No. _____

IN THE

Supreme Court of the United States

JORDY OCHOA,

Petitioner,

v.

ROBERT LUNA, SHERIFF OF LOS ANGELES COUNTY,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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NOT FOR PUBLICATION

FILED

SEP 25 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORDY EZEQUIEL OCHOA, AKA Jordy Ochoa, AKA Jordy Ezequil Ochoa-Cordova, Petitioner-Appellant, v. L. R. THOMAS, Metropolitan Detention Center, Los Angeles, California; DONALD H. BLEVINS, Respondents-Appellees.	No. 21-55906 D.C. No. 2:11-cv-06864-JGB-GJS MEMORANDUM*

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

Argued and Submitted September 11, 2024
Pasadena, California

Before: IKUTA, FRIEDLAND, and LEE, Circuit Judges.

Jordy Ochoa appeals the district court's denial of his petition for a writ of habeas corpus. Our jurisdiction arises under 28 U.S.C. §§ 1291, 2253. We review the district court's denial de novo and affirm. *Garding v. Mont. Dep't of Corr.*, 105 F.4th 1247, 1256 (9th Cir. 2024).

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

Ochoa was charged with being a felon in possession of a firearm. In a separate case, the court scheduled a probation hearing for after the criminal trial to determine whether Ochoa had possessed a firearm in violation of his probation. In his criminal trial, the jury hung. After declaring a mistrial, the judge announced in a separate probation hearing that she would not revoke his probation, stating that the prosecution had not proved he possessed a gun by a preponderance of the evidence. Ochoa was later retried on the criminal charge and convicted.

He seeks a writ of habeas on two grounds. First, he claims California violated his Fifth Amendment right against double jeopardy when it successfully retried him for unlawful possession of a firearm by a felon. Second, he contends his trial attorney's failure to object to the second trial on double jeopardy grounds constituted ineffective assistance of counsel in violation of the Sixth Amendment. Both arguments fail.

Under 28 U.S.C. § 2254(d)(1), a federal court can grant a writ of habeas corpus only if the state adjudication contradicts or unreasonably applies "clearly established Federal law, as determined by the Supreme Court of the United States." The Antiterrorism and Effective Death Penalty Act (AEDPA) thus requires federal courts to apply a highly deferential standard of review. *Renico v. Lett*, 559 U.S. 766, 773 (2010). Absent a clear answer from the Supreme Court to the question presented, the state court's decision should stand. *See Wright v. Van Patten*, 552

U.S. 120, 125-26 (2008) (per curiam).

Double Jeopardy Claim. Ochoa argues that he should not have been retried on the felon in possession of a firearm charge because the judge had declined to revoke his probation, finding that the prosecution did not prove by a preponderance that Ochoa unlawfully possessed a gun. Ochoa claims that this finding should preclude the later criminal prosecution because double jeopardy incorporates collateral estoppel principles. *Ashe v. Swenson*, 397 U.S. 436, 442-43 (1970).

His argument fails because the Supreme Court has never established that a finding from a probation hearing—which is a civil proceeding, *see Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) ("[T]he revocation of parole is not a part of the criminal prosecution,")—can qualify as a judgment of acquittal for double jeopardy purposes. Rather, the Court has applied double jeopardy only when both proceedings are criminal. *Ashe*, 397 U.S. at 446. Thus, Ochoa's double jeopardy claim is not based on "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The cases that he cites only clearly establish that judgments in criminal proceedings can constitute acquittals, and probation hearings are not criminal proceedings. *See Evans v. Michigan*, 568 U.S. 313, 318 (2013) (defining "acquittal" in the context of a criminal proceeding).

Ineffective assistance of counsel. Ochoa also argues his trial lawyer's failure to object on double jeopardy grounds to the second trial amounts to ineffective

assistance of counsel in violation of the Sixth Amendment.[1] An ineffective assistance of counsel claim requires a showing that (1) counsel performed deficiently and, as a result, (2) the client suffered prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The alleged failure of Ochoa's trial lawyer falls well short of satisfying either prong of *Strickland*.

To find deficient performance, the court must review trial counsel's actions deferentially and conclude the reviewed actions fell "outside the wide range of professionally competent assistance." *Id.* at 689-90. Failure to raise meritless arguments does not amount to deficient action. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985). Further, under AEDPA's § 2254(d)(1), after a state court adjudicates an ineffective assistance claim, the federal court's review of the trial attorney's performance becomes doubly deferential because of the further deference given to the state court's earlier review. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Ochoa's trial attorney's actions do not count as deficient because no caselaw would lead a lawyer to expect the double jeopardy claim to succeed. Given our

[1] Prior to oral argument before our court, Ochoa never argued that counsel was ineffective for failing to move for a directed verdict in the first trial after the court's probation ruling. That argument is therefore forfeited. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018) ("The usual rule is that arguments raised for the first time on appeal or omitted from the opening brief are deemed forfeited.").

highly deferential standard and our conclusion above, we cannot say the decision by Ochoa's attorney to not make the double jeopardy argument qualifies as deficient performance. *See Boag*, 769 F.2d at 1344.

Ochoa also suffered no prejudice because raising a double jeopardy objection to the second trial would not have prevented his conviction. A court finds prejudice upon a showing of a substantial likelihood that, but for counsel's deficient performance, the outcome at trial would differ. *Harrington*, 562 U.S. at 112. He has failed to meet that bar.

We **AFFIRM** the district court's denial of Ochoa's habeas corpus petition.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JORDY OCHOA, Petitioner v. L.R. THOMAS, et al., Respondents.	Case No. CV 11-6864-JGB (GJS) **FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Final Report and Recommendation is submitted to United States District Judge Jesus G. Bernal, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

This case was filed nearly a decade ago and had a long and complicated history before it was ultimately referred to the undersigned. The Court will therefore summarize the case's procedural history in brief.

On August 19, 2011, Petitioner, on a *pro se* basis, filed a habeas petition pursuant to 28 U.S.C. § 2254. [Dkt. 1, "Petition."] The Petition challenged an August 26, 2009 state court conviction in Los Angeles County Superior Court Case

No. BA349945 ("State Conviction") and raised a single federal habeas claim alleging that "Petitioner's 5th Amendment's Protection Against Double Jeopardy Was Violated [*sic*]" by his retrial following a finding in his favor at his parole revocation hearing, given that the California Court of Appeal had found that the threshold requirements of collateral estoppel had been satisfied. [Petition at 6-7.] Respondent filed an Answer and lodged certain portions of the state record. [Dkt. 20, "Lodg."] Petitioner did not file a Reply and the case, therefore, was under submission as of early 2012. [*See* Dkt. 21.]

In August 2012, Petitioner moved to have the Office of the Federal Public Defender appointed as counsel, and the originally-assigned United States Magistrate Judge (Carla M. Woehrle) granted the motion. [Dkts. 22-23.] Petitioner thereafter sought eight extensions of time to file a Reply to the Answer, and his requests were granted. [Dkts. 24-40.]

Despite his repeated extension requests, Petitioner did not file a Reply. Instead, in May 2013, he filed a motion seeking leave to amend the Petition to add "two new claims" [Dkt. 41, "Amendment Motion"] and lodged portions of the Clerk's Transcript and the Reporter's Transcript from the State Conviction proceedings [Dkts. 43-1 through 43-10].[1] With the Amendment Motion, Petitioner lodged a Proposed First Amended Petition that pleaded a double jeopardy claim now supported by and based on arguments involving federal constitutional principles and federal law (and which added a new related ineffective assistance of trial counsel subclaim, collectively alleged as Ground Three) and added two entirely new claims, one based on "actual innocence" (Ground One) and the other alleging that trial counsel provided ineffective assistance in at least 15 respects (Ground Two). [Dkt.

[1] The Clerk's Transcript has been lodged as two separate documents [Dkts. 43-1 and 43-2, collectively "CT"]. The Reporter's Transcript for Petitioner's first trial has been lodged as four separate documents [Dkts. 43-3, 43-4, 43-5, and 43-6, collectively "RT1"]. The Reporter's Transcript for Petitioner's second trial has been lodged as four separate documents [Dkts. 43-7, 43-8, 43-9, and 43-10, collectively "RT2"].

41-2, along with attached Exhibits 1-24, "First Amended Petition" or "FAP".] Concurrently, Petitioner filed a motion to stay the case, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), while he pursued exhaustion of the new claims. [Dkt. 42 and Exs. 25-29, "Stay Motion."] After receiving six extensions of time, Respondent filed an Opposition to both the Amendment Motion and the Stay Motion on October 11, 2013 [Dkt. 61]. Respondent reiterated his contention – made earlier in his Answer to the original Petition – that Petitioner had not exhausted a federal double jeopardy claim through his direct appeal and had presented only a state law collateral estoppel claim, as the California Court of Appeal found. [*Id.* at 5.] On November 8, 2013, Petitioner filed a Reply [Dkt. 64]. The Reply did not address Respondent's above-noted contention and argued that all of Petitioner's claims were exhausted due to his efforts to pursue habeas relief at the trial court and California Court of Appeal levels. [*Id.* at 4-7.]

On January 10, 2014, Judge Woehrle granted the Stay Motion and issued a *Rhines* stay of this case. [Dkt. 65.] While Petitioner's state exhaustion efforts were pending, on March 28, 2014, Judge Woehrle vacated the Amendment Motion in light of the pending stay proceedings. Her Order provided that Petitioner could "renew" the Amendment Motion following the completion of his state exhaustion proceedings. [Dkt. 70.]

On September 17, 2014, Petitioner filed a notice advising that the California Supreme Court had denied his habeas petition, and he asked to renew the Amendment Motion. [Dkt. 79.] On September 18, 2014, Judge Woehrle lifted the *Rhines* stay and directed the parties to meet and confer regarding a schedule for further briefing on the Amendment Motion. [Dkt. 80.] In response, the parties stipulated that Respondent would file an Answer to the FAP and Petitioner would file a Reply to that Answer by set dates (even though the Amendment Motion remained pending), and Judge Woehrle so ordered. [Dkts. 82, 84.]

On September 24, 2014, Petitioner filed Exhibit 30 to the First Amended

Petition. [Dkt. 83.] After receiving several extensions of time, Respondent filed a combined Answer to and Motion to Dismiss the First Amended Petition on January 26, 2015. [Dkt. 92.] Petitioner thereafter, requested, and was granted, 14 extensions of time to file a combined Traverse and Opposition, which Petitioner did on November 7, 2016. [Dkt. 126.][2] On March 8, 2017, Respondent filed a combined Reply to the Traverse and "objection" to the Amendment Motion. [Dkt. 132.][3]

On November 17, 2020, the Court issued its Report and Recommendation in this action [Dkt. 140, "Original Report"]. After resolving certain procedural issues in Petitioner's favor, the Original Report addressed Petitioner's claims on their merits and recommended that habeas relief be denied. After requesting, and receiving, three extensions of time to file objections to the Original Report, Petitioner filed his Objections on May 6, 2021 [Dkt. 149]. Respondent did not file Objections or a Reply to Petitioner's Objections. In his Objections, Petitioner objects to the Court's substantive, merits analysis in a number of respects and also raises certain objections as to procedural matters. The Court now issues this Final Report and Recommendation to address some of those procedural objections, to clarify some of the Original Report's statements, which Petitioner appears to have misunderstood, and to correct any typographical or citation errors. The Court leaves Petitioner's objections regarding the substance of the Court's merits analysis to the United States District Judge for de novo review. The additional comments and matters included within this Final Report and Recommendation do not affect or alter the Court's Original Report analysis and conclusions with respect to the merits of

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[2] In the interim, upon Judge Woehrle's retirement, this case was referred to another United States Magistrate Judge. [Dkt. 116.] Eventually, the case was transferred from that judge and referred to the undersigned. [Dkt. 136.]

[3] In his Answer, Respondent repeated his contention that Petitioner did not present his federal double jeopardy claim in his direct appeal. [Dkt. 92 at 10.] In his Traverse, in response, Petitioner stated that he had exhausted all of this claims through his California Supreme Court habeas petition, which was denied on the merits on September 10, 2014. [Dkt. 126 at 7.]

Petitioner's habeas claims – the actual substance of the Court's recommendations – and, therefore, the parties have not been given an opportunity to file additional objections.

The matter is submitted and ready for decision. For the reasons set forth below, the Court GRANTS the Amendment Motion and recommends that the District Judge deny the First Amended Petition on its merits.

PRIOR PROCEEDINGS

On January 5, 2009, in the State Conviction proceedings, Petitioner was charged with possession of a firearm by a felon in violation of California Penal Code § 12021(a)(1). (Lodg. Ex. B.) On June 19, 2009, trial commenced with jury selection and then proceeded over the next several days. [CT 98-105, 121-22, 127-28.] On June 24, 2009, shortly after commencing deliberations, the jury submitted a note indicating that the jurors were "unable to decide" and "it appears there is no hope of reaching a unanimous verdict." [CT 120.] The jurors asked to review evidence and testimony again, as well as to review items that had not been admitted into evidence. [CT 119, 123-26, 130.] On June 26, 2009, the jury advised that it was "still unable to reach a verdict." [CT 129.] After polling the jury, the trial court declared a mistrial. [CT 132; RT1 245-52.]

Prior to the institution of the State Conviction proceedings, a separate case – No. BA326153 – had been initiated in the Los Angeles Superior Court, in which Petitioner pled no contest to one of the charged counts and received probation and a 165-day jail sentence, with credits in the same amount ("Case BA326153"). [Lodg. Ex. A at 3-15.] As discussed *infra*, many of the proceedings in the State Conviction case and Case BA326153 occurred concurrently. After the State Conviction jury trial ended in a mistrial on June 26, 2009, Case BA326153 was set for a probation violation hearing before the same trial judge. She found that Petitioner was not in violation of probation, although his probation remained revoked, and did not decide

the question of whether Petitioner could be held in violation of probation following the retrial in the State Conviction case. [Lodg. Ex. A at 16-17.]

On August 21, 2009, a second jury trial commenced in the State Conviction case and continued for several days. [CT 138-42.] The jury retired to deliberate for one hour on August 25, 2009, and resumed at 9:35 a.m. the next day, August 26, 2009. That afternoon, following the lunch break, the jury continued to deliberate and reached a verdict of guilty at 3:21 p.m. [CT 167-68.] Petitioner was sentenced immediately thereafter to probation for three years with 365 days in county jail and credit for 392 days served. [CT 168-70.]

Petitioner appealed the State Conviction. He argued that his retrial has been barred by state law collateral estoppel principles due to the trial court's ruling failing to revoke probation in Case BA326153, and asserted that this collateral estoppel claim was not forfeited by trial counsel's failure to raise a double jeopardy objection, because the failure to object was ineffective assistance. He also asked the state appellate court to independently review the transcript of the trial court's *Pitchess* hearing. [CT 186-87; Lodg. Exs. D-F.] On January 4, 2011, in a published decision, the California Court of Appeal affirmed the judgment, finding that Petitioner's state law collateral estoppel argument failed under California's "public policy" exception to the collateral estoppel doctrine, and as a result, his counsel did not provide ineffective assistance by failing to make the collateral estoppel objection. [Lodg. Ex. G.; *see also People v. Ochoa*, 191 Cal. App. 4th 664, 655-57 & n.8 (2011).] While noting that Petitioner had referred to the term "double jeopardy," the California Court of Appeal found that he "presents no argument that his second trial contravened the jeopardy clause of the federal or State Constitution[s], insofar as they implicate principles other than the doctrine of collateral estoppel" and he "has thus forfeited any such contention." [*Id.* at 668 n.5.] Petitioner sought review in the California Supreme Court, re-raising his same state law collateral exception argument as in the lower appellate court. As Petitioner put

it to the state high court, the "the only question is whether the public policy exception to the doctrine of collateral estoppel applies here." [Lodg Ex. H at 3; *see also id.*at 10: "Review Should Be Granted To Consider Whether The Public Policy Exception To The Doctrine Of Collateral Estoppel Applies When The Prosecution Has Failed To Prove Its Case Even By A Preponderance Of The Evidence Standard After A Full Criminal Trial"; and *id.* at 14: "The Sole Issue Is Whether The Public Policy Exception To The Doctrine Of Collateral Estoppel Applies To This Case."] Significantly, Petitioner did not challenge, or even mention, the California Court of Appeal's finding that he had not raised a double jeopardy claim under either the federal or state constitutions. [Lodg. Ex. H, *passim*.][4] On April 20, 2011, the California Supreme Court denied review without comment or citation to authority. [Lodg. Ex. I.]

Following his conviction, Petitioner was removed to Honduras on April 8, 2010. On or about May 17, 2011, Petitioner was found in Los Angeles County, a detainer issued after Petitioner was arrested on a local warrant, and he was released to federal immigration authorities on May 20, 2011. A federal complaint issued in this District charging Petitioner with violating 8 U.S.C. § 1326(a) and (b)(2), and on September 26, 2011, Petitioner pled guilty in Case. No. 2:11-cr-00603-SVW. [Lodg. Exs. J-K.] On December 12, 2011, Petitioner received a term of three years, with three years supervised release. He appealed, and the United States Court of Appeals for the Ninth Circuit vacated the sentence and remanded for resentencing. On June 3, 2013, Petitioner was sentenced to a 33-month prison term, with three years of supervised release. [Dkts. 29, 42, 48, and 50 in Case No. 2:11-cr-00603-SVW.]

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[4] As he did in his California Court of Appeal briefing, Petitioner's California Supreme Court petition mentioned the term "double jeopardy" in passing, but never indicated that – in addition to the state law collateral estoppel/public policy exception claim that he said was the "only" and "sole" issue to be reviewed by the state high court – he also was raising a claim that the *federal* Double Jeopardy Clause had been violated by his retrial.

In the meantime, this action proceeded as described above. In his Answer to the original Petition filed in December 2011, Respondent argued that the federal double jeopardy claim alleged was unexhausted. After counsel was appointed for Petitioner and the Amendment Motion and Stay Motions were filed nine months later, Petitioner filed a habeas petition in the trial court, alleging not only the new actual innocence and ineffective assistance of counsel claims pleaded in the First Amended Petition as Grounds One and Two but also the revamped version of the original Petition's double jeopardy claim now alleged in the First Amended Petition as Ground Three. [Dkt. 46.] On June 21, 2013, the trial court denied the petition, finding that Petitioner was not in actual or constructive state custody pursuant to the State Conviction and had failed to appeal the State Conviction. [Dkt. 75-1.] On June 28, 2013, Petitioner moved for reconsideration, arguing that he had been on state probation at the time he filed his habeas petition and, in fact, had appealed the State Conviction. [Dkt. 75 at 2.] On July 25, 2013, the trial court terminated Petitioner's probation imposed in connection with the State Conviction. [Dkt. 61-1.] On August 1, 2013, ruling on the reconsideration motion, the trial court noted that Petitioner was "no longer on state probation" and then considered (and denied) two of his claims on their merits and denied the third double jeopardy claim on the ground that the issue had been raised on appeal. [Dkt. 64-1.]

Petitioner next sought habeas relief in the California Court of Appeal, filing a petition that raised his present claims. [*See, e.g.,* Dkt. 66.] On June 27, 2014, the California Court of Appeal denied the petition on the ground that Petitioner "has failed to satisfy the habeas corpus jurisdictional requirements under California law." [Dkt. 75-1.][5]

[5] The California Court of Appeal cited California Penal Code § 1473 and *People v. Villa*, 45 Cal. 4th 1063 (2009). Section 1473 states that a person "unlawfully imprisoned or restrained" may pursue habeas relief. *Villa* held that a petitioner whose state probation period had ended and who then was placed in immigration deportation proceedings was not in actual or constructive custody for habeas purposes. *Id.* at 1072.

Petitioner then filed a habeas petition in the California Supreme Court, again raising his three present claims. In addition to his merits arguments, Petitioner argued that jurisdiction existed, because he had been in custody at the time he initiated his round of state habeas proceedings and because the State Conviction had been used to enhance his sentence for his present federal conviction, for which he currently was serving a period of supervised release. [Dkt. 77.] On September 10, 2014, the California Supreme Court denied the petition in an order stating simply that it was doing so "on the merits" and citing *Harrington v. Richter*, 562 U.S. 86 (2011). [Dkt. 79.][6]

PETITIONER'S HABEAS CLAIMS

The First Amended Petition raises the following three claims:

Ground One: Petitioner is actually innocent of the offense of which he was convicted, in violation of his federal constitutional rights to due process and to be free from cruel and unusual punishment. [FAP at 5 and attached Memorandum ("Mem.") at 4-14.[

Ground Two: Trial counsel provided ineffective assistance of counsel by failing to investigate and present exculpatory evidence and by failing to make crucial objections at trial. [FAP at 5; Mem. at 14-26.]

Ground Three: Petitioner's retrial violated the Double Jeopardy Clause and counsel provided ineffective assistance by failing to raise a double jeopardy objection. [FAP at 6; Mem. at 27-32.]

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[6] The portion of the *Richter* decision cited by the California Supreme Court involved the Supreme Court's holding that when a state court presented with a federal claim denies relief, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law principles to the contrary" and that this presumption can be overcome "when there is reason to think some other explanation for the state court's decision is more likely." 562 U.S. at 99-100.

THE "PENDING" AMENDMENT MOTION

The Amendment Motion did not actually receive a ruling during the proceedings described above. Nonetheless, as ordered by the originally-assigned Magistrate Judge, the parties have briefed the merits of the claims alleged in the First Amended Petition, as well as procedural issues relating to exhaustion and timeliness, as if it were the operative petition in this case.

Federal Rule of Civil Procedure 15(a)(2) governs amendment here and is to be applied liberally. *See Janicki Logging Co. v. Mateer,* 42 F.3d 561, 566 (9th Cir. 1994). "Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (citation omitted). Respondent does not contend that Plaintiff has acted in bad faith or that Respondent will be prejudiced if amendment is allowed, and there is no factual or legal basis for finding adversely to Petitioner on either factor, nor has there been any prior, yet unsuccessful, attempt at amendment by Petitioner. Whether or not amendment should be allowed here instead turns on the futility and delay factors; Respondent argues that amendment would be futile, because the claims alleged in the FAP are not only unexhausted but untimely.

In the next two Sections, the Court addresses the defenses of exhaustion and untimeliness raised by Respondent. As explained below, the Court rejects Respondent's exhaustion argument and concludes that the timeliness issue need not be resolved before proceeding to the merits. Under these circumstances, the Court concludes that the factors of futility and delay are not sufficiently adverse to Petitioner to warrant denying amendment. Indeed, under the procedural posture of this case – in which the parties already have fully briefed the merits of the claims alleged in the FAP – denying amendment at this belated juncture would be an empty

and ineffective gesture, if not an abuse of discretion. Accordingly, the Amendment Motion is GRANTED.

THE EXHAUSTION ISSUE

In his Answer to the original Petition, Respondent asserted that the sole claim pleaded (alleging a double jeopardy violation) was unexhausted, because it had not been fairly presented as a federal claim in Petitioner's direct appeal. As outlined above, Petitioner thereafter filed the First Amended Petition that added two new claims and expanded the originally-asserted double jeopardy claim to include federal law arguments, and this case was stayed. By the time the stay issued, Petitioner was well into his exhaustion proceedings, having already filed an unsuccessful trial court habeas petition that raised Grounds One through Three and then a habeas petition in the California Court of Appeal, again raising all three claims. That exhaustion process concluded on September 10, 2014, when the California Supreme Court denied habeas relief on the "merits." By the time that state high court petition had been filed, Petitioner's probation imposed in connection with the State Conviction had been terminated for over a year.

Respondent contends that this case should be summarily dismissed for lack of exhaustion for several reasons. [*See, e.g.,* Dkt. 92 at 8-11; Dkt. 132 at 22-36.] First, Respondent concedes that the original Petition was timely filed but argues that its dismissal is required nonetheless, because the single claim alleged in the original Petition was unexhausted at the time it was brought here and all claims must be exhausted before federal habeas relief is sought. Second, Respondent argues that the three claims alleged in the First Amended Petition are unexhausted, because when Petitioner presented them in a habeas petition to the California Supreme Court, he no longer was in state custody and the state courts lacked jurisdiction to consider his claims. Third, Respondent asserts that, because the claims allegedly are unexhausted, they also are "procedurally defaulted."

With respect to Respondent's third argument, he mistakenly conflates the exhaustion doctrine with the procedural default rule, and his invocation of the latter is unavailing.

> The doctrine of exhaustion and the procedural default rule are two different things. Exhaustion generally requires that before a federal court will review a constitutional claim in habeas, the claim must first be fairly presented to the state court system. The requirement is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." [*Murray v. Carrier*, 477 U.S. 478, 489 (1986)], quoting *Rose v. Lundy*, 455 U.S. 509, 518 . . . (1982). The procedural default rule requires that if a state court rejects a habeas petitioner's federal constitutional challenge on the adequate and independent state ground that the claim is defaulted under a state procedural rule, a federal habeas court is ordinarily precluded from reviewing that claim unless the petitioner can show cause for the default and prejudice resulting from it. *Wainwright* [*v. Sykes*, 433 U.S. 72, 87 (1977)]. The rule is based on the principles of comity and is intended to promote judicial efficiency and economy. *Id.* at 88 . . . . Thus, these two facets of federal habeas corpus jurisprudence are different mechanisms devised to effectuate different, though related, policy considerations.

Justus v. Murray, 897 F.2d 709, 713 (4th Cir. 1990). *See also Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002) (clarifying that: "[e]xhaustion and procedural default are distinct concepts in the habeas context," and that "[t]he two doctrines developed independently and on different grounds, apply in different situations, and lead to different consequences"; exhaustion applies "when the state court has never been presented with an opportunity to consider a petitioner's claims and that opportunity may still be available to the petitioner under state law"; and "[]in contrast, the procedural default rule barring consideration of a federal claim 'applies only when a state court has been presented with the federal claim,' but declined to reach the issue for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally barred'") (citation omitted).

In this case, the California Supreme Court – when presented with the three claims alleged in the FAP – stated that it had resolved them on their "merits" and did not invoke any California procedural bar to deny relief. The federal procedural default rule simply has no application to this situation.

Respondent's first argument fails on its face as well. As a threshold matter, the Court agrees that Petitioner's double jeopardy claim alleged in the original Petition was not exhausted at the time this case commenced, because Petitioner had not raised any federal double jeopardy claim in his direct appeal, as the California Court of Appeal expressly found. Petitioner's contention in the Objections that he raised his current federal double jeopardy claim in his opening brief filed in the California Court of Appeal plainly fails. Although the brief noted, without comment or argument, a state court's observation that collateral estoppel "is an aspect of the Fifth Amendment's protection against double jeopardy," this mere passing reference was insufficient to apprise the state appellate court that Petitioner was tendering a *federal* double jeopardy constitutional claim in addition to his state law collateral estoppel claim, given that the entirety of Petitioner's argument that his retrial was improper focused, and rested, solely on state law collateral estoppel issues. [*See* LD 20, Exs. D and F, *passim*.] The same is true of the petition for review that Petitioner filed in the California Supreme Court, which expressly and repeatedly told the state high court that the "sole" and "only" question it was to review was whether the lower court had erred in applying California's public policy exception to the state law collateral estoppel doctrine. Indeed, it is telling that Petitioner opted not to challenge and seek review of the California Court of Appeal's finding that he had *not* raised any federal double jeopardy claim at the state appellate court level. [*See* Lodg. 20. Ex. H, *passim*.]

Thus, while Respondent correctly observes that the double jeopardy claim alleged in the original Petition was not exhausted at the time the Petition was filed, Respondent ignores a critical rule. While a state prisoner is required to exhaust his

claims before a federal habeas court may grant him relief – 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 843 (1999) – this is not the same thing as requiring that exhaustion take place before he files a federal habeas petition. Indeed, under Ninth Circuit authority, a state prisoner may file a fully unexhausted federal habeas petition and then seek and obtain a *Rhines* stay (assuming he meets the requisites for such a stay). *Mena v. Long*, 813 F.3d 907, 910-12 (9th Cir. 2016). That is exactly what Petitioner did; he filed a fully unexhausted Petition and later asked for a *Rhines* stay, was granted one, and then exhausted all three of his claims. Dismissing this case on the ground that the double jeopardy claim alleged in the original Petition was unexhausted would be contrary to Ninth Circuit precedent.

Respondent's second, and primary, exhaustion argument is that the FAP is unexhausted because the California Supreme Court assertedly lacked jurisdiction to consider the state habeas petition before it. Respondent describes how Petitioner was no longer in actual or constructive custody under state law when the trial court – having been alerted to the issue and its initial habeas error once Petitioner sought reconsideration – terminated his probation on July 25, 2013. Respondent approvingly cites the California Court of Appeal's denial of habeas relief on this basis, *i.e.,* that Petitioner was no longer in custody under the State Conviction. Respondent then asserts that the California Supreme Court "lacked jurisdiction" to "grant relief" and, thus, "properly rejected" Petitioner's claims.

Even if the Court assumes, *arguendo*, that Respondent is correct that, under California law, Petitioner was "ineligible for relief" (*Villa*, 45 Cal. 4th at 1066) when he filed his California Supreme Court habeas petition, because he was not in actual or constructive custody, this nonetheless is of no moment for the exhaustion issue. Respondent, inexplicably, ignores that the California Supreme Court clearly and explicitly stated that it had denied habeas relief "on the merits." [Dkt. 79 at 4.] The custody issue had been squarely teed up to it; in his state high court petition,

Petitioner argued vigorously that the trial court had erred in finding he was not in custody when he filed his initial petition and that his liberty was presently restrained, thus warranting habeas review. [Dkt. 77-1 at 16-18.] Had the California Supreme Court disagreed and concluded that jurisdiction to consider the habeas petition was lacking, it could have simply denied relief expressly on that basis (as did the California Court of Appeal) or without comment, giving rise to a presumption that it denied relief on the same ground as the lower court. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that federal habeas court "look[s] through" summary denial of claim to last reasoned decision from state courts to address claim). Instead, the California Supreme Court explicitly denied the petition "on the merits" and cited *Richter* for the proposition espoused therein that a merits denial is presumed absent a reason to think otherwise. Under these circumstances, the "look through" doctrine plainly is inapplicable.[7]

Respondent argues that it is "incongruous" to believe that the California Supreme Court reached the merits of the claims before it and that the existence of the *Villa* decision is a reason to find the *Richter* presumption to have been overcome. Had the California Supreme Court issued a true silent denial, that argument might have some facial appeal. But it did not and however "incongruous" Respondent might find it, the state high court chose not to follow the lower appellate court's ruling and, instead, expressly indicated that it had elected to consider the petition and deny it "on the merits," citing *Richter*. It is presumed "that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*); *see also Musladin v. Lamarque*, 555 F.3d 830, 838 n.6 (9th Cir. 2009)

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[7] *See Robinson v. Lewis*, 9 Cal. 5th 883, 895-96 (Cal. 2020), in which the California Supreme Court reiterated that each time a habeas petition is filed in a particular level of the California court system, "it is a *new* petition invoking the higher court's *original* jurisdiction," the higher court is "not bound by" any factual findings made by the lower court, although it will give them great weight, and it does "not directly review the lower courts' rulings." The state high court's explicit "merits' basis for denying relief necessarily demonstrates that it did not render its decision on the same basis as the court below, *i.e.,* on the ground that jurisdiction was lacking.

(federal habeas courts are "bound" to presume that state courts know and follow the law). Having utilized the words "on the merits" in conjunction with its *Richter* cite, the California Supreme Court did something very intentional and specific, and this Court *must* treat the California Supreme Court's Order as a merits resolution of the petition before it and not as one that denied relief based on a finding of a lack of jurisdiction. As Petitioner received a merits consideration of his three claims by the state's highest court, those claims are exhausted.[8]

THE TIMELINESS ISSUE

In contrast to Respondent's exhaustion argument, his contention that the First Amended Petition is untimely is not so easily and quickly resolvable.

Petitioner's direct appeal concluded in April 2011, and thus, his limitations period – if calculated under 28 U.S.C. § 2244(d)(1)(A) – would have expired in July 2012. Respondent concedes that the original Petition alleging only a double jeopardy claim was timely and that the double jeopardy claim realleged in the First Amended Petition is timely, because it relates back to the timely-filed original Petition. [Dkt. 92 at 6; Dkt. 132 at 48.] The Court agrees that the Ground Three double jeopardy claim – even though unexhausted at the time it originally was

[8] To the extent, as it appears, that Respondent's real argument is that the California Supreme Court committed state law procedural error in resolving the habeas petition on its merits instead of denying relief for lack of jurisdiction, and that Respondent further urges this Court to find that state law error occurred, the Court will not entertain such a suggestion. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (explaining that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Martinez v. Ryan*, 926 F.3d 1215, 1224 (9th Cir. 2019) (finding that the Circuit Court lacked jurisdiction to consider contention that state court had erred in its application of a state law procedural rule to bar claim); *Johnson v. Foster*, 786 F.3d 501, 508 (7th Cir. 2015) ("a federal habeas court is not the proper body to adjudicate whether a state court correctly interpreted its own procedural rules, even if they are the basis for a procedural default"); *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999) (holding that "[f]ederal habeas courts lack jurisdiction . . . to review state court applications of state procedural rules" and declining to consider claim that state court had misapplied state procedural rule when finding claim to be barred).

raised – is timely due to the *Rhines* stay that issued in this case. *See King v. Ryan*, 564 F.3d 1133, 1140 (9th Cir. 2009); *see also Duran v. Cate*, No. CV 16-2666-AG (FFM), 2016 WL 11522305, at *2 (C.D. Cal. Sept. 30, 2016) ("the implementation of a stay under *Rhines* holds a petitioner's place in federal court so that any timely but unexhausted claims are not rendered untimely when the petitioner returns to federal court after fully exhausting all his claims").

Unlike Petitioner's Ground Three double jeopardy claim, his actual innocence claim (Ground One) and his ineffective assistance claim (Ground Two) were not alleged in the original timely Petition and were not proffered as possibilities in this case until May 2013, well after Petitioner's limitations period had run if the typically applicable Section 2244(d)(1)(A) accrual period governs them. Petitioner concedes that the claims are untimely if Section 2244(d)(1)(A) applies to them. [Dkt. 41 at 6.] Petitioner, however, offers a number of alternate possibilities as to why Grounds One and Two allegedly are timely. He argues that these claims relate back to the timely filing date of the original Petition. He also argues that these two claims are subject to the 28 U.S.C. § 2244(d)(1)(D) delayed accrual rule for claims based on a factual predicate whose discovery was delayed notwithstanding diligence, arguing that the claims did not accrue until counsel was appointed in this case on August 27, 2012. Finally, Petitioner argues that if the claims are not timely under the foregoing theories, they are timely under the actual innocence exception to the statute of limitations.[9]

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[9] Petitioner also perfunctorily asserts that he is entitled to equitable tolling. His brief argument consists of quotations from various equitable tolling decisions followed by conclusory assertions that he acted with diligence and that his indigence, pro se status, and unspecified "ineffective of assistance of counsel" constitute extraordinary circumstances. These bare assertions, devoid of supporting facts, are inadequate to establish the required extraordinary circumstance. *See, e.g., Ford v. Pliler*, 590 F.3d 782, 789 (9th Cir. 2009) (observing that the equitable tolling "standard has never been satisfied by a petitioner's confusion or ignorance of the law alone"); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1013 n.4 (9th Cir. 2009) ("a pro se petitioner's confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling"); *Roy v. Lampert*, 476 F.3d 964, 970 (9th Cir. 2006) ("[i]t is clear that pro se status, on its

A. Relation Back

1. Grounds One and Two

Petitioner initially argued that his original Petition "advanced the core contention of his innocence" by alleging that his retrial violated the Double Jeopardy Clause, and that as a result, all of his claims relate back to the original double jeopardy claim. [Dkt. 64 at 9-10.] This argument is wholly unpersuasive. The original Petition alleged cursorily a standard double jeopardy claim and no more; it in no way intimated that Petitioner claimed to be actually innocent or that his counsel had provided ineffective assistance in the numerous ways alleged in Ground Two. [Dkt. 1 at 6-6a.] There is no tenable basis for finding that the perfunctory double jeopardy claim asserted in the original Petition and the detailed claims asserted through Grounds One and Two – which rely in substantial part on "new" evidence obtained after the Petition was filed – arise from a common core of operative facts within the relation back standards established by the Supreme Court and Ninth Circuit. *See Mayle v. Felix*, 545 U.S. 644, 650 (2005) ("[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth"); *see also id.* at 662-64; *Hebner v. McGrath*, 543 F.3d 1133, 1134 (9th Cir. 2008) (when the limitations period has run, "a new claim in an amended petition relates back to avoid a limitations bar . . . only when it arises from the same core of operative facts as a

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own, is not enough to warrant equitable tolling"); *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (collecting cases from other circuits and holding that "a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance"); *see also Johnson v. United States*, 544 U.S. 295, 311 (2005) (in the parallel 28 U.S.C. § 2255 context, rejecting a movant/prisoner's attempt to justify his lack of diligence based on his pro se status and lack of legal sophistication, and stating: "we have never accepted pro se representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness"). Given that Petitioner's cursory equitable tolling argument does not come close to meeting his burden of proof, it will not be considered further.

claim contained in the original petition. It is not enough that the new argument pertains to the same trial, conviction, or sentence.").

Grounds One and Two do not relate back to the timely-filed original Petition. The two claims remain untimely absent some other basis for finding them timely.

2. New Ground Three Subclaim

When Petitioner filed the FAP, he not only alleged new claims Grounds One and Two but, as a part of his realleged original double jeopardy claim (now set forth in Ground Three), he slipped in an additional new claim. At the tail end of Ground Three, Petitioner has added a perfunctory ineffective assistance subclaim, arguing that counsel should have asserted a double jeopardy objection to the retrial. [Mem. at 32.] Petitioner argues that this new ineffective assistance claim relates back to the timely substantive double jeopardy claim alleged in the original Petition, because the ineffective assistance claim is "inferred by the facts in the first petition that indicated that he was placed in jeopardy twice for the same offense." [Dkt. 126 at 12-14.] While Petitioner concedes that he "did not specifically raise" this new ineffective assistance claim in the original Petition, he contends that he "was not required to expressly state that counsel failed to raise the double jeopardy objection" for the new ineffective assistance claim to relate back to the originally pleaded double jeopardy claim, relying on *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013).[10] [Dkt. 126 at 12-13.]

In two decisions that predated *Nguyen*, the Ninth Circuit had found that a claim based on a substantive constitutional violation differs in nature and type from a claim alleging ineffective assistance for failing to raise an objection based on the substantive constitutional violation, and thus, raising one such claim does not raise the other. In *Rose v. Palmateer*, 395 F.3d 1108 (9th Cir. 2005), the petitioner raised claims in his state habeas petition that trial counsel failed to argue properly that his

[10] *Nguyen* has been abrogated on another ground not at issue here. *See Hurles v. Ryan*, 914 F.3d 1236, 1237 (9th Cir. 2019) (*per curiam*).

confession was inadmissible in connection with a motion to suppress and that appellate counsel should have raised an argument based on the trial court's adverse ruling on the motion to suppress. When the petitioner attempted to raise a Fifth Amendment claim attacking his confession in his federal habeas case, the Ninth Circuit found that his Sixth Amendment claim raised in the state court did not exhaust the Fifth Amendment claim, because "[w]hile admittedly related, they are distinct claims with separate elements of proof." *Id.* at 111-12. In *Schneider v. McDaniel*, 674 F.3d 1144 (9th Cir. 2012), the Ninth Circuit applied this proposition in the relation back context. The petitioner raised a claim in his original petition that his trial counsel had provided ineffective assistance by failing to investigate his co-defendant's trial strategy, which would have led him to file a timely motion to sever. In an amended petition, he claimed that the trial court's denial of his untimely motion to sever deprived him of due process. *Id.* at 1151. The Ninth Circuit held that the later-raised due process claim did not relate back to the timely ineffective assistance claim, because: "Schneider's original theory was based on trial counsel's alleged failures. His amended theory is based on the trial court's alleged errors. The core facts underlying the second theory are different in type from the core facts underlying the first theory." *Id.*

Nguyen was decided the next year. Petitioner's Nguyen's original petition included an unexhausted claim that his sentence violated double jeopardy and an exhausted claim attacking the sentence under the Eighth Amendment. Nguyen was granted a *Rhines* stay to exhaust the double jeopardy claim along with a claim alleging that appellate counsel had provided ineffective assistance for failing to raise a double jeopardy claim. 736 F.3d at 1291. Respondent later argued that the ineffective assistance claim, which had not been alleged in the timely original petition, did not relate back and, thus, was untimely. The Ninth Circuit opined that the relation back standard, including *Mayle's* "time or type" language, applies only to the facts supporting claims and that differences in the substantive nature of the

claims or grounds asserted do not matter. *Id.* at 1297. The Ninth Circuit concluded that the "facts" that supported all three claims were simple and the same, namely, that Nguyen (1) had served his sentence yet (2) had been resentenced thereafter based on the same count. Without analysis, the Ninth Circuit concluded that the ineffective assistance of appellate counsel claim related back to the substantive double jeopardy claim. *Id.* The *Nguyen* decision did not discuss or acknowledge the *Schneider* decision.

A number of district courts have observed that *Schneider* and *Nguyen* appear to be irreconcilable or in tension and have noted the rule set forth in *Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011) that when a later three-judge panel opinion conflicts with the opinion of an earlier-three judge panel, the earlier decision controls.[11] The Court agrees that there is an obvious tension between the two Ninth Circuit decisions. The *Nguyen* relation back analysis is brief and is dependent on the panel's highly simplified characterization of the underlying "facts" and its view that the substantive nature of the wrong alleged does not matter. *Schneider*, in contrast, examined the differing nature of the facts underlying the substantive claim and the ineffective assistance claim and found that, while one fact overlapped, others did not. In addition, *Schneider* looked to the nature of the wrongs alleged, one based on asserted errors by the trial court and the other on asserted failings by counsel, and found the difference between them to matter for relation back purposes.

The Court, however, need not attempt to resolve this tension. While the two claims at issue here involve different actors and constitutional predicates, they are

[11] *See, e.g., Wildman v. Arnold*, No. CV 16-08570-JLS (JDE), 2017 WL 8186436, at *23 (C.D. Cal. Sept. 25, 2017), accepted by 2018 WL 1226016 (March 6, 2018); *Hines v. Ducart*, No. CV 14-08490-JAK (KES), 2017 WL 2416374, at *9 (C.D. Cal. March 21, 2017), accepted by 2017 WL 2407521 (June 2, 2017); *Gonzales v. Ryan*, No. CV-99-02016-PHX-SMM, 2014 4476558, at *7 (D. Ariz. Sept. 10, 2014); *Posey v. Harrington*, No. CV 10-1779-GW (JPR), 2014 WL 1289604, at *1 (C.D. Cal. March 31, 2014).

tied to a common core of operative facts and a common legal theory. Specifically, both claims rest on Petitioner's assertions that: a mistrial occurred when he was tried on his criminal charges; the trial court, in ruling on a related probation violation charge, declined to find that Petitioner had committed the charged crimes; this probation hearing ruling allegedly acquitted Petitioner of the criminal charges for double jeopardy purposes; and the trial court, thus, should not have scheduled a second trial on the criminal charges. Unlike in *Schneider*, the core facts underlying the two claims here overlap almost entirely (the only additional fact is that counsel failed to object when the second trial was scheduled) and the asserted constitutional violations were contemporaneous in time. And while the Fifth Amendment governs one claim and the Sixth Amendment the other, both claims rest entirely on, and will be resolved based on, Petitioner's contention that the trial court's probation violation ruling was an acquittal for federal double jeopardy purposes.

Given the foregoing and the *Nguyen* decision, the Court concludes that the ineffective assistance subclaim alleged in Ground Three should be deemed to relate back to the timely filing of the original Petition. Thus, this subclaim is timely.

B. Section 2244(d)(1)(D)

Petitioner contends that Section 2244(d)(1)(D) affords him a delayed accrual of the limitations period applicable to Grounds One and Two. He argues that the limitations period for these two claims did not accrue because he lacked counsel, and that the limitations period only accrued and begin running once he was appointed counsel in this case on August 27, 2012.

Section 2244(d)(1)(D), by its terms, applies only when two predicates are met: (1) there is a delayed discovery of the facts giving rise to a claim; and (2) the delay is excusable because the petitioner has exercised diligence. As the Ninth Circuit has made clear, the limitations period begins to run pursuant to Section 2244(d)(1)(D) "'when the prisoner knows (or through due diligence could discover)

the important facts, not when the prisoner recognizes their legal significance.'" *Hasan v. Galaza*, 254 F.3d 1150, 1154 & n.3 (9th Cir. 2001) (citation omitted) (further observing that, once the petitioner was aware of the facts themselves, even if he did not understand their legal significance, the limitations "clock started ticking"). Section 2244(d)(1)(D) does not apply unless a petitioner makes "an adequate showing of due diligence." *Majoy v. Roe*, 296 F.3d 770, 776 n.3 (9th Cir. 2002).

Petitioner, in his Section 2244(d)(1)(D) argument, does not identify a single "fact" of which he was unaware, much less identify why any belatedly-discovered "fact" could not have been discovered previously through the exercise of due diligence. Petitioner's Section 2244(d)(1)(D) argument boils down to his contention that, as a prisoner, he could not have investigated and obtained some of the facts on which Grounds One and Two rest, but this argument is belied by his own allegations. For example, Petitioner alleges that, at the time of trial, his family "specifically directed" his trial counsel to additional exculpatory witnesses, but he did not present them as trial witnesses. Petitioner also alleges that his trial counsel failed to interview his mother or sister, who both would have provided exculpatory information, or percipient witness that Petitioner's mother and other relatives advised counsel wanted to testify on Petitioner's behalf. Petitioner alleges that, prior to his first trial, a critical witness (Jeannette) confessed to Petitioner's sister that she was willing to testify in a manner that exculpated Petitioner and that this fact was conveyed to trial counsel. In addition, Petitioner's sister and mother had provided statements to prior trial counsel regarding the alleged targeting by police of Petitioner based on his pending lawsuit against the police department. [Mem. at 15-20.]

These "facts" underlie Grounds One and Two and plainly either were known to Petitioner as of the time of his trial or would have been had he made any effort to communicate with his family members. That Petitioner did not obtain declarations

and the like to support these known "facts" until he obtained counsel does not implicate Section 2244(d)(1)(D), because the factual predicate of a claim is a habeas petitioner's knowledge of the facts supporting the claim, *not* the evidentiary support proving them. *See Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012) ("factual predicate" for Section 2244(d)(1)(D) purposes means "vital facts," and "if new information is discovered that merely supports or strengthens a claim that could have been properly stated without the discovery, that information is not a 'factual predicate' for purposes of triggering the statute of limitations under § 2244(d)(1)(D)"); *Earl v. Fabian*, 556 F.3d 717, 725-26 (8th Cir. 2009) (rejecting contention that, under Section 2244(d)(1)(D), petitioner's limitations period accrual was delayed until he received his case file and opining that "'[s]ection 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim'") (citation omitted); *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007) ("Clearly, [petitioner] has confused the facts that make up his claims with evidence that might support his claims.") (citing *Johnson v. McBride*, 381 F.3d 587, 589 (7th Cir. 2004) ("A desire to see more information in the hope that something will turn up differs from 'the factual predicate of [a] claim or claims' for purposes of § 2244(d)(1)(D).")); *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005) ("Section 2244(d)(1)(D) does not restart the time when corroborating evidence becomes available"), abrogated on another ground in *McQuiggin v. Perkins*, 569 U.S. 383 (2013); *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998) (rejecting a Section 2244(d)(1)(D) argument such as that made here, because the petitioner "is confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim"); *see also Bunney v. Mitchell*, 241 F.3d 1151, 1155 (9th Cir.), opinion withdrawn on other grounds, 249 F.3d 1188 (9th Cir. 2001) ("Petitioner's argument in this case conflates her knowledge of the 'factual predicate' of a claim with the development of sufficient

evidentiary support to prove the claim. But the text of AEDPA answers Petitioner's argument; under subsection (d)(1)(D), the statute of limitations begins to run when a petitioner knows (or should know through the exercise of due diligence) the facts on which a claim is predicated, without reference to when (or if) she can muster evidence sufficient to prove that claim.").

Petitioner's position – that if a prisoner lacks habeas counsel, he automatically gets a deferred accrual date of his limitations period until such time as he obtains counsel – finds no support in the caselaw interpreting and applying Section 2244(d)(1)(D). Petitioner's reliance on *Martinez v. Ryan*, 566 U.S. 1, 12 (2012), is misplaced, as the quoted language had nothing to do with the accrual of limitations periods for federal habeas claims and, instead, related to the question of whether the ineffective assistance of counsel in an initial review collateral proceeding might serve as "cause" for a prisoner's procedural default of a claim alleging ineffective assistance of trial counsel.

There is no basis here for finding that the predicates for a delayed accrual pursuant to Section 2244(d)(1)(d) apply to either Ground One or Ground Two. Accordingly, these two claims remain untimely.[12]

C. Actual Innocence

Finally, Petitioner invokes the "actual innocence" equitable exception to the Section 2244(d) limitations period for Grounds One and Two. *See McQuiggin*, 569 U.S. at 386. Petitioner's timeliness/actual innocence arguments overlap almost entirely with the merits of Ground One of the FAP, which is a freestanding claim of "actual innocence." In addition, considering them now will also necessarily

[12] In his Objections, Petitioner disagrees with the Court's Section 2244(d)(1)(D) analysis. Given the Court's ultimate conclusion that any untimeliness issue should be set aside in favor of a merits consideration of the FAP's three claims, the Court declines to address Petitioner's arguments, other than to note that it stands by its Section 2244(d)(1)(D) analysis.

duplicate much of the analysis needed in connection with a merits consideration of Ground Two. Put otherwise, resolving Petitioner's invocation of the actual innocence exception to Section 2244(d) necessarily will require the Court to conduct an analysis that will duplicate, if not exceed, that to be done were the Court instead to consider Grounds One and Two on their respective merits. Moreover, were the Court to conclude that resolving the actual innocence issue for timeliness purposes requires further factual development (whether through discovery or an evidentiary hearing), this would render resolution of the issue more difficult and time-consuming than a merits resolution of (at least) Ground One.[13]

In short, the resolution of the timeliness issue in this case at this juncture may be less efficient than a threshold consideration of the merits of Petitioner's claims under Section 2254(d). The AEDPA limitations period is not a jurisdictional bar, and district courts are not required to dismiss based on untimeliness. *Day v. McDonough*, 547 U.S. 198, 205 (2006); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), overruled in part on other grounds by *Calderon v. United States District Court (Kelly V)*, 163 F.3d 530, 540 (9th Cir. 1998); *see also Van Buskirk v. Baldwin*, 265 F.3d 1080, 1083 (9th Cir. 2001) (a district court may deny a petition on its merits rather than reaching "the complex questions lurking in the time bar of the AEDPA"). The Court concludes that a consideration of the merits of Grounds One and Two, pursuant to the Section 2254(d) standard of review, would be proper before resolving the actual innocence equitable exception issue. Indeed, the timeliness issue, as well as the potential need for any factual development or credibility assessment on the timeliness issue, would be mooted if the Court were to determine that Petitioner has not satisfied the Section

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[13] The deferential Section 2254(d) standard of review governs the Court's initial merits federal habeas review of Grounds One and Two, and thus, its review is limited to the record that was before the state court at the time it adjudicated the claims. *See Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011). Review of Petitioner's "actual innocence" assertions under the timeliness rubric, however, does not carry with it any such limitation.

2254(d) standards and his first and second claims, therefore, do not warrant federal habeas relief.[14]

Accordingly, the Court declines to resolve the timeliness question as to Grounds One and Two at this juncture and now will turn to the merits of all three claims alleged in the FAP.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), Petitioner is entitled to habeas relief only if the state court's decision on the merits "(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" or "(2) resulted in a decision that was based on an unreasonable

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[14] In his Objections, Petitioner asserts that the Court committed legal error by deciding to consider his Ground One actual innocence claim on its merits, instead of first determining whether the claim is untimely by conducting the pertinent inquiry and analysis that would be required to assess his invocation of actual innocence as a "gateway" to avoiding the Section 2244(d) statute of limitations. Petitioner insists that he is entitled to have the Court undertake a timeliness analysis of Ground One pursuant to the *Schlup v. Delo*, 513 U.S. 298 (1995) test and that the Court must, as a part of doing so, hold an evidentiary hearing on the timeliness issue.

This is the first time in the Court's experience that a petitioner has complained about receiving a merits consideration of his claim rather than having it first subjected to, and possibly dismissed, pursuant to a timeliness analysis. Petitioner's argument – that the Court improperly conflated the standard that governs a merits analysis of an actual innocence claim with that applicable when actual innocence is considered as an equitable exception to the statute of limitations – is without merit. The Court expressly declined to engage in the latter, *i.e.*, a timeliness/actual innocence analysis, because under the circumstances involved here, there is no reason to do so instead of simply proceeding to consider Petitioner's actual innocence assertion on its actual merits and as a basis for federal habeas relief. While Petitioner is correct that the inquiry contemplated by the *Schlup* test can be an extensive one, why would any habeas petitioner wish to have his claim subjected to that highly demanding standard and possibly found wanting and therefore to be untimely and required to be dismissed on that procedural basis when, instead, he could receive that which should be the goal of any habeas petitioner, namely, to have his claim actually considered on its merits? Petitioner's complaint about the Court's decision to decline to consider Respondent's timeliness challenge to Ground One is highly unusual, to say the least, and instead seems to be an ill-disguised attempt to do an end run around the above-noted *Pinholster* limitation that he concedes applies to the Court's consideration of Ground One on its merits.

determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Pinholster*, 563 U.S. at 181; *see also Richter*, 562 U.S. at 98 ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)."). Petitioner's claims are governed by the Section 2254(d) standard of review, because as discussed earlier, the California Supreme Court expressly resolved the claims on their "merits" when it denied them on habeas review.[15]

For purposes of Section 2254(d)(1) review, the relevant "clearly established Federal law" consists of Supreme Court holdings (not dicta), applied in the same context to which the petitioner seeks to apply it, existing at the time of the relevant state court decision. *See Lopez v. Smith*, 574 U.S. 1, 2, 4 (2014) (*per curiam*); *see also Greene v. Fisher*, 565 U.S. 34, 40 (2011). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably appli[es]" clearly established Federal law if it engages in an "objectively unreasonable" application of

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[15] In his Objections, with respect to his Ground Three double jeopardy claim, Petitioner asserts that the Court committed legal error by looking to the California Supreme Court's merits habeas denial of Ground Three as the relevant state court decision for Section 2254(d) purposes instead of the California Court of Appeal's earlier decision on direct appeal. This argument fails for the obvious reason that, as explained earlier, Petitioner did not raise his Ground Three federal constitutional double jeopardy claim in that direct appeal, as the California Court of Appeal expressly found. Critically, Petitioner did not challenge that state appellate court finding when he sought review in the California Supreme Court. Indeed, why would Petitioner have raised the federal double jeopardy claim in his state habeas proceedings if he, in fact, had already raised and exhausted it many years earlier on direct appeal? As Petitioner earlier and correctly acknowledged (Traverse at 7) in response to Respondent's assertion that the First Amended Petition was unexhausted, he exhausted "all" of his claims though his California Supreme Court habeas proceeding and the state high court's merits denial of them. As a result, that habeas decision is the operative state court decision for purposes of Section 2254(d) review in this case. Petitioner's Objection contention that the California Court of Appeal's decision on direct appeal should have been treated as the operative decision for purposes of Section 2254(d) review of Ground Three rests on the erroneous premise that he actually exhausted his federal double jeopardy claim in his direct appeal. He plainly did not, and this Objection is factually and legally meritless.

the correct governing legal rule to the facts at hand; however, Section 2254(d)(1) "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 425-27 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* at 419 (citation omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 466, 473 (2007).

In his Objections, Petitioner asserts that the Report erred in finding that the review of his claims are governed by Section 2254(d)(1) only and noting that he did not raise any claim of Section 2254(d)(2) error. He asserts that: his failure to actually make any Section 2254(d)(2) argument did not "waive" any such claim, because in his Traverse, he issued a general denial to any "defense proffered by Respondent that is based on AEDPA" and said the Court should allow unspecified "fact-finding" before considering the merits of his claims; and because the Amendment Motion had not been formally ruled on earlier, he "reasonably assumed" that any order granting that motion "would identify the claims to be litigated and frame the issues going forward (including the applicability of section 2254(d))," and thus, any briefing by him on the applicability of Section 2254(d) "would have been premature."

Petitioner had been represented by very able counsel since 2012. Under Rules 2 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts, the only briefing allowed in a Section 2254 case such as this one is the petition, the answer thereto, and an optional reply. Petitioner was required to state all of his arguments for habeas relief in connection with his three grounds in the First Amended Petition itself, so that Respondent would have notice of them and be able to respond to them in his Answer. *See Cacoperdo v. Demosthenes*, 37 F.3d

504, 507 (9th Cir. 1994) (finding that a petitioner's claims must be included within his petition and that: "In order for the State to be properly advised of additional claims, they should be presented in an amended petition or, as ordered in this case, in a statement of additional grounds. Then the State can answer and the action can proceed."). In this case, the prior Magistrate Judge ordered that Respondent file an Answer to the Petition [Dkt. 5], he did so [Dkt. 20], and the Magistrate Judge then ordered that Petitioner could file an optional Reply and that the case then would be under submission unless otherwise ordered [Dkt. 21].

Petitioner did not file a Reply but, instead, obtained counsel and submitted the First Amended Petition and related Stay Motion and Amendment Motion, and the prior Magistrate Judge ordered briefing on the Motions [Dkts. 42-44]. Respondent thereafter filed a combined Opposition to both Motions and Petitioner filed a Reply [Dkts. 61, 64]. The Magistrate Judge stayed the case and vacated the Amendment Motion subject to Petitioner's request that it be considered following the conclusion of exhaustion proceedings [Dkts. 65, 70]. That request thereafter was made and the Magistrate Judge ordered that the parties meet and confer and either advise the Court that no further briefing on the Amendment Motion was needed or stipulate to a schedule for any further briefing [Dkt. 80]. In response, the parties stipulated to dates by which the Answer to the First Amended Petition and the Reply were to be filed, and the Magistrate Judge signed their related proposed Order [Dkts. 82, 84]. Respondent thereafter filed a combined Answer to and Motion to Dismiss the First Amended Petition [Dkt. 92]. Two weeks later, the parties filed a stipulation in which they agreed that: in two and a half months, Petitioner would file "one final reply brief/opposition to motion to dismiss" that would respond to Respondent's filing "as well as the application of 28 U.S.C. § 2254(d), if any, to the case"; and within 30 days thereafter, Respondent would file "one final reply" that also would address "the application of 28 U.S.C. § 2254(d), if any, to the case" [Dkt. 93]. An Order to this effect issued the next day [Dkt. 94]. In his "one final reply" – the

Traverse filed on November 7, 2016 – Petitioner did *not* raise *any* contention or argument that Section 2254(d)(2) applied to his case, whether directly or indirectly. In fact, the Traverse did not reference either Section 2254(d)(1) or (d)(2) at all.

Petitioner's assertion that he actually did preserve a Section 2254(d)(2) argument and/or was under the belief he would have the opportunity to make such an argument in the future through some unspecified briefing mechanism is flatly belied by the record. He expressly stipulated that he would address any Section 2254(d) issue in his Traverse, and for whatever reason, his counsel chose not to do so, notwithstanding that habeas relief is precluded in this case by the demanding Section 2254(d) standard of review unless and until it is shown that this standard has been met. It is wholly inappropriate to wait to make new legal claims and arguments on something as fundamental as the applicable standard of review until after briefing is completed and a report and recommendation on the merits of a petitioner's claims has issued. "[A]llowing parties to litigate fully their case before the Magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrate Act. We do not believe that the Magistrate Act was intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court." *See Greenhow v. Secretary of Health & Human Services*, 863 F.2d 633, 638-39 (9th Cir. 1988), overruled on other grounds, *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc). Petitioner's complaint that the Court should have reviewed his case under Section 2254(d)(2) is untimely, factually baseless, and foreclosed by his own conduct. It also is legally baseless, given that neither the First Amended Petition nor the Traverse identify any assertedly erroneous factual determination made by the state courts that falls within the purview of Section 2254(d)(2).[16] Accordingly, this case remains governed by Section 2254(d)(1).

[16] Apparently recognizing his failure to raise any issue falling within the scope of Section 2254(d)(2) review, in his Objections, Petitioner now argues for the first time that Section

The California Supreme Court's resolution of Grounds One through Three was made by a summary statement on habeas review that relief was denied "on the merits." When a state court's merits decision does not contain an explanation of the state court's underlying reasoning, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. In such an instance, a federal habeas court must determine what arguments or theories "could have supported" the state court's decision and then assess whether the foregoing standards are met as to any such arguments or theories. *Id.* at 102. In this instance, the federal court engages in an independent review of the record and then decides whether or not the state court's decision was objectively unreasonable under the Section 2254(d) standards. *See, e.g., Murray v. Schriro*, 882 F.3d 778, 802 (9th Cir. 2018) (noting that this task does not involve a de novo review of the constitutional question).

Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 562 U.S. at 102; *see also id.* at 103 (as "a condition for obtaining habeas relief," a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in

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2254(d)(2) error exists because: the California Court of Appeal's opinion on direct appeal contains unidentified erroneous "assumptions" about the facts at trial; and under California law, the California Supreme Court should have issued an order to show cause and afforded him an evidentiary hearing, given that his state high court habeas petition contained "robust" allegations and ample evidence warranting relief. As to his first contention, the California Court of Appeal's direct appeal decision is not the state court decision to be assessed under Section 2254(d)(1) or (d)(2). As to the second contention, the California Supreme Court rarely issues OSCs and orders evidentiary hearings in connection with habeas petitions. If Petitioner's argument were correct, then Section 2254(d)(2) automatically is satisfied, *ipso facto*, by the fact that a state court declined to hold an evidentiary hearing notwithstanding a petitioner's belief that his state habeas petition alleged facts warranting relief. In practical effect, this would mean that the Section 2254(d)(2) limitation automatically is of no effect in most cases brought by a California prisoner and de novo review always must occur. This is not the law, however, and an assertion that an evidentiary hearing was justified under state law given a petitioner's belief in the merits of his state habeas petition, does not obviate the demanding standards of Section 2254(d)(2).

existing law beyond any possibility for fairminded disagreement"). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015) "[T]his standard . . . is 'difficult to meet,'" *Metrish v. Lancaster*, 569 U.S. 351, 357-58 (2013) (citation omitted), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id.* at 101 (citation omitted). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' . . . and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

DISCUSSION

I. Ground Three: The Double Jeopardy Issue

In his original claim, now pleaded as his third, Petitioner asserts that the Double Jeopardy Clause was violated when he was retried after his first trial ended in a mistrial and, in a concurrent proceeding, the trial court declined to find a probation violation.

A. Background

On December 30, 2008, a felony information was filed in the State Conviction proceeding that charged Petitioner with possession of a firearm by a felon who had a prior felony conviction (hereafter, the "Criminal Case"). [CT 18-19.] In separately-filed Case BA326153, Petitioner was charged with a violation of his probation imposed in connection with his prior felony conviction; the charged probation violation apparently was based on the pending Criminal Case charge

(hereafter, the "Probation Violation Case"). A review of the record shows that the pre-trial minute orders for the Criminal Case often included a notation to the effect of "Also Case No. BA326153-01," apparently indicating that the events being scheduled were for both the Criminal Case and the Probation Violation Case. [*See, e.g.,* CT 20, 69, 84-90, 92-95.]

On June 19, 2009, the trial court called "the matter of [Petitioner], BA349945, also BA326153" for a jury trial in the Criminal Case and then a probation violation hearing. The parties stipulated that "the facts that are deduced at the time of the trial can be used with respect to the probation violation hearing as well." [RT1 4-6.] The jury trial of the Criminal Case then commenced with jury selection. [CT 98-101; RT1 9.] On the afternoon of the second day of trial, after the jury was selected and pre-instructed, the presentation of evidence commenced. After instructions and closing arguments, the jury began deliberations on the late morning of June 24, 2009. [CT 101-05, 121-22; RT1 19-228.]

On the afternoon of June 24, 2009, the jury began asking to see various items both in and not in evidence. [CT 119, 121-22, 124, 127-28, 130; RT1 236-37.] After those requests were resolved, the jury submitted a note indicating that it was unable to decide and it appeared there was no hope of reaching a verdict. The trial court spoke to the jurors, noted that they only had been deliberating for a matter of hours, requested that they continued to deliberate, and adjourned until the next morning. [CT 120; RT1 238-41.] The jury deliberated on June 25, 2009, and requested testimony readback several times. [CT 125-28; RT1 242-44.] On the morning of June 26, 2009, the jury submitted a note stating that it was still unable to reach a verdict. [CT 129.] The trial judge spoke with the jury foreperson and confirmed that the jury was "hopelessly deadlocked" and could not reach a verdict through further deliberations. [RT1 245-51.] The trial court declared a mistrial in the Criminal Case, and the jury foreperson thereafter advised that the jury had been split five for guilty and seven for not guilty. [CT 132; RT1 252.]

After the jury was excused, the trial judge turned to counsel and stated that they needed to decide whether to proceed on the Probation Violation Case and whether to set the Criminal Case for retrial, which were "somewhat related issues." [RT1 254.] The trial judge noted that "at this point basically I've been hearing this case as the probation violation matter" and suggested that, as a result, the probation violation hearing proceed. [RT1 254-55.] Petitioner's counsel stated that "the defense really has no problem with" having the trial judge hear the Probation Violation Case at that time. [RT1 255.] The trial judge noted that the alternative would be to schedule the retrial of the Criminal Case and continue the Probation Violation Case to that time, and the asked the prosecutor his thoughts. [*Id.*] The prosecutor noted the different standards of proof for the two types of cases and agreed that it was appropriate to resolve the Probation Violation Case at that time. [RT1 255-56.] The trial judge confirmed that "all of the evidence that was presented during the trial will be considered by the court" in connection with the Probation Violation Case, then asked if either side wished to present any additional witnesses or evidence; both counsel declined to do so. [RT1 256.] The prosecutor declined to present any additional argument and Petitioner's counsel presented a brief argument. [RT1 256-57.] The trial court then took a brief recess to review notes. [RT1 258.]

After the recess, the trial court noted the applicable standard for the Probation Violation Case – preponderance of the evidence – and declined to find a probation violation. The trial judge noted that, but for certain rulings she had made in the Criminal Case, there would have been additional evidence to consider regarding the inconsistent statements made by a witness, but because that additional evidence had not been admitted during the Criminal Case, it would not be considered. [RT1 258.] With respect to prosecution witness Officer Ortega, who testified that Petitioner had a gun and put it in the purse of someone called Janet or Janette, the trial judge found that the officer had been a credible witness. [RT1 258-59.] The trial judge noted

that, at the same time, there were four defense witnesses who testified relatively consistently that Petitioner was carrying a baby, which was inconsistent with using his hands to take a gun out of the back of his shorts, and had been somewhere else. The trial court also noted that three of the four witnesses had an incentive not to tell the truth given their close relationship with Petitioner and that the fourth was a friend, and that one of the witnesses had been impeached in one respect. [RT1 259-60.] The trial judge concluded that, nonetheless, given the absence of DNA and fingerprints on the gun, she did not find the balance to be tipped sufficiently and, as a result, concluded: "I cannot say that it is more likely than not that [Petitioner] on the facts that I have before the Court at this time committed the crime. So, I'm not at this time going to find him in probation violation." [*Id.*]

The trial judge noted that an "interesting question" remained, namely, whether if the jury in the retrial of the Criminal Case found Petitioner guilty, could the trial judge then find Petitioner to have violated his probation, but she declined to resolve the issue at that time. [RT1 260.] The trial court and the parties then discussed the scheduling of the retrial of the Criminal Case, and Petitioner's counsel did not raise any objection to it proceeding. [RT1 261.] The trial judge asked whether another probation violation hearing should be set for the same date as the retrial, and in response, Petitioner's counsel wondered about the effect of the credits Petitioner would be receiving and asked if the trial court was reinstating probation. [RT1 262.] The trial judge advised that, although she was not ruling on the issue, there was an argument that, depending on what happened in the retrial of the Criminal Case, Petitioner still could be found to be in probation violation, and then ruled that his probation remained revoked and that a probation violation hearing would be scheduled along with the retrial. [RT1 263-64.]

Petitioner was retried in late August 2009, and the jury found him guilty. [*See* CT 137-68; RT2, *passim*.]

B. Under Section 2254(d)(1), Relief Is Foreclosed.

It is well established that the Fifth Amendment guarantee against double jeopardy protects against a second prosecution for the same offense after acquittal. *See, e.g., Brown v. Ohio*, 432 U.S. 161, 165 (1977). As the Supreme Court has explained:

> An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'... If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair."... The law "attaches particular significance to an acquittal."

United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (citations omitted). "The same result is definitely otherwise in cases where the trial has not ended in an acquittal." *Id.* at 130. Thus, it is equally well-established that double jeopardy does not bar retrial when a mistrial does not stem from Government misconduct or when it is supported by manifest necessity or it results from the defendant's consent to a declaration of mistrial. *Id.*; *Arizona v. Washington*, 434 U.S. 497, 505, 514-16 (1978); *United States v. You*, 382 F.3d 958, 964 (9th Cir. 2004).

As described above, the first trial in the Criminal Case ended in a mistrial following a jury deadlock, and in the Probation Violation Case hearing that followed, the trial court declined to find a probation violation (hereafter, the "Violation Hearing"). As also described above, the Violation Hearing did not involve the presentation of any new evidence or argument; the trial judge relied on the evidence admitted in the Criminal Case trial and then rendered her decision declining to find a probation violation. Petitioner contends that the trial judge's decision in the Probation Violation Case constituted a final judgment with respect to an issue of ultimate fact and an acquittal of the criminal charges alleged in the

Criminal Case, and thus, he could not be retried on those criminal charges without violating the Double Jeopardy Clause. Petitioner invokes three Supreme Court decisions as constituting the clearly established federal law that governs Ground Three: *United States v. Scott*, 437 U.S. 82, 91, 95, 97 (1978); *Evans v. Michigan*, 568 U.S. 313, 319, 322 (2013); and *Ashe v. Swenson*, 397 U.S. 436, 442-43, 445 (1970).

In *Scott*, at the close of evidence, the trial court granted an earlier-made motion to dismiss two counts based on pre-indictment delay and then submitted the third count to the jury, which rendered a not guilty verdict. The question before the Supreme Court was whether the Double Jeopardy Clause precluded the Government from appealing the trial court's dismissal of the two counts. 437 U.S. at 84. The Supreme Court noted that double jeopardy did not bar an appeal when the dismissal ground is other than insufficiency of the evidence, but if there is a judgment of acquittal, whether due to a jury's not guilty verdict or a court ruling that the evidence was insufficient to convict, double jeopardy does bar an appeal. *Id.* at 87-91. The Supreme Court discussed the nature of certain dismissals as they related to double jeopardy concerns, contrasting the case before it with those that constituted an acquittal, *i.e.,* "'when the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged'" and involved an evaluation of the Government's evidence and the consequent determination "'that it was legally insufficient to sustain a conviction.'" *Id.* at 95-97 (citation omitted). The Supreme Court concluded that the dismissal at issue, which was on a basis "unrelated to factual guilt or innocence of the offense" charged, was not of the sort protected by the Double Jeopardy Clause and, thus, a Government appeal was permitted. *Id.* at 98-99. Thus, while the *Scott* decision contains general language relating to what constitutes an acquittal and what does not, the decision is factually and legally inapposite to this case.

Evans also involved a situation far afield of that here. After the prosecution rested its case, the trial judge granted the defense motion for a directed verdict of acquittal after concluding that the prosecution had failed to prove a particular element. It turned out that the trial court had made a legal error, because no such element applied in the defendant's case and it did not need to be proven by the prosecution. 568 U.S. at 315. After discussing the nature of "substantive rulings" of acquittal (*i.e.*, a trial court's finding that the evidence is insufficient to establish criminal liability for an offense) as opposed to "procedural dismissals" (*i.e.*, rulings unrelated to factual guilt or innocence), the Supreme Court concluded that the trial court's "erroneous acquittal," even though based on the trial court's mistake of law, sufficed to constitute an "acquittal" for double jeopardy purposes under its earlier precedent regarding mistaken acquittals. *Id.* at 316-20. Again, no such factual circumstances or legal issues are involved here.

In *Ashe*, six men were playing poker at the home of one of them, and several masked men broke in and robbed the six players. The petitioner and others were charged with six robbery offenses, one for each of the players. The petitioner was tried on one of the charges involving one of the players, but the evidence of identity was weak and the jury acquitted him "due to insufficient evidence." The State thereafter tried him on a charge involving a different player and presented much stronger identification evidence, and this time the petitioner was convicted. 397 U.S. at 437-40. As Petitioner notes, the Supreme Court concluded that collateral estoppel principles are embodied within the Double Jeopardy Clause and under the facts before it, double jeopardy was violated by the second trial, because the jury's not guilty verdict in the first trial reflected a finding that petitioner was not one of the robbers and the State was precluded from taking a second stab at that particular issue by a new trial involving additional evidence. *Id.* at 445-47. *Ashe*, thus, involved the prosecution's choice to try charges alleged within a single criminal case by way of separate trials based on each victim and rested on the double

jeopardy effect of an actual acquittal by the jury in the first such trial – circumstances markedly different from those at issue in this case.

There is no question that, as Petitioner argues, the above three decisions state certain broad principles, including that when there is a substantive ruling in a criminal case in a defendant's favor – *i.e.*, one that finds the government's evidence insufficient to establish guilt of the criminal charges alleged – this is an acquittal in that criminal case and double jeopardy therefore adheres and prevents further prosecution on those same charges. Petitioner, however, did not receive any "substantive ruling" of acquittal within his Criminal Case itself. Rather, the jury deadlocked, and in a subsequent probation violation proceeding, albeit one based on the same evidence over which the jury had deadlocked, the trial judge declined to find that a probation violation had occurred. Petitioner asks the Court to find that, by the foregoing three decisions, the Supreme Court has clearly held that, in this situation, the probation violation decision constitutes an acquittal for double jeopardy purposes as to still pending separate criminal case in which the jury earlier deadlocked. Stated otherwise for Section 2254(d)(1) purposes, the question is whether the Supreme Court has clearly held not only that events which happen within a criminal case itself can constitute an acquittal but, further, that events which happen subsequently in a different case can have a *nunc pro tunc* acquittal effect as to the still pending criminal case?

Given that the trial court and the parties opted to treat the Criminal Case and the Probation Violation Case as interrelated enough that the evidence in one served as the evidence in the other, there is a superficial appeal to Petitioner's contention that the trial judge's probation violation decision meant that she believed that the evidence would not have been enough to find Petitioner guilty of the charges pending in the Criminal Case had it not ended in mistrial. Any such speculation, however, cannot override the fact that the Criminal Case ended in a jury deadlock-induced mistrial, not a directed verdict in Petitioner's favor and not in a verdict by

the jury of not guilty. *See Scott*, 437 U.S. at 96 (observing that the trial judge's characterization of his action does not control whether or not it had a double jeopardy effect). And under the clearly established federal law, the Double Jeopardy Clause does not preclude retrial following such a mistrial. This case is governed by Section 2254(d)(1) and nothing in the decisions cited by Petitioner supports the legal conclusion that the trial judge's decision not to find Petitioner in violation of his probation had the legal effect of acquitting him of the criminal charges on which the jury had deadlocked, nor do those decisions provide any guidance in this unique situation. Indeed, Petitioner does not argue that the decisions on which he relies are apposite to his case. Rather, he simply plucks out a few wholly general statements from these three decisions and touts them as the Section 2254(d)(1) clearly established federal law that mandates federal habeas relief in his case. He is mistaken.

Petitioner's arguments suffer from a fatal flaw for AEDPA purposes, one that the Supreme Court repeatedly has cautioned that lower courts must avoid. In determining what is "clearly established" federal law under Section 2254(d)(1), it is not enough to identify a broad principle and then cry error when a state court fails to extend that principle to an area never visited or considered by the Supreme Court. *See Lopez v. Smith*, 574 U.S. at 5-6 (finding error when the Circuit Court relied on cases standing for general propositions to govern the specific question before it, when the "proposition is far too abstract to establish clearly the specific rule" that would have needed to exist in order for the petitioner to overcome Section 2254(d)(1)); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam) (finding Circuit Court error when it "elided the distinction" between the factual circumstance in the case before it and the factual circumstances involved in prior Supreme Court precedent and then characterized that precedent as recognizing a particular broad right: "By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into

'clearly established Federal law, as determined by the Supreme Court.'"); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (*per curiam*) (when the Circuit Court was presented with a "novel factual context" and the Supreme Court's precedent "g[a]ve no clear answer to the question presented," because it had not "squarely addresse[d] the issue" involved, it was error to find that a Supreme Court decision arising from a different factual context governed and warranted relief); *Carey v. Musladin*, 549 U.S. 70, 76 (2006) (when prior Supreme Court decisions had addressed only the effect of state-sponsored courtroom practices on a defendants' fair trial right, the Circuit Court erred in treating those decisions as clearly established law governing a claim based on spectator conduct, because no holding of the Supreme Court required such an application and the state court's decision therefore could not be objectively unreasonable).

As the Ninth Circuit has explained, these precedents from the Supreme Court have "clarified that in the absence of a Supreme Court decision that 'squarely addresses the issue' in the case before the state court, or establishes an applicable general principle that 'clearly extends' to the case before us to the extent required by the Supreme Court in its recent decisions, we cannot conclude that a state court's adjudication of that issue resulted in a decision contrary to, or an unreasonable application of, clearly established Supreme Court precedent." *Moses v. Payne*, 555 F.3d 742, 760 (9th Cir. 2009). Put otherwise by another Circuit, in light of these decisions, while "exact factual identity" between the case at hand and Supreme Court decisions is not required to find precedent to be clearly established, "federal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts." *House v. Hatch*, 527 F.3d 1010, 1016 n.5 (10th Cir. 2008).

Here, Petitioner relies on several generalized propositions asserted by the Supreme Court and asserts that they establish a specific rule for purposes of this case with its unusual facts, *to wit*, that a finding in a defendant's favor in a probation

violation case constitutes an acquittal for double jeopardy purposes with respect to the underlying and still pending criminal charges that led to the probation violation charge. The Supreme Court, however, has not so held to date, nor has it rendered any decision that intimates this to be the rule. Petitioner does not cite a single case in which the Supreme Court has encountered a situation even remotely similar to that here and/or has indicated that a favorable probation violation outcome serves as a double jeopardy or collateral estoppel bar to a trial on the underlying criminal charges, and the Court has not found such a case. Petitioner's attempt to extrapolate clearly established federal law for Section 2254(d)(1) purposes from the broad statements on which he relies – arising out of wholly different factual contexts – is not persuasive and is contrary to the Supreme Court's admonitions. This case involves the sort of "novel factual context" not governed by any "clear answer" in which the Supreme Court has cautioned that extending decisions arising out of different factual contexts is improper under Section 2254(d)(1) (*Van Patten*, *supra*).

As the Supreme Court has made clear, when – as in this case – the Supreme Court precedent relied upon in general in nature, "[a]pplying a general standard to a specific case can demand a substantial element of judgment" and "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *see also Woods v. Donald*, 575 U.S. 312, 317 (2015) (explaining that "where the precise contours of [a] right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims") (internal quotation marks and citations omitted). The Supreme Court also has made clear that state courts act unreasonably within the meaning of Section 2254(d)(1) when they fail to extend a generalized rule to a new factual situation "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question. *Woodall*, 572 U.S. at 427 (citation omitted). While it is possible a fairminded jurist might find Petitioner's arguments about why the Probation Violation Case decision

constituted an "acquittal" of the pending Criminal Case charges to be persuasive, it is equally possible, if not likely, that other fairminded jurists could disagree given the lack of clear Supreme Court precedent in this respect. At a minimum, there exists a "possibility for fairminded disagreement," which means that Section 2254(d)(1) is unsatisfied. *Richter*, 562 U.S. at 103. Under these facts and the existing state of Supreme Court precedent, it was not objectively unreasonable for the California Supreme Court to decline to find that the decision in the Probation Violation Case constituted an acquittal, for double jeopardy and/or collateral estoppel purposes, of the charges pending in the Criminal Case. Federal habeas relief, therefore, is precluded based on the double jeopardy claim alleged in Ground One.

II. Ground Three: The Ineffective Assistance Issue

As a subclaim of Ground Three, Petitioner argues that his trial counsel's failure to make a double jeopardy objection to retrial violated the Sixth Amendment's guarantee of the effective assistance of counsel. Petitioner asserts that there was no reasonable strategic reason for trial counsel not to have made such an objection and that, had it been made, the trial court "would have been required to sustain his objection" and he would not have been retried and convicted. (Mem. at 32.)

A. The Clearly Established Federal Law

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court clearly established the legal standards for an ineffective assistance of counsel claim. Under the *Strickland* test, a petitioner must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Id.* at 687-88. As both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, the failure to satisfy either prong requires the denial of an

ineffective assistance claim. *See id.* at 687.

The first prong of the *Strickland* test – deficient performance – requires a showing that, in light of all the circumstances, counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690; *see also Richter*, 562 U.S. at 105 (the "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom"). Judicial scrutiny of counsel's performance "must be highly deferential," and a reviewing court must guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. *Strickland*, 466 U.S. at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*; *see also Pinholster*, 563 U.S. at 189. "[F]ederal courts are to afford 'both the state court and the defense attorney the benefit of the doubt.'" *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (*per curiam*) (citation omitted). The burden to show deficient performance "rests squarely on the" petitioner, and "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 22-23 (2013).

The second prong of the *Strickland* test – prejudice – requires establishing a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. The court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010).

"The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*,

562 U.S. at 105 (citations omitted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (review of a *Strickland* claim pursuant to Section 2254(d)(1) is "doubly deferential"). To succeed on an ineffective assistance of counsel claim governed by Section 2254(d), the petitioner must show that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699; *see also Richter*, 562 U.S. at 105 (the "question is not whether counsel's actions were reasonable," but rather, "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard"). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 556 U.S. at 123; *see also Richter*, 562 U.S. at 105 (given the general nature of the *Strickland* standard, "the range of reasonable applications [of the *Strickland* standard] is substantial").

B. Deference To The State Court Decision Is Required.

The ineffective assistance claim alleged perfunctorily at the conclusion of Ground Three rests on the premises that: (1) the Probation Violation case decision constituted an acquittal of the Criminal Case charges for double jeopardy purposes; and (2) therefore, the trial court necessarily would have sustained a double jeopardy-based objection to retrial, had trial counsel made one, and then dismissed the Criminal Case. Neither premise is persuasive.

As explained earlier, Petitioner has not shown that the issuance of the Probation Violation Case decision had a double jeopardy effect with respect to the Criminal Case. Petitioner has not proffered any tenable basis for finding that trial counsel should have believed that, under existing law, a double jeopardy objection was warranted or required. It is not deficient performance to fail to take an action that is not warranted in law or fact. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective

assistance."); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take futile action can never be deficient performance"); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) ("A lawyer's zeal on behalf of his client does not require him to" take meritless action). The proverbial throwing spaghetti against the wall in the hope that something will stick approach is not required by the Sixth Amendment and the first *Strickland* prong.

The second *Strickland* prong also is not met, because there is no reasonable probability that the outcome here would have been different had trial counsel had objected to retrial on double jeopardy grounds. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 375, (1986) (omitted action must be shown to be meritorious to support an ineffective assistance of counsel claim); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."). The trial judge's comments made after she rendered her decision in the Probation Violation Case make clear that a double jeopardy objection would not have prevailed. The trial judge twice indicated that, should Petitioner be convicted at his retrial in the Criminal Case, she might have to revisit her Probation Violation Hearing decision and find that Petitioner had violated probation. [RT1 260, 263-64.] Given the trial judge's view that her Probation Violation Case decision was not necessarily final or dispositive on the probation violation question, it defies belief that the judge would have found that this same potentially ephemeral decision should have a dispositive double jeopardy/acquittal effect on the Criminal Case charges. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) (to show prejudice under *Strickland* based on failure to file a motion, a petitioner must show that the motion would have been granted).

The state court's rejection of the ineffective assistance subclaim made at the end of Ground Three was not contrary to or an unreasonable application of the *Strickland* test. Accordingly, Section 2254(d)(1) precludes granting federal habeas relief based on this portion of Ground Three.

III. Ground One: Actual Innocence

In his first claim, Petitioner asserts that he has been deprived of his Fifth, Eighth, and Fourteenth Amendment rights to due process and to be free from cruel and unusual punishment, because he is actually innocent of the conviction crime of being a felon in possession of a firearm. Ground One presents what is known as a "freestanding" claim of actual innocence, *i.e.,* a claim that federal habeas relief is required – independent of whether or not constitutional error occurred – purely because the petitioner claims to be actually innocent, as demonstrated by evidence not presented at trial.

To support Ground One, Petitioner relies on some things that existed prior to trial, such as records of witness interviews and pretrial motions and news stories, and some that did not, such as declarations by family members. He also relies on his contention that his first trial ended in a mistrial when additional evidence was presented to the jury that was not presented at his retrial, at which he was convicted. Accordingly, before addressing the merits of Ground One, the Court will examine the evidence presented at both trials and the assertedly new evidence proffered in this case.

A. Background: First And Second Trials And New Evidence

1. The First Trial

Petitioner's first trial occurred in June 2009. The prosecution's primary witness was police officer Lazaro Ortega, who testified, in pertinent part, as follows. On December 4, 2008, Officer Ortega was a member of the Hollywood Gang Enforcement Detail. [RT1 38.] He and his partner were in their police vehicle on that date approaching 453 North Kingsley and from about 20-25 feet away, Officer Ortega observed Petitioner (who he knew from prior contacts) standing on the sidewalk close to two other people. A female was sitting on cement steps directly in front of Petitioner, and they were facing each other. Another male was standing on

the sidewalk with his back to Officer Ortega and his partner. Officer Ortega did not see anyone else in the vicinity. [RT1 39-41, 50-51, 56.] The officers shone the vehicle's spotlight on Petitioner and the other two people, who looked in their direction. The officers started to get out of the vehicle, which by now was about ten feet from the three people, and Petitioner leaned forward toward the seated female and reached into his waistband. [RT1 41-42, 54-56, 58-61.]

The officers announced themselves as police officers and said, "Hey, let me see your hands. Police." [RT1 42.] Petitioner simultaneously pulled a black object out of his waistband and tossed it toward the female, who was holding her purse open, and it landed in her open purse. [RT1 41-44, 51.] The officers walked toward Petitioner, who glanced at them again and then immediately ran westbound towards a hallway leading into the apartment complex at the 453 Kingsley location. Officer Ortega started to run towards Petitioner but stopped and held the hallway, so as not to get separated from his partner. Officer Ortega saw Petitioner turn left and go upstairs to an apartment. [RT1 42, 49.]

At that point, the other male present moved in an apparent attempt to block the officers' view of the female. [RT1 70-72.] She was sitting on the steps, looked "really frantic" and started trying to close the zipper on her open purse. Officer Ortega asked her what she was doing and she immediately concealed the purse under her legs. [RT1 44, 61-63.] Officer Ortega grabbed the purse, opened it up, and saw a black semiautomatic handgun at the bottom of the purse. [RT1 45, 63.] While the officers waited for additional units to arrive, Officer Ortega took the purse to his police vehicle for safekeeping in the trunk, where he had gloves. He removed the gun's magazine and ejected the single round. Prior to then, the handgun had been ready for live fire. [RT1 46-49.]

Other units arrived within five minutes. [RT1 49, 66.] Two other officers went inside the apartment complex and brought Petitioner down to the alcove area. His mother was with him. [RT1 68-69.]

The second prosecution witness was Stacy Vanderschaaf, who testified about DNA testing performed on the handgun recovered from the female's purse. The handgun was swabbed in several sections but not completely, and the swabs were sent to an outside laboratory for testing along with a reference sample from an individual of interest (Petitioner). The lab results showed a mixture of three different people's DNA but excluded the reference sample. [RT1 80-83.] Vanderschaaf explained that it was possible for someone to have handled the gun yet have his DNA be excluded, for several reasons. First, she only swabbed certain portions of the gun, leaving unswabbed those areas that were going to be subjected to fingerprint testing, and the person could have handled the gun in unswabbed portions. Second, if the gun was handled using the palm of the hand, cells from hand palms do not have a nucleus and, thus, do not contain DNA. Third, if the gun was in a waistband, the person's DNA on the gun could have rubbed off onto other items, such as clothing. In addition, it is possible that the person might not have left enough cells on the gun for there to be collectible DNA. [RT1 81, 83-85, 92.] Vanderschaaf conceded that it was possible the person of interest never touched the gun. [RT1 86, 93.]

The parties stipulated that Petitioner previously had been convicted of a felony on October 4, 2007. They also stipulated that the handgun had been examined for fingerprints and that no latent prints of value had been developed. [RT1 26, 93.]

The defense presented five witnesses to the jury: Robert Hernandez, an evidence and property custodian with the Los Angeles Sheriff's Department; Margarita Xatruch, Petitioner's mother; Yesenia Gonzalez, Petitioner's partner and the mother of his children; Marta Alfaro, Gonzalez's mother; and Eunice Paz, Petitioner's friend. Hernandez appeared simply to bring and identify the clothing Petitioner had been wearing when he was booked, which the defense had subpoenaed. [RT1 101-02.]

Margarita Xatruch testified that on December 4, 2008, she was at Yesenia Gonzalez's apartment, with Gonzalez, Petitioner and their children, along with Gonzalez's mother and brother. [RT1 104.] Petitioner left with his one and a half year old son to go buy an ice cream from a nearby ice cream truck, because the child heard the truck and was crying to get ice cream. Five to ten minutes later, Petitioner returned with nachos for the older child and ice cream. Petitioner was holding his young son. Xatruch did not look out the window while Petitioner was gone. [RT1 105-06, 113.] While they were eating ice cream, Petitioner looked out the window and said he saw the police "down there." [RT1 106.] Xatruch immediately went downstairs, because her other son (Edwin) and "Janet" were down there. When Xatruch got downstairs, Edwin was standing facing the wall with his hands behind him and Janet was sitting down. The police told her that they were "just checking" as a normal matter of course. [RT1 106-07.] There were two police officers present when Xatruch got downstairs, although three arrived thereafter. [RT1 110.]

Everyone else who had been in Gonzalez's home then came down, except Petitioner. The police searched Edwin and an officer then had Janet stand up, looked in her purse with a flashlight, and had her sit down again. The police officer took the purse to the back of the police car, put on some gloves, opened the purse and started to search it, then came back to Janet, looking upset, and handcuffed her. [RT1 108-09.] Xatruch saw Petitioner looking down from the upstairs window. The police went upstairs and brought Petitioner down in handcuffs. [RT1 110-11.]

Marta Alfaro, Gonzalez's mother, testified next. Alfaro confirmed that Gonzalez and Petitioner, with their children and Xatruch, were present in the apartment on December 4, 2008. [RT1 115.] After one of the children started crying about wanting ice cream, Petitioner left for "about two minutes" with the baby and returned with nachos and ice cream. [RT1 116.] Petitioner looked out the window and said something to his mother, who left the apartment and went downstairs. About two minutes later, Alfaro went downstairs by herself, although

Gonzalez came down soon after. Only Petitioner and the children stayed upstairs. [RT1 117-18, 121-23.] There were two girls present, "Chunie" and her friend "Judy." No one else was present besides Xatruch and the police officers. Chunie was sitting on the stairs. [RT1 118-19.] Alfaro then changed her prior testimony and said that Petitioner's brother was present and the police "had him by the car." [RT1 119.] A police officer went over to Chunie and opened and closed her purse while shining a light, then took it to the police car and put it on top of the trunk. He then opened the purse, put gloves on, searched it, and pulled out a gun. [RT1 119.] The officer had Chunie get up and then police officers went upstairs and brought Petitioner down. [RT1 120-21.]

Yesenia Gonzalez testified that Petitioner is her partner and the father of her children. [RT1 125.] She also confirmed that on the day in question, she, Petitioner and their children, as well as Alfaro and Xatruch, were present in the apartment when her son began crying for ice cream and Petitioner picked him up and took him to get ice cream. Petitioner returned after two minutes, holding the child, and had nachos. [RT1 126-27.] Petitioner looked out the window, said something to his mother, and she went downstairs. [RT1 127-28.] Gonzalez and Petitioner stayed upstairs. Gonzalez looked out the window and saw "Edwin" (Petitioner's brother) under arrest, "Janet" stand up, and the police "flash[]" her purse. An officer took Janet's purse to a police car and placed it on top, started digging in it, and pulled a weapon out. [RT1 128, 131-33.] Gonzalez did not leave the apartment until the police came and banged on the door and told them to get out. [RT1 132.]

Eunice Paz described herself as a friend and neighbor of Petitioner, who lived across the street. [RT1 135.] On the day in question, Paz was on her balcony and could see Petitioner's apartment building. She saw Petitioner come downstairs with a baby in his arms and cross the street to go to the ice cream truck beneath her balcony. He bought an ice cream cone and nachos, gave his son the cone, walked back across the street, said hello to his brother Edwin for a "few seconds," and then

went back inside his building. Paz did not see Petitioner take an item and toss it into a purse. Janet was there with Edwin. The police were not there. [RT1 136-38, 140-41, 144.] About two minutes later, a police car pulled up. The officers got out of the car and searched and handcuffed Edwin. The officers were talking to Janet and then another police car pulled up. [RT1 141-42.] Paz went downstairs and crossed the street. Xatruch and Alfaro came downstairs. After the two women arrived, an officer grabbed Janet's purse, unzipped it, shone a flashlight, and left it there. He left and came back and placed the purse "right next to" Paz, then grabbed a glove and searched it. [RT1 142-43.] On cross-examination, Paz changed her testimony and stated that the first search of the purse happened before the second set of officers arrived. [RT1 151.] Paz also testified that her memory at the June 2009 trial regarding the events at issue was better than it was five months earlier on January 2, 2009, a month after the incident, when she was interviewed by a defense investigator. [RT1 146.]

The prosecution called as a rebuttal witness Ruben Castellanos, who interviewed Paz for the defense on January 2, 2009. [RT1 175.] At that time, Paz told him that she saw Petitioner come out of his apartment with a baby in his arms, purchase nachos from an ice cream truck, and then stand around outside eating the nachos. [RT1 176.] According to Paz, the baby started crying and simultaneously police officers arrived, and Petitioner went back into the apartment. [RT1 176-77.][17]

The prosecutor's closing argument was, admittedly, "brief." [RT1 199.] The prosecutor relied almost entirely on the testimony of the two prosecution witnesses, labelling the case one that depending entirely on "what happened when the police

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[17] The prosecutor also attempt to ask Castellanos about Xatruch's interview, including her statement reflected in his report that Petitioner was outside with his child when the police arrived. Ayala objected and the trial court disallowed the questioning, because when Xatruch had testified earlier, she had not been asked about her statements to the investigator and she no longer was available for such questioning. [RT1 176-86.] As discussed below, this evidence did come in at the second trial.

pulled up." [RT1 199-203.] He addressed the testimony by the defense witnesses only to argue, cursorily, that Xatruch, Alfaro, and Gonzalez testified that they could not see, and thus did not know, what happened when the police pulled up. [RT1 202-03.]

Among other things, Petitioner's counsel argued that the shorts worn by Petitioner – which were shown to the jury – could not have supported a gun being held in the waistband. Defense counsel also argued it defied belief that the two officers would have allowed Petitioner to run away after he dropped something into the purse. [RT1 212-13.]

The jury deliberated for two days before a mistrial was declared. The jury later indicated that it had split seven to five in favor of not guilty. [RT1 245-52.]

2. The Second Trial

The prosecution presented the same two witnesses at Petitioner's second trial: Officer Ortega; and criminalist Vanderschaaf. Their testimony was so substantially similar to that they gave at the first trial that the Court will not describe it here.

Defense witnesses Gonzalez, Paz, and Xatruch[18] again testified, although prior defense witness Alfaro (Gonzalez's mother) did not, nor did the witness who responded to the subpoena for Petitioner's clothing. As with the prosecution witness testimony, the testimony of Gonzalez did not differ materially from her testimony at the first trial, and thus, will not be recounted here. The testimony of Xatruch and Paz, however, did vary from their prior testimony.[19] While Xatruch

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[18] At the first trial, the interpreter spelled the name of Petitioner's mother as "Xatruch." [RT1 103.] At the second trial, the interpreter spelled the name as "Xaturch" [RT2 406], and that was how it was reported in the transcript. In a May 10, 2013 declaration discussed *infra*, the name is spelled as "Xatruch." Accordingly, the Court has utilized the "Xatruch" spelling.

[19] At the first trial, the name of the woman with the purse was reported variously as "Janet" or "Chunie," but at the second trial, her name was reported as "Jeanette," which appears to have been her correct name. The Court, thus, will use "Jeanette" hereafter.

had testified at the first trial that Gonzalez came downstairs "a little after" Xatruch did and before any officer had dealt with the purse [RT1 108], at the second trial, Xatruch testified instead that Gonzalez remained upstairs in the apartment the entire time until the police officers went up to the apartment and brought Petitioner down. [RT2 411, 413-14.] On cross-examination, Xatruch was asked about a statement in the January 2, 2009 witness interview report of a defense investigator, which indicated that she told the investigator that "[w]hile [Petitioner] was outside with his child," she saw the police and went out to find out what was going on. [RT2 413; *see* FAP Ex. 12.] Xatruch denied having made that statement to the defense investigator. [RT2 413.]

Paz again testified that both searches of Jeanette's purse happened after the second police car arrived [RT2 387, 394, 398], as she did in her initial testimony at the first trial, although at the first trial, on cross-examination, Paz changed her testimony to be that the first search of the purse happened before the additional police officers arrive. At the second trial, Paz testified that Gonzalez and her children came down from the apartment before Paz left her balcony and went to the street and before police officers brought Petitioner down from his apartment [RT2 388, 394-96] – something she did not state at the first trial. On cross-examination, however, Paz stated that Gonzalez and the children came down *after* Paz had left the balcony and crossed the street, although she confirmed that this happened before the police officer conducted a second search of the purse. [RT2 399-402.] In addition, Paz expanded on her prior testimony about the second search of the purse, testifying that the officer: brought the purse over to "the sidewalk right where [Paz] was at"; placed the purse on the sidewalk by her and left it there, while he went over to his car, opened the trunk, and grabbed a glove; he returned and searched the purse; and then the officer took the purse and placed it on top of his police car and apparently searched it again. [RT1 402-02.] Contrary to her first trial testimony, Paz now asserted that her memory at trial was "the same" as it was it was when she was

interviewed by the defense investigator on January 2, 2009. [RT2 403-04.]

After the three defense witnesses testified,[20] the parties stipulated that Castellanos' reports of his interviews with Paz and Xatruch would be admitted into evidence.[21] [RT2 603-05; *see* FAP Ex. 12.] As in the First Trial, pursuant to the parties' stipulation, the jury was told that Petitioner had a 2007 felony conviction. [RT2 366.]

In closing argument, the prosecutor again gave a brief argument but changed his tack from the prior trial. From the outset, he emphasized the discrepancies between the August 2009 testimony of Paz and Xatruch and their statements made in early January 2009 to a defense investigator. [RT2 620-22.] He argued that all of the defense witnesses were "biased" given their close relationships with Petitioner. He also argued that their story – that when the police drove up, Petitioner already had been inside the upstairs apartment for a while and only Petitioner's brother and his girlfriend were present outside, and they immediately arrested the brother and searched the girlfriend's purse and found a gun, and then decided to go into the apartment building to an upstairs apartment to arrest Petitioner – did not make sense. As the prosecutor put it, why would the police look in the girlfriend's purse and, upon finding a gun in it, then go arrest someone who was not even present? [RT2 622-23.] The prosecutor asserted that Officer Ortega's version of events "makes sense," unlike the "inconsistent stories" provided by Petitioner's family members and friends. [RT2 623-25.]

In his closing argument, Petitioner's counsel made much of a discrepancy between the police report and Officer Ortega's testimony regarding the direction

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[20] Petitioner also called Jeanette Dominguez (the woman sitting on the steps with the purse) as a trial witness. Outside the presence of the jury, and on the advice of her appointed counsel, she invoked her Fifth Amendment privilege to remain silent. Thus, she did not testify in front of the jury. [RT2 601-03.]

[21] As discussed in connection with Ground Two, the version of the Xatruch interview report admitted was redacted to omit portions.

Petitioner was facing when the officers drove up. [RT2 627-28.] Counsel argued that it was not believable that: Petitioner would pull a gun out of his waistband with police officers ten feet away; Officer Ortega saw what he claimed; or that officers would not have chased after Petitioner when he ran away. [RT2 629-32.] Counsel argued that, even if the officer did see Petitioner toss an "object" into the woman's purse, there was no reason to believe it was a gun, given that the officer could not describe all of the items found in the purse and that Petitioner's DNA and fingerprints were absent from the gun. [RT2 632-34.] Counsel again asserted that it was improbable that the gun could have been held in the waistband of the type of baggy shorts Petitioner was wearing. [RT2 635, 637.]

The jury deliberated for approximately five hours total and then found Petitioner guilty. [CT 142, 167.]

3. The New Evidence

To support his assertion of actual innocence, Petitioner argues that the evidence at trial, coupled with various items of evidence that were not presented at his first or second trials, proves that he is innocent. This new evidence falls into two categories

a. New and Nontrial Evidence Contradicting Officer Ortega's Testimony

The prosecution's case against Petitioner rested on the earlier described trial testimony of Officer Ortega. Petitioner contends that Officer Ortega's version of events presented at trial does not make sense, was contradicted by the testimony of the defense witnesses, is not supported by physical evidence, and is contradicted by evidence not presented at trial, which consists of post-trial declarations from his mother, his half-brother, and his sister, as well as evidence available at the time of, but not presented at, trial. [Mem at 8-10.] This "new" evidence includes the following:

Petitioner first proffers the defense investigator's report regarding a January 2009 telephone interview he conducted of Wendy Gutierrez, who lived across the street from Petitioner's apartment. Gutierrez told the investigator that she observed the following: Petitioner walked across the street with his young son and bought nachos; he returned to his apartment and, on the way back, nodded to Jeanette Dominguez in a "simple greeting," who was seated outside on the stairs; a short time after Petitioner went back inside, police officers arrived and spoke to Jeanette and examined her purse; another officer was speaking to "Edwin," who was handcuffed; an officer took Jeanette's purse and put it in the trunk of his car; and additional officers arrived, went into the apartment building, and exited with Petitioner, who was handcuffed. [FAP Ex. 10.]

Petitioner next proffers two declarations made by Edwin Gonzales Ochoa, Petitioner's half-brother ("Edwin"). In an April 8, 2013 Declaration, Edwin states that he was standing outside the apartment building with his then-girlfriend Jeanette Dominguez ("Jeanette"). Petitioner came downstairs with his son in his arms. At some point, Petitioner saw a police car arrive and went back upstairs. Edwin did not see Petitioner put a gun in Jeanette's purse. [FAP Ex. 1 ¶¶ 1-2.] The police asked Edwin about the guy who just left. Edwin, Jeanette, and Petitioner were arrested and taken to the police station. The prosecutor later rejected the case as to Edwin and Jeanette. [*Id.* ¶ 5.][22]

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[22] An investigator employed by Petitioner's present counsel – Roberto Loeza – has submitted a May 23, 2013 declaration in which he states that he met with Edwin, who was incarcerated, and had him sign a declaration that Loeza had prepared (presumably, the April 2013 Declaration), but because of time constraints, Loeza could not include in that declaration all that they discussed. [FAP Ex. 4 ¶¶ 1-2.] In his Declaration, Loeza describes additional statements he claims were made by Edwin to him, as well as statements made by a third party to Edwin and then conveyed by Edwin to Loeza. [FAP Ex. 4 ¶¶ 18-32.] This recitation, of course, consists of hearsay and double hearsay. In any event, Petitioner thereafter submitted a second declaration signed by Edwin on May 22, 2013, which is discussed *infra* and which the Court has considered. Edwin states therein that the second declaration was made because he and Loeza ran out of time during their first meeting, and Edwin wanted to include more information through the second declaration. Given that Loeza's Declaration consists of hearsay and is duplicative of the second declaration

In a second Declaration dated May 22, 2013, Edwin states that on the evening in question, Petitioner came downstairs, with his son in his arms, to where Edwin and Jeanette were hanging out. "At some point," Petitioner said that a police car was pulling up behind them, and he turned and went back upstairs. [Dkt. 83, Ex. 30 ¶ 4.] Edwin states that Petitioner did not pull out a gun or put anything in Jeanette's purse, but Edwin knew that Jeanette had a gun in her purse. [*Id.* ¶¶ 5-6.] One officer asked Jeanette if she was on probation and she responded that she did not know. The officer picked up her purse, said it was "heavy," and opened it and found the gun. [*Id.* ¶¶ 9-10.] At the station, Edwin could hear the police telling Jeanette to tell the truth "about whose gun it really was," and Jeanette later told Edwin that she had told the officers it was her gun. An officer called Edwin a "'bitch'" for letting his "girl take the rap." [*Id.* ¶¶ 12-13.]

Petitioner also proffers evidence about statements allegedly made by Jeanette, all of which rest on hearsay or multiple layers of hearsay. In a May 2013 Declaration, Petitioner's mother (Xatruch) states that, on several occasions, Jeanette told Xatruch she was surprised that Petitioner had been charged, because the gun was hers and he had nothing to do with it. [FAP Ex. 2 ¶ 11.] In a May 2013 Declaration, Petitioner's sister, Martha Ochoa ("Martha"), states that Edwin and Jeanette told her that Jeanette often had a gun in her purse. [FAP Ex. 5.] Petitioner also proffers statements made by Xatruch and Martha in the Declarations that, essentially, seek to convey that Jeanette was a bad person, including that: Xatruch saw Jeanette high on drugs and wearing expensive items that she could not afford, and Xatruch "heard" – she does not say how or from who – that Jeanette obtained things by breaking into houses; Martha knew that Jeanette had a troubled relationship with her mother and had been kicked out of her house due to drug use; Edwin and Jeanette told Martha about burglaries Jeanette had committed to obtain

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made by Edwin, the Court will not consider the Loeza Declaration to the extent that is purports to recount statements made by Edwin.

money for drugs; and Martha had observed Jeanette with large amounts of cash, foreign currency, and exotic coins. [FAP Ex. 2 ¶12; FAP Ex. 3 ¶¶ 4-5.]

Petitioner also proffers a motion his trial counsel made prior to his first trial, which contained a copy of Jeanette's signed statement given to the police at the time of her December 4, 2008 arrest. The motion asserted that Jeanette's statement, while hearsay, was admissible as a declaration against penal interest. [FAP Ex. 17.] Jeanette's statement is handwritten and appears to read: "I was with a friend hanging out, things didn't go as planned he bocked [*sic*][23] it, I was left with gun to hold and stranded. Only place I knew to go and was familiar with so that I ccin [*sic*] use a phone, was at the place were [*sic*] I was arrested." [*Id.* at #464.] Petitioner's counsel argued that this statement indicated that Jeanette was given the gun somewhere else and then went to the Kingsley address, where she was found with it. [RT1 15.] The trial court disagreed, finding that Jeanette appeared to be saying that her friend gave her the gun at the Kingsley location and then ran and left her with the gun, *i.e.*, "'He was the one with the gun. He gave it to me. I was stuck with it.'" [RT1 13, 15, 16.] The trial court found that the statement did not satisfy the declaration against penal interest requirements and was inadmissible. [RT1 16-18.]

In addition, Petitioner proffers a new assertion by Xatruch, which was not included in her testimony at the first trial and the second trial. In her 2013 Declaration, Xatruch asserts that when Officer Ortega started to search Jeanette's purse for the first time, Xatruch could "clearly see" that the gun was at the "very bottom of the purse." [FAP Ex. 2 ¶ 7.] Petitioner contends that this asserted fact proves that the gun "could not have been thrown into" the purse and that Officer Ortega therefore was lying. [Traverse at 22.]

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[23] Both the trial court and Petitioner's counsel interpreted this word to be "booked," as in "he booked it." [RT1 12.] Given the context, that interpretation appears both reasonable and correct.

b. New Evidence of Police Motive to Target Petitioner

At Petitioner's first trial, the prosecutor filed a motion to exclude evidence of a civil case that Petitioner had brought against the Los Angeles Police Department (LAPD). That motion is not contained in the trial and state habeas record. Petitioner's counsel agreed that there would be "no mention of that." [RT1 18.]

Here, to demonstrate his innocence, Petitioner argues that the police "had a motive to target him." He principally relies on an alleged civil case he brought against the LAPD officers who arrested him for a 2008 murder and attempted murder, charges that later were dropped by the District Attorney's Office after reviewing a video that appeared to exonerate him. Petitioner alleges that the officers possessed the exonerating video from the start and suppressed it and that the civil action was pending at the time of the incident at issue here. [Mem. at 10-11.] To support these allegations, Petitioner has proffered a copy of a news story about the dismissal of the charges [FAP Ex. 23] and a printout from Google Maps [FAP Ex. 21.] In addition, Petitioner proffers a copy of a California Government Code tort claim submitted to the City of Los Angeles for money damages on or about October 17, 2008, which was denied on October 23, 2009. [FAP Ex. 18.] Petitioner, however, has not produced any evidence of the civil lawsuit he alleges. Moreover, given that his government tort claim – the necessary precursory to any state law-based lawsuit – was still pending on December 4, 2008, it is unclear how he could have had a civil action pending at that time.

To further support this assertion, Petitioner proffers the 2013 Xatruch Declaration, in which Xatruch states that: she felt that the officers at the December 4, 2008 incident were targeting Petitioner due to a civil suit he had filed against the LAPD and that police officers had harassed Petitioner previously because of the suit; and it appeared to her that the arresting officers knew who Petitioner was and were targeting him. [FAP Ex. 2 ¶ 10.] Petitioner also proffers the defense investigator's report from the January 2, 2009 interview of Xatruch, which reports

her statements that: an officer looked at the apartment window where Petitioner was looking out and "recognized him as someone who has a lawsuit against the police"; and the officer told his partners he had seen Petitioner put something in the purse. [FAP Ex. 7.] Petitioner also proffers the defense investigator's report from the January 2, 2009 interview of Alfaro, which reports her statement that Petitioner was looking out the window when one of the officers said, in Spanish, "I know that guy. He has a lawsuit against us." [FAP Ex. 8.]

Further, Petitioner relies on the 2013 declarations of his half-brother Edwin, who states that: when Petitioner left the scene, officers asked him whether that was Petitioner; Edwin believed that the officers knew Petitioner because of the civil case he had filed; and an unspecified officer told the brother that Petitioner "had tried to sue the department." [FAP Ex. 1 ¶ 3; Dkt. 83, Ex. 30 ¶ 7.] Edwin further states that, on the way to the station, an officer mentioned Petitioner's lawsuit and said that Petitioner had been asking for trouble. [*Id.* ¶ 11.]

In addition, Petitioner notes that in 2007, he was charged with criminal counts that included battery on a peace officer and that he pled guilty to a charge of resisting an officer. Petitioner alleges, on information and belief, that the officer-victim was Officer Gabriel Blanco and that he was the same Officer Blanco who participated in the December 4, 2008 incident and arrest of Petitioner. To support this assertion, Petitioner relies on three items. First, he notes a page in the police report for the December 4, 2008 incident, which notes that an Officer Blanco (#36365) arrived with the second unit and knew that Petitioner lived in an apartment in 453 N. Kingsley Dr. based on his and another officer's "prior arrest of" Petitioner. [CT 57.] Second, Petitioner proffers minutes from Los Angeles Superior Court Case No. BA326153, which apparently was the 2007 criminal case he mentions, although they do not mention anything about an Officer Blanco. [FAP Ex. 19.] Third, Petitioner proffers a copy of a District Attorney's Office master

witness list for the second trial of the underlying criminal case here, which lists an Officer Blanco, #36365, as on call. [FAP Ex. 14.]

B. The Governing Federal Law

Under existing Supreme Court precedent, it is an open question if a freestanding actual innocence claim, whether raised as a due process claim and/or Eighth Amendment claim, is cognizable in a federal habeas action. The Supreme Court has repeatedly elected to leave this issue unsettled. *See McQuiggin*, 569 U.S. at 392 ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *see also District Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2009) (opining that whether a "federal constitutional right to be released upon proof of 'actual innocence'" "exists is an open question" under the Supreme Court's precedent); *House v. Bell*, 547 U.S. 518, 555 (2006) (expressly declining to "resolve" the question of whether "freestanding actual innocence claims are possible"); *Herrera v. Collins*, 506 U.S. 390, 399, 404-05 (1993) (opining that: "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding"; and "[w]e have never held that [the miscarriage of justice exception to procedural bars to habeas relief as based on factual innocence] extends to freestanding claims of actual innocence").

In *Herrera*, the Supreme Court acknowledged the possibility that a freestanding actual innocence claim might warrant federal habeas relief in a capital case, but stressed that it would be only upon an "extraordinarily high" and "truly persuasive" threshold showing. 506 U.S. at 417. Thirteen years later in *House*, another capital case, the Supreme Court expressly declined to answer the question left unresolved in *Herrera*, finding that although the petitioner's showing as to his asserted actual innocence had satisfied the gateway standard for proceeding on a

procedurally defaulted claim,[24] he had not satisfied the "extraordinarily high" burden for a "hypothetical freestanding innocence claim" "whatever" that burden might be. 547 U.S. at 555. Subsequently in *Osborne,* a civil rights action brought by a state prisoner seeking access to trial evidence to submit it for DNA testing, the Supreme Court declined to find that due process was violated by the state procedures available to the plaintiff for obtaining such testing. The Supreme Court also declined to resolve the plaintiff's assertion that he had a federal constitutional right to be released if he proved he was actually innocent, because such a claim, if cognizable, would sound in habeas rather than civil rights. In so concluding, the Supreme Court again opined that the existence of a freestanding actual innocence claim is "an open question" and noted "the difficult questions such a right would pose and the high standard any claimant would have to meet." 557 U.S. at 71.

The Ninth Circuit also "ha[s] not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although [it has] assumed that such a claim is viable." *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014).[25] The Ninth Circuit has opined that if

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[24] While the viability of asserting actual innocence as a freestanding, extant basis for federal habeas relief remains an open question, in contrast, it is well established that habeas petitioners may avoid a procedural bar to pursuing habeas relief by a showing of actual innocence meeting the standards established in *Schlup, supra*. The latter is what is known as a "gateway claim" (*House*, 547 U.S. at 554), namely, using asserted actual innocence as a basis for being allowed to seek federal habeas relief at all, when pursuing relief otherwise would be procedurally barred. *See, e.g., McQuiggin*, 569 U.S. at 396-97 (a properly supported showing of actual innocence can allow a petitioner to avoid untimeliness); *Schlup*, 513 U.S. at 319-22, 327 (a prisoner who asserts actual innocence as a gateway to proceeding on defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt"). *House* made clear that, whether or not there is such a thing as a freestanding actual innocence claim, the standard for that type of claim is more demanding than that applicable to gateway claims. *House*, 547 U.S. at 554-55 (a freestanding actual innocence claim "requires more convincing proof of innocence than *Schlup*").

[25] Of course, when a habeas claim is governed by AEDPA, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court'" within the meaning of Section 2254(d)(1). *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (2012) (*per curiam*) (citation omitted); *see also Glebe v. Frost*, 574 U.S. 21, 24 (2014) (*per curiam*) (reliance

such a claim is cognizable, the petitioner must go beyond demonstrating doubt about his guilt and must affirmatively prove that he is probably innocent. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (*en banc*); *see also Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000). Requiring affirmative proof of innocence is appropriate, because a freestanding claim of innocence seeks relief notwithstanding a constitutionally valid conviction. *Carriger*, 132 F.3d at 477.

Thus, under current law, neither the Supreme Court nor the Ninth Circuit has actually "determined" and held that a freestanding actual innocence claim asserted in a noncapital case is a basis for federal habeas relief on its own; at most, they have "assumed without deciding that such a claim is viable." *Morris v. Hill*, 596 Fed. Appx. 590, 591 (9th Cir. Mar. 10, 2015) (also declining to "decide whether to recognize a freestanding actual innocence claim"). "The Supreme Court has never recognized 'actual innocence' as a constitutional error that would provide grounds for relief without an independent constitutional violation." *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016).

C. Federal Habeas Relied Is Not Warranted.

Applying these principles, the Court concludes that Ground One does not warrant habeas relief, because the state court's decision was not contrary to, or an unreasonable application of, any clearly established federal law.

This Court's review of Ground One is governed at the threshold by Section 2254(d)(1). The Supreme Court has never squarely held that a freestanding actual innocence claim is a cognizable federal habeas claim, especially in the non-capital context. Indeed, despite having been presented with multiple opportunities to

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on Ninth Circuit precedent that did not arise under AEDPA, and thus did not purport to reflect clearly established Supreme Court precedent, was error). That said, circuit precedent which identifies the clearly established Supreme Court precedent and interprets it is relevant to the Section 2254(d)(1) analysis. *See, e.g., Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (characterizing such decisions as "persuasive authority").

resolve the issue, the Supreme Court repeatedly and explicitly has declined to do so and has characterized the issue as an "open question."[26]

As a result, the state courts' rejection of Ground One cannot be contrary to, or an unreasonable application of, clearly established federal law. *Moses*, 555 F.3d at 760 (when "a Supreme Court decision that 'squarely addresses the issue' in the case before the state court" is absent, there is no clearly established federal law for Section 2254(d)(1) purposes and deference to the state court decision is required) (*citing, inter alia, Van Patten*, 552 U.S. at 125-26, and *Musladin*, 549 U.S. at 77); *see also Knowles*, 556 U.S. at 122 (under Supreme Court precedent, it is not an unreasonable application of clearly established federal law "for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court); *Holley v. Yarborough*, 568 F.3d 1091, 1097-98 (9th Cir. 2009) ("[c]ircuit precedent may not serve to create established federal law on an issue the Supreme Court has not yet addressed," and "[w]hen there is no clearly established federal law on an issue, a state court cannot be said to have unreasonably applied the law as to that issue"). "[W]here the Supreme Court has expressly concluded that an issue is an 'open question,'" "a constitutional principle is not clearly established for purposes of § 2254." *Murdoch v. Castro*, 609 F.3d 983, 994 (9th Cir. 2010) (*en banc*); *see also Musladin*, 549 U.S. at 76-77 (finding that Section 2254(d)(1) could not be found satisfied when habeas relief depended upon applying caselaw that involved "an open question in [Supreme Court] jurisprudence"); *Larson v.*

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[26] Petitioner objects to this conclusion, asserting that *Herrera* and *In re (Troy Anthony) Davis*, 557 U.S. 952 (2009) constitute "clearly established federal law that a substantive innocence claim is viable" for purposes of Section 2254(d)(1). Suffice it to say, the Court believes Petitioner's assertion to be wrong for the reasons set forth above. In his Objections, Petitioner also contends that a freestanding actual innocence claim cannot be subjected to the Section 2254(d) standard of review and then denied, even though the state court denied the claim on its merits. Whether or not such a rule should be adopted across the board, as Petitioner urges, the Court does not believe that existing law to date supports a ban on applying Section 2254(d) review under the facts of this case.

Palmateer, 515 F.3d 1057, 1066 (9th Cir.2008) (because the Supreme Court had expressly left an evidentiary issue an open question, the state court did not unreasonably apply clearly established federal law in finding that the challenged admission of evidence did not violate due process).

Moreover, this is an issue on which federal circuits have differed, with some flatly refusing to consider freestanding actual innocence claims given that their viability remains an open question under Supreme Court precedent to date. *See, e.g., Farrar v. Raemisch*, 924 F.3d 1126, 1131 (10th Cir. 2019) (opining that the Supreme Court "has never recognized freestanding actual innocence claims as a basis for federal habeas relief" and that "actual innocence does not constitute a freestanding basis for habeas relief"); *Johnson v. Warden, Georgia Diagnostic and Classification Prison*, 805 F.3d 1317, 1324 (11th Cir. 2015) (observing that it is "not settled" under Supreme court precedent whether a freestanding actual innocence claim "is viable" even in capital cases and that its own circuit precedent forbids granting habeas relief based on actual innocence in non-capital cases); *Thomas v. Perry*, 553 Fed. Appx. 485, 487 (6th Cir. Jan. 15, 2014 (finding freestanding actual innocence claim to be "not cognizable," citing *Herrera*, 506 U.S. at 400). This divergence between the Circuits only underscores that Section 2254(d)(1) cannot be satisfied here. *See Meras v. Sisto*, 676 F.3d 1184, 1190 (9th Cir. 2012) (finding the Section 2254(d)(1) threshold unmet when there was "extensive, reasoned disagreement" among courts regarding the question posed by the petitioner's habeas claim, thus demonstrating that "'fairminded jurists'" not only "could disagree" (*Richter*, 562 U.S. at 101) but "in fact did" disagree on the issue, thereby precluding federal habeas relief); *Bailey v. Newland*, 263 F.3d 1022, 1032 (9th Cir. 2001) (declining to find that the state court unreasonably applied clearly established federal law "[i]n view of the difference of opinion among the courts of appeal" on a question on which the Supreme Court had not yet ruled).

Ground One rests on the premise that a freestanding actual innocence claim is

viable, even though the Supreme Court – to date – has not actually so held. Section 2254(d)(1), however, precludes relief when a claim rests on a constitutional issue that the Supreme Court has declined, repeatedly, to resolve and has made clear remains an open question. For this reason alone, federal habeas relief based on Ground One is foreclosed.

In addition, even if the Court could ignore Section 2254(d)(1)'s mandate, Petitioner still must make an evidentiary showing sufficient to satisfy the demanding standards both the Supreme Court and Ninth Circuit have indicated would apply if an actual innocence claim could be considered. The determination of that question requires the Court to examine both the trial evidence and the "new" evidence proffered by Petitioner – both individually and in cumulation – in light of the following principles.

Post-trial declarations purporting to prove innocence "are to be treated with a fair degree of skepticism." *Herrera*, 506 U.S. at 423 (O'Connor, J., concurring). This is especially so when they "conveniently blame" someone else as the culprit who is not available to contest the allegations, or when they "contradict each other." *Id.* In addition, declarations purporting to show innocence based on hearsay statements are "particularly suspect," *Herrera*, 506 U.S. at 417, and those from friend and relatives have lesser "probative value" that those provided by third parties "with no evident motive to lie," *House*, 547 U.S. at 552. Further, "[e]vidence that merely undercuts trial testimony or casts doubt on the petitioner's guilt, but does not affirmatively prove innocence, is insufficient to merit relief on a freestanding claim of actual innocence." *Jones*, 763 F.3d at 1251; *see also Carriger*, 132 F.3d at 476 (finding that the threshold for a freestanding claim of actual innocence "contemplates a stronger showing than insufficiency of the evidence to convict" and, instead, there must be evidence affirmatively proving that the petitioner is probably innocent). New evidence that raises a significant doubt about the petitioner's guilt is not enough. *See House*, 547 U.S. at 555 (evidence proffered by

the petitioner that "cast considerable doubt on his guilt" not sufficient to meet the "extraordinarily high" "burden a hypothetical freestanding actual innocence claim would require"); *Jackson*, 211 F.3d at 1165 (rejecting a freestanding actual innocence claim even though the petitioner's new evidence "certainly cast doubt on his conviction").

To begin, Petitioner has not personally claimed innocence; there is no declaration or other evidence from Petitioner himself. Rather, to support his actual innocence claim, he relies on the statements of family members, friends, and neighbors, some of whom already testified at trial.[27] Plainly, as do any relatives, Petitioner's mother (Xatruch), half-brother (Edwin), and sister (Martha) have a motive to lie, and thus, their post-trial declarations must be read with the skepticism that the Supreme Court has said is required. Moreover, as discussed below, these "new" declarations rely in substantial part on hearsay and/or on an attempt to pin blame on an absent party – factors that the Supreme Court has counseled render any such "new" evidence suspect. With this in mind, the Court turns to the evidence Petitioner contends proves his actual innocence.

Petitioner's principal actual innocence argument is that the trial testimony of all of the defense witnesses, as supplemented by the 2013 declarations of one of them (Xatruch) and of two non-witnesses (Edwin and Martha), demonstrates that Officer Ortega was lying about what happened. However, the trial testimony of the defense witnesses was considered by the jury and obviously rejected, given its verdict. To the extent that Petitioner argues that the jury got it wrong and should have believed the defense witnesses, rather than Officer Ortega, he does not come close to satisfying the "extraordinarily high" affirmative proof of probable

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[27] In his Objections, Petitioner asserts that by this language in the Report, the Court somehow finds the lack of any declaration from Petitioner to be dispositive of his actual innocence claim. That is an inaccurate reading of the Report, which merely pointed out that this was a situation in which a petitioner's assertion of innocence was based on evidence from third parties rather than from the petitioner himself.

innocence required. *Herrera*, 506 U.S. at 417; *Carriger*, 132 F.3d at 776. The Court's task instead is to examine whether the "new" evidence proffered, in light of the trial record, satisfies those stringent standards.

Petitioner proffers the declarations of his mother and half-brother as proof that the events described by Officer Ortega did not occur. Xatruch's Declaration repeats much of what she testified to at trial, including that Petitioner already was upstairs in the apartment before the police arrived, although she adds some new details to which she did not testify and which Petitioner contends show that Officer Ortega was lying.[28] Xatruch states that when Officer Ortega first looked into Jeanette's purse, Xatruch observed the gun at the "very bottom" of the purse. Petitioner contends that Xatruch's observation proves he could not have tossed the gun into the purse, and thus, Officer Ortega lied when he testified that he saw Petitioner do so. This contention is unpersuasive, to put it mildly. An object with the weight of a gun tossed into a flexible object like a purse easily could sink to its bottom, particularly when, as here, the purse has been "grabbed" and moved before being searched [RT2 410]. Xatruch also states that: police officers saw Petitioner in the apartment window and asked who he was; she told them it was Petitioner; and the officers said they wanted to speak with him, over her protests that "he had nothing to do with what was happening downstairs."[29] Even crediting this statement, it also does nothing to cast doubt on Petitioner's guilt. Officer Ortega

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[28] Xatruch testified twice at her son's two trials in 2009, yet failed to mention these matters in her testimony. That she did not do so and waited four years to mention them raises some reliability concerns. *See Herrera*, 506 U.S. at 423 (labelling as "suspect" affidavits that are produced after a long delay and without a reasonable explanation for the delay) (O'Connor, J., concurring).

[29] At the first trial, Xatruch started to testify that Petitioner was looking down from the window and "the police asked me who," but an objection was sustained. She then was allowed to testify that she saw Petitioner looking down from the window and that the police told her they were going to go get him. [RT1 110-11.] She did not provide any similar testimony at the second trial.

testified that Petitioner ran upstairs as the two officers who first arrived approached the building. Given this circumstance, it is not surprising that officers who saw Petitioner in the window observing the events might wish to speak with him. Xatruch's new and fuller description about this event does not detract from Ortega's testimony in any way and, if anything, could be said to tend to support it. In any event, both Xatruch's new statement in this respect and Ortega's testimony can be true.

Edwin's two 2013 Declarations actually are "new" evidence in the sense that Edwin was not a trial witness, even though he admits that he was available in 2009 to testify at Petitioner's second trial with respect to the matters asserted in his Declarations. [Dkt. 83, Ex. 30 ¶¶ 16, 18.]

Critically, Edwin contradicts the testimony of all of the other defense witnesses, as well as the Declaration of his mother (Xatruch), on a dispositive issue. Edwin states that Petitioner was downstairs talking to him and Jeannette *when the police arrived* and went upstairs *after* he "saw the cops" and *after* advising Edwin and Jeanette that a police car was "pulling up behind" them. [FAP Ex. 1 ¶ 2; Dkt. 83, Ex. 30 ¶ 4.] These sworn statements by Edwin are essentially consistent with Officer Ortega's testimony that Petitioner was present with Edwin and Jeanette and left the scene as the officers approached. Moreover, Edwin's statements directly contradict the testimony (and Declaration) of Xatruch and the testimony of Gonzalez, and Paz that Petitioner had returned to and been inside the upstairs apartment for some period of time before the police arrived.[30] Given that

[30] It is important to note that when Xatruch was interviewed by a defense investigator within a month of the incident, she told him that the police arrived "[w]hile our client [Petitioner] was outside with his child." [FAP Ex. 12.] At trial, Xatruch testified that Petitioner was inside the apartment when the police arrived and claimed that she had been referring to Edwin when she made this statement to the investigator. [RT2 413.] Edwin, however, did not have a child with him at the time of the incident, and moreover, Xatruch did not tell the investigator that Petitioner had returned to the apartment after getting ice cream and before the police arrived, as she claimed at trial. Rather, as the investigator reported, Xatruch said that Petitioner went to get ice cream

Petitioner's actual innocence claim rests entirely on the premise that he had returned to, and was inside the upstairs apartment, before the police officers arrived, as defense witnesses testified at trial, and that Officer Ortega therefore could not have seen Petitioner standing downstairs and toss something in Jeanette's purse before running upstairs, Edwin's Declarations fundamentally undermine Petitioner's actual innocence claim. At a minimum, Petitioner's own evidence as to this factual issue critical to his assertion of actual innocence is in conflict, which renders it difficult, if not impossible, to find that Petitioner has made the required "extraordinarily high" showing of innocence.

Petitioner also relies on Edwin's declaration statement that he did not see Petitioner put a gun or anything else in Jeanette's purse. Even if it could be assumed that Edwin's eyes were on Petitioner at all relevant times – and, significantly, he does not say that they were – this statement by Edwin merely conflicts with Officer Ortega's testimony that he did see Petitioner toss a gun in the purse. This conflict, however, at most gives rise to a he said-he said situation and is not sufficient to affirmatively prove Petitioner's probable innocence, particularly when viewed in light of Edwin's status as Petitioner's relative.

Petitioner's next actual innocence argument is that declaration statements made by his family members regarding Jeanette prove that the gun found in Jeanette's purse was hers, and thus, Petitioner could not have put it there and Officer

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with his child and the police arrived while he was outside with the child, so she went downstairs to see what was happening. [*Id.*]

Petitioner also relies on the defense investigator's report of a January 2009 telephone interview of Wendy Gutierrez, discussed earlier, in which Gutierrez is reported as having stated that Petitioner went inside before the police arrived. While this evidence is "new," in that Gutierrez did not testify at trial, it is hearsay with no apparently applicable exception to render it admissible. Further, is entirely cumulative of the trial testimony of Petitioner's relatives and neighbor Paz. Thus, while the Court has considered the report, it does not add much to the innocence issue. In his Objections, Petitioner cites this language from the Report and asserts that the Court thereby has "dismisse[d]" all of the new evidence he presented as cumulative of the testimony at trial. This is misleading and untrue.

Ortega lied. Edwin states that he "knew" that Jeanette had a gun in her purse. Xatruch states that Jeanette was constantly in trouble and that Xatruch had observed her high on drugs many times. Xatruch also states that she observed Jeanette wearing expensive items "that she clearly could not afford" and that Xatruch had "heard" she got them by committing burglaries. Martha states that Jeanette had problems with her mother and had been kicked out of her home for drug use, and that Jeanette often had large amounts of cash and foreign currency. Martha also states that Edwin and Jeanette told her about burglaries Jeanette had committed to obtain money for drugs.

The problem with these statements is that they are vague and not particularly probative. For example, Edwin does not say how he "knew" Jeanette had a gun in her purse, and critically, he does not contend that he had seen the gun in the purse before the police arrived. Xatruch's and Martha's statements are vague as well and rest, in part, on hearsay. Petitioner's attempt to paint Jeanette as a bad person and thus, by implication, someone who could have been carrying a gun is not properly supported or persuasive. But even if these partially hearsay assertions could competently prove that Jeanette was someone who used drugs, had problems at home, and who had committed burglaries, these circumstances would not demonstrate that she had a gun in her purse and that Petitioner had not put it in her purse. A troubled mother-daughter relationship, the use of drugs, and the commission of burglaries to support a drug habit do not equate, necessarily, to owning a gun and/or carrying it with you while socializing in public. And as the record Petitioner has provided shows, Petitioner had his own earlier interactions with the criminal justice system, including his conviction two years prior. Thus, his contention that prior criminal activity equates to possession of a gun cuts both ways.

In these same three Declarations, Edwin, Xatruch, and Martha recount statements allegedly made by Jeanette, which Petitioner relies on to demonstrate that the gun belonged to Jeanette. Edwin states that Jeanette told him she had told the

police repeatedly that the gun was hers. Martha states that both Edwin and Jeanette told her that she often carried a gun and often did so in her purse, and that Jeanette later said to Petitioner's counsel that she wanted to testify that the gun was hers. Xatruch states that, after Jeanette was released, she told Xatruch on several occasions that the gun was hers and Petitioner had nothing to do with it.

Petitioner, however, has not presented any evidence from Jeanette herself that would support these witnesses' hearsay assertions about the statements attributed to her.[31] All of these assertions are hearsay or double hearsay, and there is no apparent hearsay exception that renders Jeanette's alleged statements and/or Edwin's alleged statements to Martha and Xatruch admissible.[32] Moreover, the only actual statement by Jeanette proffered by Petitioner – her signed statement to the police, as described earlier – indicates that Jeanette claimed that the gun belonged to someone else who had "booked it." While defense counsel, prior to the first trial, argued that Jeanette's statement could be construed to mean that she was given the gun, the person who gave it to her left, and she only then went to the Kingsley apartments, it is equally possible to interpret her statement to mean that she was given the gun at the Kingsley apartments and the person who gave it to her left, an interpretation that is consistent with Officer Ortega's testimony. In short, Jeanette's statement to the police may help to support Petitioner's actual innocence contention or may

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[31] In his Objections, Petitioner asserts that, by this sentence, the Report "faults" Petitioner for not producing a declaration from Jeanette. Again, this is an inaccurate representation as to the Report's content. As set forth above, the Report merely pointed out that, through hearsay and double hearsay, a host of third parties attribute a variety of statements to Jeanette, but there is no declaration or other evidence from Jeanette on these issues.

[32] Although Petitioner asserts that evidence from third parties that Jeanette had said the gun was hers would have been admissible as a declaration against interest, it is not clear that the requirements for this California Evidence Code § 1230 hearsay exception are satisfied absent evidence that Jeanette would have been subject to criminal liability for possessing the gun (*e.g.,* the gun was unregistered or she was a convicted felon). No such evidence, however, exists in the record.

substantially hurt it, an ambiguity that precludes this particular evidence from satisfying the foregoing stringent standards. In any event, the hearsay nature of Petitioner's proffer and the unavailability of Jeanette only makes clear the unreliable nature of Petitioner's evidence allegedly showing that the gun belonged to Jeanette rather than to Petitioner. Whatever one thinks of this evidence, it is not of the persuasive nature needed to affirmatively demonstrate Petitioner's probable innocence.

Finally,[33] Petitioner argues that other new evidence, as described in Subsection A.3.a above, proves that the police had a motive to frame him based on a pending lawsuit he had brought against the LAPD. The threshold problem is that Petitioner has not submitted any competent proof of such a lawsuit. The document on which he relies is a government tort claim submitted to the City of Los Angeles [FAP Ex. 18] not proof of a commenced lawsuit, and the news story about the dismissal of the charges against him and a Google Maps printout do nothing evidence-wise to establish any lawsuit. Petitioner has not even provided a case number for the alleged lawsuit or identified the court in which it was filed, as well as its status as of December 4, 2008 (and as noted earlier, it is difficult to see how a lawsuit could have been filed as of then given that the government tort claim remained pending). The Declaration statements of Xatruch and Edwin regarding what police officers allegedly said about a lawsuit are hearsay, as is the similar evidence from trial (a defense investigator's reports as to Alfaro's and Xatruch's statements).

But even if, notwithstanding the lack of evidentiary support, the Court

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[33] Petitioner also argues that: there was no physical evidence tying Petitioner to the gun; Petitioner's shorts were too baggy to hold a gun in the waistband; it doesn't make sense that Petitioner would throw the gun into the purse instead of simply running upstairs with it; and no other police officers testified to support Officer Ortega's testimony. These are all matters that were before the jury and are not new evidence; indeed, defense counsel argued most of them in closing. Even when considered with the new evidence presented, they do not come close to constituting the affirmative proof of probable innocence the Ninth Circuit has required.

assumes that Petitioner, in fact, had filed a civil lawsuit against the LAPD prior to December 4, 2008, and further, that the police officers who responded to the incident knew about it, this does not rise to the level of affirmative proof of probable innocence. There is no evidence before the Court that the police officers who were the target of that lawsuit were the same officers who responded on December 4, 2008. Even if local area police officers knew about such a lawsuit, this does not, in turn, raise reasonable doubt as to the veracity of Officer Ortega's testimony, particularly now that Edwin has provided two sworn statements that contradict all other defense witnesses on the critical issue of where Petitioner was when the police arrived – upstairs in the apartment or downstairs with Edwin and Jeanette, as Edwin states and Officer Ortega testified. Speculation that Ortega and the responding officers wanted to "frame" Petitioner because he had sued other officers does not prove that he is innocent and, at most, is a factor bearing on Officer Ortega's credibility.

To further support his motive argument, Petitioner also cites to the fact that an Officer Blanco was present at the December 4, 2008 incident and that a year earlier in 2007, Petitioner was convicted of resisting an officer and the officer involved was named Officer Gabriel Blanco. The evidence Petitioner proffers, however, does not actually establish the name of the officer involved in the 2007 conviction. While it is possible that the same officer was involved in both incidents, the evidence does not establish this fact, and it is equally possible that different officers were involved in each incident given that Blanco is not an uncommon name in Los Angeles. To the extent that Petitioner's motive theory also rests on the existence of a single Officer Blanco who was biased against him due to the 2007 conviction, Petitioner has not come close to proving any such thing.

Petitioner's showing in this case does not begin to approach the "extraordinarily high" level of proof the Supreme Court has opined would be necessary to merit relief on a freestanding actual innocence claim (if such a claim

even were cognizable). Indeed, far more persuasive and compelling showings of innocence have been held to be inadequate to meet the level of proof needed to state a viable freestanding actual innocence claim and to affirmatively prove probable innocence. *See, e.g., House*, 547 U.S. at 553-55 (new DNA evidence that semen found on victim came from her husband, new evidence that victim's blood on petitioner's clothes could not have come from victim when alive and likely came from spilled vials, and new testimony from multiple disinterested witnesses implicating victim's husband – while sufficient to meet the *Schlup* gateway standard – nonetheless was insufficient to satisfy the higher burden for freestanding actual innocence claims); *Carriger*, 132 F.3d at 474-77 (evidence that another suspect had confessed to the murder, described details only a participant in the crime would have known, and boasted that petitioner had been set up, which "casts a vast shadow of doubt over the reliability of his conviction," was held to be insufficient to affirmatively prove actual innocence).

Even when the "new" evidence proffered by Petitioner is construed most strongly in his favor despite the problems with it outlined above, the most that can be said is that it may cast doubt on his guilt. Merely casting doubt, however, is insufficient to meet the "extraordinarily high" and "truly persuasive" level of proof required and falls far short of affirmatively proving Petitioner's probable innocence. Even if Petitioner could be said to have the right to assert a freestanding actual innocence claim in this action governed by Section 2254(d)(1), he has not met the stringent standards enunciated by the Supreme Court and the Ninth Circuit that must be satisfied to prevail on such a claim. Accordingly, for all of the reasons set forth above, Ground One should be denied.

IV. Ground Two: The Ineffective Assistance Issue

Petitioner initially was represented by a Los Angeles County Deputy Public Defender who had an investigator interview six eyewitnesses and write related

reports, conducted the preliminary hearing, and filed a *Pitchess* motion. [CT 1-17, 20, 24-51; FAP Exs. 6-10, 12.] Petitioner's family then retained attorney Ralph Ayala and paid him $4,000 to represent Petitioner, and he first appeared on Petitioner's behalf on February 11, 2009. [CT 69; FAP Ex. 2 ¶ 13.] Ayala's performance is the subject of Ground Two.[34]

A. The Instances Of Ineffective Assistance Alleged

In his second habeas claim, Petitioner contends that Ayala provided ineffective assistance in numerous respects.[35] These contentions, which rest primarily on the Declaration statements of Xatruch, Martha, and Edwin, are as follows:

First, Petitioner alleges that Ayala failed to hire an investigator or request additional funds to do so and that he improperly relied only on the interview reports generated by his predecessor. Petitioner bases this contention on: Xatruch's and

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[34] The Court notes that Petitioner's ineffective assistance arguments often discuss things that happened (or did not happen) in connection with the first trial. Petitioner, however, was not convicted at the first trial. For Sixth Amendment purposes, the focus here must be on Ayala's conduct related to and/or that actually had an effect on the trial of conviction, *i.e.,* the second trial. Put otherwise, the federal habeas question is did any constitutional error occur in connection with the second trial that led to the judgment under habeas attack?

[35] Petitioner also: complains that Ayala did not have his family sign a retainer agreement and did not provide them with a receipt for the $4,000 paid; and asserts that Ayala had been a prosecutor but was fired for "regularly using cocaine off duty," relying on 1987 newspaper articles indicating that Ayala was fired based on a single incident. [Mem. at 14-15; FAP Ex. 22.] Petitioner does not allege that Ayala's performance was affected by either of these matters, nor does Petitioner argue that either one caused him prejudice within the meaning of the Sixth Amendment. Moreover, Petitioner's assertion of "regular" drug use by Ayala lacks any evidentiary support. The relevant inquiry on an ineffective assistance claim is whether counsel's performance was deficient and caused prejudice in connection with the particular defendant and trial in issue, not what occurred elsewhere. *See, e.g.*, *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir. 1995); *see also, e.g., Smith v. Ylst*, 826 F.2d 872, 876 (9th Cir. 1987) (petitioner alleging that mental illness of counsel resulted in ineffective assistance was still required to "point to specific errors or omissions which prejudiced his defense"). These alleged retainer and drug use matters are irrelevant to this case and counsel's references to them are gratuitous and inappropriate.

Martha's statements that it "appeared to" them that Ayala did not conduct any investigation; and Martha's statement that Ayala never asked her (nor to her knowledge Xatruch) for investigation funds. [Mem. at 15.]

Second, Petitioner alleges that Ayala did not interview "any" witnesses, and thus, failed to discover and present relevant exculpatory evidence including Xatruch's and Martha's statements portraying Jeanette as a bad person. To support this contention, Petitioner relies on: Xatruch's statement that neither Ayala personally nor anyone on his behalf interviewed her; and Martha's statements that she told Ayala that Edwin and Jeanette were willing to testify but "to her knowledge," Ayala did not interview them or ask them to testify, that Ayala did not interview her, and that "she does not recall" "Ayala ever interviewing" Xatruch. [Mem. at 15-16.]

Third, Petitioner alleges that Ayala did not prepare "any witnesses" for their trial testimony. Petitioner relies on Xatruch's statements that: neither Ayala nor his representative interviewed her; before the first trial, Xatruch spoke with Ayala and told him about Petitioner's lawsuit against the police department, and he told her not to bring it up; and other than that conversation, Ayala did not discuss the substance of her testimony with her prior to either trial. [Mem. at 15.]

Fourth, Petitioner alleges that Ayala failed to interview third party witnesses and neighbors "Nikki and Julie," last names unknown. Petitioner bases this allegation on Xatruch's representations that: the two women were buying ice cream at the time of the incident; Julie argued with the officers when Petitioner was arrested, because she could see he wasn't involved; and both women wanted to testify. [Mem. at 16.]

Fifth, Petitioner complains that Ayala failed to interview Wendy Gutierrez (whose interview report was discussed in connection with Ground One) or call her to testify, even though he had included her on the defense witness list. [Mem. at 16.]

Sixth, Petitioner complains that Ayala failed to interview Edwin. Petitioner concedes that Edwin was unavailable to testify at the first trial (because he was in custody and then was deported) but asserts that had Edwin been interviewed prior to the first trial, his "statements" could have been admitted through an unidentified exception to the hearsay rule. [Mem. at 17.]

Seventh, Petitioner alleges that, in connection with the second trial,[36] when (according to Xatruch and Martha) Jeanette was present at the courthouse and told Ayala she would testify that the gun was hers, Ayala warned Jeanette that this was not a good idea and that she could go to jail. Petitioner asserts that once Jeanette took the Fifth, Ayala should have presented evidence (through Martha and Xatruch testimony) of what she said to him in the courthouse earlier as a "declaration against interest." [Mem at 17-18, 22-23.]

Eighth, Petitioner asserts that Ayala should have presented evidence that the officers involved had a motive to frame him due to his lawsuit brought against the LAPD. To support this assertion, Petitioner relies upon Xatruch's and Martha's declaration statements that they told Ayala about it, as well as Xatruch's and Alfaro's January 2009 statements to the defense investigator. Petitioner also relies on the California Court of Appeal's decision in Petitioner's direct appeal, which in connection with a *Pitchess* motion issue, noted that an attorney had submitted a complaint to the LAPD alleging that Officer Ortega had falsified his report regarding the December 4, 2008 incident. [Mem. at 18-19.]

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[36] Petitioner also complains about Ayala's conduct prior to the first trial, such as that: his only effort to locate Jeanette prior to the first trial was to attempt to serve her with a subpoena, without any follow-up; Ayala told Martha that it would be a bad idea for Jeanette to testify; and the motion to have Jeanette's signed statement to the police admitted in the first trial failed, because Ayala did not proffer to the trial court the earlier-discussed hearsay evidence regarding statements Jeanette allegedly made to Xatruch and Martha, which Petitioner asserts would have been admissible under the declaration against interest exception. The Court will not address these first-trial related arguments for the reasons discussed earlier.

Ninth, Petitioner complains that Ayala failed to obtain DNA from Jeanette and Edwin and to have DNA testing done on the gun to see if it matched Jeanette's and/or Edwin's DNA. According to Martha, she asked Ayala to do so and he was not interested. [Mem. at 20-21.]

Tenth, Petitioner complains about Ayala's failure to present Alfaro (who had testified at the first trial) as a defense witness at the second trial. [Mem. at 21.]

Eleventh, Petitioner faults Ayala for failing to present evidence that police officers saw Petitioner in the upstairs apartment window. Petitioner argues that the prosecutor was able to "exploit" this lack of evidence by stating: "The whole, I guess, hangup with that story is that, if police arrive five minutes after the defendant went upstairs, how do they know he was there?" [Mem. at 21.]

Twelfth, Petitioner faults Ayala for failing to present the baggy shorts worn by Petitioner at the second trial, even though he presented them at the first, and instead, allegedly only asked Gonzalez whether Petitioner was wearing baggy shorts. [Mem. at 21-22.]

Thirteenth, Petitioner faults Ayala for failing to make an argument he had made at the first trial, namely, that Officer Ortega's testimony that Petitioner had thrown a gun into Jeanette's purse was "implausible." Petitioner further faults Ayala for failing to adduce evidence that Jeanette's purse was "medium" in size, even though Ortega described it as "medium-sized" at the preliminary hearing. [Mem. at 22.]

Fourteenth, Petitioner contends that Ayala should not have stipulated to have a redacted version of the investigator's report regarding his interview with Xatruch admitted into evidence. Petitioner contends that an omitted paragraph would have clarified that a statement in the report's first paragraph – *i.e.,* that Xatruch said Petitioner was downstairs with his child when the police arrived – was a mistake, and that this omission allowed the prosecutor to note the inconsistency between Xatruch's testimony and the report on where Petitioner was when the police arrived.

[Mem. at 23-24.]

Fifteenth, at the first trial, Ayala objected to a jury instruction regarding the concept of constructive possession and the judge sustained his objection. At the second trial, Ayala did not again object to the instruction and it was given. Petitioner argues that Ayala had no reasonable strategic basis for not objecting again. [Mem. at 24-25.]

B. Habeas Relief Is Not Warranted.

In Section II, the Court set forth the clearly established federal law regarding ineffective assistance of trial counsel claims and will not repeat it here. The question for Ground Two is whether, when viewed through the doubly deferential standard that governs, the state court's rejection of the numerous ineffective assistance subclaims raised through Ground Two was contrary to or an unreasonable application of the *Strickland* test? The Court concludes that it was not, and that Section 2254(d)(1) deference is required, for the following reasons.

Petitioner's **first** subclaim based on Ayala's alleged failure to investigate and reliance on the investigation done by his predecessor. A defense attorney has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. To show prejudice based on Ayala's asserted failure to investigate, Petitioner must demonstrate that further investigation would have revealed favorable evidence. *See Ceja v. Stewart*, 97 F.3d 1246, 1255 (9th Cir. 1996); *Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995). He also must show that "the noninvestigated evidence was powerful enough to establish a probability that a reasonable attorney would decide to present it and a probability that such presentation might undermine the jury verdict." *Mickey v. Ayers*, 606 F.3d 1223, 1236-37 (9th Cir. 2010).

Petitioner cites the statements of Xatruch and Martha that it "appeared" to them that Ayala had not done any investigation and never asked Martha for money

to hire an investigator. This subjective belief by Petitioner's mother and sister alone would be an inadequate showing that there was a complete failure by Ayala to investigate, but the Loeza Declaration does provide some further support. [FAP Ex. 4 ¶ 10: stating that Ayala said he did not hire an investigator and, thus, there was no separate investigator's file.]. But the failure to retain an investigator does not, in itself, prove that an investigator was needed or that no investigation was done. Ayala was able to utilize the results of the investigative efforts of Petitioner's prior counsel, including the reports of the interviews of five eyewitnesses, which was the most relevant information for the defense. Petitioner has not shown that these reports were inadequate. Ayala's file also contained, *inter alia*, the results of the prosecution's forensic testing, the arrest report, evidence report, and related documents, pictures of the crime scene, and news clippings about the dismissal of the charges against Petitioner in the separate murder case. [FAP Ex. 4 ¶ 4.]

In short, this is not so much a claim of a total failure to investigate but a claim that, while some investigation was done, further investigation was constitutionally required. Petitioner's first subclaim rests on the premise that had Ayala investigated beyond the materials he had: he would have discovered the *additional* matters set forth in the Edwin, Xatruch, and Martha Declarations discussed earlier in connection with Petitioner's actual innocence claim; Ayala thereby necessarily would have presented such additional information as evidence at the second trial and it necessarily would have been admitted into evidence; and Petitioner thus would have been acquitted. But according to Xatruch and Martha, Ayala *was aware of* almost all of this additional information because they had told him about it. [FAP Ex. 2 ¶¶ 15, 17, 19, 19A, 20; FAP Ex. 3 ¶¶ 7-10, 12, 13.] Thus, given that Ayala knew of this information, the Court must assume that he made a decision not to proffer it at trial. As discussed below in connection with the second subclaim, Petitioner's arguments about the admissibility and exculpatory impact of the additional information set forth in these family member declarations are far from

persuasive. As a result, the Court concludes that it was not objectively unreasonable for the state court to find that Ayala's asserted lack of additional investigation did not equate to deficient performance, nor did it result in prejudice.

Petitioner **second** subclaim rests on the assertion that Ayala did not interview "any" witnesses, based on the statements of Xatruch and Martha that Ayala did not interview them and that Martha believes that he did not interview Edwin and Jeanette. Petitioner argues that, had Ayala interviewed unspecified persons, he would have discovered the additional information set forth in the Xatruch, Martha, and Edwin Declarations, which, in turn, would have resulted in admissible evidence that would have caused Petitioner to be acquitted. Petitioner's second contention fails for two reasons.

First, there is no rule requiring an attorney to interview all prospective witnesses. *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) ("'the duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed'") (citation omitted). This is especially so when the witness's account is already known to counsel. *Id.* As noted above, the Xatruch and Martha Declarations make clear that Ayala did talk to them on more than one occasion and they told him about the additional information they now assert was critical. Indeed, they expressly fault him for not acting on this information they had conveyed to him. Given that they had made this information known to Ayala, there is no apparent reason why a separate formal "interview" was required. Ayala also had the investigator's reports of the interviews done of Xatruch, Alfaro, Gonzalez, Paz, and Gutierrez, and moreover, Ayala had the additional benefit of having heard the testimony of Xatruch, Alfaro, Gonzalez, and Paz at the first trial. Again, Petitioner proffers no reason why an additional "interview" of these witnesses was required. While it is true that Ayala did not interview Edwin or Jeanette, Edwin was unavailable as of the time of the first trial,

as was Jeanette apparently,[37] and in any event, Ayala was already aware of their purported value (or not) as witnesses based on what he had been told by Xatruch and Martha, including about Jeanette possessing a gun.

Moreover, as discussed earlier, Edwin has provided a version of events that directly contradicts the version provided by Xatruch, Gonzales, and Paz at trial on the lynchpin question of where Petitioner was at the time the police arrived. The defense theory proffered through these three trial witnesses was that Officer Ortega necessarily was lying about what happened, because Petitioner was upstairs at the time the police officers arrived and had been for some time and, thus, could not have thrown a gun into Jeanette's purse. Edwin, however, clearly states, under penalty of perjury, that Petitioner *was* downstairs with Edwin and Jeanette when the police arrived and left when he saw them (as Officer Ortega testified) and that he would have so told Ayala had he been contacted. [FAP Ex. 1 ¶¶ 3, 5; Dkt. 83 Ex. 30 ¶¶ 4, 18.] Given the defense theory – which was the same theory proffered at the first trial that ended in a jury deadlock – had Ayala learned that Edwin would provide testimony at the second trial that would contradict all of the other defense witnesses on this issue critical to the defense, it is hard to imagine that Ayala (or any reasonably competent defense counsel) would have presented Edwin as a defense witness. Indeed, had he done so, the Court suspects that Petitioner would be seeking relief based on that action and labelling it ineffective assistance.

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[37] The defense investigator had not been able to locate Jeanette as of early 2009 (FAP Ex. 11), and as discussed earlier, Ayala had attempted to find her but also been unsuccessful. In their Declarations, Xatruch and Martha allude to Jeanette coming to the courthouse and telling Ayala that she wished to testify, but they both are unclear about whether this was at the first or second trial. [FAP Ex. 2 ¶ 17; FAP Ex. 3 ¶ 9.] Given Jeanette's appearance at the second trial, it seems more likely it happened then. Martha also asserts that, prior to the first trial, she told Ayala that Jeanette wanted to testify. [FAP Ex. 3 ¶ 8.] If, as she claims, Martha had been in contact with Jeanette then, it is unclear why she failed to provide Ayala with contact information for Jeanette. In any event, both Xatruch and Martha agree that, when Jeanette did come to the courthouse, Ayala talked to her and heard about how she planned to testify if called. There is no reason that a separate formal "interview" was needed.

Second, Petitioner overstates the value of the additional information that Petitioner contends would have been elicited had unspecified "witnesses" been interviewed by Ayala. Petitioner argues that, had Ayala interviewed Xatruch and Martha, he would have discovered, and been able to present, the "exculpatory evidence" that Jeanette was "constantly in and out of trouble," a drug user, and a "seasoned burglar" who often carried a gun in her purse. As discussed earlier, however, all of this supposed "evidence" rests, to some degree, on vague, unsupported, and incompetent assertions by Petitioner's mother and sister and, to a significant degree, on hearsay and double hearsay. Their assertions about what a bad person Jeanette is – including her alleged family problems, drug use, and burglaries – would have been irrelevant at Petitioner's trial absent possible use for impeachment purposes (and that seems particularly iffy), but Jeanette took the Fifth and did not provide any testimony. Critically, neither woman claims to have seen Jeanette with a gun or to have seen one in her purse. Martha's declaration relies on alleged statements by Edwin and Jeanette to this effect, but as noted earlier and contrary to Petitioner's assertion, there is no apparent basis for the admission of this hearsay pursuant to California's version of the declaration against interest exception. Petitioner further argues that, had she been interviewed, Xatruch would have testified that she saw the gun in the bottom of Jeanette's purse when Officer Ortega opened the purse, which Petitioner seems to believe means Officer Ortega's testimony that Petitioner tossed the gun into the purse was a physical impossibility. The Court again repeats its view that this argument is frivolous. Heavy things tend to move to the bottom of loosely-filled containers, especially when, as here, all witnesses agree that the purse had been moved around before Ortega looked in it.

Given the doubly deferential standard that governs, the Court concludes that it was not objectively unreasonable for the state court to find that neither deficient performance, nor prejudice, had been established with respect to Petitioner's second/failure to interview subclaim.

Petitioner's **third** subclaim – that Ayala failed to prepare any witness for testifying at trial – fails on its face. Petitioner does not identify what additional preparation was needed, nor does he identify any way in which this asserted lack of preparation prejudiced him within the meaning of the *Strickland* standard. There is nothing in the record that renders the state court's rejection of this ineffective assistance subclaim objectively unreasonable.

Petitioner's **fourth** subclaim is that Ayala provided ineffective assistance by failing to interview "Nikki and Julie" and to present them as defense witnesses. Petitioner has not identified these women by their full names. Petitioner, moreover, has not submitted any evidence establishing that these two women actually would have been willing to testify at his trial, much less what they would have said. Xatruch's statements are hearsay and, more importantly, do not establish anything exculpatory to which these women would have testified. Absent proof that these two women would have testified in a manner that would have aided Petitioner, his fourth subclaim fails on its face. *See Alcala v. Woodford*, 334 F.3d 862, 872-73 & n.3 (9th Cir. 2003) (to succeed on a claim of ineffective assistance of counsel based upon a failure to call witnesses, a habeas petitioner not only must identify the witnesses in question but also must describe specifically the testimony those witnesses would have given and how such testimony would have altered the trial's outcome); *Bragg*, 242 F.3d at 1088 (petitioner's mere speculation that, had a witness been interviewed, he might have given helpful information, is not enough to establish ineffective assistance); *see also Dows v. Woods*, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting an ineffectiveness claim based on trial counsel's failure to interview or call an alibi witness, when there was no evidence in the record that the witness would have testified favorably for the defense, and stating, "Dows provides no evidence that this witness would have provided helpful testimony for the defense -- *i.e.*, Dows has not presented an affidavit from this alleged witness").

Petitioner's **fifth** subclaim complains of Ayala's failure to call neighbor Wendy Gutierrez to testify about what she saw, even though he knew about her and what she had told the investigator. It is true that, at the outset of the second trial, Ayala announce that Gutierrez would be called as a defense witness. [RT2 2.] There is no evidence about why he did not do so. The substance of Gutierrez's interview by the defense investigator was discussed earlier in connection with Petitioner's actual innocence claim. Assuming Gutierrez would have testified consistently with her interview statements, her testimony would have been essentially the same as that provided by neighbor Paz as well as that of Petitioner's mother and partner, *i.e.,* that Petitioner went inside the apartment building after he bought food and before the police arrived. There is no evidence before the Court that Gutierrez actually was available to testify on Petitioner's behalf as of the time of his second trial. But even if she was, given the wholly cumulative nature of Gutierrez's possible testimony, it was not objectively unreasonable for the state court to find that neither *Strickland* prejudice prong was met by her absence from trial.

Petitioner's **sixth** subclaim is that Ayala provided ineffective assistance by failing to interview Edwin. For the reasons discussed above in connection with Petitioner's second contention, this subclaim fails. It was not objectively unreasonable to find that failing to call a witness who would have undercut the defense theory – that Petitioner had been upstairs for some time before the police arrived – in a critical respect was neither deficient performance nor prejudicial under the *Strickland* standard.

Petitioner's **seventh** subclaim revolves around Jeanette. Much of Petitioner's complaints here relate to his first trial, which did not result in a conviction. Any purported failings by Ayala to take sufficient steps to find Jeanette before the first trial and/or in connection with the substance of the motion he made to introduce her police statement at the first trial cannot serve as a basis for relief here. As to the

second trial, the record shows that Ayala did list Jeanette as a defense witness and, thus, planned to call her. [RT2 2.] As discussed earlier, when Ayala did call Jeanette to testify, she exercised her Fifth Amendment right to remain silent. Petitioner faults Ayala for that event, arguing he acted wrongly when, after he spoke with Jeanette, he cautioned her about possible legal consequences if she testified that the gun was hers. The Court is not convinced that the Sixth Amendment constitutionally obligates a lawyer to allow a third party witness to unknowingly subject herself to legal consequences by testifying; at a minimum, fairminded jurists could disagree on this proposition. And as note before, the Court is not persuaded by Petitioner's assertion that the trial court would have allowed hearsay evidence from Xatruch and Martha about statements allegedly made by Jeanette. Finally, had Jeanette somehow testified at the second trial that the gun was hers, she could have been impeached by her statement to the police discussed earlier, in which she said a friend left her with the gun "to hold" and then "booked it" [FAP Ex. 17], and the admission of that statement could have been damaging to Petitioner if she identified him as the friend who gave her the gun to hold and then left. Under these circumstances, the Court does not find the state court's rejection of the seventh subclaim to be objectively unreasonable under the doubly deferential standard that governs its review.

Petitioner's **eighth** subclaim relies on the "motive" evidence he believes should have been submitted at trial, namely, that the LAPD had a motive to frame him because he had filed a civil lawsuit about the murder charges brought against him and later dismissed. As noted earlier, there is no evidence before the Court establishing the existence of any such lawsuit as of December 4, 2008 (much less what happened), although there is evidence that Petitioner had submitted a government tort claim as of that date and, according to the California Court of Appeal's decision on appeal, at some point submitted a complaint to the LAPD alleging that Officer Ortega had falsified his report. The Court has assumed that

Ayala was aware of these events. Indeed, according to Xatruch, prior to her testimony at the first trial, Ayala told her not to bring it up. Of course, the record shows that the prosecutor had moved to exclude any evidence of a civil lawsuit and Ayala had agreed not to mention it. [1RT 18.] Thus, plainly, Ayala knew of the lawsuit-related matters and had made a decision not to introduce any such evidence.

The jury already knew that Petitioner had suffered a 2007 felony conviction, because a prior felony conviction was an element of the charged crime and the parties had stipulated to this fact at both the first and second trials. [RT1 26; RT2 366.] The jury, however, did not know the nature of that prior conviction. The jurors also did not know that Petitioner had been charged with murder and attempted murder in the shootings of two men approximately eight months prior to the December 4, 2008 incident, and that those charges later were dismissed. Had Ayala proffered evidence of the efforts made related to bringing a civil lawsuit, the trial court presumably would have had to allow in related evidence about that lawsuit, including evidence about why Petitioner had been arrested and charged for a gun-related homicide and attempted homicide[38] and why the charges had been dropped. Ayala could have decided that a foray into these ancillary matters – even had the trial court been willing to allow it – might not be in the defense's best interest given the possible cloud it cast over Petitioner.

As noted earlier, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." and habeas petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation and citation omitted). Courts considering ineffective assistance claims do not second-guess counsel's tactical decisions unless the petitioner has

[38] For example, according to the news accounts on which Petitioner relies here, Petitioner had been involved in a fight with the victims at a family celebration and witnesses had identified him as the shooter. [FAP Ex. 23.]

overcome this presumption. *Id.* at 689. Given the prosecutor's motion to exclude this evidence at the first trial and Ayala's response, Ayala obviously had considered this issue and determined that evidence related to the civil lawsuit should not come in. Instead, knowing that Petitioner's 2007 conviction necessarily would be before the jury, Ayala elicited evidence that Officer Ortega had had prior contacts with Petitioner and knew he was on probation, and Ayala used that evidence to argue that Ortega and the other officers had targeted Petitioner. [RT2 326, 329-30, 345, 636-37, 640.] "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" when raised in an ineffective assistance habeas claim. *Id.* at 690; *see also Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (finding no deficient performance when counsel "knew about the [potentially favorable evidence] and looked into it, but chose as a tactical matter not to use it," because "[a] reasonable tactical choice based on an adequate inquiry is immune from attack under *Strickland*").

Whether or not Ayala made the "correct" call in foregoing attempting to present evidence of Petitioner's civil lawsuit efforts is not the question before the Court. Rather, under Section 2254(d)(1), the question is whether the state court acted unreasonably in finding the *Strickland* standard unsatisfied as to Petitioner's eighth ineffective assistance subclaim. The Court believes that fairminded jurists could disagree on this question and on whether Petitioner has met his burden of showing that Ayala's tactical decision was "outside the realm of the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. As a result, and under the doubly deferential standard that governs this Court's review, the eighth subclaim does not satisfy Section 2254(d).

In his **ninth** subclaim, Petitioner faults Ayala for failing to obtain DNA from Edwin and Jeanette to compare to the DNA testing done on the gun, to see if there was a match. Petitioner notes Martha's Declaration, in which she alleges that she asked Ayala if he could do this and he was not interested. Of course, for Ayala to

have been able to have had such testing performed, Edwin and Jeanette not only would have had to have been available for the collection of DNA swabs but, also, agreed to give them voluntarily. There is no evidence of this. Moreover, even if they had done so, Ayala would had to pay for an expert to review any DNA testing and present the findings to the jury. There is no evidence that Petitioner's family would have been willing to pay for this, but most importantly, even if they had been, there is *no* evidence of what such testing would have revealed. Put otherwise, and critically, there is no showing that any such additional DNA testing actually would have produced exculpatory evidence. This failure on its own precludes finding that the ninth subclaim serves as a basis for habeas relief. See *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("[s]peculation about what an expert could have said is not enough to establish prejudice" under *Strickland*); *see also Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (rejecting, on the prejudice prong, an ineffective assistance claim premised on counsel's failure to retain an expert, because: "[petitioner] offered no evidence that an arson expert would have testified on his behalf at trial. He merely speculates that such an expert could be found. Such speculation, however, is insufficient to establish prejudice."). Moreover, when, as here, the "record furnishes no reason to believe that" an expert analysis "would have created an issue" helpful to the defense, there is no basis for finding the deficient performance prong met. *Langford v. Day*, 110 F.3d 1380, 1387-88 (9th Cir. 1996).

Petitioner also argues that Ayala should have "familiarized himself with the science of DNA testing" so that he could have "exploited the lack of a conclusive result linking [Petitioner] to the firearm." [Traverse at 25.] Ayala, however, did make such an argument in closing. [RT2 634-35.] Petitioner has not identified what additional argument Ayala could or should have made.

Petitioner's speculation that further DNA testing of the gun could have provided a basis for the jury to acquit Petitioner is insufficient to satisfy the

Strickland standard. The state court's rejection of the ninth subclaim was not objectively unreasonable for purposes of Section 2254(d)(1).

Petitioner's **tenth** subclaim rests on Ayala's failure to present Alfaro, Gonzalez's mother, as a defense witness at the second trial even though she had testified at the first trial. The record does not show why Ayala did not call Alfaro as a witness at the second trial. Ayala may have elected not to present Alfaro again because her testimony was cumulative of the testimony of the other defense witnesses in some respects (such as she agreed that Petitioner was in the apartment when the police arrived) but differed in other respects. While Gonzalez testified that she stayed upstairs with Petitioner until the police came to their door and made them leave, Alfaro contradicted her. Alfaro testified that, after Xatruch went downstairs, she went downstairs and Gonzalez came down shortly after her, leaving Petitioner and the children upstairs.[39] Unlike any other witness, Alfaro testified that two women were present with Edwin, one named "Chunie" and her friend "Judy." Given these inconsistencies, and the fact that Ayala already had three defense witnesses who would testify that Petitioner was upstairs in the apartment before the police arrived and in a more consistent fashion, Ayala may have decided that it was not worth putting on a fourth whose testimony might get picked apart on cross-examination. It was not objectively unreasonable for the state court to conclude that Petitioner had not overcome the presumption that this was a reasonable tactical decision by Ayala.

In his **eleventh** subclaim, Petitioner complains about Ayala's failure to present testimony that police officers observed Petitioner in the window upstairs and that this allowed the prosecutor to argue that the defense version of events did not make sense, because how would the officers have known Petitioner was upstairs. In

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[39] As noted earlier, at the first trial, Xatruch also testified that Gonzalez came downstairs shortly after Xatruch, leaving Petitioner upstairs. However, at the second trial, she testified that Gonzalez remained upstairs the entire time and came down when Petitioner did with the police.

their January 2009 statements to the defense investigator, both Xatruch and Alfaro stated that a police officer looked up, saw Petitioner in the window, and recognized him. [FAP Exs. 6-7.] In contrast, in her 2013 Declaration, Xatruch states that the police officer looked up and saw Petitioner in the window but did not recognize him and asked her who that person was. [FAP Ex. 2 ¶ 8.] At the first trial, Ayala asked Xatruch if she could see Petitioner while she was downstairs and she responded that she looked up and saw him in the window looking down. [RT1 110-11.] Ayala attempted to ask Alfaro the same thing, but she did not provide a responsive answer. [RT1 120-21.] At the second trial, Ayala did not ask Xatruch if she and/or any officer saw Petitioner in the upstairs apartment window. Ayala did argue, however, that the police knew Petitioner lived at the address. [RT2 631.]

There is nothing in the record that explains why Ayala did not ask Xatruch, at the second trial, about whether she observed Petitioner in the apartment window or whether any police officer did. But even if he had done so and Xatruch had testified that an officer saw Petitioner and recognized him, given the generalized nature of the *Strickland* test and the attendant "leeway" the state court had in applying it (*Yarborough v. Alvarado*, 541 U.S. at 664), the Court cannot say that the state court's rejection of this eleventh subclaim was objectively unreasonable under Section 2254(d)(1). Whether or not the deficient performance prong is met by Ayala's failure to ask this question, fairminded jurists could disagree on whether it is reasonably probable that, but for the lack of this question, the result of the trial would have been different, and thus, whether prejudice had been shown. *Strickland*, 466 U.S. at 694.

In his **twelfth** subclaim, Petitioner complains that Ayala failed to produce in evidence the shorts worn by Petitioner at the time in question, noting that Ayala did so at the first trial. Petitioner asserts that, instead, Ayala relied only on Gonzalez's testimony that Petitioner's shorts were baggy [RT2 370] and, thus, when Ayala argued in closing that Petitioner's shorts were too baggy to hold a firearm in the

waistband [RT2 637], he had given the jury "almost no evidence to support the argument.' [Mem. at 21-22.] Petitioner misstates the record. When Ayala cross-examined Officer Ortega, he repeatedly elicited testimony from the officer that the shorts were "baggy" and "oversized." [RT2 327, 346.] Given Ortega's admission, the jury did not need to see the actual shorts for Ayala to make what was a supported argument. Neither *Strickland* prong is met as to this subclaim.

Petitioner faults Ayala for two things in the **thirteenth** subclaim. First, at the first trial, in closing, Ayala noted Officer Ortega's testimony that the gun was ready to shoot and argued that, therefore, Ortega's testimony that Petitioner tossed a gun into the purse was not plausible, because the gun "could" have gone off had this happened but it did not. [RT1 214.] Petitioner faults Ayala for failing to repeat this argument at the second trial. Second, Petitioner complains that Ayala did not elicit testimony from Ortega that Jeanette's purse was "medium-sized," as he had stated at the preliminary hearing. [CT 14.] Both arguments fail. In the Court's view, Ayala acted reasonably in not repeating his implausibility argument at the second trial, because it was not a particularly credible one. While Officer Ortega stated that the gun was ready to shoot, he also indicated that the trigger would need to be pulled to fire it. [RT2 317-18.] There was no evidence as to the likelihood, or not, that the trigger on this particular firearm would have been depressed if it were tossed into a purse. That the gun was ready to shoot did not render Ortega's testimony implausible. Petitioner's argument that the purse's "medium" size also rendered Ortega's testimony implausible is equally unpersuasive. A medium sized purse is large enough to accommodate a gun. The state court's rejection of the thirteenth subclaim was not objectively unreasonable.

Petitioner's **fourteenth** subclaim is based on the parties' stipulation to allow into evidence a redacted version of the investigator's report of his interview of Xatruch. The portion admitted included the statement – discussed previously – reading: "While our client was outside with his child, Ms. Xatruch saw the police

outside and walked out to find out what was going on." The redacted portion (the last three paragraphs) included the following language at issue here: "One of our officers looked toward out client who was inside, looking out from a window, and recognized him as someone who has a lawsuit against the police." [*Compare* FAP Ex. 7 with Ex. 12.] Petitioner argues that the prosecutor was able to capitalize on this omission in closing argument by noting the discrepancy between Xatruch's trial testimony that Petitioner was upstairs the whole time and her earlier interview statement. [RT2 621.]

The record does not reveal why Ayala agreed to allow a redacted version of Xatruch's interview report to be admitted as opposed to a complete version, other than that the prosecutor noted the parties were doing so to avoid having to bring the interviewer in as a live witness. [RT2 603-04.] As noted earlier, when Xatruch was questioned at the second trial about the report's notation that she said Petitioner was outside with his child when the police arrived, she testified that the investigator had made a mistake and that she had referred to her "son," meaning Edwin. [RT2 412-13.] Thus, the jury was made fully aware of Xatruch's position that the report's statement had been recorded erroneously, and no other witness at trial contradicted her testimony that this was an error. Had the interviewer been required to appear as a witness, it is certainly possible, if not likely, that he would have testified that he did *not* make a mistake and that Xatruch *did* tell him that Petitioner was downstairs with his child when the police appeared. By stipulating to the admission of the report itself, this: allowed Xatruch to testify – without contradiction – that the investigator had erred in reporting what she said; and thus preserved the ability of the jury to find that the report contained an error and the defense to argue that the evidence showed Petitioner was upstairs the whole time in question.

Moreover, contrary to Petitioner's assertion, the redacted statement in the text – that later on, when Xatruch looked up at the apartment window, she saw Petitioner looking down – does not demonstrate that the interviewer recorded her prior

statement in error and that she did not say that Petitioner initially was downstairs. Both statements can be reconciled, as is demonstrated by both Edwin's sworn statements that Petitioner initially was outside with his child when the police arrived but then went upstairs and Officer Ortega's testimony that Petitioner was downstairs and then went upstairs as the police approached.

Under these circumstances, it was not objectively unreasonable to find that neither *Strickland* prong was satisfied based on the fourteenth subclaim.

Petitioner's **fifteenth** subclaim rests on a jury instruction that was given at the second trial. Petitioner was charged with possession of a firearm by a felon, and the standard jury instruction for that crime is CALCRIM 2511, which sets forth its elements, including explaining possession. [*See* CT 161.] During the first trial's jury instructions conference, when CALCRIM 2511 came up, Ayala objected to the portion of the instruction discussing the notion of constructive possession, *i.e.,* reading: "A persons does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/or the right to control it), either personally or through another person." Ayala argued that the case was not a constructive possession one and the trial court agreed, noting that the jury was called upon to find that either Petitioner did have possession of the gun and tossed it into the purse, or he did not and Officer Ortega's testimony was not true. Although noting that the language was a correct statement of the law, the trial court agreed with Ayala that the language could be confusing and agreed to redact it from the instruction to be given. [RT1 162-66.] At the second trial, however, Ayala did not ask for the same redaction and CALCRIM 2511 was given to the jury in its complete form. [CT 161; RT2 617.]

The record does not show why Ayala did not again object to the constructive possession language in CALCRIM 2511 at the second trial. Given that the instruction correctly stated the law, it is hard to say that the failure to do so rose to the level of deficient performance for Sixth Amendment purposes. But in any event,

there is no basis for finding the prejudice prong satisfied. There were no facts in evidence that possibly could have supported a constructive possession theory for the charged offense and the prosecutor never argued such a theory. As the trial court noted at the first trial, this was a "simple" issue: either the jury believed Officer Ortega, in which case the possession element was satisfied by the testimony that Petitioner had the in his waistband before he got rid of it; or the jury believed the defense witnesses and there could be no possession, because Petitioner was not there and the gun already was in Jeanette's purse when police arrived. There is simply no basis in the record for believing that the jury relied on this factually inapplicable constructive possession language as the basis for convicting Petitioner.

Finally, the Court notes that in his Traverse, Petitioner raises an argument not expressly made in his First Amended Petition, namely, a cumulative prejudice theory. Under this theory, even if no instances of deficient performance, on their own, result in prejudice within the meaning of *Strickland*, a court should look to the cumulative impact of such events to find the prejudice requirement satisfied. Petitioner is correct that there are a variety of Ninth Circuit decisions, most often in the capital case context, which have relied on several pre-AEDPA decisions to note that in assessing prejudice under *Strickland* in a case presenting multiple attorney errors, the cumulative impact of those errors may be considered. *See, e.g., Pizzuto v. Arave*, 385 F.3d 1247, 1260 (9th Cir. 2004) (relying on *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995), and *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992)); *Turner v. Duncan*, 158 F.3d 44, 457 (9th Cir. 1998) (citing *Harris*). It is also true that the Ninth Circuit has, on occasion, applied the cumulative prejudice principle in cases governed by AEDPA review standards, although it has found relief unwarranted. *See, e.g., Woods v. Sinclair*, 764 F.3d 1109, 1139 (9th Cir 2014); *Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir. 2004). The Circuits are split on whether a cumulative prejudice-type analysis is permitted in connection with ineffective assistance of counsel claims raised in the habeas context when cases are

governed by the Section 2254(d) standard of review, with the majority allowing such an analysis.[40] To date, the Supreme Court has not held clearly and explicitly that, in the context of an ineffective assistance claim governed by *Strickland*, the second prong (prejudice) requirement can be fulfilled by cumulating the effects of counsel's conduct found deficient under the first prong. *See* Ruth A. Moyer, *To Err is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 DRAKE L. REV. 447, 479-83 (2013) (agreeing with Circuits that have found that "the cumulative-error doctrine as a means to establish *Strickland* prejudice is not 'clearly established Federal law, as determined by the Supreme Court of the United States,'" and concluding that it therefore is error to apply the doctrine to *Strickland* claims reviewed pursuant to Section 2254(d)(1)).

While the Court has seen the argument made (including by Petitioner) that language in various Supreme Court decisions hints at the possibility of cumulating counsel's errors for purposes of assessing prejudice under *Strickland*, those hints are oblique. In the absence of a clear and express Supreme Court holding endorsing

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[40] For example, the Second and Seventh Circuits have allowed a consideration of the combined prejudicial effect of counsel's errors in determining whether *Strickland*'s prejudice prong is met. *See, e.g., Sussman v. Jenkins*, 636 F.3d 329, 361-61 (7th Cir. 2011); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir.1991). The First, Third, Tenth, and Eleventh Circuits also appear to allow a cumulative error type approach to the *Strickland* prejudice analysis. *See Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986); *Williams v. Trammell*, 782 F.3d 1184, 1209 (10th Cir. 2015); *Evans v. Sec'y, Dep't of Corrections*, 699 F.3d 1249, 1269 (11th Cir. 2012). The Fifth and Sixth Circuits have questioned the propriety of using the cumulative prejudice doctrine in connection with habeas claims governed by Section 2254(d), noting the lack of a clear Supreme Court holding in this respect. *See Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006); *Hill v. Davis*, 781 Fed. Appx. 277, 278, 280-81 (5th Cir. July 3, 2019). The Fourth and Eighth Circuits do not permit utilizing cumulative error principles to assess prejudice under *Strickland*. *See Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998) ("ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively"); *Forrest v. Steele*, 764 F.3d 848, 860 (8th Cir. 2014) (rejecting argument that *Strickland* allows for a cumulative prejudice-type analysis and finding such an argument unavailing under Section 2254(d)(1), because no Supreme Court decision supported it).

such an approach, applying the AEDPA standard strictly, there presently appears to be no route to federal habeas relief under Section 2254(d)(1) based on the cumulative prejudice analysis in ineffective assistance claims espoused by Petitioner. *See Kessee v. Mendoza-Powers*, 574 F.3d 675, 677 (9th Cir. 2009) ("For purposes of AEDPA review, . . . a state court's determination that is consistent with many sister circuits' interpretations of Supreme Court precedent, even if inconsistent with our own view, is unlikely to be 'contrary to, or involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'"); *Hart v. Broomfield*, No. CV 05-03633-DSF, 2020 WL 4505792, *118 (C.D. Cal. Aug. 5, 2020) (finding that an ineffective assistance claim based on a cumulative *Strickland* prejudice theory fails under Section 2254(d)(1) due to the lack of clearly established Supreme Court precedent allowing such a theory); *Reed v. Beard*, No. CV 13-5698-RGK (RNB), 2015 WL 799483, *34 (C.D. Cal. Feb/ 25, 2015) (same).

This reason alone could doom Petitioner's cumulative prejudice argument. But even if it could be said that the argument *is* supported by clearly established Supreme Court precedent, Petitioner's cumulative prejudice argument fails here because, as discussed earlier, the Court has not found multiple instances of deficient performance that can be cumulated. "There can be no cumulative error when a defendant fails to identify more than one error." *United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012); *see also Mancuso v. Oliver*, 292 F.3d 939, 957 (9th Cir. 2002) (when "there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation"); *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("if there are no errors or a single error, there can be no cumulative error").

The Court has examined Petitioner's numerous ineffective assistance arguments and subclaims and, for the reasons set forth above, finds them wanting. Many of them fail on their face and, as to those that present more close questions, it

is clear that fairminded jurists could differ on the propriety of the state court's rejection of them. Under these circumstances, the Section 2254(d)(1) threshold has not been surmounted. As a result, federal habeas relief based on Ground Two is foreclosed.[41]

V. Asserted Prematurity Of The Report

In his Objections, Petitioner asserts that any consideration of and recommendations regarding the merits of his claims was premature and improper, because there had been no briefing yet on the merits of his claims and no evidentiary hearing had taken place. Petitioner's assertion that his claims had not been briefed on their merits before the Report issued and that further merits briefing was to occur is simply untrue. As discussed earlier, the record readily demonstrates the merits briefing that has occurred in this case and the related court orders and stipulations by the parties, which culminated with Petitioner's Traverse filed in November 2016, and Respondent's Reply filed in March 2017, at which point this case was under submission.

With respect to Petitioner's claim that the Court could not consider the merits of his claims unless and until an evidentiary hearing occurred, Petitioner inexplicably ignores the by now well established *Pinholster* rule that controls in cases such as this one, which are governed by the Section 2254(d) standard of review. The Court's threshold Section 2254(d) review necessarily was limited to the record that actually was before the state high court when it considered the claims raised through Petitioner's habeas petition and denied them on their merits in September 2014. *See Pinholster*, 563 U.S. at 180-81; *see also id.* at 185 ("evidence introduced in federal court has no bearing on § 2254(d)(1) review"). Based on that review, the Court has found that Petitioner's claims fail to surmount the deferential

[41] The Court's conclusions as to Grounds One and Two moot the timeliness issues raised by Respondent.

standards of Section 2254(d). Petitioner's assertion that an evidentiary hearing is required therefore fails, because unless and until the threshold requirements of Section 2254(d) are found satisfied, an evidentiary hearing is not permitted. *Id.* at 185 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); *see also Gulbrandson v. Ryan*, 738 F.3d 976, 993-94 (9th Cir. 2013) (when a state court has denied claims on their merits, *Pinholster* precludes "further factual development of these claims" through an evidentiary hearing to determine whether Section 2254(d) is satisfied); *Stokley v. Ryan*, 659 F.3d 802, 809 (9th Cir. 2011) ("*Pinholster*'s limitation on the consideration of [a petitioner's] new evidence . . . in federal habeas proceedings also forecloses the possibility of a federal evidentiary hearing"). This limitation applies whether a claim is evaluated under Section 2254(d)(1) or Section 2254(d)(2). *See Pinholster*, 563 U.S. at 189 n.7; *Gulbrandson*, 738 F.3d at 993 n.6.

Petitioner's objection that the Report is premature necessarily fails.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Final Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: June 2, 2021

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JORDY OCHOA,
Petitioner

v.

L.R. THOMAS, et al.,
Respondents.

Case No. CV 11-6864-JGB (GJS)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative 28 U.S.C. § 2254 petition in this case (Dkt. 41-2, "Petition") and all relevant pleadings, motions, and other documents filed in this action, the original Report and Recommendation of United States Magistrate Judge (Dkt. 140), Petitioner's Objections to the original Report and Recommendation (Dkt. 149), and the Final Report and Recommendation of United States Magistrate Judge (Dkt. 150, "Report"). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of the matters to which objections have been stated.

Petitioner's assertions and arguments have been reviewed carefully. The Court, however, concludes that nothing set forth in the Objections or otherwise in the record for this case affects or alters, or calls into question, the findings and

analysis set forth in the Report. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

Accordingly, **IT IS ORDERED** that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 27, 2021

JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JORDY OCHOA, Petitioner v. L.R. THOMAS, et al., Respondents.	Case No. CV 11-6864-JGB (GJS) **JUDGMENT**

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED THAT this action is dismissed with prejudice.

DATE: July 27, 2021

JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

S220190

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JORDY OCHOA on Habeas Corpus.

The application to file exhibit 46 under seal is granted. (Cal. Rule of Court, rule 8.45.)

The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. __ [131 S.Ct. 770, 785], citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

CANTIL-SAKAUYE

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JORDY OCHOA,

on Habeas Corpus.

B250918

(Los Angeles County
Super. Ct. No. BA349945)
(Barbara R. Johnson, Judge)

ORDER

THE COURT:*

The petition for writ of habeas corpus has been read and considered and is denied on the ground that petitioner has failed to satisfy the habeas corpus jurisdictional requirements under California law. (Pen. Code, § 1473; *People v. Villa* (2009) 45 Cal.4th 1063.)

*EPSTEIN, P. J. MANELLA, J. EDMON, J. **

** Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

FILED
LOS ANGELES SUPERIOR COURT

AUG - 1 2013

JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
BY: E. GIFFORD, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff v. JORDY OCHOA Defendant.	CASE NO. BA 349945 ORDER DENYING MOTION FOR RECONSIDERATION

The Petitioner's motion for reconsideration has been read and considered. The motion is DENIED.

The Petitioner is no longer on state probation. There being no legal cause for restraint or for the continuation thereof, the warrant has been recalled and the probation terminated.

Notwithstanding, the court will address the merits of Petitioner's other claims.

The Petitioner's claim of actual innocence.

The principal question is whether petitioner has proven to a sufficient degree of certainty that he was uninvolved in and innocent of criminal responsibility for the possession of the weapon. The standard for deciding actual innocence in a case alleging newly discovered evidence requires that the evidence be of such character "as will completely undermine the entire structure of the case

upon which the prosecution was based." *In re Lawley*, (2008) 42 Cal.4th 1231. The court finds that the petitioner has not met this burden. The petitioner attaches several declarations purporting to exclude petitioner as the culprit. The same witnesses that testified at petitioner's first trial also testified at the second. Habeas corpus is not available to review the credibility of witnesses or weigh the evidence supporting the judgment of conviction. *In re La Due*, (1911) 166 Cal.633, *In re Adams* (1975) 14 Cal.3d 629,635. Furthermore, the petitioner claims that the officers testified falsely. Habeas corpus is not available to re-litigate determinations of fact made upon conflicting evidence after a fair trial. *In re Dixon,* (1954) 41 Cal.2d 756, 760. The jury found the officers to be credible despite the other witness's testimony to the contrary. In one trial the conflicting testimony was sufficient to hang the jury. In another trial it was not.

Ineffective Assistance of Counsel

Petitioner's last claim is that of ineffective assistance of counsel. That claim must also fail. Petitioner must establish a deficient performance and resulting prejudice. Deficient performance is indicated when counsel's representation falls below an objective standard of reasonableness under prevailing professional norms and because of such performance, subjected the defendant to prejudice, i.e., but for counsel's failing, the result would have been more favorable to the defendant. The court's inquiry must be highly deferential to the attorney's performance and there is a "strong presumption that counsel's conduct falls within the wide range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, (1984) 466 U.S. 668; *In re Cox* (2003) 30 Cal.4th 974, 1019. Tactical decisions made by counsel of who to call as witnesses are one of those areas within the discretion of the attorney. Petitioner has failed to establish a reasonable probability that had he called other witnesses to testify, he would have received an acquittal of the charges.

The first trial resulted in a mistrial. A tactic of the attorney could have been to either get an acquittal with the same witnesses or even another hung jury mandating another mistrial—eventually leading to a dismissal. He may not have wanted to raise the issue of the officer's bias (because of the lawsuit) because that would have made the jury aware of the prior murder allegation against the defendant. Even though that case was dismissed, the attorney may not have wanted the jury to know

that a civil suit had been filed against the Police Department. That revelation may not have necessarily worked in the petitioner's favor.

Double jeopardy

The issue of double jeopardy was raised on appeal and was rejected. Petitioner has failed to allege facts establishing an exception to the rule barring a consideration of claims that have been raised on appeal. *In re Reno,* (2012) 55 Cal.4th 428, *In re Harris* (1993) 5 Cal.4th 813.

For the foregoing reasons and for those stated in the Order Denying the Petition for Writ of Habeas Corpus filed June 21, 2013, the motion is denied.

Judicial Assistant to give notice

Sean Kennedy
Federal Public Defender
Alexander W. Yates
Deputy Public Defender
321 E. 2nd Street
Los Angeles, Ca 90012-4202

The District Attorney
Habeas Corpus Litigation Team
320 W. Temple St., Room 540
Los Angeles, CA 90012

DATED: 8-1-13

SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA

BARBARA R. JOHNSON
Judge of the Superior Court

DECLARATION OF SERVICE BY MAIL

The undersigned is over the age of eighteen, not a party to the within action, whose business address is 210 West Temple Street, Los Angeles, California 90012 and on August 1, 2013 served the ORDER DENYING MOTION FOR RECONSIDERATION in the within action by placing a true copy thereof, enclosed in a separate sealed envelope with the postage thereon fully prepaid, in the United States mail at Los Angeles, County of Los Angeles, State of California, addressed as follows:

Sean Kennedy
Federal Public Defender
Alexander W. Yates
Deputy Public Defender
321 E. 2nd Street
Los Angeles, CA 900112-4202

The District Attorney
Habeas Corpus Litigation Team
320 W. Temple Street, Room 540
Los Angeles, CA 90012

DATED: 8-1-13

Clerk of the Court

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 06/21/13

CASE NO. BA349945

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: JORDY EZEQUIEL OCHOA

COUNT 01: 12021(A)(1) PC FEL

05/03/13 ARREST DISPOSITION REPORT SENT VIA FILE TRANSFER TO DEPARTMENT OF JUSTICE

ON 06/21/13 AT 830 AM IN CENTRAL DISTRICT DEPT 117

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: BARBARA R. JOHNSON (JUDGE) ALEX ALDANA (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

THE COURT DENIES THE PETITION FOR WRIT OF HABEAS CORPUS FILED JUNE 7, 2013. THE COURT'S ORDER IS MAILED TO THE PETITIONER'S ATTORNEY, SEAN KENNEDY (FEDERAL PUBLIC DEFENDER) AND TO THE DISTRICT ATTORNEY. PROBATION REMAINS REVOKED, B/W OUTSTANDING.

COURT ORDERS AND FINDINGS:

-PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

COPY

FILED
LOS ANGELES SUPERIOR COURT

JUN 21 2013

JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
BY: _____, DEPUTY
A. ALDANA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff v. JORDY OCHOA, Defendant.	CASE NO. BA 349945-01 ORDER SUMMARILY DENYING PETITION FOR WRIT OF HABEAS CORPUS

SUPERIOR COURT OF LOS ANGELES COUNTY • CALIFORNIA •

The court has read and considered the Petition for Writ of Habeas corpus filed by the Petitioner and Defendant on June 7, 2013, and hereby DENIES the Writ for the following reasons:

This court lacks jurisdiction to grant the Habeas Corpus Petition as the Petitioner is not in the actual or constructive state custody based on his conviction. According to the Petitioner, he is "federally incarcerated for illegal reentry". This custody has not been requested or authorized by the State of California. Rather, Petitioner's custody is at most a collateral consequence of his California conviction. On August 26, 2009, Petitioner was sentenced to 365 days in county jail and placed on three years formal probation. He served his time and was released from state custody. Under such circumstances, Petitioner is not in custody for California habeas corpus purposes.

People v. Villa (2009) 45 Cal.4th 1063, 1069-74; *In re Azurin* (2001) 87 Cal.App. 4th 20, 25-26; Penal Code Section 1473, 1473.5

The Petitioner did not file an appeal from the conviction. He raises issues that could have been raised on appeal, but were not, and the Petitioner has failed to allege facts establish an exception to the rule barring habeas consideration of claims that could have been raised on appeal. *In re Reno* (2012) 55 Cal.4th 428,490-493; *In re Harris*, (1993) 5 Cal.4th 813,825-826; In re Dixon, (1953) 41 Cal.2d 755,759

Judicial Assistant is to give notice:

Sean Kennedy
Federal Public Defender
Alexander W. Yates
Deputy Public Defender
321 E. 2nd Street
Los Angeles, CA 90012-4202

The District Attorney
Habeas Corpus Litigation Team
320 W. Temple Street, Room 540
Los Angeles, CA 90012

Judicial Assistant to give notice:

DATED: 6-21-13

BARBARA R. JOHNSON
Judge of the Superior Court

SUPERIOR COURT, LOS ANGELES COUNTY, CA

DECLARATION OF SERVICE BY MAIL

The undersigned is over the age of eighteen, not a party to the within action, whose business address is 210 West Temple Street, Los Angeles, California 90012 and on June 21, 2013 served the ORDER SUMMARILY DENYING PETITION FOR WRIT OF HABEAS CORPUS in the within action by placing a true copy thereof, enclosed in a separate sealed envelope with the postage thereon fully prepaid, in the United States mail at Los Angeles, County of Los Angeles, State of California, addressed as follows:

Sean Kennedy
Federal Public Defender
Alexander W. Yates
Deputy Public Defender
321 E. 2nd Street
Los Angeles, CA 90012-4202

The District Attorney
Habeas Corpus Litigation Team
320 W. Temple Street, Room 540
Los Angeles, CA 90012

DATED: 6/21/13

Clerk of the Court

A. ALDANA
285695

Alexandra W. Yates, Deputy Federal Public Defender
NAME

CA Bar No. 250442
PRISON IDENTIFICATION/BOOKING NO.

321 E. 2nd St.
ADDRESS OR PLACE OF CONFINEMENT

Los Angeles, CA 90012

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JORDY OCHOA
FULL NAME (*Include name under which you were convicted*)
Petitioner,

v.

L.R. THOMAS, Warden,
DONALD H. BLEVINS, Chief Probation Officer

NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER
Respondent.

CASE NUMBER:

CV 11-6864-JGB(CW)
To be supplied by the Clerk of the United States District Court

☒ FIRST AMENDED

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION Los Angeles
PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(*List by case number*)
CV
CV

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum. the grounds for relief from the conviction and/or sentence that you challenge.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:
1. [X] a conviction and/or sentence.
2. [ ] prison discipline.
3. [ ] a parole problem.
4. [ ] other.

PETITION

1. Venue
   a. Place of detention USP Victorville, PO Box 3900, Adelanto, CA 92301
   b. Place of conviction and sentence LA Superior Court, Dept. 117, Hon. Barbara R. Johnson, Judge

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked).*
   a. Nature of offenses involved *(include all counts)* : Felon in possession of a firearm
   b. Penal or other code section or sections: Cal. Penal Code 12021(a)(1)
   c. Case number: BA349945
   d. Date of conviction: August 26, 2009
   e. Date of sentence: August 26, 2009
   f. Length of sentence on each count: 365 days in county jail and three years formal probation
   g. Plea *(check one)* :
      [x] Not guilty
      [ ] Guilty
      [ ] Nolo contendere
   h. Kind of trial *(check one)* :
      [X] Jury
      [ ] Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? [X] Yes [ ] No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: B218800
   b. Grounds raised *(list each)* :
      (1) Double Jeopardy
      (2)

(3) _____

(4) _____

(5) _____

(6) _____

c. Date of decision: January 4, 2011

d. Result Affirmed

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? [x] Yes [ ] No

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

a. Case number: S190669

b. Grounds raised *(list each)* :

(1) Double Jeopardy

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

c. Date of decision: April 20, 2011

d. Result Petition for Review Denied

5. If you did not appeal:

a. State your reasons _____

b. Did you seek permission to file a late appeal? [ ] Yes [ ] No

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

[ ] Yes [x] No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

c. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision:

(6) Result

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: Actual Innocence

(1) Supporting FACTS: Please see attached memorandum of points and authorities

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

Filing exhaustion petition

b. Ground two: Ineffective Assistance of Counsel

(1) Supporting FACTS: Please see attached memorandum of points and authorities

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

Filing exhaustion petition

c. Ground three: Double Jeopardy

(1) Supporting FACTS: Please see attached memorandum of points and authorities

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

Filing exhaustion petition

d. Ground four:

(1) Supporting FACTS:

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

e. Ground five:

(1) Supporting FACTS:

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

9. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: Grounds 1 and 2 were not previously presented to the Cal. Supreme Court. I am filing an exhaustion petition in Superior Court and a motion to stay and abey this case until the California courts have ruled on these two grounds.

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

☐ Yes ☒ No Except for the initial petition in this case.

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

11. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☒ Yes ☐ No The initial petition filed pro se in this case.

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: US District Court, Central District of California

(2) Case number: CV 11-6864-JGB(CW)

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: August 19, 2011

(4) Grounds raised *(list each)*:

(a) Double Jeopardy

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

12. Are you presently represented by counsel? ☒ Yes ☐ No

If so, provide name, address and telephone number: Alexandra W. Yates, Deputy Federal Public Defender
321 E. 2nd St., Los Angeles, CA 90012
(213) 894-5059

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding,

/S/ Alexandra W. Yates
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 5/24/13
Date

/S/ Alexandra W. Yates for Jordy Ochoa
Signature of Petitioner

SEAN K. KENNEDY (No. 145632)
Federal Public Defender
Sean_Kennedy@fd.org
ALEXANDRA W. YATES (No. 250442)
Deputy Federal Public Defender
Alexandra_Yates@fd.org
321 East 2nd Street
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Telephone (213) 894-5059
Facsimile (213) 894-0081

Attorneys for Petitioner
JORDY OCHOA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JORDY OCHOA Petitioner, v. L.R. THOMAS, Warden, DONALD H. BLEVINS, Chief Probation Officer Respondents.	CASE NO. CV 11-6864-JGB (CW) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

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I. INTRODUCTION

Jordy Ezequiel Ochoa is an innocent man who was wrongly convicted of being a felon in possession of a firearm in California state court in 2009. Unfortunately for Mr. Ochoa, he was represented by a private attorney who did no investigation and failed to present available, exculpatory evidence at trial. Despite this attorney's deficient performance, Mr. Ochoa's first jury hung seven-to-five for acquittal. The case against Mr. Ochoa was so weak that the trial judge then made a finding that the evidence did not prove Mr. Ochoa guilty even by a preponderance standard. Mr. Ochoa's attorney did not make a double jeopardy objection to a retrial following this finding, and Mr. Ochoa was tried again. At the second trial, counsel presented even less of the available, exculpatory evidence than he put forth at the first trial, stipulated to the introduction of misleading, factually incorrect evidence, and agreed to prejudicial jury instructions that the judge struck from the first trial. Mr. Ochoa was convicted. He asks this Court to grant him habeas relief.

II. STATEMENT OF THE CASE

Mr. Ochoa was arrested on December 4, 2008, and charged with being a felon in possession of a firearm, in violation of California Penal Code section 12021(a)(1). (CT 18-19, 52.)[1] His first trial took place in June 2009, and functioned simultaneously as a hearing on whether he violated his probation from a prior case by possessing the firearm. (1 RT 4-6.) The jury hung seven-to-five for acquittal, and the court granted a mistrial. (1 RT 246, 252.) The court then ruled that Mr. Ochoa had not violated his probation because the evidence presented at trial failed to prove that Mr. Ochoa possessed the firearm, even under a preponderance of the evidence standard. (1 RT 258.)

[1] "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript; the number preceding the abbreviation refers to the first or second trial and the number following the abbreviation refers to the page.

Mr. Ochoa was retried on the felon in possession charge and convicted by jury on August 26, 2009. He was sentenced to 365 days in county jail and three years of formal probation. (CT 167-68.)

Mr. Ochoa filed an appeal in which he argued, *inter alia*, that the first trial court's ruling that he had not committed the crime of being a felon in possession of a firearm barred retrial on that same charge. (Lodged Doc. D.) The California Court of Appeal affirmed. *See People v. Ochoa*, 191 Cal. App. 4th 664 (2011) (Lodged Doc. G). Mr. Ochoa filed a petition for review, which the California Supreme Court summarily denied on the merits on April 20, 2011. (Lodged Docs. H, I.)

Mr. Ochoa filed a timely pro se petition for writ of habeas corpus in this Court, on August 19, 2011. (CR 1.) That petition included only one claim: that his Fifth Amendment protection against double jeopardy was violated by his retrial following a judicial determination that Mr. Ochoa was not guilty of the charged offense. After an answer was filed (CR 20), the Court appointed counsel (CR 23). With the assistance of counsel, Mr. Ochoa now requests permission to file this First Amended Petition for Writ of Habeas Corpus, seeking relief on three grounds: (1) Mr. Ochoa is actually innocent of the offense for which he was convicted and sentenced, in violation of his Fifth, Eighth, and Fourteenth Amendment rights to be free from cruel and unusual punishment and to due process of law; (2) Mr. Ochoa's trial counsel failed to investigate and present exculpatory evidence, and failed to make crucial objections at trial, in violation of Mr. Ochoa's Sixth and Fourteenth Amendment rights to effective assistance of counsel; and (3) Mr. Ochoa was twice placed in jeopardy for the same offense, in violation of his Fifth and Fourteenth Amendment rights.

III. CLAIMS FOR RELIEF

A. Claim One: Mr. Ochoa Is Actually Innocent of the Offense for Which He Was Convicted and Sentenced, in Violation of His Fifth, Eighth, and Fourteenth Amendment Rights to Be Free from Cruel and Unusual Punishment and to Due Process of Law

The Eighth Amendment's prohibition on cruel and unusual punishment, incorporated through the Fourteenth Amendment, and the Fifth and Fourteenth Amendments' requirement of substantive due process, prohibit the punishment of a factually innocent person. U.S. Const. amends. V, VIII, XIV. Mr. Ochoa presents reliable evidence demonstrating that he is actually innocent of being a felon in possession of a firearm. This Court should grant habeas relief based on his freestanding claim of actual innocence.

1. Supporting Facts

On December 4, 2008, Mr. Ochoa, his half-brother Edwin Gonzales Ochoa (aka Oscar Lucas Martinez), and Edwin's girlfriend Jeannette Dominguez were arrested at an apartment complex located at 453 N. Kingsley Drive in Los Angeles, California. (CT 52-54.) There is no dispute that the arrest followed the recovery by police of a semi-automatic handgun from Jeannette's purse. (CT 63.)

The only witness to link Mr. Ochoa to the gun was Officer Lazaro Ortega, a police officer with the Los Angeles Police Department ("LAPD"), who worked in the Hollywood Gang Enforcement Detail. Officer Ortega testified at the preliminary hearing, first trial, and second trial. (CT 4-15; 1 RT 38-77; 2 RT 310-51.) In summary, Officer Ortega testified as follows.

On December 4, around 5:30 p.m., he and his partner Officer Jeff Castillo were driving a marked police car in the area of 453 N. Kingsley Drive. Mr. Ochoa was standing outside the apartment complex with another male, later identified as Edwin. A female, later identified as Jeannette, was sitting on the stairs in front of them. The officers recognized Mr. Ochoa from prior contacts. When Mr. Ochoa saw the car approaching, he reached into the waistband of his baggy shorts with both hands and

"dropped" or "tossed" or "threw" a black object into Jeannette's medium-sized purse, which she held open on her lap. He then looked in the direction of the officers and ran upstairs into the apartment complex. Officer Ortega recovered a semi-automatic handgun—loaded, cocked, and ready to fire—from the bottom of Jeannette's purse. After additional officers arrived, they brought Mr. Ochoa down from an upstairs apartment and arrested him. At that point—but not before—Mr. Ochoa's mother and girlfriend came downstairs, and bystanders began to congregate in the street. Mr. Ochoa, Edwin, and Jeannette were arrested. (*Id.*)

All other available evidence contradicts Officer Ortega's story in its entirety.

First, every other witness present at the scene consistently describes a different series of events. Mr. Ochoa's mother, Margarita Xatruch, testified at both the first and second trials and recently signed a declaration regarding the events of December 4. Her consistent testimony is that, on that date, she was at the Kingsley apartment complex where Mr. Ochoa's girlfriend, Yesenia Gonzalez, lived. With her in the apartment were Mr. Ochoa, Yesenia, the couple's children, and Yesenia's mother Marta Alfaro. The family heard an ice cream truck passing by, and the couple's youngest child, Jordy Jr., who was eighteen months old at the time, began crying because he wanted ice cream. Margarita gave Mr. Ochoa some money to buy ice cream, and Mr. Ochoa left the apartment with Jordy Jr.

About five or ten minutes later, Mr. Ochoa returned to the apartment carrying in his arms Jordy Jr., ice cream, and nachos. Mr. Ochoa looked out the window and told his mother that the police were downstairs with her other son, Edwin. She immediately went downstairs to see what was going on.

When Margarita got downstairs, she saw two police officers, Edwin, and Jeannette. Edwin was facing the wall with his hands behind his back while the police searched him. Jeannette was sitting down. Margarita asked the police what was happening, and was told it was just a routine check.

One of the officers shined a flashlight into Jeannette's purse and asked her what was inside. He then took the purse over to his car, put on gloves, opened the purse on

top of the trunk of his car, and searched it. The officer found an item at the bottom of the purse and then arrested Jeannette. All this time, Mr. Ochoa remained upstairs. Yesenia, her mother, and the children came downstairs, and neighbors congregated around.

Additional officers arrived. Mr. Ochoa was looking down at the scene from the apartment window above. One of the officers looked up and saw Mr. Ochoa, recognized him as someone who had sued the police department, and told his partners that he had seen Mr. Ochoa put the item into the purse. The police told Margarita that they were going to get Mr. Ochoa from the apartment. They then brought him downstairs in handcuffs. Margarita asked a police sergeant why they were arresting Mr. Ochoa when he had not done anything. The sergeant responded that it was part of the routine investigation process. (1 RT 103-13; 2 RT 406-16; Ex. 7, Xatruch Investigation Report; Ex. 2, Margarita Xatruch Decl.)

Yesenia Gonzalez testified at both trials that she was at the Kingsley apartment with Mr. Ochoa, their children, Mr. Ochoa's mother Margarita, and her mother. Her son Jordy Jr. started crying for ice cream, and Margarita told Mr. Ochoa to take him outside to the ice cream truck, which Mr. Ochoa did. When he returned, he was walking normally (not running) and carrying in his arms Jordy Jr., nachos, and ice cream.

Mr. Ochoa looked out the window and said that the police were downstairs with Edwin. Margarita then went downstairs. Shortly after, Yesenia's mother did as well. Yesenia stayed upstairs and watched what was happening through the window. She saw the officers arrest Edwin. She then saw a police officer shine a flashlight into Jeannette's purse, pick it up, place it on the trunk of the police car, put gloves on, dig through the purse, and pull out a weapon. Mr. Ochoa was inside the apartment this entire time, looking out the window a little bit.

Two additional police units arrived. The officers asked who was upstairs. One of them said that they knew the person. Police officers then came to the apartment and ordered everyone out. (1 RT 125-34; 2 RT 368-81.)

Eunice Paz, a neighbor who lived across the street from the Kingsley apartment complex, testified at both trials that at the time of the incident she was on her balcony with a clear view of the area. She saw Mr. Ochoa come downstairs with his baby in his arms. He walked across the street to an ice cream truck that was below her balcony. Mr. Ochoa bought ice cream and some nachos. He then crossed the street, paused briefly to say hello to Edwin and Jeannette, and went back upstairs. The police had not yet arrived.

Ms. Paz was in a position to clearly see Mr. Ochoa as he went to the ice cream truck and returned to the residence. At no time did she see him take an item and toss it into Jeannette's purse.

Very soon after Mr. Ochoa went upstairs, Ms. Paz saw two police officers arrive, get out of their car, and walk up to Edwin. They searched him and placed him in handcuffs. The officers spoke with Jeannette, and one of them searched her purse. Additional officers arrived.

Ms. Paz then crossed the street to where everyone was. Mr. Ochoa's mother and Yesenia's mother were there. An officer took Jeannette's purse and put it right next to Ms. Paz and then on top of a police car. The officer searched the purse using gloves. Mr. Ochoa was upstairs this entire time. Officers then went up to the apartment and brought Mr. Ochoa down in handcuffs. (1 RT 135-53; 2 RT 381-06.)

Marta Alfaro, Yesenia's mother, testified at the first trial that on the date in question she, her daughter, Mr. Ochoa, the couple's three children, and Mr. Ochoa's mother Margarita were at the Kingsley apartment. One of the children began crying for an ice cream, so Margarita told Mr. Ochoa to buy him one. Mr. Ochoa went to do so, and returned carrying in his arms the baby, nachos, and an ice cream.

Shortly thereafter, Mr. Ochoa looked out the window and told his mother that the police had his brother downstairs. Margarita then left the apartment, and about two minutes later, Ms. Alfaro did as well. When she got downstairs, she saw the police officers with Edwin. Jeannette was seated.

An officer shined a flashlight into Jeannette's purse and then picked it up and put it on top of the trunk of the police car. The officer felt something heavy, put on gloves, searched all the way to the bottom of the bag, and removed a gun. Mr. Ochoa was upstairs this entire time. The police later went upstairs and brought him down. (1 RT 114-24.)

Wendy Gutierrez was interviewed one month after the incident and provided the following information. On December 4, 2008, she was on her balcony, which faces the Kingsley apartment complex. She saw her neighbor, Mr. Ochoa, exit the apartment carrying his one-year-old son. Mr. Ochoa walked to an ice cream truck and purchased nachos. He then returned to his apartment, nodding a greeting of "hello" toward Jeannette.

Soon after, two police officers approached Jeannette. One of them used a flashlight to examine her purse. The officer then took Jeannette's purse and placed it on the trunk of his police car. Another officer was talking with Edwin, who was handcuffed.

Additional officers arrived and went inside the apartment complex. Ms. Gutierrez saw the police exit less than ten minutes later with Mr. Ochoa, who was in handcuffs. Mr. Ochoa, Edwin, and Jeannette were taken away in police cars. (Ex. 10, Wendy Gutierrez Investigation Memo.)

Edwin Gonzales Ochoa recently was interviewed and provided a declaration regarding the events of December 4, 2008. On that date, Edwin and his then-girlfriend Jeannette were standing in front of the Kingsley apartment building. Mr. Ochoa came downstairs holding his son Jordy Jr. in both arms. At some point, Mr. Ochoa noticed a police car arriving and went back upstairs with his son. Mr. Ochoa did not pull out a gun or put a gun in Jeannette's purse.

Edwin stayed downstairs with Jeannette. When he turned around and saw the cops, he realized that he and Jeannette would be searched and that the officers would find a gun that he knew was in Jeannette's purse.

When the cops arrived, they asked Edwin about the guy who just left and asked if it was Mr. Ochoa. An officer told Edwin that he knew Mr. Ochoa because of a civil suit he had against the Hollywood Police Department.

One of the officers picked up Jeannette's purse and commented that it was heavy. He then opened it and found the gun. Soon after, another officer came downstairs with Mr. Ochoa. Edwin, Jeannette, and Mr. Ochoa were all arrested, but charges were never filed against Edwin and Jeannette. Jeannette later told Edwin that she had told the officers it was her gun. (Ex. 1, Edwin Gonzalez Ochoa Decl. ¶¶ 1-4; Ex. 4, Roberto Loeza Decl. ¶¶ 16-32.)

Second, in addition to the statement she made to Edwin, Jeannette made a number of out-of-court confessions that the gun belonged to her and that Mr. Ochoa had nothing to do with it. According to Margarita Xatruch, after Jeannette was released from jail she told Margarita on several occasions that she was surprised Mr. Ochoa was charged because the gun was hers and he had nothing to do with it. (Ex. 2, Margarita Xatruch Decl. ¶ 11.) Margarita also was present for a conversation between Jeannette and Ralph Ayala, Mr. Ochoa's trial counsel. Jeannette told Mr. Ayala that she wanted to testify that the gun was hers and that Mr. Ochoa did not put the gun in her purse. (*Id.* ¶ 17.)

Martha Ochoa, Mr. Ochoa's sister, had similar experiences. She spoke with Jeannette several times before and during Mr. Ochoa's trials, and Jeannette told her that she wanted to testify on Mr. Ochoa's behalf because the gun was hers and not Mr. Ochoa's. Martha was present when Jeannette told Mr. Ayala that she wanted to testify that the gun was hers. (Ex. 3, Martha Ochoa Decl. ¶¶ 6, 8-9.)

The idea that the gun belonged to Jeannette is consistent with other information we know about her. Around the time of the incident in question, Jeannette was constantly in and out of trouble. For example, Margarita saw Jeannette high on drugs many times and wearing expensive items that Jeannette clearly could not afford and that Margarita heard she got by breaking into houses. (Ex. 2, Margarita Xatruch Decl. ¶ 12.) Martha Ochoa, who lived with Jeannette for about six months prior to the

December 2008 incident, knew that Jeannette had a troubled relationship with her mother and had been kicked out of her family home because of drug use. During the time Jeannette lived with Martha, Jeannette and Edwin both told Martha that Jeannette often carried a gun. They told Martha to be careful if she was picking up or moving Jeannette's purse because of the gun. They also told Martha about burglaries Jeannette had committed for money, which was consistent with what Martha saw—that Jeannette often had large amounts of cash, foreign currency, and exotic coins, which she would exchange for U.S. dollars. (Ex. 3, Martha Ochoa Decl. ¶¶ 3-5.)

Third, Officer Ortega's story does not make sense. At the time of the arrest, Mr. Ochoa was wearing a baggy pair of basketball shorts. To believe Officer Ortega's account, one must believe that Mr. Ochoa was carrying a loaded and cocked semi-automatic firearm in the waistband of these baggy shorts. He then took that loaded and cocked gun and "threw" it into a medium-sized purse in the lap of someone seated on the stairs. He did this directly in front of the officers, who had no idea he was carrying a gun, rather than simply turn and head upstairs with the gun concealed in his shorts. Of note, although several other police officers were present at the scene, no other officers testified in support of Officer Ortega's version of events—even after the first jury hung 7-5 in favor of acquittal.

Fourth, there was no physical evidence tying Mr. Ochoa to the gun, but there was physical evidence proving that other individuals had touched it. Although no latent fingerprints were found on the gun, at least three different DNA profiles were recovered, none of them belonging to Mr. Ochoa. (2 RT 361, 366-67.) No one ever compared Edwin or Jeannette's DNA profiles with the profiles found on the gun. (1 RT 92.)[2]

Fifth, the officers who arrested Mr. Ochoa had a motive to target him. In April 2008, a shooting occurred just a few blocks from the Kingsley apartment complex.

[2] The gun has since been handled by the superior court evidence clerks, and cannot be retested. (Ex. 4, Roberto Loeza Decl. ¶ 35.)

One person died and another was injured. Officers from LAPD's Hollywood Division arrested Mr. Ochoa and another man, and the two were charged with murder and attempted murder. After spending four months in jail, the men were released at the urging of the district attorney's office because video evidence conclusively proved that they could not have been the shooters. Mr. Ochoa filed a civil complaint against the LAPD officers, who possessed the video evidence from the beginning of their investigation but suppressed it, and their colleagues who covered up the misconduct through a "Code of Silence." Mr. Ochoa's complaint was filed in October 2008, and was pending at the time police officers from the same Hollywood Division accused in the complaint arrested Mr. Ochoa for felon in possession. (Ex. 18, Ochoa v. City of Los Angeles; Ex. 23, Homicide Media Clippings; Ex. 21, Google Map.)

Despite the conclusive video evidence and the dismissal of charges against Mr. Ochoa, Hollywood Division officers apparently had not given up on the possibility that—contrary to the findings of the District Attorney's Office—he was in fact involved in the April 2008 homicide. When Hollywood Division Officer Rodriguez, who was not present during the December 2008 arrest but was involved in the investigation that followed, submitted the gun found in Jeannette's purse for DNA testing, he wrote that Mr. Ochoa "is also suspected in a homicide with similar [*sic*] weapon. Firearm will be test fired after DNA for comparison in casings recovered during homicide." (Ex. 15, Request for Serology/DNA Analysis.)

In addition, in a separate incident in 2007, Mr. Ochoa was charged with five criminal counts, including battery on a peace officer, and pled guilty to resisting an officer, in violation of California Penal Code section 69. The officer who testified against Mr. Ochoa at his preliminary hearing, and presumably was the victim in the case, was Officer Gabriel Blanco—who, on information and belief, is the same Officer Blanco who participated in the December 2008 arrest. (CT 57; Ex. 19, Case No. BA326153 Minutes; Ex. 14, DA Witness List.)

Multiple witnesses report that the police officers who arrested Mr. Ochoa were indeed targeting him because of these prior incidents. Margarita Xatruch provided a

witness statement that "[o]ne of the officers looked toward [Mr. Ochoa] who was inside, looking out from a window, and recognized him as someone who has a lawsuit against the police. The officer then told his partners that he had seen [Mr. Ochoa] put something in the purse." (Ex. 7, Xatruch Investigation Report.) She also explains in her sworn declaration that she "felt the officers were targeting Jordy because of a civil suit that he had against the police department. Police officers had previously harassed Jordy because of the suit and because he had beaten a murder charge. It appeared to me that the arresting officers in this case knew who Jordy was and were targeting him." (Ex. 2, Margarita Xatruch Decl. ¶ 10.)

Martha Alfaro provided a witness statement that Mr. Ochoa "was looking out through the window when one of the officers recognized him and blurted out in Spanish, 'I know that guy, He has a lawsuit against us.'" (Ex. 8, Alfaro Investigation Report.)

According to Edwin Gonzales Ochoa, "The police started questioning me about the guy who they saw leave and asked if it was Jordy Ochoa who had gone upstairs. I believe they knew him because of the civil case he had against the Hollywood police department. The police officer told me that Jordy had tried to sue the department." (Ex. 1, Edwin Gonzales Ochoa Decl. ¶ 3.) On the way to the police station, one of the officers commented to Edwin about his brother's lawsuit, saying that Mr. Ochoa had been asking for trouble. (Ex. 4, Roberto Loeza Decl. ¶ 25.)

2. Legal Analysis

In *Herrera v. Collins*, the Supreme Court assumed without deciding "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief" in the absence of state relief. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Three Justices suggested that punishing a defendant who is actually innocent of a noncapital offense would also violate the Constitution. *See id.* at 432 n.2 (Blackmun, J., dissenting).

Two years later, the Supreme Court wrote that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the fundamental value determination of our society that it is far worse to convict and innocent man than to let a guilty man go free." *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (internal quotation marks omitted).

In 2006, the Supreme Court again assumed without deciding that a freestanding claim of actual innocence might entitle a petitioner to habeas relief. *See House v. Bell*, 547 U.S. 518, 555 (2006). And importantly, as recently as 2009, the Supreme Court reiterated this assumption *in the context of a noncapital habeas case*. *See Dist. Atty's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009).

To establish a freestanding claim of actual innocence, a petitioner must show "that he is probably actually innocent." *Herrera*, 506 U.S. at 432 n.2 (Blackmun, J., dissenting); *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997) (en banc) (adopting Justice Blackmun's standard). "In considering whether a prisoner is entitled to relief on an actual-innocence claim, a court should take all the evidence into account, giving due regard to its reliability." *Herrera*, 506 U.S. at 443. Where discovery would facilitate making a reliable determination on this matter, a district court should order it. *See id.* at 444.

Mr. Ochoa has presented sufficient evidence to demonstrate that he is probably actually innocent, and that the gun in fact belonged to Jeannette Dominguez. In addition to the overwhelming number of eyewitnesses who place Mr. Ochoa inside the apartment complex at the time the police arrived, Ms. Dominguez—known to carry a gun—made several confessions that the gun belonged to her, and that Mr. Ochoa had nothing to do with it. Especially when considered in conjunction with evidence that the officers who arrested Mr. Ochoa had a motive to accuse him, and that they made multiple comments at the time of the arrest suggesting they were targeting him, this evidence meets the *Herrera* standard. To the extent that this Court believes

otherwise, Mr. Ochoa requests discovery and the opportunity for a hearing to adduce additional facts in support of his claim.

B. Claim Two: Mr. Ochoa's Trial Counsel Failed to Investigate and Present Exculpatory Evidence, and Failed to Make Crucial Objections at Trial, in Violation of Mr. Ochoa's Sixth and Fourteenth Amendment Rights to Effective Assistance of Counsel

The Sixth Amendment's guarantee of the assistance of counsel, incorporated through the Fourteenth Amendment, requires trial counsel to perform effectively. U.S. Const. amends. VI, XIV. Mr. Ochoa's trial counsel failed to meet this standard, and his deficient performance prejudiced Mr. Ochoa. This Court should grant habeas relief based on counsel's deficiencies, either individually or cumulatively.

1. Supporting Facts

Mr. Ochoa initially was represented on the felon in possession charge by a Los Angeles County public defender. (CT 20.) The public defender interviewed six eyewitnesses, conducted a preliminary hearing, and filed a *Pitchess* motion for pretrial discovery of complaints against the officers involved in Mr. Ochoa's arrest. (CT 1-17, 24-51; Ex. 6, Martinez Investigation Report; Ex. 7, Xatruch Investigation Report; Ex. 8, Alfaro Investigation Report; Ex. 9, Gonzales Investigation Report; Ex. 10, Dominguez Investigation Report; Ex. 12, Redacted Investigation Reports, at 1 (Eunice Paz).)

However, prior to trial, Mr. Ochoa's mother retained attorney Ralph Ayala to represent Mr. Ochoa. (CT 69; Ex. 2, Margarita Xatruch Decl. ¶ 13.) Mr. Ayala was a former prosecutor who had been fired for regularly using cocaine off duty, and apparently thereafter became a private defense attorney. Oddly, although Mr. Ayala was charged with being under the influence of cocaine and being present at a location where controlled substances were in use, and was fired from the district attorney's office for this misconduct, the State Bar has no public record of this matter. (Ex. 22, LA Times Articles; Ex. 24, Ayala Bar Profile.) The family paid Mr. Ayala $4,000 total for his representation of Mr. Ochoa at two separate trials. (Ex. 2, Margarita

Xatruch Decl. ¶ 13.) They do not recall signing a retainer agreement or receiving receipts for any of their payments to Mr. Ayala. (*Id.*; Ex. 3, Martha Ochoa Decl. ¶ 16.)

Mr. Ayala never hired an investigator and did not ask the family for funds to hire one. He does not appear to have interviewed any witnesses himself. Instead, the evidence shows that Mr. Ayala relied entirely on the limited interview reports prepared by the public defender's office and put some (but not all) of the exculpatory witnesses the public defender's office had interviewed on the stand without any advance preparation. Although Mr. Ochoa's family specifically directed Mr. Ayala to additional exculpatory witnesses who were willing and available to testify at trial, Mr. Ayala did not follow up on these leads. To the contrary, he actively discouraged one witness, Jeannette Dominguez, from testifying that the gun belonged to her and that Mr. Ochoa had nothing to do with it, and then he failed to present available evidence that Jeannette had made similar statements to other witnesses. There is no reasonable strategic decision that can account for these failures.

Specifically:

- Mr. Ayala did not hire an investigator or request additional funds to do so. It does not appear that he conducted any investigation at all. (Ex. 2, Margarita Xatruch Decl. ¶ 21; Ex. 3, Martha Ochoa Decl. ¶¶ 14-15.)
- Mr. Ayala did not interview any witnesses, and therefore failed to discover and present relevant exculpatory evidence. (Ex. 2, Margarita Xatruch Decl. ¶ 14; Ex. 3, Martha Ochoa Decl. ¶¶ 7-11.)
- Mr. Ayala did not prepare any witnesses for their testimony on the stand. (Ex. 2, Margarita Xatruch Decl. ¶ 14-16.)
- Mr. Ayala did not interview Mr. Ochoa's mother, Margarita Xatruch, or prepare her to testify. If he had, he would have discovered additional exculpatory evidence set forth in her declaration, which he did not present at trial. For example, Margarita could have testified that Jeannette was constantly in and out of trouble, high on drugs, and a seasoned burglar. She also could have testified

that she clearly saw that the gun the officer found was at the *bottom* of Jeannette's purse. (Ex. 2, Margarita Xatruch Decl. ¶ 7, 12, 22-23.)

- Mr. Ayala did not interview Mr. Ochoa's sister, Martha Ochoa, and if he had, he would have discovered exculpatory evidence set forth in her declaration, which he did not present at trial. For example, Martha could have testified that Jeannette was a drug user and a seasoned burglar who often carried a gun in her purse. (Ex. 3, Martha Ochoa Decl. ¶¶ 3-5, 17.)
- Mr. Ayala did not interview Nikki and Julie, percipient witnesses who could have corroborated Mr. Ochoa's version of the events of December 4. When Margarita first hired Mr. Ayala, she told him that there were several witnesses who wanted to testify on her son's behalf. At court before each trial, Margarita specifically told Mr. Ayala that two neighbors, Nikki and Julie, wanted to testify. They were buying ice cream when the incident occurred, and told Margarita that they wanted to testify. Julie had argued with the officers when they arrested Mr. Ochoa because she could see that he was not involved. Margarita knew where Nikki and Julie lived and that they were available for both trials. Mr. Ayala did not ask for any information so that he could follow up on these leads. (Ex. 2, Margarita Xatruch Decl. ¶ 19A.)
- Mr. Ayala did not interview Wendy Gutierrez, a percipient witness who could have corroborated Mr. Ochoa's version of the events of December 4. Although Mr. Ayala was in possession of an investigation memo prepared by the public defender's office, placed Ms. Gutierrez on his witness list, and announced her as a witness for the defense, for no apparent reason he did not actually call her as a witness. (2 RT 2; Ex. 10, Wendy Gutierrez Investigation Memo; Ex. 13, Defense Witness List.)
- Mr. Ayala did not interview any of the other percipient witnesses that Mr. Ochoa's relatives told him were willing and available to corroborate Mr. Ochoa's version of the events of December 4. (Ex. 2, Margarita Xatruch Decl. ¶ 19A.)

- Mr. Ayala did not interview Edwin Gonzales Ochoa, who was in custody in California as of December 29, 2008, and was either in custody or in Honduras at the time Mr. Ayala assumed his role as Mr. Ochoa's attorney. Even if Edwin was an unavailable witness at the time of Mr. Ochoa's first trial, his statements could have been presented to the jury through an exception to the hearsay rules. (Ex. 6, Martinez Investigation Report; Ex. 1, Edwin Gonzales Ochoa Decl.)
- Mr. Ayala did not interview Jeannette Dominguez, despite information that she had confessed that the gun was hers and that Mr. Ochoa had nothing to do with it. The only effort Mr. Ayala made to contact Jeannette was to send a process server to serve her with a subpoena to appear at trial. The process server informed Mr. Ayala that he did not locate Jeannette at the address he was given, but that he was told she lived in Sacramento. Mr. Ayala made no further efforts to contact her. Although Mr. Ayala was appointed to represent Mr. Ochoa more than a month before the attempted service of the subpoena, Mr. Ayala did not attempt to interview Jeannette before subpoenaing her. Instead, Mr. Ayala told Mr. Ochoa's family members that it would be a bad idea for Jeannette to testify. (CT 69; Ex. 3, Martha Ochoa Decl. ¶¶ 6, 8-10; Ex. 17, Motion as to Declaration Against Penal Interest.)
- Mr. Ayala initially pursued a strategy of admitting a declaration against interest that Jeannette made to police officers after her arrest, in which she stated, "I was with a friend hanging out, things didn't go as planned he booked it. I was left with gun [*sic*] to hold and stranded. Only place I knew to go and was familiar with so that I can use a phone, was at the place where I was arrested." (CT 60.)[3] That motion was denied because the trial court thought the statement was partially exculpatory, and thus not fully against penal interest. (1 RT 10-18.) However, Mr. Ayala was aware of additional, squarely inculpatory

[3] Suspiciously crossed out from Jeannette's handwritten statement are the words, "I was waiting for my ride before the cops rolled up." (CT 60.) Because Mr. Ayala did not interview Jeannette, we do not know why she crossed out that sentence. Attempts by Mr. Ochoa's current counsel to locate Jeannette have been unsuccessful. (Ex. 4, Roberto Loeza Decl. ¶¶ 33-34.)

statements that Jeannette had made. Specifically, Mr. Ayala was in possession of a statement made by Margarita Xatruch to the public defender investigator that Jeannette told the officers at the scene of the crime that the gun belonged to her. (Ex. 7, Xatruch Investigation Report.) Margarita also had information that Jeannette had confessed to her on several occasions, saying the gun was hers and Mr. Ochoa had nothing to do with it. (Ex. 2, Margarita Xatruch Decl. ¶ 11.) Jeannette also confessed to Martha Ochoa prior to Mr. Ochoa's first trial, and said that she was willing to testify that the gun was hers and not Mr. Ochoa's. This information was conveyed to Mr. Ayala, but he did not seek to have these crucial declarations against interest admitted. (Ex. 3, Martha Ochoa Decl. ¶¶ 8-10.)

There is no reasonable strategic decision that can account for these failures. Mr. Ayala could not make a reasoned decision about which witnesses to present at trial, or what questions to ask them, without interviewing the witnesses and preparing them to testify. Mr. Ayala's efforts to dissuade Jeannette from testifying not only undermined Mr. Ochoa's case, but violated Mr. Ayala's ethical obligations to his client. And his failure to present the numerous declarations against interest that Jeannette had made to available witnesses, of which Mr. Ayala was aware, cannot be reasonable in light of their highly exculpatory value. Rather than make a reasoned strategic decision not to present this information, it appears that Mr. Ayala—who initially sought to subpoena Jeannette and present a far weaker declaration against interest to the jury—was making inconsistent, day to day decisions about what evidence to present, without having conducted any of the investigation that should have informed these judgments.

Mr. Ayala did not present exculpatory evidence of the motive the Hollywood police officers had to frame Mr. Ochoa for the gun. Margarita Xatruch and Marta Alfaro both provided statements to the public defender's office, which Mr. Ayala possessed, that suggested officers were targeting Mr. Ochoa because of the lawsuit he had against the Hollywood police department. (Ex. 7, Xatruch Investigation Report;

Ex. 8, Alfaro Investigation Report.) Margarita had additional information of the officers' motives. Before she testified at the first trial, she told Mr. Ayala about the lawsuit, but Mr. Ayala said not to bring it up in court. (Ex. 2, Margarita Xatruch Decl. ¶ 8-10, 15.) Martha Ochoa also informed Mr. Ayala, prior to trial, that Mr. Ochoa had a civil suit pending against the police department, but Mr. Ayala did not appear interested in knowing more. (Ex. 3, Martha Ochoa Decl. ¶ 12.)

Moreover, the public defender who initially represented Mr. Ochoa had filed a *Pitchess* motion to obtain complaints against the officers involved in Mr. Ochoa's arrest, and specifically stated in that motion that police were fabricating the charges against Mr. Ochoa in retaliation for his resisting arrest, having the murder charge against him dismissed, and filing a complaint against the department. (CT 22-51; *see* CT 33.) That motion resulted in the discovery of a complaint that Mr. Ochoa's civil attorney had filed, that alleged that Officer Ortega falsified his report after arresting Mr. Ochoa on December 4, 2008. (CT 84; *People v. Ochoa*, Lodged Doc. G, at 139.) Mr. Ayala, however, never investigated the civil suit or complaints and did not offer the jury any reason to believe that Officer Ortega was not being truthful.

There is no reasonable strategic decision that can account for these failures. It does not appear that Mr. Ayala was concerned about the jury learning that Mr. Ochoa had prior police contacts, because Mr. Ayala himself elicited testimony at the first trial that officers had prior contacts with Mr. Ochoa, including an altercation; tried to elicit at the first trial that Mr. Ochoa had had problems with the police before; and elicited at the second trial that Officer Ortega had prior contacts with Mr. Ochoa, including two previous arrests, and that at the time of the incident Mr. Ochoa was on probation, was dressed in baggy gang attire, and was associating with someone with a large tattoo on his shaved head. (1 RT 56-57, 124; 2 RT 326-29, 345-46.)

The value of this information to Mr. Ochoa's defense is demonstrated by the prosecution's efforts to prevent the jury from hearing it, through the filing of a motion in limine. (1 RT 18.) At the first trial, Mr. Ayala argued in closing that Mr. Ochoa had prior contacts with the police, and suggested that the officers were targeting him

specifically. (1 RT 210-11, 214.) But Mr. Ayala did not present any of the available evidence to back up that assertion and, rather than oppose the prosecution's motion, simply stated that there would be no mention of the civil lawsuit. (1 RT 18.) The prosecutor capitalized on this deficiency, arguing to the jury that there was not any evidence to support defense counsel's suggestion that the police had an issue with Mr. Ochoa or were after him personally. (1 RT 221-22.)

At the second, trial, Mr. Ayala similarly did not present any evidence of the officers' motive for targeting Mr. Ochoa. Yet he did not object when the prosecution presented evidence that officers had previously arrested Mr. Ochoa and knew he was a felon. (2 RT 320, 366.) Again, in closing argument, Mr. Ayala suggested that the officers were targeting Mr. Ochoa, but without the benefit of any evidence to support that assertion. (2 RT 636-37, 640.) And again, the prosecutor was able to exploit this absence of evidence, arguing,

> And when you listen to those [defense witnessess'] stories, it starts to not make sense. Their story yesterday doesn't make sense that the police drive up and they see a girl and a guy, and according to them, it was only the defendant's brother and this girl sitting there. *And the police drive up and arrest him for no reason whatsoever*. And then go upstairs and arrest the defendant.

(2 RT 622 (emphasis added).)

Mr. Ayala did not pursue a comparison of the multiple DNA profiles found on the gun with Jeannette's or Edwin's DNA. When Mr. Ochoa's sister Martha asked Mr. Ayala whether he could do DNA testing on the gun, Mr. Ayala did not appear interested. Instead, he responded that "he didn't really know much about DNA, that he never had any training on it, and that when he passed the bar exam DNA was not a big deal." (Ex. 3, Martha Ochoa Decl. ¶ 13.) There is no reasonable strategic decision for this failure. Had Mr. Ayala sought such a comparison, the district attorney could not have objected because his office had filed a motion in the very

same case to compel a DNA swab from Mr. Ochoa, arguing that obtaining a DNA sample from an individual does not violate his or her Fourth or Fifth Amendment rights. The court had granted that motion. (Ex. 16, Order for Defendant to Submit to DNA Swab.)

Despite all of these deficiencies on Mr. Ayala's part, the evidence against Mr. Ochoa—one officer's uncorroborated testimony—was so flimsy that the jury hung seven-to-five for acquittal after the first trial. The trial court then ruled that Mr. Ochoa was not guilty of possessing the firearm, even under a preponderance of the evidence standard. As discussed more fully below, Mr. Ayala should have objected to a second trial on double jeopardy grounds, and had he done so, the court should have granted that motion. Mr. Ayala, however, did not make an objection. There is no reasonable strategic decision that could explain his failure to do so.

Mr. Ochoa was thus subjected to a second trial. Mr. Ayala did no investigation to prepare for this second trial. (Ex. 4, Roberto Loeza Decl. ¶ 11.) To the contrary, for no apparent reason, Mr. Ayala failed to present even the minimal evidence that he had presented at the first trial, which had been persuasive to the jury. Specifically:

- Mr. Ayala failed to present Marta Alfaro as a witness at the second trial. Ms. Alfaro had presented helpful, exculpatory evidence at the first trial, wanted to testify at the second trial, and was available to testify. Mr. Ayala listed her as a witness for the defense during voir dire. (2 RT 2.) For no apparent reason, Mr. Ayala did not call her. (Ex. 2, Margarita Xatruch Decl. ¶ 19.)
- Mr. Ayala failed to present any evidence that the police officers saw Mr. Ochoa in the upstairs window while they were searching Edwin and Jeannette, and thereafter went up to arrest him. The prosecutor was able to exploit this omission in closing argument, telling the jury, "The whole, I guess, hangup with that story is that, if the police arrive five minutes after the defendant went upstairs, how do they know he was there?" (2 RT 622-23.)
- Mr. Ayala failed to present Mr. Ochoa's baggy shorts as evidence at the second trial, although he had focused on this evidence at the first trial. (1 RT 100-03,

213.) Instead, he simply asked Yesenia Gonzalez whether Mr. Ochoa was wearing baggy basketball shorts. (2 RT 370.) Mr. Ayala clearly wished to focus on the baggy shorts, as he argued in closing at the second trial that "if you look at the circumstances, he is wearing these baggy clothes with the gym shorts, how would a gun stay in these types of pants, these basketball baggy shorts that everyone wears these days?" (2 RT 637.) But for no apparent reason, he gave the jury almost no evidence to support this argument.

- Mr. Ayala did not argue to the jury that Officer Ortega's story—that Mr. Ochoa threw a loaded gun into a purse—was implausible, although he had done so at the first trial. (1 RT 214.) Nor did he bring out the fact that the purse was only "medium" in size, as the public defender had adduced at the preliminary hearing. (CT 12.)

There is no reasonable strategic decision that could explain Mr. Ayala's failure to present available, exculpatory evidence that had resulted in a seven-to-five for acquittal hung jury at the first trial.

By the time of the second trial, there was also new, available evidence of Mr. Ochoa's innocence, but Mr. Ayala failed to investigate or present it. First, Edwin Gonzales Ochoa was back in Los Angeles and available as a witness at the second trial. He wished to testify consistently with Mr. Ochoa's version of events, and specifically that the gun did not belong to Mr. Ochoa and that Mr. Ochoa did not put the gun in Jeannette's purse. Edwin also had information that the officers who arrested Mr. Ochoa targeted him because of the civil lawsuit. However, Mr. Ayala did not interview Edwin or seek to have him testify. (Ex. 1, Edwin Gonzales Ochoa Decl. ¶¶ 2-5; Ex. 4, Roberto Loeza Decl. ¶¶ 16-32; Ex. 2, Margarita Xatruch Decl. ¶ 20; Ex. 3, Martha Ochoa Decl. ¶¶ 6-7.)

Second, although Mr. Ayala's limited attempts to subpoena Jeannette for the first trial were unsuccessful, by the second trial she was present in court. In fact, Jeannette confronted Mr. Ayala at the courthouse and said that she wanted to testify that the gun was hers and Mr. Ochoa had nothing to do with it. Margarita Xatruch

and Martha Ochoa were both present during this conversation. Rather than interview Jeannette then and there, Mr. Ayala violated his ethical duty of loyalty to Mr. Ochoa by warning Jeannette that she could go to jail if she testified. (Ex. 2, Margarita Xatruch Decl. ¶ 17-18; Ex. 3, Martha Ochoa Decl. ¶ 9.) Jeannette was then appointed counsel and exercised her Fifth Amendment right to remain silent, at which point she became an unavailable witness. (CT 141; 2 RT 601-03.) *See* Cal. Evid. Code § 240(a)(1). Nonetheless, Mr. Ayala did not seek to present her new declaration against interest, made to him just moments earlier in the presence of Margarita and Martha, to the jury through those witnesses.

There is no reasonable strategic decision that could explain Mr. Ayala's failure to investigate and present this additional exculpatory evidence. In particular, with regard to Jeannette, Mr. Ayala had included her in his witness list several months earlier, had announced her as a witness at the start of the second trial, and had tried to admit a far less helpful declaration against interest that she made through a pretrial motion. (1 RT 10-18; 2 RT 2; Ex. 17; Motion as to Declaration Against Penal Interest; Ex. 13, Defense Witness List.)

Mr. Ayala also failed to make important objections at the second trial, allowing in damaging and misleading evidence and prejudicial jury instructions. First, Mr. Ayala stipulated to the introduction in evidence of a redacted copy of public defender investigator Ruben Castellanos's report of his interview with Margarita Xatruch. (2 RT 603-04.) The redacted version included only the first two paragraphs of the report. In the second paragraph, it says, "While our client was outside with his child, Ms. Xatruch saw the police outside and walked out to find out what was going on." (Ex. 12, Redacted Investigation Reports, at 2.) The prosecutor used this report to argue to the jury:

> You heard different stories from different people. Then you look back to what they said almost eight months ago. Eight months ago, when you see what Margarita Xatruch said, which is the defendant's mother, you're going

> to see that she said that she came down while the defendant was down there to see what was going on.
>
> . . . .
>
> But [her] testimony yesterday tried to separate that. So you can see how [she's] a little bias [*sic*] trying to separate the defendant from when the police arrived.

(2 RT 621.)

Earlier in the second trial, the prosecutor had questioned Margarita on this apparent inconsistency. Margarita explained that she was referring to her other son, Edwin, who was outside, and that the investigator must have gotten confused. (2 RT 412-13.) The redacted portion of the report makes it clear that the investigator indeed made an error when he wrote that Mr. Ochoa was outside when the police arrived. In the fourth paragraph, the report states, "One of the officers looked toward our client who was inside, looking out from a window, and recognized him as someone who had a lawsuit against the police." (Ex. 12, Redacted Investigation Reports, at 2.) However, the jury never saw this portion of the report. There is no reasonable strategic decision that could explain Mr. Ayala's stipulation to introduce the redacted report, with its misleading, factually incorrect statement—especially without requiring that the entire report, which demonstrates the inaccuracy, be admitted.

Second, at Mr. Ochoa's second trial Mr. Ayala agreed to a jury instruction that stated, "A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/or the right to control it), either personally or through another person." (CT 161; 2 RT 605.) Mr. Ayala objected to this instruction at Mr. Ochoa's first trial, arguing that the jury could be confused if they believed Mr. Ochoa did not touch the gun, but was in the area when Jeannette possessed it. The objection was sustained because the court agreed that the instruction could be confusing and prejudicial to Mr. Ochoa. (1 RT 161-66.) Thus, the first jury was not given this instruction. (CT 114-15.) There is no reasonable strategic decision that can explain Mr. Ayala's failure to object at the second trial to an instruction that the court

previously found confusing and prejudicial, when he successfully excluded it from the first.

2. Legal Analysis

A successful ineffective assistance of counsel claim has two components: trial counsel's performance was deficient, and the deficiency prejudiced the defense. *Porter v. McCollum*, 558 U.S. 30, 38 (2009) (per curiam). To establish deficient performance, the petitioner "must demonstrate his 'counsel's representation fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "To establish prejudice, he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. (quoting *Strickland*, 466 U.S. at 694). To show that he is entitled to an evidentiary hearing on this claim, Mr. Ochoa "is not required to conclusively establish . . . that counsel was prejudicially deficient. Rather, [he] must demonstrate by his evidence the potential of a colorable claim . . . ." *Earp v. Ornoski*, 431 F.3d 1158, 1170 (9th Cir. 2005).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91; *see Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005); *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) ("Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments."); *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995) (holding that counsel is deficient if he "neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so"); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client."); *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991) ("Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support

those theories. Counsel has a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence.'" (citations omitted)). When an attorney fails to investigate, he cannot make reasonable strategic decisions about the case, because he lacks the necessary information with which to do so. *See Wiggins*, 539 U.S. at 527-28.

The Ninth Circuit has "repeatedly found that a lawyer who fails adequately to investigate and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confident in the verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (internal citations and quotation marks omitted); *see Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999) (finding deficiency where "trial counsel had at their fingertips information that could have undermined the prosecution's case, yet chose not to develop this evidence and use it at trial").

In addition, trial counsel has a duty to object to improper, misleading evidence. *See Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (finding counsel deficient for failing to object to improper evidence). When counsel fails to make motions or objections that, if made, would have prevailed, *Strickland*'s standard of deficient performance is satisfied. *See Tomlin v. Myers*, 30 F.3d 1235, 1238-39 (9th Cir. 1994).

Here, Mr. Ayala's performance, as outlined above, was deficient for all of these reasons. These deficiencies were not mere technicalities, but went to the heart of the jury's decision on whether to find Mr. Ochoa guilty. Individually and cumulatively, they prejudiced Mr. Ochoa because, had Mr. Ayala performed to the level required by the Sixth Amendment, there is a reasonable probability that the result of the proceedings would have been different. Moreover, as to Mr. Ayala's failures to present at the second trial even the minimal evidence he presented at the first trial, the prejudice is demonstrated by the first jury's seven-to-five vote for acquittal and the original trial judge's finding that the evidence presented at the first trial did not prove Mr. Ochoa guilty by even a preponderance standard.

C. Claim Three: Mr. Ochoa Was Twice Placed in Jeopardy for the Same Offense, in Violation of His Fifth and Fourteenth Amendment Rights

The Fifth Amendment, incorporated through the Fourteenth Amendment, prohibits twice placing a defendant in jeopardy for the same offense. U.S. Const. amends. V, XIV. Following Mr. Ochoa's initial trial, the superior court found that the evidence was insufficient to find Mr. Ochoa guilty of being a felon in possession of a firearm, even under a preponderance standard. Mr. Ochoa was nonetheless tried again and convicted. This Court should grant habeas relief based on this violation of Mr. Ochoa's double jeopardy rights.

1. Supporting Facts

Mr. Ochoa simultaneously was tried for being a felon in possession of a firearm, in violation of California Penal Code section 12021(a)(1), and for violating his probation from an earlier case by possessing the firearm. At the start of Mr. Ochoa's trial, the parties stipulated "that the facts that are deduced at the time of the trial can be used with respect to the probation violation hearing as well." (1 RT 5-6.) Subsequently, each time Mr. Ochoa's case was called, it was called under the numbers for both the felon in possession trial and the probation violation hearing. (1 RT 10, 68, 97, 99, 242.) After the jury deadlocked seven-to-five for acquittal on the felon in possession charge, the judge declared a mistrial and the district attorney asked the court to rule on the probation violation. (1 RT 246, 252.)

The judge stated that "at this point basically I've been hearing this case as the probation violation matter." (1 RT 255.) The court explained that "there's an agreement by counsel that the evidence presented at the trial would apply with respect to the probation violation matter," and asked the prosecutor if he wanted to present any additional evidence. (1 RT 255-56.) The prosecutor declined the invitation, and the court stated, "[S]o with respect to the probation violation matter, all of the evidence that was presented during the trial will be considered by the court." (1 RT 256.) The prosecutor elected not to present any additional argument to the court, and

defense counsel briefly addressed the lower standard of proof, a preponderance of the evidence. (1 RT 256-57.)

The court recessed to review its notes of the witnesses presented at trial. (1 RT 258.) The court then stated, "I recognize that for [*sic*] probation violation hearing, the standard is a preponderance of the evidence. The court need only find that of Mr. Ochoa on his violation that it is more likely than not *that he committed the crime*." (*Id.* (emphasis added).) On that question, the court found that the prosecution had not met its burden of proof. (*Id.*) According to the court, "The testimony of the four [defense witnesses] was relatively consistent with each other that Mr. Ochoa was carrying a two-year-old baby. Certainly that's inconsistent with his using both hands to take the gun out of the back of his shorts." (1 RT 259.) The court continued, "Frankly, in light of both there were no fingerprint and no DNA on the gun, if you put that all together, I cannot say that it is more likely than not that Mr. Ochoa on the facts that I have before the court at this time *committed the crime*." (1 RT 260 (emphasis added).)

The court then set the case for a new trial. Mr. Ochoa's trial counsel did not object to a second trial on double jeopardy grounds. (1 RT 260-65.) Mr. Ochoa subsequently was retried on the felon in possession charge and convicted.

2. Legal Analysis

The Fifth Amendment provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As the Supreme Court has explained,

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. The underlying idea, one that is deeply

ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980) (alteration and internal quotation marks omitted). "[C]entral to the objective of the prohibition against successive trials is the barrier to affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 128 (internal quotation marks omitted). "[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *Id.*

Although the double jeopardy bar does not prohibit retrial following a mistrial, *id.* at 130, where there has been an acquittal, "the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried," *id.* at 129 (internal quotation marks omitted). Retrial after acquittal runs the "risk that the Government, with its superior resources, would wear down a defendant, thereby enhancing the possibility that even though innocent he may be found guilty." *Id.* at 130 (internal quotation marks omitted).

An acquittal is defined as "a jury verdict of not guilty or . . . a ruling by the court that the evidence is insufficient to convict." *United States v. Scott*, 437 U.S. 82, 91 (1978). It is a "determination of factual guilt or innocence," *id.* at 94, and when made by a judge, is "the court's conclusion that the Government ha[s] not produced sufficient evidence to establish the guilt of the defendant," *id.* at 95. Thus, "a defendant is acquitted . . . when the ruling of the judge, whatever its label, actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 97 (alteration and internal quotation marks omitted).

This longstanding definition of "acquittal" was reaffirmed by the Supreme Court just this year, when the Court wrote, "[O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal

liability for an offense." *Evans v. Michigan*, __ U.S. __, 133 S. Ct. 1069, 1074-75 (2013). Citing *Scott*, the Court explained that "an 'acquittal' includes a ruling by the court that the evidence is insufficient to convict, a factual finding that necessarily establishes the criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence." *Id.* at 1075 (alterations and internal quotation marks omitted). The trial court need not use the label "acquittal" for the double jeopardy clause to be triggered. Instead, the Supreme Court has "emphasized that labels do not control our analysis in this context; rather, the substance of a court's decision does." *Id.* at 1076; *see id.* at 1078 ("Our decision turns not on the form of the trial court's action, but rather whether it serves substantive purposes or procedural ones." (alteration and internal quotation marks omitted)). If the trial court "acted on its view that the prosecution has failed to prove its case," that is an acquittal, regardless of how the trial court characterized its decision. *Id.*

In the context of a state retrial of a defendant following acquittal, the related concept of "collateral estoppel" comes into play under the due process clause of the Fourteenth Amendment. *See Ashe v. Swenson*, 397 U.S. 436, 442-43 (1970). Collateral estoppel is "an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future lawsuit." *Id.* at 443. "[C]ollateral estoppel has been an established rule of federal criminal law at least since" 1916. *Id.* It "is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445.

In Mr. Ochoa's case, the trial judge made a factual determination that the evidence presented by the prosecution at the first trial was insufficient to establish that Mr. Ochoa had committed the crime of being a felon in possession of a firearm, even under a preponderance standard. The State was thus collaterally estopped from retrying Mr. Ochoa.

The California Court of Appeal, in addressing this question, agreed that all of the threshold requirements of collateral estoppel were met. *See People v. Ochoa*, 191

Cal. App. 4th 664, 672 (2011) (Lodged Doc. G). Nonetheless, it held that there is a public policy exception to the rule that a defendant cannot twice be tried for the same offense. *See id.* at 669. According to the state court, "confidence in the judicial system may be undermined when two tribunals render different verdicts, but . . . the differences in the determinations at a revocation hearing and a trial would not have this effect, as the two proceedings serve different purposes and interests." *Id.* at 669-70. In addition, the court explained, because a judge does not determine guilt or innocence at a revocation hearing, only whether a violation of probation has occurred, "the limited nature of this inquiry may inhibit the prosecution from presenting a full evidentiary showing at a revocation hearing, [and] the prosecution's failure to satisfy the lower burden of proof at the hearing does not necessarily amount to an acquittal." *Id.* at 670 (internal quotation marks omitted).

The Fifth Amendment, however, contains no exception to its protection against double jeopardy, including for when retrial might be in the public interest. To the contrary, the Supreme Court has held that "[w]here the [Double Jeopardy] Clause does apply, its sweep is absolute." *DiFrancesco*, 449 U.S. at 131 (internal quotation marks omitted). The state court unreasonably applied this law by creating an exception to Mr. Ochoa's double jeopardy protection.

The court's ruling was especially unreasonable because, even if some exception could be made for factual rulings made in the course of probation violation hearings, Mr. Ochoa's violation hearing was the functional equivalent of a trial. The state court conceded as much. *See Ochoa*, 191 Cal. App. 4th at 656 (explaining that Mr. Ochoa's "revocation hearing was procedurally akin to a trial"). The prosecution had the opportunity to present all of its evidence to the judge, and the judge did not simply decide that Mr. Ochoa should not have his probation revoked—she found that Mr. Ochoa *did not commit the crime of being a felon in possession of a firearm*. Thus, the state court's public policy rationale for an exception to the general rule does not actually apply in this case. *See Ashe*, 397 U.S. at 444 ("The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied

with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.").

Finally, Mr. Ayala rendered ineffective assistance of counsel by not objecting on double jeopardy grounds. There is no reasonable strategic decision that could explain Mr. Ayala's failure to do so. *See Tomlin*, 30 F.3d at 1238-39 (holding that counsel performs deficiently when he fails to make motions or objections that, if made, would have prevailed). Had Mr. Ayala objected, the court would have been required to sustain his objection, and Mr. Ochoa could not have been retried and convicted.

IV. CONCLUSION

For the foregoing reasons, the Court should stay the federal habeas proceedings until Petitioner has exhausted his state habeas remedies. If the State unreasonably denies relief, this Court should grant federal habeas relief on each claim, individually or cumulatively.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: May 24, 2013

By */S/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

PRAYER FOR RELIEF

WHEREFORE, Jordy Ochoa, prays that this Court:

1. Grant him the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts alleged in this Petition;

2. Grant him and his counsel the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories, as well as the means to preserve the testimony of witnesses;

3. Require Respondents to bring forth the entire state court records in the following cases so that this Court can review those parts of the record that are relevant to the issues and defenses raised in this proceeding: *People v. Ochoa*, Los Angeles County Superior Court Case Nos. BA349945 and BA326153.

4. Permit him to amend this Petition to allege any other basis for his unconstitutional confinement as it is discovered;

5. Conduct an evidentiary hearing at which proof may be offered concerning all of the allegations in this Petition;

6. Issue a writ of habeas corpus to have Jordy Ochoa brought before this Court to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentences, including the sentence imposed in Los Angeles County Superior Court Case No. BA349945; and

9. Grant such other relief as this Court may deem appropriate.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: May 24, 2013

By */S/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

VERIFICATION

I am an attorney admitted to practice before the Courts of the State of California and have my office in Los Angeles County. I am an attorney for Petitioner herein and am authorized to file this Petition. Petitioner is unable to make the verification because he is absent from Los Angeles County due to confinement in USP Victorville in Adelanto, California, and for that reason I make this verification on Petitioner's behalf. I have read the foregoing Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities in support thereof and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I certify under penalty of perjury that the foregoing is true and correct. Executed May 24, 2013, at Los Angeles, California.

By */S/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

Attorney for Petitioner
JORDY OCHOA

DECLARATION REGARDING AUTHENTICITY OF EXHIBITS

I, Alexandra W. Yates, declare as follows, under penalty of perjury:

1. I am an attorney admitted to practice law in the State of California and am a Deputy Federal Public Defender appointed to represent Petitioner Jordy Ochoa, who is confined and restrained of his liberty at USP Victorville in Adelanto, California.

2. The originals of all Exhibits filed by Mr. Ochoa are in the custody and control of counsel for Mr. Ochoa, whose office is located at 321 East 2nd Street, Los Angeles, California. Viewing of the originals is available upon request.

I declare under penalty of perjury that the foregoing is true and correct. Executed May 24, 2013, at Los Angeles, California.

By */S/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

Attorney for Petitioner
JORDY OCHOA

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. JORDY OCHOA, DEFENDANT-APPELLANT,	CASE NO. BA349945 AUGMENTATION

MAR 05 2010

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE GAIL RUDERMAN FEUER, JUDGE PRESIDING PURSUANT

TO NOTICE DATED FEBRUARY 5, 2010

REPORTERS' TRANSCRIPT ON APPEAL

JUNE 19, 22, 23, 24, 25, AND 26, 2009

APPEARANCES:

FOR THE RESPONDENT: EDMUND G. BROWN, JR.
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 1701
LOS ANGELES, CALIFORNIA 90013

FOR THE APPELLANT: IN PROPRIA PERSONA

VOLUME 2 OF 2
PAGES 1 THROUGH 265

ROSALIND M. DUDLEY, CSR 6505
OFFICIAL REPORTER

COPY

CASE NUMBER: BA349945 AND BA326153
CASE NAME: PEOPLE VS. JORDY OCHOA
LOS ANGELES, CALIFORNIA JUNE 19, 2009
DEPARTMENT NO. 71 HON. GAIL RUDERMAN FEUER
REPORTER: ROSALIND M. DUDLEY, CSR #6505
TIME: 2:18 P.M.

APPEARANCES:

DEFENDANT JORDY OCHOA, PRESENT WITH COUNSEL, RALPH AYALA, DEPUTY PUBLIC DEFENDER; SEAN GIPSON DEPUTY DISTRICT ATTORNEY, FOR THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: CALLING THE MATTER OF JORDY OCHOA, BA349945, ALSO BA326153. WE HAVE EVERYONE HERE. MR. OCHOA IS PRESENT. GOOD AFTERNOON. WE HAVE COUNSEL'S APPEARANCES.

MR. AYALA: RALPH AYALA, PRESENT WITH MR. OCHOA.

MR. GIPSON: SEAN GIPSON FOR THE PEOPLE.

THE COURT: THANK YOU FOR YOUR PATIENCE AS WE HAD EVERYTHING SET. APPARENTLY OUR JURORS ARE OUTSIDE. SO WE'RE GOING TO GET STARTED IN JUST A SECOND. LET ME DO A FEW THINGS FOR THE RECORD.

FIRST OF ALL, I DO HAVE -- AND I SPOKE WITH COUNSEL EARLIER OFF THE RECORD, AND I DO HAVE A WITNESS LIST THAT WAS PROVIDED BY MR. AYALA AND ALSO HAPPENS TO INCLUDES THE OFFICERS ON THE WITNESS LIST FROM THE PEOPLE. SO I WILL BE READING THOSE NAMES TO THE JURY AS

PART OF MY INTRODUCTORY COMMENTS.

MR. GIPSON: YOUR HONOR, I DID GET FIRST NAMES FOR DETECTIVE RODRIGUEZ.

THE COURT: THANK YOU.

MR. GIPSON: HIS FIRST NAME IS ALEX AND OFFICER MORALES, AND HIS FIRST NAME IS GERALDO.

THE COURT: I DON'T HAVE MORALES ON THIS LIST.

MR. GIPSON: I THINK IT WAS A HANDWRITTEN NAME.

THE COURT: ACTUALLY DON'T HAVE HIM. I HAVE THE POLICE OFFICERS AS ORTEGA, OCHOA, BOLANCO, DUNSTER, AND CASTILLO. I HAVE HANDWRITTEN NAMES RODRIGUEZ, NOW ALEX RODRIGUEZ, YOUNGBLOOD, ROBERT RODRIGUEZ, WHOSE NAME I AM NOT READING AND S.I.D. CRIMINALIST, AND I'M NOW ADDING MORALES AND HIS FIRST NAME IS?

MR. GIPSON: GERALDO, G-E-R-A-L-D-O.

THE COURT: DID I MISS ANYONE ELSE?

MR. GIPSON: FOR THE CRIMINALIST, I JUST GOT HER NAME.

THE COURT: OKAY.

MR. GIPSON: IT IS STACEY, S-T-A-C-E-Y, VANDERSCHAAF, V-A-N-D-E-R-S-C-H-A-A-F.

THE COURT: OKAY. VERY WELL. AND WITH THAT, I BELIEVE I HAVE ALL THE NAMES TO READ TO THE JURY. A COUPLE OF HOUSEKEEPING MATTERS -- MORE THAN HOUSEKEEPING. FIRST OF ALL, I HAVE A PROBATION VIOLATION MATTER HERE. I BELIEVE THERE'S STIPULATION BY COUNSEL THAT THE FACTS THAT ARE DEDUCED AT THE TIME OF THE TRIAL CAN BE USED WITH RESPECT TO THE PROBATION VIOLATION HEARING AS WELL.

SO STIPULATED?

MR. AYALA: YES.

MR. GIPSON: YES.

THE COURT: AND THEN I TALKED WITH COUNSEL OFF THE RECORD, BUT I WILL PUT ON THE RECORD THERE ARE GOING TO BE A NUMBER OF 402 MOTIONS. I DO WANT TO NOTE ONE OF THOSE NOW BECAUSE WHAT I SUGGEST IS IF, COUNSEL, SINCE WE HAVE THE JURY, WE SHOULD START WITH JURY SELECTION, AND THEN SCHEDULE THE 402 MOTIONS FOR MONDAY MORNING.

COUNSEL GAVE ME A HEADS UP OF WHAT THEY WERE, BUT ARGUMENT WILL BE ON THE RECORD WHEN WE START MONDAY MORNING. I DO, HOWEVER, HAVE ONE EXCEPTION WHICH I WILL RAISE IN A MOMENT. I TAKE IT THAT'S ACCEPTABLE WITH COUNSEL TO DO THE 402'S MONDAY MORNING, OBVIOUSLY, BEFORE WE START WITH OPENING STATEMENTS.

MR. AYALA: YES.

MR. GIPSON: YES.

THE COURT: HERE'S THE ONE EXCEPTION. I DID DO SOME RESEARCH AT THE LUNCHTIME ON THE ISSUE DEFENSE COUNSEL HAS SAID THAT YOU WOULD HAVE A 402 MOTION TO BIFURCATE THE ISSUE OF WHETHER OR NOT THE JURY NEEDED TO HEAR THAT THE DEFENDANT WAS A -- HAD A FELONY CONVICTION, AND I DID DO SOME RESEARCH, AND THERE IS A CASE ON POINT ON THAT ISSUE.

THE REASON I WANT TO RAISE IT NOW -- AND I'LL BE HAPPY FOR COUNSEL TO ADDRESS IT ON MONDAY -- IS THAT IN THE CASES THAT PRECEDED THIS CASE AND PRECEDED PROPOSITION 8, THERE WAS SOME CASE LAW THAT SUPPORTED THE

PART OF MY INTRODUCTORY COMMENTS.

MR. GIPSON: YOUR HONOR, I DID GET FIRST NAMES FOR DETECTIVE RODRIGUEZ.

THE COURT: THANK YOU.

MR. GIPSON: HIS FIRST NAME IS ALEX AND OFFICER MORALES, AND HIS FIRST NAME IS GERALDO.

THE COURT: I DON'T HAVE MORALES ON THIS LIST.

MR. GIPSON: I THINK IT WAS A HANDWRITTEN NAME.

THE COURT: ACTUALLY DON'T HAVE HIM. I HAVE THE POLICE OFFICERS AS ORTEGA, OCHOA, BOLANCO, DUNSTER, AND CASTILLO. I HAVE HANDWRITTEN NAMES RODRIGUEZ, NOW ALEX RODRIGUEZ, YOUNGBLOOD, ROBERT RODRIGUEZ, WHOSE NAME I AM NOT READING AND S.I.D. CRIMINALIST, AND I'M NOW ADDING MORALES AND HIS FIRST NAME IS?

MR. GIPSON: GERALDO, G-E-R-A-L-D-O.

THE COURT: DID I MISS ANYONE ELSE?

MR. GIPSON: FOR THE CRIMINALIST, I JUST GOT HER NAME.

THE COURT: OKAY.

MR. GIPSON: IT IS STACEY, S-T-A-C-E-Y, VANDERSCHAAF, V-A-N-D-E-R-S-C-H-A-A-F.

THE COURT: OKAY. VERY WELL. AND WITH THAT, I BELIEVE I HAVE ALL THE NAMES TO READ TO THE JURY. A COUPLE OF HOUSEKEEPING MATTERS -- MORE THAN HOUSEKEEPING. FIRST OF ALL, I HAVE A PROBATION VIOLATION MATTER HERE. I BELIEVE THERE'S STIPULATION BY COUNSEL THAT THE FACTS THAT ARE DEDUCED AT THE TIME OF THE TRIAL CAN BE USED WITH RESPECT TO THE PROBATION VIOLATION HEARING AS WELL.

SO STIPULATED?

MR. AYALA: YES.

MR. GIPSON: YES.

THE COURT: AND THEN I TALKED WITH COUNSEL OFF THE RECORD, BUT I WILL PUT ON THE RECORD THERE ARE GOING TO BE A NUMBER OF 402 MOTIONS. I DO WANT TO NOTE ONE OF THOSE NOW BECAUSE WHAT I SUGGEST IS IF, COUNSEL, SINCE WE HAVE THE JURY, WE SHOULD START WITH JURY SELECTION, AND THEN SCHEDULE THE 402 MOTIONS FOR MONDAY MORNING.

COUNSEL GAVE ME A HEADS UP OF WHAT THEY WERE, BUT ARGUMENT WILL BE ON THE RECORD WHEN WE START MONDAY MORNING. I DO, HOWEVER, HAVE ONE EXCEPTION WHICH I WILL RAISE IN A MOMENT. I TAKE IT THAT'S ACCEPTABLE WITH COUNSEL TO DO THE 402'S MONDAY MORNING, OBVIOUSLY, BEFORE WE START WITH OPENING STATEMENTS.

MR. AYALA: YES.

MR. GIPSON: YES.

THE COURT: HERE'S THE ONE EXCEPTION. I DID DO SOME RESEARCH AT THE LUNCHTIME ON THE ISSUE DEFENSE COUNSEL HAS SAID THAT YOU WOULD HAVE A 402 MOTION TO BIFURCATE THE ISSUE OF WHETHER OR NOT THE JURY NEEDED TO HEAR THAT THE DEFENDANT WAS A -- HAD A FELONY CONVICTION, AND I DID DO SOME RESEARCH, AND THERE IS A CASE ON POINT ON THAT ISSUE.

THE REASON I WANT TO RAISE IT NOW -- AND I'LL BE HAPPY FOR COUNSEL TO ADDRESS IT ON MONDAY -- IS THAT IN THE CASES THAT PRECEDED THIS CASE AND PRECEDED PROPOSITION 8, THERE WAS SOME CASE LAW THAT SUPPORTED THE

CASE NUMBER:	BA349945 AND BA326153
CASE NAME:	PEOPLE VS. JORDY OCHOA
LOS ANGELES, CALIFORNIA	JUNE 22, 2009
DEPARTMENT NO. 71	HON. GAIL RUDERMAN FEUER
REPORTER:	ROSALIND M. DUDLEY, CSR #6505
TIME:	10:49 A.M.
APPEARANCES:	(HERETOFORE MENTIONED)

THE COURT: CALENDER NO. 2, BA349945, ALSO PROBATION VIOLATION MATTER VA326153. BOTH COUNSEL ARE PRESENT. WE ARE APPARENTLY ARE WAITING FOR FOUR JURORS -- TWO. AND I'LL NOTE ONE OF THE TWO CALLED IN EARLIER THIS MORNING TO SAY THAT THE JUROR WAS RUNNING LATE BY AN HOUR. THAT IS JUROR NO. 10. LET ME NOTE WITH RESPECT TO JUROR NO. 10, WHAT I WOULD PROPOSE -- WE'RE STILL WAITING FOR TWO. LET'S FIND OUT WHEN THE OTHER ONE COMES.

IF WE'RE STILL HALF AN HOUR AWAY, I WOULD PROPOSE TO EXCUSE JUROR NO. 10. I WOULD REQUIRE TEN TO SERVE ANOTHER JURY SERVICE SO THEY'RE NOT GOING TO GET OUT OF IT, BUT FOR THE PURPOSES OF WHAT WE'RE DOING, A HALF HOUR SEEMS TOO LONG. I THINK BY 11:00 O'CLOCK WE NEED TO GET STARTED. IS THAT ACCEPTABLE TO COUNSEL?

MR. AYALA: SURE.

MR. GIPSON: ACCEPTABLE TO THE PEOPLE.

THE COURT: WHAT I'D LIKE TO DO, THEN, IS USE OUR TIME TO DEAL WITH, AS FAR AS ANY 402'S ARE CONCERNED. IT

REGARDING A STIPULATION FIRST TO THE DEFENDANT'S PRIOR CONVICTION THAT THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF A FELONY ON OCTOBER 4, 2007, IN CASE BA326153.

MR. AYALA: YES. SO STIPULATED.

MR. GIPSON: IN ADDITION, THE PEOPLE HAVE A ONE-PAGE REPORT. IT'S MARKED AS LOS ANGELES POLICE DEPARTMENT ANALYZED EVIDENCE REPORT WITH A D.R. NUMBER OF 080633223. THIS REPORT INDICATES THAT D. YOUNGBLOOD IS A FORENSIC PRINT SPECIALIST EMPLOYED BY THE LOS ANGELES POLICE DEPARTMENT.

AND THAT ON FEBRUARY 13, 2009, HE EXAMINED THE ITEMS BOOKED UNDER THE D.R. NUMBER PREVIOUSLY MENTIONED, AND THAT ITEMS 1 AND ITEMS 2 WERE ANALYZED, AND HE FORMED THE OPINION THAT NO LATENT PRINTS OF VALUE WERE OF DEVELOPED ON THE ABOVE PROCESSED ITEMS.

MR. AYALA: SO STIPULATED.

THE COURT: I TAKE IT THAT EVIDENCE REPORT -- IS THAT GOING TO BE MARKED AND ADMITTED AS AN EXHIBIT?

MR. GIPSON: YES.

THE COURT: SO THAT WILL BE PEOPLE'S EXHIBIT 1.

MR. GIPSON: YES.

THE COURT: AND, FINALLY, COUNSEL, DO YOU STIPULATE THAT THE REPORT WITH A HEADING OF BODE TECHNOLOGY WHICH SPECIFIES THAT NATALIE MORGAN IS A SENIOR DNA ANALYST ONE WITH BODE TECHNOLOGY PERFORMED THE DNA ANALYSIS ON APRIL 16, 2009, AND ANALYZED THE SAMPLE COLLECTED FROM JORDY OCHOA AND ALSO THE SAMPLE COLLECTED

LAST NAME, ORTEGA, O-R-T-E-G-A.

THE COURT CLERK: THANK YOU.

THE COURT: YOU MAY PROCEED.

LAZARO ORTEGA,

CALLED BY THE PEOPLE AS A WITNESS, WAS SWORN, AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. GIPSON:

Q GOOD AFTERNOON, OFFICER.

A GOOD AFTERNOON, COUNSEL.

Q WHAT IS YOUR OCCUPATION AND ASSIGNMENT?

A I'M A POLICE OFFICER FOR THE CITY OF LOS ANGELES CURRENTLY ASSIGNED TO THE HOLLYWOOD GANG ENFORCEMENT DETAIL.

Q ON DECEMBER 4, 2008, AT APPROXIMATELY 5:30 P.M., WERE YOU IN THE AREA OF 453 NORTH KINGSLEY AVENUE IN THE CITY AND COUNTY OF LOS ANGELES?

A I WAS.

Q AND WHAT WERE YOU DOING IN THAT AREA?

A WE WERE ASSIGNED TO THE GANG UNIT. WE WERE CONDUCTING GANG ENFORCEMENT IN THE AREA.

Q AND WERE YOU ALONE AT THAT TIME?

A NO, I WAS NOT.

Q WHOM WERE YOU WITH?

A I WAS WORKING WITH MY PARTNER JEFF CASTILLO.

Q AND EXACTLY WHAT WERE YOU DOING AS PART OF

YOUR ENFORCEMENT DETAIL?

A PART OF WORKING THE GANG ENFORCEMENT DETAIL, YOU'RE TASKED WITH IDENTIFYING GANG MEMBERS, COMING INTO CONTACT WITH GANG MEMBERS, PEOPLE IN THE COMMUNITY, SEE WHAT KIND OF ACTIVITIES THE GANGS ARE INVOLVED IN WITHIN THE AREA. IT'S ALSO TO GET INFORMATION TO SEE WHAT KIND OF GANG FEUDS AND RIVALRIES ARE GOING ON.

Q AT THAT TIME, DID YOU OBSERVE SOMEONE THERE WHO'S PRESENT IN THIS COURTROOM TODAY?

A I DID.

Q CAN YOU TELL ME WHERE THAT PERSON IS SEATED AND DESCRIBE WHAT HE'S WEARING.

A SURE. MR. JORDY OCHOA. HE'S SITTING TO THE LEFT OF DEFENSE COUNSEL WEARING THE LIME COLORED SHIRT.

THE COURT: AND THE RECORD WILL REFLECT HE'S POINTED TO THE DEFENDANT MR. OCHOA AND DESCRIBED HIM.

Q BY MR. GIPSON: WHEN YOU SAW THE DEFENDANT, WHAT WAS HE DOING?

A HE WAS STANDING DIRECTLY, I WOULD SAY, JUST ADJACENT TO 453 NORTH KINGSLEY.

Q HOW FAR AWAY WERE YOU FROM HIM AT THAT TIME?

A WHEN WE FIRST OBSERVED MR. OCHOA, I WOULD SAY ABOUT 20, 25 FEET.

Q WAS HE ALONE AT THAT TIME?

A NO, HE WAS NOT.

Q HOW MANY OTHER PEOPLE WERE WITH HIM?

A TWO OTHER PEOPLE.

Q CAN YOU DESCRIBE WHAT THOSE TWO OTHER PEOPLE WERE DOING?

A SURE. IT WAS A FEMALE THAT WAS DIRECTLY JUST WEST OF WHERE MR. OCHOA WAS STANDING. HE WAS ON THE WEST SIDEWALK OF KINGSLEY. SHE WAS SEATED ON SOME CEMENT STEPS DIRECTLY IN FRONT OF HIM. THEY WERE FACING EACH OTHER, AND JUST SOUTH OF HIS LOCATION ON THE SIDEWALK WAS ANOTHER MALE HISPANIC WITH HIS BACK TOWARDS MY PARTNER AND MYSELF.

Q AND WERE YOU AND YOUR PARTNER WALKING AT THAT TIME?

A NO. AT THAT POINT, WE WERE DRIVING UP TOWARDS THAT LOCATION.

Q AND WHAT WERE YOU DRIVING IN?

A WE WERE DRIVING IN OUR MARKED BLACK AND WHITE POLICE VEHICLE. IT'S A POLICE HYBRID VEHICLE. IT'S WHAT THE GANG ENFORCEMENT UNIT USES. IT DOESN'T HAVE THE OVERHEAD LIGHT BAR, BUT IT DOES HAVE A RED FIXED LIGHT WITHIN THE FRONT, AND IT IS MARKED BLACK AND WHITE WITH THE CITY OF LOS ANGELES POLICE LOGOS ON THE SIDES.

Q YOU SAID THAT THE DEFENDANT WAS STANDING ON THE SIDEWALK?

A THAT IS CORRECT.

Q AND THAT THERE WAS A FEMALE SITTING ON THE STEPS?

A CORRECT.

Q HOW FAR AWAY WERE THEY FROM EACH OTHER?

A I WOULD SAY NO MORE THAN THREE FEET.

Q AND THE THIRD INDIVIDUAL -- WHERE WAS HE IN RELATION TO THE DEFENDANT?

A SAME THING. NO MORE THAN THREE FEET, IN GENERAL PROXIMITY. HE WAS JUST STANDING SOUTH OF WHERE THEY WERE AT.

Q ONCE YOU SAW THE DEFENDANT AND THE OTHER INDIVIDUAL, WHAT DID YOU DO?

A AT THAT POINT WE, SHINED OUR SPOTLIGHT -- OUR VEHICLE SPOTLIGHT ON MR. OCHOA AND THE INDIVIDUALS THAT WERE WITH HIM AT WHICH TIME THEY LOOKED IN OUR DIRECTION.

Q NOW, WHO SHINED THE SPOTLIGHT -- WAS IT YOU OR YOUR PARTNER?

A I BELIEVE IT WAS MY PARTNER TO THE BEST OF MY RECOLLECTION.

Q AND YOU SAID THAT ONCE YOU SHINED THE SPOTLIGHT ON THE DEFENDANT AND PEOPLE WITH HIM, WHAT DID THE DEFENDANT DO?

A LOOKED IN OUR DIRECTION.

Q AND ONCE THE DEFENDANT LOOKED IN YOUR DIRECTION, WHAT DID HE DO?

A AT THAT TIME, WE WERE SIMULTANEOUSLY TRYING TO GET THE CAR IN PARK AND SEE IF WE COULD APPROACH ON FOOT. I IMMEDIATELY RECOGNIZED MR. OCHOA FROM PRIOR CONTACTS THAT WE HAVE HAD WITH HIM AND SO HE IMMEDIATELY LOOKED IN OUR DIRECTION. HE LEANED FORWARD TOWARDS WHERE

THE FEMALE WAS SITTING AND REACHED IN HIS WAISTBAND WITH BOTH HANDS.

Q AND WHAT HAPPENED AFTER HE REACHED INTO HIS WAISTBAND? WHAT DID YOU SEE?

A AT THAT TIME, WE ANNOUNCED OURSELVES AS POLICE OFFICERS. WE SAID HEY LET ME SEE YOUR HANDS. POLICE. AT WHICH TIME SIMULTANEOUSLY I SAW HIM PULL OUT A BLACK OBJECT. IT WAS A BLACK GUN. I DIDN'T KNOW THIS AT THE TIME, AND I SEEN HIM TOSS IT INTO THE DIRECTION WHERE THE FEMALE WAS AT, AND IT LANDED INTO HER PURSE.

Q AFTER YOU SAW THE DEFENDANT THROW THAT OBJECT INSIDE THE PURSE, WHAT DID HE DO NEXT?

A HE GLANCED OVER ONE MORE QUICK TIME TOWARDS WHERE WE WERE AT. WE WERE NOW WALKING TOWARDS -- ADVANCING HIS LOCATION, AND HE IMMEDIATELY RAN WESTBOUND TOWARDS THE HALLWAY THAT LEADS INTO THE APARTMENT COMPLEX AT 453 KINGSLEY. I RAN TOWARDS HIM, BUT I DID NOT GIVE UP GROUND JUST TACTICALLY NOT TO SEPARATE FROM MY PARTNER. I HELD DOWN THE HALLWAY AND JUST IMMEDIATELY SAW HIM TURN LEFT WHICH WOULD BE UPSTAIRS INTO AN APARTMENT. I DON'T KNOW WHICH ONE AT THAT TIME.

Q NOW, I WANT TO GET SOME DETAILS. WHEN YOU STOPPED THE POLICE CAR, HOW FAR AWAY WERE YOU FROM THE DEFENDANT AT THAT TIME?

A I WOULD SAY WITHIN 10 OR 15 FEET JUST BECAUSE WE HAD GAINED SOME GROUND ON HIM.

Q TELL ME -- WHEN YOU WERE AT THAT LOCATION, WHAT POSITION WAS THE DEFENDANT TO YOU? WHAT ANGLE WERE

THE FEMALE WAS SITTING AND REACHED IN HIS WAISTBAND WITH BOTH HANDS.

Q AND WHAT HAPPENED AFTER HE REACHED INTO HIS WAISTBAND? WHAT DID YOU SEE?

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A HE GLANCED OVER ONE MORE QUICK TIME TOWARDS WHERE WE WERE AT. WE WERE NOW WALKING TOWARDS -- ADVANCING HIS LOCATION, AND HE IMMEDIATELY RAN WESTBOUND TOWARDS THE HALLWAY THAT LEADS INTO THE APARTMENT COMPLEX AT 453 KINGSLEY. I RAN TOWARDS HIM, BUT I DID NOT GIVE UP GROUND JUST TACTICALLY NOT TO SEPARATE FROM MY PARTNER. I HELD DOWN THE HALLWAY AND JUST IMMEDIATELY SAW HIM TURN LEFT WHICH WOULD BE UPSTAIRS INTO AN APARTMENT. I DON'T KNOW WHICH ONE AT THAT TIME.

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A I WOULD SAY WITHIN 10 OR 15 FEET JUST BECAUSE WE HAD GAINED SOME GROUND ON HIM.

Q TELL ME -- WHEN YOU WERE AT THAT LOCATION, WHAT POSITION WAS THE DEFENDANT TO YOU? WHAT ANGLE WERE

MOMENT. I'M NOT YET MAKING A RULING WHETHER IT'S HEARSAY. THE QUESTION IS WHAT THE OFFICER DID. I'M GOING TO SUSTAIN WHAT THE FEMALE DID AS NONRESPONSIVE AND LET COUNSEL FOLLOW-UP. THAT PORTION IS STRICKEN, AND THE REMAINDER STAYS AS TO WHAT THE OFFICER DID.

THE WITNESS: YES.

Q BY MR. GIPSON: SO BACK TO MY QUESTION. WHAT DID YOU DO, IF ANYTHING, WITH THAT PURSE?

A I OPENED UP THE PURSE AND OBSERVED A BLACK SEMIAUTOMATIC HANDGUN RESTING AT THE BOTTOM OF THE PURSE.

Q AND AFTER YOU OBSERVED THAT, WHAT DID YOU DO WITH THE PURSE?

A I WENT AHEAD AND CONTAINED CONTROL OF IT BECAUSE OF THE FACT THAT IT WAS JUST MY PARTNER AND I. WE WERE WAITING FOR ADDITIONAL UNITS TO RESPOND TO OUR LOCATION. I DIDN'T WANT TO GIVE UP GROUND ON WHERE THE DEFENDANT HAD RAN AND SO ONCE WE GOT ADDITIONAL OFFICERS THERE TO OUR LOCATION, I WENT AHEAD AND TOOK THE WHOLE PURSE WITH THE GUN INSIDE TO MY CAR AND RENDERED IT SAFE.

Q WHEN YOU SAY RENDER IT SAFE, CAN YOU DESCRIBE EXACTLY WHAT YOU DID?

A SURE. I WENT AHEAD AND LAID THE PURSE INSIDE THE TRUNK OF MY VEHICLE. I REACHED IN WITH RUBBER GLOVES SO I WOULDN'T CONTAMINATE THE HANDGUN, AND I WENT AHEAD AND FIRST I TOOK OFF THE MAGAZINE WHICH WAS SEATED INSIDE THE MAGAZINE ROLL, THE HANDGUN. I PLACED THAT ASIDE. I THEN SLIDED -- MOVED THE SLIDE BACKWARDS TO WHERE ONE .32 CALIBER ROUND WAS EJECTED FROM THE HANDGUN.

A I KNOW THE TWO OFFICERS THAT WENT DOWN THAT ALCOVE AND HELD ON THE STAIRS.

Q AND AT SOME LATER POINT, DID YOU SEE MR. OCHOA?

A YES.

Q HOW MUCH LATER DID YOU SEE MR. OCHOA?

A I'D SAY WITHIN -- AFTER FIVE MINUTES THAT THE OFFICERS GOT THERE I EXPLAINED TO THEM WHAT HAPPENED, WHAT WAS GOING ON. THEY HELD ON THE STAIRS AND APPROXIMATELY FIVE TO TEN MINE LATER THEY WENT AHEAD AND TOOK MR. OCHOA INTO CUSTODY AND BROUGHT HIM DOWN TO WHERE I WAS AT.

Q AND THEY BROUGHT HIM DOWN THROUGH THAT ALCOVE AREA. CORRECT?

A DOWN THE ALCOVE, YES.

Q AND YOU WERE STANDING OUTSIDE THE ALCOVE?

A RIGHT AT THE MOUTH OF THE ALCOVE WAS.

Q WITH THE FEMALE AND OTHER INDIVIDUALS?

A NO. MY PARTNER WAS STANDING WITH THE FEMALE AND THE OTHER INDIVIDUAL AND OTHER OFFICERS. AND I WAS AT THAT ALCOVE.

Q WELL, WHEN WAS IT THAT YOU PUT THE GLOVES ON AND RETRIEVED THE WEAPON?

A OKAY. ONCE THE ADDITIONAL UNITS GOT THERE, I EXPLAINED WHAT I HAD. THEY WENT AHEAD AND FORMED WHAT IS CALLED A CONTACT TEAM OR SEARCH TEAM. THEY WENT AHEAD AND WENT DOWN THE ALCOVE, SET UP ON THE ALCOVE TOWARDS THE STEPS AT THAT TIME BECAUSE THEY ALREADY HAD EYES ON

GUN?

A YES.

Q AND I THINK I ASKED YOU ALREADY. ISN'T IT TRUE THAT IT'S ALSO POSSIBLE THAT THE PERSON JORDY OCHOA NEVER TOUCHED THE GUN?

A YES.

MR. AYALA: NOTHING FURTHER.

THE COURT: MR. GIPSON, ANYTHING FURTHER?

MR. GIPSON: NOTHING FURTHER.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH. YOU MAY STEP DOWN. WOULD THE PEOPLE WISH TO CALL ANY ADDITIONAL WITNESSES?

MR. GIPSON: THE PEOPLE HAVE NO WITNESSES.

THE COURT: I BELIEVE THERE'S A STIPULATION EACH BETWEEN COUNSEL?

MR. GIPSON: COUNSEL, DO YOU STIPULATE THAT THE DEFENDANT HAS PREVIOUSLY CONVICTED OF A FELONY ON OCTOBER 4, 2007, IN CASE NO. BA326153?

MR. AYALA: SO STIPULATED.

MR. GIPSON: ALSO DO YOU STIPULATE TO THE FACT THAT D. YOUNGBLOOD IS A FORENSIC PRINT SPECIALIST FOR THE LOS ANGELES POLICE DEPARTMENT, AND ON FEBRUARY 13, 2009, HE MADE AN EXAMINATION OF ITEMS ONE AND TWO BOOKED UNDER D.R. NO. 080633223 AND FORMED THE OPINION THAT NO LATENT PRINTS OF VALUE WERE DEVELOPED ON THE ABOVE PROCESSED ITEMS?

MR. AYALA: SO STIPULATED.

MR. GIPSON: AND DO YOU ALSO STIPULATE THAT THE

SCHEDULING.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:

THE COURT: WE'RE BACK ON THE RECORD. SO WE ARE ACTUALLY GOING TO BREAK EARLY TODAY. THE GOOD NEWS IS, AS YOU CAN TELL BY THE FACT THAT THE PEOPLE HAVE NOW RESTED, WE ARE AHEAD OF SCHEDULE IN PART BECAUSE OF ALL THE STIPULATIONS OF COUNSEL, AND I APPRECIATE COUNSEL DOING THAT.

SO WE ARE GOING TO BREAK FOR THE DAY TODAY, AND THEN WE'LL START WITH WITNESSES FOR THE DEFENSE TOMORROW. WE'RE GOING TO START AT 10:30 A.M. TOMORROW. AS WE ARE COMING CLOSER TO THE END OF THE CASE, PLEASE BE PREPARED TO START ON WEDNESDAY AS EARLY AS 9:00.

SO I WILL LET YOU KNOW TOMORROW IF WE'RE STARTING ON WEDNESDAY AT 9:00 OR 10:30. BE AVAILABLE TO START ON WEDNESDAY AT 9:00 A.M. SAME ADMONITION NOT TO TALK ABOUT THE CASE OR ANY ISSUES WITH ANYONE OR MAKE UP YOUR MIND ABOUT ANY SUBJECT OR ANY ISSUE.

THANK YOU ALL FOR YOUR PATIENCE. YOU ARE ALL EXCUSED AND AGAIN ORDERED BACK TOMORROW AT 10:30 A.M. THANK YOU. THE CASE IS CONTINUED TO TOMORROW 10:30 A.M. THE PROBATION VIOLATION MATTER IS CONTINUED AS WELL.

WHICHEVER COUNSEL WANT TO PROVIDE ME A LIST OF PROPOSED JURY INSTRUCTIONS HAVING IT TOMORROW MORNING SO I CAN GET PROPOSED JURY INSTRUCTIONS WILL BE HELPFUL.

CASE NUMBER:	BA349945 AND BA326153
CASE NAME:	PEOPLE VS. JORDY OCHOA
LOS ANGELES, CALIFORNIA	JUNE 23, 2009
DEPARTMENT NO. 71	HON. GAIL RUDERMAN FEUER
REPORTER:	ROSALIND M. DUDLEY, CSR #6505
TIME:	10:59 A.M.
APPEARANCES:	(HERETOFORE MENTIONED)

THE COURT: CALLING CALENDAR NO. 2, JORDY OCHOA BA349945, ALSO PROBATION VIOLATION MATTER CASE NO. BA326153. MR. OCHOA IS PRESENT. GOOD MORNING. BOTH COUNSEL ARE PRESENT. THANK YOU ALL FOR YOUR PATIENCE THIS MORNING. AT THIS POINT, I BELIEVE THE JURY IS HERE. LET'S BRING IN THE JURY.

(JURY RESUME.)

THE COURT: GOOD MORNING. WE'RE BACK ON THE RECORD IN THE MATTER OF MR. JORDY OCHOA. ALL THE MEMBERS OF OUR JURY AND TWO ALTERNATES ARE HERE. THANK YOU FOR YOUR PATIENCE. WE ARE NOW READY TO PROCEED. AT THIS TIME, I'LL TURN TO MR. AYALA. YOU MAY CALL YOUR FIRST WITNESS.

MR. AYALA: YES. DEFENSE WOULD CALL ROBERT HERNANDEZ.

THE COURT CLERK: PLEASE RAISE YOUR RIGHT HAND.

Q NOW, ON THIS PARTICULAR OCCASION, DID JORDY LEAVE THE HOUSE?

A WHERE TO?

Q FOR ANYWHERE.

A NO. WHEN WE WERE AT THE HOUSE, THE ICE CREAM TRUCK WENT BY. SO THE YOUNGEST CHILD LOOK OUT THE WINDOW. HE WAS CRYING BECAUSE HE WANTED AN ICE CREAM.

Q SO WHAT HAPPENED?

A AND I GAVE EZEKIEL A DOLLAR. I GAVE HIM MONEY, ABOUT $3.00, TO GO BUY THE CHILD AN ICE CREAM.

Q WHEN YOU SAY EZEKIEL, YOU GAVE MONEY TO EZEKIEL?

A YES.

Q WHO IS EZEKIEL?

A JORDY.

Q YOU CALL JORDY EZEKIEL?

A YES.

Q SO YOU GAVE JORDY SOME MONEY?

A YES.

Q AND AFTER YOU GAVE JORDY THE MONEY, WHAT DID HE DO?

A THE CHILD WAS CRYING SO HE WENT WITH THE CHILD TO GET HIM THE ICE CREAM.

Q HOW OLD IS THE CHILD?

A HE JUST TURNED TWO.

Q AS OF TODAY HE'S TWO YEARS OLD?

A AS OF TODAY, YES, HE'S TWO. BUT AT THAT TIME, HE WAS LIKE A YEAR AND A HALF.

Q AND SO DID JORDY LEAVE THE APARTMENT WITH THE CHILD?

A HE WENT TO THE ICE CREAM TRUCK TO GET THE ICE CREAM.

Q DID JORDY RETURN SOMETIME LATER?

A ABOUT TEN MINUTES LATER, HE CAME BACK WITH AN ICE CREAM AND SOME NACHOS FOR THE OTHER CHILD JOSEPH.

Q AND WHEN HE CAME BACK, DID HE HAVE THE CHILD THAT HE LEFT WITH?

A YES. HE WAS HOLDING HIM.

Q NOW, WHEN JORDY CAME BACK WITH THE CHILD AND THIS -- THE ICE CREAM, DID SOMETHING HAPPEN?

A YES. WE WERE HAVING THE ICE CREAM, AND SINCE WE COULD SEE OUT FROM THE WINDOW, HE SAW -- HE SAID, "MOMMY, THE POLICE IS DOWN THERE."

Q WHO SAID THAT?

A EZEKIEL.

Q JORDY?

A JORDY. JORDY.

Q NOW, WHEN YOU WERE ADVISED THAT THE POLICE WERE DOWN THERE, WHAT HAPPENED? WHAT DID YOU DO?

A I IMMEDIATELY WENT DOWN BECAUSE MY OTHER SON WAS THERE.

Q YOUR OTHER SON WAS THERE. WHO IS YOUR OTHER SON?

A EDWIN.

Q DID YOU LOOK OUT THE WINDOW?

A NO. I WENT DOWN.

Q IS THAT YES?
A YES.
Q AND DO YOU KNOW THIS GENTLEMAN JORDY OCHOA?
A YES. HE IS MY DAUGHTER'S HUSBAND.
Q AND DID HE LIVE AT THAT LOCATION AT THAT TIME?
A YES. AT THAT TIME, MYSELF, MY DAUGHTER, HE, AND THE CHILDREN WERE THERE.
Q WHICH CHILDREN WERE THERE ON THAT PARTICULAR DAY IN THE AFTERNOON?
A JORDY EZEKIEL OCHOA. JOSEPH WAS THERE AND JAYDEN WAS THERE. UH-HUH.
Q AND JAYDEN AND JOSEPH AND JORDY ARE THE THREE CHILDREN THAT WERE THERE?
A YES. THE THREE OF THEM.
Q NOW, ON THAT DAY IN THE AFTERNOON, WAS MARGARITA THERE?
A NO. MARGARITA ARRIVED LATER.
Q OKAY. BUT SHE DID ARRIVE AT YOUR APARTMENT AT SOME POINT. CORRECT?
A YES, SHE ARRIVED. YES.
Q WAS YESENIA THERE?
A YES, YESENIA WAS THERE.
Q AND YESENIA IS YOUR DAUGHTER?
A YES, SHE'S MY DAUGHTER.
Q NOW, AT SOME POINT, DID JORDY -- THIS JORDY THAT'S HERE -- DID HE LEAVE THE APARTMENT?
A YES. HE HAD TO STEP OUTSIDE BECAUSE

MARGARITA TOLD HIM BECAUSE THE CHILD WAS CRYING TO GO BUY THE CHILD AN ICE CREAM. SO HE WENT DOWN TO BUY AN ICE CREAM AND NACHOS. AND HE WAS JUST TOOK HIM TWO MINUTES BEFORE HE CAME OUT.

Q SO HE WAS GONE FOR ABOUT TWO MINUTES?

A YES, FOR ABOUT TWO MINUTES.

Q NOW, DID HE RETURN TO THE APARTMENT?

A YES, HE RETURNED TO THE APARTMENT.

Q AND WHEN HE RETURNED, WAS HE BY HIMSELF?

A NO. WE WERE THERE.

Q NO. WHEN HE RETURNED TO THE APARTMENT, WAS HE BY HIMSELF?

A NO. HE CAME WITH THE BABY.

Q DID HE HAVE TO CARRY THE BABY?

A YES. HE WAS CARRYING HIM.

Q AND DID HE HAVE ANYTHING ELSE WITH HIM?

A YES. HE HAD THE NACHOS, AND THE BABY HAD HIS ICE CREAM.

Q AND AFTER HE CAME BACK WITH THE BABY, DID SOMETHING HAPPEN?

A YES. SINCE THE WINDOW WAS QUITE BIG -- THE WINDOW IN THE APARTMENT -- HE WAS JUST WALKING ABOUT, AND THEN HE LOOKED THROUGH THE WINDOW, AND HE SAW THROUGH THE WINDOW -- HE TOLD HIS MOTHER TO GO DOWNSTAIRS.

MR. GIPSON: OBJECTION. CALLS FOR HEARSAY.

THE COURT: ONE MOMENT. WITH RESPECT TO THE STATEMENT REGARDING WHETHER MR. OCHOA -- WHAT HE DID OR DID NOT SEE, I'M SUSTAINING THE OBJECTION, STRIKING IT

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A YEAH.
Q WITH THE CHILD?
A YES.
Q WHICH CHILD WAS THAT?
A JORDY.
Q JORDY, JR.?
A YES.
Q AND DID JORDY RETURN?
A YES, HE DID.
Q HOW LONG WAS HE GONE?
A HE WAS GONE FOR, LIKE, TWO MINUTES MAYBE.
Q AND WHEN HE RETURNS, DID HE HAVE THE CHILD WITH HIM?
A YES, HE DID.
Q AND DID HE HAVE ANYTHING ELSE WITH HIM?
A YES. HE HAD NACHOS IN HIS HAND AND HOLDING JORDY.
Q DID LITTLE JORDY HAVE ANYTHING WITH HIM?
A AN ICE CREAM.
Q AND YOU INDICATED THAT THEY RETURNED IN ABOUT TWO MINUTES?
A UH-HUH.
Q IS THAT YES?
A YEP. I'M SORRY.
Q WHAT HAPPENED, IF ANYTHING, AFTER THEY RETURN TO THE APARTMENT?
A HIS MOM WENT DOWNSTAIRS BECAUSE THEY HAD EDWIN DOWNSTAIRS -- THE POLICE.

KNOW, I WAS JUST THERE.

Q AND WHAT HAPPENED?

A AND I SEEN -- I SAW JORDY COME DOWN WITH HIS BABY IN HIS ARMS. HE WALKED ACROSS THE STREET TOWARDS MY SIDE BECAUSE THE ICE CREAM TRUCK WAS RIGHT BENEATH MY BALCONY.

Q YOU SAW THE ICE CREAM TRUCK?

A RIGHT.

Q WHAT DID YOU SEE JORDY DO?

A HE BOUGHT ICE CREAM CONE AND SOME NACHOS.

Q DID YOU SEE WHAT HE DID AFTER HE BOUGHT THOSE ITEMS?

A YES. HE CROSSED THE STREET, AND HE SAID HI TO HIS BROTHER AND FOR, LIKE, NOT EVEN TWO MINUTES, LIKE, FOR, LIKE, A FEW SECONDS, AND HE WENT BACK UP.

Q NOW, YOU SAID HE SAID HI TO HIS BROTHER?

A RIGHT.

Q WHO IS HIS BROTHER?

A EDWIN.

Q WAS EDWIN ALONE?

A EXCUSE ME?

Q WAS EDWIN ALONE?

A NO.

Q WAS SOMEONE ELSE THERE?

A YES.

Q WHO?

A JANET.

Q DO YOU KNOW JANET?

CASE NUMBER:	BA349945
CASE NAME:	PEOPLE VS. JORDY OCHOA
LOS ANGELES, CALIFORNIA	JUNE 25, 2009
DEPARTMENT NO. 71	HON. GAIL RUDERMAN FEUER
REPORTER:	ROSALIND M. DUDLEY, CSR #6505
TIME:	11:39 A.M.
APPEARANCES:	(HERETOFORE MENTIONED)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: JORDY OCHOA, BA349945, ALSO PROBATION VIOLATION MATTER BA326153. MR. OCHOA IS PRESENT. BOTH COUNSEL ARE PRESENT. SO THERE HAVE BEEN A SERIES OF NOTES. INTERESTINGLY, YESTERDAY AT THE END OF THE DAY, THERE WAS A NOTE FROM THE JURY SAYING, "WE ARE UNABLE TO DECIDE, AND IT APPEARS THERE IS NO HOPE OF REACHING A UNANIMOUS VERDICT."

AT THAT TIME, I BELIEVE JUDGE WINDHAM WAS HERE. THEY WERE SENT TO DELIBERATE FURTHER, AND THEY CAME BACK AT 9:30. I EXPECTED AT THAT TIME, WE POTENTIALLY WOULD HAVE A HUNG JURY, BUT THEN IT TURNS OUT THIS MORNING WHEN WE WERE WAITING FOR COUNSEL TO SHOW UP, THEY SENT US TWO MORE NOTES.

THE FIRST NOTE IS THEY ASKED TO REVIEW THE

THE COURT: OKAY. SO I AM GOING TO GO AHEAD AND DECLARE A MISTRIAL. SO I'M GOING TO BRING THE JURY BACK AND FIND OUT WHAT THE SPLIT IS, AND WE'LL PROCEED FROM THERE.

MR. GIPSON: AND IS THE COURT GOING TO RULE ON THE PROBATION VIOLATION?

THE COURT: LET'S -- WE'LL DISCUSS WHAT HAPPENS NEXT. SO I WANT TO HEAR FROM COUNSEL ON THE NEXT STEP. I AM GOING TO DECLARE A MISTRIAL. I'LL FIND OUT WHAT THE FINAL VOTE WAS, AND THEN IF COUNSEL WANT, I CAN GIVE COUNSEL AN OPPORTUNITY TO TALK WITH THE JURORS.

MR. AYALA: I'D RATHER WE JUST PROCEED.

THE COURT: OKAY. LET'S BRING IN THE JURY.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:

THE COURT: SO WE NOW HAVE OUR JURY AND OUR TWO ALTERNATES PRESENT. I HAVE HAD AN OPPORTUNITY TO TALK WITH COUNSEL. IT IS THE VIEW OF THE COURT THAT THE JURY IS HOPELESSLY DEADLOCKED AND THAT FURTHER DELIBERATIONS WOULD NOT CHANGE THAT FACT. SO I AM GOING TO DECLARE A MISTRIAL IN THE CASE. LET ME TURN TO OUR FOREPERSON, JUROR NO. 11. NOW THAT I'VE DECLARED A MISTRIAL, CAN YOU PLEASE TELL ME THE SEVEN VERSUS FIVE. THE SEVEN WAS VOTING WHICH WAY?

JUROR NO. 11: SEVEN WAS NOT GUILTY, AND FIVE WAS GUILTY.

BASICALLY I'VE BEEN HEARING THIS CASE AS THE PROBATION VIOLATION MATTER. IT SEEMS TO ME AT THIS POINT, WE SHOULD PROCEED WITH THE PROBATION VIOLATION MATTER. AT THE CONCLUSION OF WHAT THE COURT DECIDES, THEN THE PEOPLE NEED TO DECIDE IF THEY WANT THE MATTER RESET FOR A TRIAL, AND IF YES, I WOULD GO AHEAD AND SET IT FOR TRIAL.

I'LL HEAR FROM BOTH COUNSEL ON THAT ISSUE AS WELL. SO WITH RESPECT TO PROCEEDING ON THE PROBATION VIOLATION MATTER, MR. AYALA?

MR. AYALA: IT SEEMS TO ME THAT SINCE IT WAS AGREED AND DEFENSE HAS REALLY NO PROBLEM WITH, YOU'VE HEARD THE CASE. YOU'VE HEARD THE EVIDENCE. NO ONE WOULD KNOW BETTER THAN YOU THAN BEFORE ANOTHER JUDGE WHO WOULD SAY THEY DID NOT HEAR ANYTHING. THEN IT WOULD SEEM APPROPRIATE FOR YOU TO MAKE THAT DECISION.

THE COURT: THAT IS MY VIEW. THE ONLY ALTERNATIVE, I WOULD NOTE, WOULD BE IF THE CASE WERE TO BE SET FOR RETRIAL. THE PROBATION VIOLATION MATTER COULD BE CONTINUED AT THAT TIME. I THINK IT MAKES MORE SENSE SINCE THERE'S AGREEMENT BY COUNSEL THAT THE EVIDENCE PRESENTED AT THE TRIAL WOULD APPLY WITH RESPECT TO THE PROBATION VIOLATION MATTER.

THAT, AT THIS TIME, THE COURT HEAR FROM COUNSEL, AND I'LL MAKE A RULING ON THE PROBATION VIOLATION MATTER. MR. GIPSON, DO YOU WANT TO BE HEARD?

MR. GIPSON: JUST BRIEFLY. THAT I THINK THE STANDARD OF PROOF AT A PROBATION VIOLATION HEARING IS MORE LIKELY THAN NOT RATHER THAN BEYOND A REASONABLE

DOUBT. AND I DO AGREE THAT IT'S APPROPRIATE TO GO AHEAD AND GET A RULING ON THE PROBATION VIOLATION MATTER NOW.

THE COURT: LET ME INQUIRE OF COUNSEL. JUST TO BE CLEAR, SO WITH RESPECT TO THE PROBATION VIOLATION MATTER, ALL OF THE EVIDENCE THAT WAS PRESENTED DURING THE TRIAL WILL BE CONSIDERED BY THE COURT. COUNSEL DO HAVE AN OPPORTUNITY IF THEY WANT TO PRESENT ANY ADDITIONAL EVIDENCE OR CALL ANY ADDITIONAL WITNESSES WITH RESPECT TO THE PROBATION VIOLATION MATTER, THEY MAY DO SO.

SO LET ME INQUIRE FIRST OF, MR. GIPSON, DO THE PEOPLE INTEND TO PRESENT ANY ADDITIONAL EVIDENCE OR CALL ANY ADDITIONAL WITNESSES WITH RESPECT TO THE PROBATION VIOLATION MATTER?

MR. GIPSON: NO, THE PEOPLE DO NOT.

THE COURT: ALL RIGHT.

MR. AYALA: NOR DO THE DEFENSE.

THE COURT: OKAY. SO LET ME HEAR FROM COUNSEL BRIEFLY. OBVIOUSLY, I LISTENED TO YOUR CLOSING ARGUMENT WHICH PROBABLY SOUNDS ABOUT WHAT YOUR ARGUMENT WOULD BE EXCEPT FOR, OBVIOUSLY, THERE IS A DIFFERENT STANDARD WITH RESPECT TO THE VIOLATION. SO, MR. GIPSON, ANYTHING ELSE YOU WANTED TO ADD?

MR. GIPSON: NOTHING ADDITIONAL.

THE COURT: MR. AYALA?

MR. AYALA: I MEAN IT'S VERY OBVIOUS. WE HAD A JURY THAT OBVIOUSLY WAS VERY ATTENTIVE. WE KNOW YOU WERE VERY ATTENTIVE. AND I DO UNDERSTAND THAT THE BURDEN OF PROOF IS OBVIOUSLY DIFFERENT. IT'S NOT A REASONABLE

DOUBT. AND I DO AGREE THAT IT'S APPROPRIATE TO GO AHEAD AND GET A RULING ON THE PROBATION VIOLATION MATTER NOW.

THE COURT: LET ME INQUIRE OF COUNSEL. JUST TO BE CLEAR, SO WITH RESPECT TO THE PROBATION VIOLATION MATTER, ALL OF THE EVIDENCE THAT WAS PRESENTED DURING THE TRIAL WILL BE CONSIDERED BY THE COURT. COUNSEL DO HAVE AN OPPORTUNITY IF THEY WANT TO PRESENT ANY ADDITIONAL EVIDENCE OR CALL ANY ADDITIONAL WITNESSES WITH RESPECT TO THE PROBATION VIOLATION MATTER, THEY MAY DO SO.

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MR. GIPSON: NO, THE PEOPLE DO NOT.

THE COURT: ALL RIGHT.

MR. AYALA: NOR DO THE DEFENSE.

THE COURT: OKAY. SO LET ME HEAR FROM COUNSEL BRIEFLY. OBVIOUSLY, I LISTENED TO YOUR CLOSING ARGUMENT WHICH PROBABLY SOUNDS ABOUT WHAT YOUR ARGUMENT WOULD BE EXCEPT FOR, OBVIOUSLY, THERE IS A DIFFERENT STANDARD WITH RESPECT TO THE VIOLATION. SO, MR. GIPSON, ANYTHING ELSE YOU WANTED TO ADD?

MR. GIPSON: NOTHING ADDITIONAL.

THE COURT: MR. AYALA?

MR. AYALA: I MEAN IT'S VERY OBVIOUS. WE HAD A JURY THAT OBVIOUSLY WAS VERY ATTENTIVE. WE KNOW YOU WERE VERY ATTENTIVE. AND I DO UNDERSTAND THAT THE BURDEN OF PROOF IS OBVIOUSLY DIFFERENT. IT'S NOT A REASONABLE

DOUBT. AND I DO AGREE THAT IT'S APPROPRIATE TO GO AHEAD AND GET A RULING ON THE PROBATION VIOLATION MATTER NOW.

THE COURT: LET ME INQUIRE OF COUNSEL. JUST TO BE CLEAR, SO WITH RESPECT TO THE PROBATION VIOLATION MATTER, ALL OF THE EVIDENCE THAT WAS PRESENTED DURING THE TRIAL WILL BE CONSIDERED BY THE COURT. COUNSEL DO HAVE AN OPPORTUNITY IF THEY WANT TO PRESENT ANY ADDITIONAL EVIDENCE OR CALL ANY ADDITIONAL WITNESSES WITH RESPECT TO THE PROBATION VIOLATION MATTER, THEY MAY DO SO.

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MR. GIPSON: NO, THE PEOPLE DO NOT.

THE COURT: ALL RIGHT.

MR. AYALA: NOR DO THE DEFENSE.

THE COURT: OKAY. SO LET ME HEAR FROM COUNSEL BRIEFLY. OBVIOUSLY, I LISTENED TO YOUR CLOSING ARGUMENT WHICH PROBABLY SOUNDS ABOUT WHAT YOUR ARGUMENT WOULD BE EXCEPT FOR, OBVIOUSLY, THERE IS A DIFFERENT STANDARD WITH RESPECT TO THE VIOLATION. SO, MR. GIPSON, ANYTHING ELSE YOU WANTED TO ADD?

MR. GIPSON: NOTHING ADDITIONAL.

THE COURT: MR. AYALA?

MR. AYALA: I MEAN IT'S VERY OBVIOUS. WE HAD A JURY THAT OBVIOUSLY WAS VERY ATTENTIVE. WE KNOW YOU WERE VERY ATTENTIVE. AND I DO UNDERSTAND THAT THE BURDEN OF PROOF IS OBVIOUSLY DIFFERENT. IT'S NOT A REASONABLE

DOUBT STANDARD. OF COURSE, IT'S BEEN OUR POSITION, AS YOU KNOW BY OUR ARGUMENT AND THROUGH THE TESTIMONY WE PRESENTED, THAT MR. OCHOA IS NOT VIOLATION BECAUSE HE DIDN'T HAVE THE GUN.

AND THERE ARE THE FACTORS AND THE POINTS AGAINST THAT COME AGAINST THOSE FACTORS SUCH AS THE PRINT EVIDENCE, THE DNA EVIDENCE WHICH IS, IN MY OPINION, BASED ON THE FACTS THE WAY THIS OFFICER TALKED EXTREMELY, EXTREMELY HEAVY AND SHOULD BE -- AND SHOULD BE GIVEN MUCH WEIGHT BY THE COURT.

A DEFENSE WAS PRESENTED, AND OBVIOUSLY THE JURY THAT HEARD THAT MUST HAVE HAD SOME PROBLEM. BUT THE QUESTION IS TO WHAT WEIGHT DOES THE COURT GIVE OR TO WHAT WEIGHT, IF ANY, OR TO WHAT EXTENT, IF ANY, DOES THE COURT DISCOUNT THE DEFENSE THAT WAS PRESENTED ESPECIALLY BY THE WITNESS WOULD HAD A VIEW TO SEE EVERYTHING THAT OCCURRED.

IT WOULD APPEAR, AND OF COURSE I'M DEFENSE ATTORNEY AND MY CLIENT IS SITTING HERE AND I AM STATING WHAT'S IN HIS BEST INTERESTS, THAT IT IS QUESTIONABLE AS TO THE VALIDITY I GUESS YOU WANT TO CALL IT OR THE CREDIBILITY OF THE POLICE OFFICER THAT TESTIFIED IN THIS CASE.

AND I THINK BASED ON EVERYTHING THIS COURT HAS HEARD IT WOULD NOT RISE TO THE LEVEL EVEN FOR A PROBATION VIOLATION HEARING FOR THE COURT TO FIND THAT VIOLATION TRUE. SO I'D ASK THE COURT TO FIND MY NOT IN VIOLATION.

THE COURT: ALL RIGHT. THANK YOU. OKAY. AND AT

ORTEGA TO BE A VERY CREDIBLE WITNESS WOULD DESCRIBED THE DEFENDANT HAVING A GUN AND PUTTING IT IN THE PURSE OF THE PERSON WHO HAS BEEN CALLED EITHER JANET OR JANETTE. I FOUND HIM TO BE CREDIBLE.

AT THE SAME TIME, THE DIFFICULTY I HAVE, IS I THEN HAD HEARD FROM FOUR WITNESSES. THREE OF WHOM HAVE A CLOSE RELATIONSHIP, OBVIOUSLY, WITH THE DEFENDANT AND HAD AN INCENTIVE NOT TO TELL THE TRUTH, BUT THREE OF WHOM DESCRIBED THEIR -- WHAT THEY BELIEVED HAPPENED, AND THEN A FOURTH WAS APPARENTLY A FRIEND.

I DON'T KNOW HOW CLOSE A FRIEND, BUT THE FOURTH WAS A FRIEND WOULD LIVES POSSIBLY ACROSS THE STREET. THE TESTIMONY OF THE FOUR WAS RELATIVELY CONSISTENT WITH EACH OTHER THAT MR. OCHOA WAS CARRYING A TWO-YEAR-OLD BABY. CERTAINLY THAT'S INCONSISTENT WITH HIS USING BOTH HANDS TO TAKE THE GUN OUT OF THE BACK OF HIS SHORTS.

SO THE QUESTION IS DOES THE COURT THINK IT'S MORE LIKELY THAN NOT THAT THE FOUR WITNESSES WERE LYING WHEN THEY WERE ON THE STAND TESTIFYING THAT THE DEFENDANT HAD THE BABY; THAT HE WENT OUTSIDE TO BUY THE ICE CREAM AND NACHOS AND, THEREFORE, REALLY WASN'T THERE WHEN THE OFFICER CLAIMS THAT HE WAS THERE.

CERTAINLY MS. PAZ WAS IMPEACHED WITH ONE STATEMENT SHE APPARENTLY MADE TO THE INVESTIGATOR WHICH WAS THAT SHE SAID -- I GUESS THERE WERE ACTUALLY TWO STATEMENTS -- BOTH THAT MR. OCHOA WAS OUTSIDE EATING THE NACHOS AS OPPOSED TO BRINGING THE NACHOS AND THE ICE

CREAM BACK AND THAT THE POLICE OFFICERS ARRIVED SIMULTANEOUSLY AS MR. OCHOA WAS WALKING UPSTAIRS.

THAT STILL TO ME DOES NOT TILT THE BALANCE SUFFICIENTLY. FRANKLY, IN LIGHT OF BOTH THERE WERE NO FINGERPRINT AND NO DNA ON THE GUN, IF YOU PUT THAT ALL TOGETHER, I CANNOT SAY THAT IT IS MORE LIKELY THAN NOT THAT MR. OCHOA ON THE FACTS THAT I HAVE BEFORE THE COURT AT THIS TIME COMMITTED THE CRIME. SO I'M NOT AT THIS TIME GOING TO FIND HIM IN PROBATION VIOLATION.

NOW, AN INTERESTING QUESTION THAT CONCLUDES THIS HEARING WITH RESPECT TO THAT. IT'S NOT CLEAR TO ME WHAT HAPPENS NEXT. I NEED TO HEAR FROM THE PEOPLE. CERTAINLY IF THEY WANT THE COURT TO SET THE CASE FOR A RETRIAL ON THE OPEN CASE, IT'S AN INTERESTING QUESTION WHETHER -- THE INTERESTING QUESTION IS WHETHER BASED ON THE NEW CASE, MR. OCHOA COULD STILL BE FOUND IN VIOLATION OF HIS PROBATION OR WHETHER THE FINDING THE COURT IS MAKING AT THIS TIME WOULD PREVENT THAT HAVE HAPPENING.

IT DOES SEEM TO ME, FRANKLY, IF THE JURY WERE TO FIND THE DEFENDANT -- WELL, IT'S AN INTERESTING QUESTION WHAT HAPPENS NEXT IF THE CASE GETS RETRIED WITH RESPECT TO A POSSIBLE VIOLATION OF PROBATION. MY RULING AT THIS TIME DOES NOT ADDRESS THAT QUESTION.

I ONLY ADDRESS THE QUESTION ON THE EVIDENCE THAT WAS BEFORE ME FROM THE TRIAL. DO I FIND THE DEFENDANT HAS VIOLATED PROBATION? THE ANSWER IS NO. SO THE NEXT QUESTION IS DO THE PEOPLE WISH TO HAVE THE MATTER SET FOR TRIAL?

THIS TIME, I ASSUME -- IT'S NOW JUST BEFORE 11:00 O'CLOCK. I WOULD LIKE TO TAKE A SHORT BREAK. I THINK IT MAKES SENSE. WHY DON'T WE TAKE A TEN-MINUTE RECESS, AND THEN I'LL RETURN.

MR. AYALA: THANK YOU.

THE COURT: WE'LL BE IN RECESS.

(SHORT BREAK.)

THE COURT: WE ARE BACK ON THE RECORD. WE'RE NOW DEALING WITH THE PROBATION VIOLATION MATTER BA326153. I HAVE TAKEN SOME TIME TO REVIEW MY NOTES OF THE WITNESSES DURING THE TRIAL. I RECOGNIZE THAT FOR PROBATION VIOLATION HEARING, THE STANDARD IS A PREPONDERANCE OF THE EVIDENCE. THE COURT NEED ONLY FIND THAT OF MR. OCHOA ON HIS VIOLATION THAT IT IS MORE LIKELY THAN NOT THAT HE COMMITTED THE CRIME.

BASED ON THE EVIDENCE BEFORE ME, I AM NOT GOING TO VIOLATE HIM ON HIS PROBATION. I THINK THE MATTER SHOULD BE SET FOR A NEW TRIAL IF THE PEOPLE SEEK IT.

THERE CLEARLY WAS, SEEMS TO ME LIKELY WOULD, BUT FOR SOME RULINGS BY THE COURT, THERE MIGHT HAVE BEEN SOME ADDITIONAL EVIDENCE PRESENTED TO THE COURT REGARDING INCONSISTENT STATEMENTS OF A WITNESS, BUT I DIDN'T HEAR THAT TESTIMONY SO I CAN'T TAKE IT INTO ACCOUNT OF MY RULING.

BASE ON WHAT I HEARD, I FOUND OFFICER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 71 HON. GAIL RUDERMAN FEUER, JUDGE

THE PEOPLE OF THE STAT OF CALIFORNIA,
PLAINTIFF,
VS.
JORDY OCHOA,
DEFENDANT.

CASE NO. BA349945

REPORTER'S CERTIFICATE

I, ROSALIND M. DUDLEY, CSR 6505, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES, A-1 THROUGH 265, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN IN THE ABOVE-ENTITLED CAUSE ON JUNE 19, 22, 23, 24, 25, AND 26, 2009.

DATED THIS 5TH DAY OF MARCH, 2010.

Rosalind M. Dudley, CSR #6505
ROSALIND M. DUDLEY
OFFICIAL REPORTER