Green was paid for her testimony and the prosecution suppressed such evidence. See Runningeagle v. Ryan, 686 F.3d 758, 766-71 (9th Cir. 2012) (speculative claim insufficient to prove Brady violation).

Accordingly, Petitioner is not entitled to habeas relief on Claim Eleven.

VII.

PETITIONER FAILS TO DEMONSTRATE ACTUAL INNOCENCE

A. APPLICABLE LAW

"Actual innocence, if proved, serves as a gateway through which a petitioner may pass" to obtain judicial review of an otherwise time-barred petition. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013); Stewart v. Cate, 757 F.3d 929, 937-38 (9th Cir. 2014). To pass through this gateway, a petitioner must show that "in light of new [reliable] evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). When an otherwise time-barred habeas petition "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error," the Court may consider the petition on the merits. Schlup, 513 U.S. at 316.

The Supreme Court has cautioned, however, that "tenable actual-innocence gateway pleas are rare." McQuiggin, 569 U.S. at 386. "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. (citing Schlup, 513 U.S. at 329); see also House v. Bell, 547 U.S. 518, 538 (2006) (emphasizing that the Schlup standard is demanding and seldom

met). The Schlup standard permits review only in the "extraordinary" case. Schlup, 513 U.S. at 324-27 (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful").

Under Schlup, the Court must "assess how reasonable jurors would react to the overall, newly supplemented record," including all the evidence the petitioner now proffers. Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011) (en banc). "To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." Schlup, 513 U.S. at 324. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998) (citation omitted); Jaramillo v. Stewart, 340 F.3d 877, 882 (9th Cir. 2003).

"[A] petitioner may pass through the Schlup gateway by promulgating evidence that significantly undermines or impeaches the credibility of witnesses presented at trial, if all the evidence, including new evidence, makes it 'more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Gandarela v. Johnson, 286 F.3d 1080, 1086 (9th Cir. 2002) (quoting Schlup, 513 U.S. at 327). "[N]ew evidence that undermines the credibility of the prosecution's case may alone suffice to get an otherwise barred petitioner through the Schlup gateway." Id. (emphasis in original). However, such evidence does not "necessarily . . . get a petitioner through the Schlup gateway." Id. (emphasis in original).

B. PETITIONER HAS NOT SHOWN, IN LIGHT OF THE NEW EVIDENCE, THAT NO REASONABLE JUROR WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT

Petitioner presents new evidence regarding: (1) monetary payments made to Tucker and false testimony regarding these payments; (2) Tucker's prior prosecutions

and probationary status at the time of Petitioner's trial; (3) pending charges against Comeaux; (4) a pending investigation of Officer Smith, discussed above in Section VI B.; and (5) alleged payments made to Green, discussed above in Section VI C.[15] As detailed below, Petitioner has not provided sufficient new evidence[16] to convince the Court that, in light of that new evidence, no reasonable juror would have found him guilty beyond a reasonable doubt. Hence, Petitioner's untimely claims cannot pass through the actual innocence gateway.

1. New Evidence Relevant to Tucker's Testimony

a. Payments

Petitioner presents new evidence demonstrating Tucker was paid approximately $915.00 by the LAPD before trial. FAP at 8; dkts. 265-13 at 143-56, 168-69; 279-4 at 52-70, 72; 279-7 at 60; 296-2 at 11, 13; 303-2 at 20; 303-4 at 9-28. Petitioner has also presented new witness testimony establishing these payments were not disclosed at the time of trial. Dkts. 265-13 at 178-79; 298 at 43, 140, 142. In addition, Petitioner now offers a July 11, 2010 declaration from his brother Dunn implying Dunn did not beat up Tucker. Dkt. 279-4 at 43.[17] Petitioner argues the story presented at trial that Tucker was beaten up by Dunn was a "ruse" to justify and conceal the payments to Tucker by claiming they were only paid in connection with

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15 As discussed in Section VI, the Court finds no constitutional error occurred with regard to Claims Nine and Eleven. Additionally, as discussed in Sections VII B.2-4, the evidence presented in Petitioner's trial was sufficient to conclude Petitioner cannot meet his burden of establishing actual innocence as required under Schlup.

16 Petitioner does not present new evidence with respect to Claim Five, that the prosecution knowingly used the perjured testimony of Green and Tucker. FAP at 10. Rather, Petitioner argues his claim is supported by previously known evidence, i.e., Tucker's ambiguous testimony at trial, 1 RT 170-71, and the prosecutor decision not to call Veronica at Petitioner's trial based on her conflicting testimony at Vincent's trial that she and Green were in her car parked behind the cab but also that she looked in her rear view mirror when she heard the shot. FAP at 14.

17 Respondent objects to Dunn's declaration on the grounds of relevance and hearsay. Dkt. 265-1 at 21-22. Petitioner sought to call Dunn to testify as a witness at an evidentiary hearing "consistent with his [d]eclaration." Dkt. 279 at 14. For purposes of this Court's analysis, the Court will assume Dunn would have testified at an evidentiary hearing consistently with his declaration. Respondent's objection is, therefore, OVERRULED.

placing Tucker in witness protection. FAP at 7. Petitioner claims this evidence supports Claims One and Two regarding the suppression of the Tucker payments and related Tucker and Detective Baird false testimony. FAP at 6; 1 RT 257; 2 RT 399, 404.

The Court first notes Petitioner's new evidence would have been critical to impeaching Tucker, the prosecution's main witness at trial. Tucker offered testimony that after the gunshot, he saw Petitioner holding a gun as he moved his hand down toward his leg, 1 RT 157, 159, 172-73, 191, and that the sight "was something that you don't forget," id. at 173, 177-78. Tucker also testified that when he asked Petitioner if he shot the victim, Petitioner merely shrugged his shoulders. Id. at 162-63. Finally, Tucker testified that before trial, Petitioner called him and offered him money and cocaine to change his favorable testimony. Id. at 166-68. Petitioner's new evidence would have established the trial testimony of Tucker and Detective Baird denying such payments was false. Dkts. 265-13 at 143-56, 168-69; 279-4 at 52-70, 72; 279-7 at 60. Had Petitioner's Claims One and Two been timely, it is likely Petitioner would be entitled to relief under Brady and Napue v. People of State of Ill., 360 U.S. 264 (1959) (finding prosecution may not present or fail to correct material testimony it knows or reasonably should know is false).

The standard for relief under Schlup is distinct and significantly higher than the standard for a habeas claim brought under Brady or Napue. Under Schlup, the question is whether, in light of that new evidence, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. Because errors were made with respect to Tucker that could have had a material impact on Petitioner's trial, the Court will not consider Tucker's testimony as evidence of Petitioner's guilt for purposes of the Court's analysis. As discussed below in Sections VII B.2-4, however, even assuming a trial where Tucker's testimony was not presented to the jury, or Tucker and Detective Baird were impeached with the new evidence, Petitioner cannot make a showing of actual innocence. Specifically, in light of the remaining testimony of

Comeaux and Green, and evidence demonstrating Petitioner's consciousness of guilt, the Court cannot conclude no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

b. New Evidence Regarding Holmes and Tucker's Criminal History

Petitioner also presents new evidence of a notation on a superior court form, which he claims demonstrates Holmes was the prosecutor on Tucker's prosecution, dkts. 279-3 at 188, 198; 279-7 at 64, and evidence he claims demonstrates Tucker was on probation for multiple cases at the time of Petitioner's trial, dkts. 279-3 at 8, 12-13, 188-207, 209-11; 279-4 at 2-4, 6-15, 17-29, 31-33; 279-5 at 66, 68-69, 72, 88-89; 279-6 at 2-4, 23-24; 279-7 at 62, 64. Petitioner argues this evidence supports his Claim Four that the prosecutor committed misconduct when he represented to the jury that (1) he spoke to Tucker's judge to keep Tucker out of county jail, but did not disclose he was the prosecutor in Tucker's case; (2) Tucker was on probation for one drug case, when in fact Tucker had two prior narcotic-related offenses; and (3) Tucker had no felony convictions, when in fact he had felony convictions under the aliases Rolando Sanchez and Manual Evans. FAP at 10, 12-13. Petitioner also argues this evidence demonstrates Tucker was induced to give perjured testimony at trial, evidenced by the fact that "all charges against Tucker were not prosecuted and[/]or dismissed after Petitioner's trial." Id. at 13.

i. The Evidence Does Not Demonstrate Holmes Was the Prosecutor in Tucker's Case

First, Petitioner has not shown Holmes was the assigned prosecutor on any prosecution against Tucker. Petitioner merely presents two municipal court documents from a single court date in Tucker's case with Holmes's name. Those documents indicate Holmes appeared in a municipal court hearing on Tucker's "bench warrant surrender" and reported to the court that Tucker was "a witness in two murder cases - is being cooperative - has been beat by friends of those

[defendants]." Dkts. 279-3 at 188, 198; 279-7 at 64. Petitioner has not presented any other evidence from Tucker's cases suggesting Holmes appeared at any other time or in any other capacity; in fact, other documentation Petitioner presents regarding Tucker's case reflects the names of different prosecutors. See, e.g., dkts. 279-3 at 8, 12-13, 190-96, 199-02, 204; 279-5 at 72.[18] Most importantly, Petitioner knew (and Holmes disclosed) at Petitioner's trial, that Holmes had appeared on Tucker's behalf, informed the court Tucker was a cooperative witness, and urged the court to consider that information when determining whether to release Tucker. 1 RT 180.

ii. The Evidence Does Not Demonstrate Tucker Was on Probation for More Than One Case

Second, Petitioner has not established that Tucker had more than one case pending at the time of Petitioner's trial. The majority of the court documents Petitioner presents regarding Tucker's criminal cases reflect a protracted court process on a single case, Los Angeles Municipal Court case number A964935.[19] Dkts. 279-3 at 8, 13, 188-207, 209; 279-4 at 2-4, 6, 15, 17, 29; 279-5 at 66, 68-69, 72, 88-89; 279-6 at 2, 4; 279-7 at 62, 64. The record shows Tucker had one other case pending before Petitioner's trial, but it does not establish how or when this case was resolved or that it remained pending against Tucker at the time of Petitioner's trial. Dkt. 279-6 at 23-

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[18] The Court notes a discrepancy in the municipal court documents involving Tucker's case. On some documents, the case number is identified as "A968935." See, e.g., dkts. 279-3 at 188, 209; 279-4 at 2-4; 279-5 at 89; 279-7 at 64. However, on other documents, the case number is identified as "A964935." See, e.g., dkts. 279-3 at 8, 13, 189-207; 279-4 at 6, 15, 17, 29; 279-5 at 66, 68-69, 72; 279-6 at 2, 4. It is apparent all of these documents refer to the same case, as dates and hearing notes on the various documents correspond with one another. See, e.g., dkts. 279-3 at 188, 194, 197-98, 209. Moreover, on one document, the case number was originally identified as "A968935," but was corrected to read "A964935." Dkts. 279-5 at 88; 279-7 at 62.

[19] Incidentally, although Tucker was under probation supervision for this case under a diversion program at the time of Petitioner's trial, he was not placed on formal probation for this case until after Petitioner's trial. Dkts. 279-3 at 190-91, 193-97, 204-05.

24; FAP, Ex. 17.[20] Evidence was presented to the jury that Tucker had charges pending in at least one case at the time of Petitioner's trial, 1 RT 168, 178-80, 183-86; therefore, demonstrating Tucker had another prosecution pending, even if Petitioner could present credible evidence to support this, would be of little significance.

iii. The Evidence Does Not Demonstrate Tucker Sustained Felony Convictions under Aliases

Third, Petitioner has not shown Holmes failed to disclose that Tucker sustained felony convictions under the aliases Rolando Sanchez and Manual Evans. Although Petitioner shows a record from Los Angeles County Superior Court case number A964935 for a defendant by the name Rolando Sanchez, FAP, Ex. 18, Petitioner has not shown this case to be related in any way to Tucker's municipal court case of the same number. In fact, it is clear from the record related to Rolando Sanchez that the case was unrelated to Tucker, as Sanchez's case involved a theft or robbery related offense, id., rather than the drug offense for which Tucker was prosecuted, dkts. 279-3 at 8, 13, 188-207, 209; 279-4 at 2-4, 6, 15, 17, 29; 279-5 at 66, 68-69, 72, 88-89; 279-6 at 2, 4; 279-7 at 62, 64. As to Manual Evans, the record does not contain any evidence related to a defendant by this name, let alone evidence suggesting Tucker used this name as an alias in felony prosecutions.

2. New Evidence Regarding Comeaux's Testimony

Petitioner presents new evidence showing Comeaux was arrested pursuant to a December 1988 body attachment for failure to appear in court, found to be in possession of cocaine, and booked on charges of drug possession. Dkt. 279-5 at 2-4. Petitioner claims this evidence supports Claim Three that the prosecutor suppressed evidence of Comeaux's pending criminal charges, and concludes this demonstrates

[20] The record before the Court makes just one other reference to Tucker having more than one case against him. Dkt. 279-4 at 33. However, that reference is dated on November 15, 1989, after Petitioner's conviction. Id.

charges were never filed or were dismissed by the prosecution in exchange for Comeaux's testimony at trial. FAP at 6, 12.

As detailed herein, Comeaux testified Petitioner demanded money from the victim, 1 RT 117-18, and then Comeaux heard a gunshot she believed came from where Petitioner was standing, id. at 118-19, 133. In addition, Detective Baird testified he interviewed Comeaux after the shooting and she stated that after the shot was fired, she turned around and saw Petitioner with a gun in his hand. Id. at 250-51.

Despite this testimony on direct examination, on cross-examination, Comeaux testified (1) she was not sure it was Petitioner who demanded money from the victim, id. at 127-28; (2) Vincent, not Petitioner, killed the victim, id. at 130; and (3) Vincent's family threatened her with violence if she did not say Petitioner was the killer, id. Comeaux's testimony was clearly inconsistent. The record, however, offers an explanation for the inconsistency: Comeaux testified she was afraid of Petitioner, who was personally questioning her on cross-examination. Id. at 136. Once Comeaux was back on re-direct examination by the prosecutor, she testified she did not see Vincent kill the victim and confirmed the gunshot came from the area where Petitioner was standing. Id. at 133.

The Court is not persuaded that Comeaux's testimony would have been materially impeached by new evidence that she had criminal charges pending at the time she testified and that such charges were never actually filed or were dismissed after Petitioner's trial. Comeaux admitted at trial she used and sold cocaine, id. at 111-16, 128, 132-35; she was on probation when she spoke to police and at the time of trial, id. at 131-32; and police told her that her probation would not be revoked if she testified, id. at 129. Significantly, Detective Baird testified he did not intervene with regard to Comeaux's probation, 2 RT 405, and Petitioner has not presented any evidence to rebut this testimony. It is not reasonable to believe the jury would have been more likely to discredit Comeaux's testimony had additional evidence been admitted that she had charges pending at the time of Petitioner's trial.

This is particularly true in light of evidence presented to the jury corroborating Comeaux's testimony. The jury heard testimony that the version of the crime Comeaux offered on direct examination was consistent with her statements to police, the preliminary hearing testimony, the testimony at the trial of Petitioner's co-defendant, and Petitioner's trial. 1 RT 125-26, 133-34, 251-52. In addition, Comeaux was the first to identify to police the other individuals who were present on the block at the time of the crime, including Green and Veronica, who both later admitted to police that they, in fact, had been present. Id. at 249-52; dkt. 265-3 at 13-15.

Finally, to the extent this corroboration of Comeaux's testimony relied on the credibility of Detective Baird, who, as new evidence suggests, withheld evidence and provided false testimony with respect to payments to Tucker, Comeaux's testimony was corroborated, in part, by Green's testimony, as discussed below.[21]

3. Green's Testimony Corroborates Comeaux's Testimony

Consistent with Comeaux, Green testified she was near the scene at the time of the shooting. 1 RT 139. Green also confirmed Comeaux's account of Petitioner, Vincent, and Tucker being present in the area. Id. at 139-40. Green further testified, just as Comeaux had, that Petitioner and Vincent approached the victim's cab,

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[21] The Court acknowledges Petitioner's assertion that the trajectory of the bullet proves he was not the shooter and that the pathologist altered her findings and testified falsely to conform the evidence to Comeaux's allegation that Petitioner stuck his hand inside the victim's car. See dkt. 257-1 at 24. Petitioner purports to rely on "[a] handwritten note by Pathologist Dr. [E]va Heuser, whom testified for the prosecution that the trajectory of the bullet that entered the victim's body was at a 40° downward angle. When in fact, at Petitioner's trial, Dr. Heuser testified that the trajectory was a mere 6° downward angle[.]" Id. Petitioner appears to be mistaken that the handwritten note he refers to was authored by Dr. Heuser. Rather, the handwriting on the note, dkt. 265-3 at 192, is consistent with other handwriting contained in investigation notes within the murder book, see, e.g., id. at 7-13, and inconsistent with the handwritten notes found throughout the rest of the autopsy report, see, e.g., id. at 188-90. Furthermore, the handwriting is so obviously inconsistent with that of Dr. Heuser, the Court does not find it necessary to grant Petitioner's request for the appointment of a handwriting expert as discussed above. Because Petitioner cannot establish that the pathologist authored the note on which he relies, Petitioner cannot show the pathologist altered her findings or testimony in any way, let alone in such a way as to conform to Comeaux's testimony. Importantly, Dr. Heuser's trial testimony was entirely consistent with the findings documented in her report. 1 RT 101-05; dkt. 265-3 at 182, 190.

although Green stated she did not see Comeaux join them. Id. at 140-41. Additionally, similar to the description of events described by Comeaux, Green then heard a gunshot and saw the cab driving away and Vincent on the ground. Id. at 141, 143. Although Green did not confirm Comeaux's testimony that Petitioner shot the victim, Green testified she had seen Petitioner with a gun earlier on the day of the shooting. Id. at 141-43.

Notably, Green's testimony on cross-examination did not undermine the corroborative value of Green's testimony to Comeaux's account. Although Green admitted she told a defense investigator Petitioner was across the street when she looked up after the gunshot, id. at 145, she also testified that by the time she saw Petitioner across the street, Vincent had already fallen to the ground, id. at 141, 143. This suggests some interval of time had lapsed between when Vincent had been holding onto the cab and when he fell to the ground. This would have given Petitioner the time to move from the cab to the position where Green eventually saw him across the street.

Finally, the Court is unpersuaded by Petitioner's arguments that Green's testimony about seeing Petitioner with a gun was untrue. As explained in Section VI C., above, there is no evidence Green testified falsely at Petitioner's trial, and Petitioner fails to demonstrate the prosecution suppressed evidence of payments to Green.

4. Consciousness of Guilt Corroborates Witness Testimony

Evidence of Petitioner's consciousness of guilt in fleeing from arrest also corroborates the testimony of Comeaux and Green implicating Petitioner in the shooting. Specifically, Petitioner was asleep in someone else's home when he was located by police. Id. at 197-202, 210-11, 214-16. Petitioner subsequently fled, led police on a foot pursuit, and was apprehended only after being surrounded by police and shot by Officer Smith. Id. at 205-09, 218-23, 225, 227, 232-43, 245, 271-75, 278-79.

Even if the Court were to ignore the circumstances of Petitioner's flight and arrest on the basis of his assertions that Officer Smith improperly shot him, the evidence suggested Petitioner was making plans to leave the state before he was encountered by police. After Petitioner's arrest, police found bus tickets to Mississippi in Petitioner's wallet that had been purchased just the day before Petitioner's arrest. Id. at 254-56, 260, 276, 278. This evidence was sufficient for the jury to have inferred Petitioner had a consciousness of guilt. Cf. Soto v. Alameida, No. CIV S-04-1432 LKK-DAD-P, 2008 WL 2705151, at *4, 10 (E.D. Cal. July 8, 2008), report and recommendation adopted, 2008 WL 3979765 (E.D. Cal. Aug. 21, 2008) (considering claim of instructional error for instructing jury on flight as evidence of consciousness of guilt and finding "it would not have been 'irrational' to infer consciousness of guilt" from evidence that after the crime, the defendant went to the Greyhound bus station intending to leave town but remained temporarily and then stayed in motels before abruptly leaving for a different city).

5. Conclusion

Ultimately, the Court must consider the new evidence, and "assess how reasonable jurors would react to the overall, newly supplemented record." See Lee, 653 F.3d at 945. Having done so, the Court cannot find Petitioner has met the high threshold requirement of Schlup by showing that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. McQuiggin, 569 U.S. at 386. In light of the testimony of Comeaux and Green, and evidence of consciousness of guilt, Petitioner cannot meet the actual innocence gateway. Schlup, 513 U.S. at 324-27. Hence, despite any errors in Petitioner's prosecution, Petitioner's case is not one of the "extraordinary" cases warranting habeas relief.

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VIII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered DENYING the FAP and DISMISSING the action with prejudice.

Dated: March 12, 2021

HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES, Petitioner, v. CHRISTIAN PFEIFFER, Acting Warden, Respondent.	Case No. CV 14-7687-JGB (KK) ORDER ACCEPTING FINAL FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition for a Writ of Habeas Corpus, the records on file, and the Final Report and Recommendation of the United States Magistrate Judge. The Court has engaged in de novo review of those portions of the original Report and Recommendation to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered (1) denying the Petition for a Writ of Habeas Corpus; and (2) dismissing this action with prejudice.

Dated: July 29, 2021

HONORABLE JESUS G. BERNAL
United States District Judge

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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES, Petitioner, v. CHRISTIAN PFEIFFER, Acting Warden, Respondent.	Case No. CV 14-7687-JGB (KK) JUDGMENT

Pursuant to the Order Accepting Final Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the First Amended Petition is DENIED and this action is DISMISSED with prejudice.

Dated: July 29, 2021

HONORABLE JESUS G. BERNAL
United States District Judge

APPENDIX C

FILED

DEC 16 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAVIN MAURICE RHODES, Petitioner-Appellant, v. CHRISTIAN PFEIFFER, Warden, Warden, in individual capacity, Respondent-Appellee.	No. 21-55870 D.C. No. 2:14-cv-07687-JGB-KK Central District of California, Los Angeles ORDER

Before: LEE and H.A. THOMAS, Circuit Judges, and BENNETT,* District Judge.

Judges Lee, Thomas, and Bennett have voted to deny the Petition for Rehearing. Judges Lee and Thomas voted to deny, and Judge Bennett recommended denying, the Petition for Rehearing En Banc. The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote. Petitioner-Appellant's Petition for Rehearing and Rehearing En Banc (Dkt. No. 42), filed November 16, 2022, is DENIED. The memorandum disposition filed October 31, 2022 (Dkt. No. 39) is amended to note that the panel declines to address Petitioner-Appellant's uncertified claims. The parties may not file another petition for rehearing or petition for rehearing en banc.

* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

NOT FOR PUBLICATION

FILED

DEC 16 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAVIN MAURICE RHODES, Petitioner-Appellant, v. CHRISTIAN PFEIFFER, Warden, in individual capacity, Respondent-Appellee.	No. 21-55870 D.C. No. 2:14-cv-07687-JGB-KK AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Submitted October 6, 2022**
Pasadena, California

Before: LEE and H.A. THOMAS, Circuit Judges, and BENNETT,*** Senior District Judge.

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

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

*** The Honorable Richard D. Bennett, Senior United States District Judge for the District of Maryland, sitting by designation.

Kavin Rhodes, who was convicted of first-degree murder and attempted second-degree robbery, appeals the dismissal of his 28 U.S.C. § 2254 habeas petition. In his petition, Rhodes argued that newly discovered evidence undermines the credibility of trial witnesses and thus supports his innocence. The district court held that he did not timely present these claims and that he could not meet the "actual innocence" standard under *Schlup v. Delo* for time-barred claims. 513 U.S. 298 (1995). We affirm the district court's dismissal.

1. Timeliness of claims: Rhodes first challenges the district court's finding that Claims One through Five in his habeas petition were not timely. Even though this issue was not expressly certified for appeal, we review it because the timeliness of these claims determines whether the district court properly analyzed them under *Schlup*. *See Tillema v. Long*, 253 F.3d 494, 502–03 n.11 (9th Cir. 2001) (considering a question that "clearly [was] comprehended" within the claim certified for appeal even though that question was not expressly certified), *overruled on other grounds by Pliler v. Ford*, 542 U.S. 225 (2004); *Jones v. Smith*, 231 F.3d 1227, 1231 (9th Cir. 2000) ("Absent an explicit statement by the district court . . . we will assume that the [certificate of appealability] also encompasses any procedural claims that must be addressed on appeal.").

The district court correctly concluded that Claims One through Five of Rhodes's habeas petition are untimely. Under the Antiterrorism and Effective Death

Penalty Act (AEDPA), habeas claims based on newly discovered evidence must be brought within one year of discovery of the evidence, not counting periods "during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d). Rhodes claims that he timely raised his claims because they were referenced in post-conviction discovery motions. But a post-conviction discovery motion does not qualify as a collateral review motion because it does not allow a court to grant relief from a judgment or to grant a reduction in sentence. Rhodes's post-conviction discovery motions and discovery appeals thus did not toll AEDPA's statute of limitations. Nor did Rhodes's inclusion of a request to remand for resentencing in his discovery appeal convert the appeal into a motion for collateral review, because the resentencing request was procedurally improper. California's post-conviction discovery statute does not allow a court to grant a petitioner relief from a sentence. *See* Cal. Penal Code § 1054.9.

Rhodes argues in the alternative that he is entitled to equitable tolling of AEDPA's statute of limitations. This argument fails under *Holland v. Florida*, 560 U.S. 631 (2010), because Rhodes does not contend that an extraordinary circumstance prevented his timely filing. *See id.* at 649.

2. *Schlup* "actual innocence": Because Claims One through Five of Rhodes's habeas petition are untimely, the district court appropriately analyzed them under *Schlup*'s "actual innocence" standard. *Schlup* allows a habeas petitioner

whose claims would otherwise be procedurally barred to proceed only if the petitioner can "show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." 513 U.S. at 327.

The district court certified for appeal the question whether Rhodes can meet the "actual innocence" standard on Claims One through Five in his habeas petition "solely by undermining or impeaching the credibility of witnesses." When new evidence undermines the credibility of witnesses who testified against a petitioner, *Schlup* requires that the evidence do more than merely "provide[] a basis for some degree of impeachment" of those witnesses. *Sistrunk v. Armenakis*, 292 F.3d 669, 677 (9th Cir. 2002). Instead, the evidence must "fundamentally call into question the reliability of [the petitioner's] conviction." *Id.* While it is possible that a witness's credibility can be so undermined as to fundamentally call a petitioner's conviction into question, Rhodes is unable to meet that standard here.

The evidence supporting Claims One through Five of Rhodes's habeas petition raises potentially troubling questions about the prosecution's conduct. It does not, however, meet the high bar for "actual innocence" under *Schlup*. Claims One and Two center on evidence of payments by law enforcement to Hyron Tucker, a main witness who testified against Rhodes. This evidence does not satisfy *Schlup* because Tucker disclosed at trial that he benefited in his own criminal case by acting as a cooperative witness against Rhodes. Evidence that Tucker also benefited

financially from testifying against Rhodes is cumulative. In addition, the evidence does not conclusively establish that Tucker lied under oath about receiving payments from police, as the payments may have been included with the witness protection program that Tucker admitted that he was placed in. And Tucker's trial testimony was generally corroborated by two other witnesses, reducing the impact of any impeachment of his credibility. Finally, though this evidence may demonstrate that a detective testified falsely about payments to Tucker, it does not satisfy *Schlup* because the detective's testimony was of limited value in securing Rhodes's conviction.

Claim Three of Rhodes's habeas petition focuses on evidence of criminal charges against Yvette Comeaux, another witness who testified against Rhodes. This evidence also does not satisfy *Schlup*. First, it is cumulative to Comeaux's trial testimony disclosing that she engaged in criminal activity. Second, a reasonable juror would not credit Rhodes's purely speculative argument that Comeaux testified falsely because of pressure from law enforcement arising out of these criminal charges. In any event, Comeaux testified at trial that police promised not to revoke her probation if she testified against Rhodes, so any additional evidence of law enforcement leverage over her is cumulative.

Claim Four of Rhodes's habeas petition centers on evidence that the same prosecutor appeared both in Rhodes's case and in a criminal case against Tucker, as

well as evidence of Tucker's criminal history. This evidence does not satisfy *Schlup* because Tucker disclosed at trial that Rhodes's prosecutor advocated for him in a criminal case because he was acting as a cooperative witness against Rhodes, so Rhodes's speculative argument that Tucker received still other benefits from law enforcement would be cumulative even if it were true. And evidence of Tucker's criminal past is cumulative to Tucker's trial testimony that he engaged in criminal behavior. Finally, even if the evidence proves that Tucker lied under oath that he had no prior felony convictions, the fact that his testimony was generally corroborated by other witnesses would maintain his credibility before a reasonable juror.

Claim Five of Rhodes's habeas petition relies on an eyewitness statement that contradicts the trial testimony of Shashawn Green, another witness against Rhodes. This evidence does not satisfy *Schlup* because Green's testimony was of limited value in securing Rhodes's conviction.

3. Other claims: Rhodes makes several additional arguments based on newly discovered evidence that fall outside of the claims certified for appeal. The evidence supporting these arguments does not demonstrate Rhodes's innocence. We decline to address them. 9th Cir. R. 22-1(e).

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.