No.

In the
United States Supreme Court

James Jordan McClain,

Petitioner,

v.

Tammy L. Campbell, Warden

Respondent.

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

Petitioner's Appendix

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Appendix

Appendix A

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AUG 30 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES JORDAN MCCLAIN,

Petitioner-Appellant,

v.

ROBERT NEUSCHMID, Warden,

Respondent-Appellee.

No. 21-56035

D.C. No.
8:20-cv-00656-SVW-LAL
Central District of California,
Santa Ana

ORDER

Before: NGUYEN and FORREST, Circuit Judges, and BENNETT,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing.

The petition for panel rehearing is **DENIED.**

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

2a
Appendix B

NOT FOR PUBLICATION

FILED

AUG 10 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES JORDAN MCCLAIN, Petitioner-Appellant, v. ROBERT NEUSCHMID, Warden, Respondent-Appellee.	No. 21-56035 D.C. No. 8:20-cv-00656-SVW-LAL MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted July 19, 2023
Pasadena, California

Before: NGUYEN and FORREST, Circuit Judges, and BENNETT,** District Judge.
Concurrence by Judge BENNETT.

California state prisoner James Jordan McClain, who was convicted of murder in 1994, appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253, and we deny

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

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

McClain's petition as untimely.[1]

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year limitations period for state prisoners to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). Where a petitioner raises a claim based on newly discovered evidence, the limitations period begins to run when the petitioner "knows or through diligence could discover the vital facts" underlying his claim, "regardless of when their legal significance is actually discovered." *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012); *see also* 28 U.S.C. § 2244(d)(1)(D). The limitations period is "subject to equitable tolling." *Holland v. Florida*, 560 U.S. 631, 645 (2010). But equitable tolling is "a very high bar, and is reserved for rare cases." *Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir. 2014). A petitioner must demonstrate that, during the one-year limitations period, he was "pursuing his rights diligently" *and* "some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (internal quotation marks and citation omitted). Absent a showing of actual innocence, after AEDPA's one-year limitation period expires, a petitioner's "ability to challenge the lawfulness of [his] incarceration is permanently foreclosed" in federal court. *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002).

[1]We review de novo whether a petitioner's habeas petition was timely filed, *Rudin v. Myles*, 781 F.3d 1043, 1053 (9th Cir. 2014), and "we may affirm [the] denial of habeas relief on any ground supported by the record," *Prescott v. Santoro*, 53 F.4th 470, 479 n.6 (9th Cir. 2022) (internal quotation marks and citation omitted).

McClain asserts the State violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the statement of a witness who could not be located for trial and by losing a photo of the witness. AEDPA's one-year limitations period for this *Brady* claim began running on January 31, 2016, when McClain received a letter from the missing witness with her exculpatory statement.[2] But McClain waited nearly two years before filing a state habeas petition asserting a *Brady* claim based on this new evidence. *See Corjasso v. Ayers*, 278 F.3d 874, 878 (9th Cir. 2002) ("AEDPA allows a petitioner just 365 days to complete the entire process of filing a fully-exhausted federal habeas petition."). Therefore, he must demonstrate that within one year of receiving the witness's letter he was both "pursuing his rights diligently" *and* "some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (internal quotation marks and citation omitted). He has failed to make this showing.

"Extraordinary circumstances" exist when some "external force . . . cause[s] the untimeliness." *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Even assuming McClain exercised the requisite "reasonable diligence," *Holland*, 560 U.S. at 653, his inability to obtain legal assistance or to obtain a sworn

[2]McClain's counsel conceded at oral argument that the limitations period began to run on McClain's *Brady* claim when McClain received a copy of the missing witness's letter in 2016. The record reflects that McClain received the witness's letter in January 2016, but does not specify an exact date. We therefore assume that McClain received the letter on January 31, 2016.

affidavit from the missing witness do not constitute "extraordinary circumstances beyond [his] control" that made it "*impossible* [for him] to file a petition on time," *Ford*, 683 F.3d at 1237; *see, e.g.*, *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling."). He could have sought habeas relief within the one-year limitations period by presenting the witness's unsworn letter as support. Indeed, when McClain ultimately filed his state habeas petition nearly two years after receiving the letter, that is exactly what he did.[3]

Moreover, the California Superior Court's rejection of the missing witness's unsworn letter as hearsay in its denial of McClain's state habeas petition could not have *caused* his failure to file his petition during the limitations period because those events had not yet occurred. *See Roy v. Lampert*, 465 F.3d 964, 972 (9th Cir. 2006) (discussing cases where equitable tolling did not apply because more than one year passed before the claimed extraordinary circumstances justifying equitable tolling arose). Thus, we need not remand to the district court to conduct a hearing on equitable tolling because "the record 'is amply developed' and does not indicate [that

[3]Because more than one year passed between the date AEDPA's limitations period began to run on McClain's *Brady* claim and his filing of a state habeas petition, he cannot benefit from tolling under § 2244(d)(2) for time spent exhausting his claim in state court. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed.").

the alleged extraordinary circumstances] caused the untimely finding." *Orthel v. Yates*, 795 F.3d 935, 940 (9th Cir. 2015).

Even if we found that McClain's petition was timely and not procedurally defaulted, we would deny it on the merits. McClain argues that the missing witness would have corroborated his self-defense theory or helped establish a lesser offense than first degree murder. Under California law, "[t]he right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When the danger ceases to appear to exist, the right to use force in self-defense ends." CALJIC No. 5.52; *see also* CALJIC No. 5.53. Although the missing witness's statement corroborates McClain's trial testimony that the victim was the aggressor and another witness who testified that he saw the victim assume a "combative stance," all the other witnesses at trial testified that the victim did not act aggressively. And multiple witnesses—including McClain himself—testified that McClain shot the victim as the victim was running away. Additionally, McClain fired multiple shots from his car window as he fled the scene, which also undercuts his assertion that he shot the victim impulsively in self-defense upon a "sudden quarrel" and in the "heat of passion." Considering the missing witness's statement in the context of the entire record, *Turner v. United States*, 582 U.S. 313, 324–25 (2017), there is not "a reasonable probability" that the jury would have reached a different result, *Kyles v.*

Whitley, 514 U.S. 419, 433–34 (1995).[4]

AFFIRMED.

[4]McClain also has not demonstrated that the photograph of the witness that the State lost had any material exculpatory value as required under *California v. Trombetta*, 467 U.S. 479, 488–89 (1984), or that the State acted in bad faith as required under *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), *see Illinois v. Fisher*, 540 U.S. 544, 547–48 (2004).

8a
Appendix B

FILED

AUG 10 2023

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

James Jordan McClain v. Robert Neuschmid, No. 21-56035

BENNETT, Senior District Judge, sitting by designation, concurring in the judgment:

I concur with my distinguished colleagues that the district court's denial of James Jordan McClain's petition for writ of habeas corpus under 28 U.S.C. § 2254 should be AFFIRMED. However, I concur in the judgment based on the merits and not on a finding that the petition was untimely.

For equitable tolling purposes, this Court has held that equitable tolling is meant to be interpreted narrowly. *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) ("[E]quitable tolling is available 'only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of [the prisoner's] untimeliness.'"). Nevertheless, consistent with *Holland v. Florida*, 560 U.S. 631 (2010), "our cases have applied this 'impossibility' standard leniently, rejecting a literal interpretation." *Gibbs v. Legrand*, 767 F.3d 879, 888 n.8 (9th Cir. 2014). Indeed, this Court has held that equitable tolling "does not impose a rigid 'impossibility' standard on litigants, especially not on '*pro se* prisoner litigants.'" *Smith v. Davis*, 953 F.3d 582, 600 (9th Cir. 2020).

In December 2017, when McClain filed a petition relying only on the missing witness's unsworn letter, the California Superior Court dismissed his

petition for relying on inadmissible evidence. When he obtained a sworn affidavit from that witness in 2019, his petition was dismissed as successive, and his claim was foreclosed. Thus, while McClain could have technically filed the same petition ten months earlier, such a filing would have been both futile and prejudicial. Accordingly, I find that McClain's petition should not be procedurally defaulted and I would address the merits.

However, I concur with my colleagues that the district court's denial of the petition in this matter should be AFFIRMED on the merits for the reasons set forth in the majority opinion.

Appendix C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES JORDAN MCCLAIN, Petitioner, v. ROBERT NEUSCHMID, Respondent.	Case No. SACV 20-656-SVW (LAL) **JUDGMENT**

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

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: July 27, 2021

HONORABLE STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES JORDAN MCCLAIN, Petitioner, v. ROBERT NEUSCHMID, Respondent.	Case No. SACV 20-656-SVW (LAL) **ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections and the remaining record, and has made a *de novo* determination.

Petitioner's Objections lack merit for the reasons stated in the Report and Recommendation.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the Petition and dismissing this action with prejudice; and

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3. The Clerk serve copies of this Order on the parties.

DATED: July 27, 2021

HONORABLE STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES JORDAN MCCLAIN, Petitioner, v. ROBERT NEUSCHMID, Respondent.	Case No. SACV 20-656-SVW (LAL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On March 26, 2020,[1] James Jordan McClain ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On October 2, 2020, Respondent filed a motion to dismiss the Petition, arguing the Petition was untimely. On October 26, 2020, Petitioner filed an opposition to the motion to dismiss. On ///

[1] 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. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (citation omitted).

December 4, 2020, the previously assigned magistrate judge issued an order declining to rule on Respondent's motion to dismiss, finding Claims Two and Four of the Petition likely untimely, and directing Respondent to file an Answer addressing Claims One and Three of the Petition.

On December 17, 2020, Respondent filed an Answer. On January 7, 2021, Petitioner filed a Reply. Thus, this matter is ready for decision.

II.

PROCEDURAL HISTORY

On January 27, 1994, Petitioner was convicted after a jury trial in the Orange County Superior Court of one count of first degree murder.[2] (Clerk's Transcript ("CT") at 328, 396.) On February 25, 1994, the trial court sentenced Petitioner to a state prison term of 30 years to life. (CT at 396.)

Petitioner appealed his convictions to the California Court of Appeal. (Lodgments 16-18.) On April 25, 1995, the California Court of Appeal affirmed the judgment. (Lodgment 1.)

Petitioner then filed a petition for review in the California Supreme Court.[3] On July 12, 1995, the California Supreme Court denied review. (Lodgment 19.)

Nearly twenty years later Petitioner secured a written statement from a previously unavailable witness and, on December 28, 2017, constructively filed a habeas corpus petition in the Orange County Superior Court. (Lodgment 2.) On February 7, 2018, the superior court denied the petition. (Lodgment 3.)

Petitioner then filed a habeas petition in the California Court of Appeal. (Lodgment 4.) On November 29, 2018, the California Court of Appeal denied the petition. (Lodgment 5.)

Next, Petitioner filed a second habeas petition in Orange County Superior Court. (Lodgment 6.) On April 19, 2019, the superior court denied the petition. (Lodgment 7.)

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[2] Cal. Penal Code § 187(a).

[3] The record before this Court contains a copy of the California Supreme Court's order denying review but does not contain a copy of the petition for review. According to the state courts' website, Petitioner filed his petition for review on May 31, 1995. https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1778609&doc_no=S046851&request_token=NiIwLSEmTkw8WzBZSCNdVE9IMDw0UDxbJyM%2BJz9TICAgCg%3D%3D

Petitioner next filed a second habeas petition in the California Court of Appeal. (Lodgment 8.) On July 3, 2019, the California Court of Appeal denied the petition without prejudice. (Lodgment 9.)

Petitioner then filed a third habeas petition in the California Court of Appeal. (Lodgment 10.) On July 25, 2019, the California Court of Appeal denied the petition. (Lodgment 11.)

Finally, Petitioner filed a habeas petition in the California Supreme Court. (Lodgment 12.) On January 2, 2020, the California Supreme Court denied the petition as untimely. (Lodgment 13.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

This Court has independently reviewed the state court record. Based on this review, this Court adopts the factual discussion of the California Court of Appeal's opinion on direct review in this case as a fair and accurate summary of the evidence presented at trial:[4]

> At about 1:30 a.m. on October 25, 1991, Leo Parker Sr., a security guard at Mr. J's nightclub, was outside the front of the club at the top of the stairs trying to move the crowd out when a black Camaro pulled up. There were two men in the car; [Petitioner] was the driver. Parker observed [Petitioner]'s car move forward at the same time Willie Ford and a woman were walking by. Ford turned to [Petitioner] with his arms raised and hands open and asked, "What's up?" [Petitioner] got out of his car and talked briefly with Ford. Ford then turned around and began running away from [Petitioner]. He only made it about 10 to 15 feet when [Petitioner] pulled a handgun from his waistband, aimed it at Ford, and began shooting. After firing seven or eight shots, [Petitioner] got back into his car and drove out of the parking lot, firing several shots out the window as he left.

[4] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the state appellate court under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted).

Parker wrote down the license plate number of [Petitioner]'s car before he drove away. Shortly thereafter, police officers arrived and investigated the crime scene. Ford was bleeding profusely and transported to a hospital, where he died several hours later. Seven casings were recovered.

When [Petitioner] was arrested on June 5, 1992, he identified himself as Tony Johnson and presented false identification to the arresting officers. He claimed at trial he did so because of outstanding traffic warrants.

. . .

Defense Case:

Saint Anthony Fox, an employee of Mr. J's nightclub, was outside the club helping to disperse the crowd on the evening of the shooting. Fox went over to the passenger side of the black Camaro and asked the occupants to move the vehicle. As he did so, a woman named "Phamous" walked past and [Petitioner] said something to her. Willie Ford got out of a nearby car and asked Phamous what was wrong. She said something to him and Ford walked very fast to the Camaro. Ford asked, "What's up?" in an aggressive manner while standing in a boxing position. Fox heard the sound of a "smack" and saw [Petitioner] pull a gun from his waistband. Fox saw Ford running away at the same time he heard the sound of shots being fired. According to Fox, [Petitioner] was coming to Phamous' defense.

[Petitioner] testified he was sitting in the black Camaro when Phamous came over to him and said she was having trouble with two men in a nearby Honda. She asked [Petitioner] to walk her to her car, which he agreed to do. [Petitioner] got out of the car and walked about five steps when Fors approached, said something and punched him. [Petitioner] pulled his handgun from his waistband and began shooting at Ford. He did not intend to kill Ford; only to stop Ford from hitting him. [Petitioner] fired the shots from the car because he was afraid Ford's friends might try to shoot him.

Rebuttal Evidence:

Melissa Jorgenson witnessed the shooting. She heard [Petitioner] say to a woman outside the club, "I have a big dick. So why don't you suck it?" She saw Ford walk over and ask, "What's up?" The next thing she saw was [Petitioner] firing a gun at Ford while Ford was running away. Jorgenson never saw Ford punch [Petitioner] or assume a combative stance before he was shot.

When Fox was interviewed by detectives three or four hours after the shooting, he did not mention seeing Ford assume a combative stance or hearing the sound of a smack.

(Lodgment 1 at 2-4 (footnotes omitted).)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) The prosecution suppressed material exculpatory evidence in violation of due process;

(2) Petitioner's due process rights were violated when the prosecution secured his conviction on the basis of false evidence that it "introduced, condoned, and exploited" at trial;

(3) Newly discovered evidence proves Petitioner's innocence; and

(4) Petitioner's trial counsel rendered a "constitutionally deficient performance" by failing to seek sanctions against the prosecution for withholding evidence.

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[5] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[6]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[7] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any, "clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[8] Ninth Circuit cases "may be persuasive."[9] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[10]

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5 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).
6 28 U.S.C. § 2254(e)(1).
7 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).
8 LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
9 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).
10 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[11] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[12] However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[13]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[14] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[15] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[16] An "unreasonable application" is different from merely an incorrect one.[17]

Where, as here with respect to Claim Three, higher courts summarily deny a claim on habeas review, the "silent" denial is considered to be "on the merits" and to rest on the last

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spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

[11] Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).

[12] Williams, 529 U.S. at 406.

[13] Early, 537 U.S. at 8.

[14] Id. at 11 (citing 28 U.S.C. § 2254(d)).

[15] See Williams, 529 U.S. at 406-10, 413.

[16] 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

[17] Williams, 529 U.S. at 409-10.

reasoned decision on the claim.[18] In the case of Claim Three, this Court looks to the Orange County Superior Court's February 7, 2018 decision on habeas review.[19]

Where, as here with respect to Claims One, Two, and Four, the state courts have supplied no reasoned decision for denying the petitioner's claims on the merits, this Court must perform an "'independent review of the record' to ascertain whether the state court decision was objectively unreasonable."[20]

VI.

DISCUSSION

A. Claims Two and Four Are Untimely[21]

1. Background

In Claim Two, Petitioner argues his due process rights were violated when the prosecution secured his conviction on the basis of false evidence that it "introduced, condoned, and exploited" at trial. (Petition at 47.)[22] Specifically, Petitioner challenges the prosecution's use of the allegedly false and misleading testimony of Melissa Jorgenson at trial, which, Petitioner argues, is now has been proven false by new evidence from previously unavailable witness Georgia Brown. (Petition at 48-52.)

In Claim Four, Petitioner argues his trial counsel was ineffective for failing to move under Brady v. Maryland,[23] rather than California v. Trombetta,[24] for sanctions against the prosecution for

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[18] See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Wilson v. Sellers, ___ U.S. ___, 138 S. Ct. 1188, 200 L. Ed. 2d 530 (2018).

[19] Cannedy v. Adams, 706 F.3d 1148, 1156-59 (9th Cir. 2013) (holding that "look through" practice continues to apply on AEDPA review of California Supreme Court summary denials of habeas petition).

[20] Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

[21] For the reasons stated by the previously assigned magistrate judge in the December 4, 2020 order declining to rule on the motion to dismiss, this Court deems Claims One and Three timely and addresses them on the merits below. In addition, Respondent argues all of Petitioner's claims are procedurally barred by the California Supreme Court's denial of habeas relief on the basis of untimeliness. (Answer at 3.) In the interest of judicial economy, this Court will address petitioner's claim on the merits rather than perform an analysis of the procedural default issues Respondent raises. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (courts "are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar").

[22] For consistency, this Court refers to the page numbers assigned to the Petition by the electronic docketing system.

[23] 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (a prosecutor violates due process by suppressing evidence favorable to an accused and material to either guilt or punishment).

the fact that the police lost a photograph with Brown's contact number written on the back. (Petition at 65-74.)

As relevant to Petitioner's claims and this Court's statute of limitations analysis below, the record establishes the following procedural history:

In October 2013, nearly 20 years after Petitioner's trial, Brown contacted Petitioner's mother in response to a newspaper advertisement that described the 1991 shooting and sought information about a person nicknamed "Phamous." (July 28, 2020 Affidavit of Georgia Brown, ¶ 5.)[25]

In April 2014, attorney Wendy Koen conducted a recorded interview of Brown on Petitioner's behalf. (Id., ¶ 6; Declaration of Wendy J. Koen, ¶ 9.) About a year later, attorney Dan Cook from the Orange County Public Defender's Office contacted Brown and persuaded her to write a letter informing the Orange County Superior Court of what she knew about the 1991 shooting. (July 28, 2020 Affidavit of Georgia Brown, ¶ 7.)

On May 5, 2015, Brown submitted the letter to the Orange County Superior Court. (March 26, 2020 Declaration of James Jordan McClain, ¶ 8.) The superior court responded that her letter was "unacceptable," "not sworn," "hearsay," and "of no use to the Court." (March 26, 2020 Declaration of James Jordan McClain, ¶ 8; July 28, 2020 Affidavit of Georgia Brown, ¶ 7.) The superior court stated Petitioner's "remedy is a petition for writ of habeas corpus." (Petitioner's June 15, 2020 Response to Order to Show Cause, Ex. I.)

On January 31, 2019, Brown executed a sworn affidavit on Petitioner's behalf. (July 28, 2020 Affidavit of Georgia Brown.) In the affidavit, Brown confirmed the existence of a photograph with her contact number written on the back; contradicted portions of Jorgenson's trial testimony by stating it was another man, not Petitioner, who made disrespectful comments to her before the shooting; and stated she spoke with police the morning after the shooting and

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[24] 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (failure to preserve evidence violates a defendant's right where the evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

[25] For the purposes of this Court's analysis herein, it presumes the veracity of Brown's assertion that she was the woman named Phamous who witnessed the shooting.

gave them the same description of events she offered in the affidavit. (January 31, 2019 Affidavit of Georgia Brown, ¶¶ 5-6; July 28, 2020 Affidavit of Georgia Brown, ¶¶ 3-4.)

2. 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 ("AEDPA"). Therefore, the requirements for habeas relief set forth in AEDPA, including the one-year limitations period for filing a federal habeas corpus petition, apply.[26] "AEDPA's one-year statute of limitations in § 2244(d)(1) applies to each claim in a habeas application on an individual basis."[27] Therefore, the limitations period may run from, and expire on, different dates for different claims in a petition.[28]

3. Absent a Later Trigger Date or Tolling the Petitioner is Untimely

Ordinarily, AEDPA's one-year statute of limitations runs from the date on which the petitioner's judgment of conviction "became final by the conclusion of direct review or the expiration of the time for seeking such review[.]"[29] "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 ninety days after the decision of the state's highest court."[30]

Here, Petitioner's conviction became final on October 10, 1995, i.e., ninety days after the California Supreme Court denied his petition for review on July 12, 1995. (Petition at 2, 79.) Thus, the statute of limitations commenced the next day, October 11, 1995, and, absent a later trigger date or tolling of the statute of limitations, expired on October 11, 1996. Petitioner did not constructively file the instant Petition until March 26, 2020. Therefore, unless Petitioner can establish he is entitled to either a later trigger date of the limitations period, or statutory or equitable tolling, the Petition is untimely by over twenty-three years.

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[26] Soto v. Ryan, 760 F.3d 947, 956-57 (9th Cir. 2014) (AEDPA rules apply to petitions filed after AEDPA's effective date); Thompson v. Lea, 681 F.3d 1093, 1093 (9th Cir. 2012) (citation omitted) (explaining AEDPA "sets a one-year limitations period in which a state prisoner must file a federal habeas corpus petition.").

[27] Mardesich v. Cate, 668 F.3d 1164, 1171 (9th Cir. 2012).

[28] Id.

[29] 28 U.S.C. § 2244(d)(1).

[30] Porter v. Ollison, 620 F.3d 952, 958-59 (9th Cir. 2010) (citations omitted).

4. Later Trigger Date

Section 2244(d)(1) provides three scenarios in which the one-year limitations period may begin to run on a date later than the date on which the conviction became final.[31] As relevant here, if a petitioner brings newly-discovered claims, the limitations period begins to run on the date the claims could have been discovered.[32] Importantly, "[t]he 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."[33] Put another way, the statute of limitations begins to run "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance."[34] In addition, "[t]he question is when petitioner had the essential facts underlying his claim, not when he obtained additional evidence supporting his claim."[35]

Here, Petitioner appears to argue that, under 28 U.S.C. § 2244(d)(1)(D), the statute of limitations started running on January 31, 2019, the date he secured an affidavit from witness Georgia Brown. (CM/ECF No. 20 at 3.) He claims he could not have filed a habeas petition earlier because a letter Brown drafted in 2015 was not admissible evidence. (Id. at 3-4.) However, as stated, the statute of limitations "starts running on the date when the petitioner knew or with the exercise of diligence could have discovered the factual predicate of his claim, not from the date on which the petitioner obtains evidence to support his claim."[36]

As to Claims Two and Four of the instant Petition, even if he did not possess admissible evidence to submit to the Court to support the claims, Petitioner knew of the factual predicate of the claims since the time of his 1996 trial. With respect to Claim Two, because Petitioner concedes he was present at the shooting, he must have known since the date of Melissa Jorgenson's trial testimony that she allegedly testified falsely regarding details of the crime. (Petitioner's Opposition to Motion to Dismiss at 3; March 26, 2020 Declaration of James Jordan

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[31] 28 U.S.C. § 2244(d)(1)(B)-(D).
[32] 28 U.S.C. § 2244(d)(1)(D).
[33] Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012).
[34] Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001).
[35] Coley v. Ducart, No. 2:16-1168-AC (P), 2017 WL 714304, at *4 (E.D. Cal. Feb. 23, 2017).
[36] Juniors v. Dexter, No. 07-1377-DMG (AGR), 2011 WL 1334422, at *2 n.3 (C.D. Cal. Jan. 14, 2011).

McClain, ¶ 7.) Similarly, with respect to Claim Four, because Petitioner concedes he was present at his trial, he must have known of trial counsel's allegedly deficient performance regarding his argument for sanctions since that time. (Petitioner's Opposition to Motion to Dismiss at 3.) Thus, Petitioner is not entitled to a later trigger date for Grounds Two and Four.

5. Statutory Tolling Does Not Render Claims Two and Four 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.'"[37] 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."[38] Moreover, "section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."[39]

Absent tolling, AEDPA's one-year limitation period expired on October 11, 1996, one year after Petitioner's conviction became final by the expiration of time to file a petition for writ of certiorari in the United States Supreme Court. Petitioner did not constructively file his first state habeas petition until December 28, 2017, over twenty-one years after the statute of limitations had expired. (Lodgment 2.) Therefore, statutory tolling does not render Claims Two and Four of the Petition timely.[40]

6. Equitable Tolling Does Not Render Claims Two and Four Timely

In addition to the statutory tolling under section 2244(d)(2), the "AEDPA limitations period may be tolled" when it is "equitably required."[41] "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."[42] Petitioner must

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[37] Nedds v. Calderon, 678 F.3d 777, 780 (9th Cir. 2012) (quoting 28 U.S.C. § 2244(d)(2)).
[38] Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
[39] Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (citation omitted).
[40] See id.
[41] Doe v. Busby, 661 F.3d 1001, 1011 (9th Cir. 2011) (citations omitted).
[42] Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); Forbess v. Franke, 749 F.3d 837, 839 (9th Cir. 2014) (noting courts may grant equitable tolling only where "'extraordinary circumstances' prevented an otherwise diligent petitioner from filing on time" (citation omitted)).

prove 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.[43] The "threshold necessary to trigger equitable tolling [under AEDPA] is very high[.]"[44] The petitioner "bears a heavy burden to show that [he] is entitled to equitable tolling, lest the exceptions swallow the rule[.]"[45]

Petitioner has not been diligent in pursuing his rights with respect to Claims Two and Four. Specifically, Petitioner possessed the factual predicate for Claims Two and Four since the time of his 1996 trial but did not constructively file his first state habeas petition for over twenty years. During this delay, Petitioner appears to have made little effort to obtain evidence relevant to Grounds Two and Four. Petitioner has described his "gargantuan" efforts to locate Brown (Petitioner's Opposition to Motion to Dismiss at 15), but Brown's testimony alone does little to suggest the prosecution knowingly secured the conviction based on false evidence, as alleged in Claim Two, or trial counsel's performance was constitutionally deficient, as alleged in Claim Four. Therefore, Petitioner fails to provide sufficient facts that he pursued his rights diligently with respect to Claims Two and Four.

Additionally, Petitioner does not appear to point to any extraordinary circumstance that prevented him from presenting Claims Two and Four to the court in a timely fashion. Although Petitioner states he did not receive Brown's sworn affidavit until February 2019 (August 17, 2020 Declaration of James Jordan McClain, ¶ 4), Brown's affidavit was not a necessary predicate to Claims Two and Four in the same way it is for Claims One and Three.

Thus, equitable tolling does not render Claims Two and Four timely

7. Petitioner Has Not Established an Entitlement to Relief Under the Actual Innocence Exception to the Statute of Limitations

Finally, Petitioner has not established he is entitled to pass through the actual innocence gateway to obtain relief from the expiration of the statute of limitations.

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[43] Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009); Roy v. Lampert, 465 F.3d 964, 973 (9th Cir. 2006) (citing Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003)).
[44] Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010) (internal quotation marks and citation omitted).
[45] Rudin v. Myles, 781 F.3d 1043, 1055 (9th Cir. 2014) (internal citation and quotation marks omitted).

"Actual innocence, if proved, serves as a gateway through which a petitioner may pass" to obtain judicial review of an otherwise time-barred petition.[46] 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.'"[47] 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.[48]

The Supreme Court has cautioned, however, that "tenable actual-innocence gateway pleas are rare."[49] "[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."[50] The Schlup standard permits review only in the "extraordinary" case.[51]

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.[52] "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."[53] "'[A]ctual innocence' means factual innocence, not mere legal insufficiency."[54]

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[46] McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013); Stewart v. Cate, 757 F.3d 929, 937-38 (9th Cir. 2014).

[47] House v. Bell, 547 U.S. 518, 537, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).

[48] Schlup, 513 U.S. 298, 316 (1995).

[49] McQuiggin, 569 U.S. at 386.

[50] Id. (citing Schlup, 513 U.S. at 329); see also House, 547 U.S. at 538 (emphasizing that the Schlup standard is demanding and seldom met).

[51] Schlup, 513 U.S. at 324-27 (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful").

[52] Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011) (en banc).

[53] Schlup, 513 U.S. at 324.

[54] Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); Jaramillo v. Stewart, 340 F.3d 877, 882 (9th Cir. 2003).

For the same reasons stated in Sections B and C, below, Petitioner has not shown that new evidence is sufficient to prove his actual innocence so that he is entitled to relief from the statute of limitations.

Accordingly, for all the foregoing reasons, Claims Two and Four must be denied as barred by the statute of limitations.[55]

B. Suppression of Evidence

1. Background

In Claim One, Petitioner argues the prosecution suppressed material exculpatory evidence. (Petition at 35-46.) First, based on the assertions of Brown in her recently executed affidavit, Petitioner argues the prosecution team suppressed evidence of a police interview of Brown the day after the shooting. (Petition at 39-40, 42-44; January 31, 2019 Affidavit of Georgia Brown, ¶ 6; July 28, 2020 Affidavit of Georgia Brown, ¶ 4.) Second, Petitioner argues the prosecution team suppressed a photo of Brown taken just before the shooting that would have allowed the defense to impeach prosecution witness Melissa Jorgenson. (Petition at 45.)

After the shooting, witnesses stated a woman named Phamous, who later identified herself as Brown, had interacted with Petitioner and the victim immediately before the shooting. (Volume 1 Reporter's Transcript ("RT") at 143, 153-54; 2 RT at 296-97, 317-19, 323, 340, 365, 371-74, 385, 409-14, 432; 4 RT at 496-98, 504.) Eyewitness Saint Anthony Fox told police he had taken a polaroid photo with Brown earlier that night and she had written her pager number on the back. (1 RT at 43-46; 3 RT at 287-89.) Fox gave this photo to police. (1 RT at 43-44; 3 RT at 306-07, 312, 346-47.)

Before trial, the police lost the photo. (1 RT at 43-44, 68; 3 RT at 346-47.) However, the record suggests the pager number was memorialized in a police report and available to the defense. (See 1 RT at 44, 48.) Despite apparently having the pager number, the prosecution and defense were unable to locate Brown before trial. (1 RT at 48-51, 70; 4 RT at 484-85.)

Nearly twenty years after Petitioner's conviction, Brown came forward. (January 31, 2019 Affidavit of Georgia Brown; July 28, 2020 Affidavit of Georgia Brown, ¶ 5.) According to

[55] This Court further notes it has considered Petitioner's Claims Two and Four and find they lack merit.

Brown's newly executed affidavit, she took a polaroid photo with someone at the club on the night of the shooting and wrote her pager number on the back. (January 31, 2019 Affidavit of Georgia Brown, ¶¶ 5-6.) Brown further stated in her affidavit that police contacted her the morning after the shooting. (January 31, 2019 Affidavit of Georgia Brown, ¶ 6; July 28, 2020 Affidavit of Georgia Brown, ¶ 4.) At that time, she told police the victim instigated the confrontation with Petitioner by punching Petitioner in the face without provocation. (January 31, 2019 Affidavit of Georgia Brown, ¶¶ 5-6; July 28, 2020 Affidavit of Georgia Brown, ¶¶ 3-4.) The blow caused Petitioner to "stumble" and Brown, who was walking with Petitioner's arm around her neck, to fall to the ground. (January 31, 2019 Affidavit of Georgia Brown, ¶ 5; July 28, 2020 Affidavit of Georgia Brown, ¶ 3.) It was only then that Petitioner produced his gun and started shooting toward the victim. (January 31, 2019 Affidavit of Georgia Brown, ¶ 5; July 28, 2020 Affidavit of Georgia Brown, ¶ 3.) The police told Brown that a detective would follow up with her later, but she never heard from police again. (January 31, 2019 Affidavit of Georgia Brown, ¶ 6; July 28, 2020 Affidavit of Georgia Brown, ¶ 4.)

2. Legal Standard

Under Brady v. Maryland, a prosecutor violates due process by suppressing evidence favorable to an accused and material to either guilt or punishment.[56] 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."[57]

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."[58] This includes evidence affecting witness credibility when the witness's reliability likely is "determinative of guilt or innocence."[59]

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[56] 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).
[57] Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).
[58] Milke v. Ryan, 711 F.3d 998, 1012 (9th Cir. 2013) (citing Strickler, 527 U.S. at 281-82).
[59] Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

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.[60] In addition, the prosecutor is obligated not only to turn over evidence in her personal possession but, in addition, the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case."[61]

Finally, in making a materiality determination, courts must evaluate the withheld evidence in the context of the entire record.[62] Evidence is material "only if there is a reasonable probability that had the evidence been disclosed the result at trial would have been different."[63] "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.'"[64] Thus, a "reasonable probability" may be found "even where the remaining evidence would have been sufficient to convict the defendant."[65]

Once the materiality of the suppressed evidence is established, no further harmless error analysis is required.[66] "When the government has suppressed material evidence favorable to the defendant, the conviction must be set aside."[67]

3. Analysis

a. Police Interview

i. Background

First, Petitioner argues the prosecution failed to disclose the statements Brown gave to police in an interview the day after the shooting. (Petition at 39-40, 42-44.)

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60 Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).
61 Id. at 438.
62 Turner v. United States, ___ U.S. ____, 137 S. Ct. 1885, 1893, 198 L. Ed. 2d 443 (2017).
63 United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).
64 Smith v. Cain, 565 U.S. 73, 75-76, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012) (quoting Kyles, 514 U.S. at 434).
65 Jackson v. Brown, 513 F.3d 1057, 1071 (9th Cir. 2008); see Kyles, 514 U.S. at 436 (finding that, once error has been established, the error necessarily had "substantial and injurious effect or influence in determining the jury's verdict").
66 Kyles, 514 U.S. at 435-36; see also Silva v. Brown, 416 F.3d 980, 986 (9th Cir. 2005).
67 Silva, 416 F.3d at 986.

ii. Additional Relevant Law

Brown's statements about the shooting are relevant to Petitioner's defense theory at trial, as they could have weighed on the issue of provocation to reduce Petitioner's conviction from first-degree to second-degree murder, or heat of passion for purposes of voluntary manslaughter.

As relevant here, under California law, first-degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation, and second-degree murder is an unlawful killing with malice but without premeditation and deliberation.[68] The state courts have explained:

> To reduce a murder to second degree, premeditation and deliberation may be negated by heat of passion arising from provocation . . . . If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder . . . . If the provocation would cause a reasonable person to react with deadly passion, the defendants is deemed to have acted without malice, so as to further reduce the crime to voluntary manslaughter . . . .[69]

The provocation necessary to reduce first degree murder to second degree murder does not have to pass an objective test.[70] "The issue is whether the provocation precluded the defendant from deliberating. This requires a determination of the defendant's subjective state."[71]

iii. Analysis

Even assuming all facts in Petitioner's favor, i.e. the truth of Brown's assertion that she spoke with police the day after the shooting, Petitioner's assertion that the defense was not made aware of this interview before trial, and Brown's assertions about the crime made in her affidavit, and further assuming that Brown's statements to police would have been deemed

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68 See People v. Hernandez, 183 Cal.App.4th 1327, 1332 (2010).
69 Id. (citations omitted).
70 People v. Fitzpatrick, 2 Cal.App.4th 1285, 1295-96 (1992).
71 Id. at 1295 (citations omitted).

admissible due to her unavailability at trial,[72] Petitioner's claim still fails to establish materiality for purposes of Brady.

Brown's account of the shooting in her affidavit, which she asserts she told police the day after the crime (January 31, 2019 Affidavit of Georgia Brown, ¶ 6; July 28, 2020 Affidavit of Georgia Brown, ¶ 4), would have supported the defense theory at trial that Petitioner was guilty of something less than first-degree murder. Specifically, according to Brown, Petitioner was attempting to defend Brown against the victim's unwanted advances and fired his gun only after the victim had punched Petitioner in the face, thereby causing Petitioner to stumble and knocking Brown to the ground. (January 31, 2019 Affidavit of Georgia Brown, ¶ 5; July 28, 2020 Affidavit of Georgia Brown, ¶ 3.) Although a reasonable person might not have reacted to the alleged punch in the face with deadly passion to reduce the crime to voluntary manslaughter,[73] Brown's account would have been supportive of a defense theory that, subjectively, Petitioner felt provoked by the victim for purposes of determining whether Petitioner was guilty of second-degree, rather than first-degree, murder.

Despite not hearing any statements or testimony from Brown, the jury heard the testimony of Petitioner, which was materially indistinguishable from Brown's account of the shooting. (3 RT at 409-15, 426-29.) However, the jury might have afforded less weight to Petitioner's testimony, as it was inherently self-serving.[74] In addition, the jury heard from Fox, who testified the victim approached Petitioner "very fast" before Fox heard the sound of a smack, which the jury could have inferred was a punch, and then saw the victim in a "boxer's

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[72] Because Petitioner's trial occurred before the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the rules regarding the admissibility of this hearsay evidence would have been less rigid, would have focused on the reliability of Brown's statements, and would not have absolutely required that the statements previously had been subjected to cross-examination such as through a preliminary hearing. Compare id. at 54 (the Confrontation Clause does not allow the "admission of testimonial statements of a witness who did not appear at trial unless [s]he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination") with Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597 (1980) ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, h[er] statement is admissible only if it bears adequate 'indicia of reliability.'").

[73] Hernandez, 183 Cal.App.4th at 1332.

[74] Muriel v. Madden, No. CV 15-01353 R (RAO), 2017 WL 1404381, at *18 (C.D. Cal. Mar. 13, 2017), report and recommendation adopted, No. CV 15-01353 R (RAO), 2017 WL 1404304 (C.D. Cal. Apr. 18, 2017) ("the jury was free to disregard Petitioner's own testimony as self-serving and therefore as not credible").

pose." (3 RT at 298-99, 330-31.) But the prosecutor significantly impeached Fox's trial testimony based on contradictory statements he gave to police soon after the shooting. (3 RT at 315, 320-21, 323-34.) Specifically, the prosecutor showed that, contrary to Fox's trial testimony, he told police he never left the front steps of the club during the incident (3 RT at 315-16), suggesting he might not have been as close to the action as he suggested through his testimony. Fox also told police he did not see what side of the victim's car the victim came from, despite testifying at trial he saw the victim come out of the passenger side of the car. (3 RT at 319-21.) In addition, despite his testimony at trial, Fox never told police he saw the victim in a boxing stance and admitted the smacking sound he heard could have been a clicking sound, such as that of a gun's slide being operated. (3 RT at 326, 329-32; 4 RT at 526.) Ultimately, the jury necessarily gave less weight to the testimony of Fox and Petitioner by finding Petitioner guilty of first-degree murder.

Although Brown's testimony would have corroborated Fox and Petitioner and, thus, might have offered the jury a reason to afford greater weight to Petitioner's defense theory, her account of events also lacks credibility. Tellingly, Brown's version of the shooting closely tracks Petitioner's account, particularly as it relates to the fact that Petitioner was walking next to Brown with his arm around her shoulder or neck and that the victim's blow to Petitioner's face caused Petitioner to stumble and Brown to fall to the ground. (3 RT at 414; January 31, 2019 Affidavit of Georgia Brown, ¶ 5-6.) Yet, no other witness reported seeing Petitioner and Brown walking so closely in the manner Petitioner and Brown described, or either of them stumbling or falling at any time during the events of the shooting. Given these remarkable, yet uncorroborated, similarities between the accounts of Petitioner and Brown, the jury likely would have found Brown's testimony not credible, or perhaps even influenced by Petitioner.

Moreover, even with Brown's statements, the jury would have weighed this less persuasive defense testimony against the testimony of Leo Parker, Sr., Leo Parker, Jr., and Melissa Jorgenson, none of whom saw the victim act aggressively toward Petitioner or even get within striking distance of him. (1 RT at 126-30; 3 RT at 363-64, 374-76, 379; 4 RT at 498,

500.) In fact, even Fox admitted he never saw the victim try to strike Petitioner. (3 RT at 332-33.)

Finally, in deciding between first-degree and second-degree murder, the jury would have considered the witness accounts of the interaction between Petitioner and the victim before the shooting in the context of the shooting itself and Petitioner's actions immediately after. First, Jorgenson testified she heard Petitioner, not the victim, being disrespectful to Brown in the parking lot. (4 RT at 496-97.) In addition, Parker, Sr. testified the victim and Brown were walking together outside of the club when Petitioner jerked his car forward toward them. (1 RT at 125-26.) Importantly, the witnesses, including Fox, agreed that the victim did not display any type of weapon and was running away from Petitioner when Petitioner fired his gun. (1 RT at 127-30; 3 RT at 300, 312, 324-25, 335, 380.) Then, even after Petitioner left the parking lot and would have had time to reflect on whether there continued to be any threat to him, Petitioner turned around to drive by the parking lot again and opened fire a second time. (1 RT at 133-34, 140; 3 RT at 327-28, 444, 468.) Thus, when considering whether Petitioner subjectively felt provoked by the victim, the jury would have had to consider evidence that Petitioner was the aggressor, the victim could not have posed an immediate threat to Petitioner when he fired, and Petitioner continued to take deadly action even after he had time to reflect on any alleged provocation the victim may have engaged in.

Based on the state of this evidence presented at trial, it would have been reasonable for the state courts to conclude the jury's verdict would not have been different even had it heard the statements of Brown. Thus, the state courts reasonably could have concluded Petitioner had failed to establish materiality for purposes of Brady.

b. Photo

Next, Petitioner argues the prosecution suppressed the photo of Brown and that the photo was material because it would have shown witness Jorgenson was mistaken, or dishonest, when she testified Brown was wearing a white dress on the night of the shooting. (Petition at 45.)

There is no dispute the photo existed and was given to police. (See 1 RT at 43-46; 3 RT at 287-89, 306-07, 312, 346-47.) In addition, there is no dispute the police lost the photo.[75] (See 1 RT at 43-44, 68; 3 RT at 346-47.) However, despite the unavailability of the photo, the jury heard other evidence undermining Jorgenson's testimony with respect to the color of Brown's outfit.

Specifically, Fox testified at trial that Brown was wearing a black outfit on the night of the shooting. (3 RT at 288.) Neither the prosecution nor the defense challenged Fox's testimony on this point. On the other hand, when Jorgenson testified on cross-examination that Brown was wearing a white dress, Petitioner's trial counsel challenged her by asking if she was "positive." (4 RT at 503.) When Jorgenson stated she was "positive" Brown wore a white dress, Petitioner's trial counsel asked her to estimate how far away she had been from Brown when she made this observation. (4 RT at 504.) Then, during closing arguments Petitioner's trial counsel argued:

> "What does Ms. Jorgenson [say] of Phamous, what is she wearing? White. A white outfit. She's the one, one everyone (sic) else has the person named Phamous wearing other dark clothes, pants suit. Inconsistencies. Yet the prosecution would have you believe and give credibility to witnesses who can neither recall nor accurately tell you, the jurors, what happened on that evening or morning hours."

(4 RT at 593.) Because Jorgenson's testimony regarding the color of Brown's clothing had already been called into question, this Court cannot conclude that the jury would have been persuaded to reject the testimony of Jorgenson and the other witnesses and render a different verdict had a photograph further proven she had been mistaken about the color of the outfit.

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[75] This Court notes that Petitioner presents his claim regarding the photo specifically as one of a failure of the prosecution to disclose the evidence under Brady, not of a failure to preserve the evidence under California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (failure to preserve evidence violates a defendant's right where the evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"). Nevertheless, this Court has considered a claim regarding the loss of the photo and finds it lacks merit, as Petitioner has never been able to show bad faith on the part of the police in losing the photo. See Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (a defendant must demonstrate that the police acted in bad faith in failing to preserve potentially useful evidence).

Furthermore, Jorgenson's mistake about the color of Brown's outfit had little relation to Jorgenson's testimony regarding the actions of Petitioner and the victim. Thus, it does not necessarily follow that, simply because Jorgenson was mistaken about Brown's outfit, the jury would have rejected her testimony in its entirety.

Accordingly, Petitioner cannot show the missing photograph was material to the impeachment of Jorgenson, as he cannot show the jury's verdict would have been different had it been presented with additional evidence Jorgenson was mistaken about the color of Brown's outfit. Thus, the state courts' denial of Claim One was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is not warranted.

C. Actual Innocence

1. Background

Finally, in Claim Three, Petitioner argues the newly acquired Brown affidavit proves Petitioner is innocent of first-degree murder. (Petition at 53-64.)

2. State Court Opinion

The Orange County Superior Court denied Petitioner's claim on habeas review, finding Brown's statement, presented at that time in unverified letter form, was inadmissible, was "largely cumulative and corroborative of testimony given by petitioner at trial," and was "not credible or material nor of such decisive force and value that it would have more likely than not changed the outcome at trial given the evidence adduced during petitioner's trial. (Lodgment 3 at 6.)

3. Legal Standard

The United States Supreme Court has expressly left open the question of whether a freestanding claim of actual innocence is cognizable on federal habeas review.[76] However, the Ninth Circuit has assumed that freestanding actual innocence claims are cognizable in non-capital cases.[77]

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[76] See McQuiggin v. Perkins, 569 U.S. 383, 391, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.").

[77] Jones v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014) ("We have not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the noncapital context, although we have assumed that such a claim is viable.").

The Ninth Circuit has "not articulated the precise showing required" for a freestanding actual innocence claim,[78] but has indicated a petitioner's burden is "'extraordinarily high'" and requires a showing that is "'truly persuasive.'"[79] Thus, at a minimum, "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."[80] Additionally, the Ninth Circuit has "discussed the standard for a freestanding actual innocence claim by reference to the Schlup 'gateway' showing."[81] As stated in Section A.7., above, to pass through the Schlup gateway, 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.'"[82]

4. Analysis

As stated in Section B.3.a., above, this Court finds the account Brown gave in her new affidavit, which she claims she told police the day after the shooting, was not so persuasive that it met the less burdensome standard for proving error under Brady, i.e. that there was a reasonable probability that had the jury heard Brown's statements its verdict would have been different.[83] For the same reasons, this Court cannot conclude Petitioner has met the higher standard of showing that, in light of Brown's account of the crime as stated in her affidavit, it is more likely than not that no reasonable juror would have found Petitioner guilty of first-degree murder beyond a reasonable doubt.

Accordingly, the state courts' denial of Petitioner's claim was not contrary to, or an unreasonable application of, Supreme Court precedent. Habeas relief is not warranted on Claim Three.

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78 Id. at 1247.
79 Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (quoting Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)).
80 Id. at 476.
81 Jones, 763 F.3d at 1247.
82 House v. Bell, 547 U.S. 518, 537, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).
83 United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: March 17, 2021

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

38a
Appendix F

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 09/18/2020 02:09 PM

Docket (Register of Actions)

McCLAIN (JAMES JORDAN) ON H.C.
Division SF
Case Number S257743

Date	Description	Notes
08/30/2019	Petition for writ of habeas corpus filed	Petitioner: James Jordan McClain Pro Per
01/02/2020	Petition for writ of habeas corpus denied	The petition for writ of habeas corpus is denied. (See In re Robbins (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely].)

Click here to request automatic e-mail notifications about this case.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAMES JORDAN McCLAIN on Habeas Corpus.	G058013 (Super. Ct. No. C99486) O R D E R

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

O'LEARY, P. J.

* Before O'Leary, P. J., Bedsworth, J., and Ikola, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAMES JORDAN MCCLAIN on Habeas Corpus.	G057935 (Super. Ct. No. C-99486) O R D E R

THE COURT:*

Petitioner's request for judicial notice of the record in superior court case number C-99468 is GRANTED.

The petition for a writ of habeas corpus is DENIED without prejudice so that petitioner may file a petition in the superior court first. (Cal. Const., art. VI, § 10; *In re Hillery* (1962) 202 Cal.App.2d 293, 294.)

BEDSWORTH, ACTING P. J.

* Before Bedsworth, Acting P. J., Aronson, J., and Ikola, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

In re JAMES JORDAN McCLAIN, Petitioner ON HABEAS CORPUS	Orange County Superior Court Case Number: M-17903 (M-17302, C-99486) **ORDER DENYING HABEAS CORPUS**

TO THE OFFICE OF THE ORANGE COUNTY DISTRICT ATTORNEY AND PETITIONER:

HAVING REVIEWED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS CORPUS AND EXHIBITS SUBMITTED IN SUPPORT THEREOF, THE COURT ISSUES THE FOLLOWING ORDER:

On January 27, 1994, a jury found petitioner guilty of first degree murder [Pen. Code, § 187(a)] committed through the personal use of a firearm [Pen. Code, § 12022.5(a)]. On February 25, 1994, petitioner was sentenced to an indeterminate term of 30 years to life in state prison with the possibility of parole. The judgment was affirmed on appeal.

Petitioner, in pro per, challenges the validity of the judgment of conviction and sentence claiming:

1. The prosecution violated petitioner's constitutional right to due process and a fair trial by suppressing material exculpatory evidence resulting in the conviction of an innocent man.

2. The prosecution violated petitioner's constitutional right to due process by securing petitioner's conviction through the use of false evidence at trial.

3. Newly discovered evidence, in the form of a sworn statement from percipient witness Georgia Brown, absolves petitioner of culpability for first degree murder.

4. Ineffective assistance by counsel who allegedly failed to seek dismissal of charges or sanctions as a remedy for prosecutorial withholding of material exculpatory evidence.

The petition is denied on the following separate and independent grounds:

The petition, as it pertains to petitioner's first, second, and fourth claims of error, is denied on grounds it is untimely and successive. Petitioner does not adequately explain and justify the 25 year delay in seeking post-conviction collateral review of his claims of error nor his failure to raise the same in a prior habeas petition filed with the court last year (Orange County Superior Court case number: M-17302). "A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner. It has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief." (*In re Reno* (2012) 55 Cal.4th 428, 459.) Unreasonable delay "bars consideration of a petition for writ of habeas corpus under the doctrine of laches." (*In re Douglas* (2011) 200 Cal.App.4th 236, 245.) "Successive habeas petitions based on claims which could have been adjudicated in previous petitions are not permitted, except in rare instances where a fundamental miscarriage of justice has occurred." (*Younan v. Caruso* (1996) 51 Cal.App.4th 401, 410.) As presented and contrary to petitioner's contention, none of petitioner's claims of error amount to a potential fundamental miscarriage of justice sufficient to overcome the procedural bar against untimely and successive requests for habeas corpus relief.

(*In re Clark* (1993) 5 Cal.4th 750, 797-798.)

The petition, as it pertains to petitioner's third claim of error, is denied on grounds petitioner's claim of error was previously considered and denied by the court via habeas corpus on February 7, 2018 (Orange County Superior Court case number: M-17302). No material change in the applicable law or facts is identified warranting reconsideration of petitioner's claim of error. Absent a change in the applicable law or the facts, a court will not consider repeated petitions for habeas corpus presenting claims previously rejected. (*In re Clark* (1993) 5 Cal.4th 750, 767; *In re Terry* (1971) 4 Cal.3d 911, 921.) "A prisoner whose petition has been denied by the superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal." (*In re Clark, supra*, 5 Cal.4th at 767, fn. 7.)

The petition for writ of habeas corpus is DENIED.

Dated: 4/19/19

Judge of the Superior Court

CHERI PHAM

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAMES JORDAN McCLAIN on Habeas Corpus.	G056992 (Super. Ct. No. C-99486) O R D E R

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

MOORE, ACTING P. J.

* Before Moore, Acting P. J., Ikola, J., and Thompson, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

In re JAMES JORDAN McCLAIN, Petitioner ON HABEAS CORPUS	Orange County Superior Court Case Number: M-17302 (C-99486) **ORDER DENYING HABEAS CORPUS**

TO THE OFFICE OF THE ORANGE COUNTY DISTRICT ATTORNEY AND PETITIONER:

HAVING REVIEWED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS CORPUS AND EXHIBITS SUBMITTED IN SUPPORT THEREOF, THE COURT ISSUES THE FOLLOWING ORDER:

On January 27, 1994, a jury found petitioner guilty of first degree murder [Pen. Code, § 187(a)] committed through the personal use of a firearm [Pen. Code, § 12022.5(a)]. On February 25, 1994, petitioner was sentenced to an indeterminate term of 30 years to life in state prison with the possibility of parole. The judgment was affirmed on appeal.

At about 1:30 a.m. on October 25, 1991, Leo Parker, Sr., a security guard at Mr. J's nightclub, was outside the front of the club at the top of the stairs trying to move the crowd out when a black Camaro pulled up.[1] There were two men in the car; petitioner was the driver. Parker observed petitioner's car move forward at the same time Willie Ford and a woman were walking by. Ford turned to petitioner with his arms raised and hands open and asked, "What's up?" Petitioner got out of his car and talked briefly with Ford. Ford then turned around and began running away from petitioner. He only made

1 The statement of facts is derived from the appellate opinion affirming the judgment of conviction. (*People v. McClain* (Apr. 25, 1995, G015635) [nonpub. opn.].)

it about 10 to 15 feet when petitioner pulled a handgun from his waistband, aimed it at Ford, and began shooting. After firing seven or eight shots, petitioner got back into his car and drove out of the parking lot, firing several shots out the window as he left.

Parker wrote down the license plate number on petitioner's car before he drove away. Shortly thereafter, police officers arrived and investigated the crime scene. Ford was bleeding profusely and transported to a hospital, where he died several hours later. Seven casing were recovered.

When petitioner was arrested on June 5, 1992, he identified himself as Tony Johnson and presented false identification to the arresting officers. He claimed at trial he did so because of outstanding traffic warrants.

Defense Case:

Saint Anthony Fox, an employee of Mr. J's nightclub, was outside the club helping to disperse the crowd on the evening of the shooting. Fox went over to the passenger side of the black Camaro and asked the occupants to move the vehicle. As he did so, a woman named "Phamous" walked past and petitioner said something to her. Willie Ford got out of a nearby car and asked Phamous what was wrong. She said something to him and Ford walked "very fast" to the Camaro. Ford asked, "What's up?" in an aggressive manner while standing in a boxing position. Fox heard the sound of a "smack" and saw petitioner pull a gun from his waistband. Fox saw Ford running away at the same time he heard the sound of shots being fired. According to Fox, petitioner was coming to Phamous' defense.

Petitioner testified he was sitting in the black Camaro when Phamous came over to him and said she was having trouble with two men in a nearby Honda. She asked petitioner to walk her to her car, which he agreed to do. Petitioner got out of the car

and walked about five steps when Ford approached, said something and punched him. Petitioner pulled his handgun from his waistband and began shooting at Ford. He did not intend to kill Ford; only to stop Ford from hitting him. Petitioner fired the shots from the car because he was afraid Ford's friends might try to shoot him.

Rebuttal Evidence:

Melissa Jorgenson witnessed the shooting. She heard petitioner say to a woman outside the club, "I have a big dick. So why don't you suck it?" She saw Ford walk over and ask, "What's up?" The next thing she saw was petitioner firing a gun at Ford while Ford was running away. Jorgenson never saw Ford punch petitioner or assume a combative stance before he was shot.

When Fox was interviewed by detectives three or four hours after the shooting, he did not mention seeing Ford assume a combative stance or hearing the sound of a smack.

Petitioner, in pro per, challenges the validity of the judgment of conviction and sentence claiming:

1. Newly discovered evidence from a percipient witness absolves petitioner of culpability for first degree murder.
2. The prosecution violated petitioner's constitutional right to due process and a fair trial by suppressing and destroying in bad faith potentially exculpatory evidence consisting of a percipient witness's photograph and contact information thereby rendering her unavailable for trial.
3. The trial court prejudicially erred by denying a defense motion to substitute appointed counsel with retained counsel in violation of petitioner's constitutional rights.

In support of his principal claim of error, petitioner submits as an exhibit correspondence dated May 5, 2015 purportedly authored by Georgia Brown (aka "Phamous") and addressed to the trial court. In relevant part, Ms. Brown represents she was a percipient witness to the events that led to petitioner's murder conviction and asserts petitioner was attacked while escorting her to her vehicle.

"A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid." (*In re Cox* (2003) 30 Cal.4th 974, 997.) "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands." (*In re Roberts* (2003) 29 Cal.4th 726, 740-741.)

The petition is denied on the following separate and independent grounds:

The petition, with respect to petitioner's second claim of error, is denied on grounds petitioner does not adequately explain and justify his failure to raise the issue on appeal. At trial, the defense moved to dismiss criminal charges or, in the alternative, impose sanctions based on law enforcement's failure to preserve potentially exculpatory evidence in the form of a photograph and contact information for the same percipient witness identified by petitioner in his habeas petition. The trial court denied the motion. The issue is reflected in the trial record and petitioner's failure to raise the issue on appeal is not excused by the assertion the alleged percipient witness was just recently located.

When an "issue could have been but was not raised on appeal, the unjustified failure to present it on appeal generally precludes its consideration on habeas corpus." (*In re Sakarias* (2005) 35 Cal.4th 140, 169.) This same principle also bars

consideration of petitioner's largely undeveloped claims of prosecutorial misconduct and instructional error.

The petition, with respect to petitioner's third claim of error, is denied on grounds the issue was considered and denied on appeal. (*People v. McClain* (Apr. 25, 1995, G015635) [nonpub. opn.].) Issues raised and rejected on appeal cannot be renewed in a petition for writ of habeas corpus. (*In re Harris (*1993) 5 Cal.4th 813, 829, *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1114.)

As for petitioner's remaining and principal claim of error, petitioner maintains that Ms. Brown's declaration constitutes newly discovered evidence that exonerates him of murder and corroborates his position that, at most, he acted in imperfect self-defense warranting only a conviction for voluntary manslaughter. Petitioner claims Ms. Brown is an unbiased percipient witness who is credible and impeaches the prosecution's case. Had Ms. Brown been available to testify for the defense at trial, petitioner believes there is a reasonable probability he would have obtained a more favorable outcome.

Effective January 1, 2017, Penal Code § 1473 was amended to allow for the prosecution of a petition for writ of habeas corpus based on newly discovered evidence.

> "A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons: …
>
> (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.
>
> (B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not

have been discovered prior to trial by the existence of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching."

(Pen. Code, § 1473(b)(3).)

Petitioner's contention is without merit and denied on this basis. Petitioner does not meet his burden of setting forth a prima facie case warranting habeas corpus relief based on his claim of newly discovered evidence. The written statement attributed to Ms. Brown does not constitute a verified declaration executed under penalty of perjury. (See, Code of Civ. Proc., § 2015.5.) The unverified statement is inadmissible and is largely cumulative and corroborative of testimony given by petitioner at trial. Moreover, Ms. Brown's unverified, conclusory statement to the effect that petitioner was attacked while walking Ms. Brown to her car alone is not credible or material nor of such decisive force and value that it would have more likely than not changed the outcome at trial given the evidence adduced during petitioner's trial.

No prima facie case for relief is established. An order to show cause will issue only if petitioner has established a prima facie case for relief on habeas corpus. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.)

The petition for writ of habeas corpus is DENIED. Petitioner's reservation of the right to file additional claims of error in successive petitions for writ of habeas corpus is of no consequence. "The inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

Dated: 2/7/18

Judge of the Superior Court

SHEILA HANSON

51a

Appendix L

Fourth Appellate District, Division Three, No. G015635
S046851

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

JAMES JORDAN MC CLAIN, Appellant

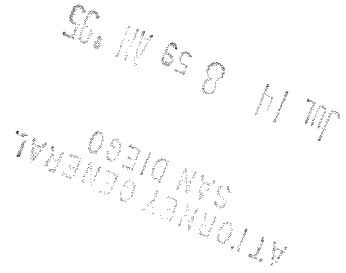
Appellant's petition for review DENIED.

LUCAS

Chief Justice

52a

Appendix L



NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	G015635
Plaintiff and Respondent,	(Super. Ct. No. C-99486)
v.	OPINION
JAMES JORDAN McCLAIN,	
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Richard L. Weatherspoon, Judge. Affirmed.

Stephen Gilbert, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Janelle B. Davis and Maxine P. Cutler, Deputy Attorneys General, for Plaintiff and Respondent.

Appendix M

A jury convicted James Jordan McClain of first degree murder and found true the allegation that he personally used a firearm. McClain was sentenced to 25 years to life in prison with an additional five-year enhancement for the firearm use. He appeals, contending the trial court denied his right to counsel and the evidence was insufficient to support a first degree murder conviction. We affirm.

* * *

At about 1:30 a.m. on October 25, 1991, Leo Parker, Sr., a security guard at Mr. J's nightclub, was outside the front of the club at the top of the stairs trying to move the crowd out when a black Camaro pulled up. There were two men in the car; McClain was the driver. Parker observed McClain's car move forward at the same time Willie Ford and a woman were walking by. Ford turned to McClain with his arms raised and hands open and asked, "What's up?" McClain got out of his car and talked briefly with Ford. Ford then turned around and began running away from McClain. He only made it about 10 to 15 feet when McClain pulled a handgun from his waistband, aimed it at Ford, and began shooting. After firing seven or eight shots, McClain got back into his car and drove out of the parking lot, firing several shots out the window as he left.

Parker wrote down the license plate number on McClain's car before he drove away. Shortly thereafter, police officers arrived and investigated the crime scene. Ford was bleeding profusely and transported to a hospital, where he died several hours later. Seven casings were recovered.

When McClain was arrested on June 5, 1992, he identified himself as Tony Johnson and presented false identification[1] to the arresting officers. He claimed at trial he did so because of outstanding traffic warrants.

McClain was charged with first degree murder (Pen. Code, § 187) and personal use of a firearm (Pen. Code, § 12022.5, subd (a)). He pleaded not guilty and the

[1] The false identification was a driver's license in the name of Tony Johnson issued in March 1992.

trial date was ultimately continued to January 18, 1994. At that time, counsel were ordered not to become engaged in any case that would interfere with the instant trial.

Defense Case:

Saint Anthony Fox, an employee of Mr. J's nightclub, was outside the club helping to disperse the crowd on the evening of the shooting. Fox went over to the passenger side of the black Camaro and asked the occupants to move the vehicle. As he did so, a woman named "Phamous" walked past and McClain said something to her. Willie Ford got out of a nearby car and asked Phamous what was wrong. She said something to him[2] and Ford walked "very fast" to the Camaro. Ford asked, "What's up?" in an aggressive manner while standing in a boxing position. Fox heard the sound of a "smack" and saw McClain pull a gun from his waistband. Fox saw Ford running away at the same time he heard the sound of shots being fired. According to Fox, McClain was coming to Phamous' defense.

McClain testified he was sitting in the black Camaro when Phamous came over to him and said she was having trouble with two men in a nearby Honda. She asked McClain to walk her to her car, which he agreed to do. McClain got out of the car and walked about five steps when Ford approached, said something and punched him. McClain pulled his handgun from his waistband and began shooting at Ford. He did not intend to kill Ford; only to stop Ford from hitting him. McClain fired the shots from the car because he was afraid Ford's friends might try to shoot him.

Rebuttal Evidence:

Melissa Jorgenson witnessed the shooting. She heard McClain say to a woman outside the club, "I have a big dick. So why don't you suck it?" She saw Ford walk over and ask, "What's up?" The next thing she saw was McClain firing a gun at

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2 She said, "I am tired of niggers saying that they got big dicks."

Ford while Ford was running away. Jorgenson never saw Ford punch McClain or assume a combative stance before he was shot.

When Fox was interviewed by detectives three or four hours after the shooting, he did not mention seeing Ford assume a combative stance or hearing the sound of a smack.

I

On the date set for trial, McClain requested permission to substitute counsel, who had been retained three court days earlier, for appointed counsel. The prosecution objected on the grounds there had been several continuances in municipal court due to McClain's changes of counsel, and its witnesses were subpoenaed, available and ready to go to trial. Although he did not object to the substitution, defense counsel was ready to proceed. Retained counsel was not, stating he would need three to four weeks to prepare for trial.

The court held what it characterized as a "quasi-Marsden" hearing and queried McClain as to his complaints.[3] McClain was unhappy with the defense investigation of his case, stating he told his attorney he wanted two witnesses interviewed (a musician at the nightclub and the driver of a limousine that was parked in front of the club at the time of the shooting), but that was never done. Defense counsel deferred to the investigator who indicated he had made numerous, albeit unsuccessful, attempts to locate those two witnesses.

The court denied the request for substitution of counsel, in part because the request was untimely (made on the day of trial) and in part because McClain had what it termed a "proclivity to substitute counsel." Finding the request untimely and that "the

[3] McClain pointed to the fact that the majority of witnesses at trial were favorable to the prosecution in an attempt to bolster his argument that defense counsel was lax. McClain wanted the court to conclude that had defense counsel worked harder, that would not have been so. The facts speak for themselves.

interruptions or delay which might result in this case could be most serious by permitting new counsel," the court denied the request.

McClain first complains that by not granting his request for substitution of retained counsel the court impermissibly interfered with his Sixth Amendment right to counsel of his choice. Although McClain characterizes the issue as the right to counsel of his choice, it really is not. Had retained counsel been ready to proceed, we have no doubt the court would have granted the request for substitution. It was retained counsel's request for a three-to-four week continuance that troubled the court. The real issue is whether the court abused its discretion in refusing a continuance for the purpose of substituting in retained counsel.

"The granting or denial of a motion for continuance rests within the sound discretion of the trial court. [Citation.] That discretion, of course, must be exercised in conformity with the applicable law. A continuance may be granted only on the moving party's showing of good cause. [Citation.] Such a showing requires, inter alia, a demonstration that both the party and counsel have used due diligence in their preparations. [Citation.]" (***People*** v. ***Mickey*** (1991) 54 Cal.3d 612, 660.) Stated another way, "[a] continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (***People*** v. ***Courts*** (1985) 37 Cal.3d 784, 790-791.) In determining whether the trial court abused its discretion in denying a request for a continuance, the appellate court must look to the circumstances of each case. (***Ibid; People*** v. ***Strozier*** (1993) 20 Cal.App.4th 55, 60, citing ***People*** v. ***Crovedi*** (1966) 65 Cal.2d 199, 207.)

Here, McClain requested substitution of counsel, in effect requesting a continuance, on the day of trial. By that time, the case was over two and one-half years old, and had been continued numerous times already, several times in municipal court and once in superior court. McClain had substituted counsel three times previously and sought his fourth substitution. And although retained counsel suggested that McClain's

mother only recently became able to retain counsel for her son by taking out a loan, there was no showing that *McClain* had been in any way diligent in attempting to retain counsel. Finally, there was no compelling reason favoring the granting of a continuance in view of the lateness of the request. Nothing in the "quasi-Marsden" hearing suggested defense counsel's performance was in any way deficient.[4] (***People*** v. ***Courts, supra,*** 37 Cal.3d at p. 792, fn. 4 [timeliness of the request is a "significant factor" and in the absence of "compelling circumstances to the contrary" may justify a denial of the request].)

II

McClain next contends the evidence was insufficient to satisfy the three-pronged test of premeditation and deliberation set forth in ***People*** v. ***Anderson*** (1968) 70 Cal.2d 15, that is, planning activity, motive and manner of killing. (***Id.*** at pp. 26-27.) He maintains it established nothing more than an "argument between strangers and a sudden explosion of violence[.]"

We disagree. " . . . ***Anderson*** does not require that these [three] factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. ***Anderson*** was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. (***People*** v. ***Pride*** (1992) 3 Cal.4th 195, 247.)

Reviewing, as we must, the entire record in the light most favorable to the judgment, our task is to determine whether it discloses substantial evidence from which the jury could find McClain premeditated and deliberated the killing. (***People*** v. ***Perez*** (1992) 2 Cal.4th 1117, 1124.) It does. McClain brought a loaded handgun to the nightclub and armed himself with it, demonstrating evidence of planning. When the

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[4] In fact, a review of the trial transcript reveals exemplary and zealous advocacy.

victim, who was unarmed, intervened in McClain's apparent verbal assault of Phamous, McClain drew his handgun from his waistband and began firing *after* the victim began running away, establishing motive and a manner of killing indicative of premeditation.

Although the exchange between McClain and the victim was brief, "'[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (***People*** v. ***Perez, supra,*** 2 Cal.4th at p. 1127.) The evidence is sufficient to support the jury's finding.

The judgment is affirmed.

WALLIN, J.

WE CONCUR:

SILLS, P. J.

CROSBY, J.

FORM CR 292

☒ SUPERIOR ☐ MUNICIPAL ☐ JUSTICE

COURT (I.D.) S 3 0 0 0 0 0 0

COURT OF CALIFORNIA, COUNTY OF ORANGE

BRANCH OR JUDICIAL DISTRICT:

FILED
ORANGE COUNTY SUPERIOR COURT
MAR 07 1994
ALAN SLATER, Executive Officer/Clerk
By _____ DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: MCCLAIN, JAMES JORDAN ☒ PRESENT ☐ NOT PRESENT

C-99486 - A / - B / - C / - D / - E

AKA:

COMMITMENT TO STATE PRISON ☐ AMENDED
ABSTRACT OF JUDGMENT ABSTRACT ☐

DATE OF HEARING 02/25/94 | DEPT. NO. 38 | JUDGE RICHARD L. WEATHERSPOON | CLERK A. DARNELL

REPORTER H. KLINE | COUNSEL FOR PEOPLE CAROLYN KIRKWOOD DDA | COUNSEL FOR DEFENDANT JAMES SPELLMAN PD | PROBATION NO. OR PROBATION OFFICER A-222156

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES:
☐ ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT _____ (NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	CONCURRENT	CONSECUTIVE	654 STAY
1	PC	187(a)*	1st deg murder	91	01	27	94	X					

2. ENHANCEMENTS charged and found true TIED TO SPECIFIC COUNTS (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC. For each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Total
1	12022.5(a)PC	05									05 00

3. ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER:
List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b), list § 667.5(b) 2 times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Total
Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Enhancement	Yrs. or "S"	Total

+ 5yrs on enhancement as to Ct.1.

4. Defendant was sentenced to State Prison for an indeterminate term:
A. ☐ For LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts _____.
B. ☐ For LIFE WITH POSSIBILITY OF PAROLE on counts _____.
C. ☐ For 15 years to life, WITH POSSIBILITY OF PAROLE on counts _____.
D. ☒ For 25 years to life, WITH POSSIBILITY OF PAROLE on counts 1.
E. ☐ For other term prescribed by law on counts _____. *(Specify term on separate sheet if necessary.)*

PLUS enhancement time shown above.

5. ☐ Indeterminate sentence shown on this abstract to be served ☐ consecutive to ☐ concurrent with any prior incompleted sentence(s).

6. Other Orders: *(List all consecutive/concurrent sentence relationships, fines, etc. if not shown above)*

Sentence imposed shall be consecutive to case #NA011649 imposed by Los Angeles.

Dept. of Corrections to collect $300.00 purs to 13967 GC.

(Use an additional page if necessary.)

7. ☒ The Court advised the defendant of all appeal rights in accordance with rule 470, California Rules of Court. (AFTER TRIAL ONLY)

8. EXECUTION OF SENTENCE IMPOSED:
A. ☒ AT INITIAL SENTENCING HEARING B. ☐ AT RESENTENCING PURSUANT TO DECISION ON APPEAL C. ☐ AFTER REVOCATION OF PROBATION D. ☐ AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170(d)) E. ☐ OTHER

9. DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR)	CREDIT FOR TIME SPENT IN CUSTODY	TOTAL DAYS	INCLUDING: ACTUAL LOCAL TIME	LOCAL CONDUCT CREDITS	STATE INSTITUTIONS
02/25/94		943	629	314	☐ DMH ☐ CDC

10. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:
☒ FORTHWITH ☐ AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:
☐ CALIF. INSTITUTION FOR WOMEN—FRONTERA ☐ CCWF—CHOWCHILLA ☐ CALIF. INSTITUTIONS FOR MEN—CHINO ☐ DEUEL VOC. INST.
☐ WASCO ☐ SAN QUENTIN ☐ R.J. DONAVAN
☒ OTHER R.J. DONOVAN

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

CLERK OF THE COURT

DEPUTY'S SIGNATURE _____ DATE 03/07/94

396

This form is prescribed under Penal Code § 1213.5 to satisfy the requirements of § 1213 for indeterminate sentences. Attachments may be used but must be referred to in this document.

Form Approved by the Judicial Council of California Effective January 1, 1993

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE
CR 292

Pen. C. § 1213.5

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