APPENDIX

Case: 15-15345, 09/18/2017, ID: 10584085,
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS BEAUDREAUX, Petitioner-Appellant, v.	No. 15-15345 D.C. No. 5:13-cv-00351-BLF
J. SOTO, Warden, Respondent-Appellee./	MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted February 16, 2017
San Francisco, California

Before: GOULD and BERZON, Circuit Judges, and GARBIS,** District Judge.

Nicholas Beaudreaux appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He contends that (1) his trial counsel provided him with ineffective assistance of counsel ("IAC") at his trial on a first-degree murder charge by failing to object to, or move to

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

** The Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, sitting by designation.

exclude, the testimony of one eyewitness as the product of impermissibly suggestive photographic identification procedures; and (2) trial counsel's deficient performance prejudiced Beaudreaux's defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1. The relevant inquiry with respect to the first *Strickland* prong is whether a reasonably competent attorney would have made a motion to exclude or raised an objection regarding witness Dayo Esho's identification of Beaudreaux. *Id.* at 687–88. Given the importance of Esho's testimony, the significant chance of succeeding on a suppression motion, and the absence of any plausible strategic reason for not filing such a motion, a reasonably proficient attorney would have filed it.

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks and citation omitted). Applying that presumption, we can find no basis for concluding that trial counsel David Kelvin's failure to object to, or to move to exclude, Esho's identification testimony was, or could have been, the product of sound strategic consideration.

First, Kelvin submitted a declaration stating that he did not remember considering filing a motion to exclude Esho's identification testimony, and that his failure to do so "denied Mr. Beaudreaux the effective assistance of counsel." A state court is not necessarily bound to accept trial counsel's testimony regarding whether a particular action at trial was "tactical" or simply a mistake. *Edwards v.*

Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). *Edwards*, however, is inapposite. In *Edwards*, the relevant IAC claim concerned trial counsel's decision to allow a defendant to testify regarding conversations with his wife (thereby waiving the marital communications privilege and permitting the defendant's wife to give inculpatory testimony). *Id.* at 1123–24. In such a case, an objectively reasonable attorney might well have concluded that the potential benefit of his client's testimony regarding any privileged conversations would outweigh any detriment from his wife's testimony about the same communications. No such tactical benefit could inure here, where prevailing on a motion to suppress would have eliminated an identification of central importance to the prosecution's case, without any countervailing procedural or substantive risk to Beaudreaux. *Cf. Premo v. Moore*, 562 U.S. 115, 126–27 (2011); *Strickland*, 466 U.S. at 673. Trial counsel's indication that there was no tactical reason for his failure to challenge Esho's identification is therefore quite plausible, and so merited some weight.

Second, although "it is not professionally unreasonable to decide not to file a motion . . . clearly lacking in merit," *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9th Cir. 1994) (quoting *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991)), a motion to exclude Esho's in-court identification as the product of impermissibly suggestive pretrial identification procedures would have had a significant chance of success on the merits.

More than seventeen months expired between the shooting of Wayne Drummond and the police's interview of Esho. Police showed Esho two successive "six-pack" photographic lineups containing

six photographs of African-American men. Both lineups included photographs of Beaudreaux; no other individual appeared in both lineups. The officer who presented the photographic arrays to Esho testified that it was not common practice to show the same individual in successive arrays.

Esho did not make a positive identification from either photographic array. He first stated that Beaudreaux's photo was "closest" to the gunman, but that the photograph showed a man whose "face [was] a little wider and his head a little higher." Esho testified that at that point, he was "pretty sure" that the man in the photograph was *not* Drummond's killer. After seeing a second photographic array which *also* included Beaudreaux, Esho wrote that the photograph of Beaudreaux was "very close." Esho testified at trial that he may have unconsciously relied on the first photographic lineup when viewing the second one. The suggestiveness of identification procedures—and the danger of misidentification—increases when, as here, "the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." *Simmons v. United States*, 390 U.S. 377, 383 (1968); *see also Foster v. California*, 394 U.S. 440, 442–43 (1969).

After the two photographic lineups, Esho still did not positively identify Beaudreaux. He did so only after seeing Beaudreaux at a preliminary hearing. Courtroom procedures such as the defendant's preliminary hearing are "undoubtedly suggestive" as to the defendant's identity as the perpetrator. *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995); *see also Foster*, 394 U.S. at 443. The pretrial identifications were therefore based on unduly suggestive procedures.

Even if a pretrial identification procedure is unduly suggestive, an in-court identification may still be admissible. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainly demonstrated by the witnesses at the confrontation, and the length of time between the crime and the confrontation." *Id.* These factors would have supported a finding that Esho's in-court identification was not reliable.

Esho had a good opportunity to view the gunman at the time of the crime and paid close attention to the gunman. But the other three factors weigh against the state. Seventeen months elapsed between the shooting and the photographic lineups. Esho's initial description of the gunman portrayed a man several inches taller than Beaudreaux with a significantly darker complexion. And Esho's initial identifications evinced considerable uncertainty; only after repeated exposure to Beaudreaux's photograph did Esho positively identify him at the preliminary hearing, itself a suggestive situation.

2. Given the weakness of the state's case, there is a "reasonable probability" that a jury would have reached a different result had the motion been filed. *See Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Esho's identification testimony was essential to the state's case. Without Esho's identification, the strongest evidence against Beaudreaux was the eyewitness testimony of Brandon Crowder, which included identification of Beaudreaux. But Crowder

was likely not regarded as a credible witness. He initially lied to police over the course of several interrogations regarding the crime at issue, and cooperated only after he had been arrested and charged with a separate crime. And Crowder was himself was himself charged with Drummond's murder; he testified against Beaudreaux pursuant to a plea agreement in which he pled no contest to the lesser offense of voluntary manslaughter and received a sentence of probation, with no prison term. In contrast to Crowder, a known liar and criminal offender with a strong incentive to identify Beaudreaux as the killer, Esho had not criminal record, and his testimony was not induced by any deal with the government.

The third piece of evidence on which the state relied at trial—the recording of a conversation between Beaudreaux and Crowder in a police van transporting the two suspects to prison—was not enough to dissipate the prejudice related to Esho's identification. The recording is certainly persuasive evidence that Beaudreaux was extremely angry at Crowder for fingering him as a murderer. But there was no statement in the recording revealing whether Beaudreaux was livid because he had committed the murder or because he had not and was being falsely identified. If the jury was not convinced by Crowder's testimony identifying Beaudreaux, there is a reasonable probability that it would not have regarded the recorded conversation as sufficient to conclude beyond a reasonable doubt that Beaudreaux was the murderer.

3. The state has the benefit of "doubly deferential" review on *Strickland* claims subject to AEDPA. *Cullen v. Pinholster*, 563 U.S. 170, 190

(2011); *see* 28 U.S.C. § 2254(d)(1). But Beaudreaux meets his high burden here.

In light of the merits of the motion to suppress, the importance of the evidence subject to suppression, the lack of any apparent tactical advantage in declining to raise the issue, and Kelvin's declaration that he recalled no strategic motives, a conclusion by the state court that Kelvin's representation was not deficient was not reasonable. *Cf. Kimmelmlan v. Morrison*, 477 U.S. 365, 385–86 (1986).

On the second prong of *Strickland*, Beaudreaux's conversation with Crowder offered the jury some basis for convicting Beaudreaux in the absence of Esho's identification. But the question on the second prong of *Strickland* is not whether a jury *could* have convicted Beaudreaux absent the ineffectiveness of his counsel, but whether there is a reasonable probability that it would have. *See Vega v. Ryan*, 757 F.3d 960, 969–70, 974 (9th Cir. 2014). The only reasonable conclusion given the weakness of the state's case and the critical importance of Esho's identification, is that a more favorable verdict was "reasonably likely" absent the ineffective representation. *Strickland*, 466 U.S. at 696; *see* 28 U.S.C. § 2254(d)(1).

We conclude that the stringent requirements of AEDPA are met here. We therefore **REVERSE** and **REMAND** to the district court with instructions to grant the writ of habeas corpus.

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Beaudreaux v. J. Soto, 15-15345

GOULD, J. Dissenting:

I respectfully dissent. Relying on corroborated accomplice testimony and recorded comments made by Beaudreaux, it would also be reasonable for a state court to conclude that, under *Strickland v. Washington*, 466 U.S. 668 (1984), any ineffective assistance of trial counsel in how eyewitness identification evidence was handled did not prejudice Beaudreaux. Assuming there was an error in the identification procedure, I am not persuaded that it had a substantial and injurious effect on the verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). In short, it cannot be said that the state appellate court decision to not give relief to Beaudreaux was an objectively unreasonable application of Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). So relief under AEDPA is not warranted.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS BEAUDREAUX, Petitioner-Appellant, v.	No. 15-15345 D.C. No. 5:13-cv-00351-BLF
J. SOTO, Warden, Respondent-Appellee./	ORDER

Before: GOULD and BERZON, Circuit Judges, and GARBIS,* District Judge.

Judges Garbis and Berzon have voted to deny the petition for panel rehearing. Judge Gould has voted to grant the petition for panel rehearing.

Judge Berzon has voted to deny the petition for rehearing en banc, and Judge Garbis so recommends. Judge Gould has voted to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

*The Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

NICHOLAS BEAUDREAUX,
Petitioner,

v.

J. SOTO, Warden
Respondent./

No. C 13-00351 BLF (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; GRANTING CERTIFICATE OF APPEALABILITY AS TO CLAIM SEVEN AND CLAIM EIGHT

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent has filed an answer addressing the merits of the petition. Petitioner has filed a traverse. Having reviewed the briefs and the underlying record, the Court concludes that Petitioner is not entitled to relief based on the claims presented and denies the petition.

PROCEDURAL HISTORY

Petitioner was found guilty by a jury in Alameda County Superior Court of first degree murder and attempted second degree robbery. The jury also found true the enhancement allegations that Petitioner personally used a firearm and personally

and intentionally discharged it during the commission of the murder and attempted robbery. Lastly, the jury found true that Petitioner personally and intentionally discharged a firearm, inflicting great bodily injury on the victim and causing his death in connection with the murder. Petitioner was sentenced to 50 years to life in state prison. (Ans. Ex. A at 360-64, 416-22; Ex. B at 906-08, 917-18.)

Petitioner filed a direct appeal to the California Court of Appeal and a petition for writ of habeas corpus. On July 21, 2011, the state appellate court affirmed the judgment and summarily denied the petition. (Ans. Exs. I & J.)

The California Supreme Court denied Petitioner's request for a review of his direct appeal and the state habeas petition. The state high court summarily denied both petitions on October 11, 2011. (Ans. Exs. M & N.)

On December 29, 2012, Petitioner filed another petition for writ of habeas corpus in the California Court of Appeal, which summarily denied the petition on January 10, 2013. (Ans. Ex. P.)

On January 23, 2013, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which summarily denied the petition on March 27, 2013. (Ans. Ex. S.)

Petitioner filed the instant federal habeas petition on January 25, 2013, which was stayed pending Petitioner's litigation and exhaustion of the issues in his then pending state habeas petition. (Docket No. 6.) On July 16, 2013, the Court lifted the stay and ordered Respondent to show cause why Petitioner was not entitled to relief. (Docket No. 8.)

BACKGROUND[1]

On the evening of September 3, 2006, Aluma Raymond Nkele went out for drinks with his friends, Wayne Drummond, Dayo Esho and Shandon Massey at Kip's on Durant Avenue in Berkeley. [FN2] After drinking a couple of pitchers of beer, the group left and walked up to Telegraph Avenue. They saw a large crowd in front of Blakes, a bar on Telegraph, and proceeded to walk in that direction. Nkele ran into his friend, Marquel, on the corner of Durant and Telegraph and stopped to talk with him.

> FN2. Nkele and Esho were 2005 graduates from the University of California, Berkeley (UCB); Massey graduated from UCB in 2004. Drummond attended community college.

Esho saw Crowder and greeted him, but Crowder did not reciprocate and instead tapped [Petitioner] who was with him and said, "That's him. That's him," pointing. Drummond was in the group behind Esho. Crowder and Drummond then started to argue angrily. Nkele and Massey also heard the argument ensuing between Drummond and Brandon Crowder, who was also one of Nkele's friends. [FN3] Nkele could hear that Drummond was upset but he could not hear what Drummond and Crowder were arguing about. Massey testified that he heard Drummond and Crowder agree to settle their argument around the corner.

> FN3. Nkele found Crowder to be a bit immature so Nkele was a "big brother" to

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[1] The facts of this case are taken from the California Court of Appeal opinion in *People v. Beaudreaux*, No. A126140 (Cal. App. 1 Dist. July 22, 2011). (Pet. Ex. I ("Op").)

him and tried to mentor him by having him associate with his friends.

Esho tried to break up the fight. But Drummond and Crowder continued to argue and walked around the corner up Durant Avenue. Esho followed them and [Petitioner] was behind him. Massey was following the group behind Esho. Esho heard [Petitioner] say, "I don't know how to fight, but I know how to use this metal." Esho continued to try to physically break up Drummond and Crowder. A crowd of people followed them.

Drummond and Crowder eventually stopped and faced each other on Durant Avenue and continued arguing. At some point, Drummond pointed to Crowder and said, "I'll fuck you up, I'll fuck you up." He also said the same thing to [Petitioner] and a third unidentified male that was with them. Massey testified that he heard Drummond say, "I'll fuck you up" and "I don't care. I'll fight anybody." Crowder then said, "Yo, somebody handle this," and moved to the left. [Petitioner] then walked up to Drummond, pointed a gun at his neck, and aggressively said, "You need to give me your wallet right now." Massey told police that he heard the gunman say, "Give me your wallet or break yourself." Drummond grabbed the barrel of the gun and tried to wrestle it away from [Petitioner]. As Drummond pushed the gun away to his right and started to run, [Petitioner] pulled the trigger. Drummond ran up Durant. Esho heard a gunshot. He testified that the gun had been pointed at the area between Drummond's hip and stomach. [Petitioner] followed Drummond up Durant but stopped when Esho approached him. Esho told him to "leave us alone." [Petitioner] said, "He tried to grab my pistol." [Petitioner] turned and walked back down

Durant towards Telegraph while Esho went to find Drummond.

Esho found Drummond on Bowditch, just a few feet from Durant. He was rolling around on the ground. Esho tried to see if he had been shot. He checked his shirt where he thought Drummond had been shot but saw no blood or any signs of a bullet wound. A young man was near Drummond and told Esho that he had seen him fall pretty hard and did not think he had been shot. The man was not part of Esho's group of friends. Esho tried to talk with Drummond, but he was moaning and looked like someone who had had too much to drink.

Nkele also heard the gunshot and followed the crowd at a brisk pace and heard a pop. He did not see a gun or the shooter. The crowd dispersed. Nkele ran up Durant Avenue in search of Drummond. Massey also followed Drummond and found his wallet on the sidewalk near the area of the gunshot and picked it up. When he got to Bowditch, he saw Drummond on the ground. Esho and Massey, and another man were also there.

Nkele checked on Drummond and thought he was very drunk. His speech was slurred and he did not look good. Nkele spoke with Esho and knew someone had brandished a gun. Nkele and Massey checked Drummond for injuries, but did not see anything. Drummond was wearing a white shirt and there was no blood on it.

Nkele then went to meet Crowder who was around the corner on Durant and got into Crowder's car. They had a brief conversation. Crowder apologized and told Nkele, "I'm sorry it happened like that. But, you know, you mess with me, that's what you get." Nkele told Crowder to stay away from Drummond: "Wayne doesn't exist to you from

now on. Okay. You see each other, no eye contact. Don't say anything at all. Just keep walking." Nkele had no idea that Drummond had been shot. He got out of the car and Crowder drove away.

Nkele returned to Drummond and found him in the same condition. Drummond asked for water. He was not able to stand, and was slurring his words. Esho left to get water. He drove to the Chevron station at Telegraph and Ashby and bought two bottles of water. There, he saw Crowder's van drive away from the station. A surveillance tape from Chevron showed Esho's car and Crowder's van at the station and Esho at the window of the minimart there. Esho left the Chevron station at 1:54 a.m.

Esho returned to Drummond and tried to give him the water, but Drummond was not able to drink it. Officer Elgin McIntosh, who was on routine patrol, noticed a man on the ground and stopped to determine whether he needed medical assistance at approximately 2:00 a.m. Drummond appeared to be intoxicated; he was somewhat responsive, he had vomited, and his speech was slurred. McIntosh did not observe any injuries or blood on Drummond. Although McIntosh asked Esho and the others present what had happened, no one mentioned the shooting. Nkele testified that "at that point, I'm thinking . . . honestly and truthfully . . . we're going to sleep this off. I'm going to take him to a bed, we're going to sleep this off and deal with all this in the morning." Massey did not want to deal with the police, and Drummond had said he wanted to go home. Esho, Nkele, and Massey placed Drummond in Esho's car and took him to a sorority on 2311 Prospect Street, where Nkele was staying. Once he was in Nkele's room, Esho noticed that

Drummond was bleeding from the nose and was nonresponsive. Esho called 911.

Emergency personnel responded to Esho's call but were unable to save Drummond. Drummond died from a gunshot wound to the right hip, penetrating his pelvis, fracturing his pelvic bone, and hitting a major blood vessel. He suffered substantial internal bleeding and went into shock. He had gunshot residue on his hands. It is impossible to determine whether Drummond would have survived the injury had he received prompt medical attention.

On the afternoon of September 4, 2006, Esho, Massey, and Nkele identified Crowder as the person who had argued with Drummond early that morning.

The police interviewed Crowder in September 2006 and learned that Crowder had gone to school with the person who shot Drummond.

In 2008, the police learned that Crowder was involved in a criminal threats case. Crowder turned himself in to the Berkeley police department on February 13, 2008 on the threats warrant. Crowder waived his *Miranda* [FN4] rights and eventually identified [Petitioner]'s photograph from a middle school yearbook as Drummond's shooter. He then identified [Petitioner] from a photographic lineup.

FN4. *Miranda v. Arizona* (1966) 384 U.S. 436.

On February 19, 2008, the police transported Crowder and [Petitioner] in a van from the Berkeley jail to the North County jail for court. The van had a tape recorder and during the drive [Petitioner] made various comments to Crowder including, "You think it's hard now? Shit's

about to get real out here. . . . Respect my gangster. . . . No turning back." [Petitioner] also told Crowder, "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again." And [petitioner] said, "Man, fuck this . . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is."

On February 14, 2008, Esho identified [Petitioner] as possibly being the shooter in two photographic lineups. Esho identified [Petitioner] as the shooter at both the preliminary hearing and at trial. Massey was not absolutely sure that [Petitioner] was the shooter.

Crowder was initially a codefendant with [Petitioner] at trial. After the jury was selected, however, Crowder entered into a plea agreement with the prosecution under which he agreed to testify against [Petitioner]. Crowder testified that he entered into a written plea agreement under which he agreed to plead no contest to a charge of voluntary manslaughter, with the understanding that he would testify truthfully in the case and in exchange he would be sentenced to time served.

Crowder testified that he suffered a misdemeanor conviction for possession of stolen property in 2005. In September 2006, he was 19 years old and living in Berkeley. He had known [Petitioner] since middle school. He met Drummond through a friend at a party in 2005. Drummond was friends with Nkele, who was also one of Crowder's friends. Drummond was a mentor to Crowder in 2006, but at some point, they were no longer getting along. Crowder grew annoyed with him. He told others that he wanted to "get" him or "stomp" him.

> On September 3, 2006, Crowder drove to Blakes with some friends and smoked some marijuana. At Blakes, Crowder shared some marijuana with [Petitioner]. At about 1:30 a.m., he left Blakes and saw [Petitioner] hanging around with some people. He shook [Petitioner]'s hand, and [Petitioner] said, "I'll see you next time."
>
> Esho then approached Crowder and greeted him, but Crowder focused on Drummond who was behind Esho. Crowder and Drummond started to talk "trash" to each other. They began to argue and agreed to fight. Crowder testified, "I was fed up with all the name calling, and I was just kind of excited." They walked up Telegraph and then turned right on Durant. Esho, [Petitioner], and others followed them "to see a fight." He could hear [Petitioner] talking but he did not remember what he said. At some point, they stopped walking, faced each other, and continued the name calling. They called each other "bitch" and were pushing each other. Esho was trying to break them up. Drummond pointed to Crowder and said, "I'll fuck you up"; he also pointed to [Petitioner] and said the same thing. Crowder stepped back. [Petitioner] broke through the crowd, pulled out a gun, and pointed it at Drummond's neck. [Petitioner] told Drummond, "You need to give me your money right now." Drummond wrestled with [Petitioner] for the gun and then a shot went off. Drummond jumped back and then ran up Durant. Crowder did not think that Drummond had been shot. After meeting up with Nkele, Crowder drove to the Chevron station to meet with Trevina, a female friend. Crowder positively identified [petitioner] as the shooter.

(Op. at 2-6.)

DISCUSSION

I. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 384-86 (2000), while the second prong applies to decisions based on factual determination, *Miller-El v. Cockrell*, 531 U.S. 322, 340 (2003).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if the state court correctly identifies the

governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "Under§ 2254(d)(l)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409. The federal habeas court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In determining whether the state court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest state court to address the merits of a Petitioner's claim in a reasoned decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000). Here, that decision is the opinion of the California Court of Appeal on

direct appeal with respect to the first three claims stated below. (Ans. Ex. I.) The claims of ineffective assistance of counsel were raised in state habeas petitions and summarily denied. See *supra* at 2.

The Supreme Court has vigorously and repeatedly affirmed that under AEDPA, there is a heightened level of deference a federal habeas court must give to state court decisions. *See Hardy v. Cross*, 132 S. Ct. 490, 491 (2011) (per curiam); *Harrington v. Richter*, 131 S. Ct. 770, 783-85 (2011); *Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (per curiam). As the Court explained: "[o]n federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Id.* at 1307 (citation omitted). With these principles in mind regarding the standard and limited scope of review in which this Court may engage in federal habeas proceedings, the Court addresses Petitioner's claims.

II. Petitioner's Claims

Petitioner claims the following as grounds for federal habeas relief: (1) the trial court erred in denying the defense's request for a continuance based on counsel's incapacitating injury, violating Petitioner's right to due process; (2) the trial court erred by refusing to grant a new trial based on ineffective assistance of counsel, violating his Sixth Amendment right; (3) the trial court erred by refusing to grant a new trial based on newly discovered evidence, violating his rights to a jury, to present a defense, and to due process; and (4) ineffective assistance of counsel based on five failures (Claims 4-8).

A. Refusal to Grant a Continuance (Claim 1)

Petitioner's first claim is that the trial court violated his right to due process by failing to grant a continuance based on his trial counsel's back injury, pain and effects of pain medication. (Pet. Attach. at 4.)

The California Court of Appeal reviewed what occurred at trial with respect to this claim:

> On June 15, 2009, during the prosecution's case, the court recessed the trial until June 29, 2009 because it was going to be covering another judge's calendar the following week. On Monday, June 29, 2009, defense counsel informed the court that he had gone to the emergency room at Highland Hospital on Saturday, June 26, 2009 because of intolerable back pain. Dr. Nagdev gave him a prescription for Vicodin and said that his symptoms were consistent with radiculopathy or a compressed nerve. Defense counsel represented that he was told he could return to work in five days. He also told the court he did not feel able to function, he could feel the effects of the Vicodin, and he was in significant pain. Defense counsel said, "the analogy I would use . . . if I were an airplane pilot, I don't think I'd be flying a plane today. But it's obviously the Court's decision whether [to] proceed or not. I'd like to go home, but if I have to sit here and try this case, that's what I'm going to do." The prosecutor indicated that he had offered to help defense counsel with exhibits, recordings, and other matters so that defense counsel could remain seated during questioning and examination and that he anticipated resting the case on Wednesday. Finally, the prosecutor said that it was "the People's position that we go forward, and if at some point during the day it becomes unbearable for Mr. Kelvin, perhaps he can let

us know. In other words, to go forward with what we have now." The court stated, "I don't care what the People's position is, quite frankly. [¶] Here's the issue. Mr. Kelvin, you've indicated you've had this. I have back pain every day. And I think I told the lawyers, every day I do 20 minutes of stretching. It's been since 2003 where I saw an orthopedist, and I continue to do this because it's part of the routine. We all have, as we age, we get these back issues. I was reading a book right now regarding somebody and [his] back. [¶] I do have this emergency [form]—from an emergency doctor at Highland who says, '[r]estrictions, no work requiring repetitive bending.' And I do have Mr. Kelvin saying that he's had this back pain for a while, but he went in on Saturday and he's taking this medication. Just knowing the back, knowing what I go through, and I'm not discounting anything you say regarding this, because it talks about a possible sprain of the back and it tells you it could reappear or it couldn't, when it says about—in this little information you gave me, Mr. Kelvin. [¶] Are you seeing an orthopedist, Mr. Kelvin? [¶] [MR. KELVIN]: I don't know what qualifications Dr. Nagdev has. He [was just] an emergency room doctor. . . . I'm supposed to be arranged for an MRI today, but obviously if I'm here—[¶] [THE COURT]: It sort of seems to me—well, like I said, I've seen an orthopedist, and they didn't do an MRI off the top. They just don't do it, not a specialist in this area. I'm not certain why they haven't referred you to an orthopedist, because it's a back. It's not an emergency room specialist. They don't have the expertise to deal with backs. And like I said, this is something that we have. This is what we just live with. [¶] My inclination was that—and before even Mr. Wellman [deputy district attorney] made his

statement, my inclination is to move forward today, because you're going to have this back pain. There's not too much I can do about it, and I don't think there's much you can do about it. It's a thing that's going to be a whole process for the rest of your life. We would take—my thought is we're going to take breaks a little more frequently than we do, that you can cross-examine from the bench, Mr. Kelvin, if you don't feel you can stand up and do it. [¶] What it's saying here is you shouldn't be bending. Doesn't say you shouldn't be standing. Actually, standing is probably better, but I don't know. I'm not certain what—I can't read into this or what the doctor is saying. That's what my thoughts are. [¶] [MR. KELVIN]: The only other comment I would have, I have a number of materials relating [to] this case in the car, which I didn't carry in the court because it was kind of hard to carry them. But I'll just limp back and get them if I can get them in. [¶] [THE COURT]: No. Mr. Payne will get them for you, from the DA's office. [¶] [MR. KELVIN]: He doesn't know where they are. [¶] [THE COURT]: He'll go with you, and he's going to carry them back for you. [¶] [MR. KELVIN]: Okay. Then I'll have a helper. [¶] [THE COURT]: That's my thought. And we are going to be off—assuming that Mr. Wellman finishes, I would have us off after Wednesday. You wouldn't come in on Thursday. [¶] And I'm not certain what you are going to do with your case, Mr. Kelvin. If you're going to call witnesses, we would start on Monday with the witnesses. And if not, we'll start—we'll also do instructions and prepare for argument." Defense counsel then expressed concern that the prosecution intended to call Crowder that day so he needed to go get the recorded statements. The court then deferred Crowder's examination until after the

prosecution completed several other witnesses. Hence, the court's minutes reflect that trial was in session for approximately four hours, [FN5] with the court taking three recesses during that period. [FN6]

> FN5. In its preliminary instructions to the jury, the court informed it that the court would be in session from 9:00 a.m. to 1:30 p.m. with recesses in between on Mondays through Thursdays and that court was not in session on Fridays.
>
> FN6. The court's minutes show that questioning of witnesses began at 9:20 a.m., a recess was taken at 10:02 a.m., and questioning resumed at 10:30 a.m. Trial was again recessed at 11:36 a.m., and at 11:53 a.m., court and counsel discussed matters outside the presence of the jury. The court recessed again for four minutes and then resumed trial at 11:59 a.m. At 12:25 p.m., the People called and began the examination of Crowder. At 1:19 p.m., the court ordered the jury to return the following morning. The court then discussed a couple of notes from jurors before adjourning at 1:24 p.m.

On June 30, 2009, defense counsel again asked for a continuance. The following colloquy occurred: [MR. KELVIN]: "Yesterday I raised an issue concerning my ability to perform in this case based on health factors. I have to tell you today I feel worse than I did yesterday. It took me half an hour to walk from my car to here, which is a block and a half away. I don't feel that Mr. Beaudreaux has an attorney in the meaningful sense of the word. My back hurts real bad and I should be either getting my MRI in line now. And having said that, I know the Court's position. But yesterday I was working all day and I don't know. I'm just a layperson, but to me it exacerbated the

situation. I'm in bad pain and I was unable to concentrate on what Mr. Crowder was saying yesterday. He's the most critical witness in the case. I don't know what anybody is supposed to do about it. I know Mr. Wellman wants to finish the trial. [¶] [THE COURT]: Finishing the trial has nothing to do with it. Mr. Kelvin, yesterday you went through some of these witnesses who were probably two-minute witnesses, you spent 15 minutes on cross-examination. To the extent you had the inability to perform as a lawyer, I didn't see it. In fact, I was amazed with the amount of time that you spent and the issues that you took up with some of these witnesses. So to that extent, you perform well and beyond anybody I've seen in any courtroom as it relates to cross-examining and dealing with issues with witnesses. [¶] Yesterday after everybody left you were here for another 15 minutes. You were walking around, you were doing something with the video. I understand if, yes, you may have some back pain. I had back pain this morning, as I say every day. I have sciatica. I feel the numbness in my legs. I'm here. [¶] You have done, in terms of performing as counsel, I'm just not certain what the real issues are. To the contrary, your performance is totally contrary to the state of condition that you indicated that you were in yesterday. [¶] [MR. KELVIN]: Well, Judge. [¶] [THE COURT]: And I did take several recesses yesterday, including one which was a half an hour long, which is definitely longer than ever that we take a recess in this department. [¶] [MR. KELVIN]: Judge, I'm not going to sit here and not try to do the best I can, but my best at the moment is not much. I just feel that my client's interests are being prejudiced. I did stay yesterday after the jury left because I was trying to get my computer to display

the recorded interview of Mr. Crowder. It works on the computer, but on the screen on the wall there's a signal saying that it's not right. I have an attorney, Mr. Andrew Kapur, who is very technically skilled, and I was going to set it up before we went on the record this morning so my computer will work. Mr. Wellman says, well, his computer is plugged in and he didn't want to unplug his so I can plug mine in. I'm still not in a position to display the interview of Mr. Crowder, which I wanted to do. That's a whole different issue. [¶] If the Court thinks I'm malingering or I'm just trying to make an excuse to delay the thing, that's an assessment the Court has to make. I'm telling you, I'm in pain. I'm not able to do my job. And if the Court is ordering me to proceed, that's what I'm going to do, but I'm just not—I should be lying down. [¶] [THE COURT]: What did you do after you left here yesterday, Mr. Kelvin? [¶] [MR. KELVIN]: I went to one other court and went home about 4:00 o'clock and I laid down until the morning. [¶] [THE COURT]: Why did you go to another court if you were in such a condition? Why didn't you call that court or have my clerk call that court? I don't understand that. [¶] [MR. KELVIN]: Because that court is your Judge Bean's court and I delayed it last week and I promised her I'd be there yesterday. [¶] [THE COURT]: You mean you drove all the way down to Hayward from here yesterday? [¶] [MR. KELVIN]: Yes, I did. I felt like I'd already delayed her case one time and I don't like to be unreliable. In fact, I met in the hallway in Hayward an attorney Mike Wohlstadter, who you know well, and he came up to me unsolicited and said, "Mr. Kelvin, you look terrible. You look like you're in bad pain. Your eyes are sunk in your head." This is a guy who I didn't ask him to come up and tell

me this. [¶] [THE COURT]: Mr. Kelvin, you went down to Hayward for a misdemeanor, and you could have had this Court call down there? [¶] [MR. KELVIN]: You know, Judge, those are the facts. I'm not going to sit here and lie about them. I've been in my bed since 4:00 o'clock yesterday afternoon. And I got up this morning and I felt worse than I did yesterday. That's just—those are the facts as I'm aware of them. If the Court's position is I have to proceed with the trial, then that's what I'm going to do. I'm not able to do the things that I need to be doing. I can't concentrate. All I can think about is how bad my back hurts and that's the situation. . . ." The court then recessed for a minute and when trial resumed, asked defense counsel if he had taken any medication. Defense counsel responded that he was taking Vicodin and had last taken one at 5:00 a.m. He also informed the court that he had taken one at 4:00 p.m. and at 8:00 p.m. the previous day. Counsel reiterated that he could not do what was required of him, that his back hurt "pretty bad" and described his pain level as worse than the "seven or eight" it had been on Saturday. The court then continued the matter to the following day. But before the court could adjourn for the day, defense counsel requested some time to discuss jury instructions and to work with a computer technician to set up a video. The court became exasperated with counsel, telling him, "I can't believe I'm having this discussion where you say you have to be home, you need to be resting and you're talking about doing this computer. I can't believe I'm having this discussion. [¶] Go ahead, Mr. Kelvin. I expect you here tomorrow morning to be prepared."

The following day, July 1, 2009, defense counsel presented the court with a note from

Highland, stating he was to be off work until July 6. Counsel stated, "I understand that that can't happen, but just want to say for the record I feel today like I felt yesterday, which is not good. I would ask that this be placed in the file. It's a letter from Alameda County Medical Center regarding the state of my health." The court asked counsel about his state of mind. Defense counsel responded, "It's pretty much like it was yesterday. I'm in a lot of pain, but I don't want all these people sitting here and waiting for me. I feel bad about it. So I'll proceed." The following discussion ensued: "[THE COURT]: "There is a threshold of pain. As I said to you, I'm in pain today, and I've been that way for six years. That's just something I deal with. And sometimes it's worse than on other days. That's just what I deal with. I mean, to that extent that's what I'm asking you. Yes, you are in pain? [¶] [MR. KELVIN]: Yes. And I understand that we have to make sacrifices. All I can say is as long as I'm lying down in a bed, you know, taking medication with a heating pad under me, I'm fine. But when I get up and start walking around, it's fairly painful. So getting in the courtroom today was a process. But hopefully as long as I'm— I'm planted in a chair and I'm going to go ahead. [¶] [THE COURT]: Let's keep you in the chair. I don't have any reason for you to stand up." Defense counsel indicated that Andrew Kapur, an attorney that he works with, would be assisting him to play some recorded statements of Crowder, and the prosecutor also expressed his willingness to assist defense counsel with exhibits.

Trial then proceeded at 9:08 a.m. with the completion of the direct and cross-examination of Crowder, and the examination of Michelle Dilbeck, an expert in the field of firearms examination, Ann Keeler, an expert in the field of gunshot

residue, and police officer Todd Sabins. The court's minutes reflect that the court took three recesses ranging in time from 16 minutes to 23 minutes, with the court adjourning for the day at 1:29 p.m.

Prior to adjourning, the court remarked, "I want to say for the record, having observed Mr. Kelvin today, he's had an incredibly extensive cross-examination of each of the witnesses. He has performed as he generally does. He has moved slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits, and I just want to make sure the record is clear as it relates to that activity and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse." Defense counsel responded that he was in some pain and distress but was trying to do the best he could.

Trial resumed on July 2, 2009, without any request by defense counsel for a continuance or accommodation for his back problem. The prosecution and defense both rested their cases.

On Monday, July 6, 2009, trial resumed with the court commencing jury instructions. The court declared a brief recess almost immediately as one of the jurors felt ill and needed a five minute break. Defense counsel informed the court that he was not feeling well and then proceeded to discuss a jury instruction issue. In the midst of that discussion, defense counsel implied that he would have given the court case authorities earlier but "I can't even walk. I can't get out of my car. It took me a half an hour to walk two blocks, and I'm doing the best I can. I apologize." In response, the court remarked that he appreciated that defense counsel was making his record. The parties proceeded to

> discuss jury instructions, followed by the court's instructions to the jury, and closing arguments and the court's final instructions to the jury. The jury retired for deliberations. In noting his availability for the following day, defense counsel noted that he had a motion in Department 115 and a trial in Department 130.

(Op. at 7-13.)

After a thorough review of the record, the Court of Appeal rejected Petitioner's claim:

> The trial court has broad discretion in determining whether good cause exists to grant a continuance of the trial. (§ 1050, subd. (e).) "'The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 972, quoting *People v. Laursen* (1972) 8 Cal.3d 192, 204.) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.) Defendant bears the burden of demonstrating that the court's denial of a continuance was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)
>
> While we do not condone the trial court's interjection of its own back pain threshold into its analysis of defense counsel's pain issue, our review of the record convinces us that the court did not abuse its discretion.

First, it is unclear from the record whether defense counsel's emergency room doctor ordered that he not return to work for five days. The doctor's note that counsel provided to the court indicated simply that he was restricted from work that required repetitive bending. [FN7] Second, although defense counsel claimed to be both in significant pain and under the influence of Vicodin, the record reflects that he nevertheless proceeded to cross-examine several prosecution witnesses and appeared to be engaged in the trial. The court took two recesses, of 17 and 28 minutes, in the four-hour-long court day, and a third recess of four minutes. Defense counsel did not indicate at any time during that court day that he was unable to proceed, and the court later remarked on counsel's thorough cross-examination.

FN7. The note from the emergency room physician is not in the record.

When defense counsel informed the court the following day that he was still in significant pain, the court recessed for the day. The court, however, noted for the record that counsel had not left the court immediately upon adjournment the previous day but had spent another 15 minutes working with the video equipment. The court was also chagrined to learn that defense counsel had driven to another court in Hayward that afternoon rather than resting. [FN8].

FN8. Although the court continued the matter for a day, it did so only after reminding defense counsel that he was not to go to other courts that day: 'Mr. Kelvin, here's what I'm telling you right now: If I'm going to continue and delay this case because you have this back pain and you say that you can go down and

make an appearance at another court, I'm questioning your representation.

Finally, when trial resumed on July 1, 2009, defense counsel, although giving the court a note from Highland Hospital stating he should be off work until July 6, [FN9], and informing the court that he was still in pain, did not request a continuance but told the court that he would proceed with the trial. Again, the record reflects that counsel performed diligently in cross-examining witnesses and engaging in discussions with the prosecutor and the court. The record further reflects that counsel complained a final time about pain on July 6, 2009 during a discussion on jury instructions but notably did not request a continuance but rather proceeded to argue about jury instructions. In addition, when the jury retired for deliberations, counsel informed the court of his scheduled appearances in other court rooms for the following day, one of which included a trial.

FN9. The letter is not part of the record.

In sum, the record demonstrates that defense counsel, despite complaints of back pain and sporadic requests for continuances, proceeded to provide [petitioner] with effective representation. Even if we were to conclude that the court abused its discretion in denying counsel's initial request for a continuance, there is simply no showing that defendant was prejudiced.

People v. Crovedi (1966) 65 Cal.2d 199, 201, cited by [petitioner], is inapposite. That case involved the issue of defendant's right to counsel of choice. There, the defendant's attorney suffered a heart attack after the first four days of trial. The court continued the matter for two weeks and then denied defendant's request for a continuance even

though his attorney's law partner presented medical documentation that defendant's counsel would not be able to resume the trial until seven weeks later. (*Id.* at pp. 201-202.) Instead, over the defendant's and the law partner's objections, the court appointed the law partner to represent defendant, allowing him only one week to prepare for trial. (*Id.* at p. 203.) Our Supreme Court held that the trial court's refusal to permit the defendant to be represented by his counsel of choice constituted a denial of due process. (*Id.* at p. 208.) [FN10]

> FN10. *People v. Panah* (2005) 35 Cal.4th 395 (*Panah*), cited by [petitioner], is also of no assistance to him. That case, like *Crovedi, supra*, involved an issue of choice of counsel. (*Panah, supra* at pp. 426-427.) While the defendant there requested a continuance to permit his secondary counsel to recover from a back injury, the court questioned the true reasons for the request, noting that defendant's primary counsel had already informed the court that his secondary counsel was not qualified to try the case and that he was making 97 percent of the decisions in the case. (*Id.* at pp. 423-424.) The court ultimately removed the secondary counsel and replaced him. (*Id.* at p. 426.) *Panah*, while concluding that the court did not abuse its discretion in denying a continuance, did not involve a situation where counsel is present in court and the court has the opportunity to observe counsel's abilities and physical appearance

Here, by contrast, defense counsel appeared in court and although he complained of pain, he continued to afford [petitioner] effective representation. "[W]here defense counsel present in court

> requests a continuance on the grounds of illness, a factual issue is presented for the trial court as to whether the attorney's condition precludes him from effectively proceeding with his defense [citations]." (*People v. Augustine* (1968) 265 Cal.App.2d 317, 329.) The trial court, based on its discussions with and observation of defense counsel in court, determined that counsel was not incapacitated and that he was fully able to proceed with the trial. Our review of the record substantiates the trial court's observations. Not only did defense counsel provide [petitioner] with adequate representation, he did so in the face of overwhelming evidence of Esho's and Crowder's eyewitness identifications of [petitioner] as the shooter.

(Op. at 13-16.)

To establish a constitutional violation based on the denial of a continuance motion, a petitioner must show that the trial court abused its discretion through an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Houston v. Schomig*, 533 F.3d 1076, 1079 (9th Cir. 2008) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (finding trial judge acted within his broad discretion in denying motion for continuance to retain private counsel). In addition, the improper denial of a requested continuance warrants habeas relief only if there is a showing of actual prejudice to petitioner's defense resulting from the trial court's refusal to grant a continuance. *See Gallego v. McDaniel*, 124 F.3d 1065, 1072 (9th Cir. 1997).[2]

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[2] *Accord Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (habeas petitioner not entitled to relief unless record demonstrates actual prejudice, i.e., that trial error had

(continued...)

A requisite abuse of discretion will be found if, after carefully evaluating all relevant factors, it is concluded that the denial is arbitrary or unreasonable. *See Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986). When considering whether there has been an abuse of discretion, the court looks to four factors: (1) the degree ,of diligence by the defendant prior to the date beyond which a continuance was sought; (2) whether the continuance would have served a useful purpose if granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the amount of prejudice suffered by the defendant as a result of the court's denial. *See id.*; *see, e.g., United States v. Thompson*, 587 F.3d 1165, 1173-75 (9th Cir. 2009) (finding district court did not abuse its discretion in denying defendant's request for reappointment of counsel/continuance at final pretrial conference, held three and a half years after the initial pretrial conference; request was made for purposes of delay and to disrupt proceedings); *Gallego*, 124 F.3d at 1072 (district court did not err in denying habeas relief where petitioner did not show actual prejudice to defense from trial court's refusal to grant continuance).

Petitioner's claim is without merit because the trial court's denial of a continuance was neither arbitrary or unreasonable as determined by the state appellate court. The state court opinion reflects a thorough review of the record as shown by its detailed account of what occurred at trial with

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(...continued)
substantial and injurious effect or influence in determining the jury's verdict).

respect to counsel's requests for a continuance based on his back troubles. With respect to the first two factors under *Armant*, 772 F.2d at 556, there was first no diligence by counsel prior to June 29, 2009, when he requested a continuance in court, and second, it seems unlikely that a continuance would have served a useful purpose since counsel continued to work on other trial matters after the trial recessed the same day. *See supra* at 11. With respect to the third factor, the continuance would have inconvenienced the court and the opposing party because the trial had already been in recess for two weeks prior, and the prosecution wanted to proceed. *See supra* at 9. Lastly, it does not appear that the defendant was prejudiced by the denial because, as the trial court observed, counsel was performing "well and beyond anybody" with cross-examination that day. *Id.* at 11. These factors do not indicate an abuse of discretion by the trial court. Furthermore, the trial court duly considered the emergency room doctor's note, which only stated that counsel should refrain from repetitive bending. *Id.* at 9. To accommodate that directive, the court stated that they would take more frequent breaks and that counsel could remain sitting during cross-examination. *Id.* at 10. Counsel also had assistance from the DA's office with retrieving materials from his car. *Id.* Lastly, the state appellate court observed that during the four hours that the court was in session that day, counsel never indicated that he was unable to proceed. *Id.* at 14. Rather, as Respondent points out, counsel was able to conduct an extensive cross-examination of prosecution witness Shandon Massey during which he was able to effectively cast doubt on the reliability of his direct testimony. (Ans. at 18-19, citing to Ex. B at 392-93, 395, 385-402, 527, 413-14, 420 and 428.) Based on

these facts, the state court was not unreasonable in determining that the trial court did not abuse its discretion by denying a continuance on June 29, 2009.

The record also shows that the trial court did in fact grant one of counsel's requests for a continuance. The following day on June 30, 2009, when counsel again complained of back pain and indicated that he had been taking Vicodin, the court decided to continue the matter until the next morning. *See supra* at 11-12. The court granted the continuance despite its observation that counsel's performance "[was] totally contrary to the state of condition that [he] indicated that [he was] in yesterday." *Id.* at 11. Therefore it cannot be said that the trial court disregarded counsel's complaints of pain in an arbitrary manner. But even after the continuance was granted, counsel still wanted to discuss jury instructions and work with a computer technician, belying his insistence that he needed immediate rest. *Id.* at 12.

Although defense counsel continued to complain sporadically of pain during the remainder of the trial, he made no further requests for a continuance. Counsel presented a note from Highland Hospital on July 1, 2009, and continued to assert that he was in pain, but he agreed to proceed with the trial. *See supra* at 12. At the end of the day, the court noted that counsel "performed as he generally does" and "it doesn't appear that anything suffered in terms of his abilities here." *Id.* at 13. Indeed, the record shows that counsel was able to conduct an extensive and effective cross-examination of Brandon Crowder, a key prosecution witness: counsel was able to establish that Crowder repeatedly lied, made inconsistent statements, and withheld information

from the police on several occasions. (Ans. at 19, citing Ex. B at 531-32, 543-44, 546-48, 540-41, 554, 548-49, 554-55, 557, 585, 557-559, 559-64, 562, 569, 567-68, 569-70, 571-72, 578-80, 580-84.) Trial resumed the following day without any request by counsel for a continuance or accommodation for his back problem. *See supra* at 13. Counsel also thoroughly cross-examined Dayo Esho, casting doubt on his direct testimony. (Ans. at 20, citing Ex. B at 726-27, 736-45, 717-19, 719-23, 744-45, 729-34.) Before resting his case, counsel presented two Berkeley Police officers as defense witnesses and gave a vigorous closing argument, stressing the unreliability of Crowder's testimony and the weaknesses in the identification of Petitioner as the shooter. (Ans. at 20, citing Ex. B at 754-55, 765-66, 850-83.) After resting on Thursday, July 2, 2009, trial resumed on Monday morning, July 6, 2009, with the court commencing jury instructions. *See supra* at 13. Counsel complained of pain again during a discussion on jury instructions, but did not request a continuance. *Id.* The parties resumed the discussion on jury instructions, and after the jury retired for deliberations, counsel indicated that he had court appearances for other matters scheduled the following day. *Id.* This record demonstrates that defense counsel continued to provide Petitioner with effective representation such that Petitioner suffered no "actual injury" by the denial of a continuance. *See Brecht*, 507 U.S. at 637. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

B. Refusal to Grant a New Trial

Petitioner's second claim is that the trial court erred by refusing to grant a new trial based on ineffective assistance of counsel (Claim 2) and based on newly discovered evidence (Claim 3).

1. New Trial based on Ineffective Assistance of Counsel (Claim 2)

The Court of Appeal rejected Petitioner's claim that a new trial was warranted based on ineffective assistance of counsel:

> In order to prove a claim of inadequate representation, a defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Effective and competent representation requires "counsel's 'diligence and active participation in the full and effective preparation of his client's case.' [Citation.]" (*Id.* at pp. 424-425.) We will reverse a conviction on the ground of inadequate counsel only if the defendant affirmatively shows that the omissions of defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Zapien, supra,* 4 Cal.4th at p. 980.) The defendant must also establish prejudice from counsel's acts or omissions. Ordinarily prejudice must be affirmatively proved; the defendant must establish the reasonable probability that had counsel not been incompetent, the proceeding would have had a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)
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> In his motion for a new trial, defendant alleged that his counsel's back pain prevented him from providing effective representation. In particular, defense counsel's declaration submitted in support of

the motion averred that due to his back pain, his "contact visits with [petitioner] [] during trial were infrequent and brief" and that he was unable to devote any time outside of court to meet with him and prepare him to testify. He further declared that a recent MRI showed that he had bulging discs at L4-L5 and L5-S1, impinging on a nerve and that he was awaiting corrective surgery.

The trial court properly denied the motion. "[T]he trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel's acts or omissions were those of a reasonably competent attorney." (*People v. Jones* (1981) 123 Cal.App.3d 83, 89.) This was not defense counsel's first case before the trial court; the court was familiar with defense counsel, and acknowledged that he tried this case in accordance with his usual standards, noting that his "performance [was] totally contrary to the state of condition that you indicated that you were in . . ." The court further commented that defense counsel "performed as he generally does. He has moved slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits . . . and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse."

The record reflects that defense counsel informed the court that he did not intend to call [petitioner] to testify. At no point did defense counsel subsequently tell the court that he had changed his mind on that issue or that he needed additional time to prepare defendant to testify. The defense theory was that Crowder was lying and defense counsel sought both in his cross-examination and in closing argument to discredit Crowder and the other prosecution witnesses. We cannot

> second guess defense counsel's strategy. While in hindsight he claimed that [petitioner] would have testified, [petitioner]'s testimony would have been problematic as he had made pretrial incriminatory statements and had suffered a prior conviction involving gun use. Moreover, our review of the record persuades us that [petitioner] was not prejudiced by his counsel's decision. In view of the eyewitness testimony that [petitioner] was the shooter, it is not reasonably probable that defendant would have received a more favorable verdict. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

(Op. at 16-18.)

In reviewing this claim, the Court will look to the underlying argument that counsel rendered ineffective assistance. In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective" standard of reasonableness" under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Court has already evaluated counsel's performance in light of his back-pain in rejecting the first claim involving the denial of a continuance. Simply put, Petitioner cannot show that he was prejudiced by any alleged deficiency in counsel's performance. *Strickland*, 466 U.S. at 694. Rather, counsel was able to conduct extensive and thorough cross-examinations of the prosecution's witnesses,

present defense witnesses, and give a vigorous closing argument. *See supra* at 17-18.

With respect to counsel's declaration that his back injury kept him from having Petitioner testify, (Pet. Ex. B at 4), the Court of Appeal noted that the record showed counsel actually informed the court that Petitioner did not intend to testify, and "[a]t no point did defense counsel subsequently tell the court that he had changed his mind on that issue or that he needed additional time to prepare defendant to testify." *See supra* at 20. By his declaration, counsel also fails to set forth what Petitioner would have testified to or how his testimony would have affected the outcome in favor of Petitioner. On this basis, the state appellate court found little merit in counsel's contention in hindsight that he would have had Petitioner testify because such testimony would have been more problematic than beneficial, especially considering Petitioner's pretrial incriminatory statements and prior conviction involving gun use. *Id.* Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

2. New Trial based on Newly Discovered Evidence (Claim 3)

The Court of Appeal also rejected the claim based on new evidence:

> Defendant also argues that the court should have granted a new trial based on newly discovered evidence. In support of his motion for a new trial, defendant submitted

the declarations of two friends, Elisha Nelson and Amber Hill. Nelson declared that she was a friend of Ronald Benjamin, who was now deceased. She stated that Benjamin told her at her birthday party on September 4, 2006 that he had shot someone earlier in the day. He asked her to keep the information to herself but when she heard of defendant's conviction, she got in contact with defendant's counsel. Hill, in turn, averred that she was friends with both defendant and Benjamin and that she was at the scene of the shooting. She was with defendant when the fight broke out between two men outside Blakes. She and defendant followed a crowd of people around the corner. The smaller of the two men fighting challenged people in the crowd, including Benjamin, and swore at them. She heard a gunshot and declared that defendant did not have a weapon in his hand and did not fire any shot, but that the sound of the gun came from where Benjamin was standing.

"A defendant on a motion for a new trial based on newly discovered evidence must show . . . that the evidence is in fact newly discovered; that it is not merely cumulative to other evidence bearing on the factual issue; that it must be such as to render a different result probable on a retrial; and that the moving party could not, with reasonable diligence, have discovered and produced the evidence at trial." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.)

Here, defendant failed to show that the evidence was newly discovered or that it could not have been discovered and presented at trial. As the trial court remarked prior to denying the motion: "I find it fascinating that Ms. Nelson visited [petitioner] 21 times in the Santa Rita Jail. The 21 times in all this interaction, there's never been any

> information that the lawyers derive from her or defendant that she was a witness and could corroborate certain facts and circumstances in this case. . . . I don't know if it's coincidental that Mr. Benjamin, who is dead, is said to have said that before he died sometime that he shot somebody off around the corner from Telegraph. If it's coincidental or not, I don't know." Indeed, the record reflects that Nelson visited [petitioner] 21 times between May 16, 2008 and March 22, 2009, well before trial commenced. On these facts, her declaration that she acceded to Benjamin's request to keep his information confidential, and felt compelled to reveal it only after hearing of defendant's conviction lacks credibility. In addition, as the court noted, Nelson's declaration does not state that Benjamin shot Drummond, only that he shot "someone." Finally, defendant failed to show that Hill's declaration was newly discovered. Her declaration was also questionable. As an eyewitness at the scene of the crime, and a friend of defendant's, the timing of her statement alone was cause for suspicion. Moreover, she did not aver that Benjamin was the shooter, just that the sound of the gunshot came from where he was standing.
>
> The trial court justifiably denied the new trial motion based on this evidence, and based on the absence of any showing that this evidence could not have been discovered and produced at trial. [FN11]
>
> > FN11. By separate order today, we deny defendant's petition for writ of habeas corpus.

(Op. at 18-19.)

Respondent asserts that the claim is essentially one of actual innocence that has no merit. (Ans. at 26.) "Claims 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." *Herrera v. Collins*, 506 U.S. 390,400 (1993). "This rule is grounded on the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.* (citations omitted). However, there is a narrow exception established by the Supreme Court that limits a "miscarriage of justice" exception to habeas petitioners who can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing *Murray v. Carrier*, 477 U.S. at 496); *see Johnson v. Knowles*, 541 F.3d 933, 936-38 (9th Cir. 2008) ("[t]he miscarriage of justice exception is limited to those extraordinary cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt."); *see, e.g., Wildman v. Johnson*, 261 F.3d 832, 842-43 (9th Cir. 2001) (petitioner must establish factual innocence in order to show that a fundamental miscarriage of justice would result from application of procedural default). The required evidence must create a colorable claim of actual innocence, that the petitioner is innocent of the charge for which he is incarcerated, as opposed to legal innocence as a result of legal error. *Schlup*, 513 U.S. at 321. It is not enough that the evidence show the existence of reasonable doubt; petitioner must show "that it is more likely than not that no 'reasonable juror' would have convicted him." *Id.* at 329. As the Ninth Circuit has put it, "the test is whether, with the new evidence, it is more likely than not that no reasonable juror would have found [p]etitioner

guilty." *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1084 (9th Cir. 2001). Here, Petitioner's proffered evidence does far from establish his actual innocence; at most, they are attempts at raising reasonable doubt which is insufficient.

On the other hand, Petitioner asserts that this claim is grounded in due process because the trial court should not have denied the motion without an evidentiary hearing. (Trav. at 33.) However, it appears that the trial court-duly considered the declarations and reviewed their content before the denying the motion. The court was justifiably unconvinced that the evidence was credible and could not be discovered and produced at trial. The court noted that Ms. Nelson visited Petitioner 21 times while he was in jail, which made it highly suspicious that such information did not come to light sooner. *See supra* at 22. Furthermore, her frequent visits to Petitioner made it less credible that she felt compelled to reveal the information only after hearing of Petitioner's conviction and conveniently, only after Benjamin had died. *Id.* Lastly, the content of the information—that Benjamin shot "someone"—does not conclusively show that Benjamin—and not Petitioner—was the one who actually shot Drummond. *Id.* Likewise, Hill's declaration was also questionable. The trial court was not unreasonable in finding that the timing of Hill's statement was suspicious in light of the fact that she was an eyewitness to the incident and a friend of Petitioner. Furthermore, her statement that "the sound of the gun came from where Benjamin was standing" does not establish that Benjamin himself was the shooter and definitively prove Petitioner's innocence. *Id.* Ultimately, the newly discovered evidence, which is highly suspicious and could have easily been discredited by the

prosecution if presented at trial, was not likely to have changed the outcome of the trial. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

C. Ineffective Assistance of Counsel (Claims 4-8)

Petitioner's final claims are based on his counsel's insufficient performance throughout the course of the trial. The state high court summarily denied these claims which were presented in habeas petitions. *See supra* at 2.

As discussed above, Petitioner must establish two things in order to prevail on a Sixth Amendment ineffectiveness of counsel claim. *Id.* at 20. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The *Strickland* framework for analyzing ineffective assistance of counsel claims is considered to be "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011). A "doubly" deferential judicial review is appropriate in

analyzing ineffective assistance of counsel claims under § 2254. See *id.* at 1410-11. The general rule of *Strickland*, i.e., to review a defense counsel's effectiveness with great deference, gives the state courts greater leeway in reasonably applying that rule, which in turn "translates to a narrower range of decisions that are objectively unreasonable under AEDPA." *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). When§ 2254(d) applies, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 131 S. Ct. at 788.

1. Failure to Renew Request for Continuance and to Inform the Court that Petitioner Wanted to Testify (Claim 4)

Petitioner claims that counsel was ineffective for failing to renew his request for a continuance and for failing to inform the trial court that he intended to have Petitioner testify. (Pet. Attach. at 10.) As discussed above, this Court found that the state appellate court reasonably rejected the related claims that the state trial court erred in denying a continuance or a motion for a new trial based on its determination that Petitioner was not prejudiced. *See supra* at 17-18, 20-21. Furthermore, counsel did in fact renew the request the following day and obtain a one day continuance. *Id.* at 17. Lastly, counsel's declaration indicates that he did not believe that he would have been granted a continuance if he had renewed his request in light of the trial court's belief that counsel was fully capable of proceeding. (Pet. Ex. B at 2.) If that was the case, trial counsel

cannot have been ineffective for failing to raise a meritless motion. *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996). Ultimately Petitioner cannot show that he was prejudiced by counsel's failure to renew his motion, i.e., that the result of the proceeding would have been different but for this alleged error. *Strickland*, 466 U.S. at 694.

Petitioner's second assertion is that counsel was deficient for failing to inform the court that he wanted to have Petitioner testify. In his state habeas petition before the Court of Appeal, Petitioner asserts that he would have testified as follows:

> On September 4, 2006, Ronald Benjamin and other people called me to a party in Berkeley near the record store on Telegraph Avenue. I drove there alone. I saw Brandon Crowder there—I didn't know his name at that time but he looked familiar. He came up to see me and other people and said he had marijuana for sale. My friend Ronald Benjamin was going to buy some but then Crowder offered to smoke some with us because of the girls that were standing around. The party ended shortly after that.
>
> I did not see Benjamin and so I went in front of Larry Blake's Club on Telegraph to wait for him. I heard a shot go off and people ran back inside the club. Five or ten minutes later the party-goers, including myself, came back out. That was when I saw Crowder who was about to fight someone (whom I later learned was Wayne Drummond), but the police were right there so the fight moved up the street. The crowd, including myself, followed the fight until we were in front of Tower Records. Crowder and Drummond were still about to fight.

I saw Benjamin with another guy and then walked away from where I had been standing near Amber Hill and walked over to Benjamin to watch the fight. Crowder looked over at me and Benjamin and said, "Y'all get him." In response to that Drummond ran up to our group and threatened everyone saying, "I'm going to fuck you up" and pointing to me. I thought at first that the group of people standing next to me was going to jump Drummond but then out of nowhere Benjamin pulled out a gun. Drummond was right in front of Benjamin and tried to take the gun from him. They fought over the gun back and forth and then the gun went off. People started running up and down the street.

At first I thought Benjamin had shot the sidewalk and missed Drummond because Drummond took off running up near the street and Benjamin went after him. I stood with the group of people around me and watched as Benjamin and Drummond went up the street. A friend of Drummond's who was standing next to me (whom I later learned was Dayo Esho) said, "Leave us alone, we don't want any problems." I told him, "I don't have nothing to do with that dude (meaning Drummond because I didn't know his name)." Esho then walked up the street after Drummond. I returned to Larry Blake's. After about five minutes I drove back to East Oakland.

The next day some people called and told me that the guy Benjamin "got into it with" died. I tried to call Benjamin but he didn't answer his phone for a few days. When I finally contacted him, he didn't want to talk about what happened, so I left it alone, so he wouldn't think I was trying to set him up. He was the kind of person that would say, "What, are you the police?" if you ask too

> many questions and I didn't want to get that thought in his head.
>
> I didn't even know Benjamin had a gun on him that night because we didn't come together, and he never said anything about it when I got to the club. I was just standing there when the whole thing happened, just like Esho and everyone else who was just standing there watching. I didn't push Benjamin to fight or help him in any way.
>
> I was going to testify to these facts at my trial. Mr. Kelvin was going to prepare me for testifying. But in the middle of our preparations he got sick and said he could not come to see me, and he couldn't carry his laptop and paperwork that we needed to get started. I asked Mr. Kelvin to just put me on the stand to testify out he said it wouldn't be good to do that. I never said anything to the judge because at the motion for new trial, Mr. Kelvin argued that I should have a new trial so I could testify.

(Ans. Ex. A, Ex. F at 1-3.)

Whether this self-serving testimony would have resulted in a more favorable outcome is unlikely because it is at odds with the strong testimonies of the key witnesses presented at trial. Notwithstanding his plea agreement, Crowder presented persuasive testimony identifying Petitioner as the shooter. It is undisputed that Crowder was familiar with Petitioner prior to the incident: Crowder knew Petitioner since middle school, and they had smoked marijuana together earlier on the night of the incident. *See supra* at 6. Crowder also stated that as they were verbally fighting, Drummond said, "I'll fuck you up," to Crowder, Petitioner and an unidentified third person. *Id.* Then Petitioner pulled out a gun, pointed it at Drummond's neck and demanded his money. *Id.*

The two then struggled over the gun, resulting in Petitioner shooting Drummond. *Id.* Crowder's testimony was corroborated by Shandon Massey and Dayo Esho, who also testified that they heard Drummond say "I'll fuck you up," and the shooter demand Drummond's wallet. (Ans. Ex. B at 174-75, 368-69, 370-71, 386-88, 431-32, 684-85, 688, 714-15.) In contrast, Petitioner makes absolutely no mention of this demand for money. In addition to Crowder's identification, Esho positively identified Petitioner as the shooter at the preliminary hearing and at trial. *See supra* at 5. Lastly, although Massey was not absolutely sure that Petitioner was the shooter, he was able to state hat a picture of Petitioner showed a man with "similar characteristics." (Ans. Ex. B at 390, 627-29, 645-46, 656-57.)

Furthermore, it is not likely that a jury would give much credence to Petitioner's version of events in light of the incriminating statements he made to Crowder during their transport from the Berkeley jail to the North County jail during trial on February 19, 2008. Petitioner's recorded comments to Crowder included the following: "You think it's hard now? Shit's about to get real out there. . . Respect my gangster . . . No turning back"; "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again"; "Man, fuck this . . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is." *See supra* at 5. These statements indicate a strong consciousness of guilt and includes no claim of mistaken identify or any reference to another possible shooter, much less any mention of Benjamin by name.

Because Petitioner's testimony was not likely to have changed the outcome of the proceedings, it cannot be said that Petitioner was prejudiced by counsel's actions. *Strickland*, 466 U.S. at 694. Indeed, under the doubly deferential view, *see Pinholster*, 131 S. Ct. at 1410-11, the Court finds that counsel acted reasonably in ultimately not having Petitioner testify. *See Harrington*, 131 S. Ct. at 788. As the state appellate court pointed out, Petitioner's testimony would have been problematic "as he had made pretrial incriminatory statements and had suffered a prior conviction involving gun use." (Op. at 18.) Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

2. Failure to Adequately Investigate and Present Exculpatory Evidence (Claim 5)

Petitioner claims that counsel was ineffective for failing to investigate and present additional evidence that Benjamin was the shooter. (Pet. Attach. at 11.) Specifically, Petitioner points to the declarations of Elisha Nelson and Amber Hill to that effect, as discussed under Petitioner's claim involving newly discovered evidence. *See supra* at 21-22. The relevant part of Nelson's declaration is as follows:

> On September 4, 2006, I had a party for my 19th birthday at my mother's house in Oakland. One of the persons at this party was Ronald Benjamin. He passed away in 2008. He attended Willard Middle School and Berkeley High School and was a friend of [petitioner] and also a friend of mine. He was

> approximately six feet one and dark complexioned.
>
> At this party, I overheard Benjamin telling his friends about shooting someone earlier that day. I spoke with him privately and asked what happened. Benjamin told me he had been in Berkeley in Telegraph Avenue when someone called him a bitch and he shot that person. He asked that I keep this information to myself, which I did until I read the newspaper that [Petitioner] was convicted of this crime. I then contacted a relative of [Petitioner] who put me in touch with counsel for [Petitioner].

(Ans. Ex. A at 365-66.)

The following is the relevant excerpt from Hill's declaration:

> I am a friend of [Petitioner] and was a friend of Ronald Benjamin, deceased. I was present at Larry Blake's in Berkeley on a date I do not exactly recall. The incident I observed was memorable and I have no doubt about what I observed. It was late and I was leaving Blake's. I saw [petitioner] outside and we began talking. An argument began between a big person and a small person. Both of them were black males. These persons went around the corner from Blake's and a crowd of people followed, including myself and [Petitioner].
>
> The small person appeared to be intoxicated. He challenged people in the crowd for no reason, insulting them with curse words. One of those he challenged was Ronald Benjamin, who pulled out a pistol and approached the small person. [Petitioner] pushed me away. I heard a gunshot. I can testify from personal knowledge that [Petitioner] had no weapon in his hand, did not fire any shot, and did not approach the

> small person. I did not see Benjamin fire a shot, but the sound came from where he was standing. I did not know at the time anyone had been struck by the gunshot I heard.
>
> Over the years I lost contact with [Petitioner]. He did not have my telephone number. I did not know he was arrested for this incident at Blake's. I read in the newspaper he had been convicted of the shooting at Blake's. I went to visit him in custody. He asked if I would give a statement. I agreed because he did not commit the crime and a big mistake has been made.

(*Id.* at 374-75.)

As discussed above, the Court has determined that even with this newly discovered evidence, which is highly suspicious and easily discredited, Petitioner has failed to show that it is more likely than not that no reasonable juror would have convicted Petitioner. *See supra* at 23-24. Furthermore, this Court must presume correct any determination of a factual issue made by the state court unless Petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(l). For purposes of § 282254(e)(1), factual issues are defined as "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Coombs v. Maine*, 202 F.3d 14, 18 (1st Cir. 2000) (citations and internal quotation marks omitted). Here, Petitioner has failed to rebut the state court's finding that the declarations were not credible with clear and convincing evidence as he merely relies on the content of the declarations alone.

Ultimately, Petitioner fails to show that he was prejudiced by counsel's failure to present this evidence. Even if the jury had heard the testimonies

of Nelson and Amber, it was not likely to have changed its verdict. Nelson's reliability was highly questionable, particularly in light of the fact that she visited Petitioner 21 times in jail prior to trial. It is unlikely that she was completely unaware that Petitioner was in jail and facing trial for the Berkeley murder despite her assertion in the declaration that she came forward only after she found out about the conviction in the paper. *See supra* at 28. It is hard to fathom why she withheld such exculpatory evidence from Petitioner during all of these visits, until after the fact of Petitioner's conviction, and especially after Benjamin's death in 2008, which was well before Petitioner's trial had concluded.

With respect to Hill's statement, she did not definitively state that she saw Benjamin fire the shot that struck Drummond, only that the sound came from where he was standing. *See supra* at 29. This lone testimony to that effect was not likely to persuade the jury that Petitioner was not the shooter in light of the strong eyewitness testimonies presented by Crowder, Esho and Massey and Petitioner's own incriminating statements. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

3. Failure to Challenge Juror for Bias (Claim 6)

Petitioner claims that counsel was ineffective for failing to strike Juror No. 10 based on bias. (Pet. Attach. at 14.)

Juror No. 10 was originally prospective Juror No. 54. During jury selection, this juror stated that she

was an attorney practicing family law in Oakland, and had worked previously for the California Attorney General's Office, a District Attorney's Office, and a Public Defender's Office. (Ans. Ex. O, Appendix Ex. G at 32-33.) She stated that she would have no difficulty following the court's instructions and would not be "rooting or hoping for one side versus another." (*Id.*) She also stated that her husband was an attorney with the Alameda County Counsel's Office, but that "nothing about that would affect [her] here." (*Id.* at 33.)

During the trial, Juror No. 10 sent the court a note explaining that her husband had told her that he had an ongoing trial with defense counsel. She stated that her husband told her that counsel had "showed up late to the last trial," and her husband had talked to her "about it a little bit." (Ans. Ex. B at 494-95.) She also stated: "And I guess the trial was going on before this trial even started, and so he talked to me about it before then without us realizing." (*Id.* at 495.) When the trial court asked her, "'what impact does that have on you and your ability to be a fair and impartial juror?", she replied, "I don't think it has an impact." (*Id.*) Then Juror No. 10 and counsel had the following exchange:

> Q. Is your husband upset that he was delayed in starting his trial?
>
> A. I think he was, yes.
>
> Q. And what did he say about me in that regard?
>
> A. He said that you were late and you said part of the reason was because you had this murder trial going on.
>
> Q. Did he say anything else about why I was late?

A. You had another hearing or something going on that day.

Q. Is that all he told you?

A. Yes.

Q. So you're satisfied, despite the relationship with your husband, that your deliberations in this case won't be affected one way or another?

A. That's correct.

Q. You're not leaning [prosecutor's] Wellman's way because he was on time or anything like that?

A. No.

THE COURT: You wouldn't know if Mr. Wellman is on time or not, because you didn't start until 9:30 this morning, right?

JUROR NO. 10: We were late this morning.

THE COURT: You don't know what happened. To the extent of what's important, I know you're a lawyer also, and you understand the rules if there's some outside influence, and I've given you jurors beforehand, I want to know about it and I appreciate you bringing this to my attention. What's more important is that you can be fair and impartial to both parties and that something else outside is not going to influence how you decide this case.

JUROR NO. 10: That's right.

THE COURT: You think you can be fair and impartial?

JUROR NO. 10: I do.

(*Id.* at 495-496.)

To disqualify a juror for cause requires a showing of either actual or implied bias—"'that s is . . . bias in

fact or bias conclusively presumed as a matter of law.'" *United States v. Gonzalez*, 214 F.3d 1109, 1111-12 (9th Cir. 2000) (quoting 47 Am. Jur. 2d Jury § 266 (1995)). Actual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. *See Gonzalez*, 214 F.3d at 1112. Courts have found actual bias where, based upon personal experience, a potential juror stated he could not be impartial when evaluating a drug dealer's testimony, where a juror in a case involving embezzlement from a labor union emphasized his negative experiences with unions and responded equivocally when asked if he could render a fair and impartial verdict despite those views, and where a juror in a drug distribution case admitted to a conviction for marijuana possession, but stated that he believed it to be the product of entrapment. *See id.* (citing cases).

In extraordinary cases, courts may presume bias based upon the circumstances. Unlike the inquiry for actual bias, in which the court examines the juror's answers on voir dire for evidence that he was in fact partial, the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced. *See id.* Prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. *See id.*; *Tinsley*, 895 F.2d at 527. Applying this standard, courts have found implied bias in cases where the juror in question has had some personal experience that is similar or identical to the fact pattern at issue or where the juror is aware of highly prejudicial information about the defendant. *See Gonzalez*, 214 F.3d at 1112-13 &

n.4 (cataloguing cases in which implied bias was found); *Tinsley*, 895 F.2d at 527-29 (same).

Based on the record, the Court finds no basis for finding either actual or implied bias. It cannot be said that counsel was remiss in failing to challenge this juror during jury selection because there was no indication that either her work or that of her husband would cause her to be impartial, and no relevant personal experiences came to light which could raise concerns of actual bias. Counsel stated in his declaration that "[h]ad I been myself, I would have noticed the same last name—Massey—and that her husband was a lawyer with the Alameda County Counsel's office and I would have inquired." (Pet. Ex. B at 3.) However, this assertion is not persuasive because there is no indication in the record that counsel was not "[himself]" during jury selection and he only began to complain of back-pain in the middle of the prosecutor's case. Even counsel admits that he would not have been able to prove cause during jury selection had he moved to do so. (Ans. Ex. O Appendix Ex. S at 925.)

Nor can it be said that these circumstances are so extraordinary that the court may presume bias. Once she became aware of her husband's involvement in a case with defense counsel, the juror immediately informed the court and disclosed the extent of his discussions with her. Counsel asserts that her husband was "very angry and hostile" towards him during the trial, and that counsel "would have expected that [her husband] discussed the case with her." (Pet. Ex. B at 3.) Even so, it cannot be said that an average person in the position of Juror No. 10 would be prejudiced against counsel or Petitioner based on these circumstances. *See Gonzalez*, 214 F.3d at 1112. Juror No. 10's assertion

that she could remain fair and impartial was sufficient to satisfy the trial court, and its determination of juror partiality is entitled to a presumption of correctness on federal habeas review. *See Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *Dyer v. Calderon*, 151 F.3d 970, 974-76 (9th Cir.1998) (en banc) (presumption fails if state court fact-finding process was not objective or failed to reasonably explore issues presented and if the facts left undeveloped by the state court are material); *see also United States v. Alexander*, 48 F.3d 1477, 1484 (9th Cir.) (determination of impartiality particularly within province of trial judge), *cert. denied*, 516 U.S. 878 (1995).

Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

4. Failure to Challenge the Admission of Suggestive Identifications (Claim 7)

Petitioner claims that counsel was ineffective for failing to challenge the allegedly suggestive identifications of Petitioner by the prosecution witness Dayo Esho. (Pet. Attach. at 14.)

"A conviction which rests on a mistaken identification is a gross miscarriage of justice." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Thus, the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to

persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (citing rights to counsel, compulsory process, confrontation, cross-examination, as examples). Due process requires suppression of eyewitness identification evidence "when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at 718; *see Manson v. Brathwaite*, 432 U.S. 98, 107-09 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-98 (1972). The purpose of this rule is "to deter police from rigging identification procedures." *Perry*, 132 S. Ct. at 721. Consequently, in "cases in which the suggestive circumstances were not arranged by law enforcement officers," due process does not require exclusion of the identification evidence. *Id.* at 720-21 (holding due process does not require exclusion of evidence that witness, in response to a police officer asking her to describe the suspect, pointed out her window to defendant standing in her parking lot after another officer had asked him not to leave). "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 721.

Petitioner challenges two photographic ("photo") lineups prepared by the police which were shown to Esho on February 14, 2008, almost two years after the incident. Each of the lineups included a different picture of Petitioner, and in both lineups, Esho pointed out Petitioner's photo as the closest but could not make a positive identification. (Ans. Ex. B at 190-92, 203-06, 621-26, 639-41, 711-13.) He indicated that he wanted to see Petitioner in person to be sure. *Id.* at 713-14. When Esho saw Petitioner at the preliminary hearing, he became sure that

Petitioner was the shooter, and later testified at trial that "I was just sure when I saw him. Just basically clicked." (*Id.* at 715.) Esho's identification was made more certain by the fact that he also recognized the "[s]ort of the way [Petitioner] walked." (*Id.*) At trial, Esho remained sure that Petitioner was the one who shot Drummond. (*Id.* at 716.)

In his petition, Petitioner makes no factual allegations as to why these photo lineups were impermissibly suggestive and unnecessary. *Perry*, 132 S. Ct. at 718. He did not provide copies of the lineups in his state habeas petition or in the instant action. Rather, he states that Esho's description of the shooter was that he was "6'1"—the same height as him—and with a darker complexion." (Pet. Attach. at 15, citing to Ans. Ex. B at 730-734.) Petitioner states that he is shorter than Esho and has a "medium complexion." (*Id.*) However, he makes no argument as to why this difference in physical description is relevant as evidence that the lineups were unduly suggestive. Rather, Petitioner relies on counsel's declaration that he does not recall why he did not challenge Esho's identification and that in hindsight he should have done so. (*Id.* at 16.) However, counsel also fails to provide specific facts in support of his belief that the identification procedures were suggestive and merely states that he was in great pain and mental distress as a result of his back injury. (Pet. Attach. Ex. B at 5.) But as the Court noted above, *see supra* at 33, there was no indication prior to June 29, 2009, when counsel made his first request for a continuance based on his back problem, that counsel was incapacitated early on in the proceedings. Certainly no mention of such a possibility was made during motions in limine when such a motion to suppress would have been appropriate. (Ans. Ex. B at 1-49.)

For the first time in his traverse, Petitioner asserts that the photographic lineups were suggestive because of repetition, i.e., only Petitioner's photograph was displayed in both lineups. (Trav. at 44.) He also asserts that the in-court identifications were unduly influenced by the suggestive lineups. (*Id.* at 45.) However, even if we assume that counsel's performance was deficient for failing to move to suppress the lineups, Petitioner fails to show that he was prejudiced because the subsequent in-court identifications were sufficiently reliable. *See United States v. Gibson*, 690 F.2d 697, 703-04 (9th Cir. 1982) (failure to make evidentiary objections does not render assistance ineffective unless challenged errors can be shown to have prejudiced the defense), *cert. denied*, 460 U.S. 1046 (1983).

In determining whether in-court identification testimony is sufficiently reliable, courts consider five factors: (1) the witness' opportunity to view the defendant at the time of the incident; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the time of the identification procedure; and (5) the length of time between the incident and the identification. *See Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199-200. *See, e.g., United States v. Drake*, 543 F.3d 1080, 1089 (9th Cir. 2008) (finding that where first four factors weighed in favor of reliability, four-day delay between robbery and photo spread identification did not call identification's accuracy into question); *United States v. Jones*, 84 F.3d 1206, 1209-10 (9th Cir.) (although drive-by identification by witnesses was suggestive, it was permissible because there was not a substantial likelihood of misidentification), *cert. denied*, 519 U.S. 973 (1996); *United States v. Wang*, 49 F.3d 502, 505 (9th Cir. 1995) (identification of

defendant in photographs reliable where witness had ample opportunity to view defendant and actually spoke with him).

Although two of the factors above, i.e., the vagueness of Esho's prior description and the two years that had passed between the incident and the identification, weighs against reliability, the other three factors indicate that Esho's testimony was sufficiently reliable: (1) as Petitioner admits, Esho actually spoke with Petitioner immediately after the shooting; (2) Esho was paying attention as he clearly recalled Petitioner's apology and the distinctive way that Petitioner walked; and (3) Esho demonstrated a high degree of certainty when he identified Petitioner at the preliminary hearing and at trial. See *Manson*, 432 U.S. at 114.

Because Petitioner has failed to show that he was prejudiced by counsel's performance with respect to the identification procedures, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled to habeas relief on this claim. For reasons discussed below, see infra at 40, Petitioner shall be granted a certificate of appealability on this issue.

5. Conflict of Interest (Claim 8)

Petitioner's final claim is that counsel was essentially operating under a conflict of interest when the trial court denied his requests for a continuance and insisted that the trial proceed without further delay. (Pet. Attach. at 16-17.) Petitioner asserts that counsel should have done more, e.g., submitted more medical documentation to support his need for bed rest or simply stayed home,

rather than continue to appear because he did not want to make the trial court angry with him. (*Id.* at 18.) Because counsel was placed "in the impossible situation of having to choose between his own interests and his client's," the result was an "unconstitutional conflict of interest." (*Id.*)

The Sixth Amendment guarantee of assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970), and the right to counsel's undivided loyalty, *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981). A criminal defendant accordingly is entitled under the Sixth Amendment to an effective attorney who can represent him competently and without conflicting interests. *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994). If counsel is prevented by a conflict of interest from asserting his client's contentions without fear or favor, the integrity of the adversary system is cast into doubt because counsel cannot play the role necessary to ensure that the trial is fair. *See Strickland*, 466 U.S. at 685.

The Sixth Amendment's right to conflict-free counsel is violated only if the conflict "adversely affected" trial counsel's performance. *Alberni v. McDaniel*, 458 F.3d 860, 870 (9th Cir. 2006). "[A]n actual conflict of interest mean[s] precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (emphasis omitted).

Where counsel suffers from a potential or actual conflict of interest but defense counsel did not disclose the conflict and the court had no independent reason to know of it, the court is not on notice and has no duty to inquire. *See Cuyler v. Sullivan*, 446 U.S. 335, 346-48 (1980). As the

Supreme Court put it, "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347 (footnote omitted). In order to establish that a conflict of interest "adversely affected counsel's performance," petitioner need only show "that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) (citing *Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988)); *see Lockhart v. Terhune*, 250 F.3d 26 1223, 1231 (9th Cir. 2001) (same); *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996) (same); *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994) (reviewing court "must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conduct"). *But see Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001) (petitioner must demonstrate that conflict of interest "actually affected" the attorney's performance). This showing need not rise to the level of actual prejudice, as it must with an ineffective assistance claim based on counsel's incompetence. *Maiden v. Bunnell*, 35 F.3d 477,481 (9th Cir. 1994); *Miskinis*, 966 F.2d at 1268.

An adverse effect in the *Cuyler* sense "must be one that significantly worsens counsel's representation of the client before the court or in negotiations with the government." *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995). A conflict which causes problems of some sort in some facet of the attorney-client relationship (for example, by generating transient feelings of mistrust between attorney and client), but which ultimately has no significant impact on counsel's representation before the court or in negotiations with the government,

does not cause an adverse effect in the sense of *Cuyler*. *See id.* at 1535-36.

In support, Petitioner points to the trial court's threat of having counsel arrested if he did not appear. (Pet. Attach. at 18; Ex. B at 6.) However, the threat to hold counsel in contempt was made after the trial court granted a continuance on June 30, 2009, and was only to be imposed if counsel attended another court matter (as he had the day before, *see supra* at 11) when he had represented that he needed immediate rest. The trial court explicitly stated: "I wouldn't expect you to go to [another court] if we recess this case today. And if you did, I will clearly find you in contempt of this Court because that's just," (Ans. Ex. B at 502); "Go where you need to go [i.e., the hospital] . . . You're not going to be held in contempt. It's going to another court when you say you have illnesses, that's what disturbs me," (*id.* at 504). It was not unreasonable for the trial court to be skeptical of counsel's representations that he could not proceed with the trial because of his back pain when he was still able to pursue other court matters.

Even if counsel was experiencing a conflict, this claim is without merit because Petitioner fails to show that counsel's performance was adversely affected. *Alberni*, 458 F.3d at 870; *Bragg*, 242 F.3d at 1087. In denying Petitioner's claim that the trial court had erred in denying counsel's motion for a continuance based on his back injury, the state appellate court found that the record substantiated the trial court's determination that counsel was not incapacitated, but rather fully able to proceed with the trial. *See supra* at 15. Petitioner has failed to rebut the presumption of correctness as to this factual issue by clear and convincing evidence. 28

U.S.C. § 2254(e)(1). Counsel's averments to the contrary are not persuasive in light of the trial court's personal observations of counsel's behavior in-court and beyond, i.e., he continued to walk and move about during and after trial and he attended other court matters. There is no indication that counsel's representation of Petitioner worsened after his initial complaints of back pain, and the trial court's observation that counsel was performing well indicates that there was no significant impact on counsel's representation before the court. *Mett*, 65 F.3d at 1535-36. Accordingly, the state court's rejection of this claim did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim. For reasons discussed below, Petitioner shall be granted a certificate of appealability on this issue.

CONCLUSION

For the reasons set forth above, the petition for writ of habeas corpus is DENIED.

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and reasonable jurists would find debatable the district court's assessment of Petitioner's claims that his right to effective assistance of counsel was violated due to counsel's failure to object to suggestive identification procedures (claim 7) and a conflict of interest (claim 8). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, a certificate of appealability is **GRANTED** on those two claims. The certificate of appealability is **DENIED** as to all the other claims in the petition. Petitioner is cautioned that the Court's ruling on the certificate of appealability does not relieve him of the obligation to file a timely notice of appeal if he wishes to appeal.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: February 5, 2015

BETH LABSON FREEMAN
United States District Judge

FILED 7/21/11

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
NICHOLAS BEAUDREAUX,
Defendant and Appellant./

A126140

(Alameda County Super. Ct. No. 60022

Nicholas Beaudreaux appeals from a judgment upon a jury verdict finding him guilty of first degree murder (Pen. Code,[1] § 187) and attempted second degree robbery (§ 211, 644). As to both offenses, the jury also found true the allegation that defendant was armed with and personally used a firearm and intentionally discharged it causing great bodily injury (§§ 12022, subd. (a)(1); 12022.5, subd. (a); 12022.53, subds. (b) & C)). As to the murder offense, the jury found true the additional allegation that defendant personally and intentionally discharged a

[1] All further statutory references are to the Penal Code.

firearm inflicting great bodily injury causing death in violation of sections 12022.7, subdivision (a) and 12022.53, subdivision (d). Defendant contends that the trial court abused its discretion in refusing to great defense counsel a mid-trial continuance, and that the trial court erred in denying the motion for a new trial based on ineffective assistance of counsel and newly discovered evidence. We affirm.

I. FACTS

On the evening of September 3, 2006, Aluma Raymond Nkele went out for drinks with his friends, Wayne Drummond, Dayo Esho and Shandon Massey at Kip's on Durant Avenue in Berkeley.[2] After drinking a couple of pitchers of beer, the group left and walked up to Telegraph Avenue. They saw a large crowd in front of Blakes, a bar on Telegraph, and proceeded to walk in that direction. Nkele ran into his friend, Marquel, on the corner of Durant and Telegraph and stopped to talk with him.

Esho saw Crowder and greeted him, but Crowder did not reciprocate and instead tapped defendant who was with him and said, "That's him. That's him," pointing. Drummond was in the group behind Esho. Crowder and Drummond then started to argue angrily. Nkele and Massey also heard the argument ensuing between Drummond and Brandon Crowder, who was also one of Nkele's friends.[3] Nkele could hear that Drummond was upset but he could not hear what Drummond and Crowder were arguing

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[2] Nkele and Esho were 2005 graduates of the University of California, Berkeley (UCB); Massey graduated from UCB in 2004. Drummond attended community college.

[3] Nkele found Crowder to be a bit immature so Nkele was a "big brother" to him and tried to mentor him by having him associate with his friends.

about. Massey testified that he heard Drummond and Crowder agree to settle their argument around the corner.

Esho tried to break up the fight. But Drummond and Crowder continued to argue and walked around the corner up Durant Avenue. Esho followed them and defendant was behind him. Massey was following the group behind Esho. Esho heard defendant say, "I don't know how to fight, but I know how to use this metal." Escho continued to try to physically break up Drummond and Crowder. A crowd of people followed them.

Drummond and Crowder eventually stopped and faced each other on Durant Avenue and continued arguing. At some point, Drummond pointed to Crowder and said, "I'll fuck you up, I'll fuck you up." He also said the same thing to defendant and a third unidentified male that was with them. Massey testified that he heard Drummond say, "I'll fuck you up" and "I don't care. I'll fight anybody." Crowder then said, "Yo somebody handle this," and moved to the left. Defendant then walked up to Drummond, pointed a gun at his neck, and aggressively said, "You need to give me your wallet right now." Massey told police that he heard the gunman say, "Give me your wallet or break yourself." Drummond grabbed the barrel of the gun and tried to wrestle it away from defendant. As Drummond pushed the gun away to his right and started to run, defendant pulled the trigger. Drummond ran up Durant. Esho heard a gunshot. He testified that the gun had been pointed at the area between Drummond's hip and stomach. Defendant followed Drummond up Durant but stopped when Esho approached him. Esho told him to "leave us alone." Defendant said, "He tried to grab my pistol." Defendant turned and walked back down

Durant towards Telegraph while Esho went to find Drummond.

Esho found Drummond on Bowditch, just a few feet from Durant. He was rolling around on the ground. Esho tried to see if he had been shot. He checked his shirt where he thought Drummond had been shot but saw no blood or any signs of a bullet wound. A young man was near Drummond and told Esho that he had seen him fall pretty hard and did not think he had been shot. The man was not part of Esho's group of friends. Esho tried to talk with Drummond, but he was moaning and looked like someone who had had too much to drink.

Nkele also heard the gunshot and followed the crowd at a brisk pace and heard a pop. He did not see a gun or the shooter. The crowd dispersed. Nkele ran up Durant Avenue in search of Drummond. Massey also followed Drummond and found his wallet on the sidewalk near the area of the gunshot and picked it up. When he got to Bowditch, he saw Drummond on the ground. Esho and Massey, and another man were also there.

Nkele checked on Drummond and thought he was very drunk. His speech was slurred and he did not look good. Nkele spoke with Esho and knew someone had brandished a gun. Nkele and Massey checked Drummond for injuries, but did not see anything. Drummond was wearing a white shirt and there was no blood on it.

Nkele went to meet Crowder who was around the corner of Durant and got into Crowder's car. They had a brief conversation. Crowder apologized and told Nkele, "I'm sorry it happened like that. But, you know, you mess with me, that's what you get." Nkele told Crowder to stay away from Drummond. "Wayne

doesn't exist to you from now on. Okay. You see each other, no eye contact. Don't say anything at all. Just keep walking." Nkele had no idea that Drummond had been shot. He got out of the car and Crowder drover away.

Nkele returned to Drummond and found him in the same condition. Drummond asked for water. He was not able to stand, and was slurring his words. Esho left to get water. He drove to the Chevron statin at Telegraph and Ashby and bought two bottles of water. There, he saw Crowder's van drive away from the station. A surveillance tape from Chevron showed Esho's car and Crowder's van at the station and Esho at the window of the minimart there. Esho left the Chevron station at 1:54 a.m.

Esho returned to Drummond and tried to give him water, Drummond was not able to drink it. Officer Elgin McIntosh, who was on routine patrol, noticed a man on the ground and stopped to determine whether he needed medical assistance at approximately 2:00 a.m. Drummond appeared to be intoxicated; he was somewhat responsive, he had vomited, and his speech was slurred. McIntosh did not observe any injuries or blood on Drummond. Although McIntosh asked Esho and the others present what had happened, no one mentioned the shooting. Nkele testified that "at that point, I'm thinking. . . honestly and truthfully. . . we're going to sleep this off. I'm going to take him to a bed, we're going to sleep this off and deal with all this in the morning." Massey did not want to deal with the police, and Drummond had said he wanted to go home. Esho, Nkele, and Massey placed Drummond in Esho's car and took him to a sorority on 2311 Prospect Street, where Nkele was staying. Once he was in Nkele's room, Esho that Drummond was

bleeding from the nose and nonresponsive. Esho called 911.

Emergency personnel responded to Esho's call but were unable to save Drummond. Drummond died from a gunshot wound to the right hip, penetrating his pelvis, fracturing his pelvic bone, and hitting a major blood vessel. He suffered substantial internal bleeding and went into shock. He had gunshot residue on his hands. It is impossible to determine whether Drummond would have survived the injury had he received prompt medical attention.

On the afternoon of September 4, 2006, Esho, Massey, and Nkele identified Crowder as the person who had argued with Drummond early that morning.

The police interviewed Crowder in September 2006 and learned that Crowder had gone to school with the person who shot Drummond.

In 2008, the police learned that Crowder was involved in a criminal threats case. Crowder turned himself in to the Berkeley police department on February 13, 2008 on threats warrant. Crowder waived his *Miranda*[4] rights and eventually identified defendant's photograph from a middle school yearbook as Drummond's shooter. He then identified defendant from a photographic lineup.

On February 19, 2008, the police transported Crowder and defendant in a van from the Berkeley jail to the North County jail for court. The van had a tape recorder and during the drive defendant made various comments to Crowder including, "You think it's hard now? Shit's about to get real out here. . . . Respect my gangster. . . . No turning back."

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

Defendant also told Crowder, "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again." And defendant said, "Man, fuck this. . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is."

On February 14, 2008, Esho identified defendant as possibly being the shooter in two photographic lineups. Esho identified defendant as the shooter at both the preliminary hearing and at trial. Massey was not absolutely sure that defendant was the shooter.

Crowder was initially a codefendant with defendant at trial. After the jury was selected, however, Crowder entered into a plea agreement with the prosecution under which he agreed to testify against defendant. Crowder testified that he entered into a written plea agreement under which he agreed to plead no contest to a charge of voluntary manslaughter, with the understanding that he would testify truthfully in the case and in exchange he would be sentenced to time served.

Crowder testified that he suffered a misdemeanor conviction for possession of stolen property in 2005. In September 2006, he was 19 years old and living in Berkeley. He had known defendant since middle school. He met Drummond through a friend at a party in 2005. Drummond was friends with Nkele, who was also one of Crowder's friends. Drummond was a mentor to Crowder in 2006, but at some point, they were no longer getting along. Crowder grew annoyed with him. He told others that he wanted to "get" him or "stomp" him.

On September 3, 2006, Crowder drove to Blakes with some friends and smoked some marijuana. At Blakes, Crowder shared some marijuana with defendant. At about 1:30 a.m., he left Blakes and saw defendant hanging around with some people. He shook defendant's hand, and defendant said, "I'll see you next time."

Esho then approached Crowder and greeted him, but Crowder focused on Drummond who was behind Esho. Crowder and Drummond started to talk "trash" to each other. They began to argue and agreed to fight. Crowder testified, "I was fed up with all the name calling, and I was just kind of excited." They walked up Telegraph and then turned right on Durant. Esho, defendant, and others followed them "to see a fight." He could hear defendant talking but he did not remember what he said. At some point, they stopped walking, faced each other, and continued the name calling. They called each other "bitch" and were pushing each other. Esho was trying to break them up. Drummond pointed to Crowder and said, "I'll fuck you up"; he also pointed to defendant and said the same thing. Crowder stepped back. Defendant broke through the crowd, pulled out a gun, and pointed it at Drummond's neck. Defendant told Drummond, "You need to give me your money right now." Drummond wrestled with defendant for the gun and then a shot went off. Drummond jumped back and then ran up Durant. Crowder did not think that Drummond had been shot. After meeting up with Nkele, Crowder drove to the Chevron station to meet with Trevina, a female friend. Crowder positively identified defendant as the shooter.

II. DISCUSSION

1. Motion for Continuance

Defendant contends that the trial court abused its discretion and denied him due process when it denied defense counsel's request for a continuance to address his back pain.

a. Factual Background

On June 15, 2009, during the prosecution's case, the court recessed the trial until June 29, 2009 because it was going to be covering another judge's calendar the following week. On Monday, June 29, 2009, defense counsel informed the court that he had gone to the emergency room at Highland Hospital on Saturday, June 26, 2009 because of intolerable back pain. Dr. Nagdev gave him a prescription for Vicodin and said that his symptoms were consistent with radiculopathy or a compressed nerve. Defense counsel represented that he was told he could return to work in five days. He also told the could he did not feel able to function, he could feel the effects of the Vicodin, and he was in significant pain. Defense counsel said, "the analogy I would use. . . if I were an airplane pilot, I don't think I'd be flying a plane today. But it's obviously the Court's decision whether [to] proceed or not. I'd like to go home, but If I have to sit here and try this case, that's what I'm going to do." The prosecutor indicated that he had offered to help defense counsel with exhibits, recordings, and other matters so that defense counsel could remain seated during questioning and examination and that he anticipated resting the case on Wednesday. Finally, the prosecutor said that it was "the People's position that we go forward, and if at some point during the day it becomes unbearable for Mr. Kelvin, perhaps he can let us know. In other

words, to go forward with what we have now." The court stated, "I don't care what the People's position is, quite frankly. [¶] Here's the issue. Mr. Kelvin, you've indicated you've had this. I have back pain every day. And I think I told the lawyers, every day I do 20 minutes of stretching. It's been since 2003 where I saw an orthopedist, and I continue to do this because it's part of the routine. We all have, as we age, we get these back issues. I was reading a book right now regarding somebody and [his] back. [¶] I do have this emergency [form]—from an emergency doctor at Highland who says, '[r]estrictions, no work requiring repetitive bending.' And I do have Mr. Kelvin saying that he's had this back pain for a while, but he went in on Saturday and he's taking this medication. Just knowing the back, knowing what I go through, and I'm not discounting anything you say regarding this, because it talks about a possible sprain of the back and it tells you it could reappear or it couldn't, when it says about—in this little information you gave me, Mr. Kelvin. [¶] Are you seeing an orthopedist, Mr. Kelvin? [¶] [MR. KELVIN]: I don't know what qualifications Dr. Nagdev had. He [was just] an emergency room doctor. . . . I'm supposed to be arranged for an MRI today, but obviously if I'm here— [¶] [THE COURT] It sort of seems to me—well, like I said, "I've seen an orthopedist, and they didn't do an MRI off the top. They just don't do it, not a specialist in this area. I'm not certain whey they haven't referred you to an orthopedist, because it's a back. It's not an emergency room specialist. They don't have the expertise to deal with backs. And like I said, this is something that we have. This is what we just live with. [¶] My inclination was that—and before even Mr. Wellman [deputy district attorney] made his statement, my inclination is to move forward today,

because you're going to have this back pain. There's not too much I can do about it, and I don't think there's much you can do about it. It's a think that's going to be a whole process for the rest of your life. We would take—my thought is we're going to take breaks a little more frequently than we do, that you can cross-examine from the bench, Mr. Kelvin, if you don't feel you can stand up and do it. [¶] What it's saying here is you shouldn't be bending. Doesn't say you shouldn't be standing. Actually, standing is probably better, but I don't know. I'm not certain what—I can't read into this or what the doctor is saying. That's what my thoughts are. [¶] [MR. KELVIN]: The only other comment I would have, I have a number of materials relating [to] this case in the car, which I didn't carry in the court because it was kind of hard to carry them. But I'll just limp back and get them if I can get them in. [¶] [THE COURT]: No. Mr. Payne will get them for you, from the DA's office. [¶] [MR. KELVIN]: He doesn't know where they are. [¶] [THE COURT]: He'll go with you, and he's going to carry them back for you. [¶] [MR. KELVIN]: Okay. Then I'll have a helper. [¶] [THE COURT]: That's my thought. And we are going to be off—assuming that Mr. Wellman finishes, I would have us off after Wednesday. You wouldn't come in on Thursday. [¶] And I'm not certain what you are going to do with your case, Mr. Kelvin. If you are going to call witnesses, we would start on Monday with the witnesses. And if not, we'll start—we'll also do instructions and prepare for argument." Defense counsel then expressed concern that the prosecution intended to call Crowder that day so he needed to go get the recorded statements. The court then deferred Crowder's examination until after the prosecution completed several other witnesses. Hence, the court's minutes reflect that trial was in

session for approximately four hours,[5] with the court taking three recesses during that period.[6]

On June 30, 2009, defense counsel again asked for a continuance. The following colloquy occurred: [MR. KELVIN]: "Yesterday I raised an issue concerning my ability to perform in this case based on health factors. I have to tell you today I feel worse than I did yesterday. It took me half an hour to walk from my car to here, which is a block and a half away. I don't feel that Mr. Beaudreaux has an attorney in the meaningful sense of the word. My back hurts real bad and I should be either getting my MRI in line now. And having said that, I know the Court's position. But yesterday I was working all day and I don't know. I'm just a layperson, but to me it exacerbated the situation. I'm in bad pain and I was unable to concentrate on what Mr. Crowder was saying yesterday. He's the most critical witness in the case. I don't know what anybody is supposed to do about it. I know Mr. Wellman wants to finish the trial. [¶] [THE COURT]: Finishing the trial has nothing to do with it. Mr. Kelvin, yesterday you went through some of these witnesses who were probably

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[5] In its preliminary instructions to the jury, the court informed it that the court would be in session from 9:00 a.m. to 1:30 p.m. with recesses in between on Mondays through Thursdays and that court was not in session on Fridays.

[6] The court's minutes show that questioning of witnesses began at 9:20 a.m., a recess was taken at 10:02 a.m., and questioning resumed at 10:30 a.m. Trial was again recessed at 11:36 a.m., and at 11:53 a.m., court and counsel discussed matters outside the presence of the jury. The court recessed again for four minutes and then resumed trial at 11:59 a.m. At 12:25 p.m., the People called and began the examination of Crowder. At 1:19 p.m., the court ordered the jury to return the following morning. The court then discussed a couple of notes from jurors before adjourning at 1:24 p.m.

two-minute witnesses, you spent 15 minutes on cross-examination. To the extent you had the inability to perform as a lawyer, I didn't see it. In fact, I was amazed with the amount of time that you spent and the issues that you took up with some of these witnesses. So to that extent, you perform well and beyond anybody I've seen in any courtroom as it relates to cross-examining and dealing with issues with witnesses. [¶] Yesterday after everybody left you were here for another 15 minutes. You were walking around, you were doing something with the video. I understand if, yes, you may have some back pain. I had back pain this morning, as I say every day. I have sciatica. I feel the numbness in my legs. I'm here. [¶] You have done, in terms of performing as counsel, I'm just not certain what the real issues are. To the contrary, your performance is totally contrary to the state of condition that you indicated that you were in yesterday. [¶] [MR. KELVIN]: Well, Judge. [¶] [THE COURT]: And I did take several recesses yesterday, including one which was a half an hour long, which is definitely longer than ever that we take a recess in this department. [¶] [MR. KELVIN]: Judge, I'm not going to sit here and not try to do the best I can, but my best at the moment is not much. I just feel that my client's interests are being prejudiced. I did stay yesterday after the jury left because I was trying to get my computer to display the recorded interview of Mr. Crowder. It works on the computer, but on the screen on the wall there's a signal saying that it's not right. I have an attorney, Mr. Andrew Kapur, who is very technically skilled, and I was going to set it up before we went on the record this morning so my computer would work. Mr. Wellman say, well, his computer is plugged in and he didn't want to unplug his so I can plug mine in. I'm still not in a position to

display the interview of Mr. Crowder, which I wanted to do. That's a whole different issue. [¶] If the Court thinks I'm malingering or I'm just trying to make an excuse to delay the thing, that's an assessment the Court has to make. I'm telling you, I'm in pain. I'm not able to do my job. And if the Court is ordering me to proceed, that what I'm going to do, but I'm just not—I should be lying down. [¶] [THE COURT]: What did you do after you left here yesterday, Mr. Kelvin? [¶] [MR. KELVIN]: I went to one other court and went home about 4:00 o'clock and I laid down until the morning. [¶] [THE COURT]: Why did you go to another court if you were in such a condition? Why didn't you call that court or have my clerk call that court? I don't understand that. [¶] [MR. KELVIN]: Because that court is your Judge Bean's court and I delayed it last week and I promised her I'd be there yesterday. [¶] [THE COURT]: You mean you drove all the way down to Hayward from here yesterday? [¶] [MR. KELVIN]: Yes, I did. I felt like I'd already delayed her case one time and I don't like to be unreliable. In fact, I met in the hallway in Hayward an attorney Mike Wohlstadter, who you know well, and he came up to me unsolicited and said, "Mr. Kelvin, you look terrible. You look like you're in bad pain. Your eyes are sunk in your head." This is a guy who I didn't ask him to come up and tell me this. [¶] [THE COURT]: Mr. Kelvin, you went down to Hayward for a misdemeanor, and you could have had this Court call down there? [¶] [MR. KELVIN]: You know, Judge, those are the facts. I'm not going to sit here and lie about them. I've been in my bed since 4:00 o'clock yesterday afternoon. And I got up this morning and I felt worse than I did yesterday. That's just—those are the facts as I'm aware of them. If the Court's position is I have to proceed with the trial,

then that's what I'm going to do. I'm not able to do the things that I need to be doing. I can't concentrate. All I can think about is how bad my back hurts and that's the situation. . . ." The court then recessed for a minute and when trial resumed, asked defense counsel if he had taken any medication. Defense counsel responded that he was taking Vicodin and had last taken one at 5:00 a.m. He also informed the court that he had taken one at 4:00 p.m. and at 8:00 p.m. the previous day. Counsel reiterated that he could not do what was required of him, that his back hurt "pretty bad" and described his pain level as worse than the "seven or eight" it had been on Saturday. The court then continued the matter to the following day. But before the court could adjourn for the day, defense counsel requested some time to discuss jury instructions and to work with a computer technician to set up a video. The court became exasperated with counsel, telling him, "I can't believe I'm having this discussion where you say you have to be home, you need to be resting and you're talking about doing this computer. I can't believe I'm having this discussion. [¶] Go ahead, Mr. Kelvin. I expect you here tomorrow morning to be prepared."

The following day, July 1, 2009, defense counsel presented the court with a note from Highland, stating he was to be off work until July 6. Counsel stated, "I understand that that can't happen, but just want to say for the record I feel today like I felt yesterday, which is not good. I would ask that this be placed in the file. It's a letter from Alameda County Medical Center regarding the state of my health." The court asked counsel about his state of mind. Defense counsel responded, "It's pretty much like it was yesterday. I'm in a lot of pain, but I don't want all these people sitting here and waiting for me. I

feel bad about it. So I'll proceed." The following discussion ensured: [¶] [THE COURT]: "There is threshold of pain. As I said to you, I'm in pain today, and I've been that way for six years. That is just something I deal with. And sometimes it's worse than on other days. That's just what I deal with. I mean, to that extent that's what I'm asking you. Yes, you are in pain? [¶] MR. KELVIN]: Yes. And I understand that we have to make sacrifices. All I can say is as long as I'm lying down in a bed, you know, taking medication with a heating pad under me, I'm fine. But when I get up and start walking around, it's fairly painful. So getting in the courtroom today was a process. But hopefully as long as I'm—I'm planted in a chair and I'm going to go ahead. [¶] [THE COURT]: Let's keep you in the chair. I don't have any reason for you to stand up," Defense counsel indicated that Andrew Kapur, an attorney that he works with, would be assisting him to play some recorded statements of Crowder, and the prosecutor also expressed his willingness to assist defense counsel with exhibits.

Trial then proceeded at 9:08 a.m. with the completion of the direct and cross-examination of Crowder, and the examination of Michelle Dilbeck, an expert in the field of firearms examination, Ann Keeler, an expert in the field of gunshot residue, and police officer Todd Sabins. The court's minutes reflect that the court took three recesses ranging in time from 16 minutes to 23 minutes, with the court adjourning for the day at 1:29 p.m.

Prior to adjourning, the court remarked, "I want to say for the record, having observed Mr. Kelvin today, he's had an incredibly extensive cross-examination of each of the witnesses. He has performed as he generally does. He has moved

slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits, and I just want to make sure the record is clear as it relates to that activity and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse." Defense counsel responded that he was in some pain and distress but was trying to do the best he could

Trial resumed on July 6, 2009, without any request by defense counsel for a continuance or accommodation for his back problem. The prosecution and defense both rested their cases.

On Monday, July 6, 2009, trial resumed with the court commencing jury instructions. The court declared a brief recess almost immediately as one of the jurors felt ill and needed a five minute break. Defense counsel informed the court that he was not feeling well and then proceeded to discuss a jury instruction issue. In the midst of that discussion, defense counsel implied that he would have given the court case authorities earlier but "I can't even walk. I can't get out of my car. It took me a half an hour to walk two blocks, and I'm doing the best I can. I apologize." In response, the court remarked that he appreciated that defense counsel was making his record. The parties proceeded to discuss jury instructions, followed by the court's instructions to the jury, and closing arguments and the court's final instructions to the jury. The jury retired for deliberations. In noting his availability for the following day, defense counsel noted that he had a motion in Department 115 and a trial in Department 130.

b. Analysis

The trial court has broad discretion in determining whether good cause exists to grant a continuance of trial. (§ 1050, subd. (e).) "'The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 972, quoting *People v. Laursen* (1972) 8 Cal.3 192, 204.) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.) Defendant bears the burden of demonstrating that the court's denial of a continuance was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

While we do not condone the trial court's interjection of its own back pain threshold into its analysis of defense counsel's pain issue, our review of the record convinces us that the court did not abuse its discretion. First it is unclear from the record whether defense counsel's emergency room doctor ordered that he not return to work for five days. The doctor's note that counsel provided to the court indicated simply that he was restricted from work that required positive repetitive bending.[7] Second, although defense counsel claimed to be both in

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[7] The note from the emergency room physician is not in the record.

significant pain and under the influence of Vicodin, the record reflects that he nevertheless proceeded to cross-examine several prosecution witnesses and appeared to be engaged in the trial. The court took two recesses, of 17 and 28 minutes, in the four-hour long court day, and a third recess of four minutes. Defense counsel did not indicate at any time during that court day that he was unable to proceed, and the court later remarked on counsel's thorough cross-examination.

When defense counsel informed the court the following day that he was still in significant pain, the court recessed for the day. The court, however, noted for the record that counsel had not left the court immediately upon adjournment the previous day but had spent another 15 minutes working with the video equipment. The court was also chagrined to learn that defense counsel had driven to another court in Hayward that afternoon rather than resting.[8]

Finally, when trial resumed on July 1, 2009, defense counsel, although giving the court a note from Highland Hospital stating he should be off work until July 6,[9] and informing the court that he was still in pain, did not request a continuance but told the court that he would proceed with the trial. Again, the record reflects that counsel performed diligently in cross-examining witnesses and engaging in discussions with the prosecutor and the court. The

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[8] Although the court continued the matter for a day, it did so only after reminding defense counsel that he was not to go to other courts that day: "Mr. Kelvin, here's what I'm telling you right now: If I'm going to continue and delay this case because you have this back pain and you say that you can go down and make an appearance at another court, I'm questioning your representation."

[9] The letter is not part of the record.

record further reflects that counsel complained a final time about pain on July 6, 2009 during a discussion on jury instructions but notably did not request a continuance but rather proceeded to argue about jury instructions. In addition, when the jury retired for deliberations, counsel informed the court of his scheduled appearances in other court rooms for the following day, one of which included a trial.

In sum, the record demonstrates that defense counsel, despite complaints of back pain and sporadic requests for continuances, proceeded to provide defendant with effective representation. Even if we were to conclude that the court abused its discretion in denying counsel's initial request for a continuance, there is simply no showing that defendant was prejudiced.

People v. Crodedi (1966) 65 Cal.2d 199, 201, cited by defendant, is inapposite. That case involved the issue of defendant's right to counsel of choice. There, the defendant's attorney suffered a heart attack after the first four days of trial. The court continued the matter for two weeks and then denied defendant's request for a continuance even though his attorney's law partner presented medical documentation that defendant's counsel would not be able to resume the trial until seven weeks later. (*Id.* at pp. 201-202.) Instead, over the defendant's and the law partner's objections, the court appointed the law partner to represent defendant, allowing him only one week to prepare for trial. (*Id.* at p. 203.) Our Supreme Court held that the trial court's refusal to permit the defendant to be represented by his counsel of choice constituted a denial of due process. (*Id.* at p. 208.)[10]

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[10] *People v. Panah* (2005) 35 Cal.4th 395 (*Panah*), cited by defendant, is also of no assistance to him. That case, like

(continued...)

Here, by contrast, defense counsel appeared in court and although he complained of pain, he continued to afford defendant effective representation. "[W]here defense counsel present in court requests a continuance on the grounds of illness, a factual issue is presented for the trial court as to whether the attorney's condition precludes him from effectively proceeding with his defense [citations]." (*People v. Augustin* (1968) 265 Cal.App.2d 317, 329.) The trial court, based on its discussions with and observation of defense counsel in court, determined that counsel was not incapacitated and that he was fully able to proceed with the trial. Our review of the record substantiates the trial court's observations. Not only did defense counsel provide defendant with adequate representation, he did so in the face of overwhelming evidence of Esho's and Crowder's eyewitness identifications of defendant as the shooter.

(...continued)
Crovedi, supra, involved an issue of choice of counsel. (*Panah, supra* at pp. 426-427.) While the defendant there requested a continuance to permit his secondary counsel to recover from a back injury, the court questioned the true reasons for the request, noting that defendant's primary counsel had already informed the court that his secondary counsel was not qualified to try the case and that he was making 97 percent of the decisions in the case. (*Id.* at pp. 423-424.) The court ultimately removed the secondary counsel and replaced him. (*Id.* at p. 426.) *Panah,* while concluding that the court did not abuse its discretion in denying a continuance, did not involve a situation where counsel is present in court and the court has the opportunity to observe counsel's abilities and physical appearance.

2. Effective Assistance of Counsel

Defendant contends that the trial court erred in denying his motion for a new trial in which he argued that he was denied the effective assistance of counsel.

In order to prove a claim of inadequate representation, a defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Effective and competent representation requires "counsel's diligence and active participation in the full and effective preparation of his client's case.' [Citation.]" (*Id.* at pp. 424-425.) We will reverse a conviction on the ground of inadequate counsel only if the defendant affirmatively shows that the omissions of defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Zapien, supra,* 4 Cal.4th at p. 980.) The defendant must also establish prejudice from counsel's acts or omissions. Ordinarily prejudice must be affirmatively proved; the defendant must establish the reasonable probability that had counsel not been incompetent, the proceeding would have had a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

In his motion for a new trial, defendant alleged that his counsel's back pain prevented him from providing effective representation. In particular, defense counsel's declaration submitted in support of the motion averred that due to his back pain, his "contact visits with defendant [] during trial were infrequent and brief" and that he was unable to devote any time outside of court to meet with him and prepare him to testify. He further declared that a recent MRI showed that he had bulging discs at L4-

L5 and L5-S1, impinging on a nerve and that he was awaiting corrective surgery.

The trial court properly denied the motion. "[T]he trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel's acts or omissions were those of a reasonably competent attorney." (*People v. Jones* (1981) 123 Cal.App.3d 83, 89.) This was not defense counsel's first case before the trial court; the court was familiar with defense counsel, and acknowledged that he tried this case in accordance with his usual standards, noting that his "performance [was] totally contrary to the state of condition that you indicated that you were in. . . ." The court further commented that defense counsel "performed as he generally does. He has moved slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits ... and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse."

The record reflects that defense counsel informed the court that he did not intend to call defendant to testify. At no point did defense counsel subsequently tell the court that he changed his mind on that issue or that he needed additional time to prepare defendant to testify. The defense theory was that Crowder was lying and defense counsel sought both in his cross-examination and in closing argument to discredit Crowder and the other prosecution witnesses. We cannot second guess defense counsel's strategy. While in hindsight he claimed that defendant would have testified, defendant's testimony would have been problematic as he had made pretrial incriminatory statements and had suffered a prior conviction involving gun use.

Moreover, our review of the record persuades us that defendant was not prejudiced by his counsel's decision. In view of the eyewitness testimony that defendant was the shooter, it is not reasonably probably that defendant would have received a more favorable verdict. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

Defendant also argues that the court should have granted a new trial based on newly discovered evidence. In support of his motion for a new trial, defendant submitted the declarations of two friends, Elisha Nelson and Amber Hill. Nelson declared that she was a friend of Ronald Benjamin, who was now deceased. She stated that Benjamin told her at her birthday party on September 4, 2006 that he had shot someone earlier in the day. He asked her to keep the information to herself but when she heard of defendant's conviction, she got in contact with defendant's counsel. Hill, in turn, averred that she was friends with both defendant and Benjamin and that she was at the scene of the shooting. She was with defendant when the fight broke out between two men outside Blakes. She and defendant followed a crowd of people around the corner. The smaller of the two men fighting challenged people in the crowd, including Benjamin, and swore at them. She heard a gunshot and declared that defendant did not have a weapon in his hand and did not fire any shot, but that the sound of the gun came from where Benjamin was standing.

"A defendant on a motion for a new trial based on newly discovered evidence must show . . . that the evidence is in fact newly discovered; that it is not merely cumulative to other evidence bearing on the factual issue; that it must be such as to render a different result probable on a retrial; and that the

moving party could not, with reasonable diligence, have discovered and produced the evidence at trial." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.)

Here, defendant failed to show that the evidence was newly discovered or that is could not have been discovered and presented at trial. As the trial court remarked prior to denying the motion: "I find it fascinating that Ms. Nelson visited Mr. Beaudreaux 21 times in the Santa Rita Jail. The 21 times in all this interaction, there's never been any information that the lawyers derive from her or Mr. Beaudreaux that she was a witness and could corroborate certain facts and circumstances in this case. . . . I don't know if it's coincidental that Mr. Benjamin, who is dead, is said to have said that before he died sometime that he shot somebody off around the corner from Telegraph. It it's coincidental or not, I don't know." Indeed, the record reflects that Nelson visited defendant 21 times between May 16, 2008 and March 22, 2009, well before trial commenced. On these facts, her declaration that she acceded to Benjamin's request to keep his information confidential, and felt compelled to reveal it only after hearing of defendant's conviction lacks credibility. In addition, as the court noted, Nelson's declaration does not state that Benjamin shot Drummond, only that he shot "someone." Finally, defendant failed to show that Hill's declaration was newly discovered. Her declaration was also questionable. As an eyewitness at the scene of the crime, and a friend of defendant's, the timing of her statement alone was cause for suspicion. Moreover, she did not aver that Benjamin was the shooter, just that the sound of the gunshot came from where he was standing.

The trial court justifiably denied the new trial motion based on this evidence, and based on the

absence of any showing that this evidence could not have been discovered and produced at trial.[11]

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.

A126140 *People v. Beaudreaux*

[11] By separate order today, we deny defendant's petition for a writ of habeas corpus.

Court of Appeal First Appellate District
FILED JUL 22 2011
Diana Herbert, Clerk
By _____Deputy Clerk

COURT OF APPEAL
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

In re NICHOLAS BEAUDREAUX on Habeas Corpus.

A130110
Alameda County No. 160022

BY THE COURT:

The petition for writ of habeas corpus is denied.

Date: JUL 22 2011 REARDON, ACTING P.J.

Court of Appeal, First Appellate Disrict
Division Four – No. A130110

S195827

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re NICHOLAS BEAUDREAUX
on Habeas Corpus.

The petition for review is denied.

SUPREME COURT
FILED
OCT 12 2011
Frederick K. Ohlrich Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

Court of Appeal, First Appellate Disrict,
Division Four – No. A126140

S195831

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,
v.
NICHOLAS BEAUDREAUX, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED
OCT 12 2011
Frederick K. Ohlrich Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

FILED JAN 10 2013
Court of Appeal – First App. District
DIANA HERBERT
By_____
DEPUTY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re NICHOLAS BEAUDREAUX, on Habeas Corpus.	A137478
_____/	(Alameda County Super. Ct. No. 160022

THE COURT:

The petition for writ of habeas corpus is denied.

(Ruvolo, P.J., Reardon, J., and Rivera, J., joined in the decision.)

Date: JAN 10 2013 Ruvolo, P.J.

Court of Appeal, First Appellate Disrict,
Division Four – No. A137478

S208146

IN THE SUPREME COURT OF CALIFORNIA

En Banc

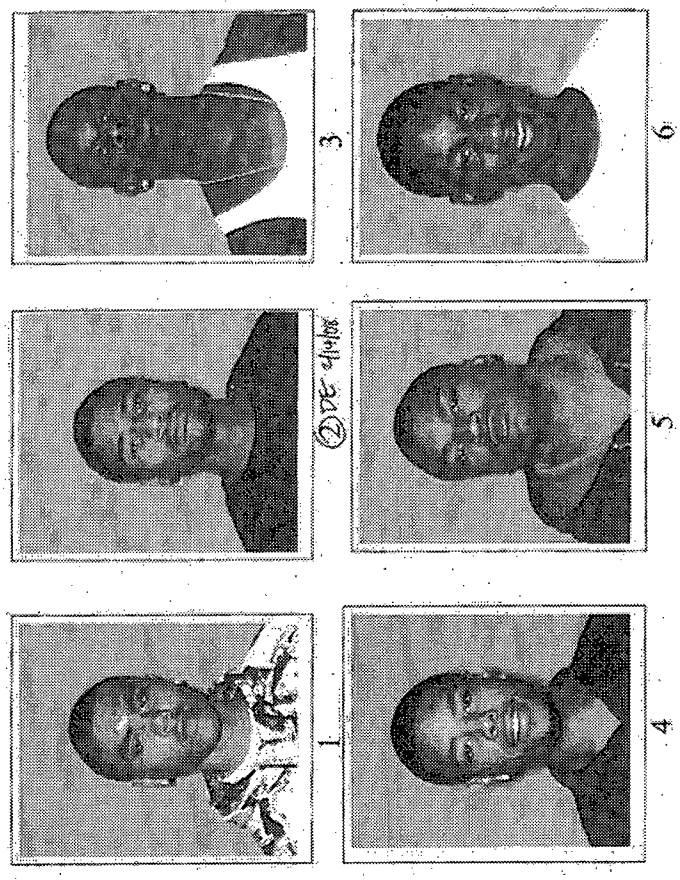
In re NICHOLAS BEAUDREAUX, on Habeas Corpus.

The petition for review is denied.

SUPREME COURT
FILED
MARCH 27 2013
Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice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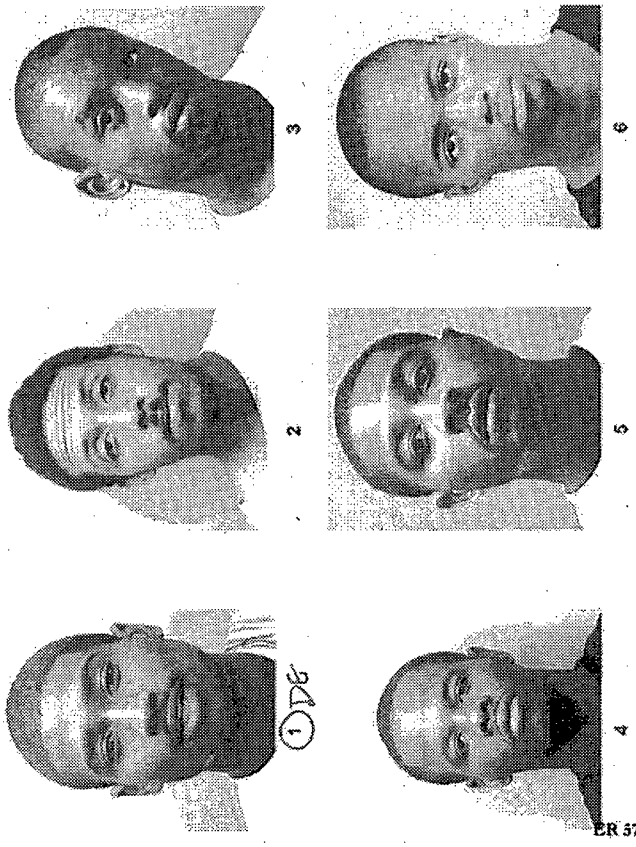
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