

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO SANDERS,

Petitioner,

vs.

RONALD DAVIS, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

APPENDICES G-I

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APPENDIX G

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICARDO RENE SANDERS,

Petitioner,

v.

VINCE CULLEN,¹ Acting Warden
of California State Prison
at San Quentin,

Respondent.

CASE NO. CV 96-07429 JFW

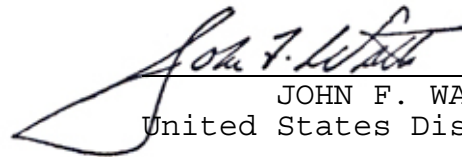
DEATH PENALTY CASE

JUDGMENT

Pursuant to the Order Denying Petition for Writ of Habeas Corpus,
IT IS HEREBY ORDERED AND ADJUDGED that the Petition is denied
with prejudice and judgment is entered in favor of Respondent and
against Petitioner.

The Clerk is ordered to enter this judgment.

Dated: May 6, 2010



JOHN F. WALTER
United States District Judge

¹ Vince Cullen is substituted for his predecessor, Robert K. Wong, as Warden of the California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d)(1).

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NOTICE PARTY SERVICE LIST**Case No.** CV 96-7429 JFW **Case Title** Sanders v Vince Cullen, Acting Warden San Quentin**Title of Document** Judgment

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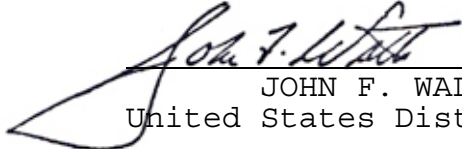
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1 issues presented were 'adequate to deserve encouragement to proceed
2 further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations
3 and internal quotation marks omitted). "In a capital case, the nature
4 of the penalty is a proper consideration in determining whether to
5 issue a certificate of probable cause, but the severity of the penalty
6 does not in itself suffice to warrant the automatic issuing of a
7 certificate." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

8 For the reasons set forth in the Order Denying Petition for Writ
9 of Habeas Corpus, Petitioner has not made the requisite substantial
10 showing of the denial of a constitutional right with respect to any
11 claim. Therefore, a certificate of appealability is denied as to all
12 claims and rulings in this case.

13 IT IS SO ORDERED.

14 Dated: May 6, 2010

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16 
17 JOHN F. WALTER
18 United States District Judge
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NOTICE PARTY SERVICE LIST**Case No.** CV 96-7429 JFW **Case Title** Sanders v Vince Cullen, Acting Warden San Quentin**Title of Document** Judgment

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 RICARDO RENE SANDERS,) NO. CV 96-07429 JFW
12)
13 Petitioner,) DEATH PENALTY CASE
14)
15 v.) ORDER DENYING PETITION
16) FOR WRIT OF
17 VINCE CULLEN,¹ Acting Warden) HABEAS CORPUS
18 of California State Prison)
19 at San Quentin)
20 Respondent.)
21 _____)
22)
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18 On February 22, 2010, the parties filed their final briefs relating
19 to Claims 10, 27, 40, and 44, as directed by the Court in its January
20 28, 2010 Order. [Docket Nos. 189, 193]. Pursuant to Rule 78 of the
21 Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds
22 that this matter is appropriate for decision without oral argument.
23 After considering the papers and the arguments therein, the Court rules
24 as follows.
25

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27 ///

28 ¹ Vince Cullen is substituted for his predecessor, Robert K. Wong, as Warden of the California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d)(1).

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 1980, there were nine employees and two customers inside the Bob's Big Boy on La Cienega Boulevard.² Around 2:00 a.m., the restaurant was closed and its doors were locked. Michael Malloy was the night manager; Derwin Logan was the cook; the waitresses were Dionne Alicia Irvin, Evelyn Jackson, Rhonda Robinson, and Dita Agtani; the busboys were Cesario Luna and his son Ismael Luna; the cashier was Ahmad Mushuk; and the customers were David Burrell and Tami Ellen Rogoway.

Logan came to Malloy who was in his office and told him that the two remaining customers wanted to leave the restaurant. Malloy gave Logan the keys to the front door, and Logan walked to the front door with Burrell and Rogoway. When Logan opened the door, Petitioner and another man later identified as Franklin Freeman, both armed with shotguns, forced Logan, Burrell, and Rogoway back into the restaurant. Petitioner yelled at them: "It's a jack. It's a stickup." He grabbed the keys from Logan. Freeman hit Mushuk on the head with the butt of his shotgun, and Mushuk fell to the floor unconscious. Irvin, Jackson, Agtani, Robinson, and Cesario Luna were ordered to lay face down on the floor. Several minutes later, they were forced to the kitchen area and again ordered to lay down on the floor.

Shortly thereafter, Petitioner ordered Malloy, Logan, Burrell, and Rogoway to the back of the restaurant and told them to lay face down on the floor of the hallway outside the freezer. Petitioner asked for the manager, and Malloy stood up. Petitioner asked Malloy where the alarm and the safe were, and ordered Malloy to give him the money in the safe.

² These facts are summarized from the California Supreme Court's decision on direct review, *People v. Sanders*, 11 Cal. 4th 475, 498-504 (1995).

1 Malloy placed approximately \$1,300 and some coins that were wrapped in
2 Bank of America wrappers in a box.

3 Petitioner then told everyone "get up off the floor . . . We are
4 going to the back. You're going to get hurt." Malloy, Logan, Burrell,
5 and Rogoway were forced into the freezer, where the other employees were
6 held against their will. Mushuk remained on the floor unconscious in
7 the front part of the restaurant.

8 Petitioner demanded watches, wallets, and jewelry, which Malloy
9 collected in a bucket from everyone in the freezer. No one resisted,
10 and some pleaded, prayed, and cried. Petitioner and Freeman ordered
11 everyone to "turn around and face the wall" and to kneel. Jackson stood
12 up and begged: "Don't hurt me. Don't hurt me." She was ordered to
13 turn around and as soon as she complied, she was shot. Petitioner and
14 Freeman continued firing until they apparently ran out of ammunition.
15 After the firing ceased, Petitioner asked, "How many rounds do you
16 have?" Freeman answered, "None," and they closed the freezer door and
17 left the restaurant.

18 The victims were piled on top of each other on the floor of the
19 freezer. Inside the freezer, Burrell and Agtani were dead, and Mushuk
20 was dead on the floor outside the freezer. Cesario Luna was severely
21 wounded and died several months later. Malloy was struck by a bullet in
22 his right eye, which he lost. Rogoway suffered gunshot wounds to her
23 back and spine, resulting in numbness on her right side and an
24 intermittent inability to walk. Jackson suffered severe head injury,
25 resulting in permanent impairment of her brain function. Irvin suffered
26 gunshot wounds to his arm. Only three of the victims, Logan, Ismael
27 Luna, and Robinson, were physically unharmed, although Robinson
28 developed severe psychological problems requiring extensive treatment.

1 Within days of the robbery murder, several individuals provided
2 information to the police implicating Petitioner. On December 17, 1980,
3 Jerry Lankford anonymously called the police and told them about his
4 September 1980 conversation with Petitioner during which Petitioner
5 advised him that he planned to rob a Bob's Big Boy. Lankford also
6 described Petitioner and his car. The police thereafter identified
7 Lankford, who provided the police a written statement detailing his
8 knowledge of Petitioner's plan to rob the restaurant.

9 On December 20, 1980, Andre Gilcrest contacted the police and
10 provided them with information that he knew about Petitioner's robbery
11 plan. In addition, Zola Taylor, who was living with the Gilcrest
12 family, contacted the police, and advised them that she had personal
13 knowledge of the meetings between Petitioner and co-defendant Freeman
14 before the robbery. Both Gilcrest and Taylor provided written
15 statements to the police describing their knowledge of Petitioner's plan
16 to rob the restaurant.

17 On December 22, 1980, Petitioner was arrested and a lineup was held
18 the next day. The other co-conspirators, Freeman and Carletha Stewart,
19 were also arrested in connection with these crimes.

20 Four victims positively identified Petitioner as one of the Bob's
21 Big Boy robbers: Malloy identified Petitioner from a videotape of the
22 lineup, as well as at the preliminary hearing and at trial; Rogoway
23 identified Petitioner from a videotape of the lineup and at trial;
24 Ismael Luna identified Petitioner at a lineup, at the preliminary
25 hearing, and at trial; and Robinson identified Petitioner at a lineup
26 and at trial.

27 During their investigation, the police found a sawed-off shotgun
28 and shotgun shells in the closet of Petitioner's bedroom and shotgun

1 shells and casings in the bedroom of Petitioner's father. In co-
2 defendant Stewart's residence, they found \$90 in single dollar bills and
3 several rolls of coins still in Bank of America wrappers.

4 On March 18, 1981, an information was filed against Petitioner and
5 co-defendants Stewart and Freeman in Los Angeles County Superior Court
6 charging them with the Bob's Big Boy robbery murders. Petitioner
7 pleaded not guilty to the charges. His motion for a change of venue was
8 denied, and his case was severed from that of his co-defendants.

9 Petitioner's trial began on May 3, 1982. During the guilt phase,
10 the prosecution presented the testimony of the eyewitnesses who
11 identified Petitioner as one of the Bob's Big Boy robbers, as well as
12 the testimony of other witnesses who connected him to the crime. The
13 prosecution also introduced the physical evidence found at the homes of
14 Petitioner, his father, and Stewart that was consistent with the murder
15 weapons and stolen money. On August 20, 1982, the jury convicted
16 Petitioner of four counts of murder.

17 The penalty phase began on August 25, 1982. During this phase, the
18 prosecution presented evidence in aggravation, including a second degree
19 burglary Petitioner committed at the home of Dr. Donald Lawrence Cray in
20 1977. It was stipulated that Petitioner committed the burglary, that he
21 entered a plea of guilty, and that he was sentenced to prison. Dr. Cray
22 testified that when he returned to his home in Orange County on February
23 28, 1977, he saw two men running to a car parked in his driveway
24 carrying rifles. When Dr. Cray ran out and asked the men what they were
25 doing, the driver said: "Shoot him, shoot him." When Petitioner pointed
26 a rifle at him, Dr. Cray ran from the back of a car and took cover
27 behind a tree. As the burglars drove off, he wrote down the license
28 number and called the police. Inside his home, he found personal

1 property piled up in the middle of the den, including a camera and a
2 vacuum cleaner, and discovered that two rifles were missing. In
3 addition to the evidence regarding this burglary, the prosecution argued
4 that the evidence introduced during the guilt phase -- the 11 attempted
5 murders, four actual murders, four maimings, and 11 robberies --
6 supported an aggravating circumstance finding that warranted the
7 imposition of a death sentence.

8 Petitioner presented mitigation evidence, including the testimony
9 of family members, a friend, and an expert witness. His sister and
10 brother, Lisa and Adrian Sanders, and a family friend who cared for
11 Petitioner when he was a teenager testified about the difficulties
12 Petitioner had faced throughout his life, including growing up in a
13 public housing project, losing his mother at the age of ten, and being
14 neglected by his father following his mother's death. A clinical
15 psychologist testified that Petitioner's school and juvenile records
16 indicated that he performed adequately at school until his mother's
17 death, and his behavior deteriorated after that.

18 The jury returned its verdict sentencing Petitioner to death on
19 September 2, 1982. His co-defendants were also convicted. Co-defendant
20 Stewart entered a guilty plea, and co-defendant Freeman was sentenced to
21 life in prison without the possibility of parole after a jury trial that
22 followed Petitioner's trial.

23 Petitioner directly appealed his sentence and conviction, which the
24 California Supreme Court affirmed, but it vacated three of the four
25 multiple murder special circumstances found true by Petitioner's jury.
26 *See Sanders*, 11 Cal. 4th at 475. Petitioner then filed a petition for
27 certiorari, which was denied on October 7, 1996. *Sanders v. California*,
28 519 U.S. 838 (1996). Petitioner filed a state habeas corpus petition,

1 which the California Supreme Court denied on February 14, 1996.

2 Petitioner sought relief in this Court on October 22, 1996, when he
3 filed his request for counsel. On April 7, 1997, Petitioner filed his
4 federal habeas petition.

5 In a February 27, 1998 Order, the Honorable J. Spencer Letts
6 granted Respondent's Motion to Dismiss on Claims 10, 15, 30, 32
7 (partial), 33, 34 (partial), and 35. In an October 7, 1999 Order, Judge
8 Letts granted summary judgment on Claims 4, 16, 24, 25, 26, 28, 29, 32,
9 34, 36, 37, 38, 39, 41, 42, and 43. In an October 15, 2001 Order, the
10 Honorable Carlos R. Moreno denied Petitioner's Motion for an Evidentiary
11 Hearing on 21 claims (Claims 1-3, 5-9, 11-14, 17-23, 31, and 45) on the
12 grounds that none provided a "colorable" basis for relief. [Docket No.
13 138 at 12-81]. On October 20, 2009, the Honorable Stephen G. Larson
14 denied Petitioner's Motion to Vacate and for Reconsideration and
15 directed the parties to submit a Joint Status Report regarding the
16 remaining claims and the final disposition of the case within 30 days of
17 the entry of that order. [Docket No. 166].

18 On December 23, 2009, this Court directed the parties to submit
19 simultaneous briefs regarding whether the discovery described in Judge
20 Letts's September 18, 2007 Order was necessary for the resolution of
21 Claims 10, 27, 40, or 44. [Docket No. 174]. On January 28, 2010, the
22 Court denied the requested discovery on the grounds that there was no
23 good cause for the discovery because it was unnecessary to resolve the
24 remaining claims. The parties were ordered to submit final briefing on
25 the merits of Claims 10, 27, 40, and 44. [Docket No. 182].

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DISCUSSION

I. Standard of Review

Because the Petition was filed in 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). In order to obtain relief under AEDPA, a petitioner must demonstrate that the California Supreme Court's rejection of his claim: 1) "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) "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). State court factual findings are entitled to a presumption of correctness, unless they are rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"Clearly established Federal law," for purposes of Section 2254(d)(1) review, "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412 (2000); see also *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Stokes v. Schriro*, 465 F.3d 397, 401-02 (9th Cir. 2006) (explaining that this statutory language "refers to Supreme Court precedent at the time of the last-reasoned state court decision"). Section 2254(d)(1) "restricts the source of clearly established law to [the Supreme Court's] jurisprudence." *Williams*, 529 U.S. at 365; see also *Plumlee v. Mastro*, 512 F.3d 1204, 1210 (9th Cir. 2008)(*en banc*)("What matters are the holdings of the Supreme Court, not the holdings of lower federal courts."). However, although "[o]nly Supreme Court precedents are binding on state courts under AEDPA," Ninth Circuit "precedents may be pertinent to the extent that they illuminate the meaning and application

1 of Supreme Court precedents." *Campbell v. Rice*, 408 F.3d 1166, 1170
2 (9th Cir. 2005)(*en banc*).

3 A state court decision is "contrary" to federal law under the first
4 prong of Section 2254(d)(1) if the state court applied the wrong legal
5 standard in evaluating a claim, or "if the state court confronts a set
6 of facts that are materially indistinguishable from a decision of this
7 Court and nevertheless arrives at a result different from our
8 precedent." *Williams*, 529 U.S. at 405-06. Under the second prong of
9 Section 2254(d)(1), "[a] state-court decision that correctly identifies
10 the governing legal rule but applies it unreasonably to the facts of a
11 particular prisoner's case" is an "unreasonable application of federal
12 law." *Id.* at 407-08. In order to reverse a state conviction on the
13 grounds that the state court's application of Supreme Court precedent
14 was "unreasonable," "the state court's decision must have been more than
15 incorrect or erroneous . . .; [it] must have been 'objectively
16 unreasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003) (quoting
17 *Williams*, 529 U.S. at 409).

18 When a state court denies a claim on the merits without providing
19 any explanation of its reasoning, the Court must "perform an independent
20 review of the record to ascertain whether the state court decision was
21 objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th
22 Cir. 2003) (citation and internal quotation marks omitted); *Pirtle v.*
23 *Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) ("[A]lthough we
24 independently review the record, we still defer to the state court's
25 ultimate decision."). If constitutional error is found following such
26 review, habeas relief is warranted only where the error had a
27 "'substantial and injurious effect or influence in determining the
28 jury's verdict.'" *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting

1 *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

2 **II. Previously Resolved Claims**

3 There is no dispute that Claims 10, 27, 40, and 44 have not been
 4 resolved on the merits. [Docket Nos. 177, 180]. However, the parties
 5 dispute the status of Claims 1-3, 5-9, 11-14, 17-23, 31, and 45, because
 6 there is no order formally denying those claims. However, each of those
 7 claims was discussed in detail and decided in the October 15, 2001 and
 8 October 20, 2009 Orders. Petitioner essentially argues that those
 9 claims remain viable and must be considered in a cumulative error
 10 analysis. [Docket No. 193 at 2]. Although Petitioner concedes that the
 11 "prior rulings denied relief as to his individual claims" in the October
 12 15, 2001 Order, he further argues that because the Court in the October
 13 15, 2001 Order "assumed" an error on each claim and then went on to find
 14 that such an error would have been harmless, "the same assumption must
 15 be made in ruling on the cumulative error."³ *Id.*

16 However, in addition to the individual harmless error
 17 determination, the October 15, 2001 Order contains a thorough analysis
 18 on the facts and the law and a ruling that these claims failed on the
 19 merits. The Court has reviewed the October 15, 2001 and October 20,
 20 2009 Orders, the evidence relevant to these claims, and the rulings on
 21 these claims, and agrees with and adopts each of those rulings.⁴

22
 23 ³ Petitioner's argument would result in a grave injustice: if
 24 the Court now assumed error on every claim addressed in the October 15,
 25 2001 Order and considered these claims collectively, Petitioner might be
 entitled to relief even though the October 15, 2001 Order found that
 each of these claims lacked merit.

26 ⁴ In addition, based on review of the record, evidence, and all
 27 orders in this case, including the October 15, 2001 and October 20, 2009
 28 Orders, the Court finds no reason to reconsider the rulings on these
 claims. Under the 'law of the case' doctrine, 'a court is generally
 precluded from reconsidering an issue that has already been decided by

1 The Court incorporates by reference the reasons discussed in these
 2 orders explaining why these claims lack merit, and will not restate the
 3 law, evidence, and facts set forth in these orders. However, the Court
 4 will briefly discuss these claims and will now formally deny each of
 5 these claims. 28 U.S.C. § 2264(b) ("Following review subject to
 6 subsections (a), (d), and (e) of section 2254, the court shall rule on
 7 the claims properly before it."); 28 U.S.C. § 2243 ("The court shall
 8 summarily hear and determine the facts, and dispose of the matter as law
 9 and justice require.").

10 Claims 2, 6, 8, and 11 involve the allegedly false testimony
 11 provided by eyewitnesses, Tami Rogoway, Rhonda Robinson, Michael Malloy,
 12 and Ismael Luna, who identified Petitioner as one of the Bob's Big Boy
 13 robbers. All of these claims were addressed in Judge Moreno's October
 14 15, 2001 Order and were found to have no merit. Accordingly, the Court
 15 **DENIES** Claims 2, 6, 8, and 11. [Docket No. 138 at 13-25; 28-29; 26-27;
 16 29-31].

17 Claims 17, 19, 20, and 22 involve the allegedly false testimony
 18 provided by non-eyewitnesses, Andrew Gilcrest, Rhonda Givens, Rodell
 19 Mitchell, and Bruce Woods, who connected Petitioner to the Bob's Big Boy
 20 robbery. All of these claims were addressed in Judge Moreno's October
 21 15, 2001 Order and were found to have no merit. Accordingly, the Court
 22 **DENIES** Claims 17, 19, 20, and 22. [Docket No. 138 at 32-35; 36-37; 38;
 23 _____]

24 the same court, or a higher court in the identical case.'" *United*
 25 *States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (citations
 26 omitted). This doctrine precludes a court from re-examining a prior
 27 decision on a factual or legal issue, unless: "1) the first decision
 28 was clearly erroneous; 2) an intervening change in the law has occurred;
 3) the evidence on remand is substantially different; 4) other changed
 circumstances exist; or 5) a manifest injustice would otherwise result."
Id. (citation omitted). Although the law of the case doctrine would
 arguably preclude re-examining the principal rulings on the merits of
 these claims, the Court does not rely on this doctrine in this order.

1 40].

2 Claims 1, 3, 5, 7, 9, 12, 13, 18, 21, and 23 involve various acts
3 of alleged prosecutorial misconduct, including improprieties in the
4 presentation of the trial testimony provided by Rogoway, Gilcrest, and
5 Malloy; the placement of a known informant on the bus with Petitioner;
6 and various *Brady*⁵ errors. All of these claims were addressed in Judge
7 Moreno's October 15, 2001 Order and the *Brady* claims were addressed in
8 Judge Larson's October 20, 2009 Order, and were found to have no merit.
9 Accordingly, the Court **DENIES** Claims 1, 3, 5, 7, 9, 12, 13, 18, 21, and
10 23. [Docket No. 138 at 41-56; 57; 58-60; 61-63; 63-65; 66-68; Docket
11 No. 166 at 27-50].

12 In Claims 14 and 45, Petitioner alleges his trial counsel provided
13 ineffective assistance for various reasons, including her failure to
14 move to suppress the eyewitnesses' identifications and her failure to
15 present sufficient mitigating evidence. All of these claims were
16 addressed in Judge Moreno's October 15, 2001 Order and were found to
17 have no merit. Accordingly, the Court **DENIES** Claims 14 and 45. [Docket
18 No. 138 at 69-73; 73-78].

19 In Claim 31, Petitioner alleges a trial court error involving the
20 discharge of Juror Bateman. This claim was addressed in Judge Moreno's
21 October 15, 2001 Order and was found to have no merit. Accordingly, the
22 Court **DENIES** Claim 31. [Docket No. 138 at 80-81].

23 **III. Unresolved Claims**

24 **A. Claim 10**

25 In Claim 10, Petitioner alleges that "[t]he trial court improperly
26 admitted into evidence two pages of the Bob's Big Boy manager's manual

27 ⁵ These errors are alleged pursuant to *Brady v. Maryland*, 373
28 U.S. 83 (1963).

1 dealing with procedures to be followed by employees to identify robbery
 2 suspects and thereby violated [his rights] under the Sixth and
 3 Fourteenth Amendments." [Docket No. 20 at 30]. Specifically,
 4 Petitioner's argument is based on the admission into evidence of pages
 5 503 and 532 of the "Manager's Manual," entitled "Hold-ups and Robberies"
 6 and "In the Event of a Robbery" (Ex. 74), in order to bolster Malloy's
 7 identification testimony and enhance its reliability.⁶ *Id.* At trial,
 8

9 ⁶ The Manual stated that "the personal safety of the employees
 10 is the primary consideration of management" and "[n]o resistance should
 11 be made and the demands of the criminal should be followed" in the event
 12 of a robbery. It further provided ten points regarding what to do in
 13 case of a robbery, including to "[d]o exactly as told," "remain calm,"
 "[s]tudy physical features and clothing [in order to provide] an
 accurate description to the police," "[d]o not allow anyone to touch or
 disturb anything that may contain fingerprints," and "[c]all the police
 immediately after the incident." Ex. 74.

14 It also gave tips about how to identify a criminal so that the
 15 criminal can be later described to investigating authorities, including:

16 What was the criminal's height, weight, or body type?

17 Look straight into his eyes. If his eyes are above
 18 yours, he is taller; if his eyes are below yours, he is
 19 shorter. Estimate how many inches taller or shorter. You
 20 may have trouble estimating what a person weighs, but in
 describing the criminal to the police, you can compare him
 to another employee, or a member of the police. You would
 say, "The criminal was built like that person, but slightly
 heavier."

21 What were the color of his eyes and color of his skin?

22 When looking into his eyes to gauge his height, look at
 23 the color. This is very difficult to disguise. Even a
 24 masked criminal will have exposed skin around the eyes, or
 his hands, or around the collar.

25 How was he dressed?

26 Look at each item of clothing from top to bottom. Did
 27 he wear a hat? What kind and what color? Did he wear a
 coat? What kind and what color? Shirt? Sweater? A belt
 28 with an unusual buckle? What kind of pants? What color?
 What kind of shoes? What color? *Id.*

1 defense counsel objected on the grounds that the manual was hearsay and
2 irrelevant, and would "improperly bootstrap" and enhance the credibility
3 of Malloy's identification testimony. RT at 6,812-24. Petitioner
4 contends that the manual pages were inadmissible hearsay and, assuming
5 that the objectionable pages were in fact not hearsay, they were still
6 inadmissible because they were irrelevant. [Docket No. 20 at 31-32].

7 The California Supreme Court rejected this claim on its merits in
8 its written decision on direct review, stating:

9 The evidence was not hearsay; it was not offered for the
10 truth of the matter asserted, but to show what procedures
11 Malloy studied and attempted to follow. . . . The Manager's
12 Manual was not introduced for the purpose of showing that the
13 procedures established a reliable standard of care to be
14 followed by Bob's Big Boy employees; nor did admission of the
15 evidence imply that the procedures were reliable.

16 . . . Admission of the excerpts fell well within that
17 discretion: it corroborated Malloy's testimony concerning how
18 he behaved during the robbery and, in particular, that he used
19 specific techniques in his attempt to focus and concentrate on
20 defendant's appearance so that he could later identify him to
21 the police.

22 Finally, defendant argues that the trial court abused its
23 discretion in admitting the evidence because it was more
24 prejudicial than probative. No objection on this ground was
25 made in the trial court; the point has not been preserved for
26 review. Even if we construed defendant's argument to the
27 trial court that the excerpts would improperly enhance the
28 witness's credibility as an objection under Evidence Code
section 352, which we do not, the claim is unpersuasive.

21 *Sanders*, 11 Cal. 4th at 511-12.

22 In addition, the California Supreme Court found that there was no
23 constitutional error:

24 [Petitioner] also claims, for the first time on appeal,
25 that admission of the evidence was erroneous under the Sixth
26 and Fourteenth Amendments to the United States Constitution
27 "and their California counterparts." "It is, of course, 'the
28 general rule that questions relating to the admissibility of
evidence will not be reviewed on appeal in the absence of a
specific and timely objection in the trial court on the ground
sought to be urged on appeal.'" The point is also meritless.

1 It is predicated on the assertion that admission of the
2 evidence was error under California law. It was not.

3 *Sanders*, 11 Cal 4th at 512 n.4 (citations omitted).

4 Respondent previously moved to dismiss Claim 10 on the grounds that
5 it was procedurally defaulted. In the Court's February 27, 1998 and
6 October 27, 1998 Orders on Respondent's Motion to Dismiss, Judge Letts
7 found that Claim 10 was procedurally barred, but the Court took the
8 issue of whether Petitioner had established cause and prejudice
9 sufficient to excuse the procedural bar under submission until the Court
10 resolved the other challenges to the eyewitness testimony.⁷ Because all
11 of the other claims challenging the eyewitness testimony have been found
12 to lack merit, they do not impact the consideration of the merits of
13 this claim.

14 In his final brief, Petitioner simply argues that he is entitled to
15 relief on Claim 10 because the prosecution used the manual as
16 "substantive proof" in an effort to bolster Malloy's identification
17 testimony, which violated Petitioner's federal constitutional rights to
18 due process and confrontation. [Docket No. 193 at 21]. Petitioner also
19 argues that "[t]rial counsel was ineffective for failing to argue that
20 the admission of the Manager Manual violated [Petitioner's] federal
21 constitutional rights." *Id.*

22 / / /

23 / / /

24
25 ⁷ Specifically, in the February 27, 1998 Order, Judge Letts
26 stated: "Accordingly, the Court's decision to dismiss this claim on the
27 grounds of procedural bar stands," and in the October 27, 1998 Order,
28 Judge Letts stated: "The court will take the issue of whether
petitioner has established cause and prejudice that the procedural
default of claim 10 should be excused under submission, pending the
resolution of the other challenges to the eyewitness testimony."
[Docket Nos. 68, 93].

1 Even if Claim 10 is procedurally barred and Petitioner could
2 demonstrate cause and prejudice to excuse its procedural default, this
3 claim fails on its merits. *Lambrix v. Singletary*, 520 U.S. 518, 524-25
4 (1997) (finding that the interests of judicial economy counsel against
5 deciding a complex procedural bar issue when a claim can be readily
6 resolved on the merits); *Walters v. Maass*, 45 F.3d 1355, 1360 n.6 (9th
7 Cir. 1995).

8 In Claim 10, Petitioner contends that the admission of this
9 evidence violated his federal constitutional rights because it was
10 irrelevant and constituted hearsay. [Docket No. 20 at 33]. However,
11 state evidentiary rulings are not cognizable in a federal habeas
12 proceeding unless the admission of the evidence violated the
13 petitioner's due process right to a fair trial. See *Estelle v. McGuire*,
14 502 U.S. 62, 70 (1991); *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir.
15 1995); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). "It is
16 well settled that a state court's evidentiary ruling, even if erroneous,
17 is grounds for federal habeas relief only if it renders the state
18 proceedings so fundamentally unfair as to violate due process." *Spivey*
19 *v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999). The category of
20 "infractions" that violate "fundamental fairness" is a very narrow one.
21 *Estelle*, 502 U.S. at 70. (Citations omitted). Here, Petitioner's
22 federal constitutional challenges that his rights to due process and to
23 confront witnesses were violated are grounded on the alleged state
24 evidentiary violations, which fail for the reasons stated by the
25 California Supreme Court.⁸

26
27 ⁸ Accordingly, despite Petitioner's argument that his trial
28 counsel was ineffective for "failing to argue that the admission of the
Manager's Manual violated [Petitioner's] due process rights," any

Petitioner nevertheless contends that admitting this evidence constituted prejudicial error resulting in a federal constitutional violation, relying upon *Brecht* and *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002). [Docket No. 86 at 21]. In *Valerio*, the Ninth Circuit found that an error resulting from an improper "depravity of mind" instruction was not harmless where a narrowed instruction would have allowed counsel to argue much more effectively in favor of the petitioner. *Id.* In contrast, here, the evidence against Petitioner was overwhelming, including multiple eyewitnesses, physical evidence connecting Petitioner to the crime scene, and testimony establishing that Petitioner had planned to rob Bob's Big Boy.⁹ Thus, the admission of these two pages of the manual setting forth largely common sense techniques for identifying robbers and handling a crime scene, even assuming it was error, could not have resulted in prejudice. More importantly, the California Supreme Court's rejection of this claim did not constitute an unreasonable determination of the facts, nor was it contrary to or an unreasonable application of United States Supreme Court precedent.

Accordingly, Claim 10 is **DENIED**.

further objection by trial counsel on Sixth or Fourteenth Amendment grounds would have been overruled. Of course, there can be no federal constitutional violation based on counsel's failure to make an objection that would not have succeeded. See also, e.g., *James v. Borg*, 24 F.3d 20, 26-28 (9th Cir. 1994) (finding that trial counsel was not incompetent for failing to make a motion to suppress evidence obtained from a car search that would have been denied because the petitioner lacked standing to challenge the search); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (finding no ineffective assistance for failing to file a suppression motion where counsel researched the motion and spoke with other attorneys who handled similar motions).

⁹ The overwhelming evidence against Petitioner is further elaborated upon below in the discussion pertaining to Claims 27 and 44, Petitioner's cumulative error claims.

1 **B. Claim 40**

2 In Claim 40, Petitioner alleges that, "[b]y allowing the jury to
3 consider all four multiple-murder special circumstances as aggravating
4 factors, the penalty phase instructions artificially inflated the case
5 for death in violation of the Eighth and Fourteenth Amendments."
6 [Docket No. 20 at 89].

7 The California Supreme Court denied Claim 40, stating:

8 [Petitioner] argues that the trial court erred, because
9 the instructions improperly allowed the jury to consider four
10 multiple-murder special circumstances instead of just one. He
11 is correct; all but one of the multiple murder special
12 circumstances must be set aside. (*People v. Bonin, supra*, 46
13 Cal. 3d 691.) Nonetheless, as we have repeatedly held,
"consideration of such excessive multiple-murder special-
circumstance findings where, as here, the jury knows the
number of murders on which they were based, is harmless error.
[Citation.]" (*People v. Clark, supra*, 3 Cal. 4th at pp. 167-
168.)[Fn.42]

14 [Fn. 42] [Petitioner] asserts that the instructional
15 error concerning the existence of any special circumstances
16 was per se reversible under the Eighth and Fourteenth
17 Amendments, or, in the alternative, was prejudicial error.
Neither point has merit. Although there was state law error,
it was harmless. The federal constitutional provisions were
not substantially implicated.

18 *Sanders*, 11 Cal. 4th at 562-63 & n.42.

19 In this case, the Court previously acknowledged that there was a
20 state law error on Claim 40, as determined by the California Supreme
21 Court, but deferred ruling on this claim until after it determined
22 whether there were any additional constitutional errors that might be
23 relevant to a prejudice analysis. [Docket No. 104 at 51-52, Docket No.
24 119 at 8]. However, at this juncture, all of the other claims asserting
25 constitutional challenges have been found to lack merit and the
26 overwhelming evidence of Petitioner's guilt outweighs any potential
27 prejudice resulting from this error.
28

1 In a case addressing a similar issue, the Supreme Court held that
2 although two of the four eligibility factors found by the jury were
3 determined to be invalid, the invalid factors did not affect the
4 constitutionality of the death sentence ultimately imposed because the
5 remaining factors were sufficient to make the petitioner eligible for
6 the death penalty. *Brown v. Sanders*, 546 U.S. 212, 220-21 (2006).
7 Specifically, the Supreme Court stated:

8 An invalidated sentencing factor (whether an
9 eligibility factor or not) will render the sentence
10 unconstitutional by reason of its adding an improper
11 element to the aggravation scale in the weighing process
unless one of the other sentencing factors enables the
sentencer to give aggravating weight to the same facts and
circumstances. . . .

12 The issue we confront is the skewing that could
13 result from the jury's considering as aggravation properly
14 admitted evidence that should not have weighed in favor of
15 the death penalty. As we have explained, such skewing
16 will occur, and give rise to constitutional error, only
where the jury could not have given aggravating weight to
the same facts and circumstances under the rubric of some
other, valid sentencing factor.

17 *Id.* at 221 (Citations and quotations omitted).

18 Consistent with the holding in *Sanders*, the California Supreme
19 Court has repeatedly rejected this type of claim. For example, in
20 *People v. McWhorter*, 47 Cal. 4th 318, 377 (2009), the California Supreme
21 Court rejected the argument that the error in permitting the jury to
22 find true two multiple murder special circumstances, one for each count
23 of murder, prejudiced his penalty determination. The California Supreme
24 Court stated that, "[w]e have consistently found such double counting
25 harmless because it did not result in the jury considering any
26 inadmissible evidence." *Id.* (quoting *People v. Beardslee*, 53 Cal. 3d
27 68, 117 (1991)). The California Supreme Court further held that the
28 jury in that case, like the jury in *Beardslee*, was aware that there was

1 a total of two murders. *Id.*

2 Similarly, the alleged constitutional error at issue here -- the
3 erroneous instructions that the jury could consider four multiple murder
4 special circumstances instead of just one -- is not a constitutional
5 violation. As in *McWhorter*, the constitutionality of Petitioner's death
6 sentence was not affected because the jury would have necessarily
7 considered the same, admissible evidence of the four separate murders
8 even if it had been properly instructed that it could find true only one
9 multiple murder special circumstance. In addition, like *Sanders*, where
10 the death sentence was upheld because it was based on at least one
11 eligible special circumstance factor, the jury's imposition of the death
12 penalty in this case is constitutional because it was based on felony
13 murder robbery, which constituted another valid special circumstance
14 factor. Accordingly, there was no constitutional violation, and the
15 California Supreme Court's rejection of this claim did not constitute an
16 unreasonable determination of the facts, nor was it contrary to or an
17 unreasonable application of United States Supreme Court precedent.

18 Accordingly, Claim 40 is **DENIED**.

19 **C. Claim 27**

20 In Claim 27, Petitioner contends that the "cumulative effect of the
21 guilt-phase errors resulted in a fundamentally unfair trial in violation
22 of [Petitioner's] rights to due process and to a reliable guilt
23 determination in a capital case under the Sixth, Eighth, and Fourteenth
24 Amendments." [Docket No. 20 at 84].

25 On direct review, the California Supreme Court rejected this claim,
26 stating:

27 [P]etitioner asserts that, when considered together,
28 errors committed at the guilt phase of the trial require
reversal. In substance, he argues that the cumulative

1 effect of the errors resulted in an unfair trial, in
2 violation of the Sixth, Eighth, and Fourteenth Amendments
3 to the United States Constitutional and article 1, section
4 7 and 15 of the California Constitution. As shown, there
5 were few errors, none of which was prejudicial. They did
6 not, either singly or together, result in any substantial
7 detriment to the fairness or reliability of the guilt
8 trial.

9 *Sanders*, 11 Cal 4th at 537.

10 "Prejudice may result from the cumulative impact of multiple
11 deficiencies." *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995)
12 (observing that the Ninth Circuit has only found prejudice resulting
13 from cumulative error once in 11 years prior to that case) (citations
14 and internal quotation marks omitted)). "Multiple errors, even if
15 harmless individually, may entitle a petitioner to habeas relief if
16 their cumulative effect prejudiced the defendant." *Ceja v. Stewart*, 97
17 F.3d 1246, 1254 (9th Cir. 1996). However, where "each error is, at
18 best, marginal, we cannot conclude that their cumulative effect was 'so
19 prejudicial' to [a petitioner] that reversal is warranted.'" *United*
20 *States v. Karterman*, 60 F.3d 576, 579-80 (9th Cir. 1995) (citations
21 omitted); *United States v. De Cruz*, 82 F.3d 856, 868 (9th Cir. 1996)
22 (reaching the same conclusion and citing *Karterman*).

23 Here, there were no constitutional errors during the guilt phase
24 and, as in *Karterman* and *De Cruz*, all of the errors were minor and the
25 evidence against Petitioner was overwhelming. Four eyewitnesses
26 (Michael Malloy, Tami Rogoway, Rhonda Robinson, and Ismael Luna)
27 identified Petitioner as one of the robbers and testified against him at
28 trial. [Docket No. 138 at 18]. Despite Petitioner's contention that
the combined inconsistencies in the eyewitness testimony warrants habeas
relief [Docket No. 193 at 43], the jury was made aware of these
inconsistencies during counsel's vigorous cross-examination of each

1 witness and nevertheless found Petitioner guilty. RT at 7142-8015,
2 8069-130, 8143-50 (cross-examination of Malloy); RT at 8351-504, 8526-
3 67, 8569-85, 8724-55, 8768-73 (cross-examination of Rogoway); RT at
4 9161-369 (cross-examination of Luna); RT at 9903-40, 9941, 9944-49,
5 9953-55 (cross-examination of Robinson). In addition to the eyewitness
6 testimony, the testimony of other witnesses (Bruce Woods, Jerry
7 Lankford, Brenda Givens, Andre Gilcrest, Gilcrest's mother, and Zola
8 Taylor) clearly connected Petitioner to the crime and established that
9 Petitioner had conspired with co-defendants Stewart and Freeman to rob
10 Bob's Big Boy several months before the robbery occurred. [Docket No.
11 138 at 35-36]. There is no dispute that the police found shotguns,
12 shells, and casings in Petitioner's apartment which were virtually
13 identical to the type of weapons used to commit the murders. [Docket
14 No. 138 at 6-7, 35, 68]. The police also found one dollar bills and
15 several rolls of coins in Bank of America wrappings which were identical
16 to the way the stolen coins were wrapped. [Docket No. 138 at 7].

17 Moreover, this case is markedly different from the cases relied
18 upon by Petitioner [See Docket No. 193 at 43], where the errors
19 considered in combination constituted grounds for relief. *Taylor v.*
20 *Kentucky*, 436 U.S. 478, 487 (1978) (finding that the combination of the
21 trial court's skeletal instructions, possible harmful inferences from
22 references to the indictment, and repeated suggestions that the
23 petitioner's status as a defendant tended to establish his guilt
24 violated his right to a fair trial); *Chambers v. Mississippi*, 410 U.S.
25 284, 302-03 (1973) (finding that the petitioner was deprived of a fair
26 trial where a confession by a third person to the murder with which the
27 petitioner was charged was improperly excluded); *Parle v. Runnels*, 505
28 F.3d 922, 928-30 (9th Cir. 2007) (finding that the cumulative effect of

1 the errors resulting from the improper exclusion of evidence about the
2 central issues bearing on the petitioner's guilt violated his due
3 process rights). Here, the sole remaining issue to be resolved in this
4 claim (the admission of two pages of a manual consisting of instructions
5 about what to do if a crime occurs) does not approach the type or
6 magnitude of errors recognized in *Chambers* and *Parle*, or the numerous
7 errors which tended to establish the petitioner's guilt noted in *Taylor*.

8 Accordingly, Claim 27 is **DENIED**.

9 **D. Claim 44**

10 In Claim 44, Petitioner alleges that "[t]he cumulative effect of
11 the guilt and penalty phase errors requires reversal of the death
12 judgment." [Docket No. 20 at 106].

13 The California Supreme Court rejected this claim on direct review,
14 stating:

15 [Petitioner] contends that even if no single error
16 at the guilt or penalty phase warrants reversal of the
17 death judgment, the errors must be deemed prejudicial
18 when evaluated in combination. We reject the claim.
19 Thee errors at the trial as a whole were few in number
20 and of minimal significance. Whether considered
21 individually or for their cumulative" effect, they could
22 not have affected the process or result to [Petitioner's]
23 detriment.

24 *Sanders*, 11 Cal 4th at 565. The California Supreme Court also summarily
25 rejected this claim when it was raised in the state habeas corpus
26 petition. [Docket No. 193 at 45].

27 Where "the government's case is weak, a defendant is more likely to
28 be prejudiced by the effect of cumulative errors," but the harmless
error doctrine requires the court to "affirm a conviction if there is
overwhelming evidence of guilt." *United States v. Frederick*, 78 F.3d
1370, 1381 (9th Cir. 1996); *United States v. Nadler*, 698 F.2d 995, 1002

1 (9th Cir. 1983) (“[W]hether the alleged errors prejudiced the
2 [petitioner’s right] to a fair trial depends in turn upon the strength
3 of the Government’s [case] against [him]; the stronger the prosecution’s
4 case, the less likely that a [petitioner] would be prejudiced by the
5 error or misconduct”). “[W]hile a defendant is entitled to a fair
6 trial, he is not entitled to a perfect trial, ‘for there are no perfect
7 trials.’” *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991)
8 (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

9 Here, the cumulative errors during both the guilt and penalty
10 phases, considered together, were harmless and do not warrant federal
11 habeas relief. The evidence presented during the guilt phase was
12 overwhelming and any errors were minimal. Furthermore, Petitioner’s
13 argument that the penalty case was “weak” is controverted by the record.
14 Petitioner’s alleged errors during the penalty phase -- counsel’s
15 failure to present sufficient mitigating evidence and the trial court’s
16 error in excusing Juror Bateman and instructing the jury about the
17 multiple murder special circumstances -- are not constitutional
18 violations. Moreover, the prosecution’s argument that Petitioner’s 1977
19 burglary conviction coupled with the testimony of the burglary victim,
20 Dr. Donald Cray, and the circumstances of the underlying crime in this
21 case -- 11 attempted murders, four actual murders, four maimings, and 11
22 robberies -- was very compelling and fully justified the jury’s
23 imposition of the death sentence. [Docket No. 138 at 7].

24 Finally, the cases upon which Petitioner relies (the same cases he
25 relies on in support of his argument relating to Claim 27) are
26 inapposite because the errors at issue in those cases (improperly
27 excluded exonerating evidence and errors that tended to establish guilt)
28 are entirely different and distinguishable from Petitioner’s combined

1 remaining alleged instructional and evidentiary errors.

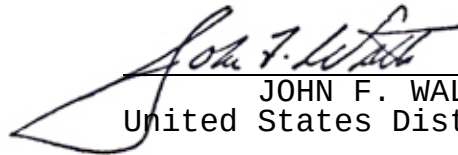
2 Accordingly, Claim 44 is **DENIED**.

3 **CONCLUSION**

4 For all of the reasons set forth above, Petitioner is not entitled
5 to federal habeas relief on any of his claims. The Court hereby denies
6 the Petition for Writ of Habeas Corpus with prejudice.

7 IT IS SO ORDERED.

8 Dated: May 6, 2010

9
10 
11 JOHN F. WALTER
12 United States District Judge
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NOTICE PARTY SERVICE LIST**Case No.** CV 96-7429 JFW **Case Title** Sanders v Vince Cullen, Acting Warden San Quentin**Title of Document** Judgment

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APPENDIX H

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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 RICARDO GENE SANDERS,

12 Petitioner,

13 v.

14 ROBERT K. WONG, Warden,

15
16 Respondent.
17

CV 96-07429 SGL

DEATH PENALTY CASE

ORDER DENYING
MOTION TO VACATE ORDER
DENYING PETITIONER'S
MOTION FOR AN EVIDENTIARY
HEARING OR, ALTERNATIVELY,
TO RECONSIDER ORDER AND
GRANT PETITIONER'S MOTION
FOR AN EVIDENTIARY HEARING

18 The Court, having reviewed the pleadings regarding Petitioner's
19 Motion to Vacate Order Denying Petitioner's Motion for an Evidentiary
20 Hearing or, Alternatively, to Reconsider Order and Grant Petitioner's
21 Motion for an Evidentiary Hearing (Motion), denies the Motion, as
22 follows.
23

24 FACTUAL AND PROCEDURAL BACKGROUND

25 A. Factual Background

26 As determined by the California Supreme Court on direct review,
27 People v. Sanders, 11 Cal. 4th 475, 498-504 (1995), the facts underlying
28

1 Petitioner's conviction are briefly summarized, as follows:¹

2 On December 13, 1980, there were nine employees and two customers
3 inside the Bob's Big Boy on La Cienega Boulevard. The restaurant doors
4 were locked. The night manager was Michael Malloy; the cook was Derwin
5 Logan; the waitresses were Dionne Alicia Irvin, Evelyn Jackson, Rhonda
6 Robinson, and Dita Agtani; the busboys were Cesario Luna and his son
7 Ismael Luna; the cashier was Ahmad Mushuk; and the customers were David
8 Burrell and Tami Ellen Rogoway.

9 Logan came to Malloy in the office and told him that the two
10 remaining customers wished to be let out. Malloy gave Logan the keys to
11 the restaurant, and Logan walked to the front door with Burrell and
12 Rogoway. When Logan opened the door, Petitioner and another man, both
13 armed with shotguns, forced Logan, Burrell, and Rogoway back into the
14 restaurant. Petitioner stated: "It's a jack. It's a stickup." He
15 took the keys from Logan. The man with Petitioner hit Mushuk on the
16 head with the butt of his shotgun, and Mushuk fell to the floor. Irvin,
17 Jackson, Agtani, Robinson, and Cesario Luna were ordered to lie face
18 down on the floor. Several minutes later, they were led to the kitchen
19 area and again ordered to lie down on the floor.

20 Petitioner took Malloy, Logan, Burrell, and Rogoway to the back of
21 the restaurant and ordered them to lie face down on the floor of the
22 hallway outside the freezer. Petitioner asked for the manager, and
23 Malloy stood up. Petitioner asked Malloy where the alarm and the safe
24 were, and Petitioner ordered him to give him the money in the safe.

25
26 ¹ On federal habeas review, "a determination of a factual issue
27 made by a State court shall be presumed to be correct," unless rebutted
28 by the petitioner by clear and convincing evidence. 28 U.S.C. §
2254(e)(1). See also Pollard v. Galaza, 290 F.3d 1030, 1033, 1035 (9th
Cir. 2002).

1 Malloy placed approximately \$1,300 in a box, and some of this money was
2 contained in Bank of America coin wrappers.

3 Petitioner then told everyone "get up off the floor . . . We are
4 going to the back. You're going to get hurt." Malloy, Logan, Burrell,
5 and Rogoway stood up and went into the freezer, which other employees
6 already occupied. Mushuk was lying on the floor unconscious.

7 Petitioner asked for watches, wallets, and jewelry, which Malloy
8 collected in a bucket from everyone in the freezer. No one resisted the
9 gunmen, and some pleaded, prayed, and cried. The gunmen ordered
10 everyone to "turn around and face the wall" and kneel. Jackson stood up
11 and pleaded: "Don't hurt me. Don't hurt me." One of the gunmen
12 ordered her to turn around and she complied. She then was shot and fell
13 to the floor. After the firing ceased, Petitioner asked, "How many
14 rounds do you have?" The other gunman answered, "None," and the gunmen
15 closed the freezer door.

16 Inside the freezer, people lay piled on top of each other and on
17 the floor. Ismael Luna jumped up to get to the door. Malloy tried to
18 restrain him, but he broke loose and ran from the freezer. When he
19 returned, he said the gunmen were gone. Burrell, Agtani, and Mushuk
20 were dead. Cesario Luna was severely wounded and died several months
21 later. Jackson suffered head injury, resulting in permanent impairment
22 of her brain function. Malloy was struck by a bullet in his right eye,
23 which he lost. Rogoway had shotgun injuries to her back and spine,
24 resulting in numbness on her right side and periodic inability to walk.
25 Irvin received a gunshot wound to his arm. Logan, Ismael Luna, and
26 Robinson were physically unharmed, although Robinson developed
27 psychological problems requiring extensive treatment.

28 On December 17, 1980, Jerry Lankford called the police and

1 anonymously told them about his September 1980 conversation with
2 Petitioner regarding his plan to rob Bob's Big Boy. Lankford also
3 described Petitioner and his car. The police thereafter identified
4 Lankford, who provided the police a written statement.

5 On December 20, 1980, Andre Gilcrest contacted the police and
6 provided them information he knew about the crimes. In addition, Zola
7 Taylor, who was living with the Gilcrest family contacted the police,
8 stating that she had personal knowledge of the robbery. Both Gilcrest
9 and Taylor provided written statements to the police.

10 In their investigation, the police found a sawed-off shotgun and
11 shotgun shell in the closet of Petitioner's bedroom and shotgun shells
12 and casings in the bedroom of Petitioner's father. At Stewart's
13 residence, they found \$90 in single dollar bills and several rolls of
14 coins in Bank of America wrappers. On December 22, 1980, Petitioner was
15 arrested and a lineup was held the next day.

16 Malloy identified Petitioner at a videotape of the lineup, at the
17 preliminary hearing, and at trial. Rogoway identified Petitioner at
18 trial and at a videotape of the lineup. Ismael Luna identified
19 Petitioner at a lineup, at the preliminary hearing, and at trial.
20 Robinson identified Petitioner at a lineup and at trial.

21 **B. Procedural Background**

22 The instant habeas proceeding was commenced on October 22, 1996,
23 when Petitioner filed his request for counsel. On April 7, 1997,
24 Petitioner filed his federal habeas petition. Therefore, the
25 Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §
26 2244(d), applies to the instant proceedings, as the petition was filed
27 after the statute's effective date, April 24, 1996.

1 On December 16, 1999, Petitioner filed a Motion for an Evidentiary
2 Hearing on 21 claims (Claims 1-3, 5-9, 11-14, 17-23, 31, and 45).
3 Petitioner's allegations in support of his Motion for an Evidentiary
4 Hearing included: manufacturing or squelching of evidence by the
5 prosecution and the police; lying by eight witnesses at the
6 prosecution's behest; and prosecutorial misconduct by failing to
7 disclose evidence, pressuring witnesses, promising witnesses benefits in
8 exchange for testimony favorable to the state, and knowingly presenting
9 the false testimony of a jailhouse informant. On October 15, 2001, the
10 Honorable Carlos Moreno issued the Order denying an evidentiary hearing
11 on all Petitioner's conspiracy claims because, as further discussed
12 infra, none provided a "colorable" basis for relief.

13 **DISCUSSION**

14 **A. Petitioner's Motion to Vacate the Order Based on 28 U.S.C. § 455(a)**

15 Petitioner first requests that the Order be vacated pursuant to 28
16 U.S.C. § 455(a). Mot. at 5-9.

17 Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate
18 [magistrate judge] of the United States shall disqualify himself in any
19 proceeding in which his impartiality might reasonably be questioned."

20 Petitioner contends that the Order must be vacated pursuant to 28
21 U.S.C. § 455(a), without any showing of Judge Moreno's bias or
22 prejudice. Mot. at 5-9. Petitioner maintains that Judge Moreno was
23 required to recuse himself under this statute because, when he ruled on
24 the Motion for an Evidentiary Hearing, "he had already been selected by
25 Governor Davis to become a member of the Court whose decision he was now
26 being called upon to declare unreasonable." Mot. at 9. In addition,
27 Petitioner asserts that "[f]or a judge to sit in review of the decision
28 of a Supreme Court of which he has been nominated to become a member

1 creates an appearance of partiality, even though no actual partiality
2 may exist." Mot. at 6.

3 In Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 859
4 (1988), the Supreme Court noted that "[s]cienter is not an element of a
5 violation of § 455(a). The judge's lack of knowledge of a disqualifying
6 circumstance may bear on the question of remedy, but it does not
7 eliminate the risk that 'his impartiality might reasonably be
8 questioned' by other persons." 486 U.S. at 859. In describing the
9 parameters of Section 455(a), the Ninth Circuit has explained: "this
10 circuit has determined that the test for recusal [under Section 455(a)]
11 is 'whether a reasonable person with knowledge of all the facts would
12 conclude that the judge's impartiality might reasonably be questioned.'" Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 714 (9th
13 Cir. 1990)(citations and quotations omitted). See also Yagman v.
14 Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993)("recusal is appropriate
15 where 'a reasonable person with knowledge of all the facts would
16 conclude that the judge's impartiality might reasonably be questioned.'"
17 (citations omitted)).

18
19 A recusal motion must be filed "with reasonable promptness after
20 the ground for such a motion is ascertained." Preston v. United States,
21 923 F.2d 731, 733 (9th Cir. 1991). A party who has had the opportunity
22 to ascertain the grounds for potential bias or impropriety should not
23 wait to bring such a motion until his receipt of an adverse ruling or
24 unfavorable judgment. See United States v. Rogers, 119 F.3d 1377, 1382
25 (9th Cir. 1997) (finding a recusal motion untimely where party was fully
26 aware of the asserted grounds for judge's disqualification and failed to
27 make any formal motion until at least nine months after his
28 resentencing, and explaining "Rogers cannot be permitted to sit back and

1 take his chances at resentencing with Judge Tevrizian only to return
2 several months later with his disqualification claims in the hope of
3 obtaining a more favorable sentencing disposition before a different
4 judge."); see also E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d
5 1280, 1295 (9th Cir. 1992) (stating that a party must make a recusal
6 motion in a timely fashion and explaining that "[t]he absence of such a
7 requirement would result in . . . a heightened risk that litigants would
8 use recusal motions for strategic purposes.'" (citation omitted)).

9 While there appears to be no precise rule for determining the
10 timeliness of a recusal motion, a delay of several months after
11 discovering the grounds for recusal has been found to constitute
12 untimeliness. See, e.g., E&J Gallo, 967 F.2d at 1295 (finding
13 disqualification motion untimely when it was filed eight months after
14 party knew of grounds for disqualification); Wood v. McEwen, 644 F.2d
15 797, 802 (9th Cir. 1981) (finding recusal motion untimely when appellant
16 waited 16 months after grounds arose for recusal); see also, e.g.,
17 Molina v. Rison, 886 F.2d 1124, 1131-32 (9th Cir. 1989) (finding recusal
18 request in a 28 U.S.C. § 2255 motion untimely because pleadings
19 demonstrated that counsel was aware during pretrial proceedings of the
20 asserted grounds for recusal).

21 Petitioner points out that Governor Davis named Judge Moreno as one
22 of four nominees on August 2, 2001, and Judge Moreno was sworn in as a
23 California Supreme Court Justice on October 18, 2001 - just three days
24 after Judge Moreno issued the Order. Mot. at 7. However, Petitioner
25 waited to seek relief based on Section 455(a) until January 7, 2002, the
26 filing date of the Motion. The appropriate time for Petitioner to have
27 sought Judge Moreno's recusal would have been in August 2001, when Judge
28 Moreno's nomination to the California Supreme Court was announced to the

1 public. Thus, waiting five months after becoming aware of Judge
2 Moreno's nomination to the Supreme Court in August 2001 and over three
3 months until after entry of the Order in October 2001 before bringing
4 the Motion in January 2002 renders Petitioner's argument based on
5 Section 455(a) untimely.

6 Even assuming Petitioner's request to vacate the Order based on
7 Section 455(a) is timely, it is nevertheless meritless, as the cases
8 requiring vacatur and remand are inapposite. In Liljeberg, the case
9 upon which Petitioner primarily relies, the Supreme Court found that,
10 because the presiding judge was a long-time trustee of a university
11 which had an interest in the dispute -- facts which, despite his actual
12 knowledge, he should have known -- the trial judge's failure to
13 disqualify himself under Section 455(a) required vacatur and remand.
14 486 U.S. at 866-68.

15 In addition, Petitioner relies upon Aetna Life Ins. v. Lavoie, 475
16 U.S. 813 (1986). There, the Supreme Court found that vacatur and remand
17 of the case was necessary due to the appearance of impropriety under
18 Section 455(a) where a state supreme court justice, who wrote the
19 majority opinion in the underlying case which was unfavorable to the
20 insurer seeking disqualification, had his own bad faith case involving
21 similar facts pending against another insurer. Id. at 827-29. In
22 explaining its holding, the Supreme Court reasoned that, as a state
23 supreme court justice, the justice's opinion would be binding on all
24 that state's courts. Id. at 822.

25 In opposing Petitioner's argument, Respondent relies upon Voigt v.
26 Savell, 70 F.3d 1552 (9th Cir. 1995), in which the Ninth Circuit
27 affirmed the district court's decision denying reassignment pursuant to
28 Section 455(a) in a civil rights action a discharged Alaska state court

1 clerk brought against an Fairbanks state court judge and administrative
2 staff members. There, although noting that the district judge
3 previously had served for 20 years as an Alaska state court judge in
4 Anchorage and two of his former law clerks were involved in the case
5 (one as a named defendant and the other as defense counsel),
6 reassignment was not necessary. Id. at 1566. The Ninth Circuit
7 explained that there was no impropriety under Section 455(a), as the
8 district judge explained that he had minimal contacts with the Fairbanks
9 bench, no ongoing personal relationship with any state judge or
10 administrator named in the complaint or likely to be a witness, and no
11 ongoing personal relationship with his former law clerks. Id.

12 In addition, Respondent cites New York City Housing Dev. Corp. v.
13 Hart, 796 F.2d 976, 981 (7th Cir. 1986), where the Seventh Circuit
14 described factors weighing against recusal: "ready recusal, coupled
15 with a rule that requires the judge to whom the case is reassigned to
16 revisit all of the rulings after the filing of the motion to disqualify,
17 would multiply the work of judges who already have much to do" and would
18 require "duplicating the work of the first [judge]" and possibly
19 "reconsider[ing] questions already resolved by the first judge."

20 Here, neither Liljeberg nor Aetna is dispositive. Unlike the state
21 court supreme justice in Liljeberg, Judge Moreno had no pecuniary
22 interest in Petitioner's case. And, unlike in Aetna, where the judge
23 effectively was sitting in judgment of his own case, Judge Moreno did
24 not participate in Petitioner's case when it was before the California
25 Supreme Court in 1995 or 1996. Furthermore, Voigt suggests that Section
26 455(a) is not violated, even when a district judge presiding over a
27 claim previously participated for several decades in the state court
28 system from which a party is seeking relief, where the judge has no

1 direct or ongoing relationship with any of the individuals in the state
2 court system who were involved in the events giving rise to the lawsuit.
3 Respondent's point is well-taken that it is unlikely that Judge Moreno,
4 as a sworn district court judge, would compromise his impartiality by
5 entering the Order based on his desire to uphold the findings the
6 California Supreme Court rendered more than five years prior due to his
7 upcoming service with that court. Petitioner admittedly presents no
8 evidence supporting this conclusion, nor would the public reasonably
9 conclude that Judge Moreno's impartiality might be questioned based on
10 these circumstances alone. See Milgard, 902 F.2d at 714, Yagman, 987
11 F.2d at 626. Thus, Petitioner's argument that the Order should be
12 vacated based on Section 455(a) is unavailing.

13 Accordingly, Petitioner's first argument requesting vacatur is
14 denied.

15 **B. Petitioner's Motion to Vacate the Order Based on a Violation of Due**
16 **Process**

17 Petitioner contends that "the Order must be vacated because it
18 decided dispositive issues which were not presented by the [Motion for
19 an Evidentiary Hearing], and without providing [Petitioner] an
20 opportunity to address those issues, in violation of his due process
21 right to notice," and that a reconsideration motion "does not cure the
22 remedy of the violation of the due process right to notice." Mot. at 5.

23 In addition, Petitioner contends that Williams v. Taylor, 529 U.S.
24 420 (2000), a Supreme Court case decided while the Motion for an
25 Evidentiary Hearing was pending, demonstrates that he should have
26 prevailed on that motion and, therefore, been allowed to develop the
27 factual basis for his claims at an evidentiary hearing under 28 U.S.C.
28 § 2254(e)(2). Mot. at 13-14. Petitioner also quotes the standards set

1 forth in the Order, arguing that the following statement constitutes a
2 "fundamental misapprehension of habeas corpus law" and "ignore[s] prior
3 proceedings in the case":

4 [G]iven the complexity of the analysis needed to
5 determine whether a claim has been exhausted and, if
6 not, whether Williams saves the claim from dismissal,
7 the Court will first consider whether each of
8 Petitioner's claims has a colorable basis under
9 Townsend. If so, the Court will then determine
10 whether the claim was "fairly presented" to the state
11 courts and, if not, whether Williams would allow
12 Petitioner to proceed.

13 Mot. at 14-15 (citing Order at 12-13). Petitioner contends that this
14 statement was error, because: 1) "claim exhaustion was not raised by
15 Petitioner's evidentiary hearing motion"; 2) "it was not raised by
16 Respondent's opposition to the motion"; 3) "claim exhaustion is
17 unrelated to Williams and 2254(e)(2)"; and 4) "the Court had already
18 adjudicated Respondent's failure to exhaust challenges to the claims
19 two years earlier." Mot. at 15.

20 Petitioner further contends that, in analyzing whether his claims
21 had a "colorable basis," the Court "overlooked the prior history of the
22 case, and thus failed to recognize that [Petitioner's] claims had
23 already been twice subjected to a determination of whether they each
24 alleged specific facts which, if true, would entitle him to relief."
25 Mot. at 16. In addition, Plaintiff contends that the Order was
26 improperly and insufficiently based on the "Narrative Summary of
27 Claims" set forth in his Motion for an Evidentiary Hearing, which was
28 not a comprehensive set of facts which, if proved, would entitle him

1 to relief. Mot. at 18. Instead, he contends that he made this showing
2 in prior pleadings.²

3 In support of his request to vacate the Order on these grounds,
4 Petitioner relies upon two cases involving a violation of due process,
5 Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001), and Lord v. Babbitt, 943
6 F. Supp. 1203 (D. Alaska 1996). In Herbst, the Ninth Circuit found
7 that the district court, although it had authority to raise the statute
8 of limitations sua sponte and dismiss the petitioner's habeas corpus
9 petition on those grounds, erred by failing to provide the petitioner
10 with adequate notice and an opportunity to respond. 260 F.3d at 1043.
11 In Lord, the district court held that the issue of whether the statute
12 of limitations was equitably tolled by the plaintiff's failure to
13 receive adequate notice could not be resolved on a motion to dismiss.
14 943 F. Supp. at 1210.

15 As noted above, in the Motion for an Evidentiary Hearing,
16 Petitioner requested a hearing to factually develop his claims
17 involving conspiracy by the prosecution and witnesses. In the February
18 25, 1999 Tentative Order On Respondent's Motion For Summary Judgment,
19 Judge Letts addressed Plaintiff's conspiracy claims, as follows:

20
21 The Court finds that the types of claims that
22 Petitioner has alleged, which support a conspiracy
23 theory regarding the manner in which his state court
24 trial was conducted, would be the type of claim upon
25 which factual development could be considered

26 ² Petitioner points to his Motion for an Evidentiary Hearing
27 wherein he stated that he would "not rebrief the extensive discussion as
28 to why these claims individual and collectively present a prima facie
case for relief, unless directed to do [so] by this Court." Mot. at 16
(citing Motion for an Evidentiary Hearing at 6).

1 appropriate under AEDPA. This is of course assuming
2 that it was due to the actions of the state that the
3 factual predicate of the claims "could not have been
4 previously discovered through the exercise of due
5 diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). Of
6 course Petitioner will also have to demonstrate that
7 his "allegations, if proven, would establish a right
8 to relief." Jeffries v. Blodgett, 5 F.3d 1180, 1187
9 (9th Cir. 1993); Hendricks v. Vasquez, 974 F.2d 1099,
10 1103 (9th Cir. 1992).

11 Therefore, until the Court examines the
12 precise issue of the extent to which the
13 conspiracy theory claims, all of which were
14 raised during Petitioner's state habeas
15 proceedings, should be factually developed under
16 the AEDPA, Respondent is not entitled to summary
17 judgment on these claims.

18 February 25, 1999 Tentative Order On Respondent's Motion For Summary
19 Judgment at 5.

20 In explaining the standard of review on a motion for an evidentiary
21 hearing, the Order states:

22 . . . The standard is straightforward. Contrary
23 to Petitioner's assertion that his claims are
24 colorable because they survived motions to dismiss
25 and for summary judgment, Petitioner's Mot. For Evid.
26 Hrg. at 6, a hearing is required when specific facts
27 are alleged which, if true, would entitle a
28 petitioner to relief. James v. Borg, 24 F.3d 20, 26

1 (9th Cir. 1994); United States v. Quan, 789 F.2d 711,
2 715 (9th Cir. 1986). There is no requirement that
3 discovery plans and witness lists be proffered when
4 making that showing.

5 Consequently, the Court is not barred
6 under § 2254(e)(2) from entertaining
7 Petitioner's request for an evidentiary hearing
8 on any of his claims not developed in state
9 court, if in evaluating the claim, specific
10 facts indicate he was diligent in pursuing the
11 claim, but his efforts were thwarted by a third
12 party's conduct, just as the Williams court had
13 contemplated. However, given the complexity of
14 the analysis needed to determine whether a
15 claim has been exhausted and, if not, whether
16 Williams saves the claim from dismissal, the
17 Court will first consider whether each of
18 Petitioner's claims has a colorable basis under
19 Townsend. If so, the Court will then determine
20 whether the claim was "fairly presented" to the
21 state courts and, if not, whether Williams
22 would allow Petitioner to proceed.

23 Order at 12-13.

24 Within its explanation of the standard of review, the Order rejected
25 Respondent's argument that, because Petitioner had not developed the
26 factual basis of his conspiracy claims in state court, he had failed to
27 develop his claims and was barred from seeking an evidentiary hearing on
28 them in this Court. Order at 9-11. In doing so, the Court discussed

1 the ruling in Williams, which found that "a failure to develop the
2 factual basis of a claim [under Section 2254(e)(2)] is not established
3 unless there is a lack of diligence, or some greater fault," following
4 the Ninth Circuit's standard set forth in Baja v. Ducharme, 187 F.3d
5 1075, 1078-79 (9th Cir. 1999). Williams, 529 U.S. at 432 (emphasis
6 added). To the extent that Petitioner maintains that the Order's
7 rejection of his request for an evidentiary hearing was based on a
8 procedural default and/or claim exhaustion analysis, which was not
9 briefed, he is incorrect. Instead, the Order's discussion with respect
10 to the denial of each claim alleged in Petitioner's Motion for an
11 Evidentiary hearing shows that every such denial was based squarely on
12 each claim's lack of a colorable basis, not procedural default and/or
13 claim exhaustion. See Order at 13-81.

14 As explained in the Order, the fact that some of Petitioner's claims
15 survived Respondent's Motion to Dismiss and Motion for Summary Judgment
16 did not equate with a finding that there was a prima facie factual or
17 "colorable" basis for them. To the extent that Petitioner suggests in
18 his Reply that Judge Letts's language regarding the conspiracy claims in
19 his order on Respondent's Motion for Summary Judgment was merely
20 "tentative" and Judge Letts intended to grant an evidentiary hearing to
21 explore the existence of their factual bases, his contention is plainly
22 belied by Judge Letts's October 7, 1999 Order. See October 7, 1999
23 Order Adopting Court's February 25, 1999 Order On Respondent's Motion
24 For Summary Judgment In Its Entirety at 1 ("The Court has reviewed all
25 the briefing submitted in response to the Court's Tentative Order on
26 Respondent's Motion for Summary Judgment, issued on February 25, 1999.
27 After careful consideration, *the Court hereby adopts its tentative order*
28 *in its entirety.*" (emphasis added)). Thus, as set forth in Judge

1 Letts's February 25, 1999 Tentative Order On Respondent's Motion For
2 Summary Judgment, which he thereafter adopted in its entirety, Judge
3 Letts simply declined to grant summary judgment of Petitioner's
4 conspiracy claims and deferred deciding whether those claims should be
5 more factually developed until they could be explored further on a
6 motion for an evidentiary hearing.

7 Petitioner's argument -- that the Order's recitation of the standard
8 constitutes a "fundamental misunderstanding of habeas law" by which it
9 improperly decided the merits of his case -- essentially appears to be
10 an argument that the Court applied the wrong standard in reviewing his
11 Motion for an Evidentiary Hearing. Petitioner's argument is confusing
12 and contradictory; in the portion of the Motion requesting
13 reconsideration, he contends that the Court used the correct standard in
14 evaluating a "colorable basis," but failed to apply it correctly.³
15 Regardless, any argument that the Court applied the incorrect standard
16 in the Order is unavailing.

17 As set forth above, the Court stated in the Order that it first was
18 reviewing the claims to determine whether they had a "colorable" basis,
19 *i.e.*, whether they set forth specific facts which, if true, would
20

21 ³ Specifically, Petitioner also contends within his Motion that
22 the standard is correct, but incorrectly applied:

23 The evidentiary hearing Order in this case correctly
24 stated the standard as being whether there was a
25 "colorable claim." ([Order at 12].) The Order also
26 correctly stated that a "colorable claim" exists "when
27 specific facts are alleged which, if true, would entitle
28 a petitioner to relief." ([Order at 12] (citations
omitted).) The Order's characterization of that standard
as being "straight forward," however, is belied by the
fundamental errors the Order repeatedly made in applying
that standard to [Petitioner's] claims.

See Mot. at 19.

1 entitle him to relief. Order at 12. This is an accurate articulation
2 of the "colorable basis" standard.

3 Several years ago, the Supreme Court explained that the decision as
4 to whether to grant an evidentiary hearing encompasses the deferential
5 standards in the AEDPA, and directed that "a federal court must consider
6 whether such a hearing would enable an applicant to prove the petition's
7 factual allegations, which, if true, would entitle the applicant to
8 federal habeas relief." Schriro v. Landigran, 550 U.S. 465, 474 (2007).
9 The Supreme Court further explained that, "[i]t follows that if the
10 record refutes the applicant's factual allegations or otherwise
11 precludes habeas relief a district court is not required to hold an
12 evidentiary hearing." Id.

13 In addition, the Ninth Circuit has found that an evidentiary hearing
14 is required where: "1) [the defendant] has alleged facts that, if
15 proven, would entitle him to habeas relief, and 2) he did not receive a
16 full and fair opportunity to develop those facts[.]" Earp v. Ornoski,
17 431 F.3d 1158, 1167 (9th Cir. 2005) (quoting Williams v. Woodford, 384
18 F.3d 567, 586 (9th Cir. 2004)), cert. denied, 126 S. Ct. 2295 (2006).
19 In construing the colorable basis test, the first prong of this
20 standard, the Ninth Circuit further explained:

21 We next consider whether [the petitioner]
22 has alleged facts which, if demonstrated to be
23 true, would present a colorable claim for
24 relief. See Insyxiengmay, 403 F.3d at 669-70;
25 William, 384 F.3d at 586. At this stage, [the
26 petitioner] does not need to prove that the
27 prosecutor committed misconduct or that his due
28 process rights were violated; he only needs to

1 allege a colorable claim for relief. See
2 *Phillips*, 268 F.3d at 973. This is a low bar,
3 and [the petitioner] has surmounted it.
4 *Earp*, 431 F.3d at 1170; see also *Jones v. Wood*, 114 F.3d 1002, 1010 (9th
5 Cir. 1997) ("Because [the petitioner] seeks to have an evidentiary
6 hearing on his claim for ineffective assistance of counsel, he must
7 demonstrate that his allegations, if proven, would establish such a
8 claim."); see also *Babbitt v. Calderon*, 151 F.3d 1170, 1177 (9th Cir.
9 1998) (in order to make a "colorable" claim of ineffective assistance of
10 counsel to entitle a petitioner to an evidentiary hearing, "a petitioner
11 must establish that his allegation of ineffective assistance, if proven,
12 would establish both deficient performance and prejudice.").
13 Accordingly, Petitioner's argument that the Order's articulation of its
14 standard of review misapprehends habeas law is wholly unpersuasive.

15 Specifically, the Order reasons how the facts Petitioner alleged in
16 support of his conspiracy claims, even if true, would not entitle him to
17 relief, and the discussion of most claims includes a harmless error
18 analysis. See Order at 13-81. As the Court correctly applied the
19 accurate standard in analyzing whether each of Petitioner's claims has
20 a "colorable basis," the Order's analysis of Petitioner's claims cannot
21 constitute a violation of due process requiring vacatur. In addition,
22 the cases upon which Petitioner relies in requesting vacatur based on a
23 due process violation, *Lord* and *Herbst*, do not address the issue in this
24 case -- viz., whether the Court may address the sufficiency of
25 Petitioner's claims in determining whether to hold an evidentiary
26 hearing by analyzing whether, if the facts he alleged in support of his
27 claims in his Petition and his Motion for an Evidentiary Hearing were
28 assumed true, he would be entitled to relief -- and are inapposite.

Respondent's point is well-taken that the case had been pending for years at the time the Order was entered, and Petitioner should have been well aware that the Court would be addressing the sufficiency of his claims. Respondent further correctly notes that Rule 4 of the Rules Governing Section 2254 Cases provides: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."

In summary, Petitioner's argument that the Order's "dispositive" analysis of his conspiracy claims constitutes a denial of due process by depriving him of the opportunity to allege further facts entitling him to relief is unfounded. Accordingly, Petitioner's request for vacatur on these grounds is denied.

B. Petitioner's Motion for Reconsideration

Petitioner does not set forth the precise grounds for his request for reconsideration. However, Local Rule 7-18 allows parties to bring a motion for reconsideration only on the grounds of:

(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider such material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support

1 of or in opposition to the original motion.

2 Local Rule 7-18.

3 Local Rule 7-18 implements much of the "law of the case" doctrine
4 as it applies to trial courts. "The 'law of the case' rule ordinarily
5 precludes a court from re-examining an issue previously decided by the
6 same court, or a higher appellate court, in the same case." Pit River
7 Home and Agric. Co-op. Ass'n v. United States, 30 F.3d 1088, 1096 (9th
8 Cir. 1994) (citation omitted). The doctrine "is a discretionary one
9 created to maintain consistency and avoid reconsideration, during the
10 course of a single continuing lawsuit, of those decisions that are
11 intended to put a matter to rest." Id. at 1097. The Ninth Circuit has
12 explained the application of this doctrine, as follows:

13
14 Under the "law of the case" doctrine, "a court
15 is generally precluded from reconsidering an issue
16 that has already been decided by the same court, or
17 a higher court in the identical case.'" Thomas v.
18 Bible, 983 F.2d 152, 154 (9th Cir. [1993]). The
19 doctrine is not a limitation on a tribunal's power,
20 but rather a guide to discretion. Arizona v.
21 California, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391,
22 124 L. Ed. 2d 661 (1983). A court may have
23 discretion to depart from the law of the case where:
24 1) the first decision was clearly erroneous; 2) an
25 intervening change in the law has occurred; 3) the
26 evidence on remand is substantially different; 4)
27 other changed circumstances exist; or 5) a manifest
28 injustice would otherwise result. Failure to apply

1 the doctrine of the law of the case absent one of the
2 requisite conditions constitutes an abuse of
3 discretion. Thomas v. Bible, 983 F.2d at 155.
4 United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (some
5 citations omitted).

6 In Alexander, the Ninth Circuit reviewed Judge Conti's opinion
7 granting the government's third motion for reconsideration on Judge
8 Walker's suppression of evidence and denial of the request for an
9 evidentiary hearing. In addressing the government's argument that
10 "clear error" supported Judge Conti's order granting reconsideration and
11 reversing Judge Walker's order by admitting evidence of a confession,
12 the Ninth Circuit explained: "in reviewing a district court's factual
13 findings for clear error, we must not reverse as long as the findings
14 are plausible in light of the record viewed in its entirety, even if we
15 would have weighed the evidence differently had we been the trier of
16 fact."⁴ Id. at 877. The court also explained that Judge Walker's
17 decision to suppress the defendant's confession was based on a finding
18 of fact that the 911 call tapes indicated that defendant was delusional
19 at the time, which was adequately supported by the record. Id. The
20 court rejected the government's argument that a "manifest injustice"
21 supported Judge Conti's order requiring an evidentiary hearing to
22 determine credibility because the declarants' testimony had been
23 impeached, explaining that no evidentiary hearing was required because
24 Judge Walker based his suppression largely on the 911 tape, rather than

25
26 ⁴ Consistent with this construction of "clear error," the
27 Supreme Court also has stated that reviewing findings for "clear error"
28 requires analyzing "whether 'on the entire evidence' the Court is 'left
with the definite and firm conviction that a mistake has been
committed.'" Easley v. Cromartie, 532 U.S. 234, 235 (2000)(citation
omitted).

1 declarations. Id. at 878.

2 Here, the preliminary issue is whether Petitioner has satisfied the
3 requirements of Local Rule 7-18 or a departure from the law of the case
4 doctrine. See, e.g., United States ex. rel. Barajas v. Northrop Corp.,
5 897 F. Supp. 1274, 1283 & n. 3 (C.D. Cal. 1995) (citing Van Ryn v.
6 Korean Air Lines, 640 F. Supp. 284, 286 (C.D. Cal. 1985)). If
7 Petitioner fails to meet those standards, the Motion fails.⁵

8 Petitioner contends that reconsideration is warranted because the
9 Order "contains multiple mistakes of both law and fact." Mot. at 5.
10 Specifically, Petitioner contends that the Court misapplied the standard
11 in analyzing whether he presented "colorable" claims in three respects:
12 1) the Order mistakenly required Petitioner to present evidence which
13 proved his allegations in order to be entitled to an evidentiary
14 hearing; 2) the Order mistakenly found a "conclusory" allegation to be
15 an allegation that was not proved by evidence submitted with the Motion;
16 and 3) the Order mistakenly analyzed whether his Brady claims were
17 "colorable" by only considering whether each alleged error, standing
18 alone, was "material." Mot. at 19.

19 In the Motion, Petitioner cites "new evidence," and quotes a portion
20 of August 8, 1989, grand jury testimony provided by Leslie White, a
21 jailhouse informant, regarding his relationship with Rogoway, who was an
22 eyewitness in Petitioner's case. However, although Petitioner somewhat
23 confusingly states that this transcript was lodged in connection with
24 the Motion (Mot. at 27 n.12), this grand jury testimony was lodged
25

26 ⁵ Although Respondent asserts that Petitioner improperly is
27 seeking relief pursuant to either Rule 59 or Rule 60(b) of the Federal
28 Rules of Civil Procedure, which apply to final judgments, Petitioner
concedes that he is not seeking relief pursuant to this authority.
Opp'n at 3-4, Reply at 5.

1 previously in connection with the Motion for an Evidentiary Hearing.
2 Thus, it clearly cannot constitute "new evidence" for purposes of Local
3 Rule 7-18(b).

4 Even assuming that it were "new," it adds nothing.⁶ Arguably, this
5 testimony pertains to Claim 1 (the alleged subornation of Rogoway's
6 perjured testimony), Claim 2 (the alleged perjured and/or materially
7 false testimony of Rogoway) and Claim 3 (the alleged failure to disclose
8 material impeachment evidence on Rogoway pursuant to Brady). In these
9 claims, Petitioner generally contends that the prosecution arranged for
10 White to be released on furloughs to have sexual relations with Rogoway,
11 which improperly influenced and caused her to falsely identify
12 Petitioner at trial as the robber/murderer. Pet. at 16-17. Petitioner
13 contends that the this evidence shows that the prosecutor, Deputy
14 District Attorney Harvey Giss, "knew that Rogoway's testimony
15 identifying him was false when it was given and/or that Giss should have
16 disclosed all this prior to trial." Mot. at 28. Specifically,
17 Petitioner quotes the following portion of that grand jury testimony:

18 [I told] Mr. Giss that I had met [Rogoway] through
19 Rodney Quine, and he seemed concerned about that. I
20 must say. However, there's not much he can do about
21 it. He told me to keep my mouth shut about the
22 relationship. And he also said that anything I can
23 find out through her or Gina [relevant] to any
24 defense witnesses in the case, that he wanted to know

25
26 ⁶ Petitioner's counsel maintains that this transcript
27 constitutes "new" evidence because, although she had possession of it in
28 1999 pertaining to another unrelated trial, she did not review the
transcripts because White did not serve as a witness in that case. Mot.
at 27 n.12. Regardless, as explained herein, even assuming it is "new"
evidence, it is not evidence supporting Petitioner's claims.

1 about it. And he also wanted the letters that Quine
2 was writing. He wanted those letters.
3 Mot. at 27 (citing August 8, 1989 Los Angeles County Grand Jury
4 Transcript at 58).

5 As set forth in the Order, under Napue v. Illinois, 360 U.S. 264,
6 269 (1959), and Mooney v. Holohan, 294 U.S. 103, 115 (1935), Petitioner
7 must show that the prosecutor knowingly used perjured testimony or
8 knowingly failed to disclose that the testimony was false, and there is
9 a reasonable likelihood that the false testimony affected the jury
10 verdict. See Order at 14-15. At best, this grand jury testimony only
11 sheds more light on the relationship White had with Rogoway and Giss's
12 knowledge of that relationship. It indicates that Giss wanted White to
13 provide him with any letters from Richard Quine, another inmate serving
14 a sentence in Chino State Prison, and any information regarding the
15 defense witnesses in the case.⁷ However, it does not indicate that
16 Rogoway's testimony was perjured, much less that Giss knew that
17 Rogoway's testimony was perjured. In any event, as the Order further
18 reasoned, Petitioner failed to show that Rogoway's testimony was
19 "material," because of other eyewitness evidence against Petitioner,
20 primarily the testimony of Malloy, who had had ample opportunity to view
21 the robber he identified as Petitioner. Thus, as the Order explained,
22 "even if all of Petitioner's allegations are taken as true, he still
23

24 ⁷ The prosecution received from White a letter written by Quine,
25 and provided that letter to the defense. This letter, which was sent to
26 Rogoway's girlfriend, Gina Gutierrez, directed Gutierrez to ask Rogoway
27 to provide Quine with details of the Bob's Big Boy robbery so he could
28 manufacture testimony as a witness in the prosecution of Petitioner's
co-defendant, Freeman. See Order at 19. However, the letter only
discusses Quine's own plans to lie as a witness in Freeman's case, not
Petitioner's case; therefore, the letter does not indicate in any way
that Rogoway perjured her testimony. Id.

1 would not be entitled to a hearing because admission of Rogoway's false
2 testimony constituted harmless error under [Brecht v. Abrahamson, 507
3 U.S. 619, 637 (1993)]." Order at 24-25.

4 Accordingly, Petitioner's argument in support of his request for
5 reconsideration should be construed as seeking reconsideration of the
6 Order based on Local Rule 7-18(c), a "manifest showing of a failure to
7 consider material facts presented to the Court before such decision," or
8 a request to depart from the law of the case doctrine based on "clear
9 error" or a "manifest injustice."

10 **1. Petitioner's Request for Reconsideration Based on the Purported**
11 **Misapplication of the Standard of Review on a Motion for an**
12 **Evidentiary Hearing**

13 In contending that the Order effectively required him to "prove" his
14 allegations in his claims before he could obtain discovery of them,
15 Petitioner relies upon Phillips v. Woodford, 267 F.3d 966 (9th Cir.
16 2001), where the Ninth Circuit reversed the district court's denial of
17 an evidentiary hearing on several claims. There, the court found that
18 the petitioner set forth a colorable ineffective assistance of counsel
19 claim because his trial counsel, by his own admission, believed the
20 petitioner's alibi defense to be an unreasonable one. Id. at 932. The
21 court further reasoned that had counsel presented a "shoot-out" defense
22 at trial, the jury might have found the petitioner did not have the
23 intent to steal prior to the killing, the special circumstance upon
24 which his death sentence was based. Id. at 982-83. The court also
25 reasoned the allegations that the prosecution knew two witnesses
26 testified falsely, combined with his counsel's failure to present a
27 "shoot out" defense, constituted a colorable basis for conducting an
28 evidentiary hearing. Id. at 986.

1 In addition, Petitioner relies upon Jones v. Gomez, 66 F.3d 199 (9th
2 Cir. 1995), in arguing that the Order conflated the standard in
3 reviewing Petitioner's allegations in support of his claims and finding
4 them "conclusory." In addressing the petitioner's Brady claim based on
5 the prosecution's alleged failure to disclose the arrest record of one
6 of its trial witnesses, the Ninth Circuit in Jones found that the claim
7 was properly denied as conclusory, "without reference to the record or
8 any document," and explained that "conclusory allegations which are not
9 supported by a statement of specific facts do not warrant habeas
10 relief." Id. at 204 (citing James, 24 F.3d at 26).

11 Petitioner's argument that the Court improperly required him to
12 "prove" his allegations in order to receive an evidentiary hearing is
13 incorrect. Instead, as explained above, the Order, in a cogent and
14 detailed discussion, goes through each of the conspiracy claims alleged
15 in the Motion for an Evidentiary Hearing and discusses how they fail to
16 show a colorable basis, even if the facts alleged in support of them
17 were proved true. To the extent that the Order may have described some
18 claims as "conclusory," a review of the Order shows that the ultimate
19 basis of the denial of each claim was rendered under the colorable basis
20 standard. Furthermore, as in Clark, where the Ninth Circuit reversed an
21 order granting reconsideration because the moving party had shown a
22 basis for an opposite conclusion but neither clear error nor a manifest
23 injustice in the court's order denying an evidentiary hearing,
24 Petitioner's arguments suggesting that there was a basis for granting
25 the motion for an evidentiary hearing are inadequate grounds for
26 granting the Motion.

27 Thus, Petitioner's first two arguments in support of his request for
28 reconsideration, viz., that the Court misapplied the standard of review

1 in requiring him to prove his allegations and finding that a
 2 "conclusory" allegation is one not proved by the evidence, are belied by
 3 the Order. They therefore fail to provide any basis for concluding that
 4 the Order's analysis of the colorable basis of Petitioner's claims
 5 involved either a "manifest showing of a failure to consider material
 6 facts presented to the Court" under Local Rule 7-18(c), or "clear error"
 7 or a "manifest injustice" to depart from the law of the case doctrine.

8 Accordingly, Petitioner's first two arguments requesting
 9 reconsideration are rejected.

10 **2. Petitioner's Request for Reconsideration Based on the Improper**
 11 **Consideration of His Alleged Brady Claims**

12 In connection with his Brady claims (Claims 3, 7, 12, and 18),
 13 Petitioner relies upon Kyles v. Whitely, 514 U.S. 419, 437-38 (1995), in
 14 arguing that the Order improperly analyzed his claimed Brady errors by
 15 determining that they were not material, standing alone, but not
 16 collectively.⁸ Mot. at 19 (citations omitted) ("Third, the Order
 17 mistakenly believed that for a claim to be colorable, [Petitioner] had
 18 to demonstrate how the claimed error, standing alone, was 'material.'
 19 The law is pellucidly clear that the determination of materiality is
 20 made collectively, not individually and separately.")

21 In Kyles, the Supreme Court stated: "the fourth and final aspect
 22 of Bagley materiality to be stressed here is its definition in terms of
 23 suppressed evidence considered collectively, not item by item." 514
 24 U.S. at 436 (emphasis added). The Supreme Court further explained in so

26 ⁸ Despite "disputing" Petitioner's construction of Kyles,
 27 Respondent essentially agrees that Kyles stands for the proposition that
 28 a conviction cannot stand where the net effect of the state-withheld
 evidence would have produced a different result at trial. See Opp'n at
 17-18.

1 holding:

2 . . . [T]he state's disclosure obligation turns on
3 the cumulative effect of all suppressed evidence
4 favorable to the defense, not the evidence considered
5 item by item. Thus, the prosecutor, who alone can
6 know what is undisclosed, must be assigned the
7 responsibility to gauge the likely net effect of all
8 such evidence and make disclosure when the point of
9 "reasonable probability" is reached. Moreover, that
10 responsibility remains regardless of any failure by
11 the police to bring favorable evidence to the
12 prosecutor's attention. To hold otherwise would
13 amount to a serious change of course from the *Brady*
14 line of cases. As the more likely reading of the
15 Fifth Circuit's opinion shows a series of independent
16 materiality evaluations, rather than the cumulative
17 evaluation required by *Bagley*, it is questionable
18 whether the court evaluated the significance of the
19 undisclosed evidence in this case under the correct
20 standard.

21 Id. at 420 (citations omitted) (emphasis added).

22 The Order goes through each of the alleged Brady violations claim
23 by claim, but does not address specifically the collective impact of
24 Petitioner's allegations of this purportedly state-withheld evidence.
25 Thus, the failure to address the colorable basis of these alleged
26 violations collectively could be construed as error. On a motion for
27 reconsideration, the issue is whether this error constitutes "clear
28 error" or a "manifest injustice" under the law of the case doctrine, or

1 whether there was a “manifest showing of a failure to consider material
2 facts presented to the Court before such decision” under Local Rule 7-
3 18(c). In order to make this determination, the alleged Brady errors
4 are discussed below, both individually and cumulatively.

5 a. Petitioner’s Claim 3: The Prosecution Failed to Disclose
6 Material Evidence and Exculpatory Impeachment Evidence
7 about Rogoway That Violated Petitioner’s Rights to a Fair
8 Trial and Due Process under the Sixth and Fourteenth
9 Amendments

10 In Claim 3, Petitioner alleges that the prosecution failed “to
11 disclose material favorable evidence and exculpatory impeachment
12 evidence about [Rogoway]” in violation of Petitioner’s right to a fair
13 trial and due process under the Sixth and Fourteenth Amendments. Pet.
14 at 17. In alleging facts in support of that claim in the petition,
15 Petitioner contends that the prosecution secretly arranged for White to
16 be released on furloughs to have conjugal relations with Rogoway, which
17 thereby influenced her and caused her to falsely identify Petitioner in
18 Petitioner’s case. Id. at 16. Petitioner further alleges that, because
19 Rogoway was unsure of her identification of Petitioner prior to these
20 secretly arranged meetings, these meetings caused her to falsely
21 identify Petitioner as her attacker. Id. Thus, the information
22 allegedly withheld by the prosecution pertaining to these meetings and
23 the Rogoway-White relationship constitutes the basis for Petitioner’s
24 Claim 3.

25 In the Motion, Petitioner contends that evidence submitted in
26 connection with the Petition (Giss’s notes (Exhibit 37), and testimony
27 of Deputy District Attorney Andrew Diamond and Long Beach Police
28 Detective Paul Chastain (Exhibits lodged in connection with the Motion

1 for an Evidentiary Hearing)) show that these furloughs were illegal and
2 given as a "favor" for his work on numerous cases. Mot. at 26. In
3 addition, he relies upon White's August 8, 1989 grand jury testimony in
4 another case submitted in connection with the Motion, as discussed
5 above. Mot. at 27. He further contends that White testified in another
6 case that he passed on "detrimental information" to Rogoway that was not
7 true. Mot. at 28 (citing Ex. 40 (March 13, 1989 transcript in People
8 v. Marshall, at 3,795-97)). Finally, Petitioner cites a copy of a
9 proposed order Giss drafted that seeks permission of White to be "wired
10 for sound by the Los Angeles District Attorney's Office in order to
11 record," which he contends is evidence showing that White was an agent
12 of the prosecution. Mot. at 29 (citing Ex. 40). Therefore, Petitioner
13 contends, discovery of these grand jury records and other evidence in
14 the possession of the prosecution "may well help [Petitioner] to prove
15 at an evidentiary hearing that Giss knew Rogoway's testimony identifying
16 him was false when given and/or that Giss should have disclosed all this
17 prior to trial." Mot. at 28.

18 The Order notes that trial counsel already was in possession of
19 information regarding a possible relationship between White and Rogoway
20 at the time of trial. Order at 43. Specifically, the Order notes that
21 trial counsel had in its possession the Quine letter, which White
22 provided to the defense, thereby indicating that White had had a
23 relationship of some sort with Rogoway, as well as Giss's testimony at
24 the February 24, 1982 discovery hearing discussing White and Rogoway's
25 relationship. Order at 43. See also Ex. 28; Reporter's Transcript
26 ("RT") at 1,692 (Giss's February 24, 1982 testimony agreeing that White
27 was "romantically linked" to Rogoway, which he described as "in a sordid
28 sort of way."). Thus, the Order correctly finds there could be no

1 viable Brady error based on these allegations, because it does not
2 appear that any information pertaining to the prosecution's alleged
3 knowledge of White's relationship with Rogoway was withheld from
4 Petitioner's trial counsel, or that Petitioner's counsel could not have
5 obtained any further information regarding their involvement with
6 reasonable diligence. See, e.g., United States v. Bracy, 67 F.3d 1421,
7 1428-29 (9th Cir. 1995) (citations omitted) (finding there was no
8 suppression of evidence where defendant has enough information to obtain
9 the Brady material on his own); United States v. Dupuy, 760 F.2d 1492,
10 1501 n.5 (9th Cir. 1985) ("Since suppression by the Government is a
11 necessary element of a Brady claim [citation], if the means of obtaining
12 the exculpatory evidence has [sic] been provided to the defense, the
13 Brady claim fails. [citations].").

14 In addition, the Order correctly explains that it is unreasonable
15 to conclude that any further information the prosecution allegedly had
16 pertaining to a dishonest informant's relationship with Rogoway in this
17 case would give rise to a Brady violation for its alleged failure to
18 turn over such evidence. See Order at 22 ("[E]ven if it were true White
19 improperly influenced Rogoway to perjure her testimony, Petitioner's
20 would not have a colorable basis for her claim.") The existence of that
21 relationship -- even assuming it were true that the furloughs were
22 illegal and given as a favor for White's assistance in cases where he
23 was acting as an informant -- does not show that Rogoway perjured her
24 testimony, much less that the prosecution knew it was perjured.

25 The evidence and additional facts upon which Petitioner relies in
26 the Motion add little, if anything, to the arguments he made in
27 connection with this claim in the Motion for an Evidentiary Hearing.
28 Giss's trial notes (Exhibit 37) only indicate that Giss was aware of

1 White's relationship with Rogoway. As the Order explained, "[n]othing
2 more may be extrapolated from his notes" aside from his contemplation
3 regarding Rogoway's potential impeachment as a witness because of that
4 relationship. Order at 23.

5 As discussed above, an examination of the grand jury testimony upon
6 which Petitioner relies shows that White stated that Giss knew about his
7 relationship with Rogoway, but it in no way indicates that he pressured
8 her to testify falsely.⁹

9 White's March 13, 1989 testimony in Marshall, nine years after
10 Petitioner's trial, indicates that he provided information to Rogoway
11 that he knew was "false" regarding this case.¹⁰ Nevertheless, although
12

13 ⁹ The other grand jury transcripts lodged in support of the
14 Motion for an Evidentiary Hearing, the August 9, 1989 testimony of Los
15 Angeles County Deputy District Attorney Andrew Diamond and the August 9,
16 1989 testimony of Long Beach Police Detective Paul Chastain, while
17 discussing their dealings with White, do not reference White's
18 relationship with Rogoway or this case.

19 ¹⁰ Specifically, in the Marshall case, White testified as follows:

20 Q: . . . Yesterday when I asked you whether you had relayed
21 any information to this girlfriend of yours who was the
22 victim of the Bob's Big Boy case, information that you had
23 gotten out of the informant tank, you remember that you
24 answered yes?

25 A: Yes, I told her. I believe I told you that I advised her
26 of everything that was told to me.

27 Q: All right. And you got information while you were in the
28 informant tank in 1981 from people who were trying to make
book on Mr. Freeman and Mr. Sanders?

A: That's correct.

Q: And you knew at that time that some of those things were
lies?

A: That's correct.

Q: And, in fact, those people told you they were lies?

A: That's correct.

Q: But, nevertheless, during your relationship with this
eyewitness victim who will go nameless for the point of this
hearing, you gave her some of that information, didn't you?

A: Yes, I did.

Q: And you don't know whether she was friendly with other
victims in that case who were coming to court to testify, do

1 he testified that he "indirectly" helped the prosecution, he did not
2 state that he told the prosecution or that the prosecution knew he was
3 providing "false" information to Rogoway about Petitioner's case or
4 seeking to improperly influence her testimony to misidentify Petitioner.
5 See Ex. 33 at 383.

6 The evidence Petitioner describes as a "proposed order Giss drafted
7 that seeks permission for White to be 'wired for sound by the Los
8 Angeles District Attorney's Office'" is a July 2, 1982 declaration in
9 Petitioner's trial apparently signed by Giss. Ex. 40. As the Order
10 notes, this declaration at most indicates that White "was wired for a
11 conversation with trial counsel who was accused of pressuring witnesses
12 for information favorable to the defense." Order at 23-24. Even
13 assuming the facts in it are true, the declaration suggests that
14 Petitioner's trial counsel was aware that the prosecution had
15 information pertaining to the purported falsity of Rogoway's testimony
16 due to White's influence, further indicating that no evidence was
17 "withheld" by the prosecution.

18 Finally, even if the prosecution had additional facts pertaining to
19 the possibility that Rogoway's testimony was perjured, in view of the
20 other evidence at trial, including Malloy's testimony and other
21 eyewitnesses identifying Petitioner, any such evidence was not material
22 in order to constitute grounds for a Brady violation. United States v.

23 _____
24 you?

25 A: No, I do not.

26 Q: You don't know what she did with that information, do you?

27 A: No, I don't.

28 Q: But some of it was very detrimental information to the
defendants in that case?

A: Yes. Yes, it was.

Ex. 38.

1 Bagley, 473 U.S. 667, 682 (1985) (holding that, for purposes of a Brady
2 violation, "evidence is material only if there is a reasonable
3 probability that, had the evidence been disclosed to the defense, the
4 result of the proceeding would have been different. A 'reasonable
5 probability' is a probability sufficient to undermine confidence in the
6 outcome."); Strickler v. Greene, 527 U.S. 263, 292-95 (1999) (applying
7 Kyles and finding that the petitioner did not show a reasonable
8 probability that his capital conviction and sentence would have been
9 different if the non-disclosed eyewitness impeachment material had been
10 available to him at the time of trial), *cf.*, Carriger v. Stewart, 132
11 F.3d 463, 482 (9th Cir. 1997) (en banc) (finding a Brady violation where
12 the state failed to disclose key witness's department of corrections'
13 file to defense counsel in a capital case where the witness's
14 credibility was essential to the case). In connection with Claim 2, the
15 Order reasons that, in view of the other eyewitnesses' testimony,
16 Rogoway's testimony was not material to the outcome of the case. The
17 testimony of Malloy, which lasted for eight days, was the primary
18 eyewitness evidence primarily relied upon by the prosecution in his
19 closing argument.¹¹ Rogoway's testimony constituted a fraction of the
20 total eyewitness evidence against Petitioner and, therefore, any
21 admission of her allegedly false testimony would have constituted
22 harmless error under Brecht. Order at 24.

23 Thus, the alleged facts in support of this claim, even if proved
24 true, would not state a colorable basis for a Brady violation.
25 Petitioner has failed to allege facts supporting this claim that would
26

27 ¹¹ In his closing argument, the prosecution also referred to the
28 testimony of Givens, Robinson, and Luna, who all identified Petitioner
at a lineup. RT at 14,988, 15,019.

1 give rise to a Brady violation and, therefore, standing alone, it does
 2 not provide a colorable basis for relief. Accordingly, considered by
 3 itself, Petitioner's argument with respect to this claim does not
 4 provide grounds, either as a "manifest showing of a failure to consider
 5 material facts presented to the Court," "clear error," or a "manifest
 6 injustice," for reversal of the Order.

7 **b. Petitioner's Claim 7: Failure to Disclose Statements**
 8 **Made to Malloy Prior to the Video Lineup Violated**
 9 **Petitioner's Rights to a Fair Trial and Due Process under**
 10 **the Sixth and Fourteenth Amendments**

11 In Claim 7, Petitioner contends that the "failure to disclose that
 12 Michael Malloy was told prior to the video lineup that the right suspect
 13 was in custody and that he should identify him violated [Petitioner's]
 14 rights to a fair trial and to due process under the Sixth and Fourteenth
 15 Amendments." Petition at 18. In alleging facts supporting this claim,
 16 Petitioner states: "Prior to viewing a lineup that included
 17 [Petitioner], victim/eyewitness Michael Malloy was told by Bob's Big Boy
 18 security liaison David Lind that the suspects had been arrested and that
 19 he should go downtown and 'identify the guys.'" Id. In the Motion for
 20 an Evidentiary Hearing, Petitioner contended that this claim further is
 21 supported by the deposition testimony of Logan and Luna that, before
 22 they attended the December 23, 1980 lineup, they were told that suspects
 23 had been arrested. Motion for an Evidentiary Hearing at 16; RT 9,285-
 24 88, 10,570.

25 In the Motion, Petitioner asserts that an evidentiary hearing is
 26 necessary to determine whether Lind was acting as an agent of the
 27 prosecution. Mot. at 41. Furthermore, Petitioner contends that the
 28 Order is fundamentally flawed in failing to acknowledge that Lind's

1 statement ran counter to proper police procedures and tainted the
2 identification, relying upon Simmons v. United States, 390 U.S. 377, 383
3 (1968). Mot. at 42.

4 In Simmons, the Supreme Court addressed the circumstances in which
5 law enforcement's improper use of photographs may cause witnesses to err
6 in identifying criminals. Simmons, 390 U.S. at 383. The Supreme Court
7 explained: "each case must be considered on its own facts, and
8 convictions based on eyewitness identification at trial following a
9 pretrial identification by photograph will be set aside on that ground
10 only if the photographic identification procedure was so impermissibly
11 suggestive as to give rise to a very substantial likelihood of
12 irreparable misidentification." Id. at 384. The court concluded that
13 the photographic line-up technique used in that case was not likely to
14 lead to misidentification, reasoning, in part, that the underlying
15 robbery took place in the afternoon in a well-lighted bank, the robbers
16 wore no masks, and the five bank employee eyewitnesses were able to
17 observe the robber for periods ranging up to five minutes. Id. at 385.

18 The Order explains that, even assuming that Lind made the
19 statement, Petitioner's allegations do not indicate that the prosecution
20 had a Brady duty to disclose Lind's statement to Malloy, because it is
21 not clear that Lind was acting as their agent. Order at 44-45. In
22 addition, the Order states that Petitioner's allegations do not indicate
23 that Lind's statement was "so impermissibly suggestive as to result in
24 a substantial likelihood of irreparable misidentification." Order at
25 46 (citations omitted). The Order further explains: "[e]ven if it were
26 true Lind made the statement and he was on the prosecution's team, the
27 Brady materiality element is missing because an examination of the
28 totality of the circumstances surrounding Petitioner's lineup does not

1 show Lind's statement unnecessarily suggested to Malloy that Petitioner
2 was the suspect in the lineup." Order at 46.

3 Petitioner's contentions in connection with this claim are similar
4 to those he made in connection with Claim 8, to wit, that Malloy
5 perjured and/or offered materially false testimony. Specifically,
6 Petitioner alleges that Malloy testified falsely at his trial when
7 Malloy denied being told before viewing a video lineup that the robbery
8 suspects had been arrested. Pet. at 19; see also RT at 7,849 (asking
9 Malloy the question: "Had you heard before you were told that you were
10 going to go downtown to identify anybody, had you heard that there were
11 suspects arrested and in custody for the incident?" to which Malloy
12 responded: "No, I didn't."). Petitioner contends that Malloy's
13 deposition testimony taken years later shows that he was so told. Ex.
14 54 (July 12, 1985 Deposition of Michael Malloy, Rogoway v. Bob's Big Boy
15 Restaurants of Am., et al.). However, as noted in the Order, the
16 deposition testimony fails to support his assertion.¹² Order at 27.

18 ¹² The relevant deposition testimony is, as follows:

19 Q: When did anybody from Bob's talk to you after this
incident?

20 A: I believe after I got out of the hospital.

21 Q: Who did you talk to?

22 A: Dave Lind.

23 Q: Where?

24 A: I went in a lineup. I went downtown to a lineup.

25 Q: How long were you in the hospital?

26 A: Two and a half weeks.

27 Q: Is that the first time you saw Dave Lind after this
incident?

28 A: At the lineup.

Q: Did he talk to you about the incident?

A: No. He just told me I was coming downtown for a
lineup, identify the guys.

Q: He called you and asked you if you would come down to
the lineup?

A: LAPD called me.

Q: What did Dave Lind -

1 Furthermore, whatever Lind said to other witnesses, such as Logan and
2 Luna, is irrelevant to what he said to Malloy. Thus, he has failed to
3 allege the key facts in support of this claim, namely, that Lind even
4 made this "suggestive" statement to him.

5 Even assuming that the statement alleged by Petitioner was made to
6 Malloy and an evidentiary hearing is necessary to determine whether Lind
7 was acting as an agent of the prosecution, the other facts he alleges
8 in support of his claim do not give rise to a Brady violation.
9 Specifically, Petitioner's arguments -- that Malloy misidentified him
10 as the robber/murderer due to Malloy's purported lack of focus during
11 the robbery based on the robber's shotgun, his apprehension, and the
12 fact that he was occupied with getting cash instead of looking upon the
13 robbers the entire time -- add nothing more to Petitioner's claim. See
14 Mot. at 43-44.

15 The Supreme Court has enumerated factors to be considered in
16 evaluating the likelihood of misidentification: 1) the opportunity of
17 the witness to view the criminal at the time of the crime; 2) the
18 witness's degree of attention; 3) the accuracy of the witness's prior
19 description of the criminal; 4) the level of certainty demonstrated by
20 the witness at the confrontation; and 5) the level of certainty
21 demonstrated by the witness at the confrontation; and 6) the length of
22 time between the crime and the confrontation. Neil v. Biggers, 409 U.S.
23 188, 199-200 (1972).

24 As in Simmons, Malloy was given the opportunity to observe
25 Petitioner's exposed face (RT 6,762, 6,874), and to look straight into
26 _____

27 A: Escorted me down.
28 Ex. 54 (emphasis added).

his eyes (RT 6,871) in a well-lit area (RT at 6,757-59, 6802) for an ample period of time, at least approximately five minutes. Petitioner's trial counsel cross-examined Malloy at length regarding the factors which could have led to his inability to observe the robber during the course of the incident, including the fact that he did not view the robber continuously, he was frightened, and he was involved with performing a certain task, i.e., putting money in a bag. RT at 7,549-74. Thus, as the Order correctly reasons, "going a step further, Brady materiality still would not be established, even if the lineup were tainted by Lind's statement, because the record demonstrates Malloy's testimony was 'nonetheless reliable' when examined under the Neil v. Biggers factors and Petitioner has no evidence to the contrary." Order at 47.

Petitioner has failed to allege facts supporting this claim that would give rise to a Brady violation and, therefore, standing alone, it does not provide a colorable basis for relief. Accordingly, considered by itself, Petitioner's argument with respect to this claim does not provide grounds, either as a "manifest showing of a failure to consider material facts," "clear error," or a "manifest injustice," for reconsideration and reversal of the Order.

c. Petitioner's Claim 12: Failure to Disclose Statements Made by the Prosecution and its Agents to Pressure Witnesses to Identify or Implicate Petitioner Violated Petitioner's Rights to a Fair Trial and Due Process under the Sixth and Fourteenth Amendments

In Claim 12, Petitioner contends that the "failure to disclose that the prosecution and its agents pressured witnesses to identify or implicate [Petitioner] violated his rights to due process and a fair

1 trial under the Sixth and Fourteenth Amendments." Pet. at 20. In
2 setting forth facts supporting this claim, Petitioner alleges:

3 50. Victim/eyewitness Derwin Logan helped
4 police prepare a composite sketch. Prior to viewing
5 the lineup, Logan was also told by David Lind that
6 the right suspects were in custody and that he should
7 identify them. After viewing a photograph of
8 [Petitioner] and observing him in a lineup, however,
9 Logan did not identify [Petitioner] as one of the
10 robbers. As a result, the prosecution told Logan
11 they thought he was involved in the crime and made
12 him take a polygraph test. Neither the fact of the
13 test nor the result were disclosed. After
14 [Petitioner's] trial, Logan revealed at Freeman's
15 trial that the police told him "Frank and Ricky" said
16 he was involved. This statement by the police to
17 Logan was a lie, however, as [Petitioner] and Mr.
18 Freeman made no statements to the police.

19 60. The police had Jerry Lankford sign a
20 statement saying that [Petitioner] asked him to help
21 rob the restaurant. Lankford, however, maintained
22 that he did not read the statement and only signed it
23 to be allowed to leave the interrogation room.
24 Further, Lankford testified that he only told police
25 about "rumors" in the neighborhood implicating
26 [Petitioner], and he testified that he had never
27 spoken to [Petitioner] in his life. Lankford denied
28 that [Petitioner] or any member of his family

1 threatened him, and has more recently stated that the
2 only threats he has ever received were from law
3 enforcement.

4 Pet. at 20-21. In the Motion, Petitioner contends that the "level
5 of pressure that Logan and Lankford were subjected to is precisely the
6 kind of evidence that warrants disclosure and an evidentiary hearing."
7 Mot. at 46. Petitioner further contends that, if the prosecution
8 pressured these witnesses, then probably other witnesses were pressured,
9 as well. Id.

10 In support of his claims in the Petition, Petitioner cites a
11 transcript from Freeman's hearing, where Freeman's counsel states that
12 he overheard Logan telling Rogoway in the hall that Petitioner and
13 Freeman told the police he was involved in the robbery. Ex. 71. In
14 addition, he cites a transcript of proceedings where Logan pleaded
15 guilty to possession of cocaine, in which Giss stated that Logan had
16 been a cooperative witness in Petitioner's case and voluntarily had
17 taken a polygraph test when the issue arose as to whether Logan had been
18 involved in the Bob's Big Boy incident. Ex. 72. Petitioner also cites
19 Lankford's June 9, 1995 declaration in which Lankford states that he
20 anonymously called the police to tell them about Petitioner's
21 involvement in the robbery based on rumors he had heard in the
22 neighborhood and that he did not know Petitioner. Ex. 73. Lankford
23 further declares that the statement he signed while being questioned by
24 the police in connection with the robbery was not true, and he only
25 signed it so that he could leave. Id.

26 The Order found Petitioner's claim to be without merit, reasoning
27 that "[e]ven if taken as true, Petitioner's allegations do not establish
28 Brady's materiality requirement because it is not reasonably likely, if

1 the information had been revealed, it would have changed the import of
2 Logan's testimony at Petitioner's trial. The strength of his testimony
3 was not great because he did not select Petitioner in the lineup."
4 Order at 49. Furthermore, there is no dispute that Logan could not
5 identify Petitioner prior to the trial. RT at 10,487; 10,670. Thus,
6 Lind's alleged statement to Logan, even assuming it was made, was not
7 overly suggestive because it did not result in an identification. As
8 the Order correctly notes, Logan's testimony was not determinative of
9 Petitioner's guilt, and the prosecution brushed it aside in its closing
10 argument.¹³ See Bagley, 473 U.S. at 682; Strickler, 527 U.S. at 292-95.

11 In addition, Logan was a minor witness whose testimony added little
12 to the prosecution's case. It is not reasonable to conclude that the
13 withholding of this evidence shows that the prosecution "pressured"
14 Logan to testify falsely against Petitioner in light of the other
15 overwhelming evidence upon which it relied in the closing argument,
16 namely, the other eyewitness/victims who did identify Petitioner as the
17 robber/murderer. Consequently, the withholding of the polygraph does
18 not give rise to a Brady allegation, as it would not have affected the
19 result of the trial. Woods v. Bartholomew, 516 U.S. 1, 7-8 (1995)
20 (holding that the prosecution's failure to disclose the fact that a key
21 witness in a capital case had failed a polygraph test did not give rise
22 to a Brady violation, because there was no reasonable likelihood that
23 disclosure of the results would have resulted in a different outcome at
24 trial).

25
26 ¹³ The prosecution referred to Logan in the closing argument, as
27 follows: "And then Derwin Logan, who gave a description that's
28 consistent with fitting with defendant, but picks the wrong people at
the lineup. . . . One of the six doesn't even count, because while Irvin
is out, Jackson is brain damaged, so Logan is the only one that's off."
RT at 15,026.

1 Petitioner's request for an evidentiary hearing pertaining to Claim
2 12 insofar as it is based on the alleged withholding of evidence
3 pertaining to Lankford fares similarly poorly. At Petitioner's trial,
4 his counsel examined Lankford about his prior signed police statement
5 attesting to his discussions with Petitioner regarding the incident
6 prior to its occurrence, much of which Lankford testified that he in
7 fact did not tell the police. RT at 666-81. Specifically, he testified
8 that he had never talked to Petitioner himself about the Bob's Big Boy
9 robbery either before or after it happened. RT at 622. He further
10 testified that he had no "firsthand" knowledge about who committed the
11 murders, and "was going by what [he] heard in the neighborhood." RT
12 682. He also testified at trial about the conditions of the small room
13 in Parker Center where he was interviewed, without any family members or
14 an attorney, and that the room had "quite a number of policemen" in it.
15 RT at 626. Thus, Lankford's June 9, 1995 declaration adds little, if
16 anything, to what he testified at trial.

17 Unlike Logan's testimony, the prosecution did rely upon Lankford's
18 signed statement implicating Petitioner in the incident in its closing
19 argument and argued that Lankford reasonably attempted to deny the
20 assertions in his statement due to his concerns for the safety of
21 himself and his family. RT at 14,940-47. Admittedly, this information
22 was important, as the prosecution argued, because "he's the only person
23 that we have [Petitioner] actually talking to about committing this
24 particular crime. The solicitation of someone on the street with a
25 record." RT at 14,958. Yet, it was not the only such evidence of
26 Petitioner's intention to rob Bob's Big Boy. The prosecution noted
27 Givens's testimony that Stewart had told her that Petitioner and Freeman
28 were going to rob Bob's Big Boy prior to the incident. RT at 14,974-76.

1 In addition, the prosecution noted Gilcrest's statements that Stewart
2 told him that Petitioner and Freeman were going to rob Bob's Big Boy.
3 RT at 15,001-02. The jury heard Lankford's trial testimony that he was
4 not concerned for his safety or afraid of Petitioner and did not read
5 the statement carefully before signing it, and presumably disbelieved
6 it. RT at 634-35. Therefore, it does not appear that there was any
7 withholding of information regarding the prosecution's questioning of
8 Lankford that would give rise to a Brady allegation, as it would not
9 have affected the result of the trial. Bagley, 473 U.S. at 682;
10 Strickler, 527 U.S. at 292-95.

11 Petitioner has failed to allege facts supporting this claim that
12 would give rise to a Brady violation and, therefore, standing alone, it
13 does not provide a colorable basis for relief. Accordingly, considered
14 by itself, his argument with respect to this claim does not provide
15 grounds, either as a "manifest showing of a failure to consider material
16 facts," "clear error," or a "manifest injustice," for reconsideration
17 and reversal of the Order.

18 **d. Petitioner's Claim 18: Failure to Disclose that Gilcrest**
19 **and His Mother Had Been Promised -- Tacitly or Explicitly**
20 **-- That They Would Receive Reward Money for Their**
21 **Testimony Violated Petitioner's Rights to a Fair Trial and**
22 **Due Process under the Sixth and Fourteenth Amendments**

23 In Claim 18, Petitioner contends that "Gilcrest denied being
24 motivated by the sizeable reward money offered by Bob's Big Boy and
25 [Giss] argued that Gilcrest had not been promised any money.
26 Handwritten notes of [Giss] discovered post-conviction reveal that
27 Gilcrest indeed sought money for his testimony and his request was never
28 denied or rejected. In fact, sometime after the trials of both

1 [Petitioner] and co-defendant Freeman, Gilcrest and his mother were paid
2 reward money." Petition at 24. Specifically, these handwritten notes,
3 which are written on a June 21, 1983 discovery motion from the Freeman
4 case requesting discovery of consideration given to or made on behalf of
5 government witnesses, state: "reward of \$10,000 [. . .] no one promised
6 anything except Gilcrest talks of [money]." Ex. 65.

7 The reward money to which Petitioner refers was a \$10,000 reward
8 offered by Marriott Corp., which formerly owned the Bob's Big Boy
9 restaurant franchise. Ex. 62. In a January 18, 1995 letter, Marriott
10 stated that LAPD "made the final determination of eligibility for the
11 reward." Ex. 64. In an April 25, 1995 letter responding to an inquiry
12 of Petitioner's counsel about this reward, Deputy District Attorney
13 Donna Weisz Jones stated that LAPD had no paperwork regarding the
14 Marriott reward; it offered no separate reward; and Giss stated that he
15 "thought reward money was paid to [Gilcrest] and his mother and one of
16 the victims . . . well after the trial was over." Ex. 63.

17 The Order rejected this claim as not having a colorable basis on
18 numerous grounds. First, it explains that Giss's notes are not dated
19 and it is not clear whether they were written in connection with
20 Petitioner's or Freeman's trial, as Giss prosecuted both cases. Order
21 at 52. Furthermore, it notes that Gilcrest's cross-examination revealed
22 that he had sought the reward money, and therefore, "information on
23 whether the reward or a promise of it was a motive for the Gilcrests was
24 equally available to the defense." Order at 54. Finally, the Order
25 explains that even if it were true that the prosecution concealed the
26 promise to pay Gilcrest the reward money, in view of Gilcrest's
27 impeachment, the result of trial would not have been different. Order
28 at 55-56.

1 In the Motion, Petitioner suggests that an evidentiary hearing is
2 necessary to determine Giss's knowledge regarding Gilcrest's receipt of
3 the reward, due to the ambiguities in his handwritten notes. In
4 particular, Petitioner contends, "the court fails to consider that
5 discovery and an evidentiary hearing may well prove that the prosecution
6 did more than lobby for these two [Gilcrest and his mother] to be paid
7 a reward, but in fact promised them, either tacitly or explicitly, that
8 they would be coming into some money for their testimony." Mot. at 47.

9 Petitioner further relies upon Giss's testimony at a hearing in another
10 case, Garmanian, stating: "nobody [acts as an informant] for nothing."
11 Mot. at 46 (citing Ex. 42 at 447-48). Finally, Petitioner argues that
12 any evidence withheld by the prosecution regarding Gilcrest's financial
13 motives in testifying could rise to the level of a Brady violation,
14 because "even if Gilcrest was impeached by cross-examination, the
15 information that defense counsel possessed at trial only provided
16 opportunities for chipping away but not for the assault that was
17 warranted." Mot. at 47.

18 Clearly, evidence bearing upon Gilcrest's request for the reward
19 would be exculpatory by showing his financial motive to testify.
20 However, as Order explained, Petitioner's trial counsel was aware of the
21 reward and Gilcrest's interest in it at trial, and was provided the
22 facts underlying the prosecution's discussions with Gilcrest regarding
23 that reward. Bracy, 67 F.3d at 1428-29; Dupuy, 760 F.2d at 1501 n.5.

24 Specifically, at the preliminary hearing prior to trial,
25 Petitioner's counsel questioned Officer Richard Jacques, the
26 investigating officer, who testified that the decision as to the
27 reward's recipient would be made after the prosecution of the case and
28 only one person, Gilcrest, had made an unofficial request for the

1 reward. RT A-111-14. Officer Jacques further testified that the
2 decision to distribute the reward would depend upon the conviction of
3 the defendants in the case, but not the penalty assessed against them,
4 as well as the consistency of Gilcrest's testimony at trial as compared
5 to prior statements or prior testimony on his part. RT A-112-13.
6 Deputy District Attorney Richard Neidorf also testified at the
7 preliminary hearing that the reward money partly motivated Gilcrest to
8 provide information. RT at 393. Gilcrest himself testified at the
9 preliminary hearing that he had seen news accounts about the \$10,000
10 reward on television, which was on at his home "all the time." RT at
11 274.

12 At Petitioner's trial, Gilcrest denied that he ever received any
13 money from LAPD or the prosecution at the time of trial.¹⁴ RT at 12,
14 442. In addition, when cross-examined as to whether he ever put in a
15 request for the reward, verbally or in writing, Gilcrest testified that
16 "I could have, but I don't remember." RT at 12,466. Nevertheless,
17 while Gilcrest testified about other reasons for providing information
18 about the robbery to the police, he testified on cross-examination that
19 he was aware that there was a \$10,000 reward and agreed that he provided
20 the police information to be a "good citizen" and for the "money."¹⁵ RT
21

22 ¹⁴ Petitioner also testified that his aunt was paid \$300 to cover
23 expenses for him while he stayed with her. RT at 12,442-43, 12,604.

24 ¹⁵ For instance, Gilcrest testified that, at the time when he
25 anonymously told the officers on the phone that he knew who committed
26 the robbery, he had not heard about the reward. RT at 12,610. In
27 addition, he testified that he provided the information because he
28 himself did not want to be implicated in the crime due to his
relationship with Stewart and his presence at the restaurant prior to
the robbery. RT at 14,428. He testified that he would not have come
forward with the information without his mother having forced him to do
so. RT at 12,581. He further testified, when cross-examined as to
whether he had "given up" on the \$10,000 reward, that he "was never

1 at 12,591, 12,606-07, see also RT at 12,195. Thus, Gilcrest in fact was
2 impeached by his request for the reward, which his testimony, albeit
3 slightly contradictory, shows that he made.

4 Moreover, it is unlikely that such allegedly withheld information
5 was material within the meaning of Brady, because, as the Order
6 suggests, Gilcrest's testimony was badly damaged on cross-examination
7 for reasons apart from his potential financial motives. A review of his
8 testimony shows that he had many other motives to implicate Petitioner
9 as the robber, such as his jealousy of Petitioner in view of
10 Petitioner's romantic relationship with Stewart, to whom Gilcrest had
11 written suicidal love letters while she was in custody for the Bob's Big
12 Boy robbery/murders. RT at 12,189-257. Furthermore, while Gilcrest's
13 testimony constituted evidence bearing upon Petitioner's plans to commit
14 the robbery, it was among other evidence on that issue, such as the
15 testimony and statements provided by Lankford and Givens. Therefore, it
16 is doubtful that any withholding of information regarding the
17 prosecution's discussions of the reward with Gilcrest would give rise to
18 a Brady allegation, as it is unlikely it would have affected the result
19 of the trial. Williams v. Calderon, 48 F. Supp. 2d 979, 1003 (C. D.
20 Cal. 1998) (finding no Brady claim was alleged, because even if the
21 state's witness had a deal in exchange for testimony, the petitioner
22 failed to establish that disclosure of it would have resulted in a
23 different outcome because the witness's credibility was attacked
24 adequately by defense counsel at trial).

25 Petitioner has failed to allege facts supporting this claim that
26 would give rise to a Brady violation and, therefore, standing alone, it

27 _____
28 trying to really get it." RT at 12,604.

1 does not provide a colorable basis for relief. Accordingly, considered
2 by itself, his argument with respect to this claim does not provide
3 grounds, either as a "manifest showing of a failure to consider material
4 facts," "clear error," or a "manifest injustice," for reconsideration
5 and reversal of the Order.

6 **5. Collective Consideration of Petitioner's Alleged Brady**
7 **Claims**

8 Although each of Petitioner's alleged Brady claims do not appear to
9 set forth a colorable claim for relief when considered alone, they
10 should viewed collectively. Kyles, 514 U.S. at 420.

11 Claims 3, 7, and 12 relate to allegedly withheld evidence pertaining
12 to eyewitness/victims Rogoway, Malloy, and Logan, respectively. Both
13 Claims 3 and 12, pertaining to allegedly withheld information bearing on
14 the testimony of Rogoway and Logan, do not set forth Brady violations,
15 because Petitioner has failed to allege facts showing that any
16 information was withheld from Petitioner's trial counsel in order to
17 further impeach these witnesses. Moreover, as noted above with respect
18 to Claim 7, Petitioner has not alleged facts with respect to the
19 withholding of evidence pertaining to Malloy, because Malloy's
20 deposition testimony upon which Petitioner relies in alleging that Lind
21 made an overly suggestive statement to Malloy (i.e., that the suspects
22 had been arrested and that Malloy should go identify them), does not
23 contain that statement or support that inference. In addition, Malloy's
24 trial testimony was independently reliable under the Neil v. Biggers
25 factors. Thus, because each of these claims fails to state any Brady
26 violations for reasons apart from their lack of materiality when
27 considered individually, viewing them collectively does not show that
28 they state a colorable basis for relief.

1 Claims 12 and 18 allege that evidence was withheld relating to
2 Gilcrest's and Lankford's testimony and statements regarding the special
3 circumstances of Petitioner's conviction, i.e., his intention to rob
4 Bob's Big Boy. Aside from these witnesses' testimony, the other
5 evidence regarding Petitioner's intention to rob Bob's Big Boy primarily
6 came from Givens.¹⁶ However, for the reasons explained above, neither
7 of these claims appears to qualify as a Brady violation. Specifically,
8 the allegedly withheld information was known by defense counsel at the
9 time of trial. These claims fail to state any Brady violations for
10 reasons apart from their lack of materiality when considered
11 individually and viewing them collectively does not show that they state
12 a colorable basis for relief, as well. Finally, for these reasons, the
13 entirety of Petitioner's Brady claims do not demonstrate a colorable
14 basis for relief.

15 Accordingly, the Order's analysis of Petitioner's alleged Brady
16 claims does not constitute a "manifest showing of a failure to consider
17 material facts," "clear error," or a "manifest injustice," and
18 Petitioner's request for reconsideration and reversal of the Order on
19 these grounds is rejected.

20 CONCLUSION

21 For the foregoing reasons, the Motion is **DENIED**. Following the
22 entry of this Order, the parties shall submit a Joint Status Report
23
24
25

26
27 ¹⁶ As noted previously, although both Gilcrest's mother and
28 Taylor came forward with this information following the incident, their
knowledge was derived from Gilcrest.

1 regarding the remaining claims and the final disposition of this case
2 within 30 days of entry of this order.

3
4 IT IS SO ORDERED.

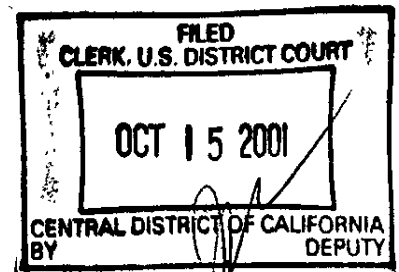
5 Dated: October 20, 2009

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Stephen G. Larson
United States District Judge
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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

RICARDO RENE SANDERS,

Petitioner,

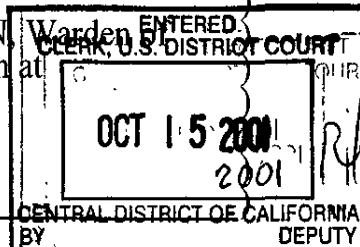
v.

ARTHUR CALDERON
 California State Prison at
 San Quentin,

Respondent.

CASE NO. CV 96-7429 CRM

DEATH PENALTY CASE



ORDER DENYING PETITIONER'S
 MOTION FOR AN EVIDENTIARY
 HEARING (Related Docket Nos. 125-
 129)

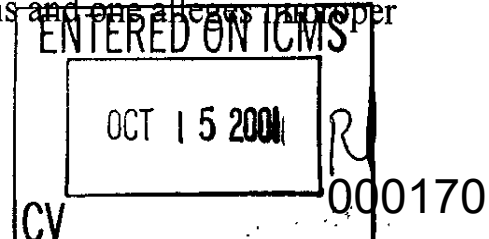
On December 16, 1999, Petitioner filed a Motion for an Evidentiary Hearing on Claims 1-3, 5-9, 11-14, 17-23, 31, and 45. Opposition to the motion was filed on February 11, 2000 and the Reply was filed on March 10, 2000. Oral argument on the motion was took place on September 24, 2001. The Court having reviewed and carefully considered the matter denies Petitioner's request for a hearing on all of these claims.

I. BASIS FOR MOTION

Petitioner's motion requests an evidentiary hearing on 21 claims. Eight claims allege eight prosecution witnesses falsely testified at his trial. Ten claims assert misconduct by the prosecution, including four Brady violations.

Two are ineffective assistance of counsel claims and one alleges improper

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1 discharge of a juror.

2 Petitioner argues an evidentiary hearing is required because he was
3 denied a full and fair hearing on the claims. The California Supreme Court made
4 no findings of fact or conclusions of law on the merits of the claims when it
5 denied his request for a hearing on his state habeas petition. Also, a hearing is
6 required because the Respondent's Answer disputes the factual predicate for the
7 claims, creating an issue of material fact. Petitioner's Mot. for Evid. Hrg. at 7.
8 And, last, Petitioner states he is entitled to a hearing because his claims must rise
9 to the level of a prima facie case if they survived Respondent's motions to dismiss
10 and for summary judgment, suggesting the claims must have colorable basis.
11 Petitioner's Mot. for Evid. Hrg. at 6. Moreover, he argues the Antiterrorism and
12 Effective Death Penalty Act (AEPDA) does not bar a hearing on any of the claims
13 since "considerable evidence to support the claims" was presented in his state
14 habeas petition. Mot. for Evid. Hrg. at 5, footnote 4, 8.

15 Respondent's opposition, filed February 11, 2000, is nothing more
16 than a blanket argument. Frequently using the phrase "not fairly presented,"
17 Respondent argues none of Petitioner's claims were presented to state court.
18 Therefore, a hearing cannot be granted on any of them because §2254(e)(2) of the
19 AEPDA bars an evidentiary hearing on a claim not factually developed in state
20 court - for whatever reason. Opposition to Mot. for Evid. Hrg. at 4.

21 **II. PROCEDURAL HISTORY**

22 On December 3, 1982, a jury sentenced Petitioner to death after
23 finding him guilty of four counts of first degree murder that occurred during the
24 robbery of Bob's Big Boy restaurant on LaCienega Boulevard in Los Angeles.
25 On automatic appeal, the California Supreme Court upheld: (1) one of the jury's
26 findings of true on four multiple murder special circumstances; (2) the findings of
27 true on the felony-murder- robbery special circumstances; (3) the guilty verdicts
28 on multiple counts of robbery, attempted robbery, assault with a deadly weapon,

1 and conspiracy to commit robbery; and (4) the findings of firearm use by
 2 Petitioner on all but one count. People v. Sanders, 11 Cal. 4th 475 (1995), cert.
 3 denied, 519 U.S. 838, 136 L. Ed. 2d 66, 117 S. Ct. 115 (1996). Petitioner's state
 4 habeas corpus petition was denied on February 14, 1996.

5 The instant habeas proceeding was commenced on October 22, 1996
 6 when Petitioner filed his request for counsel. On April 7, 1997, Petitioner filed his
 7 federal habeas petition.

8 On February 27, 1998, the Court granted Respondent's Motion to
 9 Dismiss Claims 15, 30, 32 (partial), 33, and 35. That same order also granted
 10 Petitioner's discovery request for an analysis by the LAPD's automated fingerprint
 11 identification system of the 42 unidentified fingerprints lifted from the Bob's Big
 12 Boy crime scene.

13 On October 7, 1999, under the pre-AEDPA standard of review,
 14 summary judgment was granted on Claims 4, 16, 24, 25, 26, 28, 29, 32, 34, 36, 37,
 15 38, 39, 41, 42, and 43. Even though the petition was filed post-AEDPA, the pre-
 16 AEDPA standard of review was chosen as a practical matter because it weighed in
 17 favor of Petitioner.

18 On April 14, 2000 the Court issued an order, pursuant to the parties'
 19 stipulated request, deferring discovery until the motion for evidentiary hearing was
 20 ruled on. The deferral includes postponement of the LAPD fingerprint analysis.

21 **III. FACTUAL BACKGROUND**

22 Petitioner, along with his codefendants Franklin Freeman and
 23 Carletha Stewart¹, were convicted for the Bob's Big Boy robbery which occurred
 24 on December 14, 1980 and involved eleven victims.² Nine victims were restaurant
 25 employees and two were customers.

26 ¹ Freeman received a sentence of life without the possibility of parole. The court
 27 sentenced Stewart to 25 years to life in prison pursuant to a plea. Freeman and Stewart are
 28 first cousins.

² All three defendant's cases were severed.

1 The employees working that night were waitresses Rhonda Robinson,
2 Dionne Irvin, Evelyn Jackson, and Dita Agtani, cook Derwin Logan, busboys
3 Ismael Luna and his father Cesaerio Luna, cashier Ahmad Mushuk and the
4 manager, Michael Malloy. It was past the restaurant's 2 a.m. closing time and
5 Logan was unlocking the front door to let out the last customers, Tami Rogoway
6 and her boyfriend David Burrell. That was when two robbers, armed with
7 shotguns and faces undisguised, entered. When Mushuk, the cashier, asked what
8 was happening, one of the robbers hit his head with the butt of his shotgun.
9 Mushuk fell to the floor.

10 The victims were then led to the back of the restaurant and told to lie
11 on the floor. While giving commands, one of the robbers asked for the restaurant
12 manager. Malloy answered and the robber, identified as Petitioner, instructed
13 Malloy to take him to his office to open the safe and bag money.

14 The other victims were instructed to get up and go into the
15 restaurant's walk-in freezer. Malloy turned over the money to the robber
16 identified as Petitioner, who then gave him a bucket and told him to go into to the
17 freezer to collect everyone's belongings. After Malloy finished, all the victims
18 were told to turn around with their backs away from the freezer door. Then they
19 were told to kneel, stand up, and kneel again. It was never established at trial
20 whether one or both robbers began shooting into the freezer, nevertheless shots
21 were fired. Mushuk, Agtani and Burrell died immediately from gunshot wounds.
22 Cesaerio Luna died several months later of complications from a gunshot wound
23 to the head. Rogoway, Malloy, Jackson, and Irvin suffered substantial physical
24 injuries. Logan, Robinson, and Luna escaped physically unharmed. Other than
25 Jackson begging for her life before the victims were told to turn around, there was
26 no evidence the victims said anything to robbers or resisted them in anyway.

27 In the days following the robbery, the victims, while hospitalized,
28 were shown C.R.A.S.H. unit photos of possible suspects. The record is not

1 precise on the various prelineup identifications made. However, the record does
2 indicate none of the eyewitnesses identified Petitioner from the CRASH unit
3 photos. Logan gave a description fitting Petitioner that the police broadcasted.
4 Although Luna did not pick Petitioner from the photo spread, his description of
5 him was used in the composite sketch. Logan also assisted with the composite.³

6 However, the record shows Jerry Lankerford and Andre Gilcrest,
7 who both provided police tips on the robbery, picked Petitioner out of a photo
8 spread. Lankerford stated Petitioner solicited him to help with the robbery.⁴
9 Gilcrest stated Stewart told him about their plans to rob the restaurant almost three
10 months before the robbery.⁵

11 On December 23, 1980, the victims and other witnesses attended
12 several live lineups. Only one lineup included Petitioner. Those who could not
13 make it to the lineup were instead shown a videotape of it. Robinson identified
14 Petitioner at the live lineup. Luna identified him at the live lineup, but qualified
15 his selection. Logan picked someone other than Petitioner from the live lineup.
16 Givens, a Bob's Big Boy waitress who was not working the night of the robbery,
17 picked Petitioner out from the live lineup as one of the two males she saw with
18 Stewart while both were visiting inmates at the Los Angeles County jail and
19
20
21

22 ³ The general description of the robbers was two black males, early 20's. One was taller
23 than other and one's complexion was darker. Both carried shotguns. One of the guns was
shorter than the other. One had a jeri-curl hairstyle.

24 ⁴ Lankerford's tip stated that in September 1980 Petitioner asked him to help in robbing
25 the restaurant. Inside Petitioner's car trunk, he saw the stock of a shotgun wrapped in a
blanket.

26 ⁵ Gilcrest's tip stated that on September 27, 1980 his friend Stewart told him "Frank and
27 Ricky" planned to rob Bob's Big Boy restaurant. Later that same evening Gilcrest, while
28 with Stewart, met Petitioner and Freeman who both had shotguns. Gilcrest told his brother
about the conversation who, in turn, told their mother. Gilcrest's mother, who also phoned
in a tip, urged him to go to the police with the information. Both Gilcrest and his mother
were prosecution witnesses at Petitioner's trial.

1 Stewart warned her of the robbery plans.⁶ Malloy and Rogoway identified
 2 Petitioner from the videotape of the lineup.

3 Only five of the seven survivors of the restaurant shooting testified at
 4 Petitioner's preliminary hearing and trial. Irvin did not testify because the trial
 5 court declared her incompetent due to extensive psychological problems. RT
 6 9839-9851. Jackson testified, but she did not give identification testimony
 7 because of the permanent brain damage she sustained in the incident.

8 At the preliminary hearing, Malloy and Rogoway identified Petitioner
 9 as one of the robbers. Luna and Robinson could not identify him at the hearing.
 10 At trial, all four eyewitnesses identified Petitioner in open court. Although trial
 11 counsel conducted a rigorous cross examination of each witness, bringing out
 12 many inconsistencies, each witness maintained Petitioner was one of robbers that
 13 night.

14 Other prosecution witnesses included Givens, Lankerford, and
 15 Gilcrest. Also, Rodell Mitchell, a Bob's Big Boy manager, testified Givens told
 16 him about Stewart's robbery threat. And Bruce Woods testified Stewart solicited
 17 him to help commit the robbery and Petitioner threatened him.⁷

18 Also, although circumstantial, the prosecution presented considerable
 19
 20

21 ⁶ Givens was also a prosecution witness. Not only did her friend Stewart warn her of the
 22 robbery when they saw each other at the county jail, but Stewart gave her a second more
 23 settle warning later that evening. Stewart telephoned Givens during her restaurant shift to
 find out if she had left yet and how many employees were still there.

24 ⁷ In the instant motion, Petitioner does not raise any challenges to Woods' testimony at his
 trial that, in August 1980 while riding in the car with his friend Connie and a woman
 25 named Collie, who Woods later identified as Stewart, Collie asked him whether he wanted
 to make some money robbing Bob's Big Boy. RT 11,325-11,342.

26 When Woods heard of the December 14, 1980 robbery, he was in county jail. He
 told another inmate about what Stewart had said. The inmate in turn contacted the police
 who came and interviewed Woods. RT 11,340-11,349.

27 Woods also testified that Petitioner threatened him after Petitioner's preliminary
 28 hearing while both were being transported on the same bus back to county jail. Woods'
 testimony on the threat is the subject of two of Petitioner's claims.

1 physical evidence.⁸ A 20 gauge shotgun was found in Petitioner's bedroom
 2 closet, connecting him to the robbery because 20 gauge wadding was removed
 3 from Irvin's arm and also found on the freezer floor. Two spent 12 gauge shell
 4 casings, pellet size 7 1/2,⁹ were found in Petitioner's father's closet at that same
 5 house. Size 7 1/2 pellets were removed from Cesaerio Luna's body and 12 gauge
 6 wadding was removed from Agtani's body and found on the freezer floor as well.
 7 Three live Remington & Peters 12 gauge rounds, size 6, were found on the night
 8 stand of Petitioner's father and 52 size 6 pellets were taken from Irvin's arm, as
 9 well. And last, a holster was found at Petitioner's home with inside fluting marks
 10 consistent with either a .22 or .32 gauge. .32 slugs were found in the bodies of
 11 Burrell and Cesaerio Luna.

12 Further, single dollar bills and rolls of coins in Bank of America
 13 wrappers, which had been described as taken in the robbery, were found in
 14 Stewart's bedroom.¹⁰

15 After four days of deliberation, the jury returned a verdict of guilty.
 16 The penalty phase lasted four days. As aggravating evidence of prior criminal
 17 activity involving violence, the prosecution introduced Petitioner's 1977 plea to
 18 the second degree burglary. The victim, Dr. Donald Cray, testified to the
 19 circumstances surrounding the burglary.¹¹ Also, the prosecution argued the
 20

21 ⁸ Petitioner's fingerprints were not found at the robbery scene. Matches were found for
 22 100 fingerprints lifted from the restaurant. But because of the limited fingerprint
 23 technology back then, 42 prints remained unidentified. On February 27, 1998, the Court
 granted Petitioner's discovery request for an analysis of the unidentified fingerprints by the
 LAPD's new state of the art automated fingerprint identification system.

24 ⁹ The police found after the shooting no shell casings anywhere in the freezer.

25 ¹⁰ None of the victims' belongings, though, taken in the robbery were found in Petitioner's
 26 or his codefendants' homes.

27 ¹¹ Dr. Cray testified that on February 28, 1977 around 11:15 a.m. as he was driving up his
 28 driveway, he saw a parked car facing his. At first, he thought it belonged to a repairman.
 As he was entering his house, he looked out the kitchen window and saw two men,
 carrying rifles, running away from behind the garage to the parked car. When Dr. Cray
 went out to ask the men what they were doing, the driver said shoot him and the other

1 circumstances of the crime -“11 attempted murders, 4 actual murders, 4 maimings,
2 11 robberies” - were an aggravating factor warranting imposition of a death
3 sentence. RT 16,110.

4 Mitigation evidence included the testimony of Petitioner’s sister, Lisa
5 Sanders, and his brother, Adrian Sanders. A family friend who cared for
6 Petitioner and his sister when they were teenagers and knew their father also
7 testified. And a clinical psychologist testified about Petitioner’s school and
8 juvenile records.

9 **IV. LEGAL STANDARD FOR GRANTING AN EVIDENTIARY HEARING**

10 An evidentiary hearing is mandatory to factually develop a claim in a
11 federal habeas corpus petition when material facts are in dispute and if“(1)
12 petitioner’s allegations, if proven, would establish a right to relief, and (2) the state
13 court trier of fact has not, after a full and fair hearing, reliably found the relevant
14 facts.” Jeffries v. Blodgett, 5 F.3d 1180, 1187 (9th Cir. 1992), interpreting
15 Townsend v. Sain, 372 U.S. 293, 312-13, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963),
16 overruled in part, Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S.
17 Ct. 1715 (1992); Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992); Van
18 Pilon v. Reed, 799 F.2d 1332, 1338 (9th Cir. 1986).

19 The district court has discretion to grant an evidentiary hearing
20 “where the material facts are in dispute,” even where the court “conclude[s] ...
21 [petitioner] was afforded a full and fair hearing by the state court resulting in a
22 reliable finding.” Townsend v. Sain, 372 U.S. at 318, accord Garcia v. Bunnell,
23 33 F.3d 1193, 1199 (9th Cir. 1994); Morris v. Woodford, 229 F.3d 775 (9th Cir.
24 2000); Rhoden v. Rowland, 10 F.3d 1457, 1460 (9th Cir. 1993), accord Jeffries, 5
25 F.3d at 1187.

26
27 began aiming at him. Dr. Cray ran for cover under a tree and the men drove off. He took
28 the car’s license number and called the police. Later he discovered some of his belongings
had been gathered in the middle of his den and two rifles were missing. RT 15,732–15,851.

1 If, however, a state court record reflects a petitioner has failed,
 2 without exercising due diligence, to develop a claim's factual basis the
 3 Antiterrorism and Effective Death Penalty Act (AEPDA) bars an evidentiary
 4 hearing on the claim unless:

5 (1) the claim relies on:

6 (a) a new rule of constitutional law, made
 7 retroactive to cases on collateral review by
 8 the Supreme Court, that was previously
 9 unavailable; or

10 (b) a factual predicate that could not have
 11 been previously discovered through the
 12 exercise of due diligence; and

13 (2) the facts underlying the claim would be sufficient to
 14 establish by clear and convincing evidence that but for
 15 constitutional error, no reasonable factfinder would have
 16 found the applicant guilty of the underlying offense.

17 Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed.2d 435 (2000),
 18 interpreting 28 U.S.C. § 2254(e)(2). Other than in this one respect, the AEPDA
 19 left untouched the standard for a mandatory and for a discretionary evidentiary
 20 hearing as articulated in Townsend v. Sain, 372 U.S. at 312-313. See Williams v.
 21 Taylor, 529 U.S. 420, 432, 120 S. Ct. 1479, 146 L. Ed.2d 435 (2000), discussing
 22 Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L.Ed. 2d 318, 112 S.Ct. 1715.

18 III. ANALYSIS¹²

19 A. THE EVIDENTIARY HEARING STANDARD

20 The Court agrees with Respondent's contention that the AEPDA
 21 standards for granting an evidentiary hearing govern Petitioner's request. Indeed,
 22 Petitioner's appointment of counsel request and habeas petition were both filed
 23 after the statute's April 24, 1996 effective date. Lindh v. Murphy, 521 U.S. 320,
 24 326-327, 138 L. Ed. 481, 117 S. Ct. 2059 (1997).

25 However, the Court does not agree with Respondent's no-fault
 26 reading of section 2254(e)(2), which was squarely rejected by the United States

27
 28 ¹²In the instant order, citations to Petitioner's motion are limited to the Narrative Summary of
 Claims.

1 Supreme Court in Williams, 529 U.S. 420.¹³ There, the court addressed the issue
 2 of whether exercising due diligence in pursuing a claim excuses the bar on an
 3 evidentiary hearing on a claim the petitioner failed to develop in state court. Id. at
 4 424. Recognizing the statute does not equate diligent petitioners with non-
 5 diligent ones, Id. at 436, the court concluded AEPDA only bars an evidentiary
 6 hearing on a factually undeveloped claim when a petitioner lacked due diligence
 7 in pursuing the claim. Id., at 430. The court noted “[a] person is not at fault when
 8 his diligent efforts to perform an act are thwarted, for example, by the conduct of
 9 another ...” Id., at 432.

10 Moreover, the Williams court, addressing the same no fault reading of
 11 section 2254(e)(2) as the one advanced here by Respondent, stated:

12 [i]f the opening clause of [section] 2254(e)(2) covers a
 13 request for an evidentiary hearing on a claim which was
 14 pursued with diligence but remained undeveloped in
 15 state court because, for instance, the prosecution
 16 concealed the facts, a prisoner lacking clear and
 17 convincing evidence of innocence could be barred from a
 18 hearing on the claim even if the could satisfy [section]
 19 2254(d).(citation omitted) The ‘failed to develop’ clause
 20 does not bear this harsh reading, which would attribute
 21 to Congress a purpose or design to bar evidentiary
 22 hearings for diligent prisoners with meritorious claims
 23 just because the prosecution’s conduct went undetected
 24 in state court.

25 Williams, 529 U.S. at 434-435. So, the “question is not whether the facts could
 26 have been discovered but instead whether the prisoner was diligent in his efforts.”
 27 Id., at 435.

28 Also, the Williams decision eviscerates Respondent’s arguments that
 Petitioner failed to make a showing of either cause and prejudice or fundamental
 miscarriage of justice to excuse the failure to develop his claims. The high court

¹³The Court acknowledges Respondent’s no fault reading of the AEPDA is drawn from the amici curiae that it joined and which was submitted in Williams. Williams was pending in the Supreme Court at the time its Opposition was filed.

1 explained Congress, in enacting Section 2254(e)(2), raised the Keeney v. Tamayo-
2 Reyes bar for petitioners not diligent in state court. Keeney required a petitioner,
3 who failed to develop a claim's factual basis in state court, to "demonstrate cause
4 and prejudice excusing the default before a receiving a hearing on his claim,
5 unless [he] could 'show that a fundamental miscarriage of justice would result
6 from failure to hold a federal evidentiary hearing.' " Williams, 529 U.S. at 432,
7 citing Keeney, 504 U.S. at 8, 12. The amended section 2254(e)(2), characterized
8 by the Williams court as a heightened standard, replaces the requirement of a
9 cause and prejudice showing, but discards the "miscarriage of justice" exception.
10 Williams, 529 U.S. 420.

11 Moreover, the Court disagrees with Respondent's view the AEPDA
12 has made sweeping changes that "completely reform[ed] the basis for granting
13 evidentiary hearings." Opposition to Evid. Hrg. at 4. Respondent cites Baja v.
14 Ducharme, 187 F. 3d 1075 (9th Cir. 1999), cert. denied .528 U.S. 1079, 145 L. Ed.
15 2d 673, 120 S. Ct. 798 (2000), in support of this view. But its reliance on that case
16 is misplaced. Ducharme, 187 F. 3d 1075. Townsend defined both the mandatory
17 and discretionary standards for granting an evidentiary hearing, while Keeney, a
18 pre-AEPDA decision, limited a petitioner's entitlement to and a district court's
19 power to grant a hearing when a petitioner has failed to develop the claim.
20 Ducharme did not conclude the AEPDA made broad changes to the mandatory and
21 discretionary standards. Rather, it addressed the AEPDA's effect on a district
22 court's power to grant a hearing on a claim not developed because of petitioner's
23 failure.

24 Indeed, the Supreme Court's Williams opinion confirms the AEDPA
25 only changed the standards for granting an evidentiary hearing in one respect - it
26 heightened the Keeney barrier to claims a petitioner failed to develop in state
27 court. A district court may now only grant a hearing on an undeveloped claim
28 after a showing the petitioner exercised due diligence in pursuing the claim. The

1 statute left in tact the standards for a mandatory and discretionary hearings, which
2 never governed determination of a hearing on a claim not previously developed by
3 a petitioner. Keeney did.

4 Last, Respondent argues Petitioner's hearing request should be
5 denied because extensive discovery will be required for preparation of a hearing
6 on these claims. Also, he states Petitioner has no plans to call as witnesses those
7 who allegedly perjured themselves during his trial and participated in the
8 conspiracy to convict him. Opposition to Mot. for Evid. Hrg. at 2, 12. However,
9 the evidentiary standards set forth in Townsend, Keeney, and Williams do not
10 include the extent of discovery or deficient witness lists as considerations when
11 deciding to grant a hearing request. Keeney, 504 U.S. at 8-12; Townsend, 372
12 U.S. 293. The standard is straight forward. Contrary to Petitioner's assertion that
13 his claims are colorable because they survived motions to dismiss and for
14 summary judgment,¹⁴ Petitioner's Mot. for Evid. Hrg. at 6, a hearing is required
15 when specific facts are alleged which, if true, would entitle a petitioner to relief.
16 James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994); United States v. Quan, 789 F.2d
17 711, 715 (9th Cir. 1986). There is no requirement that discovery plans and
18 witness lists be proffered when making that showing.

19 Consequently, the Court is not barred under §2254(e)(2) from
20 entertaining Petitioner's request for an evidentiary hearing on any of his claims
21 not developed in state court, if in evaluating the claim, specific facts indicate he
22 was diligent in pursuing the claim, but his efforts were thwarted by a third party's
23 conduct, just as the Williams court had contemplated. However, given the
24 complexity of the analysis needed to determine whether a claim has been
25 exhausted and, if not, whether Williams saves the claim from dismissal, the Court
26 will first consider whether each of Petitioner's claims has a colorable basis under

27 ¹⁴ Petitioner's argument is flawed. When a claim survives a motion it does not mean a prima
28 facie showing was necessarily made. Conceivably, a claim might have survived because
Respondent failed to present sufficient evidence for his request.

1 Townsend. If so, the Court will then determine whether the claim was “fairly
2 presented” to the state courts and, if not, whether Williams would allow Petitioner
3 to proceed.

4 **B. PETITIONER’S CLAIMS THE PROSECUTION WITNESSES**
5 **PERJURED AND/OR TESTIFIED FALSELY IN VIOLATION OF**
6 **HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS UNDER THE**
7 **6th & 14th AMENDMENTS**

8 Petitioner asserts an evidentiary hearing is required on 8 of his claims
9 to determine whether the prosecution used perjured testimony to obtain his
10 conviction. He claims eight prosecution witnesses were induced by the Los
11 Angeles County District Attorney’s Office to give false trial testimony identifying
12 him as one of the two Bob’s Big Boy robbers or linking him to the robbery.

13 **1. Claim 2 Perjured and/or Materially False Testimony of Tami**
14 **Rogoway**

15 Rogoway was a prosecution witness at Petitioner’s trial. She
16 sustained gunshot wounds to her back during the robbery which resulted in
17 permanent numbness on her right side and sometimes the inability to walk.

18 Petitioner asserts a jail house informant influenced Rogoway to
19 falsely identify him at his trial as one of the two robbers. Petitioner’s Mot. for
20 Evid. Hrg at 2. According to Petitioner, Rogoway could not identify him as one of
21 the robbers immediately after the robbery. She also could not identify him or his
22 codefendant Freeman from the videotaped lineups. Nor could she make a
23 courtroom identification of Freeman when she testified at Freeman’s preliminary
24 hearing until she remained in the courtroom during the testimony of another
25 eyewitness, Robinson, who identified him. Only then on further examination,
26 could she identify him. Petitioner’s Mot. for Evid. Hrg. at 2.

27 According to Petitioner, between the time Rogoway gave her
28 testimony at his preliminary hearing and before her testimony at his trial, the
prosecution clandestinely arranged for a series of conjugal visits between her and
a jail house informant named Leslie White. Petitioner contends their purpose was
for White, acting at the prosecution’s behest, to convince Rogoway to falsely

1 identify Petitioner at his trial as one of the Bob's Big Boy robbers. Petitioner's
2 Mot. for Evid. Hrg. at 11.

3 So, Petitioner complains, Rogoway, who he characterizes as
4 previously unable to identify him, was suddenly able, after the White conjugal
5 visits, to positively identify him when shown the video lineup a second time at his
6 trial with Petitioner sitting in front of her. That identification testimony, Petitioner
7 argues, was false because, earlier in that same testimony, Rogoway claimed she
8 identified Petitioner when she first saw the video lineup, when, in fact, she had
9 identified someone other than Petitioner.¹⁵ The falsity of her statement, contends
10 Petitioner, is substantiated by her trial testimony admitting little recollection about
11 the first time she saw the video lineup. Petitioner's Mot. for Evid. Hrg. at 2.

12 Petitioner requests an evidentiary hearing on these allegations to
13 determine if White had conjugal visits with Rogoway arranged by the prosecution
14 which affected her testimony. He submits 17 pieces of evidence to establish the
15 claim's merits. However, Petitioner's offer of evidence does not convince the
16 Court he has a colorable claim.

17 The allegations lack merit because they do not establish, as required
18 by Mooney-Napue, that "[the] prosecutor knowingly use[d] perjured testimony
19 or knowingly fail[ed] to disclose that [the] testimony [was] false" in obtaining
20 Petitioner's conviction and there is a reasonable likelihood the false testimony
21

22 ¹⁵ Whether Rogoway actually identified Petitioner from the video is much disputed
23 because her identification card from the video lineup that she viewed was lost. Mot. for
24 Evid. Hrg. at 2. According to Officer Steven Wesselink's testimony, RT 8268-8281, for
25 each lineup, the witnesses, whether they saw the live or videotaped lineup, were asked to
26 write on an identification card the number assigned to the person in the lineup they picked
27 as a suspect and any qualifiers for their selection. Officer Wesselink further testified he
28 recalled looking at Rogoway's card after she saw the video. RT 8276-8277. It showed she
29 picked Petitioner and wrote by his number either "positively" or "definitely." He also
30 stated he recalled Officer Richard Jacques taking a look at her card, too, and writing in the
31 police log Rogoway identified Petitioner. RT 8231.

32 Jacques himself testified he looked at the cards. He said Malloy, Robinson,
33 and Rogoway identified Petitioner. RT 8618-8636. Specifically, he remembers Rogoway
34 picked #4, which was Petitioner, and he wrote that in the police log. He also remembers
35 Wesselink telling him Rogoway identified Petitioner. RT 8618-8631.

1 affected the jury verdict. Ortiz v. Stewart, 149 F.3d 923, 936 (9th Cir. 1998);
 2 Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959);
 3 Mooney v. Holohan, 294 U.S. 103, 115, 55 S. Ct. 340, 79 L. Ed. 791 (1935); see
 4 Bonin v. Calderon, 59 F.3d 815, 844 (9th Cir. 1995); United States v. Endicott,
 5 869 F.2d 452, 455 (9th Cir. 1989); United States v. Zuno-Arce, 25 F. Supp. 2d
 6 1087, 1115-1116 (C.D. Cal. 1998), affirmed by 209 F.3d 1095 (9th Cir. 2000),
 7 discussing Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217
 8 (1959); Mooney, 294 U.S. at 115; see Bonin, 59 F.3d at 844 ("to establish a
 9 constitutional error in violation of Mooney-Napue, a movant must demonstrate
 10 that (1) the testimony (or evidence) was actually false; (2) the prosecution knew
 11 or should have known that the testimony was false; and (3) the false testimony
 12 was material.") Specifically, for the reasons stated below, none of Petitioner's
 13 vast array of evidence shows the components of a Mooney-Napue claim.

14 **(A) No Evidence Rogoway Perjured Her Testimony**

15 One reason the Rogoway perjury claim does not have a colorable
 16 basis is a lack of evidence showing her testimony was perjured. The Court
 17 concedes that if it is true she gave false testimony and the prosecution knew that,
 18 then the prosecution ignored its "constitutional obligation . . . to report to the
 19 defendant and to the court whenever government witnesses lie under oath,"
 20 Endicott, 869 F. 2d at 455, relying on California v. Trombetta, 467 U.S. 479, 485,
 21 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984), and Petitioner's conviction must be
 22 reversed. See United States v. Bernal Obeso, 989 F.2d 331, 333 (9th Cir. 1993),
 23 discussing United States v. Wallach, 935 F.2d 445 (2d Cir. 1991). But contrary to
 24 his assertions, neither the state record nor evidence outside the record that he
 25 proffers show perjured testimony by Rogoway.

26 ***a.1. Rogoway's Testimony in Petitioner's Case***

27 Specifically, Petitioner points to inconsistencies in Rogoway's trial
 28 testimony when compared to her preliminary hearing testimony given in his case

1 to show she perjured her trial testimony. Petitioner's Mot. for Evid. Hrg at 2. At
2 the preliminary hearing, which preceded the alleged Leslie White visits, Rogoway
3 testified, as she and her boyfriend were leaving the restaurant, both assailants
4 grabbed the front entry door from her. That encounter gave her a chance to look at
5 them for 90 seconds. Petitioner's Preliminary Hearing at Vol. II, 114-115, 133.
6 While she and her boyfriend, along with the others, were taken to the back of the
7 restaurant, although she had a chance to look at the assailants, she did not. When
8 taken to the freezer, she testified she saw the robber she identified as Freeman
9 standing at the door for maybe 3-5 seconds. Petitioner's Preliminary Hearing at
10 Vol. II, 117, 134. She saw both assailants from a distance of 3-5 feet when they
11 instructed the restaurant manager to collect everyone's personal belongings.
12 Petitioner's Preliminary Hearing at Vol. II, 117.

13 Rogoway testified she never attended a live lineup, but instead saw a
14 video-tape of two lineups, each with six people. She testified she believed she did
15 not pick out anyone. Petitioner's Preliminary Hearing at Vol. II, 118-119, 129-
16 131.

17 She stated she could not remember how Freeman was dressed,
18 nonetheless, she described him as wearing a below the knee, "maroonish," leather
19 coat with a sash tie. Petitioner's Preliminary Hearing at Vol. II, 134. His
20 complexion was lighter than that of the other assailant, who was 6' or 6'1" tall and
21 thin. Petitioner's Preliminary Hearing at Vol. II, 136-138. Although she could not
22 remember the length or color of the other assailant's coat, she said it had a fur
23 collar and was maybe wool. Petitioner's Preliminary Hearing at Vol. II, 135-136.
24 The one wearing the leather coat grabbed the door from her. Petitioner's
25 Preliminary Hearing at Vol. II, 136. Both had afro hairstyles. Vol. II., 146.

26 After testifying she never saw any media pictures of either Petitioner
27 or Freeman or was never shown police photographs, she identified Petitioner in
28 open court as the taller of the two assailants, although his hair was now shorter.

1 Petitioner's Preliminary Hearing at Vol. II, 146-150.

2 A comparison, though, to her trial testimony does not show, as argued
3 by Petitioner, she committed perjury. Instead, it shows Petitioner's trial counsel
4 vigorously cross examined her for three days, exposing the inconsistencies
5 Petitioner now claims amount to perjured testimony. The record reveals a panoply
6 of inconsistencies, making her testimony shaky, even perhaps unreliable, but not
7 false. Although she continued to describe the two robbers as the short one and the
8 tall one, RT 8323, she often confused which one did what. Rogoway testified only
9 one assailant - Petitioner, and later she said it was Freeman - grabbed the door
10 from her, 33 RT 8307, 8444; Petitioner wore a leather, not wool, coat with a fur
11 collar, RT 8424, 8450, 8524; Petitioner's afro was now longer than on the night of
12 the robbery, 33 RT 8419-8432; she saw Petitioner for 5 seconds when the
13 restaurant manager was ordered to gather the others' belongings, 33 RT 8432; she
14 did not recall seeing composites of the Bob's Big Boy robbery suspects on the
15 news while hospitalized, but remembered picking someone from a photograph
16 spread she thought looked like the "tall" assailant, 33 RT 8409, 8493-8494, RT
17 8503; she picked someone else out of video lineup shown to her, RT 8703-8710;
18 and she attended a live county jail lineup that included Petitioner. RT 8662.

19 Indeed, her inconsistencies in identifying the assailants, their
20 clothing, and their movements are just as likely, as even pointed out by trial
21 counsel, RT 15,292, attributable to the trauma of the shooting incident, rather than
22 an intent to perjure testimony. After all, throughout most of the course of the
23 robbery, she, along with most of the victims, were ordered at gunpoint to lie on the
24 floor, told sometimes to keep their eyes shut, and kept in the walk-in freezer. RT
25 8317, 8331 Given the sequence of events, it is not unusual her testimony is
26 replete with inconsistencies.

27 Simply stated, Rogoway was not the prosecution's best witness.
28 However, the record does not show, as Petitioner contends, her inconsistencies

1 amounted to perjury. The trial judge, advising trial counsel to refrain from cross
2 examining Rogoway on the influence of Rhonda Robinson's preliminary hearing
3 testimony on her ability to identify Freeman as an assailant, even recognized
4 "you're not going to get any details from this witness. RT 8554, 8676-8683.

5 Moreover, the other eyewitnesses' testimony contained a litany of
6 inconsistencies as well, which further suggests Rogoway's testimony was
7 inconsistent, not false. Malloy's, Robinson's and Luna's testimony bore similar
8 inconsistencies on their descriptions of the robbers' hairstyle, complexion, coat
9 color and length, eyewear, gloves, facial hair, built, voice commands, gun type
10 and size, number of gunshots, and which robber struck Mushuk. Also, often the
11 eyewitnesses were confused about the number of lineups they attended and
12 whether it was live or videotaped. Notwithstanding the inconsistencies, none of
13 the witnesses expressed doubt about their identification of Petitioner.

14 And most importantly, Petitioner's theory is compromised by the
15 record which he seems to ignore. It shows that Rogoway picked him out of the
16 lineup and identified him at his preliminary hearing, before the alleged conjugal
17 visits took place.

18 ***a.2. Rogoway's Testimony at the Freeman Preliminary Hearing***

19 Petitioner, also, goes beyond the state record to show perjured
20 testimony by Rogoway. Petitioner points to Rogoway's inconsistent testimony
21 given in the Freeman proceedings. Mot. for Evid. Hrg at 2. Apparently, Petitioner
22 believes Rogoway's inability to make a courtroom identification of Freeman at his
23 preliminary until after she heard Rhonda Robinson's courtroom identification of
24 Freeman is evidence Rogoway perjured her courtroom identification of him. But
25 that is not the case.

26 Rogoway's inconsistent identifications of Petitioner's co-defendant
27 are irrelevant to establishing the perjury claim here. Petitioner's allegation is
28 nothing more than an inference, supported by no facts, which is an improper basis

1 for a colorable claim. "The fact that a witness may have made an earlier
 2 inconsistent statement, or that other witnesses have conflicting recollections of
 3 events, does not establish that the testimony offered at trial was false." United
 4 States v. Croft, 124 F.3d 1109, 1119 (9th Cir. 1997).

5 ***a.3. Other Evidence***

6 ***a.3.1. Rogoway's relationship with Prison Inmate Richard Quine***

7 Next, Petitioner attempts to establish Rogoway lied by alleging she
 8 had relationships with two state prison inmates, who were possibly informants and
 9 improperly influenced her to give false testimony at his trial. Mot. for Evid. Hrg.
 10 at 3-4, 10-11. The first relationship was with Richard Quine, who was serving out
 11 a murder conviction at Chino State Prison. Quine was the boyfriend of Rogoway's
 12 girlfriend, Gina Gutierrez.¹⁶ Mot. for Evid. Hrg at 3-4. According to Petitioner,
 13 Quine tampered with Rogoway's trial testimony by way of a love letter sent to
 14 Gutierrez. The letter directs Gutierrez to ask Rogoway to provide him with details
 15 of the Bob's Big Boy robbery so he could manufacture testimony as a witness in
 16 Freeman's case. RT 1693-1694. Les White, also supposedly romantically linked to
 17 Gutierrez, turned the letter over to Harvey Giss, the prosecuting attorney in
 18 Petitioner's, Freeman's, and Stewart's cases, telling him Quine was a prospective
 19 defense witness. Consequently, the prosecution turned the letter over to the
 20 defense. RT 1691.

21 Contrary to Petitioner's assertions, the letter does not contain
 22 evidence Rogoway perjured her testimony. Rather, the letter discusses Quine's
 23 plans for himself to lie as a witness in Freeman's, not Petitioner's case. RT 1693.
 24 Quine stated he would "play with whoever wants to make a deal with him."
 25 Telling his girlfriend to ask Rogoway for robbery details is not probative evidence
 26 of a plan by Rogoway to falsify her own testimony in Petitioner's case.

27 Also, Petitioner points to Giss' testimony at the 2-24-82 pretrial
 28

¹⁶ She is also known as Gina Rodriquez.

1 discovery hearing, Petition Exhibit 28, RT 1691-1695 which does not support his
 2 perjury allegations. Giss testified Quine wrote the letter after a visit by Rogoway,
 3 who drove with Gutierrez to Chino State Prison to see Quine. Rogoway, not
 4 Gutierrez, visited him because Gutierrez, who was underage, could not. The visit
 5 happened after Petitioner's and Freeman's preliminary hearings, but before their
 6 trials began. Giss testified Quine and Rogoway did not discuss the Bob's Big Boy
 7 case during the visit. Nothing in Giss' testimony suggests Rogoway lied.

8 Petitioner's other piece of evidence that allegedly establishes the letter
 9 is evidence of perjury by Rogoway is a May 17, 1982 sidebar conference during
 10 his trial. In that sidebar, trial counsel sought a ruling allowing her to use the
 11 Quine letter to cross examine Rogoway on her inconsistent Freeman
 12 identification.¹⁷ Petition Exhibit 30; Mot. for Evid. Hrg. 4-5. Trial counsel argued
 13 that jail house snitches had come forward to say Rogoway told them she would
 14 take care of Freeman.¹⁸ RT 8186. However, the sidebar is not probative evidence
 15 of plans by Rogoway to lie at Petitioner's trial because trial counsel did not state
 16 Rogoway claimed she would take care of Petitioner as well. Also, trial counsel's

17 ¹⁷ In that sidebar, the prosecution counter-argued Rogoway met Quine only once and that
 18 was during the prison visit with her girlfriend. According to Giss, Rogoway had no plans
 19 to falsify her testimony. Also, he said Quine's letter was written to the girlfriend with the
 20 hope of conjugal visits in exchange for his manufactured testimony. Another informant
 turned the letter over to him, telling him Quine was now a possible defense witnesses.

21 The trial court excluded Rogoway's Freeman identification testimony, telling trial
 22 counsel "I will not let you show that she is a bad identifier by showing she may have been
 wrong about Freeman." Trial counsel attempted to clarify her position, telling the court
 she did not want to show Rogoway was bad identifier, but rather she planned to show her
 bias. The trial judge, still unpersuaded, commented:

23 her bias and interest in this case is so obvious ... that she not
 24 only lost her boyfriend who was killed, but she suffered very
 serious and probably permanent injuries herself. Of course she
 has a tremendous bias or interest. You don't have to
 demonstrate that by the evidence.

25 The court went on to express concern that the Freeman identification issue would "get[] off
 26 in a collateral area" including the "guilt or innocence of Freeman."

27 The trial court also ruled that trial counsel could not cross examine Rogoway about
 her alleged collaboration with Quine unless Quine was first called as a witness to establish
 a foundation. The defense never called Quine as a witness.

28 ¹⁸ Giss argued the informants were using Rogoway as a basis for furthering their interests,
 namely to get a favorable deal. RT 8185-8188

1 statements are based on rumors which are not probative evidence of perjury.

2 *a.3.2. Rogoway's relationship with Jail House Informant Leslie White*

3 The second prison inmate relationship that Petitioner alleges
4 improperly influenced Rogoway was, of course, the one she had with Leslie
5 White. According to Petitioner's theory, it was during conjugal visits with White
6 that she was convinced to falsely identify Petitioner. Mot. for Evid. Hrg at 10-11.
7 Petitioner relies on four exhibits as evidence of the relationship: court orders for
8 White's furloughs, Petition Exhibit 36, Giss' testimony from the February 24,
9 1982 discovery hearing, Petition Exhibit 28, and two handwritten notes by Giss.
10 Petition Exhibits 37 & 39. But the evidence only shows that Petitioner's allegation
11 lacks merit.

12 For instance, the court orders for White's furloughs, while in custody
13 in an unrelated case, do not indicate their purpose and who he visited. Therefore,
14 no Rogoway-White connection is established.

15 While Giss' pretrial discovery hearing testimony and his notes could
16 arguably be evidence that White and Rogoway were connected, as described by
17 Giss, "in a sordid sort of way," RT 1692, the notes do not provide any basis
18 whatsoever for a perjury claim.

19 And, indeed, even if it is true White and Rogoway had conjugal
20 visits, Petitioner still must show the visits improperly influenced Rogoway's
21 testimony. He attempts to show such influence over Rogoway with the 1989-1990
22 Los Angeles County Grand Jury Investigative Report of Jail House Informants.¹⁹
23 Petition Exhibit 19. But the report is not relevant to the instant claim. Not only is
24
25
26

27 ¹⁹The Grand Jury's report, released on June 26, 1990, investigated over 150 cases where jail
28 house informants testified. Petition Exhibit 19. One source of information for the report was the
informants themselves.

White not mentioned in the report,²⁰ but it only addresses the unsavory practices of incarcerated informants as witnesses. None of the informants' admissions, nor White's own admissions in his "60 Minutes" interview, Petition Exhibits 12 & 13, included manipulating an unincarcerated witness, like Rogoway, to testify falsely.

The Court may not conclude because Rogoway could have arguably had a relationship with an known dishonest informant that she herself lied at Petitioner's trial. The Court needs more probative evidence of perjury before conducting a evidentiary hearing.

(B) No Evidence Prosecution Had Knowledge, Actual or Constructive, Rogoway's Testimony Was Perjured

Nevertheless, even if it were true White improperly influenced Rogoway to perjure her testimony, Petitioner still would not have a colorable basis for his claim. A Mooney-Napue violation requires a showing the prosecution knew, Napue, 360 U.S. 264; Mooney, 294 U.S. 103, or should have known, Rogoway's testimony was false. Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) discussing United States v. Agurs, 427 U.S. 97, 103-104, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976). None of Petitioner's evidence - the court orders releasing White on furloughs, Giss' testimony at the February 24, 1982 pretrial discovery hearing, Giss' handwritten notes, or the Grand Jury Jail House Informants Report - show the prosecution possessed such knowledge.

The furlough orders lack evidence of knowledge by the prosecution. They are signed by Superior Court Judge Julius Leetham in a case unrelated to Petitioner's case. They do not indicate the prosecution in Petitioner's case - or even the district attorney's office - recommended White's release. And

²⁰Petitioner's motion concedes this point. Mot. for Evid. Hrg. at 7. In fact, the report does not name any of the informants. Nevertheless, he argues the stories described in the report by anonymous informants parallel White's stories that the media uncovered. Mot. for Evid. Hrg. at 7. Therefore, he seems to suggest the Court may reasonably conclude some or all of the report's stories are by White.

1 nevertheless, as noted before, even if the orders contained evidence of a
2 recommendation by the prosecution, the orders still could not count as probative
3 evidence because they do not show the purpose of the releases and who was
4 visited. Therefore, it is not reasonable to conclude the prosecution in Petitioner's
5 case arranged the furloughs in another case so that White could influence
6 Rogoway to lie at Petitioner's trial.

7 Similarly, neither Giss' testimony nor his handwritten notes contain
8 evidence the prosecution knew Rogoway's testimony was false or that White
9 tampered with it. RT 1695-1697. Giss' testimony explains how he knows White
10 and White's relationship to Rogoway, while his notes appear to contemplate
11 Rogoway's potential impeachment as a witness because of that connection.
12 Nothing more may be extrapolated from his notes.

13 Petitioner tries to bolster Giss' testimony and notes as evidence of the
14 prosecution's knowledge by pointing to White's 1989 testimony in an unrelated
15 case. White testified Giss knew he and Rogoway were having sexual relations.
16 Petition Exhibit 33; Mot. for Evid. Hrg. at 8-9. But his testimony is not probative.
17 It does not contain any statements that the prosecution knew the two were
18 engaging in sexual relations for the purpose of improperly influencing Rogoway's
19 testimony at Petitioner's trial.

20 Also, the Grand Jury investigative report is insufficient evidence.
21 Petitioner's allegation is not that the prosecution should have known jailhouse
22 informant White would give false trial testimony. Rather, his allegation is the
23 prosecution knew or should have known Rogoway - a noninformant - testified
24 falsely because of her association with White. For the reasons noted before by the
25 Court, the report is not relevant.

26 Moreover, Petitioner offers Giss' draft of a wiretapping order as
27 evidence White was the prosecution's agent to show the prosecution knew or
28 should have known Rogoway gave false testimony because of a relationship with

1 White. Petitioner Exhibit 40. However, that draft does not even go as far as
2 suggesting White was an agent of the prosecution. It simply shows he was wired
3 for a conversation with trial counsel who was accused of pressuring witnesses for
4 information favorable to the defense.

5 Petitioner has no probative evidence the prosecution knew or should
6 have known Rogoway was falsely testifying at Petitioner's trial.

7 **(C) Petitioner Fails to Show Rogoway's Testimony was Material**

8 Petitioner's evidence also falls short of establishing a colorable
9 perjury claim for another reason. It does not show Rogoway's testimony was
10 material because of a "reasonable likelihood that [her] false testimony, coupled
11 with the evidence properly presented at trial, could have affected the [jury
12 verdict]," Zuno-Arce, 25 F. Supp. 2d at 1115.

13 It is not reasonably likely Rogoway's testimony affected the jury's
14 verdict. The prosecution's closing argument barely referenced Rogoway's
15 testimony. Instead, it primarily relied on the testimony of Malloy, who was the
16 state's strongest eyewitness because he had a sufficient opportunity to view the
17 robber he identified as Petitioner. He, unlike the others, was not lying face
18 down on the floor or confined inside the freezer throughout most of the robbery.
19 He remained with the one robber, he identified as Petitioner, for at least five
20 minutes, following his instructions to open the safe, bag the monies, and collect
21 the victims' personal belongings. Consequently, Malloy's testimony lasted eight
22 days; Rogoway's three. Considering her testimony constituted a fraction of the
23 total evidence against Petitioner, Rogoway could not be characterized as a
24 material witness, so it is not reasonably likely her testimony affected the jury's
25 verdict.

26 Moreover, even if all of Petitioner's allegations are taken as true, he
27 still would not be entitled to a hearing because admission of Rogoway's false
28 testimony constituted harmless error under Brecht. Zuno-Arce, 25 F. Supp. 2d at

1 1116 relying on Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710,
 2 1722, 123 L. Ed. 2d 353 (1993). The error was harmless because it is not possible
 3 her testimony had a “substantial and injurious effect or influence in determining
 4 the jury's verdict.” Id., at 1116 citing Brecht, 507 U.S. at 637; see also Gilday v.
 5 Callahan, 59 F.3d 257, 267-68 (1st Cir. 1995) (using Brecht to review a perjured-
 6 testimony claim on collateral review of a petition for writ of habeas corpus), cert.
 7 denied, 516 U.S. 1175, 116 S. Ct. 1269, 134 L. Ed. 2d 216 (1996); United States
 8 v. Ross, 40 F.3d 144, 146 (7th Cir. 1994) (applying Brecht to §2255 motion).
 9 Any effect Rogoway’s testimony may have had was diminished by the jury
 10 instructions given on the credibility of witnesses whose statements are
 11 inconsistent. RT 15,557-15,561.

12 Therefore, an evidentiary hearing is not required when the factual
 13 allegations viewed against the record either do not state a claim for relief or are
 14 so incredible or frivolous as to warrant summary dismissal. Quintero v. United
 15 States, 33 F.3d 1133, 1135 (9th Cir. 1994) (per curiam); see also 28 U.S.C. §
 16 2255 (1994). Here, notwithstanding the numerous pieces of evidence Petitioner
 17 presents to the Court, none establishes the components of a Mooney-Napue
 18 claim, leaving his allegations supported by only conclusory statements, rather
 19 than specific facts, which are an insufficient basis for an evidentiary hearing.
 20 His claim is nothing more than a mere attack on Rogoway’s credibility, which is
 21 an insufficient basis for granting a hearing.

22 **2. Claim 8 - Perjured and/or Materially False Testimony of Michael**
 23 **Malloy**

24 Malloy, who lost his right eye in the shooting, was also a prosecution
 25 witness at Petitioner’s trial. The state record shows, of all the victims, he spent
 26 the most time with the robber he identified as Petitioner. Unlike the others, he
 27 was not lying on the floor or confined inside the freezer throughout most of the
 28 course of the robbery. Instead, he was standing in the front of the restaurant
 when the robbers entered. RT 7277. Also, he and the robber identified as

1 Petitioner, walked to his office to open the safe and bag money, RT 7310-7336,
2 7424-7483, 7550-7575, and they walked to the freezer where he was ordered to
3 collect the others' belongings. RT 6784, 7645.

4 Petitioner requests an evidentiary hearing to determine whether
5 Malloy falsely testified at Petitioner's trial about what he saw or was told before
6 seeing the videotape of his lineup. First, Petitioner contends Malloy falsely
7 testified when he said he only saw media coverage of the suspects composites,
8 not "photographs or moving pictures or videotapes," before the first lineup. RT
9 7857; Mot. Evid. Hrg. at 20.

10 Second, Petitioner argues Malloy testified falsely at his trial when he
11 denied being told, before viewing the video lineup, that the robbery suspects had
12 been arrested. RT 7849-7886. According to Petitioner, the statement is false
13 because Malloy stated in a civil deposition three years later²¹ that Bob's Big Boy
14 private investigator David Lind, who Petitioner describes as the prosecution
15 agent because he acted as the liaison between the prosecution and the witnesses
16 at Petitioner's trial, requested him to attend the first lineup to "identify the guys."
17 Petition Exhibit 54; Mot. Evid. Hrg at 20-21. Petitioner attempts to further
18 substantiate the claim with the testimony of eyewitnesses Logan and Luna that
19 Lind told them, before the December 23 1980 lineup, that robbery suspects had
20 been arrested. However, the proffered evidence does not show Malloy's
21 testimony was false on either point.

22 Petitioner offers no evidence or explanation to support his allegation
23 Malloy committed perjury when he denied seeing "photographs or moving
24 pictures or videotapes of suspects" that may have impacted his lineup
25 identification. Therefore, the Court need not consider the merits of the
26 allegation.

27
28 ²¹ This deposition was taken in Tami Rogoway v. Bob's Big Boy Restaurant of America, et. al., Los Angeles County Superior Court No. C397948. Mot. Evid. Hrg. at 22.

1 As for the allegation Malloy falsely testified when he said he did not
 2 know or was not told suspects were in custody before attending the first lineup,
 3 Petitioner's evidence is insufficient. Neither Malloy's subsequent deposition
 4 testimony nor the other eyewitnesses' testimony render his testimony untrue.
 5 Malloy's deposition testimony reads:

6 Q: When did anybody from Bob's talk to you after this
 incident?

7 A: I believe after I got out of the hospital.

8 Q: Who did you talk to?

9 A: Dave Lind.

10 Q: Where?

11 A: I went in a lineup. I went downtown to a lineup.

12 Q: How long were you in the hospital?

13 A: Two and a half weeks.

14 Q: Is that the first time you saw Dave Lind after this incident
 was at the lineup?

15 A: At the lineup.

16 Q: Did he talk to you about the incident?

17 A: No. He just told me I was coming downtown for a lineup,
 identify the guys.

18 Malloy's Deposition Testimony in Rogoway v. Bob's Big Boy Restaurants et al.
 19 Petition Exhibit 54.

20 Contrary to Petitioner's allegations, the testimony is not contradictory
 21 because it addresses a different subject. RT 7849. The question posed at trial
 22 was "[d]id a policeman [emphasis added] call you and tell you had to go
 23 downtown to try to identify somebody?" The deposition question only asks
 24 Malloy about his conversation with Lind at the lineup, telling him he "was
 25 coming downtown for a lineup, identify the guys." Petition Exhibit 54 at 88. He
 26 was not expressly asked during the deposition whether he knew, before the
 27 lineup, suspects were in custody or had been arrested.

28 Likewise, the other eyewitnesses's testimony is not helpful because
 their conversations with Lind are irrelevant as well. They do not establish what
 Lind said to Malloy in that conversation.

Therefore, without evidence that Petitioner's allegations are more
 than conclusory, his request for an evidentiary hearing on this perjury claim is

1 similarly denied.

2 **3. Claim 6 - Perjured and/or Materially False Testimony of Rhonda Robinson**

3 Claim 6 alleges Rhonda Robinson, who testified against Petitioner,
4 perjured her testimony at Petitioner's trial. Robinson, who sustained no physical
5 injuries from the shooting, admitted in her trial testimony that she suffered from
6 emotional problems because of the incident. RT 9834, 9875-9880. Petitioner
7 argues her testimony was false because she denied seeing a photograph of him
8 with co-defendant Stewart, holding guns, but later at Freeman's trial, she testified
9 she had seen it. Petition Exhibit 47; Mot. for Evid. Hrg. at 16.

10 The record indicates the photo was taken at a carnival and the guns
11 were toys.²² RT 9729-9755. During Petitioner's trial, questions were raised
12 about whether Robinson - and another prosecution witness - had seen the photo
13 while waiting to testify at Freeman's preliminary hearing and if that exposure
14 bolstered their ability to identify Petitioner as one of the robbers. The Court is
15 not convinced this is a colorable claim.

16 Contrary to his argument, there is no conflict between Robinson's
17 testimony at Petitioner's trial and her testimony at Freeman's trial. Petitioner's
18 trial counsel never asked Robinson whether she herself had seen the photograph
19 while waiting to testify at Freeman's preliminary hearing. RT 9909-9919. Trial
20 counsel only asked her if she remembered "any of the other witnesses in the room
21 who appeared to be looking at some pictures and things?" and Robinson
22 answered yes. RT 9915. In contrast, Freeman's trial counsel asked Robinson
23 during a § 402 evidentiary hearing:

24 Q: Do you remember seeing anybody from the room
25 looking inside the box?

26 A: Yes.

27 Q: And what exactly do you remember about that? First

28 ²² The trial court excluded that photo from evidence because it was inflammatory and prejudicial. RT 9753-9755.

1 of all, who was it that you saw looking in the box.

2 A: I don't remember who it was exactly, but someone
3 opened the notebook, and we saw a photo. Petition,
4 Exhibit 48, p. 504.

5 Just like his other perjury claims, Petitioner evidence does not show Robinson
6 gave false testimony at his trial. Petitioner's request for a hearing is denied.

7 **4. Claim 11 - Perjured and/or Materially False Testimony of Ismael**
8 **Luna**

9 Claim 11 asserts Luna, one of the restaurant's busboys, lied when he
10 testified at Petitioner's trial that he could identify Petitioner as one of the robbers.
11 Petitioner asserts when Luna picked him out of the lineup, he qualified his choice
12 as a "looks like," and later at his preliminary hearing he could not identify him.
13 Mot. for Evid. Hrg. at 25-26.

14 The record shows the first time Luna saw one of the robbers in the
15 restaurant was while he was sweeping near the kitchen. That robber ordered him
16 at gunpoint to lie on the floor. RT 9092. Then the same or the other robber
17 ordered him to get up and go into the freezer with the other employees. While
18 walking into the freezer, he saw one of the robbers standing at its door. That is
19 the one he got his best look at. RT 9204. Of the two robbers, he was the shorter
20 and lighter-skinned one. While in the freezer, the manager came in with the
21 taller, darker-skinned robber. Luna testified that during the robbery he never saw
22 both men at the same time. RT 9105. Throughout his trial testimony, Luna's
23 description of which robber was the taller, darker skinned one and which was the
24 shorter light-skinned one was often confused. His testimony was given through
25 an interpreter because he did not speak English well.

26 Petitioner points to several pieces of evidence to show Luna lied
27 during his testimony. First is Luna's C.R.A.S.H. unit photo selection of someone
28 who looked similar to one of the suspects. Second is Luna's failure to identify
Petitioner at his preliminary hearing because Luna stated Petitioner did not
appear to be the man he saw on the night of the robbery. Third is Luna's tentative

1 selection of Petitioner at the December 23, 1980 lineup. Mot. for Evid. Hrg. at
2 25.

3 The fourth piece of evidence is Luna's testimony at his trial stating
4 Petitioner "looked like" the shorter, lighter-skinned robber. Petitioner contends
5 Luna also testified all black men looked alike to him. When questioned about the
6 December 23, 1980 lineups, Luna could "not recall whether he had seen either
7 suspect in the lineups nor could he recognize anyone when shown still photos of
8 those lines." Mot. for Evid. Hrg. at 25. But, Petitioner asserts, when his trial
9 counsel asked Luna at the trial "to identify from all those present in the
10 courtroom the person who had the same skin color as the taller, darker, man,"
11 Luna picked an alternate juror, not Petitioner. Despite these inconsistencies,
12 Petitioner complains, Luna, when asked at his trial whether he saw one of the two
13 robbers in the courtroom, he pointed to him. Mot. for Evid. Hrg. at 25.

14 Petitioner then goes on to compare Luna's various statements with
15 his Freeman trial testimony to show he lied at his trial. At Freeman's trial, Luna
16 stated he could not recall very well the photos shown to him while in a room
17 before the Freeman preliminary hearing and before Petitioner's trial. He also
18 testified he remembered the shooting well and acknowledged admitting in his
19 testimony at Petitioner's trial that he wrote "looks like No. 4" on his card for
20 Petitioner's lineup. When he was shown a photo of Petitioner's lineup, Luna
21 further testified he had great difficulty in identifying blacks. When Giss showed
22 him the composite sketch he helped with, Luna said he could only say Petitioner
23 looked like one of the robbers. Mot. for Evid. Hrg. at 26; Petition Exhibit 56.
24 The Court agrees Petitioner's evidence shows inconsistencies in Luna's
25 testimony, but does not agree they amount to perjury.

26 Petitioner's evidence simply shows the same inconsistencies in
27 Luna's testimony that are evident in the record. That is, both show Luna's
28 identification of Petitioner was tentative, not perjurious. What Petitioner is now

1 calling perjury, was what everyone at trial perceived as a eyewitness who could
 2 not make a positive identification of him. RT 9301, 15,020, 15,067, 15,301. The
 3 trial judge, recognizing the inconsistencies in Luna's testimony, described him as
 4 frightened, young, and not the brightest. RT 9,301. Likewise, trial counsel in her
 5 closing argument attributed the inconsistencies to cross racial identification
 6 problems, mentioning nothing about perjury. RT 15,301. Also, the record
 7 reflects acknowledgment of Luna's limited ability to fully answer questions
 8 because of his use of an interpreter. RT 9091, 9245-9257. Luna, just like
 9 Rogoway, was not the prosecution's best witness.

10 And even if it were true Luna's inconsistent statements rose to level
 11 of perjury, Petitioner presents no evidence his testimony was material. Luna's
 12 testimony is only material if it is reasonably likely his testimony could have
 13 affected the verdict in Petitioner's case. Zuno-Arce, 25 F. Supp. 2d at 1115. But
 14 it is not reasonably likely his identification testimony affected the jury because
 15 his identifications of Petitioner were always tentative. Moreover, an effective
 16 cross examination made the deficiencies in his identification testimony even
 17 more glaring. The Court does not find a basis for an evidentiary hearing on this
 18 claim.

19 **5. Claim 17- Perjured and/or Materially False Testimony of Andre**
 20 **Gilcrest**

21 Claim 17 asserts Gilcrest, who Petitioner claims was a criminal
 22 informant, testified falsely at his trial when he claimed Stewart told him that
 23 Petitioner and Freeman planned to rob Bob's Big Boy almost three months before
 24 the actual robbery. Petitioner supports his allegations with the prosecution's
 25 closing arguments and Gilcrest's testimony from both his and Freeman's trials.
 26 Mot. for Evid. Hrg. at 36-44.

27 Petitioner contends the prosecution's closing argument at his trial
 28 argued that Gilcrest coming forward with the information was a "catharsis" and
 the jurors should get "down and kiss the ground" he walked on. But in the

1 Freeman trial, Petitioner contends the prosecution was forced to admit Gilcrest
2 was a "sleazy," "slimy" "opportunist" who lied on the stand, without whom the
3 robbery conspiracy could have proven. Nonetheless, the prosecution continued
4 to argue the September 27, 1980 story was true. Petitioner proffers these
5 statements as evidence Gilcrest lied about Stewart's statements and the
6 prosecution knew it.

7 As for Gilcrest's testimony, Petitioner's allegations about his
8 testimony are, for the most part, consistent with the record. Gilcrest's testimony
9 was given under a grant of immunity. Gilcrest testified he had been romantically
10 involved with Stewart since 1973 until about 15 months before the robbery. On
11 September 27, 1980 between 10 and 11 p.m., he met Stewart at her home. He
12 remembers the date because he had just been paid. Later that evening between
13 11:30 p.m. and 12:30 a.m., they both went to Bob's Big Boy because Stewart
14 wanted to see who was working that night and he wanted to drink coffee,
15 although Stewart had told him Petitioner and Freeman were going to rob the
16 restaurant. Gilcrest knew Petitioner was Stewart's boyfriend. While there,
17 Stewart talked to the waitresses and Gilcrest spoke to some of his sister's friends
18 out in the parking lot. Fifteen minutes before the restaurant's closing, they both
19 left and returned to her home.

20 Gilcrest also testified that later on that same evening, Stewart phoned
21 the restaurant to see how many employees were there. At some point, Stewart got
22 a call from Freeman and afterwards she went back, without Gilcrest, to the
23 restaurant. When she came back, she got a call from Petitioner and 20 minutes
24 later went outside. RT 12,086-12092 After some time passed, he followed and
25 saw Stewart speaking with someone inside a Cadillac. When Gilcrest was
26 introduced by Stewart, he saw sitting inside the car, Freeman, who had gone to
27 high school with, and Petitioner. Gilcrest said he and Petitioner acknowledged
28 seeing each other around and at county jail. Petitioner had a short barrel gun and

1 Freeman had a longer shotgun between his knees. Later on that night, Stewart
2 told Gilcrest that Petitioner had called and said they did not rob the restaurant
3 because the manager did not come outside and they would try again the next
4 night.

5 Gilcrest further testified, when he heard of the robbery, he told his
6 brother, Anthony, about that night with Stewart, and Anthony told their mother.
7 His mother pressured him to call the police and phoned in a police tip herself.
8 Because of his criminal history, he first tried to contact a police officer he knew
9 by the name of Becker. But he could never reach him and Becker never returned
10 his calls. Gilcrest finally called the police with the information and met with
11 them.²³

12 Petitioner argues when Gilcrest's testimony at his trial is compared to
13 his testimony given at Freeman's trial, many perjurious statements by him are
14 revealed. However, the Court does not find that to be true.

15 Arguably, a comparison of Gilcrest testimony at both trials reveals
16 two inconsistencies that might rise to the level of perjury. One inconsistency is
17 the date he went with Stewart to check out the restaurant before the aborted
18 robbery attempt. His Freeman trial testimony claims the date was after
19 Thanksgiving, possibly two weeks before the robbery. That date is significant
20 because it links Givens' story about Stewart warning her on September 27, 1980
21 that the restaurant would be robbed. Petitioner concedes Gilcrest went on to
22 explain the inconsistency was the result of confusion.

23 The second inconsistent statement that is arguably perjurious is
24 Gilcrest's denial at the Freeman's trial that he actually knew Freeman from high
25 school or that he had a conversation with Petitioner, even the one on September
26

27 ²³ Zola Taylor was another tipster in the case and a Gilcrest family friend who lived in
28 their home. She shared a bedroom with Gilcrest. Gilcrest asserts she overheard him tell his
brother, Anthony, about what Stewart said. Taylor claimed Gilcrest himself told her about
that night with Stewart.

1 27, 1980, or had seen him around at county jail. This testimony is important
2 because his past familiarity with the two reduced the likelihood of
3 misidentification when he saw them in the car, bolstering his story.

4 However, the Court finds both these changes in Gilcrest's testimony
5 to be, at best, a weak basis for establishing a colorable perjury claim.

6 "Contradictions and changes in a witness's testimony alone do not
7 constitute perjury." United States v. Wolny, 133 F.3d 758, 763 (10th Cir. 1998)
8 citing Tapia v. Tansy, 926 F.2d 1554, 1563 (10th Cir. 1991); see United States v.
9 Flake, 746 F.2d 535, 539 (9th Cir. 1984).

10 As for Gilcrest's Freeman trial testimony that he was fully aware
11 when he accompanied Stewart to the restaurant that she was casing it for the
12 robbery, it does not make his testimony false at Petitioner's trial which denied
13 this awareness. When Gilcrest testified at Petitioner's trial, not only did he admit
14 his motive for furnishing the tip was his fear he would be implicated if someone
15 had seen him with Stewart, but much of his testimony addressed Stewart's
16 discussions with him about the robbery plans. In light of everything else Gilcrest
17 admitted at Petitioner's trial, it cannot be said his denial amounted to perjury.

18 Further, even if those two statements by Gilcrest were accepted as
19 false, Petitioner would still have to show the prosecution knowingly used
20 Gilcrest's testimony in his trial. Petitioner relies on the prosecution's closing
21 argument at the Freeman trial to show the prosecution knew before the end of his
22 own trial that Gilcrest was lying. But the statements, some of which call Gilcrest
23 a liar, only show notice to the prosecution that Gilcrest might be lying at the time
24 of Freeman's trial and not at the time of Petitioner's trial. The most the
25 evidence, along with the record, shows is that the prosecution knew at
26 Petitioner's trial that Gilcrest's testimony was severely marred by a cross
27 examination that exposed his three possible motives to testify - the reward,
28 possible accomplice liability, and potential jealousy of Petitioner. Although the

1 thorough cross examination left the reliability of Gilcrest's testimony in tatters, it
2 did not establish he was a liar. Arguably all Giss knew was Gilcrest was a bad
3 witness with many liabilities.

4 Petitioner similarly lacks evidence of materiality. Neither
5 Petitioner's evidence nor the record support his allegation that Gilcrest was "the
6 prosecution's star witness." It was not reasonably likely Gilcrest's testimony
7 affected the jury verdict in his case because cross examination revealed three
8 possible motives for him to falsely testify. One was the \$10,000 Bob's Big Boy
9 reward offered in the case. Second was avoiding possible accomplice liability by
10 pointing the figure at Petitioner. Third was his possible jealousy of Petitioner,
11 who was Stewart's boyfriend and he admitted he was still "kinda" in love with
12 her. When the strength of his testimony is evaluated in light of these revelations,
13 it is not reasonably likely the jury was affected by his testimony

14 And even if Petitioner's allegations that the prosecution had
15 knowingly used testimony that was perjurious and material could be taken as
16 true, admission of that tainted testimony was harmless error. Petitioner alleges
17 Gilcrest was the only witness that directly implicated Petitioner in the robbery
18 conspiracy. But that is not quite true. Without Gilcrest's testimony, evidence of
19 the tips provided by Taylor, Woods, and Lankerford remain linking Petitioner to
20 the conspiracy to rob the restaurant. And also there is the eyewitnesses'
21 testimony and the physical evidence placing Petitioner at the crime scene. The
22 Court, finding no colorable basis for the claim, denies Petitioner's request for a
23 hearing.

24 **6. Claim 19 - Newly Discovered Evidence that Givens was Liar Who Had**
25 **Serious Mental Problems**

26 Givens, another Bob's Big Boy waitress, was a prosecution witness at
27 Petitioner's trial. She testified that three months before the robbery on September
28 27, 1980 she ran into Stewart while both were visiting inmates at the Los
Angeles County jail. Stewart was with two men Givens later identified as

1 Petitioner and Freeman. Stewart told Givens "Good thing I seen you...[b]ecause
2 they gonna rob Bob' Big Boy tonight, and I don't want you hurt." Givens told her
3 managers at the restaurant about what Stewart said. One of them, Rodell
4 Mitchell, called the police, who did not respond to the report.

5 Givens further testified that while at work later that evening, she
6 received a call from Stewart, asking how much longer she would be there and
7 how many employees were there. When the restaurant was closing, Stewart tried
8 to enter the restaurant, but was denied entry.

9 Petitioner requests an evidentiary hearing on this claim because at the
10 Freeman trial it was revealed Givens developed "serious mental problems" after
11 the shooting incident for which she took medication and was hospitalized.
12 Petitioner asserts when she testified at his trial, neither she nor the prosecution
13 disclosed that she had been receiving psychiatric treatment and taking
14 medication. Petition Exhibit 67; Mot. for Evid. Hrg. at 48.

15 Petitioner contends Givens testified at the Freeman trial that she saw
16 a psychiatrist after the robbery and not before. Four times, she denied taking
17 medicine. She denied ever being hospitalized or that her doctor visits were for a
18 "serious mental episode." She testified she only saw the psychiatrist four times
19 starting sometime in February or March 1981 until April or May 1981, right
20 before Petitioner's trial began. Petition Exhibit 67; Mot. for Evid. Hrg. at 48-49.

21 Petitioner relies on the testimony of Dr. Robert Kovan, Givens'
22 doctor, given at the Freeman trial to show Givens lied. Dr. Kovan stated he
23 began treating Givens on November 4, 1981. She was hospitalized at Brotman
24 Memorial Hospital from February 18, 1982 to February 21, 1982 for extreme
25 depression and anxiety and given both anti-depressants and sleep medicine.
26 Upon her discharge, she had improved, although Dr. Kovan testified he would
27 have kept her longer because she remained somewhat anxious and depressed.
28 Dr. Kovan further testified Givens was untruthful if she testified she had not been

1 hospitalized or medicated for her condition. Petition Exhibit 68; Mot. for Evid.
 2 Hrg. at 49. The Court finds Dr. Kovan's testimony to be insufficient evidence
 3 that Givens testified falsely at Petitioner's trial.

4 Not only does the evidence fail to even address the other two
 5 Mooney-Napue components - the prosecution's knowing use of false testimony
 6 and the materiality of Given's testimony - but it does not establish the perjury that
 7 is alleged here. Arguably the evidence might show Givens lied at Freeman's
 8 trial, but the same is not true for Petitioner's trial. At Petitioner's trial, Givens
 9 was not asked about her mental state or any treatment for it. Therefore, the
 10 Court does not find this claim to be colorable and denies an evidentiary hearing
 11 on the claim.

12 **7. Claim 20 - Perjured and/or Materially False Testimony of Rodell
 Mitchell**

13 Claim 20 alleges prosecution witness Rodell Mitchell, the Bob's Big
 14 Boy manager Givens told about Stewart's September 27, 1980 robbery threat,
 15 gave false testimony. RT 11,170-11,279. Petitioner argues Mitchell's claim that
 16 he called the police right after Givens told him about the threat was false because
 17 the police have no records showing they ever received such a call. According to
 18 Petitioner, Mitchell lied because the prosecution convinced him to do so. Mot.
 19 for Evid. Hrg. at 50-52.

20 Petitioner also contends Mitchell falsely claimed he was required to
 21 fill out a restaurant incident report for the threat. Mitchell testified he completed
 22 the report and gave it to David Lind, Bob's Big Boy head of security. However,
 23 Lind testified at Petitioner's trial he never received the report. Mot. for Evid. Hrg.
 24 at 50-52.

25 Petitioner supports his allegations with two pieces of evidence. The
 26 first is the 1984 deposition testimony of Los Angeles Police Department
 27 Detective Richard Stallcup in Rogoway's civil lawsuit against the Marriott
 28 Corporation. Stallcup testified the precinct watch commander is required to log

1 all activities during his watch and there was a logging procedure for a call on a
2 robbery threat. He also stated such a call is assigned the same high priority as a
3 robbery in progress and the suspects are placed under surveillance. He further
4 testified he personally searched the logs and found nothing on a robbery threat
5 for the restaurant. Mot. for Evid. Hrg. at 50; Petition Exhibit 69. Petitioner
6 claims Stallcup's testimony shows that Mitchell did not report the robbery threat
7 to the police.

8 Petitioner's second piece of evidence is Lind's declaration in support
9 of the Marriott's summary judgment motion filed in Rogoway's civil lawsuit.
10 There, Lind denied receiving an incident report on Stewart's threat. Moreover, he
11 stated his belief that Stewart's comments would not even require a report to be
12 filed, as claimed by Mitchell. Also, he did not think Mitchell would be the one
13 required to file such a report. His supervisor would have to. Petitioner argues
14 Lind's declaration, together with Lind's testimony at Petitioner's trial, are not
15 evidence Mitchell did not file an incident report. But the Court does not agree the
16 evidence is probative evidence that Mitchell lied about the call and the report.

17 The evidence is not probative of perjury. Instead, it is conclusory.
18 The Court does not find it reasonable to conclude that, because the police have
19 no record of the call or that Lind does not recall being given the report, Mitchell
20 lied. Therefore, Petitioner's request for a hearing on this claim is denied.

21 **8. Claim 22 - Perjured and/or Materially False Testimony of Bruce**
22 **Woods**

23 Claim 22 alleges the prosecution illegally planted Woods, who
24 Petitioner describes as an admitted jailhouse informant, in a seat near him during
25 the bus ride from Petitioner's preliminary hearing to county jail for the purpose
26 of eliciting an incriminating statement from him. Mot. for Evid. Hrg. at 53. Later
27 at Petitioner's trial, Woods falsely testified that, during that ride, Petitioner
28

1 threatened him and said "if they convict us they will give me the gas."²⁴ Mot. for
 2 Evid. Hrg. at 53. Petitioner's presents the Court with several pieces of evidence
 3 to establish an evidentiary basis for a hearing on the claim.

4 To show Woods was an informant who was the prosecution's agent,
 5 Petitioner relies on two portions of Woods' testimony from his trial. One is
 6 where Woods admits that after he testified at Petitioner's preliminary hearing, he
 7 went to his own sentencing proceeding where Giss spoke on his behalf.²⁵ The
 8 second is Woods' admission of the K-9 informant status he had during
 9 Petitioner's preliminary hearing because the bailiff knew Woods was a snitch
 10 against Petitioner. Mot. for Evid. Hrg. at 53.

11 He also points to three statements by Giss. First, there is Giss'
 12 closing argument at his trial. Giss described Woods as a godsend because,
 13 notwithstanding his K-9 status, he happened to be on the same bus ride with
 14 Petitioner when he made that incriminating statement to him. RT 14,967-14,968.
 15 Giss' second statement is contained in a memorandum to the director of the
 16 district attorney's Bureau and Area Operations, Petition Exhibit 44, which reads
 17 the Sheriff's Department "screwed up" when it placed Woods and Petitioner on
 18 the same bus despite a "keep away request." The memo also claimed Woods was
 19 housed at juvenile hall when he first contacted the police about Petitioner's
 20 codefendant Stewart. The third Giss statement is his testimony at a suppression

21 ²⁴ Petitioner's complete statement, according to Woods' testimony, was Woods shouldn't
 22 testify against Stewart because she was young and he - Petitioner - would get the "gas."
 23 Woods, also, testified Petitioner threatened him. Woods testified Petitioner said that if
 24 Woods ever was goes back to jail he or "some of [his] people probably [would] get hurt"
 and that "they have the address where [Woods] lives. Woods claims he never knew
 Petitioner before that day he testified against him at the preliminary hearing. RT 11,351.

25 ²⁵ Before testifying at Petitioner's preliminary hearing, Woods had pled guilty on February
 26 23, 1982 to burglary of an auto and faced up to 3 years in state prison. Woods received
 27 one year of probation on the condition of serving one year in county jail. The prosecution
 28 assured the Court no deal was made with Woods for the reduced sentence. The
 prosecution stated it only advised the sentencing judge that Woods had cooperated as a
 witness in the Bob's Big Boy case. RT 11,359-11,367

1 hearing in an unrelated case where Petitioner contends he characterized Massiah
2 v. U.S. and U.S. v. Henry as "legal technicalities," discounting their legal import.

3 Petitioner relies on a myriad of other documents. One is an arrest
4 report showing Woods was not a juvenile when he testified at Petitioner's trial.
5 Two other documents are the 1989-1990 Grand Jury Report on jail house
6 informants and a 1987 deputy district attorney interoffice memo stating that the
7 defense would maybe find their office files helpful to proving a Massiah
8 violations claim. The Court finds none of the evidence establishes a colorable
9 Mooney-Napue claim.

10 Petitioner's evidence does not show Woods falsely testified about
11 what Petitioner said to him during the bus ride. It may not be presumed that he
12 lied about what Petitioner said on the bus ride simply because he had K-9
13 informant status and a reduced sentence because of his cooperation as a witness
14 in Petitioner's trial. Without probative evidence of perjury under Mooney, 294
15 U.S. 103, and Napue, 360 U.S. 264, there is an insufficient basis for an
16 evidentiary hearing on the claim. Petitioner's request is denied.

17 **C. PETITIONER CLAIMS PROSECUTORIAL MISCONDUCT**
18 **VIOLATED HIS RIGHTS TO A FAIR TRIAL AND TO DUE**
19 **PROCESS UNDER THE 6th & 14th AMENDMENTS**

20 Petitioner asserts an evidentiary hearing is needed on 10 of his claims
21 to determine if Brady violations and other prosecutorial misconduct occurred
22 during his trial. Four claims allege the prosecution failed to disclose information
23 on four prosecution witnesses that constituted exculpatory evidence in violation
24 of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and
25 United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d
26 481 (1985) (known as the "Brady-Bagley claim"). The other six claims are a
27 variety of prosecutorial misconduct claims.
28

1 **1. Claims 3, 7, 12 & 19 - Brady Violations**

2 **(A) Claim 3 -Failure to Disclose Material Impeachment**
 3 **Evidence on Rogoway**

4 Petitioner's first Brady claim rests on the same allegations made in his
 5 claim asserting Rogoway perjured her testimony. Mot. for Evid. Hrg. at 15. He
 6 also relies on the same evidence. He argues, during his trial, the prosecution
 7 failed to provide him with evidence on the Rogoway-White liaisons and the
 8 prosecution's role in arranging them. Mot. for Evid. Hrg. at 12. Because of the
 9 information's impeachment value, Petitioner asserts the prosecution's failure to
 10 turn it over violated his 6th and 14th amendment rights. "[W]hen the reliability of
 11 a given witness may well be determinative of guilt or innocence, nondisclosure
 12 of evidence affecting [that witness'] credibility warrants a new trial irrespective
 13 of the good faith or bad faith of the prosecution." Endicott, 869 F. 2d at 456
 14 relying on Giglio v. United States, 405 U.S. 150, 153-154, 92 S. Ct. 763, 31 L.
 15 Ed. 2d 104 (1972). Here, although impeachment evidence falls within Brady's
 16 meaning, Bagley, 473 U.S. at 676 (Brady evidence encompasses "information
 17 useful for the impeachment of a prosecution witness."), the Court is not
 18 persuaded the information was Brady material "determinative of guilt or
 19 innocence."

20 Because Petitioner's Brady claim is closely related to his perjury
 21 claim, it is known as a "mixed case." Zuno-Arce, 25 F. Supp. 2d at 1117. A
 22 mixed claim mandates the court to first consider the allegations as a perjury claim
 23 under the Mooney-Napue analysis. Id., at 1117. This Court has already found
 24 Petitioner's Mooney-Napue claim meritless because he did not establish
 25 Rogoway's testimony was false. Now the Court must proceed to consider his
 26 allegations under the more stringent Brady-Bagley analysis, which requires a
 27 showing that "(1) the prosecution withheld exculpatory or impeachment
 28 evidence; (2) the prosecution knew or should have known during the proceedings
 of the evidence's existence; (3) the defendant did not possess the evidence, nor

1 could he have obtained it with reasonable diligence; and (4) the evidence was
 2 material.” Id., at 1116 discussing Brady, 373 U.S. 83 and Bagley, 473 U.S. at
 3 682; see Paradis v. Arave, 130 F.3d 385, 392 (9th Cir. 1997); Routley v.
 4 Singletary, 33 F.3d 1279, 1285 (11th Cir. 1994), cert. denied, 515 U.S. 1166,
 5 115 S. Ct. 2627, 132 L. Ed. 2d 867 (1995). Although the Brady-Bagley showing
 6 of materiality is more onerous than that required for a Mooney-Napue perjury
 7 claim, Zuno-Arce, 25 F. Supp. 2d at 1117, “[s]atisfying the elements [omit]
 8 automatically entitles [a petitioner] to habeas relief,” dispensing with the need for
 9 the harmless-error review entailed in the perjury claim. Id., at 1116-1117; see
 10 Kyles, 514 U.S. at 435-436 (“a Bagley error could not be treated as harmless,
 11 since ‘a reasonable probability that, had the evidence been disclosed to the
 12 defense, the result of the proceeding would have been different,’ [omit]
 13 necessarily entails the conclusion that the suppression must have had ‘substantial
 14 and injurious effect or influence in determining the jury’s verdict.’ ” Brecht, 507
 15 U.S. at 623 quoting Kotteakos v. United States, 328 U.S. 750, 776, 90 L. Ed.
 16 1557, 66 S. Ct. 1239 (1946)).

17 Of course, Petitioner’s Brady-Bagley claim fails under an analysis
 18 requiring a showing of materiality higher than that required for his unsuccessful
 19 perjury claim. The evidence he relies on to show materiality of the Rogoway-
 20 White relationship does not show “there is a reasonable probability that, had the
 21 evidence been disclosed to the defense, the result of the proceeding would have
 22 been different.” Zuno-Arce, 25 F. Supp. 2d at 1116 quoting Bagley, 473 U.S. at
 23 682. “A ‘reasonable probability’ is a probability sufficient to undermine
 24 confidence in the outcome.” Id., at 1116 quoting Bagley, 473 U.S. at 682.

25 Here, it cannot be argued the prosecution’s failure to disclose what it
 26 knew, if anything, about the White-Rogoway relationship undermined the
 27 confidence in the outcome. Because trial counsel’s thorough cross examination
 28 of Rogoway exposed numerous inconsistencies in her testimony, impeaching her

1 with the White relationship would not have further diminished her credibility any
2 more than what the vigorous cross examination had already done.

3 Also, even if evidence of the relationship could be characterized as
4 material, trial counsel already possessed information about a possible
5 relationship between the two, so there was no suppression of evidence. Trial
6 counsel's knowledge is evidenced by her requests to cross examine Rogoway
7 about her state prison inmate connections. For instance, trial counsel could have
8 cross-examined Rogoway about the Quine letter and her relationship with White
9 if she had first called Quine as a witness to authenticate the letter or White to
10 testify to the existence of the relationship, but trial counsel chose not to do so.
11 RT 8684-8686.

12 Further, there is Giss' testimony at the February 24, 1982 discovery
13 hearing discussing his take on the nature of White's and Rogoway's relationship.
14 Petitioner has not presented probative evidence that the prosecution knew any
15 more about the relationship than what his trial counsel knew. And "in the instant
16 case when 'a defendant has enough information to be able to ascertain the
17 supposed Brady material on his own, there is no suppression by the government.'
18 " Frierson v. Calderon, 968 F. Supp. 497, 506 (C.D. Cal. 1997) quoting United
19 States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) (citing United States v.
20 Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir.1985)); see also United States v. Bracy,
21 67 F.3d 1421, 1428-1429 (9th Cir.1995) ("disclosure provided all the
22 information necessary for the defendants to discover the alleged Brady material
23 on their own, so the government was not guilty of suppressing any evidence
24 favorable to [petitioner].") By Petitioner's own admission Rogoway's
25 relationship to White was discussed at that February 24, 1982 hearing, furnishing
26 trial counsel with the potential impeachment information before the trial ended.
27 See United States v. Agurs, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392
28 (1976) (Brady rule violated when "discovery, after trial, of information which

1 had been known to the prosecution but unknown to the defense.”) Petitioner’s
 2 request for an evidentiary hearing on this claim is denied.

3 **(B) Claim 7 - Prosecution Informed Malloy Before the Lineup**
 4 **That Suspects Were in Custody**

5 In Claim 7, Petitioner alleges Bob’s Big Boy security liaison David
 6 Lind told Malloy, before the first lineup, that suspects had been arrested and he
 7 should go downtown to identify them. Mot. for Evid. Hrg. at 20. This claim
 8 rests on the same allegations as those in the Malloy perjury claim. The allegation
 9 is supported by Logan’s and Luna’s trial testimony that Lind told them, before
 10 they attended the December 23, 1980 lineup, that suspects had been arrested.
 11 Mot. for Evid. Hrg. at 20; RT 9285-9288, 10570.

12 Petitioner characterizes Malloy’s later deposition testimony as an
 13 admission by Malloy that Lind did indeed make the statement before the lineup.
 14 Petitioner, though, does not explain how Lind’s statement to Malloy, if true,
 15 tainted Malloy’s lineup identification. Regardless, the claim lacks merit because
 16 Petitioner’s allegations are conclusory and not supported by specific facts.

17 Petitioner’s evidence does not even establish Lind told Malloy the
 18 suspects had been arrested. As previously explained, Luna’s and Logan’s
 19 testimony on their conversations with Lind are irrelevant to and not dispositive of
 20 that question. And Malloy’s deposition testimony is equally irrelevant because
 21 Malloy was not expressly asked during that deposition whether he knew, before
 22 the lineup, that suspects were in custody or had been arrested.

23 Moreover, assuming Lind made such a statement, Petitioner has not
 24 shown the prosecution had a Brady duty to disclose Lind’s statement to him.
 25 Petitioner attempts to establish the prosecution’s obligation with three statements
 26 or acts by the prosecution that impute to them knowledge of Lind’s statement, a
 27 requirement under Brady. The first is a statement during Petitioner’s preliminary
 28 hearing, describing Lind as a liaison between the prosecution and the witnesses,
 which Petitioner argues rubber-stamps Lind as its agent. Second is the fact Lind

1 sat at the prosecution's table during the preliminary hearing. Third, the
2 prosecution, in a letter, praised Lind's assistance in the case.

3 None of this evidence provides a basis for imputing to the
4 prosecution knowledge of Lind's pre-lineup statement. It is true a court may
5 "impute to the prosecutor the knowledge of other government officials operating
6 on [its] behalf." Zuno-Arce, 25 F. Supp. 2d at 1116, fn. 37; see Kyles, 514 U.S.
7 at 437-438. In Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L.
8 Ed. 2d 286 (1999), the United States Supreme Court, quoting Kyles, 514 U.S. at
9 438, stated that "the rule [even] encompasses evidence 'known only to police
10 investigators and not to the prosecutor,' " Strickler, 527 U.S. at 280, because
11 compliance with Brady requires " 'the individual prosecutor [omit] to learn of
12 any favorable evidence known to the others acting on the government's behalf
13 in this case, including the police.' " Strickler, 527 U.S. at 280 quoting Kyles, 514
14 U.S. at 437. However, a court may not "read the phrase 'should have known' so
15 broadly as to impose under the Due Process Clause a duty on the prosecutor or
16 other government officials to go beyond the 'prosecution team' in search of
17 information contradicting the testimony or evidence in question." Zuno-Arce, 25
18 F. Supp. 2d at 1116, fn. 37. "Someone within the entity, i.e., some government
19 official participating in the investigation, must have information clearly
20 demonstrating the falsity of testimony or evidence." Id.; accord United States v.
21 Duke, 50 F.3d 571, 577 (8th Cir.) citing United States v. Tierney, 947 F.2d 854,
22 860-61 (8th Cir. 1991), cert. denied, 516 U.S. 885, 116 S. Ct. 224, 133 L. Ed. 2d
23 154 (1995); United States v. Krasny, 607 F.2d 840, 844-45 (9th Cir. 1979), cert.
24 denied, 445 U.S. 942, 100 S. Ct. 1337, 63 L. Ed. 2d 775 (1980). Here, Petitioner
25 has not presented the Court with probative evidence Lind was a member of the
26 "prosecution's team." Consequently, knowledge of the statement may not be
27 imputed to the prosecution because Lind was a Bob's Big Boy employee.

28 Also, Petitioner's evidence does not show how Lind's statement is

1 material to his case. Petitioner's argument suggests Lind telling Malloy suspects
2 were in custody before viewing the lineup was prejudicial, requiring exclusion of
3 Malloy's identification testimony at both his preliminary hearing and trial.
4 However, as the petitioner in United States v. Bowman, 215 F.3d 951, 966 (9th
5 Cir. 2000), Petitioner's "fear that the lineup[] [was] impermissibly suggestive
6 because witnesses knew that the suspects were in custody is misplaced." "[I]t
7 stands to reason that there is a suspect at the lineup stage," v. Bowman, 215 F.3d
8 at 966, and Petitioner "does not suggest how this increases the suggestibility of
9 the procedure." Id.

10 To show materiality, Petitioner must go further and show that the
11 statement tainted the lineup because it was "so impermissibly suggestive as to
12 result in a substantial likelihood of irreparable misidentification." United States
13 v. Collins, 559 F.2d 561, 563 (9th Cir. 1977) relying on Simmons v. United
14 States, 390 U.S. 377[, 88 S. Ct.967, 19 L. Ed. 2d 1247] (1968); see Bowman, 215
15 F.3d at 966 citing United States v. Davenport, 753 F.2d 1460, 1462 (9th Cir.
16 1985). The court in United States v. Johnson, 820 F.2d 1065, 1072 (9th Cir.
17 1987), stated a determination of what is "unnecessarily suggestive" requires
18 examination of the "totality of the surrounding circumstances." Johnson, 820
19 F.2d at 1072; see Bowman, 215 F.3d at 966; Tuan Van Tran v. Lindsey, 212
20 F.3d 1143, 1156 (9th Cir.), cert. denied 531 U.S. 944, 148 L. Ed. 2d 274, 121 S.
21 Ct. 340 (2000).

22 Even if it were true Lind made the statement and he was on the
23 prosecution's team, the Brady materiality element is missing because an
24 examination of the totality of circumstances surrounding Petitioner's lineup does
25 not show Lind's statement unnecessarily suggested to Malloy that Petitioner was
26 the suspect in the lineup. Petitioner and the others in the lineup looked similar.
27 They were dressed the same. Nothing at the lineup suggested Petitioner was the
28 suspect. Simply stated, Lind's statement did not provide Malloy with any basis

1 for inferring Petitioner was the suspect when he saw him in the lineup.

2 Indeed, Lind's statement, told to both Logan and Luna, must not have
3 been very suggestive if Logan picked someone else from the lineup and Luna
4 questioned his selection of Petitioner. Lind's statement suggested no more than
5 the obvious - if a lineup is taking place, it is likely a suspect is in custody.

6 Moreover, going a step further, Brady materiality still would not be
7 established, even if the lineup were tainted by Lind's statement, because the
8 record demonstrates Malloy's testimony was "nonetheless reliable" when
9 examined under the Neil v. Biggers factors and Petitioner has no evidence to the
10 contrary. Neil v. Biggers, 409 U.S. 188, 199, 34 L. Ed. 2d 401, 93 S. Ct. 375
11 (1972). Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140
12 (1977), and subsequent cases, have held unnecessary suggestibility of the
13 identification procedure does not automatically require exclusion of the
14 identification testimony that is nonetheless reliable. Watkins v. Sowders, 449
15 U.S. 341, 347, 66 L. Ed. 2d 549, 101 S. Ct. 654 (1981); United States v. Peele,
16 574 F.2d 489 (9th Cir. 1978); Dearinger v. United States, 468 F.2d 1032, 1036
17 (9th Cir. 1972).

18 Under the Neil v. Biggers factors, Malloy's testimony was
19 nonetheless reliable because the record shows his identification testimony was
20 likely based on his own memory. For at least 5 minutes, and maybe as much as
21 15 minutes, Malloy had an ample opportunity to obtain a clear impression of the
22 robber's physical features. The restaurant was well lit and he was in close
23 proximity of the robber, having several chances to look into his undisguised face.
24 These factors certainly provide a reliable basis for Malloy's testimony and it
25 cannot be said that failure to disclose the alleged statement undermined the
26 confidence in the trial's outcome. Petitioner's request for an evidentiary hearing
27 on the claim is denied.

1 **(C) Claim 12 - Pressuring Prosecution Witnesses**

2 Claim 12, a Brady violation, alleges the prosecution failed to disclose
3 that it pressured two of its witnesses - Logan and Lankerford - to identify
4 Petitioner as one of the robbers or to implicate him in the robbery.

5 **1. The Prosecution Pressured Logan**

6 Logan was the Bob's Big Boy cook who was unlocking the door to let
7 out Rogoway and Burrell when the robbers rushed in. Logan was one of the three
8 victims who escaped unharmed. Although Logan helped prepare a composite
9 sketch of the robbers, he picked someone other than Petitioner from the
10 December 23, 1980 lineup.

11 Petitioner contends the police pressured Logan to identify him as one
12 of the robbers by lying to him, treating him as a suspect, and subjecting him to a
13 polygraph exam. He also asserts, before viewing the lineup, Logan was shown
14 Petitioner's photograph and David Lind told him the right suspects were in
15 custody and that he should identify them. When Logan could not identify
16 Petitioner, Petitioner complains, the prosecution made Logan take a polygraph
17 because they thought he was involved in the robbery. Further at Freeman's
18 subsequent trial Logan testified the police told him "Frank and Ricky" said he
19 was involved when, according to Petitioner, it was a lie because neither he nor
20 Freeman made the statement. Mot. for Evid. Hrg. at 27-28.

21 Petitioner supports his allegations with a 1988 plea transcript from
22 Logan's drug related case in which he received probation. Petition Exhibit 72.
23 Giss spoke on Logan's behalf at the change of plea hearing. Giss described
24 Logan as a cooperative witness in the Bob's Big Boy case, someone who
25 voluntarily subjected himself to a polygraph. Petitioner states the polygraph test
26 was not revealed until that hearing.

27 Petitioner also relies on Logan's Freeman trial testimony to show the
28 prosecution's treatment of Logan as a suspect in the robbery was not disclosed

1 until the Freeman trial. Petition Exhibit 71. While waiting to testify at that trial,
2 Petitioner claims defense counsel overheard Logan telling Rogoway about the
3 police's statement to him that Petitioner and Freeman had implicated him in the
4 robbery. Defense counsel then personally verified that statement with Logan
5 before the court.

6 The Court finds this claim to be without merit. Even if taken as true,
7 Petitioner's allegations do not establish the Brady's materiality requirement
8 because it is not reasonably likely, if the information had been revealed, it would
9 have changed the import of Logan's testimony at Petitioner's trial. The strength
10 of his testimony was not great because he did not select Petitioner in the lineup.

11 **2. The Prosecution Pressured Lankerford**

12 The record shows Lankerford provided one of the first anonymous
13 tips on the robbery to the police. Lankerford's tip stated, in September 1980,
14 while standing on a street corner with friends, Petitioner drove up in a blue
15 Cadillac. Petitioner parked his car and joined them. Petitioner had a jeri-curl and
16 was wearing a midcalf maroon leather coat with fur trim. He talked about
17 "taking down" Bob's Big Boy. Lankerford, a Bob's Big Boy employee, warned
18 Petitioner that off-duty police officers work there. Petitioner claimed he was
19 "screwing" a waitress who had "cased" the restaurant. RT 11,514-11,689.

20 Lankerford stated the two walked over to Petitioner's car. Inside its
21 trunk Lankerford said he saw the stock of a shotgun wrapped in a blanket, along
22 with shells. When he learned of the robbery, Lankerford anonymously called the
23 police - twice - about his conversation with Petitioner. The record is not clear,
24 but the police somehow managed to identify Lankerford as the tipster.²⁶

25 Lankerford was brought to the police station, for about 30-45 minutes, where he
26 signed a statement that recited his conversation with Petitioner. He also picked
27

28 ²⁶ When he phoned in his tip on December 17, 1980, Lankerford was on probation and had recently been arrested for a drug related offense.

1 Petitioner out of a photo spread.

2 Lankerford had to be subpoenaed to testify at the Freeman
3 preliminary hearing. He then claimed he could not recall personally having a
4 conversation with Petitioner about the robbery because, since a near fatal
5 motorcycle accident, his memory comes and goes. He claimed his police tip was
6 based on nothing more than neighborhood rumors.

7 At Petitioner's trial, he explained the reasons for his preliminary
8 hearing testimony. He said, since he had come forward in the case, his cars had
9 been vandalized and he feared for the safety of his family, including his young
10 children, even though no threats had been made against them. But, he said he
11 was not afraid of Petitioner and his family, because it was the neighborhood
12 committing the vandalism since it now considered him a snitch. He maintained
13 his tips were based on rumors in the neighborhood and that he could not recall a
14 personal conversation with Petitioner about the robbery. Moreover, he asserted
15 he told the police this and his police statement, which he just signed under
16 enormous pressure so he could leave, contained lies manufactured by the police.
17 The prosecution declared Lankerford a hostile witness and relied instead on
18 Lankerford's police statement to impeach him.

19 Petitioner supports the Lankerford Brady violation claim with
20 Lankerford's declaration, dated June 9, 1995. Petition Exhibit 73. In it,
21 Lankerford states the tip he provided in the case was based on neighborhood
22 rumors and that on several occasions the prosecution asked him to testify to
23 things not true. He claims the atmosphere at the police station was so oppressive
24 when they interrogated him that he just signed statement they drafted without
25 reading it so he could leave.

26 Also, Lankerford's declaration states, even though he only knew
27 Petitioner by sight, "Giss put considerable pressure" on him to testify that he had
28 personal contact with Petitioner. The declaration asserts neither he nor his family

1 were ever threatened. The Court does not agree the declaration reveals an
2 undisclosed level of pressure applied by prosecution on Lankerford.

3 Essentially, the problem with the declaration is that it says no more
4 than what Lankerford said at Petitioner's trial. The declaration is nothing more
5 than a recapitulation of his trial testimony.

6 Also, the prosecution's efforts to convince Lankerford to testify about
7 his conversation with Petitioner were no secret. And those efforts were
8 spearheaded by Lankerford's trial testimony expressing concern for his and his
9 family's safety, although he stated no threats had been made. The record reflects
10 the testimony of David Lind and Officer Steven Wesselink about several
11 conversations they had with Lankerford, who said he felt badly about his
12 testimony, but he could not testify because of safety concerns. Officer Stallcup
13 testified Lankerford expressed to him those same concerns when he signed his
14 police statement and he assured him they would try to keep his identity
15 anonymous.

16 Consequently, Petitioner was aware at the time of his trial of the
17 prosecution's efforts to convince Lankerford to testify and those efforts were not
18 suppressed as asserted by Petitioner. Petitioner's request for an evidentiary
19 hearing on both these subclaims is denied.

20 **(D) Claim 18 - Promising Gilcrest and His Mother Reward Money**

21 Claim 18 makes several allegations to show a Brady violation. It is
22 not clear, but Petitioner seems to suggest the prosecution concealed Brady
23 impeachment material that Gilcrest and his mother, who both phoned in tips to
24 the police on the Bob's Big Boy robbery, were motivated to testify at his
25 trial by the \$10,000 reward offered by Bob's Big Boy²⁷ or by the promise of it by
26 the prosecution.

27 ²⁷Actually, it was the Marriott Corp., which formerly owned the Bob's Big Boy restaurant chain,
28 that offered the reward in a letter to the Los Angeles Police Department. Mot. for Evid. Hrg. at
46; Petition Exhibit 62.

1 Specifically, Petitioner states Gilcrest's mother, Martha Simmons,
2 denied at both his and Freeman's trials that, when she phoned in the tip, she
3 never requested or was motivated by the reward offer because she was not aware
4 of it. Petition Exhibits 60 & 61. Similarly, Petitioner states Gilcrest denied
5 during cross examination at Petitioner's trial that the reward motivated him in
6 coming forward and testifying. Petitioner also points to the prosecution's closing
7 argument which denies Gilcrest was promised any money. Despite their denials,
8 Petitioner asserts that sometime after his and Freeman's trials the Gilcrests
9 received the reward, although he concedes neither Bob's Big Boy nor the Los
10 Angeles Police Department have a record of who received the reward. Mot. for
11 Evid. Hrg. at 46; Petition Exhibits 64 & 65. Petitioner supports his allegation
12 with 4 pieces of evidence. The Court, though, does not find Petitioner's Brady
13 argument to be persuasive.

14 None of Petitioner's evidence shows the reward or a promise of the
15 reward arguably constituted exculpatory impeachment evidence within Brady's
16 meaning. See Strickler, 527 U.S. 263; Bagley, 473 U.S. 667; Giglio, 405 U.S.
17 150; Endicott, 869 F. 2d 452. Petitioner's first piece of evidence is Giss'
18 handwritten notes on a discovery request made in Freeman's case that were
19 turned over pursuant to 1983 Brady request in the Freeman case. Petitioner
20 argues the notes are proof Giss "knew for a fact that Gilcrest was always
21 motivated by the reward money." Mot. for Evid. Hrg. at 46; Petition Exhibit 65.

22 However, the notes are not probative of a motive by Gilcrest for
23 several reasons. One, it is not clear whether the notes refer to Petitioner's or
24 Freeman's trial because Giss prosecuted both cases and the witnesses' named in
25 the notes testified at both trials. Second, the notes do not reflect a date or author.
26 Third, although the handwriting in the notes is hard to read, the relevant portion
27 could arguably be read "reward of \$10,000 ... no one promised anything except
28 Gilcrest talks of money ..." Petitioner's reading though does not contradict

1 Gilcrest's testimony. Rather, it is actually consistent with Gilcrest's testimony at
2 Petitioner's trial. Gilcrest admitted he probably made a verbal request for the
3 reward. RT 12,444-12,456. And although he denied receiving any money from
4 the prosecution or anyone else, RT 12,442, 12,604, he admitted his aunt Doris
5 received \$300 to cover her expenses for him while he stayed with her during his
6 appearance at Petitioner's trial. RT 12,443-12,444, 12,603.

7 Second, Petitioner relies on Giss's testimony at a suppression hearing
8 in People v. Garmanian, which reads:

9 Q: You had enough experience [as a prosecutor] to
10 recognize that at some point an informant was very likely
to ask you for some quid quo pro?

11 A: Probably. Nobody does that for nothing, you think.

12 Petition Exhibit 42; RT 721-722. Petitioner seems to offer the testimony to show
13 Giss had knowledge of Gilcrest's financial motive in testifying because he should
14 have presumed the reward motivated a tipster like Gilcrest, who has the same
15 motives as an informant.

16 His third piece of evidence is a manual entitled "Use of Jail House
17 Informant" that cautions against the use of informants in criminal cases. Petition
18 Exhibit 66. He claims it is read by the attorneys in the Los Angeles County
19 District Attorney's Office. It is not clear to the Court how these two pieces of
20 evidence on the wily ways of the jail house informant show the reward motivated
21 the Gilcrests. However, neither piece is relevant to the instant proceeding
22 because they are not probative of what the Gilcrests' motives were in Petitioner's
23 case.

24 A letter to Petitioner's federal habeas counsel from Los Angeles City
25 Attorney Donna Weisz Jones is proffered as his fourth piece of evidence. In it,
26 Jones writes that Giss told her "he believed Gilcrest, his mother, and one of the
27 victims" got the reward and that it was "well after the trial was over." Petition
28 Exhibit 63. The letter is not probative evidence. It merely states the reward was

1 paid to the Gilcrest family after conclusion of the trial, which makes Petitioner's
2 argument less persuasive. The letter does not contain evidence the Gilcrests were
3 motivated by the reward or the promise of it at the time they testified.

4 Consequently, Petitioner's evidence does not even establish the
5 prosecution possessed exculpatory impeachment evidence on the Gilcrests'
6 motives. In fact, Petitioner's evidence does not even establish a promise was
7 made by the prosecution to lobby on the Gilcrests' behalf to the Marriott
8 Corporation for the reward.

9 At best, the evidence reveals what was already known during
10 Petitioner's trial: that because Gilcrest and his mother had furnished tips leading
11 to the arrest of the robbery suspects and testified in Petitioner's case, they might
12 be eligible for the reward. Their eligibility for the reward was obvious to trial
13 counsel, as well, because she continuously cross examined Gilcrest about
14 whether the reward motivated him to testify. RT 12,092-12,998. He admitted he
15 saw the reward offer on television, RT 12,194, but did not recall telling the police
16 he came forward for it. RT 12,194. Instead, he stated he came forward because
17 of his conscience and his mother forced him to. RT 12,428, 12,581, 12,604-
18 12,610. He stated he did not make a written demand for the reward, but may
19 have made a verbal request. RT 12,444-12,456. He denied receiving any money
20 from the prosecution or anyone else, RT 12,442, 12,604, but admitted his aunt
21 Doris received \$300 to cover her expenses for him while he stayed with her. RT
22 12,443-12,444, 12,603.

23 Given that cross examination revealed Gilcrest's reward request and
24 the \$300 paid to his aunt, it is evident information on whether the reward or a
25 promise of it was a motive for the Gilcrests was equally available to the defense
26 during Petitioner's trial. Herrera v. Collins, 954 F.2d 1029, 1032 (5th Cir. 1992)
27 citing United States v. McKenzie, 768 F.2d 602, 608 (5th Cir.1985) (citation
28 omitted)(citing United States v. Milstead, 671 F.2d 950, 953 (5th Cir.1982)

1 (“When evidence is available equally to the defense and the prosecution, the
 2 defendants must bear the responsibility for their failure to diligently seek its
 3 discovery.”)) Therefore, since their eligibility was obvious to everyone during
 4 Petitioner's trial, no evidence was suppressed under Brady. Frierson, 968 F.
 5 Supp. at 506 quoting Aichele, 941 F.2d at 764 (finding no Brady violation where
 6 the state provided rap sheet for government witness, but did not turn over
 7 impeachment evidence contained in the witness's prison file); accord Quintanilla,
 8 193 F.3d at 1149 (finding no Brady violation where government failed to turn
 9 over notes from interview with co-defendant, the substance of which already was
 10 known to defendant); United States v. Gonzales, 90 F.3d 1363, 1368 (8th Cir.
 11 1996)(“government need not disclose evidence available to the defense from
 12 other sources or evidence already possessed by the defendants”); Westley v.
 13 Johnson, 83 F.3d 714, 725-726 (5th Cir. 1996) (no Brady violation if the
 14 defendant, "using reasonable diligence, could have obtained the information"),
 15 cert. denied, 136 L. Ed. 2d 718, 117 S. Ct. 773 (1997); United States v. Payne,
 16 63 F.3d 1200, 1208 (2d Cir.1995); Felker v. Thomas, 52 F.3d 907, 910 (11th Cir.
 17 1995), aff'd on other grounds, 518 U.S. 651; 116 S. Ct. 2333; 135 L. Ed. 2d
 18 827(1996); Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994) (“Brady does
 19 not compel the disclosure of evidence available to the defendant from other
 20 sources, including diligent investigation by the defense”), cert. denied, Stockton
 21 v. Angelone, 515 U.S. 1187, 132 L. Ed. 2d 918, 116 S. Ct. 37 (1995); United
 22 States v. White, 970 F.2d 328, 337 (7th Cir. 1992).

23 Moreover, even if Petitioner's evidence could be construed to be
 24 probative evidence that the reward was a motive, it nevertheless fails to establish
 25 the Brady materiality element. Zuno-Arce, 25 F. Supp. 2d at 1117, fn. 41
 26 discussing Kyles, 514 U.S. at 434 (“The question [in the Brady-Bagley context]
 27 is not whether the defendant would more likely than not have received a different
 28 verdict with the evidence, but whether in its absence he received a fair trial,

1 understood as a trial resulting in a verdict worthy of confidence.”) The record
2 shows trial counsel also significantly impeached Gilcrest on two other grounds.
3 First, she questioned him about several love letters he wrote to Stewart while she
4 was in custody for the Bob's Big Boy robbery, reading their contents into the
5 record. RT 12,196-12,262. Gilcrest claimed most of what he wrote in the letters
6 were lies to prevent Stewart from suspecting he was the one who turned her in to
7 the police, although he admitted he was still "kinda" in love with her. RT 12,077.
8 Despite Gilcrest's claims, the letters were damaging to his credibility. In the
9 letters, he confessed to Stewart his suicidal thoughts. Those passages made the
10 letters more credible, indicating their contents were more than just lies and
11 providing the defense with a jealousy motive when Gilcrest implicated Petitioner
12 in the robbery.

13 The second significant impeachment ground was Gilcrest's own
14 possible involvement in the robbery. Gilcrest was implicated because he
15 accompanied Stewart to the restaurant on September 27, 1980 when she scouted
16 it out for her codefendants. He claimed he went to the police because he feared
17 he would be implicated by someone who saw him with Stewart that night. RT
18 12,428. Because of his involvement, Gilcrest was granted immunity to testify at
19 Petitioner's trial. The cross examination established Gilcrest's was a possible
20 accomplice, whose motive might be to implicate Petitioner, rather than himself,
21 in the robbery.

22 In light of the potential damage trial counsel's cross examination
23 wreaked on Gilcrest's credibility, the Court does not think it could be argued any
24 failure to turn over the additional evidence on Gilcrest's financial motives would
25 have undermined confidence in the outcome because it is not reasonable probable
26 that, had the evidence been disclosed to the defense, the result of the proceeding
27 would have been different. An evidentiary hearing is denied on this claim as
28 well.

2. Claims 1, 5, 9, 13, 21 & 23 - Other Acts of Prosecutorial Misconduct

(A) Claim 1 - Subornation of Rogoway's Perjured

Petitioner claims the prosecution, when it secretly arranged the conjugal visits between Rogoway and Leslie White, suborned Rogoway's false in-court identification of him as one of the Bob's Big Boy robbers. This claim's allegations are also the same as those for the Rogoway perjury and Brady violation claims. Mot. for Evid. Hrg at 2. Likewise, the Court denies an evidentiary hearing on the claim.

The Court is unpersuaded by Petitioner's argument because "[t]o obtain relief on the basis of subornation and perjury, the Petitioner must demonstrate in his petition for habeas corpus (1) that a witness made a false statement; (2) that the false statement was material; and (3) that the false testimony was knowingly and intentionally employed by the government in order to obtain a conviction." Beasley v. Holland, 649 F. Supp. 561, 566 (S.D. W. Va. 1996) discussing McBride v. United States, 446 F.2d 229, 232 (10th Cir. 1971); Miller v. Pate, 386 U.S. 1, 7, 17 L. Ed. 2d 690, 87 S. Ct. 785 (1967)(due process forbids criminal conviction obtained by the knowing use of false evidence.); Ortiz, 149 F.3d at 936 ("If a prosecutor knowingly uses perjured testimony or knowingly fails to disclose that testimony is false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict."); Marsh v. Mazurkiewicz, 396 F. Supp. 28, 30 (W.D. Pa. 1975), relying on U.S. ex rel. Smith v. Reincke, 354 F.2d 418 (2nd Cir. 1965)(a claim "a prosecution witness gave perjured testimony is insufficient for federal habeas corpus relief from a state conviction absent any proof that the prosecution suborned perjury.") Petitioner has not shown Rogoway's testimony, as previously explained, was perjured. A subornation claim may not stand without a showing of perjured testimony. An evidentiary hearing is denied on this claim.

1 **(B) Claims 5 & 9 -Improperly Influencing Robinson's and Malloy's**
 2 **In-Court Identification of Petitioner by Exposing Them to a**
 3 **Highly Prejudicial Photo**

4 These two claims allege Robinson²⁸ and Malloy were only able to
 5 identify Petitioner in open court at his trial because they had seen, while waiting
 6 to testify at Freeman's preliminary hearing, the highly suggestive and
 7 inflammatory photo of him and Stewart holding the guns, which unbeknownst to
 8 them was a carnival photo. Mot. for Evid. Hrg. at 16-18, 24. Petitioner
 9 complains the prosecution never told the witnesses the photo was a carnival
 10 photo. Petitioner argues not only did the prosecution deliberately place the photo
 11 in the witness room, but suggests the prosecution knew the witnesses'
 12 identification testimony at his trial was based on their exposure to the photo,
 13 rather than what they saw on the night of the robbery. Mot. for Evid. Hrg. at 16,
 14 24. Petitioner's argument that exposure to the photo tainted the witnesses'
 15 identification testimony is not persuasive.

16 The claim has no merit because Petitioner's evidence does not show
 17 that the totality of the circumstances surrounding the exposure suggested "a very
 18 substantial likelihood of irreparable misidentification" of him by the witnesses in
 19 their subsequent in court identifications of him. Simmons, 390 U.S. at 384,
 20 discussing Stovall v. Denno, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 18 L.Ed.2d
 21 1199 (1967). Simmons the Supreme Court stated:

22 convictions based on eyewitness identification at trial
 23 following a pretrial identification by photograph will be
 24 set aside on that ground only if the photographic
 identification procedure was so impermissibly suggestive
 as to give rise to a very substantial likelihood of
 irreparable misidentification.

25 Id. Neither the record nor Petitioner's allegations bear evidence of the photo's
 26 suggestibility, leaving little concern the two witnesses were "prone to undue
 27 _____

28 ²⁸The allegations raised here concerning Robinson are the same as those raised in Claim 6 which asserts Robinson's trial testimony was perjured.

1 suggestion from the passage of time” when they saw the photo. United States v.
2 Dring, 930 F.2d 687, 693 (9th Cir.1991) in accord with Manson, 432 U.S. at 115-
3 116. Without more, the Court may only conclude Malloy's and Robinson's
4 identification testimony was not prejudiced by exposure to the photo because by
5 that time they had already identified Petitioner from the lineup.

6 Further, even assuming the photo was unnecessarily suggestive, the
7 record demonstrates under the totality of the circumstances both witnesses's
8 testimony was nonetheless reliable when examined under the Biggers factors and
9 Petitioner has no evidence contradicting that. Biggers, 409 U.S. at 199-200.
10 Manson, 432 U.S. 98, and subsequent cases, have held unnecessary
11 suggestibility of the identification procedure does not automatically require
12 exclusion of the identification testimony if the testimony is found to be
13 nonetheless reliable. Tomlin v. Meyers, 30 F.3d 1235, 1237 (9th Cir. 1994) citing
14 United States v. Wade, 388 U.S. 218, 240, 18 L. Ed. 2d 1149, 87 S. Ct. 1926
15 (1967)(where an illegal lineup is established, in-court identification is
16 permissible only where “clear and convincing evidence establishes that the in-
17 court identification was based on observations other than the lineup.”); United
18 States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978)(“suggestibility alone does not
19 require exclusion of identification testimony.”); Dearinger v. United States, 468
20 F.2d at 1036 (despite publication of newspaper photo that identified defendant as
21 suspect arrested before lineup, lineup identification testimony not excluded.)
22 The Biggers factors "include the opportunity of the witness to view the criminal
23 during the crime, the witness' degree of attention, the accuracy of the witness'
24 prior description of the suspect, the witness' level of certainty at the prior
25 confrontation, and the length of time between the crime and the pretrial
26 identification. Barron, 575 F.2d at 755.

27 Malloy's identification testimony, when examined under the five
28 Biggers factors, was reliable because the record contains ample evidence it was

1 based on his own independent memory of the robbery. He saw the robbers enter
2 through the front door. And, as a victim of the crime, Malloy had an opportunity
3 to examine the robber's physical features. Because Malloy remained with the
4 robber identified as Petitioner long enough to open the safe, bag the money, and
5 collect the victims' belongings, he was in close proximity of him for more than a
6 few minutes and had several chances to look into his undisguised face. Further,
7 Malloy identified Petitioner from the video lineup he saw on December 23, 1980,
8 which was ten days after the robbery. He also identified him at the preliminary
9 hearing. Although Malloy was confused about which lineups he attended, RT
10 6988-7183, it is clear his identification of Petitioner at his preliminary hearing
11 and trial was based on his memory of the night of the robbery, not his memory of
12 the photo.

13 The same for Robinson. The record shows her identification
14 testimony was reliable, too. She was in close proximity of the robbers because
15 she saw them enter the restaurant and, although she admitted she did not recall
16 details about their clothing, she testified she got her best look at the robber she
17 identified as Petitioner while in the freezer when their belongings were being
18 collected. No evidence was presented that her view of that robber was somehow
19 obscured or blocked. With the night's events still fresh in her mind, she
20 identified Petitioner at the December 23, 1980 live lineup. Despite her alleged
21 exposure to the photo, Robinson could not identify him at his preliminary
22 hearing. As for her testimony at Petitioner's trial, there is no evidence that her
23 identification of him in open court was based on anything other than her memory.

24 Therefore, given the evidence of both witnesses' own independent
25 recollection of that night, it is not likely it was the carnival photo that suggested
26 to them that Petitioner was one of the robbers. The request for an evidentiary
27 hearing on Claims 5 and 9 are denied.

1 **(C) Claim 13 - Bad Faith in Preserving Evidence**

2 Petitioner's Claim 13 asserts his 6th and 14th Amendment rights were
3 violated when Detective Richard Jacques of the Los Angeles County Police
4 Department lost, in bad faith, Rogoway's identification card she completed when
5 she saw the videotape of the December 23, 1980 lineup. Petitioner asserts the
6 card constituted potential exculpatory material because it would have shown
7 Rogoway did not pick Petitioner from the lineup and could have been used, along
8 with her testimony at his preliminary hearing that she did not identify anyone at
9 the lineup, to impeach her when she testified at his trial that she did pick him out
10 of the lineup. Petitioner argues the loss of the card was done in bad faith because
11 Detective Jacques is the same officer who admitted during the trial he altered
12 Malloy's lineup card by adding the word "videotape." Also, Malloy testified the
13 word "positive" which was written onto his lineup card was not his handwriting.
14 Mot. for Evid. Hrg. at 30-33.

15 To show LAPD's bad faith in losing the Rogoway's card, Petitioner
16 points to a series of errors in handling evidence in his and the Freeman cases.
17 One error is Jacques' admission at Petitioner's trial that he "forgot" to have
18 Malloy sign his lineup card and added the word "videotape" to it. Second, a
19 videotape of another lineup including suspects never charged and critical to the
20 Freeman case, which Jacques was responsible for conducting, was erased. The
21 third error that occurred is a discrepancy in Rogoway's description of her lineup
22 card and the one described by Officer Wesselink. Wesselink assisted when she
23 and Irvin saw the videotape lineup and he testified at Petitioner's trial.
24 Petitioner contends the errors are not just coincidences, particularly given
25 Jacques had twenty years of experience and was the lead investigator in the Bob's
26 Big Boy case. Rather, the errors establish, under Arizona v. Youngblood, 488
27 U.S. 51, 58, 102 L.Ed. 2d 281, 109 S. Ct. 333 (1988), LAPD acted in bad faith
28 when it lost Rogoway's card. The Court does not find this argument to be

1 convincing.

2 Petitioner's evidence does not show the loss or destruction of the card
3 was done in bad faith. United States v. Armenta, 69 F.3d 304, 307 (9th Cir.
4 1995). The United States Supreme Court in California v. Trombetta, 467 U.S.
5 479, 489, 81 L.Ed. 2d 413, 104 S.Ct. 2528 (1984), extended its Brady holding to
6 "circumstances involving the loss or destruction of potentially exculpatory
7 evidence by the government." United States v. Barton, 995 F.2d 931, 934 (9th
8 Cir. 1993) discussing California v. Trombetta, 467 U.S. 479, 489, 81 L.Ed. 2d
9 413, 104 S.Ct. 2528 (1984). Petitioner's claim that the card's loss or destruction
10 was done in bad faith will only amount to a due process violation if he shows the
11 card "both possess[ed] an exculpatory value that was apparent before [it] was
12 destroyed and be of such a nature that the defendant would be unable to obtain
13 comparable evidence by the other reasonably available means," Id., and the
14 destruction or loss was done in bad faith. Id., at 935 citing Arizona v.
15 Youngblood, 488 U.S. 51, 58, 102 L.Ed. 2d 281, 109 S. Ct. 333 (1988)(no due
16 process violation when a defendant fails to show bad faith on the part of the
17 police in failing to preserve potentially useful evidence.)

18 But the Court does not find the errors to be evidence of bad faith.
19 Without more, they are nothing more than coincidences that do not rise to the
20 level of the due process violation contemplated by Youngblood. The evidence
21 reflects the card was simply lost.

22 Moreover, Petitioner has not shown the card's exculpatory value was
23 apparent before its loss. The card's exculpatory value did not become apparent
24 until Rogoway testified at Petitioner's trial. Before that, although trial counsel
25 commented on the loss of the card, the card had no value because, according to
26 Petitioner's allegations, Rogoway's preliminary hearing testimony was she did
27 not pick Petitioner out of the lineup since she testified she recalled only picking
28 someone. The card was not needed until Rogoway claimed at Petitioner's trial

1 that she identified him from the lineup.

2 Also, Petitioner's bad faith claim fails because he has not shown the
3 card's loss prejudiced his case. Youngblood, 488 U.S. at 57 (1988); Grisby v.
4 Blodgett, 130 F.3d 365, 371 (9th Cir. 1997)("duty to preserve evidence is limited
5 to material evidence, i.e., evidence whose exculpatory value was apparent
6 before its destruction and that is of such nature that the defendant cannot obtain
7 comparable evidence from other sources") discussing California v. Trombetta,
8 467 U.S. 479, 488-490, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984); Dring, 930
9 F.2d at 693-694 discussing United States v. Valenzuela-Bernal, 458 U.S. 858,
10 873, 73 L. Ed. 2d 1193, 102 S.Ct. 3440 (1982); Miller v. Vasquez, 868 F.2d
11 1116, 1119 (9th Cir. 1989)(evidence is not constitutionally material if defendant
12 is able to obtain comparable evidence by other reasonably available means.).
13 Prejudice is established by "a plausible showing" that the lost or destroyed
14 evidence was material and favorable, "in ways not cumulative to [other
15 evidence]." Dring, 930 F.2d at 693-694 citing Valenzuela-Bernal, 458 U.S. at
16 873.

17 Rogoway's lineup card was not material. Even if Petitioner had the
18 use of it to contradict Rogoway's trial testimony, as explained when the Court
19 addressed the Rogoway perjury and Brady violation claims, Rogoway's trial
20 testimony was greatly diminished by a skillful cross examination, making the
21 card's impeachment value cumulative. Therefore, the request for a hearing on
22 this claim is denied.

23 **(D) Claim 21 - Planting Jail House Informant Woods on**
24 **Bus with Petitioner**

25 Claim 21 asserts a violation of Petitioner's Massiah right to counsel.
26 The claim is supported by the same allegations that support the Woods perjury
27 claim. Mot. for Evid. Hrg. at 57. This claim fails because there is no probative
28 evidence the prosecution intentionally planted Woods near Petitioner to obtain an
incriminating statement.

1 Petitioner's argument is not persuasive because his evidence does not
2 even show his statement constituted an incriminating statement within the
3 meaning of Massiah and Henry. United States v. Henry, 447 U.S. 264, 65
4 L.Ed.2d 115, 100 S. Ct. 2183 (1980); Massiah v. United States, 377 U.S. 201, 12
5 L.Ed.2d 246, 84 S. Ct. 1199 (1964). Petitioner's statement was a threat, not a
6 confession implicating himself in the Bob's Big Boy robbery.

7 Also, the evidence misses the mark in showing Woods was a
8 government agent. Henry, 447 U.S. at 273; Massiah, 377 U.S. at 206-207.
9 Petitioner attempts to show Woods was an agent with Woods' testimony that he
10 had K-9 status during Petitioner's preliminary hearing. But that evidence instead
11 only shows Woods received that status while testifying as a witness in
12 Petitioner's case to assure he was not be placed near Petitioner who was also
13 housed in county jail. It would be mere speculation to conclude Woods was
14 acting as a government agent. Harris v. Vasquez, 913 F.2d 606, 629-630 (1991)
15 (the two declarations proffered alleging a government agent had access to
16 petitioner's cell and papers amounted to an insufficient basis for a hearing
17 because the evidence merely speculative.)

18 Nor does Woods' statement that Giss spoke on Woods' behalf in his
19 burglary case show Woods was a government agent for pay. When the question
20 was raised during Petitioner's trial, Giss assured the trial court no deal had been
21 struck with Woods and stated he had only told the Woods' sentencing court that
22 Woods had cooperated in the Bob's Big Boy case. RT 11,359-11,367.
23 Petitioner's evidence does not contradict Giss' statement.

24 And even if Petitioner's allegations that Woods was an agent were
25 true, Giss' statements do not establish in any way that the prosecution planted
26 Woods on the bus. Giss' memo asking how Woods ended up seated near to
27 Petitioner when there was a "keep away" request, Woods' testimony about his
28 protests before and after the bus ride, and Giss' comment to the trial court on the

1 incident, show the opposite. RT 11,340-11,352. That is, they show nothing more
2 than a mix up, like the one that occurred in Vasquez. Vasquez, 913 F.2d at 629-
3 630 (petitioner's allegations that an inmate had a history of acting as a
4 government informant and was placed in petitioner's cell due to a mix-up while a
5 police officer was outside the cell during the inmate's questioning of him was
6 found to be an insufficient basis for an evidentiary hearing.); Franklin v. Fox,
7 107 F. Supp. 2d 1154, 1163 (N.D. Cal. 2000) ("If the government directs an
8 individual to elicit incriminating statements from a defendant, the sixth
9 amendment is violated. If, by contrast, the state obtains incriminating statements
10 'by luck or happenstance,' . . . the sixth amendment is not violated.")

11 And assuming further Petitioner's evidence was sufficient to show
12 Woods was a government agent, he has not presented evidence that Woods "took
13 some action, beyond merely listening, that was designed deliberately to elicit
14 incriminating remarks." Kuhlman v. Wilson, 477 U.S. 436, 459, 91 L.Ed. 364,
15 106 S. Ct. 2616 (1986); see Henry, 447 U.S. at 274 ("[b]y intentionally creating a
16 situation likely to induce Henry to make incriminating statements without the
17 assistance of counsel, the Government violated Henry's Sixth Amendment right
18 to counsel.") In Henry, in determining if the government agent deliberately
19 elicited incriminating statements from the petitioner, the high court considered
20 whether (1) the informant was acting under instruction and for pay, (2) the
21 informant was no more than a fellow inmate, and (3) the petitioner was in
22 custody and under indictment. Henry, 447 U.S. 264. Although Petitioner was in
23 custody and under indictment at the time the statement was made, not only has
24 he not shown Woods was acting under instruction and for pay, but Petitioner's
25 evidence does not show Woods did more than listen to Petitioner during the bus
26 ride. Therefore, Petitioner's request for an evidentiary hearing on this claim is
27 denied.

1 **(E) Claim 23 - Outrageous Government Conduct**

2 Petitioner argues in Claim 23 that, if not individually, cumulatively
3 the prosecution's various acts of misconduct amount to outrageous conduct
4 warranting reversal and dismissal of all the charges against him. The Court finds
5 this argument to be unpersuasive because no prosecutorial misconduct has been
6 found.

7 And even if misconduct had been found, " 'the due process channel'
8 for the defense of outrageous government conduct is 'most narrow,' United
9 States v. Stenberg, 803 F.2d 422, 429 (9th Cir. 1986), and is available only where
10 the government 'is so involved in the criminal endeavor that it shocks our sense
11 of justice.' " United States v. Franco, 136 F.3d 622, 629 (9th 1998) citing United
12 States v. So, 755 F.2d 1350, 1353 (9th Cir. 1985). The Ninth Circuit limits this
13 claim to where "complaints by defendants that their outrageous treatment by law
14 enforcement officers warrants dismissal of their indictment," like entrapment.
15 United States v. Simpson, 813 F.2d 1462, 1464 (9th Cir. 1987) discussing United
16 States v. Bogart, 783 F.2d 1428, 1431-1433 (9th Cir.) (discussing history of the
17 doctrine's evolution and application in the Ninth Circuit), vacated on other
18 grounds with respect to one defendant sub nom.; United States v. Wingender,
19 790 F.2d 802 (9th Cir. 1986). Or to where, "although [] not an entrapment case,
20 when the Government permits itself to become enmeshed in criminal activity,
21 from beginning to end, to the extent which appears here, the same underlying
22 objections which render entrapment repugnant to American criminal justice are
23 operative," Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971), "rising to
24 a level of 'creative activity' substantially more intense and aggressive than the
25 level of such activity charged against the Government in numerous entrapment
26 cases [the circuit has] examined." Greene, 454 F.2d at 787 quoting Sherman v.
27 United States, 356 U.S. 369, 372, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958).
28 Therefore, "[i]n general, that standard is met only when the police completely

1 fabricate the crime solely to secure the defendant's conviction.” Franco, 136
2 F.3d at 629.

3 The Court finds Petitioner’s evidence falls far short of this
4 “extremely high standard.” United States v. Ahluwalia, 30 F.3d 1143,1144 (9th
5 Cir. 1994) citing Greene, 454 F.2d 783; see United States v. Mitchell, 915 F.2d
6 521 (9th Cir.), cert. denied, 500 U.S. 906, 114 L. Ed. 2d 81, 111 S. Ct. 1686
7 (1990) (government's targeted solicitation of defendant for the purchase of child
8 pornography during sting operation was not outrageous); see United States v.
9 Emmert, 829 F.2d 805, 811-812 (9th Cir. 1987)(confidential informant's offer of
10 \$ 200,000 "finder's fee" to college student in return for supplying cocaine did not
11 constitute outrageous conduct); see Simpson, 813 F.2d at 1466 (FBI's continued
12 use of woman informant who became sexually involved with defendant did not
13 constitute outrageous conduct). The record does not demonstrate the
14 “government's conduct was [omit] so grossly shocking or outrageous as to
15 violate the universal sense of justice.”; see United States v. Garza-Juarez, 992
16 F.2d 896, 904 (9th Cir. 1993); see United States v. Smith, 924 F.2d 889, 897 (9th
17 Cir. 1991); see Bogart, 783 F.2d at 1432; see United States v. Bagnariol, 665
18 F.2d 877, 881-883 (9th Cir. 1981) (per curiam), cert. denied, 456 U.S. 962, 72 L.
19 Ed. 2d 487, 102 S. Ct. 2040 (1982); see United States v. Russell, 411 U.S. 423,
20 432, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973) quoting Kinsella v. United States,
21 361 U.S. 234, 246, 4 L. Ed. 2d 268, 80 S. Ct. 297 (1960); see Greene, 454 F.2d
22 783. That is, Petitioner has not given the Court any evidence that the
23 Government's involvement in his case was “malum in se or amount[ed] to the
24 engineering and direction of the criminal enterprise from start to finish.” Smith,
25 924 F.2d at 897.

26 There is no evidence that the government fabricated the case against
27 Petitioner. Quite the contrary, not only was there physical evidence against
28 Petitioner, but there was overwhelming witness testimony that showed how he

1 and his codefendants planned the robbery and placed him at the robbery scene.
 2 The police focused on Petitioner as a suspect because he was named as one of the
 3 Bob Big Boy's robbers in the tips that were phoned in. Police tips were
 4 furnished by Lankerford, Woods, Gilcrest, Gilcrest's mother, and Taylor.
 5 Additionally, Freeman's mother, Orsteen Freeman, testified she saw Petitioner
 6 and her niece Stewart together right before the robbery at about 9 p.m. on
 7 December 13, 1980.²⁹ As for the physical evidence, although Petitioner's
 8 fingerprints were not found at the robbery scene, evidence seized from his, as
 9 well as Stewart's home, connected him to the robbery.

10 Consequently, since Petitioner has not presented the Court with
 11 evidence that shows outrageous government conduct, his request for an
 12 evidentiary hearing on the claim is denied.

13 **D. INEFFECTIVE ASSISTANCE OF COUNSEL - Claims 14 & 45**

14 **1. Claim 14 - Failure to Move to Suppress the Lineup Violated** 15 **Petitioner's 6th Amendment Right**

16 Petitioner claims ineffective assistance of trial counsel because he (or
 17 she) failed to move to suppress the eyewitnesses' identifications made at in the
 18 December 23, 1980 lineup, although he admits counsel argued the lineup was
 19 unfair. According to Petitioner, a suppression motion could have been made on
 20 two constitutional grounds. First, he was not represented by counsel at the lineup
 21 because counsel was not appointed and he was not arraigned until December 24,
 22 1980. Second, the lineup was impermissibly suggestive because he was
 23 barefoot, the only one with a jeri-curl hairstyle, and obviously in pain from a
 24 recent police beating. Mot. for Evid. Hrg at 34-35. Petitioner is wrong on both
 25 points.

26 ²⁹Ms. Freeman testified her son was not there that evening because he did not live with her and
 27 her husband. He lived with his girlfriend on Venice Boulevard.

28 Moreover, Mrs. Freeman described Petitioner as having, that evening, a jeri-curl hairstyle
 which, trial counsel pointed out, was not part of her description of Petitioner given during her
 Freeman preliminary hearing testimony. Mrs. Freeman responded she was never asked.

(A) Right to Counsel

Petitioner's 6th Amendment right to counsel was not violated at the lineup. The Wade-Gilbert rule makes it clear that the 6th Amendment right to counsel attaches only at or after the "initiation of adversary judicial proceedings" against the defendant. United States v. Gouveia, 467 U.S. 180, 188, 81 L. Ed. 2d 146, 104 S. Ct. 2292 (1984) discussing Kirby v. Illinois, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972). Adversary judicial proceedings are commence "by way of formal charge, preliminary hearing, indictment, information or arraignment." Id. citing Kirby 406 U.S. at 688-689 (declining to extend the per se exclusionary rule of identification testimony when an accused's right to counsel is violated at any "critical stage of the prosecution" to the situation where the witness identifications occur "long before the commencement of any prosecution whatsoever."); United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993). Any in-court identification based on a lineup that violates this 6th Amendment principle is inadmissible. Kirby, 406 U.S. at 683 discussing Wade, 388 U.S. 218, and Gilbert v. California, 388 U.S. 263; see Simmons, 390 U.S. 377.

Petitioner's lineup did not violate these principles because it took place prior to his arraignment, his preliminary hearing, and the filing of the information. Therefore, because his lineup occurred before commencement of any adversary proceedings against him case, his right to counsel had not yet attached. Kirby, 406 U.S. at 690; LaPierre, 998 F.2d at 1464; Dearinger, 468 F.2d at 1035. Since no right had attached yet, it is likely a motion to suppress the witnesses' in-court identifications would not have been granted. So trial counsel was not ineffective for not trying to suppress that testimony.

(B) Petitioner Was Barefoot, the Only Suspect with a Jeri-Curl Hairstyle & Obviously in Pain

Petitioner's remaining argument - counsel was ineffective for not moving to suppress the lineup because he was the only lineup suspect with a jeri-curl hairstyle, barefoot, and conspicuously in pain - is unpersuasive because it does not show not only "counsel's performance fell outside 'the wide range of professionally competent assistance,' " Tuan Van Tran v. Lindsey, 212 F.3d 1143, 1156 (9th Cir. 2000) citing Strickland v. Washington, 466 U.S. 668, 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), "but also that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Williams, 529 U.S. at 390 citing Strickland, 466 U.S. at 694.

Here, Petitioner has no credible evidence Strickland prejudice exists because he has not shown the "identification . . . must be suppressed [because] the line-up [procedure was] so impermissibly suggestive as to result in a substantial likelihood of irreparable misidentification." United States v. Collins, 559 F.2d 561, 563 (9th Cir. 1977) relying on Simmons, 390 U.S. 377; Tuan Van Tran, 212 F.3d at 1156. In Tran, the Ninth Circuit noted in a footnote that:

[a]lthough the prominent Supreme Court cases discussing suggestive processes have involved show-ups or single photographs, Biggers, 409 U.S. at 195; Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140, we have held that lineups can also be impermissibly suggestive, if the people in the lineup or the procedures employed at the lineup make it so. See, e.g., United States v. Field, 625 F.2d 862, 865 (9th Cir. 1980) ... The state court did not suggest that the standards governing suggestiveness should be different for lineups than for show-ups.

Tuan Van Tran, 212 F.3d at 1156, fn.18.

The court in Johnson, 820 F.2d 1065, stated an examination of the "totality of the surrounding circumstances" will reveal whether a lineup

1 procedure was unnecessarily suggestive. Id., at 1972 citing Davenport, 753 F.2d
2 at 1462 and Stovall, 388 U.S. at 302 (photographic array was not impermissibly
3 suggestive when defendant's photograph was hazier than others.); see Simmons,
4 390 U.S. 377; see also Bowman, 215 F.3d at 966; see United States v. Burdeau,
5 168 F.3d 352, 357 (9th Cir. 1999)(photographic array not impermissibly
6 suggestive where defendant's picture was darker than the rest and he was the only
7 one whose eyes were closed); see United States v. Carbajal, 956 F.2d 924, 929
8 (9th Cir. 1992)(array not impermissibly suggestive when defendant's photograph
9 was only one in which individual wore a wig and had bruises on face). The
10 Court does not find under the totality of the circumstances that the differences in
11 Petitioner's appearance in any way suggested to witnesses they should pick him
12 as the robber.

13 Petitioner's hairstyle did not make his lineup impermissibly
14 suggestive to cause the witnesses to pick him. The Ninth Circuit in Tuan Van
15 Tran, affirming the district court's finding that "some of the fillers in the lineup
16 were 'arguably somewhat heavier, thinner, taller or shorter, unkempt, or older'
17 than [Tran]," held "there was no absolute requirement that the other persons in
18 the lineup be 'nearly identical' to [the petitioner]." Tuan Van Tran, 212 F.3d at
19 1156. The court went on to agree with the lower court's conclusion that Tran
20 did not "so obviously stand out as to create a substantial likelihood of
21 misidentification." Id. Variations in appearance are not prejudicial so long as
22 "the defendant looked fairly similar to others in the lineup." Id. relying on United
23 States v. Barrett, 703 F.2d 1076, 1084-1085 (9th Cir.1983) and Collins, 559 F.2d
24 at 563 (court rejected Petitioner's claim lineup was impermissibly suggestive
25 "for three reasons: (1) three of the six Negro male individuals depicted appear to
26 be significantly younger than defendant; (2) only defendant and two others
27 appear to have afro-style haircuts; and (3) only defendant appears to have a
28 beard.").

1 Like Tran, Petitioner did not stand out in the video of the December
2 23, 1980 lineup. Not only did his hairstyle look similar to the others, but
3 Petitioner's overall appearance looked similar in height, weight, and complexion
4 to the others. All had facial hair and wore the same clothing.

5 As for Petitioner's assertion he wore no shoes during the lineup, the
6 Court did not find that to be obvious in the video lineup. However, it was
7 obvious in the lineup photo, but Petitioner presents no evidence the photo was
8 used for witnesses to identify him. And Petitioner fails to explain how wearing
9 no shoes during a lineup unnecessarily suggested a witness should choose him.
10 There is no evidence that his appearance without shoes created the risk of
11 misidentification by the witnesses. As mentioned, all six in the lineup looked
12 similar and were dressed in identical county jail clothing.

13 Moreover, even though the record contains testimony that Petitioner
14 suffered injuries possibly the result of a police beating, Petitioner's movements
15 and mannerisms in the lineup did not indicate, as alleged, that he was in pain.
16 His mannerisms were not noticeably different from those of the others.
17 Petitioner's only conduct that could possibly be construed to suggest he was in
18 pain was his initial faint response to the commands of the officer conducting the
19 lineup and the rapid batting of his eyes once he responded. However, four other
20 suspects were told to speak louder as well and there is no evidence the eye
21 batting was noticeable to the witnesses.

22 And even if the lineup was suggestive, no per se rule requires
23 suppression of the eyewitnesses' in-court identifications, Manson, 432 U.S. 98;
24 United States v. Duran-Orozco, 192 F.3d 1277, 1283 (9th Cir. 1999); United
25 States v. Montgomery, 150 F.3d 983, 993 (9th Cir.), cert. denied, 525 U.S. 917,
26 142 L. Ed.2d 220, 119 S.Ct. 267 (1998); Barron, 575 F.2d at 754; Dearinger,
27 468 F.2d at 1036, that are found to be reliable under the totality of circumstances
28 test. Biggers, 409 U.S. at 199-200; Tomlin, 30 F.3d at 1237; Barron, 575 F.2d

1 at 755. For example, identification testimony may be found reliable when a
2 witness has had a chance to view his assailant during the crime. United States v.
3 Simoy, 998 F.2d 751, 752 (9th Cir. 1993). Therefore, to establish the required
4 Strickland prejudice for his claim, Petitioner must show the witnesses'
5 identification testimony at his trial should have been excluded because it was not
6 based on a source independent of their observations of him at the lineup. during
7 the crime

8 However, the record does not show that. The record amply shows all
9 the eyewitnesses observed the robbers throughout the course of the robbery for at
10 least 5 to 15 minutes. Although the witnesses were not positive about their initial
11 photo spread identifications when, as indicated by the record, each was possibly
12 sedated because of injuries, all four were positive about their identification of
13 Petitioner at the December 23, 1980 lineup, 9 or 10 days after the robbery.
14 Further, at least three witnesses were positive about their identifications at
15 Petitioner's trial almost a year and half later. Because Petitioner has not shown a
16 colorable basis for either of these subclaims, so his request for an evidentiary
17 hearing on Claim 14 is denied.

18 **2. Claim 45 - Failure to Present Mitigating Evidence in Penalty Phase**

19 Claim 45 alleges trial counsel was ineffective during the penalty
20 phase of Petitioner's trial because she failed to present additional mitigating
21 evidence that was not cumulative on Petitioner's background. According to
22 Petitioner, counsel had no "sound strategic considerations" for not presenting the
23 evidence that would have been "consistent with defense counsel's penalty phase
24 theory of lingering doubt." Mot. for Evid. Hrg. at 60-61. Petitioner admits trial
25 counsel did present evidence of his disadvantaged background, his good deeds
26 during his mother's sickness, and the traumatic effect of his mother's death when
27 he was 10 years old, together with the chaotic family life that followed, and his
28 love for his own son.

1 Mitigation evidence included the testimony of Petitioner's sister, Lisa
2 Sanders, who explained Petitioner was the second of six children. Their family
3 lived in a housing project. When their mother became ill with leukemia,
4 Petitioner took care of the house and other children. After her death, the
5 household became chaotic. Unlike their mother, their father did not discipline
6 them. The house was filthy and the children wore old clothing. Petitioner and her
7 took care of the younger children. Lisa Sanders went on to say she loved her
8 brother. RT 15,865-15,919.

9 A family friend, Shirley Madison, testified Petitioner's father could
10 not care for the children. Their house was dirty and he failed to discipline them.
11 Plus, he drank alcohol in front of them. Petitioner and his sister, Lisa, when they
12 were teenagers, lived with Madison. Madison found Petitioner to be respectful
13 and helpful. She said she received calls from him once or twice a week and she
14 loved him like her he were her own child. RT 15,940-15,998.

15 Petitioner's brother Adrian Sanders, who was on leave from the Army
16 in Korea, testified he looked up to Petitioner when they were growing up. He
17 said sometime Petitioner would steal food to feed the younger children.
18 Petitioner also wrote letters to him while in the service telling him to stay out of
19 trouble. He too testified that he loved Petitioner very much. RT 15,998-16,025.

20 Also, there was testimony by Lisa Sanders and Madison about the
21 great love Petitioner had for his son, who was five years old at the time of the
22 trial.

23 Dr. Michael Paul Maloney, a clinical psychologist and associate
24 professor of psychiatry at the University of Southern California School of
25 Medicine, testified that he reviewed Petitioner's school and juvenile records.
26 They showed he did fine in school before his mother died. But afterwards, he
27 became difficult to handle. RT 16,046-16,057.

28 Petitioner complains the mitigation evidence was insufficient.

1 Counsel failed to present, for example, evidence Petitioner was born with crossed
2 eyes, spina bifida, a heart murmur, thoracic scoliosis, and a one sided pigeon
3 breast. These congenital problems caused him to miss much of his elementary
4 schooling. Moreover, born into extreme poverty, Petitioner and his family lived
5 in concrete housing projects covered in lead-based paint. Also, he was neglected
6 and abused in at least one of the foster homes in which he lived after his father
7 was jailed for child endangerment. Petitioner and his siblings would run away
8 from the foster homes to be with their father.

9 Petitioner also points to his juvenile record that reflects petty crimes,
10 including stealing food and toys for his family. CYA officials described him as
11 bright and not prone to violence. Petitioner further contends racism played a
12 major role in his childhood because schooling and housing were segregated and
13 inferior to that of whites. National studies have shown the criminal justice
14 system treats minority youths more harshly.

15 The only proof Petitioner presents to show trial counsel's error in
16 failing to present the additional evidence is an excerpt from trial counsel's book
17 admitting Petitioner's case was her first penalty phase trial and wishing she had
18 more experience at that time in "making tough tactical decisions." Leslie
19 Abramson, Bob's Big Boy, The Defense is Ready: Life in the Trenches of
20 Criminal Law," p. 161. However, the Court finds that neither the record nor
21 Petitioner's evidence show trial counsel's was ineffective for failing to present
22 more mitigating evidence because "failure to present mitigating evidence at a
23 capital sentencing hearing does not always constitute ineffective assistance of
24 counsel." Correll v. Stewart, 137 F.3d 1404, 1413 (9th Cir.) cert denied 525 U.S.
25 996, 142 L. Ed. 2d 418, 119 S. Ct. 465 (1998); see Darden v. Wainwright, 477
26 U.S. 168, 186, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986).

1 The evidence is insufficient to establish error under Strickland³⁰
 2 because Abramson's statement is not probative evidence that she erred.
 3 Strickland, 466 U.S. at 691-694. Without a doubt, "[t]o be sure, ineffective
 4 assistance must be evaluated 'from counsel's perspective at the time.' " Bean v.
 5 Calderon, 163 F.3d 1073, 1080 (9th Cir. 1998) cert. denied 528 U.S. 922, 145 L.
 6 Ed. 2d 239, 120 S. Ct. 285 (1999) citing Strickland, 466 U.S. 668, 689, 80 L. Ed.
 7 2d 674, 104 S. Ct. 2052 (1984). But "[t]he test has nothing to do with what the
 8 best lawyers would have done." Dyer v. Calderon, 122 F.3d 720, 732 (9th Cir.
 9 1997) cert. denied 525 U.S. 1033, 142 L. Ed. 2d 479, 119 S. Ct. 575(1998). The
 10 only question to "ask [is] whether some reasonable lawyer at the trial could have
 11 acted, in the circumstances, as defense counsel acted at trial." Id. discussing
 12 White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992), cert. denied, 514 U.S.
 13 1131, 131 L. Ed. 2d 1008, 115 S. Ct. 2008 (1995). The test should " 'neither
 14 second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of
 15 hindsight.' " Id. at 732 quoting Campbell v. Wood, 18 F.3d 662, 673 (9th Cir.)
 16 (en banc), cert. denied, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994). The Court
 17 finds Abramson's opinion to be nothing more than her applying the fabled
 18 hindsight with 20/20 vision to second guess her earlier decisions.

19 Abramson's decision not to present the additional mitigating
 20 evidence should be "directly assessed for reasonableness in all the
 21 circumstances, applying a heavy measure of deference to counsel's judgments."
 22 Dyer, 122 F.3d at 732 citing Washington, 466 U.S. at 691 And Petitioner has
 23 the burden of showing trial counsel's performance was "neither reasonable nor
 24 the result of sound trial strategy." Murtishaw v. Woodford, 255 F.3d 926, 939
 25 (9th Cir. 2001). He must show that Abramson "made errors so serious that
 26 counsel was not functioning as the 'counsel' guaranteed the defendant by the

27
 28 ³⁰The Strickland analysis is the same with respect to the penalty phase as it is with the guilt phase." Bonin v. Vasquez

1 Sixth Amendment.” Campbell, 18 F.3d at 673 quoting Strickland, 466 U.S. at
2 687.

3 Petitioner’s evidence falls short of this showing, because contrary to
4 his allegations, the Ninth Circuit noted in Dyer “[w]e have held defense
5 counsel's performance ineffective where counsel presents absolutely no
6 mitigating evidence in a case where substantial evidence was available,” Dyer,
7 122 F.3d at 735 discussing Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992),
8 cert. denied, 507 U.S. 951, 122 L. Ed. 2d 742, 113 S. Ct. 1363 (1993), “counsel's
9 decision not to conduct a particular investigation does not render performance
10 defective where the decision is reasonably justifiable.” Id., at 735 discussing
11 Strickland, 466 U.S. at 691. The Dyer court went on to state: “[w]e have never
12 held that counsel has a duty to uncover every aspect of a defendant's past and to
13 present all evidence that might bolster a defendant's mitigation case.” Dyer, 122
14 F.3d at 735. “Strategic choices made after thorough investigation of law and
15 facts relevant to plausible options are virtually unchallengeable; and strategic
16 choices made after less than complete investigation are reasonable precisely to
17 the extent that reasonable professional judgments support the limitations on
18 investigation.” Id., at 732 citing Strickland, 466 U.S. at 690-691.

19 Therefore, Petitioner’s argument that trial counsel’s decision to
20 present no further mitigating evidence in the penalty phase was based on a less
21 than complete investigation of his background lacks merit. The additional
22 mitigating evidence, contrary to Petitioner’s assertion, would have amounted to
23 mostly cumulative evidence of his disadvantaged background, good deals, and
24 chaotic family after his mother’s death, which was already presented to the jury.
25 Dyer, 122 F.3d at 734 (petitioner’s “newly proffered evidence, largely
26 cumulative of the information that was actually presented to the jury, does not
27 establish [trial counsel’s] ineffectiveness.”); see Mills v. Singletary, 63 F.3d 999,
28 1024 (11th Cir. 1995) (“counsel is not required indiscriminately to present

evidence”), cert. denied, 134 L. Ed. 2d 940, 116 S. Ct. 1837 (1996); see United States v. Schaflander, 743 F.2d 714, 718-719 (9th Cir. 1984), cert. denied, 470 U.S. 1058, 84 L. Ed. 2d 832, 105 S. Ct. 1772 (1985)(failure to present cumulative testimony does not show prejudicial ineffective assistance).

Although conceivably an argument could be made that a failure to present evidence on Petitioner’s physical limitations is error, the argument is without merit. None of Petitioner’s evidence offered in support of this claim included probative evidence on the effect of those physical problems on Petitioner, making any error speculative at best. Therefore, the Court denies Petitioner requests for an evidentiary hearing on the claim.

E. OTHER CLAIMS

1. Claim 31 - Petitioner’s Rights to Due Process & Fair Trial Violated When Juror Bateman Was Discharged After She Told the Court She Was Well Enough to Continue Service as a Juror

Petitioner claims his Sixth and Fourteenth Amendment rights were violated when the trial judge, before the start of the penalty phase of his trial, erroneously discharged juror Patricia Bateman without conducting a hearing and replaced her with an alternate who had not participated in the guilt phase deliberations and verdict. Petitioner’s Mot. for Evid. Hrg at 59. Petitioner states the basis for Ms. Bateman’s discharge was her high blood pressure which caused her to collapse twice during jury deliberations,³¹ despite trial counsel’s argument

³¹Judge Ideman described on the record Ms. Bateman’s first attack:

at an earlier point in this trial Mrs. Bateman became ill, became unconscious. The juror then stopped breathing and was resuscitated by the clerk. The paramedics were called. She was evacuated to Queen of Angels Hospital. The Court made the determination at that time that she would be able to continue on the case, and in a very admirable fashion she has done so. The Court is advised that Mrs. Bateman does suffer from high blood pressure, and under situations of stress can and does become ill. RT 15,699.

He went on to describe her second attack:

The Court asked the jury to go back and reconsider Count VI, which

1 the attending paramedics said her condition was not life threatening and her
 2 hyperventilation was stress-induced. Petitioner's Mot. for Evid. Hrg at 59.
 3 Notwithstanding Ms. Bateman's declaration, submitted by Petitioner, that offers
 4 assurances of her ability to have continued as a juror, Petition Exhibit 84, the
 5 Court finds there is no basis for relief on the claim.

6 Notwithstanding Petitioner's allegations of 6th and 14th Amendment
 7 rights violations, his claim is not colorable because a trial court's failure to
 8 discharge a juror in accordance with a state statute is a state law error that is not
 9 cognizable in a federal habeas proceeding and Petitioner has not presented the
 10 Court with any case stating the contrary. See Blandford v. Sowders, 878 F.2d 381
 11 (6th Cir. 1989). In a 28 U.S.C. §2254(b) habeas proceeding, because a federal
 12 court is limited to deciding only whether the federal constitution or federal law
 13 has been violated, a state law error claim may only be entertained if the error
 14 "rendered the trial so 'arbitrary and fundamentally unfair' that it violated federal
 15 due process." Williams v. Vasquez, 817 F. Supp. 1443, 1469 (E.D. Cal. 1993),
 16 overruled in part by Calderon v. United States Dist. Court, 163 F.3d 530 (9th Cir.
 17 1998), citing Pennywell v. Rushen, 705 F.2d 355, 357 (9th Cir. 1983) (quoting
 18 Powell v. Spalding, 679 F.2d 163, 166 (9th Cir. 1982); see also Johnson v.
 19 Rosemeyer, 117 F.3d 104, 109 (3d Cir. 1997).

20
 21 Mrs. Ushman had indicated, due to a clerical oversight, there was an
 22 allegation that had not been signed. The Court was informed and
 23 observed that Mrs. Bateman did collapse again while back in the jury
 24 room. She appeared to be in much the same condition as the first time,
 25 except that she was still breathing. She was brightly flushed red. She
 26 was breathing rather laboriously. Her eyes had a rather fixed and
 27 glazed look. The paramedics were then called, and they have
 28 determined that she does not require hospitalization at this time but
 have informed the Court that her condition is due to the high blood
 pressure and the pressure that's inherent in this long and arduous trial
 When Mrs. Bateman collapsed the first time, I gave serious thought
 to replacing her because I don't want to endanger her life. ... I took a
 chance. I let her continue on the jury, but now it appears that the
 pressure of today's proceedings was responsible for today's attack.
 She was flat on her back in the jury room breathing heavily, her face
 was very flushed, and she's just medically unable to continue with the
 trial. RT 15,699-15,700.

Here, as the petitioner in Campbell v. Blodgett, 982 F.2d 1321, 1330 (9th Cir. 1992), Petitioner has not shown a state law error "sufficiently egregious to amount to a due process violation." Id., at 1330 (no due process violation from the Washington Supreme Court's failure to "independently review the record for evidence that [Petitioner's] death sentence was imposed through passion and prejudice, as required by state law.") Petitioner only alleges the trial court discharged Ms. Bateman *sua sponte* without the benefit of a hearing. Not only does he fail to cite the statutory or case law basis under state law mandating the hearing he suggests should have been conducted,³² but he fails to cite any federal constitutional authority mandating hearing before discharging a juror that comports with due process. See Sowders, 878 F.2d 381 (trial court's method of excusing jurors, depriving a defendant of the same jurors in both the guilt and penalty phase, is a matter of state law). Absent a specific constitutional error, this Court is limited to deciding whether the state law error rises to the level of a due process violation that rendered the trial so arbitrary and fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) (absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process.")

³²Both Cal. Pen. Code §§ 1123, which has been repealed and replaced by Cal. Code of Civ. § 233, and 1089 address the discharge of an ill juror, but neither, as conceded by appellant counsel in his Opening Brief on direct appeal of Petitioner's case, require a hearing. Appellant's Opening Brief at 185. The only arguable basis for a mandatory hearing rests in California case law. The California Supreme Court stated in People v. Bradford, 15 Cal.4th 1229, 1348; 939 P.2d 259 (1991), and later reiterated in People v. Cleveland, 25 Cal. 4th 466 (2001):

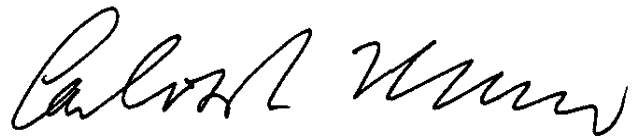
The decision whether to investigate the possibility of juror bias, incompetence, or misconduct--like the ultimate decision to retain or discharge a juror--rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.' " (People v. Osband, supra, 13 Cal. 4th 622, 675-676.) A hearing is required only where the court possesses information which, if proved to be true, would constitute "good cause" to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case. (Ibid.).

1 Petitioner presents no evidence of a due process violation raising to this level.

2 Petitioner's proffer of evidence does not suggest a state court's failure
3 to follow procedures in excusing jurors is not a matter of state law. Petitioner's
4 claim does not amount to a cognizable federal claim and his request for an
5 evidentiary hearing is denied.

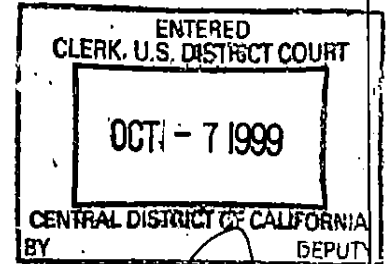
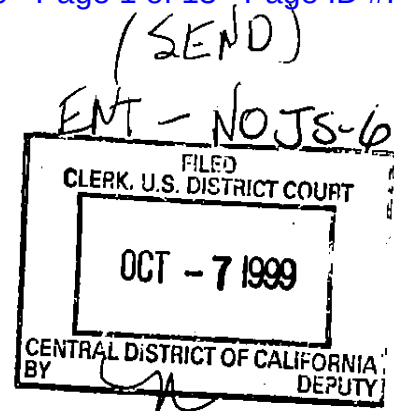
6
7 IT IS SO ORDERED.

8 Dated: October 15, 2001



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10 CARLOS R. MORENO
11 United States District Judge
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APPENDIX I



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICARDO RENE SANDERS
Petitioner,
v.
ARTHUR CALDERON, Warden of
California State Prison at San Quentin,
Respondent.

CASE NO. CV 96-7429 JSL

DEATH PENALTY

ORDER ADOPTING COURT'S
FEBRUARY 25, 1999 ORDER ON
RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT IN ITS ENTIRETY

**THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).**

INTRODUCTION

The Court has reviewed all the briefing submitted in response to the Court's Tentative Order on Respondent's Motion for Summary Judgment, issued on February 25, 1999. After careful consideration, the Court hereby adopts its tentative order in its entirety.

ANALYSIS

I. Petitioner's Arguments Regarding the Court's Tentative Order Granting Summary Judgment in Favor of Respondent on Claim 16

In claim 16 Petitioner alleges that the admission of three extrajudicial statements by accomplice Carletha Stewart¹ denied him his rights under the Confrontation Clause in violation of Bruton v. United

¹ As the Court stated in its tentative order:

The first statement Petitioner objects to arose during the testimony of Brenda Givens, a waitress at the Bob's Big Boy restaurant, who testified

(continued...)

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1 States, 391 U.S. 123 (1968).

2 The Court granted summary judgment in favor of Respondent on claim 16 in its tentative order.
 3 Petitioner objects to the tentative order's treatment of claim 16 for two reasons. First, Petitioner
 4 contends that the foundational finding required for admission of the proffered statements against
 5 Petitioner, the existence of a conspiracy and his connection to it, is not established by the facts the Court
 6 relied upon to make that finding. Second, Petitioner contends that given the statement that the Court
 7 ruled was improperly admitted was testified to by Bruce Woods, and given that Bruce Woods role in
 8 the case is the subject of two other claims, claims 21 and 22, the determination that the admission of that
 9 statement was harmless should be deferred until after the factual development of these claims is
 10 completed.

11 **A. Petitioner's Argument That the Alleged Co-conspirator Statements Should**
 12 **Not Have Been Admitted Against Petitioner Because the Independent**
 13 **Evidence Did Not Establish the Existence of a Conspiracy and Even If it**
 14 **Did, the Evidence Did Not Establish Petitioner's Participation in Any Such**
 15 **Conspiracy**

16 In the tentative order the Court found the prosecution presented substantial evidence of a
 17 conspiracy involving Petitioner and Stewart, without even considering Stewart's extrajudicial
 18 statements, such that Stewart's statements were properly admitted at trial. However, as discussed below,
 19 the Court was not required to ignore Stewart's extrajudicial statements in making this determination.

20
 21 ¹(...continued)

22 that she spoke with Stewart in county jail on a day several months before
 23 the incident. At the time Stewart was accompanied by Petitioner and his
 24 co-defendant, Franklin Freeman. Givens testified that Stewart told her:
 "Good thing I seen you today. They gonna rob Bob's Big Boy tonight
 and I don't want you hurt." RT at 10,855-864. Stewart then told Givens
 that she would come by the restaurant that evening. RT at 10,867-868.

25 The second statement came up during Andre Gilcrest's testimony.
 26 Gilcrest testified that Stewart told him "Ricky and Frank [are] going to
 27 rob Bob's Big Boy tonight." Gilcrest, who denied that he had anything
 28 to do with the robbery, went with Stewart to the restaurant on that same
 night to drink coffee. The third statement was introduced through the
 testimony of Bruce Woods, a jailhouse informant, who testified that he
 once heard Stewart ask another man if he would help her rob Bob's Big
 Boy restaurant.

Tentative Order on S/J at 11.

1 It is true that a coconspirator's out-of-court statement, standing alone, is insufficient to establish that a
 2 defendant had knowledge of and participated in a particular conspiracy. United States v. Gordon, 844
 3 F.2d 1397, 1402 (9th Cir. 1988). In other words, there must be "some evidence aside from the proffered
 4 co-conspirator's statements." United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988). However,
 5 the hearsay itself may be considered in making the determination of whether there was a conspiracy, and
 6 whether the statement was made during the course and in furtherance of the conspiracy. Bourjaily v.
 7 United States, 483 U.S. 171, 178-79 (1987). Moreover, although it is true that "there must be some
 8 evidence, aside from the proffered statements, of . . . defendant's involvement," Gordon, 844 F.2d at
 9 1402, "[o]nce the conspiracy is shown, the prosecution need only present slight evidence connecting the
 10 defendant to the conspiracy." United States v. Crespo de Llano, 838 F.2d 1006, 1017 (9th Cir. 1987).

11 **1. Petitioner's Complaint About Reliance on Bruce Woods' Testimony**

12 First, Petitioner says that the statements that were attributed to Petitioner were made long after
 13 the charged conspiracy ended, and thus have no probative value in establishing the existence of the
 14 conspiracy. However, Petitioner's knowledge at the time that he threatened Woods was that he, along
 15 with Stewart, was being charged with the murders, and that both he and Stewart were suspected of being
 16 members of the same conspiracy to rob the Bob's Big Boy restaurant. Therefore his threat to Woods
 17 can support an inference of consciousness of his own involvement in the conspiracy. Petitioner's
 18 reliance on Silverman, which held that the passage of time served as a basis for not relying upon the
 19 defendant's concealment of his identity to show he knew of or participated in the conspiracy is not well-
 20 taken, because in Silverman, at the time the defendant temporarily concealed his identity from law
 21 enforcement, he was not aware that he was suspected of involvement in the conspiracy. Silverman, 861
 22 F.2d at 580. In Silverman it was the "two-month delay, coupled with the absence of any showing by
 23 the Government that David Silverman was aware that he was suspected of involvement in any cocaine-
 24 related crime" which "rendered any inference of guilt from such concealment improper." Id. at 580
 25 (emphasis added).

26 However, here Petitioner had the knowledge that he was suspected of participating in the same
 27 conspiracy with Stewart, and thus he had a motive to intimidate a witness from testifying against his co-
 28 conspirator even though three months had passed since the conspirators had met their goal of robbing

1 the restaurant.

2 Second, Petitioner contends that the statements Petitioner made to Woods are not probative of
 3 the existence of a conspiracy or Petitioner's connection to it. However, Petitioner is examining the
 4 statements made separately, instead of looking at both statements, which were made during the same
 5 verbal exchange, in the context within which they were made. Here the statements were made
 6 immediately after Woods testified at both the preliminary hearings in Petitioner's case and Stewart's
 7 case. On the return trip to the county jail, Petitioner asked Woods why he would want to testify against
 8 Stewart, and threatened him by saying that he should be careful in jail if Petitioner went back to jail.
 9 The attempted intimidation of Woods, who planned to testify against Stewart, who was suspected of
 10 being Petitioner's co-conspirator, is in and of itself a sufficient basis from which to infer that Petitioner
 11 was also a member of the conspiracy as suspected. In other words, Petitioner's attempt to protect his
 12 alleged co-conspirator from adverse testimony can reasonably be viewed as an action meant to protect
 13 himself from being found guilty of conspiracy. From this one can reasonably infer that a conspiracy
 14 existed and Petitioner was connected to it.

15 Nor are Woods' statements the only independent evidence relied upon by this Court to show that
 16 a conspiracy existed and that Petitioner was involved in it. Moreover, once a conspiracy is shown, the
 17 prosecution need only present slight evidence connecting the defendant to the conspiracy. Crespo de
 18 Llano, 838 F.2d at 1017; United States v. Mason, 658 F.2d 1263, 1269 (9th Cir. 1981).

19 2. Petitioner's Complaint About Reliance on Orasteen Freeman's 20 Statements

21 Orasteen Freeman, Franklin Freeman's mother², testified that about five hours before the Bob's
 22 Big Boy robbery she saw Stewart and Petitioner together at her house. RT 10,306. Petitioner complains
 23 that this is evidence of "wholly innocuous conduct." Silverman, 861 F.2d at 578. While, if considered
 24 alone, Orasteen Freeman's testimony could be considered evidence of wholly innocuous activity, when
 25 placed in the context of the other evidence that supports a finding of a conspiracy, it supports a finding
 26 that Petitioner was involved in the plan to rob the restaurant.

27 As the Ninth Circuit has held, to admit a co-conspirator's out-of-court statement:

28

²Franklin Freeman was a third co-conspirator.

1 There must be "some evidence aside from the proffered co-conspirator's
 2 statement." United States v. Silverman, 861 F.2d 571, 577 (9th
 3 Cir.1988). This additional evidence will "rarely" be corroborative if the
 4 conduct or statements of the defendant were "wholly innocuous." Id. at
 5 578. A co-conspirator's statement does not become more reliable "when
 coupled with evidence of conduct that is completely consistent with
 defendant's unawareness of the conspiracy." Id. It is permissible,
however, for a court to consider the corroborating evidence "in light of
the co-conspirator's statement itself." Id.

6 United States v. Miller, 981 F.2d 439, 442 (9th Cir. 1992) (emphasis added). In addition, Orasteen
 7 Freeman's testimony can be considered in conjunction with Woods' testimony, as well as Gilcrest's
 8 testimony.

9 3. Petitioner's Complaint About Reliance on Andre Gilcrest's 10 Testimony

11 In the tentative order the Court also relied upon Gilcrest's testimony as constituting substantial
 12 evidence of a conspiracy involving Petitioner and Stewart.³ Petitioner contends that the facts reported
 13 by Gilcrest do not provide a basis for inferring the existence of a conspiracy. Petitioner argues that
 14 according to Gilcrest's testimony, Stewart was attempting to locate Petitioner and Frank after they left
 15 her house, thus, she did not know where they were at, and she went to the restaurant to see if they were
 16 there, which Petitioner contends is an unlikely event if in fact she was part of the conspiracy to rob the
 17 restaurant. Petitioner argues: "[t]o infer the existence of the charged conspiracy from these facts
 18 requires either speculation or the impermissible contaminating influence of the very evidence it is to be
 19 considered independently of." Pet'r Brf. at 7:22-24. However, as stated in Silverman:

20 in this circuit, when the proponent of the co-conspirator's statement
 21 offers no additional proof of the defendant's knowledge of and
 22 participation in the conspiracy, the statement must be excluded from
 evidence. Where, on the other hand, some additional proof is offered, the
 court must determine whether such proof, viewed in light of the co-

23
 24 ³Gilcrest testified that on September 27, 1980, he went with Stewart to Bob's Big Boy. RT at
 12,066-067. While at the restaurant Stewart spoke to two waitresses and asked who was present at the
 25 restaurant and which managers were present. RT at 12,069. She also made a telephone call. RT at
 12,070. After having coffee at Bob's Big Boy restaurant and leaving the restaurant, Gilcrest and Stewart
 26 went back to her house. She left Gilcrest's company for a period of time when Ricky and Frank came
 to the house and she was talking to them. RT at 12,070-071. When Stewart was standing by Ricky's
 27 car, talking to him, Gilcrest saw Ricky show a shotgun to Stewart. RT at 12,074-075. Gilcrest saw
 another shotgun braced between Frank's legs. RT at 12,076. After Ricky and Frank left Stewart's
 28 house, Gilcrest observed Stewart pacing the floor. RT at 12,071. Stewart attempted to make some
 telephone calls to locate Ricky and Frank, and eventually left to go to Bob's to see if they were there.
 RT at 12,071, 12,079.

1 conspirator's statement itself, demonstrates by a preponderance of the
 2 evidence that defendant knew of and participated in the conspiracy.

3 Silverman, 861 F.2d at 578 (second emphasis added).

4 Thus, the Court can consider Stewart's other statements: (1) the warning given to Brenda Givens,
 5 a waitress at the restaurant, in which Stewart warned her about the impending robbery; (2) the statement
 6 made to Gilcrest that Petitioner and Frank were going to rob the restaurant that night; and (3) the
 7 statement that Bruce Woods overheard in which she asked another man if he would help her rob the
 8 restaurant. When considered in the proper context, this evidence supports a finding that a conspiracy
 9 existed between Petitioner and Stewart, and the statements admitted where made "during the course and
 10 in furtherance of the conspiracy." Bourjaily, 483 U.S. at 175.

11 Petitioner complains that Gilcrest was not a reliable witness with respect to reporting the co-
 12 conspirator statements. However, Gilcrest's own credibility is not the issue in determining whether the
 13 statements of Stewart, who was an alleged co-conspirator, should have been admitted. Rather the issue
 14 in the admissibility of co-conspirator statements is the presumptive inherent unreliability of those
 15 statements alleged to have been made by the co-conspirator. Whether the individual who reports the co-
 16 conspirator's statements is credible is a question for the jury.

17 Based upon the above analysis, the evidence that this Court used and "viewed in light of the co-
 18 conspirator's statement itself", to find that Petitioner "knew of and participated in the conspiracy" was
 19 a sufficient basis upon which to admit the evidence of the co-conspirator's statements.⁴ Silverman, 861
 20 F.2d at 578. Accordingly, Petitioner's request that this Court not adopt its Tentative Order as to Claim
 21 16, and instead deny summary judgment at this stage in the proceeding is DENIED.

22 \\\

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24 \\\

25
 26 ⁴Here we have one alleged co-conspirator threatening a witness who planned to testify against
 27 another co-conspirator, the fact that two of the co-conspirators were together five hours before the
 28 robbery, and the observations that a co-conspirator was checking out the intended target of the robbery
 to see who was working that evening, talking with the two other co-conspirators who were armed, and
 attempting to monitor their movements. Taken together, this is sufficient independent evidence such
 that the co-conspirator's statements were properly admitted.

B. Petitioner's Argument That the Court Should Defer Ruling on Claim 16 Until After the Completion of the Factual Development of the State Habeas Claims

Petitioner contends that a harmless error determination should not be made until the Court has allowed Petitioner to factually develop claims 21 and 22. In claim 21 Petitioner alleges that illegally planting informant Bruce Woods on a jailhouse bus with Petitioner to obtain false incriminating information violated Petitioner's rights under the Sixth and Fourteenth Amendments. In claim 22 Petitioner contends that the perjured and/or materially false testimony of Bruce Woods violated Petitioner's rights under the Sixth and Fourteenth Amendments. However, these are separate and distinct claims, which have nothing to do with the co-conspirator statements testified to by Brenda Givens and Andre Gilcrest. It was the testimony of Givens and Gilcrest that demonstrates that assuming arguendo that Bruce Woods' testimony was wrongly admitted, it was harmless when considered in the context of the other evidence of the conspiracy.

Petitioner appears to argue that because he has alleged in other claims that Woods' testimony was not reliable or not legally obtained, that the Court should not determine at this juncture whether it was harmless or not in terms of the admission of the co-conspirator's statement. However, the Court finds that the claims stand on their own, as they present distinctively different issues. While the Court has found that taking Woods' testimony at face value, even if it had been incorrectly admitted at trial, it did not have an "injurious effect or influence" in determining the jury's verdict, Brecht v. Abrahamson, 507 U.S. 619, 622 (1993), the Court will later determine whether Woods' testimony should have been admitted at all under Massiah v. United States, 377 U.S. 301 (1964) and United States v. Henry, 447 U.S. 264 (1980), and whether the admission of Woods' testimony was a violation of due process because the prosecution knew the testimony was perjured. Moreover, when it comes time to rule on Petitioner's claim of cumulative error, (claim 44), the Court will then determine whether the admission of Woods' testimony entitles Petitioner to relief based upon the cumulative effect of the guilt and penalty phase errors. Accordingly, since there is no need to await resolving this aspect of claim 16, Petitioner's argument on this aspect of the Court's tentative order provides no basis for modifying the tentative order.

II. Respondent's Arguments Regarding the Court's Tentative Order Denying Summary Judgment as to All the Claims Originally Raised During State Habeas Corpus Proceedings, Cumulative Error Claims (Claims 27 and 44), and Claim 40 (Permitting the Jury to Consider All Four Multiple Murder Special Circumstance Findings as Aggravating Was an Error)

Since Petitioner filed his request for counsel after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to his petition.⁵ See Lindh v. Murphy, 521 U.S. 320, 336-38 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. denied, 118 S. Ct. 586 (1997); Calderon v. U.S. Dist. Court for Central Dist. of Cal. (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999). The AEDPA provides that a petition for a writ of habeas corpus shall not be granted unless the state court's adjudication on the merits of the claim "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." 28 U.S.C. § 2254(d)(1).

In the tentative order, the Court denied Respondent's Motion for Summary Judgment on the claims which were raised during Petitioner's state habeas proceedings, finding that summary judgment was inappropriate before the Court examines the precise extent to which these claims are permitted to be factually developed under the AEDPA.

A. Respondent's Argument That Delgado v. Lewis Supports His Position that Summary Judgment Should be Granted on the Remaining Claims

One of the issues in this case as to the rest of the claims for which Respondent had moved for summary judgment is the extent to which this Court can review a state court's "application" of clearly established law when the state court does not articulate the rationale for its determination. See Delgado v. Lewis, ___ F.3d ___, No. 97-56162, 1999 WL 415523 (9th Cir. June 23, 1999). Respondent argues that the Ninth Circuit has recently made clear that the highly deferential standard of review defined in 28 U.S.C. § 2254(d) applies to all state court adjudications on the merits, regardless of whether they were accompanied by a reasoned opinion explaining the decision. Respt. Request to Cite New Supreme Court and Ninth Circuit Authority in Support of Mot. for S/J at 1-2. Under 28 U.S.C. § 2254(d):

⁵Petitioner filed his request for counsel on October 22, 1996.

1 An application for a writ of habeas corpus on behalf of a person in
 2 custody pursuant to the judgment of a State court shall not be granted
 with respect to any claim that was adjudicated on the merits in State court
 proceedings unless the adjudication of the claim --

3 (1) resulted in a decision that was contrary to, or involved an
 4 unreasonable application of, clearly established federal law, as
 determined by the United States Supreme Court of the United
 States; or

5 (2) resulted in a decision that was based on an unreasonable
 6 determination of the facts in light of the evidence presented in the
 state court proceeding.

7 The Ninth Circuit has held that "when a state court does not articulate the rationale for its
 8 determination, a review of that court's 'application' of clearly established federal law is not possible."
 9 Delgado, 1999 WL 415523, at *3. Accordingly, "when confronted with a state court decision that does
 10 not provide the basis of its decision, we must determine whether, in light of an independent review of
 11 the record and the relevant federal law, the state court's resolution of a petitioner's claim was 'contrary
 12 to, or involved an unreasonable application of, clearly established federal law, as determined by the
 13 Supreme Court of the United States.'" Id. (quoting 28 U.S.C. § 2254(d)(1)).

14 In a footnote the Circuit explained that:

15 Conducting an independent review of the record and applicable federal
 16 law when the state has not articulated its reasoning is not the equivalent
 17 of applying a de novo standard of review to state court decisions under
 these circumstances; rather, it provides the method for ascertaining
 18 whether the state court's resolution of the case was "contrary to, or
 involved an unreasonable application of, clearly established Federal law"
 under AEDPA.

19 Id. at n. 3 (quoting 28 U.S.C. § 2254(d)(1)).

20 This is the standard under which all the remaining claims in the petition, of which there are 25,
 21 need to be examined. However, Respondent contends that none of Petitioner's remaining claims can
 22 survive the application of the standard set forth at 28 U.S.C. § 2254(d), and that the Court should grant
 23 summary judgment in its favor on the rest of the claims in the petition because "petitioner has failed to
 24 set forth any colorably meritorious claims which might require additional factual development." Respt
 25 Supp. Brf on Application of AEDPA to Remaining Claims, at 6. In other words, Respondent is
 26 attempting to demonstrate that the Court's tentative order finding that it is proper to ascertain the extent
 27 to which the viable claims left in the petition can be factually developed, prior to dismissing them on
 28 a summary judgment motion, should not be adopted.

As a preliminary matter, because this area of the law is unsettled, there is a great risk that the resources expended on adjudicating whether each of the remaining 25 claims can survive the application of 28 U.S.C. § 2254 will at least in part, be wasted should the law change prior to the ultimate disposition of the case. The Ninth Circuit has explicitly stated: “[t]his court has not yet set out a clear delineation of how to conduct a § 2254 review.” Wilson v. Henry, __ F.3d __, No. 98-16301, 99 Daily Journal D.A.R. 7629, 7629 (9th Cir. July 28, 1999) (citing Davis v. Kramer, 167 F.3d 494, 500 (9th Cir. 1999), petition for cert. filed, 67 U.S.L.W. 3570 (U.S. Mar. 8, 1999) (No. 98-1427)).

The case that Respondent relies upon, Delgado v. Lewis, __ F.3d __, No. 97-56162, 1999 WL 415523 (9th Cir. June 23, 1999), states that “Davis provides a framework for analyzing state court opinions under AEDPA.” Id., 1999 WL 415523, at *3. However, Davis states:

To date, we have not defined the term “unreasonable application” as used in § 2254(d), nor have we explained the difference between “contrary to” and “unreasonable application of,” as used in that section.

Davis, 167 F.3d at 500; see also MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir. 1999).

The Davis opinion was also cited in Wilson for the proposition that the Ninth Circuit has not clearly set forth a delineation of how to conduct § 2254(d) review.” Wilson, 99 Daily Journal D.A.R. at 7629.

While Respondent proceeds on the theory that under Delgado Petitioner’s claims should be dismissed without any consideration as to whether factual development of the claims is appropriate under the AEDPA, in Delgado the Ninth Circuit approved of the approach in Cardwell v. Greene, 152 F.3d 331 (4th Cir.), cert. denied, 119 S. Ct. 587 (1998). Delgado, 1999 WL 415523, at *3. Even Respondent explicitly recognized that the “Delgado court expressly relied” upon Cardwell. Respt. Supp. Brf on Application of AEDPA to Remaining Claims, at 18-19. Similarly, Baja v. Ducharme, __ F.3d __, 99 Daily Journal D.A.R. 8083 (9th Cir. Aug. 9, 1999), followed the approach of the Fourth Circuit in Cardwell:

The Fourth Circuit has aptly summarized the impact of the AEDPA revisions on a district court’s decision to deny a request for an evidentiary hearing. Before the enactment of the AEDPA, the decision concerning an evidentiary hearing with respect to a habeas petition was firmly committed to the discretion of the district court, subject to some judicially-created limitations on that discretion. The amendments contained in the AEDPA, by contrast, impose “an express limitation on the power of a federal court to grant an evidentiary hearing, and have

1 reduced considerably the degree of the district court's discretion. . . .

2 Baja, 99 Daily Journal D.A.R., at 8083 (internal citations and quotations omitted)

3 Baja goes on to find:

4 Under the amended statutory scheme, a district court presented with a
 5 request for an evidentiary hearing, as in this case, must determine
 6 whether a factual basis exists in the record to support the petitioner's
 7 claim. If it does not, and an evidentiary hearing might be appropriate, the
 8 court's first task in determining whether to grant an
 9 evidentiary hearing is to ascertain whether the petitioner
 10 has "failed to develop the factual basis of a claim in State
 11 court." If so, the court must deny a hearing unless the
 12 applicant establishes one of the two narrow exceptions set
 13 forth in § 2254(e)(2)(A) & (B). If, on the other hand, the
 14 applicant has not "failed to develop" the facts in state
 15 court, the district court may proceed to consider whether
 16 a hearing is appropriate, or required under Townsend.

11 Id. at 8084 (quoting Cardwell, 152 F.3d at 337).

12 In Cardwell, after the Fourth Circuit decided that the district court did not err in denying the
 13 petitioner an evidentiary hearing, and before turning to the merits of the petitioner's claims for relief,
 14 the Fourth Circuit looked to 28 U.S.C. § 2254(d), stating that it "must confront another aspect of the
 15 AEDPA in determining what standard governs our review of his federal claim." Cardwell, 153 F.3d at
 16 339. Thus, the propriety of factual development of the claims was considered first, and then the Fourth
 17 Circuit turned its attention to whether the adjudication of the claim resulted in a "decision that was
 18 contrary to, or involved an unreasonable application of, clearly established Federal law, as determined
 19 by the Supreme Court of the United States. . . . Id. (quoting 28 U.S.C. § 2254(d)(1)).

20 Despite the manner in which the issues were examined in Cardwell, which has been cited
 21 approvingly by the Ninth Circuit in both Delgado and Baja, Respondent still contends that in light of
 22 Baja, this Court should proceed to determine the claims remaining in the petition without an evidentiary
 23 hearing. Respondent assumes this is a productive manner in which to proceed even though there is not
 24 a motion for evidentiary hearing currently before the Court that it can rule upon. Without actually
 25 having a motion before it, such a ruling would be an advisory opinion. Petitioner has actually requested
 26 that the Court issue a scheduling order (or direct the parties to propose such a scheduling order), for the
 27 filing of his request for an evidentiary hearing under Local Rule 26.8.7(g), together with any discovery
 28 requests under Local Rule 26.8.7(f), and Respondent's responses thereto.

While it is true that in Baja the Ninth Circuit held that the new statute “now substantially restricts the district court’s discretion to grant an evidentiary hearing,” Baja, 99 Daily Journal D.A.R. at 8083, here Petitioner has not yet even been afforded the opportunity to make the showing that an evidentiary hearing is necessary in this case, and that he can satisfy the requirements of 28 U.S.C. 2254(e). At this juncture, particularly because no motion for evidentiary hearing has even been filed, it would be difficult to find that the instant case is one in which the record is so fully developed and so clearly demonstrates the falsity of Petitioner’s allegations that resolution of the disputed facts without an evidentiary hearing is justified. Accordingly, the Court does not accept Respondent’s argument that the Court should modify its tentative order to dismiss all the remaining claims.

B. Respondent’s Argument That Strickler v. Greene Supports His Position That Summary Judgment Should be Granted on the Remaining Claims In Which Petitioner Alleges Violation of Brady v. Maryland

Petitioner contends that in Strickler v. Greene, 119 S. Ct. 1936 (1999), the United States Supreme Court clarified the standard of review for Brady violations in a way that undercuts Petitioner’s theory for many of the remaining claims. However, Strickler is not a significant departure from the standard that this Court used in denying Respondent’s original motion for summary judgment.⁶ Moreover, the Strickler Court came to its conclusion on prejudice arising from a violation of Brady v. Maryland, 373 U.S. 83 (1963), after all the underlying facts were thoroughly developed, and for the most part, undisputed. Strickler, 119 S. Ct. at 1944-47.

The fact that in Strickler the Supreme Court came to its conclusion on prejudice after all the underlying facts were thoroughly developed, and for the most part, undisputed, Strickler, 119 S. Ct. at 1944-47, leads this Court to conclude that it has no effect on this Court’s denial of Respondent’s Motion for Summary Judgment on various Brady claims, for which factual development has not yet been addressed.

⁶Respondent is relying upon the manner in which the United States Supreme Court analyzed the underlying facts in terms of whether the impeachment of a particular witness “could reasonable be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Strickler, 119 S. Ct. at 1952 (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)). The Supreme Court recognized the analysis of prejudice is a difficult issue when it acknowledged that the District Court and the Court of Appeals had come to different conclusions on the issue of prejudice. Id. Clearly, this is a fact-intensive inquiry, and one that is better conducted after the factual disputes have been resolved.

1 **CONCLUSION**

2 For the reasons above, the Court adopts its Tentative Order of February 25, 1999 in its entirety.
3 The parties are ordered to propose a joint briefing schedule for the filing of Petitioner's Motion for
4 Evidentiary Hearing under Local Rule 26.8.7(g), along with the opposition and reply, as well as a joint
5 briefing schedule for Petitioner's Motion for Discovery, under Local Rule 26.8.7(f), along with the
6 opposition and reply. The Motion for Discovery should include a renewed request for the disclosure of
7 the unidentified fingerprints obtained from the non-public areas of the crime scene. The proposed joint
8 briefing schedules should be filed no later than 10 days from the date of this order.

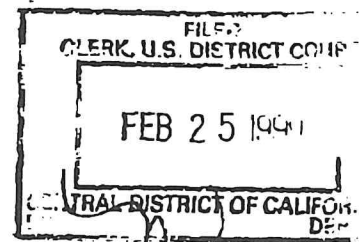
9
10 IT IS SO ORDERED.

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12 Dated: OCT 7 1999, 1999

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15 J. SPENCER LETTS
16 United States District Judge
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SEND

DEATH PENALTY



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICARDO RENE SANDERS

Petitioner,

v.

ARTHUR CALDERON, Warden of
California State Prison at San Quentin,

Respondent.

CASE NO. CV 96-7429 JSL

DEATH PENALTY

TENTATIVE ORDER ON RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT

DEATH PENALTY

I. INTRODUCTION

Respondent's Arthur Calderon's ("Respondent") Motion for Summary Judgment on Petitioner Ricardo Rene Sanders' Petition for Writ of Habeas Corpus came regularly for hearing on December 14, 1998. For the reasons set forth below, the Court hereby GRANTS Respondent's Motion for Summary Judgment in part and DENIES Respondent's Motion for Summary Judgment in part as follows:

1. Based upon the pre-AEDPA standard of review, which is more favorable to Petitioner, the Court GRANTS Respondent's Motion for Summary Judgment as to claims: 4, 16, 24, 25, 26, 28, 29, 32, 34, 36, 37, 38, 39, 41, 42, and 43.

2. The Court DENIES Respondent's Motion for Summary Judgment as to claims: 27, 40, and 44, as well as to all of the claims that were originally raised during state habeas corpus proceedings.

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II. BACKGROUND

Ricardo Rene Sanders is an inmate on California's death row. He was convicted of the first degree murder of four individuals who were shot when Petitioner robbed a Bob's Big Boy restaurant in Los Angeles on December 14, 1980. On appeal the California Supreme Court upheld the following findings and verdicts: (1) the jury's finding of true on one of the four multiple murder allegations, (2) the felony murder robbery special circumstances allegations, (3) the verdicts finding Petitioner guilty of multiple counts of robbery, attempted robbery, assault with a deadly weapon, and conspiracy to commit robbery, and (4) the finding that, as to all but one count, Petitioner used a firearm. People v. Sanders, 11 Cal. 4th 475, 497-98, 566 (1995), cert. denied, 117 S. Ct. 115 (1996). After a penalty trial, the jury recommended that Petitioner be sentenced to death.

Petitioner filed his request for counsel on October 22, 1996. His federal habeas petition was filed on April 7, 1997.

III. ANALYSIS

A. Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996 Applies to Petitioner's Case

Petitioner's federal habeas petition, filed on April 7, 1997, is governed by the provisions set forth in Chapter 153 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996. The AEDPA creates the following standard that federal courts must apply when reviewing a habeas petition brought by a state prisoner:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. S 2254(d).

As a preliminary matter, the Court finds that a state court need not have explained its decision on the merits of a claim in order for § 2254(d)'s standard to apply in federal court. Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992). Under § 2254(d) this Court is required to decide whether, based on

1 the facts presented in state court and the law at the time, "reasonable jurists considering the question
2 would be of one view that the state court ruling was incorrect." Drinkard v. Johnson, 97 F.3d 751 (5th
3 Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997), overruled on other grounds, Lindh v. Murphy, 521 U.S.
4 320 (1997).

5 With respect to the majority of Petitioner's claims which were raised and developed in the
6 California Supreme Court on direct appeal, such claims were ripe for summary judgment as there were
7 no genuine factual disputes with respect to any of the elements of these claims. The application of the
8 standard of review set forth under the AEDPA would clearly bar Petitioner from federal habeas relief.
9 Nevertheless, in an effort to alleviate any question, the Court examined those claims under the pre-
10 AEDPA standard, and determined that even if the pre-AEDPA standard applied, Petitioner would not
11 be entitled to relief on these claims as a matter of law. The analysis of each of the individual claims that
12 were raised and developed on direct appeal is contained below.

13 With respect to those claims that were raised and developed in state habeas proceedings, the

14
15 The Court notes that it rejects the pure law, versus mixed question of law and fact,
16 classification scheme. While Petitioner attaches different meanings to the phrases "contrary to" and
17 "unreasonable application of," this Court believes that these phrases do not embody a pure law-mixed
18 question distinction "in common parlance and practice." Green v. French, 143 F.3d 865, 870 (4th Cir.
1998), cert. denied, ___ S. Ct. ___, No. 98-7096, 1999 WL 8726 (U.S. Jan. 11, 1999).

17 In coming to this conclusion the Court agrees with the First Circuit's approach to explaining the
18 "pure-mixed" formulation:

19 Section 2254(d)(1) simply does not speak of "questions of law" or
20 "mixed questions of law and fact." . . . [C]ourts should tread gingerly
21 before inserting words into a statute's text, and the caution light glows
22 with particular brilliance here. Common sense suggests that, had
23 Congress desired to adopt [this] highly specific taxonomy, it could and
24 would have drafted AEDPA in more explicit terms.

25 Were this not enough reason to shun the bifurcated approach,
26 AEDPA's legislative history supplies the sockdolager. The House of
27 Representatives proposed a formulation closely akin to the bifurcated
28 approach, but Congress rejected it. It would be unseemly – and wrong
– for a court to scavenge discarded language from the legislative scrap
heap and graft such language onto the version of the bill that Congress
ultimately enacted.

25 O'Brien v. Dubois, 145 F.3d 16, 22 (1st Cir. 1998) (citation and footnote omitted).

26 Thus, when, at the time of the state court decision, "the Supreme Court [had] prescribed a rule
27 that governs petitioner's claim," a federal habeas court must "undertake an independent analysis" to
28 determine "whether the state court decision is 'contrary to' the governing rule." Id. at 24. If no
governing rule existed, the federal habeas court determines "whether the state court's use of (or failure
to use) existing law in deciding the petitioner's claim involved an 'unreasonable application' of Supreme
Court precedent." Id. It is this interpretation, and not the "pure/mixed" dichotomy articulated by the
Fifth and Seventh Circuits, that is "most faithful to the plain purpose of the statute." Green, 143 F.3d
at 870.

1 analysis differs. These claims contain a multitude of factual disputes regarding the various elements of
2 the claims. Therefore, under a pre-AEDPA standard of review, summary judgment would not be
3 appropriate at this juncture. However, this being a post-AEDPA case, the Court finds that whether it
4 is the appropriate time to determine whether the claim survives the application of 28 U.S.C. § 2254(d)
5 is dependent upon the extent of factual development of the claim that is properly permitted under
6 Chapter 153 of the new law.

7 The Court finds that its analysis of claims not contained completely on the state court record is
8 restricted to examining whether the state court made "an unreasonable determination of the facts in light
9 of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). This language directs
10 the Court to determine whether the state court's decision was reasonable based upon the evidence
11 presented to the state court. Thus, factual development of claims raised on federal habeas will be
12 substantially restricted under the AEDPA.

13 "The petitioner who seeks an evidentiary hearing in federal court must now clear the 'initial
14 hurdle' of § 2254(e)(2) before the court can proceed to determine whether an evidentiary hearing is
15 otherwise proper or necessary." Cardwell v. Greene, 152 F.3d 331, 337 (4th Cir.) (citation and quotation
16 omitted), cert. denied, 119 S. Ct. 587 (1998). 28 U.S.C. § 2254(e)(2) dictates that:

17 If the applicant has failed to develop the factual basis of a claim in State
18 court proceedings, the court shall not hold an evidentiary hearing on the
claim unless the applicant shows that --

19 (A) the claims relies on --

20 (i) a new rule of constitutional law, made retroactive
to cases on collateral review by the Supreme
Court, that was previously unavailable; or

21 (ii) a factual predicate that could not have been
previously discovered through the exercise of due
diligence; and

22 (B) the facts underlying the claim would be sufficient to
23 establish by clear and convincing evidence that but for
constitutional error, no reasonable factfinder would have
found the applicant guilty of the underlying offense.

24 28 U.S.C. § 2254(e)(2).

25 Accordingly, the issue becomes whether Petitioner "failed to develop the factual basis of a claim
26 in State court." See 28 U.S.C. § 2254(e)(2). If the answer is yes, this Court is required to deny an
27 evidentiary hearing unless Petitioner demonstrates that one of the two exceptions set forth in §
28 2254(e)(2) applies. If the answer is no, this Court should determine whether a hearing is appropriate,

1 or required under [pre-AEDPA standards]." Cardwell, 152 F.3d at 337.

2 To demonstrate entitlement to an evidentiary hearing, a petitioner is required to allege specific
3 facts which, if true, would entitle him to relief. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir.
4 1997); Rule 8 of the Rules Governing Section 2254 Proceedings. The Rules Governing Section 2254
5 Cases do not authorize fishing expeditions, and "conclusory allegations unsupported by specifics" will
6 not adequately support a request for either discovery or an evidentiary hearing." Blackledge v. Allison,
7 431 U.S. 63, 74 (1977).

8 The Court finds that the types of claims that Petitioner has alleged, which support a conspiracy
9 theory regarding the manner in which his state court trial was conducted, would be the type of claim for
10 which factual development could be considered appropriate under AEDPA. This is of course assuming
11 that it was due to the actions of the state that the a factual predicate of the claims "could not have been
12 previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). Of course
13 Petitioner will also have to demonstrate that his "allegations, if proven, would establish a right to relief."
14 Jeffries v. Blodgett, 5 F.3d 1180, 1187 (9th Cir. 1993); Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th
15 Cir. 1992).

16 Therefore, until the Court examines the precise issue of the extent to which the conspiracy theory
17 claims, all of which were raised during Petitioner's state habeas proceedings, should be factually
18 developed under the AEDPA, Respondent is not entitled to summary judgment on these claims.

19 **B. Legal Framework for Summary Judgment**

20 Summary judgment is proper if "there is no genuine issue as to any material fact and the moving
21 party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby,
22 Inc., 477 U.S. 242, 247 (1986); Taylor v. List, 880 F.2d 1040, 1044 (9th Cir. 1989). The purpose of
23 summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex
24 Corp v. Catrett, 477 U.S. 317, 323-324 (1986). The moving party has the burden of establishing that
25 there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 322-323. After
26 the moving party makes a properly supported motion, the non-moving party has the burden of presenting
27 specific facts showing that contradiction is possible. British Airways Board v. Boeing Co., 585 F.2d
28 946, 950-52 (9th Cir. 1978). A moving party who will not have the burden of proof at trial need only

1 point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the
2 burden of making a sufficient showing of the existence of genuine issues of fact. T.W. Elec. Service,
3 Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987); Celotex, 477 U.S. at 323;
4 Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir. 1986).

5 "A material issue of fact is one that affects the outcome of the litigation and requires a trial to
6 resolve the parties' differing versions of the truth." S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1306 (9th
7 Cir. 1982). It is not enough for the non-moving party to point to the mere allegations or denials
8 contained in the pleadings. Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988). Instead, it must set
9 forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual
10 issue for trial. Celotex, 477 U.S. at 323-24; Claar v. Burlington Northern R. Co., 29 F.3d 499, 502 (9th
11 Cir. 1994) (experts cannot rely on unsupported conclusions); Marks v. U.S. (Dept. of Justice), 578 F.2d
12 261, 263 (9th Cir. 1978) (genuine issues are not raised by mere conclusory allegations). The evidence
13 must be more than a mere "scintilla" of evidence; the non-moving party must show that the trier of fact
14 could reasonably find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 252.
15 "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 247-48. The opposing
16 party "must do more than simply show that there is some metaphysical doubt as to the material facts."
17 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, (1986).

18 When judging the evidence at the summary judgment stage, the Court does not make credibility
19 determinations or weigh conflicting evidence. Anderson, 477 U.S. at 249; T.W. Electric Service, Inc.,
20 809 F.2d at 630-31 (citing Matsushita, 475 U.S. at 587; Ting v. United States, 927 F.2d 1504, 1509 (9th
21 Cir. 1991)). In addition, the Court must take the non-movant's evidence as true and all inferences are
22 to be drawn in the light most favorable to the non-movant. Anderson, 477 U.S. at 255, 106 S. Ct. at
23 2513-14; Eisenberg, 815 F.2d at 1289. In other words, the court must draw all reasonable inferences
24 in favor of the non-moving party, including questions of credibility and the weight to be accorded
25 particular evidence. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991) (citing Anderson,
26 477 U.S. at 255).

27 Regardless of who is the moving party, each party must "establish the existence of elements
28 essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex Corp., 477 U.S.

1 at 322. If the non-moving party bears the burden of proof at trial, he must establish each element of his
2 claim with "significant probative evidence tending to support the claim." Smolen v. Deloitte, Haskins
3 and Sells, 921 F.2d 559, 963 (9th Cir. 1990) (quoting T.W. Elec. Service, Inc., 809 F.2d at 630). In
4 meeting their burdens of proof, each party must come forward with admissible evidence. Fed. R. Civ.
5 P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise
6 genuine issues of fact and defeat summary judgment. Anheuser-Busch Inc. v. Natural Beverage
7 Distributors, 69 F.3d 337, 345 (9th Cir. 1995); Thornhill Pub. Co. v. General Tel. & Electronics Corp.,
8 594 F.2d 730, 738 (9th Cir. 1979)); First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 891 F. Supp.
9 510, 514 (N.D.Cal. 1995). If the non-moving party fails to do so, there is no genuine issue and summary
10 judgment should be granted.

11 Petitioner complains that Respondent is utilizing an incorrect standard for review of these claims
12 because he repeatedly states that the California Supreme Court's adjudication of these claims was not
13 contrary to any clearly established and binding Supreme Court precedent, nor was it based upon an
14 unreasonable determination of the facts in light of the evidence presented in the State proceeding. This
15 language is consistent with the language set forth in the amendment made to 28 U.S.C. § 2254(d) under
16 the AEDPA. However, for pragmatic reasons, the analysis below does not rely upon the standards set
17 forth in AEDPA to justify summary judgment on the various claims at issue, which were initially raised
18 on direct appeal. Review of the pleadings submitted to the Court demonstrate that there was no "real
19 possibility" of constitutional error and no genuine issue as to any material fact. Fed. R. Civ. Proc. 56(c);
20 Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977); Celotex Corp., 477 U.S. at 324. Accordingly,
21 Petitioner's argument is rejected.

22 **C. Claims Raised on Direct Appeal For Which Respondent Requests Summary**
23 **Judgment**

24 **1. Claim 4: Improper Restrictions on Tami Rogoway's Cross-examination**

25 Petitioner contends that the trial court incorrectly limited Tami Ellen Rogoway's cross-
26 examination. Rogoway, one of the victims, appeared as a prosecution witness. Defense counsel wanted
27 to cross-examine Rogoway on two issues. First, defense counsel wanted to question Rogoway on the

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1 questionable circumstances of her identification of co-defendant Franklin Freeman.² Second, defense
2 counsel wanted to question Rogoway about her contacts with a state prison inmate regarding her wish
3 that Freeman be found guilty of the Bob's Big Boy robbery/murder.

4 The trial court limited Rogoway's cross-examination regarding her identification of Freeman,
5 stating: "I will not let you show that she is a bad identifier by showing she may have been wrong about
6 Freeman, just as I would not let the D.A. show Malloy was a good identifier by letting him testify about
7 Freeman." RT at 8671. The trial court also ruled that the defense could not question Rogoway about
8 her alleged corroboration with state prison inmates until after the defense had presented the testimony
9 of the prison inmate in question. RT at 8686. The trial court was advised as to the connection between
10 Rogoway and Mr. Quine, the state prison inmate, by the prosecutor. RT at 8681-83. Defense counsel
11 did not object to his characterization of the relationship. The trial court made it clear that it was not
12 precluding the defense from ever asking Rogoway about her association with Quine, but such questions
13 would only be permitted after the defense put Quine on the stand and laid a sufficient foundation.

14 Petitioner's argument that the trial court improperly limited the scope of his cross-examination
15 of Rogoway is meritless. While the Confrontation Clause of the Sixth Amendment guarantees a
16 criminal defendant the right to confront hostile witnesses, this guarantee does not provide an unlimited
17 opportunity for cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986) ("trial judges
18 retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limitations
19 on such cross-examination based on concerns about, among other things, harassment, prejudice,
20 confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally
21 relevant."). Constitutional error does not occur unless a reasonable juror might have received a
22 significantly different impression of a witness's credibility had counsel been permitted to pursue his
23 cross-examination. Id. at 679-80. To be entitled to relief on federal habeas, a petitioner must show that

24
25 ²Rogoway failed to pick out Freeman at a video lineup held on January 2, 1981. RT at 8233.
26 Then, at Freeman's preliminary hearing, while on the stand, Rogoway could not identify Freeman as one
27 of the perpetrators. RT at 8233-34. However, three days later, on redirect, Rogoway testified that she
28 was able to identify Freeman as one of the perpetrators, and did so. RT at 8234.

The prosecutor explained that immediately after Rogoway got off the stand, she told the
prosecutor that there was no question that Freeman was the perpetrator. RT at 8239. However, the
prosecutor wanted her to think about it. So Rogoway, who had permission to attend the rest of the
preliminary hearing, continued to observe the hearing and testified three days later that she could
identify Freeman. RT at 8239.

1 he was prohibited from engaging in otherwise appropriate cross- examination designed to show a
2 prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from
3 which jurors ... could appropriately draw inferences relating to the reliability of the witness." Id. at 680
4 (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)).

5 Petitioner argues that the proposed cross-examination was relevant, and should have been
6 allowed because Rogoway's ability to identify Freeman at his preliminary hearing would have cast light
7 on her ability to identify Petitioner, and the fact that she could be easily swayed which reflects on the
8 reliability of her identification of Petitioner. See Van Arsdall, 475 U.S. at 680 (confrontation clause
9 rights violated when defendant prevented from exposing jury to facts from which they could
10 appropriately draw inferences about witness's reliability).

11 However, a review of the trial transcript reveals that the trial judge did not significantly limit
12 Petitioner's cross-examination of Rogoway. Rogoway was extensively cross-examined on her
13 identification of Petitioner. The defense focused upon Rogoway's description of the coats worn by the
14 perpetrators, and Rogoway was impeached with the fact that her testimony on which perpetrator wore
15 which coat differed at the preliminary hearing and the trial. RT at 8411-17, 8524. Rogoway was also
16 repeatedly questioned about her descriptions of Petitioner's hair. RT at 8419-24.

17 In closing argument the defense pointed out that Rogoway identified the incorrect man when
18 reviewing a book of mug shots. RT at 15,199-200, 15,204. Defense counsel also argued that before
19 Rogoway identified anyone in a lineup, she must have seen photographs of Petitioner. RT at 15,276-
20 277, 15,354-356. The defense counsel pointed out that Rogoway got confused at the preliminary hearing
21 and apparently incorrectly testified that the tall perpetrator was wearing the wool coat, when at trial she
22 testified the other way around. She also emphasized that Rogoway's description of Petitioner's hair had
23 to be incorrect because the man she remembered from the robbery had hair shorter than Petitioner's at
24 trial, but longer than Petitioner at the preliminary hearing, which was not possible because Petitioner's
25 hair at the preliminary hearing was longer than it was at the trial. RT at 15,352. Moreover, defense
26 counsel advised the jury to disregard Rogoway's identification of Petitioner at the video lineup because
27 she testified she was not really sure who she picked out at the lineup, and although she signed a card
28 which identified her selection, the card was lost. RT at 15,353.

1 Overall, the Court finds that the jury had an adequate basis to assess Rogoway's credibility and
2 to draw fair conclusions as to whether or not she correctly identified Petitioner as one of the robbers of
3 the Bob's Big Boy restaurant. The trial court reasonably concluded that Rogoway's ability to identify
4 Freeman as the robber was of marginal relevance to the primary issue raised by her testimony, namely,
5 whether she reliably identified Petitioner as one of the perpetrators. Moreover, Rogoway freely admitted
6 that she had only observed Freeman briefly, RT at 8381, but that she had taken a better look at the other
7 perpetrator, who she identified as being Petitioner. RT at 8332, 8338. The court's restriction on the
8 cross-examination of Rogoway with respect to her previous identification of Freeman had little
9 significance in light of the cross-examination that was permitted with respect to her identification of
10 Petitioner himself. In addition, the Court's finding that Rogoway's bias and interest in the case were
11 obvious, because "she not only lost her boyfriend who was killed, but she suffered very serious and
12 probably permanent injuries herself," RT at 8673, was reasonable.

13 In light of the testimony that the defense elicited, the unavailability of the evidence that could
14 have been realized through the proposed questioning, as to the manner in which Rogoway identified
15 Freeman at his preliminary hearing, did not have any substantial influence on the jury's conclusion that
16 Petitioner was guilty of the charges with which he was charged.

17 As for Petitioner's allegation that the trial court improperly limited the cross-examination of
18 Rogoway with respect to her corroboration with state prison inmates, Petitioner did not use the
19 opportunity he was given to call to the stand the witness who allegedly could show that Rogoway
20 wanted to fabricate an identification of Freeman. Had Petitioner laid the proper foundation for this
21 testimony by calling Quine to the stand, he would have had the opportunity to impeach Rogoway with
22 her alleged contact with Quine and his offer to manufacture evidence against Freeman. Since Petitioner
23 failed to use the opportunities available to him to develop his theory of tampering with Rogoway, the
24 court declined to allow Rogoway to be impeached with her contact with Quine. Therefore, Petitioner's
25 characterization of the trial court's ruling as a limitation on his ability to cross-examine Rogoway is
26 incorrect. Accordingly, Respondent's Motion for Summary Judgment is GRANTED as to claim 4.

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2. **Claim 16: Admission of Three Extrajudicial Statements by Accomplice
Carletha Stewart**

Petitioner objects to the admission of three extrajudicial statements made by Carletha Stewart regarding the conspiracy to rob Bob's Big Boy restaurant. Petitioner argues that the admission of the three statements denied him his rights under the Confrontation Clause in violation of Bruton v. United States, 391 U.S. 123 (1968). The first statement Petitioner objects to arose during the testimony of Brenda Givens, a waitress at the Bob's Big Boy restaurant, who testified that she spoke with Stewart in county jail on a day several months before the incident. At the time Stewart was accompanied by Petitioner and his co-defendant, Franklin Freeman. Givens testified that Stewart told her: "Good thing I seen you today. They gonna rob Bob's Big Boy tonight and I don't want you hurt." RT at 10,855-864. Stewart then told Givens that she would come by the restaurant that evening. RT at 10,867-868.

The second statement came up during Andre Gilcrest's testimony. Gilcrest testified that Stewart told him "Ricky and Frank [are] going to rob Bob's Big Boy tonight." Gilcrest, who denied that he had anything to do with the robbery, went with Stewart to the restaurant on that same night to drink coffee. The third statement was introduced through the testimony of Bruce Woods, a jailhouse informant, who testified that he once heard Stewart ask another man if he would help her rob Bob's Big Boy restaurant.

The Court must initially point out that Bruton's holding that it is reversible error to admit into evidence a co-defendant's confession which also inculcates the defendant does not apply to coconspirator statements which are admissible under Fed. R. Evid. 801(d)(2)(E). See United States v. McCown, 711 F.2d 1441, 1448-49 (9th Cir. 1983). In Bourjaily v. United States, 483 U.S. 171 (1987), the Supreme Court held that "the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause." Id. at 182. "When a coconspirator's statement satisfies the requirements for admission under [the Rule], it satisfies the requirements of the confrontation clause, as well." United States v. Layton, 855 F.2d 1388, 1401 (9th Cir. 1988) (citing Bourjaily, 483 U.S. at 182), overruled on other grounds, People of Territory of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993). Therefore, there is no confrontation violation if the federal rule is satisfied. Bourjaily, 483 U.S. at 182-84; United States v. Yarbrough, 852 F.2d 1522, 1536 (9th Cir. 1988) (accord); United States v. Lujan, 936 F.2d 406, 410 (9th Cir. 1991).

1 The standard for admissibility of coconspirator statements is clear: before admitting a
2 coconspirator's statement over a hearsay objection, "[t]here must be evidence that there was a
3 conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during
4 the course and in furtherance of the conspiracy.' " Bourjaily, 483 U.S. at 175 (quoting Fed. R. Evid.
5 801(d)(2)(E)), see also United States v. Peralta, 941 F.2d 1003, 1005 (9th Cir. 1991). This must be
6 shown by a preponderance of the evidence. Bourjaily, 483 U.S. at 176; United States v. Knigge, 832
7 F.2d 1100, 1104 (9th Cir. 1987), as amended by, 846 F.2d 591 (9th Cir. 1988), United States v.
8 Silverman, 861 F.2d 571, 577 (9th Cir. 1988).

9 The coconspirator's statements may be used to prove these preliminary facts, Bourjaily, 483 U.S.
10 at 181, but because coconspirator statements are presumptively unreliable, the Ninth Circuit requires
11 some evidence, apart from the proffered statements, of the existence of the conspiracy and the
12 defendant's involvement in it. United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988), see also
13 Silverman, 861 F.2d at 577-78. A "slight" connection to the conspiracy is sufficient for admission of
14 coconspirator statements. United States v. Pinkney, 15 F.3d 825, 827 (9th Cir. 1994); see also United
15 States v. Crespo de Llano, 838 F.2d 1006, 1017 (9th Cir. 1987) ("Once a conspiracy has been shown,
16 the prosecution need only present slight evidence connecting the defendant to the conspiracy" in order
17 to admit the coconspirator's statements).

18 As a preliminary matter, Fed. R. Evid. 801(d)(2)(E) does not require that the statement be made
19 to a co-conspirator. See, e.g., United States v. Zavala-Serra, 853 F.2d 1512, 1516 (9th Cir. 1988)
20 (statement to informant); United States v. Williams, 989 F.2d 1061, 1068 (9th Cir. 1993). So that fact
21 that Stewart's statements were made to third parties is irrelevant.

22 Petitioner complains first that there was not sufficient independent evidence of a conspiracy, and
23 Petitioner's connection to it. However, the Court finds that the prosecution presented substantial
24 evidence of a conspiracy involving Petitioner and Stewart, without even considering Stewart's
25 extrajudicial statements.³

26
27 ³Gilcrest testified that on September 27, 1980, he went with Stewart to Bob's Big Boy. RT at
28 12,066-067. While at the restaurant Stewart spoke to two waitresses and asked who was present at the
restaurant and which managers were present. RT at 12,069. She also made a telephone call. RT at

(continued...)

Petitioner next complains that the statements admitted were not statements made in furtherance of the conspiracy. For a statement to be considered "in furtherance" of a conspiracy, it must in some way advance the objectives of the conspiracy. United States v. Tille, 729 F.2d 615, 620 (9th Cir. 1984); United States v. Andersson, 813 F.2d 1450, 1456 (9th Cir. 1987) ("statements made to keep a conspirator abreast of a co-conspirator's activities, or to induce continued participation in a conspiracy, or to allay the fears of a co-conspirator are in furtherance of a conspiracy") (internal quotation omitted); see also United States v. Eaglin, 571 F.2d 1069, 1083 (9th Cir. 1977). "[S]tatements are in furtherance of a conspiracy if they further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy." United States v. Arambula-Ruiz, 987 F.2d 599, 607-08 (9th Cir. 1993) (quoting United States v. Yarbrough, 852 F.2d 1522, 1535 (9th Cir. 1988)). Thus, statements which prompt participation or inspire further action in the conspiracy are admissible. Yarbrough, 852 F.2d at 1535. On the other hand, mere narrative declarations and casual admissions of culpability, not proposed to further the purpose and objectives of the conspiracy, are not admissible under the co-conspirator exception. See United States v. Bibbero, 749 F.2d 581, 583-85 (9th Cir. 1984) (hearer "virtually acknowledged" on cross examination that statement admitted was "idle conversation"), see also United States v. Castillo, 615 F.2d 878 (9th Cir. 1980).

In "determining whether a statement tends to further the objective of the conspiracy, the statement should be examined in the context in which it is made." Andersson, 813 F.2d at 1456 (citing

³(...continued)

12,070. After having coffee at Bob's Big Boy restaurant and leaving the restaurant, Gilcrest and Stewart went back to her house. She left Gilcrest's company for a period of time when Ricky and Frank came to the house and she was talking to them. RT at 12,070-071. When Stewart was standing by Ricky's car, talking to him, Gilcrest saw Ricky show a shotgun to Stewart. RT at 12,074-075. Gilcrest saw another shotgun braced between Frank's legs. RT at 12,076. After Ricky and Frank left Stewart's house, Gilcrest observed Stewart pacing the floor. RT at 12,071. Stewart attempted to make some telephone calls to locate Ricky and Frank, and eventually left to go to Bob's to see if they were there. RT at 12,071, 12,079.

In addition, Orasteen Freeman, Franklin Freeman's mother, testified that about five hours before the Bob's Big Boy robbery she saw Stewart and Ricky together at her house. RT at 10,306. Bruce Woods, a jailhouse informant testified that after he gave testimony at Petitioner's and Stewart's preliminary hearings, he was riding to the county jail in a van in the company of Petitioner. RT at 11,352. At that time Petitioner asked Woods why he wanted to testify against Stewart, and threatened Woods that if he ever went back to jail he should watch out that he did not get hurt or that "some of [his] people" didn't get hurt. RT at 11,353.

Based upon all of this evidence, the trial court's finding that there was sufficient evidence of a conspiracy such that co-conspirator's statements could be admitted, was not erroneous.

1 United States v. Layton, 720 F.2d 548, 557 (9th Cir. 1983)). Moreover, the court should look "to the
2 declarant's intent in making the statement, not the actual effect of the statement." United States v.
3 Williams, 989 F.2d 1061, 1068 (9th Cir. 1993).

4 First, Stewart's statement to Brenda Givens, was an attempt to keep Givens from becoming
5 either a victim, or a witness of the crime, that Stewart was planning. Such a statement was not idle
6 conversation because it was intended to change Givens' conduct, conduct that was directly related to the
7 manner in which the robbery would be carried out. It is reasonable to infer that the statement was made
8 to aid Stewart's stated goal of ensuring that certain people were not present at the time of the robbery.
9 Even if the purpose of the statement was for Stewart's selfish interest in making sure she was not
10 associated with the robbery, in Sears the Circuit reasoned that a conspiracy includes the goal of escaping
11 successfully. United States v. Sears, 663 F.2d 896, 905 (9th Cir. 1981). "The trial court's finding that
12 a statement was made in furtherance of a conspiracy is entitled to deference." United States v. Miller,
13 771 F.2d 1219, 1233 (9th Cir. 1985). For these reasons, the trial court did not err in concluding that
14 Stewart's statements to Givens were made in furtherance of the conspiracy objectives and were
15 admissible under the co-conspirator hearsay exception.

16 Second, when examining the admissibility of Stewart's statements to Gilcrest, regarding the fact
17 that Ricky and Frank intended to rob the restaurant on September 27, 1980, the key is Stewart's "intent
18 in making the statement, not the actual effect of the statement." Williams, 989 F.2d at 1068. Here
19 Stewart disclosed her role in the conspiracy to someone that she considered a friend, RT at 12,060.
20 12,065, someone who told her he would not disclose the contents of their conversation. RT at 12,064.
21 She then told Gilcrest that she wanted to go to Bob's Big Boy that evening, to "see how many people
22 was working that night." RT at 12,067. The actions of Stewart, and of Gilcrest in accompanying her
23 to Bob's Big Boy restaurant on the night she told him that a robbery was to occur, support the trial
24 court's conclusion that Stewart made the statement to Gilcrest to induce him to go with her to the
25 restaurant, which assisting in achieving the conspirators' common objective of knowing who they would
26 encounter when they attempted to rob the restaurant. Since Stewart's statements to Gilcrest were made
27 to allow Stewart to "set in motion transactions that [were] an integral part of the conspiracy," Aramula-
28 Ruiz, 987 F.2d at 607-08, the trial court did not error in admitting these statements.

1 Finally, Petitioner complains that the trial court erred in admitting Bruce Woods' testimony, in
2 which he testified that in August 1980 he heard Stewart ask a man she had previously dated, whether
3 he wanted to help her rob Bob's Big Boy restaurant. The prosecution admitted that they could not
4 establish that Petitioner was part of the conspiracy to rob the restaurant in August 1980. RT at 11,142.
5 Nor did Petitioner's name even come up in Bruce Woods' testimony. Nevertheless, the prosecution
6 argued that Stewart's statement supported the prosecution's evidence that Petitioner had solicited a
7 different individual, Jerry Lankford, to participate in the conspiracy in September 1980. The trial court
8 admitted the testimony, finding that it was circumstantial evidence of Stewart's state of mind in wanting
9 to form a conspiracy to rob the restaurant. RT at 11,154-156.

10 Petitioner objects to the admission of evidence of Stewart's state of mind in August 1980,
11 arguing that it was not relevant to the issue of whether Petitioner entered into a conspiracy with her a
12 month later. Stewart's state of mind, during the conspiracy that was subsequently formed, was relevant
13 to establishing the existence of the conspiracy. However, there is some issue as to whether her prior
14 state of mind would be relevant to the issues being litigated at Petitioner's trial, which all involved the
15 actions of the co-conspirators, once the conspiracy was formed, which the prosecution agreed did not
16 occur until September 1980.

17 Nevertheless, the admission of evidence that Stewart was actively soliciting assistance with her
18 plan to rob the restaurant a month before the conspiracy in which Petitioner was involved began, was
19 harmless. There was sufficient other evidence from which the jury could reasonably find that a
20 conspiracy existed, and that both Stewart and Petitioner were active members in that conspiracy, such
21 that the admission of Woods' testimony cannot be deemed to have had an "injurious effect or influence"
22 in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 622 (1993). Accordingly,
23 Respondent's Motion for Summary Judgment on claim 16 is GRANTED.

24 **3. Claim 24: The Trial Court's Exclusion of Zola Taylor's Prior Testimony**

25 Petitioner contends that the trial court erred in not permitting the defense to introduce
26 Zola Taylor's testimony from a pretrial hearing, held on Petitioner's motion to quash and traverse the
27 search warrants issued in the case, to impeach Andre Gilcrest.

28 **a. Factual Background of Claim 24**

1 Gilcrest contacted the police with information regarding the Bob's Big Boy robbery-homicides.
2 He had information about the robbery/homicides which he had obtained from Carletha Stewart, one of
3 Petitioner's co-defendants. Sanders, 11 Cal. 4th at 501. At trial "Gilcrest also testified that he was told
4 by co-defendant Stewart, that defendant and Freeman planned to rob Bob's Big Boy," and further
5 testified "in conformity with his pretrial testimony." Sanders, 11 Cal. 4th at 509, 522. Petitioner then
6 attempted to introduce portions of Zola Taylor's prior testimony at the pretrial suppression hearing for
7 the purpose of impeaching Gilcrest, pursuant to California's "former testimony" hearsay exception.
8 CAL. EVID. CODE § 1291(a)(2). To qualify for this exception the defense had to demonstrate that
9 Taylor was "unavailable" under California law. See CAL. EVID. CODE § 240. In addition, the defense
10 had to show that the prosecutor "had the right and opportunity to cross-examine [Taylor] with an interest
11 and motive similar to that which he has at the hearing." CAL. EVID CODE § 1291(a)(2).

12 The trial court did not allow the testimony to be admitted, finding that defense counsel "had not
13 exercised reasonable diligence in procuring Taylor's attendance at trial, pursuant to Evidence Code
14 section 240, subdivision (a)(5). It also concluded that because the People did not have a similar interest
15 and motive in questioning Taylor at the suppression hearing, the testimony was not admissible under
16 Evidence Code section 1291, subdivision (a)(2)." Sanders, 11 Cal. 4th at 522.

17 **b. Analysis**

18 "A state court's evidentiary ruling is grounds for federal habeas corpus relief only if it renders
19 the state proceeding so fundamentally unfair as to violate due process." Bueno v. Hallahan, 988 F.2d
20 86, 87 (9th Cir. 1993) (per curiam); Lincoln v. Sunn, 807 F.2d 805, 816 (9th Cir. 1987) ("Incorrect state
21 court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are
22 affected."); see also Estelle v. McGuire, 502 U.S. 62, 71-72 (1991); Henderson v. Kibbe, 431 U.S. 145,
23 154 (1977); Walters v. Maas, 45 F.3d 1355, 1357 (9th Cir. 1995). The state court's decision to exclude
24 certain evidence must be so prejudicial as to jeopardize the defendant's due process rights. Tinsley v.
25 Borg, 895 F.2d 520, 530 (9th Cir. 1990) (citation omitted).

26 The sole reason that the defense wanted to use Taylor's testimony to impeach Gilcrest was to
27 establish that Gilcrest was not telling the truth when he testified that he had never discussed the Bob's
28 Big Boy incident directly with Taylor. However, Taylor had already admitted that she had lied to the

1 police because the information she gave to the police had come from Gilcrest, not from her own personal
2 observations as she led the police to believe. RT at 520:26-522:8. Moreover, Taylor's testimony was
3 of limited probative value, as it only could have impeached Gilcrest on a relatively minor, tangential
4 issue, and it was potentially confusing to the jury. See Tinsley, 895 F.2d at 530-31. Accordingly,
5 Petitioner has thus failed to demonstrate that the excluded testimony evidence rendered his trial
6 fundamentally unfair. See id.

7 Furthermore, the trial court's ruling that Taylor's former testimony was not admissible because
8 the party against whom it is offered did not have a "right and opportunity to cross-examine with a
9 similar interest and motive" was not incorrect. The prosecution's interest and motive in impeaching
10 Taylor was clearly not the same at the pretrial hearing and the trial. At the pretrial hearing the
11 prosecution's concern with Taylor's veracity was only a tangential issue, whereas at the trial, Taylor's
12 veracity was directly at issue because her testimony was going to be used to impeach the testimony of
13 Gilcrest. With such different interests and motives maintained by the prosecution, which were made
14 evident to the trial court, the trial court's ruling which did not allow Taylor's prior testimony to be
15 admitted at trial was not erroneous.

16 For the reasons above, Respondent's motion for summary judgment on claim 24 is GRANTED.

17 **4. Claim 25: Griffin Error in Closing Argument**

18 In claim 25 Petitioner contends that the prosecutor committed Griffin error⁴ and other misconduct
19 during closing argument. Petitioner premises this claim on the prosecutor's argument made during his
20 rebuttal closing argument at the guilt phase. The prosecutor noted that a holster had been found in
21 Petitioner's father's closet, and that while the defense argued it could have belonged to a toy gun or a
22 child could have been using it, there was no evidence to support that. The prosecutor further argued:
23 "[t]here's been no explanation as to why [Petitioner] had a 20 gauge sawed-off shotgun." RT 15,523-
24 527. He then argued, "[s]o there's been no explanation as to what the holster was doing in the father's
25 closet, what the seven and a half pellets were doing in the father's closet." Id.

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27
28 ⁴ Under Griffin v. California, 380 U.S. 609 (1965), the prosecutor is prohibited from directly,
or indirectly commenting on a defendant's failure to testify in his or her own defense. Id. at 614.

1 Petitioner also bases claim 25 on at least three other arguments by the prosecutor.⁵ Petitioner
2 contends that while the Griffin error was the most glaring instance of prosecutorial misconduct, taken
3 cumulatively all the errors denied Petitioner due process and a fair jury trial.

4 Clearly the prosecutor cannot comment on a defendant's failure to testify. Jenkins v. Anderson,
5 447 U.S. 231, 235 (1980); Griffin v. California, 380 U.S. 609, 615 (1965). Whether a prosecutor's
6 comment violates the Fifth Amendment depends on whether the language "manifestly intended or was
7 of such character that the jury would naturally and necessarily take it to be a comment on the failure to
8 testify." United States v. Davis, 960 F.2d 820, 829 (9th Cir. 1992) (citing United States v. Bagley, 772
9 F.2d 482, 494 (9th Cir. 1985)); United States v. Mende, 43 F.3d 1298, 1031 (9th Cir. 1995); United
10 States v. Castillo, 866 F.2d 1071, 1083 (9th Cir. 1988). However, a prosecutor is permitted to comment
11 on a defendant's failure to present witnesses or exculpatory evidence without jeopardizing the
12 defendant's Fifth Amendment rights "so long as [the comment] is not phrased to call attention to [the]
13 defendant's own failure to testify." United States v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992);
14 Castillo, 866 F.2d at 1083.

15 A reading of the prosecutor's argument makes it clear that the prosecutor was not implying that
16 Petitioner failed to testify himself, but rather that the defense put on an implausible defense. and failed
17 to provide explanations as to why incriminating evidence was found in Petitioner's father's home. When
18 the prosecutor's argument is put into the context within which it was made, it becomes clear that the
19 prosecutor was challenging, on rebuttal, defense counsel's explanations during her closing argument
20 regarding the physical evidence found at Petitioner's apartment. When making the comments at issue,
21 the prosecutor explicitly pointed to defense counsel's argument that the gun holster found in Petitioner's
22 father's closet could have been a part of a toy gun, and argues that no showing had been made to support
23 such an argument. Thus, the prosecutor's comment clearly went to the weakness of the defense's case,
24 not to the defendant's silence. A comment on failures of the defense case, as opposed to failures of the
25

26 ⁵ Petitioner contends that it was improper (1) for the prosecutor to refer to the victims and their
27 loved ones in his argument; (2) for the prosecutor to refer to Petitioner as a "monster," as that constituted
28 pejorative name-calling; and (3) for the prosecutor to personally attack defense counsel by stating that
defense counsel's closing argument was not founded on fact and that she had wasted 13 weeks of
everyone's time. However, as explained below, given that the prosecutor did not commit Griffin error,
these other alleged errors, standing alone, did not deny Petitioner his right to due process and a fair jury
trial. See Darden v. Wainwright, 477 U.S. 168 (1986).

1 defendant, to counter prosecution testimony, is not a violation of the Fifth Amendment. Lopez-Alvarez,
2 970 F.2d at 596; United States v. Mares, 940 F.2d 455, 461 (9th Cir. 1991); Castillo, 866 F.2d at 1083.
3 The Ninth Circuit has explicitly held that a “comment on the failure of the defense as opposed to the
4 defendant to counter or explain the testimony presented or evidence introduced is not an infringement
5 of the defendant’s Fifth Amendment privilege.” Mares, 940 F.2d at 461 (quoting Castillo, 866 F.2d
6 at 1083).

7 Petitioner contends that the prosecutor’s comments were Griffin error because such error has
8 been committed where only the defendant could logically have provided the missing evidence referred
9 to by the prosecutor. Petitioner argues that under the circumstances of this case, Petitioner was the only
10 person who “logically or realistically could have explained ‘why he had a 20 gauge sawed-off shotgun’
11 or ‘what the holster was doing in the father’s closet, what the seven and a half pellets were doing in the
12 father’s closet.’” Memo of P&A (Guilt Phase) at 70. Petitioner points out that the jury had been
13 informed that Petitioner’s father had recently suffered a stroke. RT at 14,330-331. However, from
14 Petitioner’s sister’s testimony that their father had suffered from a stroke, Petitioner jumps to the
15 conclusion that the jury should have inferred that Petitioner’s father was not available to testify at the
16 trial. Although the testimony Petitioner points to informed the jury that Petitioner’s father suffered from
17 a stroke during that year, was hospitalized “for a while,” and consequently gave up his apartment, it does
18 not necessarily follow that Petitioner’s father was unavailable to testify. RT at 14,330-331.

19 Moreover, there were other individuals who reasonably might have possessed knowledge about
20 the items found in Petitioner’s father’s apartment because they resided at the same apartment. RT at
21 14,331-333, 13,910-12, 13,926-27, 13,940-942, 14,613. Given the number of residents of the apartment,
22 it does not follow that Petitioner was the only individual who could explain why particular objects were
23 found in his father’s apartment.

24 The Court finds that the prosecutor’s emphasis on the fact that the defense failed to rebut
25 incriminating evidence was not Griffin error, nor was it a violation of Griffin for the prosecution to note
26 that the defense failed to provide any reason that Petitioner would possess a sawed-off shotgun.
27 Accordingly, Respondent is entitled to summary judgment on claim 25.

28 \\\

1 **5. Claim 26: Guilt-phase Instructional Errors**

2 Petitioner contends that several errors were made in instructing the jury. First, the court failed
3 to deliver complete instructions on the accomplice-corroboration rule and failed to define Carletha
4 Stewart as an accomplice as a matter of law, or to include her at all in the accomplice instructions.
5 Second, the court delivered a slightly modified version of CALJIC 2.11.5 ("Unjoined Perpetrators of
6 Same Crime"). Third, the court failed to provide CALJIC 2.71 ("Admission-Defined") and CALJIC
7 2.71.7 ("Pre-Offense Statement by Defendant").

8 To obtain federal collateral relief for errors based upon jury instructions, Petitioner must show
9 that the ailing instructions so infected the entire trial that the resulting conviction violates due process
10 rendering the trial fundamentally unfair. Estelle v. McGuire, 502 U.S. 62, 71-73 (1991); Cupp v.
11 Naughten, 414 U.S. 141, 147 (1973). The instruction "may not be judged in artificial isolation, but must
12 be considered in the context of the instructions as a whole and the trial record." McGuire, 502 U.S. at
13 72 (quoting McNaughten, 414 U.S. at 147); see also Victor v. Nebraska, 511 U.S. 1, 5, 22 (1994);
14 Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995) ("[w]hether a constitutional violation has occurred
15 will depend upon the evidence in the case and the overall instructions given to the jury"); United States
16 v. Frady, 456 U.S. 152, 169 (1982) (citing Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). "It must be
17 established not merely that the instruction is undesirable, erroneous, or even 'universally condemned'
18 but that it violated some constitutional right." McGuire, 502 U.S. at 72. The trial judge is accorded
19 substantial latitude so long as the instructions fairly and adequately cover the issues presented. United
20 States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1991). Moreover, the omission of an instruction is less
21 likely to be prejudicial than a misstatement of the law. Walker v. Endell, 850 F.2d 470, 475-76 (9th Cir.
22 1987) (citing Henderson v. Kibbe, 431 U.S. 145, 155 (1977)); see also Villafuerte v. Stewart, 111 F. 3d
23 616, 624 (9th Cir. 1997).

24 Because here Petitioner did not request the instructions at issue at the time of trial, this Court
25 reviews only for plain error. United States v. Fagan, 996 F.2d 1009, 1016 (9th Cir. 1993); United States
26 v. Boone, 951 F.2d 1526, 1541 (9th Cir. 1991) (where there was no request or objection made, the
27 instructions given are reviewed for plain error); United States v. Chambers, 918 F.2d 1455, 145 (9th
28 Cir. 1990). "Plain error requires a reversal only to prevent a 'miscarriage of justice' or where 'the error

1 seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v.
2 Carpenter, 95 F.3d 773, 775 (9th Cir. 1996) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)),
3 cert. denied, 117 S. Ct. 1094 (1997).

4 **a. The Trial Court's Accomplice Instructions Were Incomplete**

5 Petitioner claims that the failure to deliver complete instructions on the accomplice-corroboration
6 rule and the failure to define Carletha Stewart as an accomplice as a matter of law or to include her at
7 all in the accomplice instructions was an error on the part of the trial court. Although the trial court did
8 instruct the jury on accomplices with CALJIC 3.10, 3.11, 3.12, 3.14, 3.18, and 3.19, Petitioner believes
9 these instructions were incomplete and misleading because they were directed solely at prosecution
10 witness Andre Gilcrest, and the trial court did not include Stewart in the accomplice instructions.
11 Petitioner also believes that CALJIC 3.16 ("Witness Accomplice as a Matter of Law") should have been
12 given, as well as CALJIC 3.13. ("One Accomplice May Not Corroborate Another.")

13 Petitioner claims that the manner in which the instructions were given violated his federal due
14 process rights because the trial court did not completely comply with California Penal Code § 1111,
15 requiring corroboration of accomplice testimony before a conviction can be had, and instruct the jury
16 as to this requirement. In addition, Petitioner contends that the trial court failed to define co-defendant
17 Stewart as an accomplice as a matter of law, and failed to include her in the accomplice instructions.

18 Petitioner's argues that this Court must apply California law which requires that the testimony
19 of an accomplice be corroborated by some other evidence linking petitioner to the crime. See CAL.
20 PENAL CODE § 1111. However, by seeking relief through a petition for a writ of habeas corpus, filed
21 in federal court, Petitioner is limited to claims under the federal constitution. Consequently, the federal
22 standard for corroboration is applicable to this case. Under federal law the "uncorroborated testimony
23 of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face."
24 United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993). See also United States v. Lai, 944
25 F.2d 1434 1440 (9th Cir. 1991); Quiles v. United States, 344 F.2d 490, 494 (9th Cir. 1965), Castellon
26 v. Whitley, 739 F. Supp. 526, 531 (D.Nev.1990), aff'd, 976 F.2d 736 (9th Cir. 1992) ("federal
27 constitutional law does not require the testimony of an accomplice be corroborated"). After reviewing
28 the record, the Court finds that as discussed with respect to claim 16, there was a substantial amount of

1 independent evidence to support the finding that a conspiracy existed.

2 Nevertheless, Petitioner contends that the absence of the jury instruction on accomplice
3 corroboration denied him the right not to be convicted based solely on accomplice testimony, as
4 guaranteed by state law, which in turn violated his federal due process rights. However, under state law,
5 accomplice testimony is to be considered by the jury so long as there is corroboration to connect the
6 defendant to the crime and satisfy the jury that the accomplice is testifying honestly. See, e.g., CAL.
7 PENAL CODE § 1111; People v. Fauber, 2 Cal.4th 792, 834, 831 P.2d 249, 9 Cal. Rptr. 2d 24 (1992);
8 People v. Price, 1 Cal.4th 324, 443- 44, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991).

9 Here the trial court gave the instruction which embodied the principles in California Penal Code
10 § 1111,⁶ instructing the jury that "[a] defendant cannot be found guilty based upon the testimony of an
11 accomplice unless such testimony is corroborated by other evidence which tends to connect such
12 defendant with the commission of the offense." CT at 1131. This instruction sufficiently satisfies the
13 state-law requirement. In addition, the jury was instructed in accordance with CALJIC 3.12 that "[t]o
14 corroborate the testimony of an accomplice there must evidence of some act or fact related to the offense
15 which, if believed, by itself and without any aid, interpretation or direction from the testimony of the
16 accomplice, tends to connect the defendant with the commission of the offense charged." CT at 1132.
17 The court's instruction on accomplice testimony in general can fairly be said to have cautioned the jury
18 to examine the circumstances under which the three statements attributed to Stewart were made. There
19 is simply no reason to believe that the jury did not carefully weigh accomplice out-of-court statements.

20 Despite these instructions, Petitioner claims that the jury was inadequately instructed because

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24 ⁶California Penal Code § 1111 states:

25 A conviction cannot be had upon the testimony of an accomplice
26 unless it be corroborated by such other evidence as shall tend to connect
the defendant with the commission of the offense; and the corroboration
is not sufficient if it merely shows the commission of the offense or the
circumstances thereof.

27 An accomplice is hereby defined as one who is liable to
prosecution for the identical offense charged against the defendant on
trial in the cause in which the testimony of the accomplice is given.

28 CAL PENAL CODE § 1111.

1 Stewart was not identified as an accomplice.⁷ Petitioner claims that due to the manner in which CALJIC
2 3.19 was given, the jury would not understand that all the accomplice instructions were to also apply
3 to Stewart's out-of-court statements. However, subsequent jury instructions made it clear that Stewart
4 was also an accomplice. CT at 1164. Moreover, it is also obvious that the instructions were modified
5 to specifically apply to Stewart. When the trial court instructed the jury that the testimony of an
6 accomplice should be viewed with distrust, in accordance with CALJIC 3.18, the jury was also
7 instructed: "[t]he term 'testimony' also includes former statements by the accomplice which are received
8 into evidence." CT at 1134.

9 In light of these instructions, the fact that the trial court's instructions was limited to Gilcrest,
10 who testified, and did not specifically mention Stewart, who did not testify but whose out-of-court
11 statements were admitted, should not have misled the jury. Under the circumstances of this case, there
12 was no constitutional due process violation as a result of the trial court's failure to include Stewart as an
13 accomplice when giving the instructions on accomplice testimony.

14 As for Petitioner's claim that CALJIC 3.13 should have been given, which would have instructed
15 the jury that one accomplice may not corroborate another, the jury was already instructed that "[i]n
16 determining whether an accomplice has been corroborated, you must first assume the testimony of the
17 accomplice has been removed from the case." CT at 1132. Such an instruction was sufficient to ensure
18 that Stewart's statements were not utilized to corroborate Gilcrest's testimony. Nor, as a practical
19 manner could Stewart's statements corroborate Gilcrest's statements, because Gilcrest's testimony
20 consisted of what he heard Stewart tell him about the plan to rob the restaurant. Thus, Gilcrest's

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22 ⁷Pursuant to CALJIC 3.19 the jury was instructed as follows:

23 You must determine whether or not the witness Andre Gilcrest
24 was an accomplice but I will define that term.

25 The defendant has the burden of proving by a preponderance of
26 the evidence that Andre Gilcrest was an accomplice in the crime of
27 conspiracy to commit robbery charged against the defendant.

28 Preponderance of the evidence means such evidence as when
weighed with that opposed to it has more convincing force and the
greater probability of truth.

In the event that the defendant has not proved by a preponderance
of the evidence that Andre Gilcrest is an accomplice or the evidence is
evenly balanced so that you are unable to say that the evidence on either
side of the issue outweighs the other, then you must find that Andre
Gilcrest was not an accomplice.

CT at 1129 (emphasis added).

1 testimony could not independently corroborate Stewart's out of court statements.

2 For the foregoing reasons, the Court finds that Petitioner's allegations regarding erroneous jury
3 instructions do not support a finding that he was denied the fundamentally fair trial guaranteed by the
4 Due Process Clause. Accordingly, Respondent is entitled to summary judgment on this sub-claim.

5 **b. Trial Court's Provision of a Slightly Modified Version of CALJIC**
6 **2.11.5**

7 Petitioner complains that CALJIC 2.11.5 should not have been given. CALJIC 2.11.5 states:

8 There has been evidence in this case indicating that a person or
9 persons other than defendant were or may have been involved in the
10 crimes for which the defendant is on trial. You must not discuss or give
any consideration as to why the other person or persons are not being
prosecuted in this trial or whether they have or will be prosecuted.

11 CT at 1111.

12 Petitioner contends that the use of this instruction conflicts with and undermines the effectiveness
13 of the instructions on the accomplice-corroboration rule, advising that accomplice testimony must be
14 viewed with distrust. Petitioner points out that Gilcrest was identified as an accomplice in the offense,
15 but was not prosecuted and was testifying for the prosecution. Petitioner argues that the jury was
16 entitled to consider Gilcrest's motivations in testifying.

17 The Court finds that the inclusion of CALJIC 2.11.5 did not so "infect[] the entire trial that the
18 resulting conviction violates due process rendering the trial fundamentally unfair." McGuire, 502 U.S.
19 at 71-73; Naughten, 414 U.S. at 147. Nor would the issuance of this instruction cloak Stewart's
20 statements in a aura of trustworthiness, as there is no reason to believe that the generic instruction on
21 viewing accomplice testimony with distrust would not be applied by a reasonable jury to Stewart's
22 testimony.

23 **c. Trial Court's Failure to Provide CALJIC 2.71 and 2.71.7**

24 Petitioner claims here that the testimony of witness Jerry Lankford required the trial court to sua
25 sponte deliver CALJIC 2.71 and 2.71.7, so that the jury would be instructed that evidence of oral
26 admissions should be viewed with caution. Lankford, who had two prior felony convictions for robbery,
27 was a prosecution witness. His pre-trial statements to the police, along with his current testimony, was
28 admitted during Petitioner's trial. According to the police reports, prior to trial Lankford told the police

1 that he had talked with Petitioner about robbing Bob's Big Boy, and that Petitioner told him he was
2 involved with a waitress who worked there. Lankford also testified that during the conversation he
3 observed a shotgun in the Petitioner's car. RT at 11,540, 11,856-865, 11,924-928. In the prior statement
4 Lankford had also stated that Petitioner told him he wanted help in pulling off the robbery. RT at
5 11,862-63, 11,926. However, at trial Lankford recanted his prior testimony and denied having had a
6 personal conversation with Petitioner regarding the plan to rob the restaurant. RT at 11,520. Instead,
7 Lankford testified that he had heard in the neighborhood that Petitioner was looking for someone and
8 he was thinking about robbing a restaurant. RT at 11,537. He also claimed to have received the
9 information he gave to the police through what he had heard on the radio and read in the newspaper.
10 RT at 11,619-623.

11 In rejecting this claim the California Supreme Court pointed out that the jury had already been
12 instructed to view evidence of oral admissions by the defendant with caution.⁸ Petitioner complains that
13 this instruction applied specifically to the testimony of Bruce Woods, and thus would not have been
14 applied to the prior statements of Lankford regarding Petitioner's plan to rob the restaurant. This
15 argument does have considerable weight, in light of the fact that the instruction focused upon the
16 testimony of Bruce Woods, and the instruction regarding Petitioner's oral statement was only added to
17 the basic instruction as a modification.

18 Nevertheless, the omission of the jury instructions at issue could not have rendered Petitioner's
19 trial fundamentally unfair. First of all, Lankford repudiated his prior statement to the police, in which
20 he said Petitioner had made oral statements about the planned robbery. Second, the jury had been
21 instructed generally on factors to consider when evaluating the credibility of witnesses, which included
22

23 ⁸The instruction given to the jury was as follows:

24 With reference to the alleged conversation between the defendant and
25 witness Bruce Woods in a sheriff's vehicle: if you find that a defendant
26 attempted to suppress evidence against himself in any manner, such as
27 [by the intimidation of a witness] such attempts may be considered by
28 you as a circumstance tending to show a consciousness of guilt.
However, such evidence is not sufficient in itself to prove guilt and its
weight and significance, if any, are matters for your consideration.
Evidence of an oral statement of a defendant should be received with
caution.

CT at 1108 (emphasis added).

1 prior inconsistent statements and prior convictions of felonies, CT at 1113, as well as specifically on
2 the effect that a prior conviction of a felony should have on the credibility of a witness. CT at 1118.
3 In addition, the jury was instructed as follows:

4 Evidence that on some former occasion, a witness made a
5 statement or statements that were inconsistent (or consistent) with his
6 testimony in this trial, may be considered by you not only for the purpose
7 of testing the credibility of the witness, but also as evidence of the truth
8 of the facts as stated by the witness on such former occasion.

9 (If you disbelieve a witness' testimony that he no longer
10 remembers a certain event, such testimony is inconsistent with a prior
11 statement or statements by him describing that event.)

12 CT at 1116.

13 Finally, the jury was instructed:

14 With respect to the witness Jerry Langford [sic], you have heard
15 his in-court testimony that certain information pertaining to the case was
16 received by him from persons other than the defendant.

17 You have heard evidence also of certain statements allegedly
18 made by Mr. Langford [sic] prior to the trial where he stated that the
19 information came from defendant Sanders himself.

20 Both versions are before you for your consideration and it is for
21 the jury to decide which, if either, of the versions is true.

22 If you find that the information came from persons other than the
23 defendant, it is inadmissible hearsay and must be disregarded by you.

24 If you find that the information came from Mr. Sanders himself,
25 then you may consider it and give to it such weight as you feel that it
26 deserves.

27 CT at 1117.

28 Due to the extent of the instructions given to the jury regarding Lankford's testimony, and the
degree to which Lankford denied that he had ever actually spoke to Petitioner himself about the robbery,
the Court finds that any error in failing to give CALJIC 2.71 and 2.71.7 instructions to the jury is
harmless. The omission of the instructions at issue would not "infect[] the entire trial [such] that the
resulting conviction violates due process rendering the trial fundamentally unfair." McGuire, 502 U.S.
at 71-73; Naughten, 414 U.S. at 147.

6. Claim 27: Guilt Phase Cumulative Error

The Court declines to rule on a claim of cumulative error until all the claims arising from the
guilt phase have been examined.

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7. **Claim 28: Inordinate Delay in Petitioner's Automatic Appeal to the California Supreme Court Mandates Commuting His Death Sentence to Life Imprisonment Under the Sixth, Eighth, and Fourteenth Amendments⁹**

Petitioner claims that because he was on death row for thirteen years waiting for his automatic appeal to go forward due to circumstances entirely beyond his control, his execution now would violate the Eighth Amendment's prohibition against "cruel and unusual" punishment. This contention has become characterized as a Lackey claim, as its worthiness of review was asserted by Justices Stevens and Breyer in Lackey v. Texas, 514 U.S. 1045 (1995). Although the issue has apparently been raised as early as 1960, it has never been successfully advanced. See McKenzie v. Day, 57 F.3d 1461, 1465 (9th Cir.), adopted en banc, 57 F.3d 1493 (9th Cir.), cert. denied, 514 U. S. 1104 (1995) (citing Chessman v. Dickson, 275 F.2d 604, 607 (9th Cir. 1960) and Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990), rev'd on other grounds, 506 U.S. 40 (1992), vacated, 986 F.2d 1583 (9th Cir. 1993)).

Petitioner cites no controlling authority which would support his claim for relief on this claim. Indeed this is not surprising as recently when the Tenth Circuit was faced with a claim that executing a defendant was cruel and unusual after fifteen years on death row, during which time he faced at least seven execution dates, it found that "[t]o our knowledge, there is no reported federal cases that has adopted the position advanced by [Stafford]."¹⁰ Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995). Understandably, Petitioner is forced to rely upon general policy arguments in support of this claim, as well as decisions of foreign courts.

Even more importantly, the Ninth Circuit has expressed doubt that the remedy Petitioner seeks here, which is vacating the death sentence, would be the appropriate remedy even if delay in carrying out the death sentence constituted cruel and unusual punishment. McKenzie, 57 F.3d at 1467. Therefore this claim is meritless as a matter of law.

⁹Although Petitioner claims that the inordinate delay in his automatic appeal mandates commuting his death sentence to life imprisonment under the Sixth, Eighth, and Fourteenth Amendments, Petitioner's argument is based solely upon the Eighth Amendment.

¹⁰ The Tenth Circuit went on to state: "[a]lthough two Supreme Court justices have expressed the view that lower federal courts should grapple with this issue, those views do not constitute an endorsement of the legal theory, which has never commanded an affirmative statement by any justice, let alone a majority of the Court." Stafford, 59 F.3d at 1028 (citing Lackey, 514 U.S. 1045).

Moreover, even if there was merit to Petitioner's Lackey claim, Petitioner does not cite to any authority existing at the time his conviction became final, on October 7, 1996, which mandated that delays in the execution of his sentence of death would be deemed cruel and unusual punishment. Thus the adoption of this new rule would run afoul of the non-retroactivity doctrine set forth in Teague v. Lane, 489 U.S. 288 (1989).

8. Claim 29: Trial Court Improperly Restricted the Scope of the Death Qualification Voir Dire, In Violation of the Sixth, Eighth, and Fourteenth Amendments

Petitioner contends that the trial court restricted his attorney from presenting hypothetical facts to the prospective jurors, even when those hypothetical facts concerned the facts of the case. In addition Petitioner alleges that the trial court incorrectly restricted other questions which were designed to: (1) ascertain possible misunderstandings and misconceptions of California death penalty law; (2) flesh out personal history as it related to support for capital punishment; and/or (3) determine which jurors would be inclined to vote for either a sentence of life without parole or the death penalty. The Sixth and Fourteenth Amendments "guarantee[] a defendant on trial for his life the right to an impartial jury." Morgan v. Illinois, 504 U.S. 719, 728 (1992). And, "'the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"' Id. (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)) (alteration in original). "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." Id. Likewise, a juror "who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do;" such a juror is not impartial and should be removed for cause. Id. at 729.

Thus, in a capital case, the right to an impartial jury is the right to an inquiry adequate to ensure, within the limits of reason and practicality, a jury none of whose members would "unwaveringly impose death after a finding of guilt" and thus would uniformly reject any and all evidence of mitigating factors, which is contrary to the law. Morgan, 504 U.S. at 733-34 (right to such an inquiry established); see id.

1 at 735-36. Questions directed simply to whether a juror can be fair, or follow the law, are inadequate
2 because they do not necessarily reveal jurors who would vote for the death penalty regardless of the facts
3 and circumstances of the case. See id. at 734-36.

4 Just how an inquiry, sufficient to determine whether any prospective jurors are so in favor of the
5 death penalty that they would be unable to perform their duties in accordance with the law, should be
6 administered is committed to the discretion of the trial courts. The Constitution no more "dictate[s] a
7 catechism" for its conduct than it does for any other subject of required voir dire inquiry. Id. at 729;
8 Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981); Aldridge v. United States, 283 U.S. 303,
9 310 (1931); Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (trial court retains great latitude in deciding
10 questions to be asked on voir dire). A trial court has considerable discretion to accept or reject proposed
11 voir dire questions and, as long as it conducts an adequate voir dire, its rejection of specific questions
12 is not error. United States v. Giese, 597 F.2d 1170, 1182-83 (9th Cir. 1979).

13 The Supreme Court has declined to dictate the subject matter of voir dire questions in all but the
14 most limited of circumstances. See Morgan, 504 U.S. at 733-34 (holding that the Constitution requires
15 that voir dire in a capital case include questions regarding whether prospective jurors would
16 automatically vote to impose the death penalty in the event of a conviction, just as it must include
17 questions regarding whether prospective jurors would automatically vote against imposing the death
18 penalty); Rosales-Lopez, 451 U.S. at 189 (holding that the Constitution requires inquiry into racial or
19 ethnic prejudice on voir dire when "racial issues [are] 'inextricably bound up with the conduct of the
20 trial'" (quoting Ristaino v. Ross, 424 U.S. 589, 597 (1976))). Moreover, the Court generally has
21 refrained from dictating the form of voir dire questions. See Mu'Min, 500 U.S. at 431 (noting Court's
22 reluctance "to specify the particulars by which" the topic of racial bias is covered during voir dire). It
23 should be noted that in Mu'Min the Court recognized that it has greater latitude in setting standards for
24 voir dire in federal courts according to its supervisory powers than in setting standards for voir dire in
25 state courts according to the Fourteenth Amendment. Id. at 422-24.

26 Inherent in the deference to the trial court's conduct of voir dire is a reluctance to second-guess
27 the court's decision to refuse inquiry into certain matters. Ristaino, 424 U.S. at 594-95; see also id. at
28 598 (generally, a trial judge need not pursue any specific line of questioning; any method is sufficient

1 provided it is probative on the issue of impartiality). Because voir dire determinations "rely largely on
2 ... immediate perceptions, federal judges have been accorded ample discretion in determining how best
3 to conduct the voir dire." Rosales-Lopez, 451 U.S. at 189; Ristaino, 424 U.S. at 598.

4 Petitioner claims that he was not afforded the opportunity to question witnesses adequately on
5 their attitude toward the death penalty because the trial court refused to permit defense counsel to pose
6 a hypothetical to each prospective juror which stressed the facts of the crimes with which Petitioner was
7 charged in the least sympathetic light, and did little more than mention three possible mitigating
8 circumstances. However, here to get at a possible disqualifying bias, the district court first explained
9 to all the prospective jurors that if the defendant was found guilty of murder of the first degree and the
10 special circumstances were found to be true during the first stage of the trial, the jury would then
11 consider whether to impose the death penalty in a second stage. During the second stage of the trial the
12 jury would consider all of the evidence which had been received during the trial, and the applicable
13 factors of aggravating or mitigating circumstances, and the court's instructions on the law. RT at 2271-
14 2280. With this framework in place, the court then asked each prospective juror specific questions about
15 whether they were so opposed to the death penalty such that they could never vote for it regardless of
16 the facts in the case, or whether they were so in favor of the death penalty that they would always vote
17 to impose it, regardless of the facts, and whether they had an open mind about the death penalty.

18 Thus, despite Petitioner's contentions to the contrary, the voir dire in this case extended beyond
19 mere general impartiality and "follow the law" questions, and adequately explored jurors' views on the
20 death penalty. The trial court was not obligated to allow examination into each juror's views as to
21 whether given the specific facts of the case, the death penalty was the appropriate penalty, as long as the
22 voir dire was adequate to discover those in the venire who would automatically vote for the death
23 penalty. See id. at 732-34. The fact that such detailed questioning might have been somehow helpful
24 to Petitioner in utilizing peremptory challenges does not serve to show abuse of the trial court's broad
25 discretion in conducting the requisite inquiry. See Mu'Min v. Virginia, 500 U.S. 415, 424-25 (1991).
26 Moreover, the kind of questioning desired by Petitioner, in which prospective jurors are asked what
27 penalty they would impose if specific mitigating factors were introduced, or the jurors are questioned
28 about specific mitigating or aggravating factors, or the questions posed to the jurors are based upon facts

specific to the instant case, has been found objectionable by several courts. United States v. McVeigh, 153 F.3d 1166, 1207-08 (10th Cir. 1998); Sellers v. Ward, 135 F.3d 1333, 1341-42 (10th Cir. 1998); United States v. McCullah, 76 F.3d 1087, 1114 (10th Cir.), reh'g and reh'g en banc denied, 87 F.3d 1136 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997); see United States v. Tipton, 90 F.3d 861, 879 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997).

The questions asked by the trial court were sufficient to cull out any prospective juror who would always vote for the death penalty whatever the circumstances.¹¹ Since the trial court made an adequate inquiry into the prospective jurors' possible biases, in a manner reasonably calculated to expose any bias, the trial court's prohibition on a fact-specific hypothetical did not constitute an abuse of discretion or render the trial constitutionally suspect. Given that the trial court's barring of a fact-specific hypothetical was not an error, the alleged additional restrictions, which Petitioner contends compounded the prejudice arising from that error, are of no moment. Accordingly, Respondent is entitled to summary judgment on claim 29.

9. Claim 32, in Which Petitioner Claims the Trial Court Erred in Admitting Evidence of the Orange County Burglary and Brandishing Offenses, Which Violated Sanders' Rights Under the Sixth, Eighth and Fourteenth Amendments¹²

During the penalty phase the state introduced evidence, which Petitioner had stipulated to, that Petitioner had committed second degree burglary in February 1977 and was sentenced to prison for the offense. The state sought to introduce the evidence of the circumstances of the burglary to prove other criminal activity involving "the use or attempted use of force or violence or which involved the express or implied threat to use force or violence," which was a statutory aggravating factor. Petitioner contends that this evidence was incorrectly admitted.

Petitioner asserts four grounds for the alleged trial court error: (1) evidence of brandishing was insufficient; (2) evidence was introduced in violation of double jeopardy; (3) unadjudicated allegations

¹¹The Court should note that Petitioner's counsel did not utilize seven of the peremptory challenges available to the defense.

¹²The sub-claim that excluding evidence that the assault with a deadly weapon charge had been dismissed violated due process was found to be procedurally barred by this court.

1 of the brandishing must not be admitted at the penalty phase; and (4) details of the prior burglary were
2 not admissible as Petitioner had stipulated to the prior burglary conviction.

3 a. Sub-Claim That Evidence of Brandishing Was Insufficient

4 i. Whether the Trial Court Erred in Admitting the Evidence of
5 Brandishing

6 The Supreme Court has made it clear that "federal habeas corpus relief does not lie for errors of
7 state law." Lewis v. Jeffers, 497 U.S. 764, 780 (1990). "A habeas petitioner who challenges a state
8 court's admission into evidence of prior acts of misconduct is not entitled to habeas corpus relief unless
9 the state court's admission of this evidence violated petitioner's federal due process right to a fair trial
10 under the Constitution." Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990). Thus, a federal court
11 cannot disturb a state court's decision to admit evidence unless the admission of evidence was arbitrary
12 or so prejudicial that it rendered the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357
13 (9th Cir. 1995); Pennywell v. Rushen, 705 F.2d 355, 357 (9th Cir. 1983) (quoting Powell v. Spalding,
14 679 F.2d 163, 166 (9th Cir. 1982)) (to be entitled to federal habeas relief Petitioner must establish that
15 the state law error "rendered the trial so 'arbitrary and fundamentally unfair' that it violated federal due
16 process").

17 Here the trial court instructed the jury that with respect to the brandishing offense, the State had
18 the burden of "proving [Petitioner] guilty beyond a reasonable doubt," and defined reasonable doubt for
19 the jury. CT at 1259. The jury was given the definition of brandishing, which was: "draw[ing] or
20 exhibit[ing] any firearm, whether loaded or unloaded, or any other deadly weapon, in a rude, angry, or
21 threatening manner." CT at 1258.

22 The jury was given the opportunity to assess the credibility of the victim, Dr. Cray, who initially
23 testified that after he asked the men who were running from his house with rifles what they were doing,
24 the driver stated "Shoot him. Shoot him." RT at 15,820-21. Dr. Cray testified that "[t]he driver was
25 getting in the car with his rifle, but it seemed like the other fellow [Petitioner] was positioning the rifle
26 towards me. ¶ But I didn't stick around to find out." RT at 15,821 (emphasis added). Subsequently,
27 in answering the trial court's questions, Dr. Cray testified "[w]ell, when he mentioned that, started to
28 move the gun, I assumed it was going to be pointed towards me." RT at 15,827 (emphasis added). In

1 response to the prosecutor's questions, Dr. Cray admitted: "[w]ell, it looked as though he was pointing,
2 going to point at me, or at least moving, him moving the gun, and I wasn't going to stand around and
3 find out." RT at 15,829. The Court then questioned Dr. Cray again, eliciting Dr. Cray's testimony that
4 "[t]hen the gun moved towards me. Whether it ever got pointed towards me I don't know, because I
5 took off." CT at 15,831-32.

6 On cross-examination Dr. Cray testified that he observed the two men trying to get the long guns,
7 which were approximately four feet, into the car. RT at 15,844. It was stipulated that at the preliminary
8 hearing, on March 25, 1977 in the Municipal Court of Central Orange County Judicial District, Dr. Cray
9 had testified that as the two men were trying to enter the car, they had to manipulate their rifles into the
10 car. RT at 15,846-47.

11 Due to the lengths that the trial court went to in an effort to ensure that the jury was in a position
12 to determine the credibility of Dr. Cray's testimony, and that Dr. Cray was pinned down to stating
13 exactly what he saw and not what he assumed to be true, the decision to admit the testimony was not
14 a violation of Petitioner's federal due process right to a fair trial. See Gordon, 895 F.2d at 613.

15 **ii. Whether There Was Insufficient Evidence of Brandishing**

16 Petitioner contends that there was insufficient evidence of brandishing. The Due Process Clause
17 "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact
18 necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 365 (1970).
19 A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied
20 that the evidence established guilt beyond a reasonable doubt, however. Payne v. Borg, 982 F.2d 335,
21 338 (9th Cir. 1992). Rather the federal court "determines only whether, 'after viewing the evidence in
22 the light most favorable to the prosecution, any rational trier of fact could have found the essential
23 elements of the crime beyond a reasonable doubt.'" Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319
24 (1979)); Gordon, 895 F.2d at 612.

25 Under California law, brandishing is defined as the drawing or exhibiting of a firearm, whether
26 loaded or unloaded, "in a rude angry, or threatening manner." CAL PENAL CODE § 417(a)(1). As the
27 California Supreme Court found "Dr. Cray's account of the incident, in which he testified that defendant
28 wielded a rifle in a threatening manner, constituted substantial evidence on the elements of a brandishing

1 offense." Sanders, 11 Cal. 4th at 542. Dr. Cray testified that the gun was being moved towards him,
2 and as a result of the perceived threat Dr. Cray moved quickly because he did not want to find out what
3 Petitioner had in mind. CT at 15,821, 15,829, 15,831. It is important to note that while the defense
4 challenged Dr. Cray on the point of whether he actually saw Petitioner point the gun at him, "the offense
5 is complete on exhibition of the weapon in a rude, angry, or threatening manner." People v. McKinzie,
6 179 Cal. App. 3d 789, 794, 224 Cal. Rptr. 891, 894 (Cal. App. 4 Dist. 1986); see also People v. Mercer,
7 113 Cal. App. 3d 803, 806, 169 Cal. Rptr. 897, 898 (Cal. App. 3 Dist. 1980); People v. Norton, 80 Cal.
8 App. 3d Supp. 14, 26, 146 Cal. Rptr. 343, 350 (Cal. App. Super. 1978) ("Once it is shown that the
9 weapon is exhibited in a rude, angry and threatening manner, the offense is complete. . .").

10 Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could
11 have found Petitioner guilty of brandishing a weapon beyond a reasonable doubt. See Payne, 982 F.2d
12 at 338- 39. Accordingly, Respondent is entitled to summary judgment on this sub-claim.

13 **b. Sub-Claim That Evidence of Brandishing Was Introduced in**
14 **Violation of Double Jeopardy**

15 Petitioner contends that the trial court erred in allowing the prosecutor to introduce evidence of
16 brandishing because although Petitioner had been charged twice with assault with a deadly weapon, the
17 charges had been dismissed for insufficiency of the evidence by the magistrate at the preliminary
18 hearing, and again in superior court on a Penal Code § 995 motion after the charges were refiled. RT
19 at 15,728-730. Petitioner argues that since the crime of brandishing is a lesser related offense of assault
20 with a deadly weapon, and the facts used to file the assault with a deadly weapon were found insufficient
21 by two different courts, RT at 15,727-731, 15,731-15,804, the evidence of brandishing should have been
22 barred by the Double Jeopardy Clause.

23 "[T]he Double Jeopardy Clause consists of several protections: It protects against a second
24 prosecution for the same offense after conviction. And it protects against multiple punishments for the
25 same offense." Schiro v. Farley, 510 U.S. 222, 229 (1994) (internal quotation omitted) (footnotes
26 omitted)). In addition, "[t]he Clause operates as a 'bar against repeated attempts to convict, with
27 consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the
28 possibility that he may be found guilty even though innocent.'" Id. at 229-230 (quoting United States

1 v. DiFrancesco, 449 U.S. 117, 136 (1980)). However, when "there is no threat of either multiple
2 punishment or successive prosecutions, the Double Jeopardy Clause is not offended." Id. at 230

3 This case is distinguishable from Ashe v. Swenson, 397 U.S. 436 (1970), the case relied upon
4 by Petitioner, because here there was no prior acquittal of either assault with a deadly weapon or
5 brandishing, such that the protections of the Double Jeopardy Clause would be invoked, nor was there
6 any determination of "a issue of ultimate fact" through a "valid and final judgment," such that issues of
7 collateral estoppel would arise. See Ashe, 397 U.S. at 443.

8 Moreover, the California Supreme Court has held that while there is an "express exclusion of
9 evidence of prior criminal activity pertaining to an offense for which the defendant has been 'prosecuted
10 and acquitted," a dismissal is not the equivalent of an acquittal under § 190.3 since "a dismissal is not
11 based on any judicial determination with respect to the truth or falsity of the charge." People v.
12 Heishman, 45 Cal. 3d 147, 193, 753 P.2d 629, 246 Cal. Rptr. 673 (1988); see also People v. Medina,
13 51 Cal. 3d 870, 907, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990) (same); People v. Robertson, 48 Cal. 3d
14 18, 47, 767 P.2d 1109, 255 Cal. Rptr. 631 (1989) (§ 190.3 "permits the introduction of all evidence of
15 violent crimes whether or not they resulted in a conviction, except those of which the defendant has been
16 acquitted").

17 Similarly, the California Supreme Court has rejected a claim that the guilty plea to a lesser
18 included offense constituted an acquittal of the charged offense, finding that evidence of the lesser
19 included offense was properly admitted during the penalty phase. People v. Taylor, 52 Cal. 3d 719, 743,
20 801 P.2d 1142, 276 Cal. Rptr. 391 (1990); see also People v. Melton, 44 Cal. 3d 713, 755, 750 P.2d 741,
21 244 Cal. Rptr. 867 (1988) ("A bargained conviction or dismissal is not an 'acquittal' as described in
22 section 190.3"); People v. McDowell, 46 Cal. 3d 551, 566-68, 763 P.2d 1269, 250 Cal. Rptr. 530 (1988)
23 (rejecting argument that guilty plea to nonviolent crime precluded introduction of the underlying facts
24 of the case).

25 Nor does the admission of evidence relating to prior offenses violate the double jeopardy rule.
26 People v. Fierro, 1 Cal. 4th 173, 231, 821 P.2d 1302, 3 Cal. Rptr. 2d 426 (1991). "In presenting
27 testimony relating to defendant's use of force or violence, the prosecutor was not relitigating the prior
28 acts for purposes of obtaining a new conviction but rather for their relevance as an aggravating factor.

1 We have held that principles of double jeopardy have no application under these circumstances." Id.
2 (citing McDowell, 46 Cal. 3d at 568 (holding "[d]efendant was not placed twice in jeopardy for the same
3 offense; rather, evidence of the offense was admitted to assist the jury in its determination of the
4 appropriate sentence.")).

5 Here since Petitioner was not in jeopardy of either receiving multiple punishments, or being
6 subjected to successive prosecutions, the admission of the evidence of brandishing did not violate the
7 Double Jeopardy Clause. Nor was the collateral-estoppel rule violated since no valid and final judgment
8 arose from the dismissal of the assault with a deadly weapon charge, nor were any ultimate facts
9 determined when the charges were dismissed on two separate occasions. Accordingly, Respondent is
10 entitled to summary judgment on this sub-claim.

11 Petitioner also summarily complains in a footnote that since brandishing is subject to a one-year
12 statute of limitations, the evidence of brandishing should have been excluded on the ground as well.
13 However, § 190.3 of the California Penal Code sets forth no temporal limitation on the evidence
14 showing a "presence or absence of criminal activity by the defendant which involved the use or
15 attempted use of force or violence or the express or implied threat to use force or violence" which the
16 trier of fact should consider when determining penalty.

17 Precedent from the United States Supreme Court dictates that a wide scope of evidence is
18 admissible during the penalty phase of a capital murder trial, so long as the evidence is not
19 "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462
20 U.S. 862, 885 (1983). Moreover, the California Supreme Court has held numerous times that "evidence
21 of offenses barred by the statute of limitations is nonetheless admissible as aggravating evidence at the
22 penalty phase." Medina, 51 Cal. 3d at 907; see also People v. Jennings, 46 Cal. 3d 963, 981-82, 760
23 P.2d 475, 251 Cal. Rptr. 278 (1988); Heishman, 45 Cal. 3d at 192. Petitioner has not cited, and the
24 Court has not found, any legal authority to the contrary. Accordingly, Respondent is entitled to
25 summary judgment on this sub-claim.

26 c. **Sub-Claim That Unadjudicated Allegations of the Brandishing Must**
27 **Not Be Admitted at the Penalty Phase**

28 Despite authority to the contrary, Petitioner complains that imposition of the death penalty in

1 partial reliance upon unadjudicated allegations of criminal behavior fails to satisfy the constitutional
2 requirement of reliability. However, the admission of this kind of evidence is permitted under
3 "California Penal Code § 190.3(b), which permits the introduction of evidence of past violent criminal
4 activity at the penalty phase of a capital case, even if the defendant has not been tried for the crimes."
5 Bonin v. Calderon, 59 F.3d 815, 839 (9th Cir. 1995) (citing People v. Phillips, 41 Cal. 3d 29, 67-72, 711
6 P.2d 423, 222 Cal. Rptr. 127 (1985)). There is no per se barrier to the introduction of unadjudicated
7 prior criminal acts. See Tuilaepa v. California, 512 U.S. 967, 976 (1994) (approving as an aggravating
8 factor the defendant's participation in prior criminal acts, even if unadjudicated, involving violence or
9 the threat of violence); see also Devier v. Zant, 3 F.3d 1445 (11th Cir. 1993) (finding that admission of
10 evidence of an unadjudicated criminal offense during the sentencing phase does not violate the Eighth
11 Amendment); Gray v. Netherland, 518 U.S. 152, 157, 173 n. 2 (1996) (acknowledging that
12 "unadjudicated-crime evidence" was admissible in the penalty phase of a capital murder trial, pursuant
13 to Virginia state law). Nor is there any question that California law permits the admission of evidence
14 of unadjudicated prior criminal acts. Bonin, 59 F.3d at 839; People v. Jackson, 49 Cal. 3d 1170, 1208,
15 783 P.2d 211, 264 Cal. Rptr. 852 (1989); People v. Grant, 45 Cal. 3d 829, 859, 755 P.2d 894, 248 Cal.
16 Rptr. 444 (1988); People v. Balderas, 41 Cal. 3d 144, 204, 711 P.2d 480, 222 Cal. Rptr. 184 (1986).

17 The cases upon which Petitioner relies to support this claim are not persuasive on this point.
18 Johnson v. Mississippi, 486 U.S. 578 (1988), is distinguishable since therein the Supreme Court held
19 that reexamination of a death sentence was necessary because it was based in part on an invalid
20 aggravating circumstance, which violated the Eighth Amendment's prohibition against cruel and
21 unusual punishment. Id. at 590. The aggravating circumstance at issue was a prior conviction, which
22 after the petitioner had been sentenced to death, had been reversed by the state court of appeals. Id. at
23 580, 582. Here there is no support for Petitioner's allegation that the evidence, which was properly
24 admitted under one of the statutory aggravating factors, is an invalid aggravating circumstance.

25 Petitioner also summarily claims that use of other-crimes evidence denied Petitioner due process
26 of law and a fair trial by jury and violated his Eighth Amendment right to a reliable death sentence
27 because California law requires neither unanimity or agreement by a substantial majority of the jury as
28 to the proof of the unadjudicated crimes. In Petitioner's trial the jury was only instructed that with

1 respect to the use of the brandishing evidence, the evidence could not be used unless it had been proved
2 beyond a reasonable doubt. CT at 1259. But the trial court did not instruct the jury that the criminal
3 activity could not be used unless the jury was unanimous on the question of whether it had been proved.

4 The Ninth Circuit has not directly addressed whether a jury must unanimously agree upon
5 aggravating factors under the California death penalty statute. Odle v. Calderon, 884 F. Supp. 1404,
6 1428 (N.D.Cal. 1995). However, the circuit has found that the Washington death penalty statute does
7 not require jurors "to be unanimous as to the appropriateness of the death penalty for each murder in a
8 multiple-murder trial." Jeffries v. Blodgett, 5 F.3d 1180, 1195 (9th Cir. 1993). Moreover, the identical
9 claim has been rejected by several district courts. Odle, 884 F. Supp. at 1428; Bonin v. Vaquez, 807
10 F. Supp. 589, 623 (C.D.Cal. 1992), aff'd, 59 F.3d 815 (9th Cir. 1995); cf. Turner v. Calderon, 970 F.
11 Supp. 781, 792 (E.D.Cal. 1997).

12 In addition, Petitioner's claim that unanimity should be required with respect to finding that
13 aggravating factors can be relied upon, cannot be reconciled with the Supreme Court's suggestion "that
14 complete jury discretion is constitutionally permissible." Buchanan v. Angelone, 522 U.S. 269, 118 S.
15 Ct. 757, 761-62 (1998); see also California v. Ramos, 463 U.S. 992, 1009 (1983).

16 Petitioner has not offered persuasive reasons as to why he is entitled to relief on such a claim.
17 Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this sub-claim.

18 **d. Sub-Claim That Details of the Prior Burglary Were Not Admissible**
19 **As Sanders' Had Stipulated to The Prior Burglary Conviction are**
20 **Not Procedurally Barred**

21 Petitioner contends that since he stipulated to the 1977 burglary conviction, the prosecution
22 should not have been permitted to introduce evidence of the underlying details of the burglary.
23 Petitioner complains that underlying details included the testimony regarding the theft of two rifles
24 belonging to Dr. Cray, and the stacking of his property in the den of his home. RT at 15,821-22, 15,824-
25 27. In addition the evidence implied that Petitioner and his accomplice had entered Dr. Cray's home
26 through the back door after parking their car in the driveway.

27 To support this claim Petitioner relies upon People v. Gates, 43 Cal. 3d 1168, 743 P.2d 301, 240
28 Cal. Rptr. 666 (1987), which stated in dicta that evidence of convictions involving nonviolent conduct

1 are strictly limited by section 190.3(c) of the California Penal Code. Id., 43 Cal. 3d at 1203. However,
2 Petitioner fails to acknowledge that "it is well settled that an 'actual' violent crime admissible under
3 factor (b) may be shown in full context."¹³ People v. Montiel, 5 Cal. 4th 877, 916, 855 P.2d 1277, 21
4 Cal. Rptr. 2d 705 (1993); People v. Melton, 44 Cal. 3d 713, 757, 750 P.2d 741, 244 Cal. Rptr. 867
5 (1988). While it is true that the burglary conviction in and of itself was non-violent conduct, the
6 brandishing conduct involved the threat of violence, and the evidence Petitioner complains of here was
7 part of "a continuous course of criminal activity" which culminated in the brandishing. People v.
8 Cooper, 53 Cal. 3d 771, 841, 809 P.2d 865, 281 Cal. Rptr. 90 (1991). "[A]ll crimes committed during
9 a continuous course of criminal activity which includes force or violence may be considered in
10 aggravation even if some portions thereof, in isolation, may be nonviolent." Id.; see also People v.
11 Ashmus, 54 Cal. 3d 932, 985, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991) ("The issue of other violent
12 criminal activity embraces not only the existence of such activity but also all the pertinent circumstances
13 thereof."). Therefore even if Petitioner's actions of stealing Dr. Cray's two rifles and piling up Dr.
14 Cray's property in the middle of his den were not violent actions, "they occurred in the course" of the
15 brandishing incident, and "thus were admissible under factor (b) to demonstrate the aggravated nature
16 of [Petitioner's] unlawful conduct." Montiel, 5 Cal. 4th at 916-17.

17 The Court finds that the instant case is distinguishable from Old Chief v. United States, 519 U.S.
18 172, 117 S. Ct. 644 (1997), because here Petitioner's stipulation to the prior burglary conviction did not
19 in any way establish any element of the alleged crime of brandishing. Rather the evidence surrounding
20 the circumstances of the burglary incident, which Petitioner complains was improperly admitted, also
21 went to establish the elements of brandishing. In addition, in Old Chief the defendant was attempting
22 to avoid disclosing the type of crime of which he had previously been convicted, because under the
23 applicable statute, the type of the offense was irrelevant. However here the evidence that Petitioner
24 sought to keep out was not only relevant to the crime to which he stipulated, but to the crime of
25 brandishing, which was being presented as aggravating evidence. Moreover, the analysis in Old Chief
26 of the Federal Rules of Evidence by the Supreme Court of the United States simply is not controlling

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28 ¹³Factor (b) of 190.3 dictates that the jury should consider "[t]he presence or absence of criminal
activity by the defendant which involved the use or attempted use of force or violence or the express or
implied threat to use force or violence."

precedent binding on this Court regarding the admissibility of other criminal activity under California Penal Code § 190.3(b). Accordingly, Respondent is entitled to summary judgment on this sub-claim.

10. Claim 34, in Which Petitioner Alleges Prosecutorial Misconduct in Penalty Phase Closing Argument by Referring to Impact on Victims' Families and by Making Numerous Other Improper and Inflammatory Comments in Violation of His Rights Under the Sixth, Eighth, and Fourteenth Amendments, is Partially Barred from Federal Review¹⁴

Here Petitioner contends that the prosecutor committed prejudicial misconduct in presenting his closing argument at the penalty phase. First, Petitioner alleges that his confrontation rights under the Sixth and Fourteenth Amendment were violated because although the prosecutor referred to the victims and their families no less than ten times in his closing argument, his argument was largely unsupported by the record and Petitioner did not have the opportunity to cross-examine family members and friends of the victim concerning the emotional impact of the murders. Second, Petitioner argues that the prosecutor engaged in misconduct when he pointedly attempted to minimize the jury's sense of personal responsibility in returning a death sentence, in violation of the Eighth and Fourteenth Amendments.

a. Violation of Confrontation Rights

"[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'" Ohio v. Roberts, 448 U.S. 56, 63 (1980) (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965) (footnotes omitted)). The Supreme Court held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." Id. at 66. "The preference for live testimony . . . is because of the importance of cross-examination, 'the greatest legal engine ever invented for the discovery of truth.'" White v. Illinois, 502 U.S. 346, 356 (1992) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

Here Petitioner is alleging that he was denied the opportunity to challenge the prosecutor's

¹⁴The only sub-claims which remain viable after the imposition of the procedural bar are: (1) the sub-claim that Petitioner was denied his confrontation rights under the Sixth and Fourteenth Amendment due to the improper argument by the prosecutor of victim impact evidence; and (2) the sub-claim that the prosecutor engaged in misconduct when he pointedly attempted to minimize the jury's sense of personal responsibility in returning a death sentence.

1 general arguments that the victims' families mourned the loss of their loved ones. However, the crux
2 of the prosecutor's generalized argument was simply that Petitioner had inflicted a great deal of suffering
3 through his actions on a number of people. This type of argument was not based upon specific facts.
4 In fact the prosecutor admitted that: "[n]obody got to be paraded up here and tell you how they felt about
5 the loss of them [the victims]," RT at 16,136, making it clear that the individual family members and
6 friends of the victims did not testify about their own feelings of loss. Nor is this type of argument
7 subject to challenge on cross-examination. Moreover it is not likely that a reasonable defense attorney
8 would even attempt to cross-examine family members of the victims regarding the depth of their grief.

9 Since the argument was a general acknowledgment of the inevitable grief that would arise from
10 four random murders, and not based upon specific reactions of the victim's family members and friends,
11 Petitioner's confrontation rights were not violated.¹⁵ Accordingly, Respondent's Motion for Summary
12 Judgment is GRANTED on this sub-claim.

13 **b. Prosecutorial Argument Regarding the Jury's Responsibility to**
14 **Determine Penalty**

15 While Petitioner raises this as a sub-claim to support claim 34 which focuses on prosecutorial
16 misconduct in closing argument, this sub-claim was also raised in claim 36, entitled "The Trial Court's
17 Instructions and the Prosecutor's Argument Prejudicially Misled the Jury About the Scope of its
18 Sentencing Discretion Under Penal Code Section 190.3 and its Duty to Consider Mitigating Evidence
19 Thereby Violating Sanders' Rights Under the Eighth and Fourteenth Amendments." As determined in
20 the Court's Order Adopting Tentative Order on Motion to Dismiss, issued on February 27, 1998, this
21 sub-claim is procedurally barred. Order, at 26.

22 Moreover, even if this sub-claim was not procedurally barred, Petitioner has not demonstrated
23 that there is any merit to this sub-claim. During closing argument the prosecutor argued that the jury
24 was not responsible for killing Petitioner, but rather Petitioner decided to take actions which under the
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26 ¹⁵Assuming arguendo that the prosecutor's generalized argument could be construed to constitute
27 the admission of victim impact statements, and that Petitioner was deprived of the opportunity to cross-
28 examine the sources of the statements, Confrontation Clause errors are subject to harmless-error
analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Thus Petitioner would have to show
that the alleged error had a "substantial and injurious effect" on the penalty phase before he would be
entitled to relief on this claim. Brecht, 507 U.S. at 623. This Petitioner cannot do.

1 law merited the death penalty. RT at 16,208-209. Petitioner contends that through this argument the
2 prosecutor attempted to minimize the jury's sense of personal responsibility in returning a death
3 sentence.

4 However, in his argument the prosecutor did not lead the jury to believe that the responsibility
5 for imposing the death sentence did not lie with them. The prosecutor's brief reference to Petitioner's
6 responsibility for being in a position in which a death verdict was a reasonable option did not indicate
7 to the jury that it was relieved of its obligation to determine the appropriateness of the death penalty.
8 See Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993). Moreover, the prosecutor made it clear to
9 the jury that they still possessed the discretion to determine the appropriate penalty on their own. RT
10 at 16,152, 16,219, 16,222. When the prosecutor's argument is examined in its totality, it is clear that
11 the jury "could not have been misled as to the gravity of its responsibility." Hendricks v. Vasquez, 974
12 F.2d 1099, 1108 (9th Cir. 1992). Accordingly, recognizing that this sub-claim has already been found
13 to be procedurally barred, Respondent's Motion for Summary Judgment on this sub-claim of claim 34
14 is GRANTED.

15 11. Claim 36: The Jury Instructions Misled the Jury about the Scope of its
16 Sentencing Discretion Under Penal Code 190.3 and its Duty to Consider
17 Mitigating Evidence Thereby Violating Petitioner's Rights Under the Eighth
18 and Fourteenth Amendments¹⁶

19 Petitioner claims that the jury instructions given during the penalty phase were unconstitutional
20 because the jury was instructed that "if you conclude that the aggravating circumstances outweigh the
21 mitigating circumstances, you shall impose a sentence of death." CT 1267 (emphasis added). No
22 instruction was given to advise the jury that they could not return a death verdict unless they found
23

24 ¹⁶ The Court previously found that Petitioner's claim that the prosecutor's argument misled the
25 jury into believing it lacked discretion to return anything other than a death verdict was procedurally
barred.

26 In addition, although the claim is presented in the petition as a "Violation of Mr. Sanders' Sixth,
27 Eighth, and Fourteenth Amendment Rights," (Pet. at 34), in the Memorandum of Points and Authorities
28 in Support of Penalty Phase Claims the claim is presented as "Violating Mr. Sanders' Rights Under the
Eighth and Fourteenth Amendments." Memo of P&A (Penalty Phase) at 64. Given that Petitioner only
presents arguments in the Memorandum of Points and Authorities to support the violations of the Eighth
and Fourteenth Amendments, (Memo of P&A (Penalty Phase) at 73), the Court should construe the
claim as limited to violations of only those two constitutional amendments.

1 capital punishment to be the appropriate penalty. Petitioner complains that this mandatory sentencing
2 formula, contained in the earlier version of CALJIC 8.84.2, violated the requirement of reliability in
3 capital sentencing as guaranteed by the Eighth and Fourteenth Amendment.

4 This claim is soundly rejected based upon two United States Supreme Court cases. In the first
5 case, the jury found the fact that the "petitioner 'committed a killing while in the perpetration of a
6 felony' to be an aggravating circumstance. Blystone v. Pennsylvania, 494 U.S. 299, 302 (1990). Under
7 the law, the jury had to sentence the petitioner to death "if the jury unanimously finds at least one
8 aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or
9 more aggravating circumstances which outweigh any mitigating circumstances." Id. (quotation omitted).
10 The Supreme Court found that the statute was not unconstitutionally mandatory because "[d]eath [wa]s
11 not automatically imposed upon conviction for certain types of murder. It [wa]s imposed only after a
12 determination that the aggravating circumstances outweigh the mitigating circumstances present in the
13 particular crime committed by the particular defendant, or that there are no such mitigating
14 circumstances." Id. In addition the statute satisfied "the requirement that a capital sentencing jury be
15 allowed to consider and give effect to all relevant mitigating evidence." Id.

16 In the second case, the jury was directed that "[i]f you conclude that the aggravating
17 circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However,
18 if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall
19 impose a sentence of confinement in the state prison for life without the possibility of parole." Bovde
20 v. California, 494 U.S. 370, 374 (1990). The jury was not given any type of guidance regarding their
21 determination of mitigation evidence and its effect on their decision, as dictated by the California statute.
22 Id. at 377. Petitioner contended that the mandatory nature of the "shall impose" language "prevented
23 the jury from making an individualized assessment of the appropriateness of the death penalty." Id. at
24 376 (internal quotation omitted). The Supreme Court did not find that the jury instruction imposed a
25 presumption of death, pointed out that the language in the jury instruction at issue "is not alleged to have
26 interfered with the consideration of mitigating evidence," and upheld California's capital sentencing
27 scheme. Id. at 377.

28 Here the jury was instructed to consider the mitigating evidence, and it was clearly stressed that

1 it was the jury's decision to determine whether the aggravating factors outweighed the mitigating factors.
2 RT at 16,213 (prosecutor reminded jury that "[a]ll you are called upon to decide is whether the
3 aggravating factors outweigh the mitigating factors . . ."). Among other things the jury was instructed
4 that "[o]ne mitigating circumstance may be sufficient for you to return a verdict of life imprisonment
5 without possibility of parole." CT at 1261. The fact that the prosecutor argued that the mitigating
6 evidence did not outweigh the aggravating evidence does not change the fact that the jury was given the
7 proper instructions. Moreover, even the prosecutor admitted that the jurors had discretion and could
8 utilize two factors, k and l, as an escape valve to avoid sentencing Petitioner to death.¹⁷ RT at 16,221-
9 222. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on claim 36.

10 **12. Claim 37: The Trial Court's Refusal to Give Five Proposed Special Defense**
11 **Instructions Violated Petitioner's Rights Under the Eight and Fourteenth**
12 **Amendments**

13 Petitioner contends that the trial court erred in refusing to give the jury five specially-tailored
14 instructions as requested by the defense at the conclusion of the penalty phase. The rejected instructions
15 were designed to inform the jury fully and properly of its duty to weigh and consider evidence in
16 mitigation of penalty. Petitioner complains that because the trial court did not give the instruction
17 proposed by the defense,¹⁸ the jury was not correctly advised that it could not consider non-

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19 ¹⁷Factor k instructed the jury to consider "[a]ny other circumstance which extenuates the gravity
20 of the crime even though it is not a legal excuse for the crime," and factor l instructed the jury to
21 consider "[t]he defendant's character, background, history, mental condition and physical condition."
CT at 1256.

22 ¹⁸The proposed instruction that Petitioner contends was the most critical provided:

23 I have previously read to you the list of aggravating circumstances
24 which the law permits you to consider if you find that any of them is
established by the evidence. You are not allowed to take account of any
other facts or circumstances as the basis for deciding that the death
penalty would be an appropriate punishment in this case.

25 However, the mitigating circumstances which I have read for your
26 consideration are given to you merely as examples of some of the factors
that you may take into account as reasons for deciding not to impose a
27 death sentence upon Ricky Sanders. You should pay careful attention to
each of those factors. Any one of them may be sufficient, standing alone,
28 to support a decision that death is not the appropriate punishment in this
case. But you should not limit your consideration of mitigating
circumstances to these specific factors. You may also consider any other

(continued...)

1 statutory aggravation and that its consideration of mitigating evidence was not limited to the statutory
2 list but embraced any aspect of the defendant's background and character that had been offered as
3 mitigation. Petitioner contends the proposed instruction was needed because factor (1) to CALJIC 8.84.1
4 was given, which permitted the jury to consider Petitioner's "character, background, history, mental
5 condition and physical condition" as aggravation. CT at 1255-56. Petitioner claims that in the absence
6 of the proposed instructions, the jury was not given the required guidance that only mitigating aspects
7 of Petitioner's general background and character could be considered in its sentencing calculations.

8 In addition Petitioner argues that three of the proposed instructions expanded upon the scope of
9 evidence offered in mitigation and the jury's obligation to consider it, and the remaining proposed
10 instruction would have given the jury the Black's Law Dictionary (3d edition) definition of mitigating
11 circumstances.¹⁸ CT at 1272, 1275-77. Petitioner believes that all of the proposed instructions were

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13 ¹⁸(...continued)

14 circumstances (relating to the case or to the defendant, Ricky Sanders,) as reasons for not imposing the death sentence.

15 CT at 1273.

16 ¹⁹Defendant's Proposed Instruction No. 3 stated:

17 You may consider as furthering mitigating factors the following facts or
18 circumstances: ¶ (a) Ricky Sanders had a deprived and chaotic childhood
19 during which he received little or no religious or moral training. ¶ (b)
20 Ricky Sanders in his formative years was warehoused in group homes
21 and institutions where he received little if any personal attention or
22 affection. ¶ (c) In spite of the inadequacies of his family home Ricky
23 Sanders developed strong personal bonds with his siblings and was a
24 positive force in their lives. ¶ (d) While in prison Ricky Sanders
25 consistently furthered his education. ¶ (e) Ricky Sanders was a model
26 prisoner. CT at 1272.

27 Defendant's Proposed Instruction No. 6 stated:

28 During the penalty phase of this trial, the defense has presented evidence
from members of the defendant's family. These witnesses have testified
to their love for the defendant and the fact that they do not wish him to
be put to death. You are instructed that you may consider and take into
account, as a mitigating factor, these expressions of love and concern for
the defendant in determining whether he should be sentenced to death or
life in prison without possibility of parole. ¶ This evidence may be
sufficient standing alone to warrant the return of a verdict of life
imprisonment without possibility of parole if you should believe that it
outweighs the aggravating factors found by you to be present in this case.
CT at 1275.

Defendant's Proposed Instruction No. 9 stated:

The fact that the defendant has been a model prisoner and has attempted

(continued...)

1 accurate statements of law and not duplicative of other instructions that the court gave.

2 a. **Whether the Jury Should Have Been Instructed That Only**
3 **Mitigating Aspects of Petitioner's General Background and**
4 **Character Could Be Considered in its Sentencing Calculations**

5 Petitioner alleges that his constitutional rights were violated because the jury was not instructed
6 during the penalty phase of his trial that only mitigating aspects of Petitioner's general background and
7 character could be considered in its sentencing calculations. The essence of Petitioner's claim is that
8 the jury was not instructed which statutory factors should be considered as mitigating and which should
9 be viewed as aggravating. Here, as is typical in a death penalty case, the jury was given a list of factors
10 to consider in determining the penalty. CT at 1255-56. The jury was not told which factors were
11 mitigating and which were aggravating. Nor was the jury instructed that certain factors should only be
12 considered in mitigation.

13 In order to place this claim in the proper context, it must be clear what is and what is not
14 constitutionally mandated in a California capital murder penalty phase. The appropriate standard is set
15 forth in California v. Ramos, 463 U.S. 992 (1983): "[o]nce the jury finds that the defendant falls within
16 the legislatively defined category of persons eligible for the death penalty, [by] determining the truth
17 of the special circumstances, the jury is then free to consider a myriad of factors to determine whether
18 death is the appropriate punishment." Id. at 1008.

19 Thus the Supreme Court has characterized the capital decision-making process as consisting of
20 two separate aspects, the eligibility decision and the selection process. Tuilaepa v. California, 512 U.S.
21 967, 971 (1994). The selection process involves "an individualized determination on the basis of the
22 character of the individual and the circumstances of the crime," and is constitutionally adequate "when
23 the jury can consider relevant mitigating evidence of the character and record of the defendant and the
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25 ¹⁹(...continued)

26 to further his education can, and should, be considered as a mitigating
27 circumstance. CT at 1276.

27 Defendant's Proposed Instruction No. 10 stated:

28 Mitigating circumstances are circumstances that do not constitute a
 justification or excuse of the offense in question, but which, in fairness
 and mercy, may be considered as extenuating or reducing the degree of
 moral culpability. CT at 1277.

1 circumstances of the crime." Tuilaepa, 512 U.S. at 971-73 (internal citation omitted); Zant v. Stephens,
2 462 U.S. 862, 879 (1983); see also Lockett v. Ohio, 438 U.S. 586, 605 (1978).

3 The discretion of the jury during the individualized determination process is liberal. The
4 Supreme Court has described the amount of discretion possessed by the jury as "expansive," "wide,"
5 and "unbridled." Tuilaepa, 512 U.S. at 973, 974, 979; see also Stephens, 462 U.S. at 875. The United
6 States Supreme Court recently stated that "complete jury discretion is constitutionally permissible."
7 Buchanan v. Angelone, 118 S. Ct. 757, 761-62 (1998). The Supreme Court has specifically held that
8 the Constitution does not require a state to adopt specific standards for instructing the jury in its
9 consideration of aggravating and mitigating circumstances. Stephens, 462 U.S. at 873-80; Tuilaepa, 512
10 U.S. at 979 ("capital sentencer need not be instructed how to weigh any particular fact in the capital
11 sentencing decision"); Williams v. Calderon, 52 F.3d 1465, 1485 (9th Cir. 1995). Under California's
12 death penalty scheme, it is not necessary that the jury instructions specifically define which sentencing
13 factors are aggravating and which are mitigating. See Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir.
14 1982), rev'd on other grounds, 465 U.S. 37 (1984) (upholding constitutionality of California's death
15 penalty statute); see also Tuilaepa, 512 U.S. at 978-980. Moreover, the Supreme Court has squarely
16 rejected the claim that California's statutory sentencing factors were unconstitutional because giving the
17 jury a single list of factors "does not guide the jury in evaluating and weighing the evidence." Tuilaepa,
18 512 U.S. at 978-79.

19 The instructions given at Petitioner's trial, which did not label the factors at issue here as
20 aggravating or mitigating, did not "interfere[] with the consideration of mitigating evidence." Boyd
21 v. California, 494 U.S. 370, 377 (1990). Petitioner's general background and character was simply a
22 factor to be considered by the jury, and the statute and pertinent jury instructions did not require the jury
23 to treat the factor in any particular way. Since the jury "need not be instructed how to weigh any
24 particular fact in the capital sentencing decision," Tuilaepa, 512 U.S. at 979, Petitioner's claim has no
25 merit. Accordingly, Respondent is entitled to summary judgment on this sub-claim.

26 **b. Whether the Jury Should Have Been Instructed That It Could Not**
27 **Consider Non-Statutory Aggravation**

28 Petitioner contends that the jury should have been instructed that they could not take into account

1 any other facts or circumstances, other than those clearly delineated in the instructions given, as the basis
2 for deciding that the death penalty would be an appropriate punishment in Petitioner's case. Petitioner's
3 claim fails as the Ninth Circuit recently stated:

4 Nothing in the Constitution limits the consideration of nonstatutory
5 aggravating factors. See Barclay v. Florida, 463 U.S. 939, 956, 103 S.
6 Ct. 3418, 77 L. Ed. 2d 1134 (1983) (holding that nothing in the
7 Constitution prohibits consideration of non-statutory aggravating factor);
8 Harris v. Pulley, 692 F.2d 1189, 1193-94 (9th Cir. 1982) (rejecting the
argument that California death penalty statute is unconstitutional because
it places no limit on the introduction of aggravating factors), rev'd in part
on other grounds, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

9 Babbitt v. Calderon, 151 F.3d 1170, 1178 (9th Cir. 1998), cert. denied, No. 98-7387, 1999 WL 80308
10 (U.S. Feb. 22, 1999). Accordingly, the trial court's failure to give an additional instruction which was
11 designed by the defense to inform the jury that they could not consider non-statutory aggravating factors
12 is not a basis for federal habeas relief.

13 **13. Claim 38: The Death Judgment Must Be Vacated Because the Trial Court**
14 **Failed to Give at the Penalty Phase Two Standard Instructions on**
15 **Evaluating Witness Credibility and Circumstantial Evidence, Both of Which**
16 **Were Given During the Guilt Phase Instructions**

17 Petitioner contends that the trial court erred in not giving the standard instructions on evaluating
18 evidence at the close of the penalty phase. Specifically Petitioner points to the omission of the
19 instructions concerning the credibility of witnesses pursuant to CALJIC 2.20, and circumstantial
20 evidence pursuant to CALJIC 2.00. Petitioner believes that the omitted instructions rendered the death
21 verdict inherently unreliable in violation of the Eighth and Fourteenth Amendments.

22 **a. CALJIC 2.20**

23 Petitioner contends that Petitioner was prejudiced by the omission of CALJIC 2.20²⁰ because
24 during penalty phase deliberations the jury had to evaluate the credibility of Donald Cray who testified
25 about Petitioner's 1977 brandishing offense. Petitioner argues that CALJIC 2.20 was necessary because
26 Mr. Cray's testimony was hazy and marred by inconsistencies and contradictions.

27
28 ²⁰CALJIC 2.20 instructs the jury on factors to consider when determining the credibility of a
witness. CT at 1112-113.

1 In order to obtain federal habeas relief for an alleged instructional error Petitioner must show that
2 the omission of the instruction by itself so infected the entire trial that the resulting sentence violates due
3 process. See Estelle v. McGuire, 502 U.S. 62, 72 (1991). The appropriate standard for review of jury
4 instructional errors is set forth in Brecht v. Abrahamson. Villafuerte v. Lewis, 75 F.3d 1330, 1339 n.
5 3 (9th Cir. 1996). Thus, Petitioner must show that the error had a "substantial and injurious effect" on
6 the penalty phase before he would be entitled to relief on this claim. Brecht, 507 U.S. at 623. Whether
7 a claim of jury instructional error is a proper basis for federal habeas relief depends "upon the evidence
8 in the case and the overall instructions given to the jury." Duckett v. Godinez, 67 F.3d 734, 745 (9th
9 Cir. 1995) (citing Cupp v. Naughten, 414 U.S. 141, 146 (1973)). The omission of the instruction cannot
10 be judged in artificial isolation, but must be considered in the context of the instructions as a whole and
11 the trial record. See Estelle v. McGuire, 502 U.S. at 72. Moreover, "[a]n omission, or an incomplete
12 instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431
13 U.S. 145, 155 (1977). Accordingly, since Petitioner's claim is premised upon the omission of an
14 instruction from the penalty phase, when the very same instruction was given at the conclusion of the
15 guilt phase, Petitioner carries an particularly heavy burden here.

16 Taken as a whole, here the jury instructions given during Petitioner's penalty phase were
17 adequate. While the jury was not given CALJIC 2.20 at both the guilt phase and the penalty phase, there
18 is no reason to believe that the omission of CALJIC 2.20 had a "substantial and injurious effect" on the
19 penalty phase, or that the jury believed that the instruction as given in the guilt phase did not continue
20 to apply to the penalty phase. Accordingly, Respondent's Motion for Summary Judgment on this sub-
21 claim is GRANTED.

22 **b. CALJIC 2.00**

23 Petitioner has not provided any support for his claim that the trial court erred in not giving the
24 jury CALJIC 2.00 to the jury both before the guilt phase deliberations and the penalty phase
25 deliberations.²¹ Since Petitioner has failed to demonstrate that the omission of CALJIC 2.00 had a
26 "substantial and injurious effect" on the penalty phase, Respondent's Motion for Summary Judgment
27 on this claim is GRANTED.

28

²¹CALJIC 2.00 instructs the jury on direct and circumstantial evidence. CT at 1107.

14. **Claim 39: The Trial Court's Failure to Instruct the Jury on the Definition of Life Without Possibility of Parole Violated His Rights to Due Process and a Reliable Death Judgment Under the Eighth and Fourteenth Amendments**

Petitioner contends that the jury rendered a death verdict while laboring under the misconception that the punishment of life imprisonment without the possibility of parole did not actually mean that Petitioner would never be paroled. Petitioner alleges that this misconception injected an improper factor into the jury's determination of penalty, and the trial court was obligated to instruct the jury that the law had changed to remove the possibility of parole in a LWOP sentence. Instead the trial court admonished each individual venireperson who expressed this misconception during voir dire to "assume" that the sentence selected would be carried out. The trial court did not give such admonishment to those prospective jurors who did not verbalize any confusion about this aspect of the law.

Petitioner bases his claim upon the voir dire of several prospective jurors, who during voir dire indicated confusion about whether a life sentence without possibility of parole actually meant that the defendant would not be eligible for parole. While the prospective jurors who expressed their confusion were not empaneled on Petitioner's jury, based upon the beliefs of those prospective jurors, Petitioner speculates that the jury that was impaneled operated under the same misconception.

Petitioner points to no controlling precedent from the United States Supreme Court which dictates that he is entitled to relief on this claim. In Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), the Circuit denied relief on an identical claim, finding that since the alleged misconception was apparently held by ten prospective jurors who were not selected as jurors or alternates, "Bonin's argument is pure speculation. He offers no evidence that any of the jurors in his trials believed that 'life without possibility of parole' means anything other than what it says." Id. at 849. ²²

For the reasons set forth in Bonin Petitioner's speculative claim is not a basis for habeas relief. Accordingly, Respondent's Motion for Summary Judgment is GRANTED on claim 39.

\\\\\\

²²Petitioner contends that he is entitled to relief pursuant to Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994). However, Hamilton is distinguishable because Petitioner concedes that his "jury was not affirmatively given inaccurate and misleading information on the effect of an LWOP sentence by the trial court," Memo of P&A (Penalty Phase) at 87, whereas in Hamilton the jury was given an inaccurate instruction. Id. 17 F.3d at 1161-63.

1 15. **Claim 40: Permitting the Jury to Consider All Four Multiple-Murder**
2 **Special Circumstances as Aggravating Factors, the Penalty Phase**
3 **Instructions Artificially Inflated the Case for Death in Violation of the**
4 **Eighth and Fourteenth Amendments**

5 Petitioner contends here, and Respondent concedes, that the trial court incorrectly permitted the
6 jury to consider all four multiple-murder special circumstance findings as aggravating factors. In Bonin
7 v. Calderon, 59 F.3d 815 (9th Cir. 1995), the Ninth Circuit, when faced with the identical type of
8 instructional error, found that the error "was cured for our purposes by the State Supreme Court's
9 conclusion that the error was harmless in Bonin's case." Id. at 849 (citing Williams v. Calderon, 52 F.3d
10 1465, 1480 (9th Cir. 1995)).

11 However, in Bonin it was clear that the California Supreme Court engaged in harmless error
12 analysis based upon the instructions given in that particular case. In this case the California Supreme
13 Court did not make an explicit finding of harmlessness in Sanders' particular case. Rather the court
14 stated: "we have repeatedly held, consideration of such excessive multiple-murder-special-circumstance
15 findings where, as here, the jury knows the number of murders on which they were based, is harmless
16 error." Sanders, 11 Cal. 4th at 562 (internal citations omitted).

17 Moreover, the district court decisions in which the issue of redundant special circumstance
18 charges are said to have artificially increased the aggravating factors, which impermissibly inflated the
19 risk that the jury would arbitrarily impose a sentence of death, have made their own findings of the
20 harmlessness of the error. See Williams v. Vasquez, 817 F. Supp. 1443, 1486 (E.D. Cal. 1993), aff'd
21 Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995), cert. denied, 116 S. Ct. 937 (1996); Bonin v.
22 Vasquez, 807 F. Supp. 589, 615 (C.D. Cal. 1992), aff'd Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995),
23 cert. denied, 116 S. Ct. 718 (1996); Bonin v. Vasquez, 794 F. Supp. 957, 981 (C.D. Cal. 1992), aff'd
24 Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996); but see, Odle v.
25 Calderon, 884 F. Supp. 1404, 1434 (N.D. Cal. 1995) (court found on motion for summary judgment that
26 petitioner not entitled to relief on claim, but did not appear to conduct its own harmless error analysis).

27 To conduct the requisite harmless error analysis, "it is the duty of a reviewing court to consider
28 the trial record as a whole and to ignore errors that are harmless, including most constitutional

violations.” United States v. Hasting, 461 U.S. 499, 509 (1983). Thus, once it is clear that a constitutional error has been established, the entire record must be reviewed. Ruff v. Kincheloe, 843 F.2d 1240, 1242-43 (9th Cir. 1988); Vicks v. Bunnell, 875 F.2d 258, 259 (9th Cir. 1989); but see Carella v. California, 491 U.S. 263, 269 (1989) (Scalia, J., concurring in judgment) (finding that it is not necessary to review entire record to find whether harmless error arose when the jury has been instructed to apply a conclusive presumption); Hart v. Stagner, 935 F.2d 1007, 1011 (9th Cir. 1991) (when examining “the effect of a jury instruction that improperly shifts the burden away from the prosecution, the reviewing court may look only to those predicate facts necessarily found by the jury in convicting the defendant, and then determine whether the jury must have also found the element on which the jury instructions were deficient.”).

In light of the need for a finding on harmlessness, the Court exercises its discretion and declines to rule on this claim now. The harmless error analysis will be completed once the existence of any additional constitutional errors has been fully litigated. Accordingly, Respondent’s Motion for Summary Judgment is DENIED as to this claim.

16. Claim 41: Allegations That the Instructions on Aggravating and Mitigating Circumstances Were Unconstitutionally Vague in That They Failed to Channel the Jury’s Sentencing Discretion as Required by the Eighth Amendment

In claim 41 Petitioner contends that the instructions on aggravating and mitigating circumstances failed to channel the jury’s discretion as required by the Eighth Amendment to avoid arbitrary and capricious imposition of the death penalty because the jury was instructed on factors that were inapplicable to Petitioner’s case, and the jury was not instructed that certain statutory circumstances could be considered only as mitigating factors.

In Tuilaepa v. California, 512 U.S. 967 (1994), the Supreme Court rejected a similar claim that California’s statutory sentencing factors were unconstitutional because giving the jury a single list of factors “does not guide the jury in evaluating and weighing the evidence.” Tuilaepa, 512 U.S. at 978-79. The Court reasoned that pursuant to the state’s statutory framework, the jury completes the function of narrowing the class of death-eligible defendants at the guilt phase, when it convicts a defendant of first

1 degree murder, along with one or more statutory special circumstances. Id. at 979. Once the
2 constitutionally required narrowing has been completed, the jury "need not be instructed how to weigh
3 any particular fact in the capital sentencing decision." Id. Rather "the sentencer may be given
4 'unbridled discretion in determining whether the death penalty should be imposed after it has found that
5 the defendant is a member of the class made eligible for that penalty.'" Id. at 979-80 (quoting Zant v.
6 Stephens, 462 U.S. 862, 875 (1983)); see also Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir. 1982),
7 rev'd on other grounds, 465 U.S. 37 (1984) (upholding constitutionality of California's death penalty
8 statute).

9 In addition, this claim was rejected in Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995). In Bonin
10 the Circuit pointed out that the juries had been instructed to consider the list of statutory factors only "if
11 applicable." Id.; see also Williams v. Calderon, 52 F.3d 1465, 1481 (9th Cir. 1995) (rejecting identical
12 argument). "The cautionary words 'if applicable' warned the jury that not all of the factors would be
13 relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." Bonin,
14 59 F.3d at 848. Here Petitioner's jury was similarly instructed that they should "consider, take into
15 account and be guided by the following factors, if applicable . . ." CT at 1255. Therefore Bonin
16 precludes relief on this claim.

17 Accordingly, Respondent's Motion for Summary Judgment is GRANTED as to claim 11.

18 **17. Claim 42: Failing to Instruct the Jury That it Must Find Unanimously and**
19 **Beyond a Reasonable Doubt That the Aggravating Circumstances**
20 **Outweighed the Mitigating Circumstances and That Death Was the**
21 **Appropriate Penalty; and Failing to Require the Jury to Make Unanimous**
22 **Separate Findings of the Truth of Specific Aggravating Circumstances or**
23 **Render A Statement of Reasons for its Verdict in the Event of a Death**
24 **Sentence**

25 In claim 42 Petitioner contends that the trial court committed constitutional error by failing to
26 instruct the penalty phase jury that, before it fixes the penalty at death, it must find unanimously and
27 beyond a reasonable doubt (1) that aggravating circumstances outweigh the mitigating circumstances;
28 and (2) that death is the appropriate penalty.

1 In order to determine whether Petitioner is entitled to relief, the Court must examine what is and
2 what is not constitutionally mandated in a California capital murder penalty phase. As discussed with
3 respect to claim 37, the appropriate standard is set forth in California v. Ramos, 463 U.S. 992 (1983):
4 "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible
5 for the death penalty, [by] determining the truth of the special circumstances, the jury is then free to
6 consider a myriad of factors to determine whether death is the appropriate punishment." Id. at 1008.

7 The Supreme Court has specifically held that the Constitution does not require a state to adopt
8 specific standards for instructing the jury in its consideration of aggravating and mitigating
9 circumstances. Stephens, 462 U.S. at 873-80; Tuilaepa, 512 U.S. at 979 ("capital sentencer need not be
10 instructed how to weigh any particular fact in the capital sentencing decision"); Williams v. Calderon,
11 52 F.3d 1465, 1485 (9th Cir. 1995) ("the failure of the [California] statute to require specific findings
12 that death is beyond a reasonable doubt the appropriate penalty does not render it unconstitutional.")
13 (internal citation omitted).

14 "The Ninth Circuit has also held that a determination of whether the death penalty should be
15 imposed is not subject to the beyond-a-reasonable-doubt standard." Gerlaugh v. Lewis, 898 F. Supp.
16 1388, 1421 (D.Ariz. 1995) (citing Harris, 692 F.2d at 1195), aff'd by, Gerlaugh v. Stewart, 129 F.3d
17 1027 (9th Cir. 1997); Bonin, 807 F. Supp. at 621; Bonin, 794 F. Supp. at 985. Although Harris v. Pulley
18 was reversed on other grounds, the Supreme Court, noted, without disapproving, the Ninth Circuit's
19 ruling that a "jury need not be instructed that it must find by proof beyond a reasonable doubt that
20 aggravating factors outweigh mitigating factors."²³ Gerlaugh, 898 F. Supp. at 1422 (citing Harris, 465
21 U.S. at 41 n.4). Accordingly, Respondent's Motion for Summary Judgment on claim 42 is GRANTED.

22 Petitioner also contends that the trial court erred when it failed to require that the jury make
23 unanimous separate findings of the truth of specific aggravating circumstances or render a statement of
24

25 ²³ The manner in which the Ninth Circuit in Harris rejected the identical claim to Petitioner's was
quite clear:

26 The United States Supreme Court has never stated that a beyond-a-
27 reasonable-doubt standard is required when determining whether a death
penalty should be imposed. . . . If the Supreme Court had intended for the
28 burden in death-penalty cases to vary from the standard burden in all
other criminal sentencing, it would have said so in one of the many
modern cases dealing with the death penalty.

Harris, 692 F.2d at 1195.

1 reasons for its verdict in the event of a death sentence. However, Petitioner has failed to point to any
2 controlling precedent that such a requirement is mandated by law. Nor has the Ninth Circuit directly
3 addressed whether a jury must unanimously agree upon aggravating factors under the California death
4 penalty statute. Odle v. Calderon, 884 F. Supp. 1404, 1428 (N.D.Cal. 1995). In addition, the Circuit
5 has found that the Washington death penalty statute does not require jurors "to be unanimous as to the
6 appropriateness of the death penalty for each murder in a multiple-murder trial." Jeffries v. Blodgett,
7 5 F.3d 1180, 1195 (9th Cir. 1993).

8 Moreover, the identical claim has been rejected by several district courts. Odle, 884 F. Supp.
9 at 1428; Bonin, 807 F. Supp. at 623; cf. Turner v. Calderon, 970 F. Supp. 781, 792 (E.D.Cal. 1997).
10 In Bonin the district court stated that "there [wa]s a dearth of cases considering a unanimity requirement
11 for aggravating factors. Bonin, 807 F. Supp. at 623. Accordingly, the Court GRANTS Respondent's
12 Motion for Summary Judgment on this aspect of claim 42.

13 Finally Petitioner contends that the trial court failed to require that the jury render a statement
14 of reasons for its verdict in the event of a death sentence in violation of his constitutional rights. This
15 claim has been repeatedly rejected by the Ninth Circuit. Dyer v. Calderon, 122 F.3d 720, 742 (9th Cir.
16 1997) (citing Harris v. Pulley, 692 F.2d 1189, 1195-96 (9th Cir. 1982) (rejecting identical claim), rev'd
17 on other grounds, 465 U.S. 37 (1984)), vacated on other grounds, 151 F.3d 970 (9th Cir.), cert. denied,
18 119 S. Ct. 575 (1998); Williams, 52 F.3d at 1484-85 (same). Accordingly, Petitioner is not entitled to
19 relief on this aspect of claim 42 and Respondent's Motion for Summary Judgment is GRANTED.

20 **18. Claim 43: Petitioner's Sentence Was Arbitrary, Discriminatory and**
21 **Disproportionate When Compared with the Sentence Accomplice Freeman**
22 **Received in a Separate Trial**

23 In claim 43 Petitioner contends that his death sentence is unconstitutionally arbitrary,
24 discriminatory, and disproportionate, especially in light of the fact that his co-defendant received a
25 sentence of life in prison without possibility of parole. The basis for Petitioner's claim is the fact that
26 a proportionality review of Petitioner's sentence has not yet been conducted, and that Petitioner's
27 accomplice's sentence has not been considered.

28 Petitioner's claim fails because it is clearly established that there is "no federal constitutional

1 requirement of inter-case proportionality analysis of death sentences." Martinez-Villareal v. Lewis, 80
2 F.3d 1301, 1308 (9th Cir.) (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)), cert. denied, 117 S. Ct.
3 588 (1996); see also Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996) (citing Harris, 465 U.S. at 50-
4 51) ("there is no federal right to proportionality review"). Accordingly, Respondent's Motion for
5 Summary Judgment as to claim 43 is GRANTED.

6 19. **Claim 44: Cumulative Effect of the Guilty Phase and Penalty Phase Errors**

7 The Court declines to rule on a claim of cumulative error until all the claims arising from the
8 guilt and penalty phases have been examined.

9 **IV. CONCLUSION**

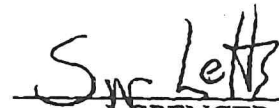
10 1. Based upon the pre-AEDPA standard of review, which is more favorable to Petitioner,
11 the Court GRANTS Respondent's Motion for Summary Judgment as to claims: 4, 16, 24, 25, 26, 28,
12 29, 32, 34, 36, 37, 38, 39, 41, 42, and 43.

13 2. The Court DENIES Respondent's Motion for Summary Judgment as to claims: 27, 40,
14 and 44, as well as to all of the claims that were originally raised during state habeas corpus proceedings.

15 3. Due to the application of the pre-AEDPA standard of review to the claims originally
16 raised on direct appeal, the Court does not believe that additional briefing on the application of AEDPA
17 to these claims would be helpful. However, to the extent that the parties would like to submit
18 supplemental briefing on application of AEDPA to the claims that were originally raised on state habeas,
19 the parties shall submit a stipulated briefing schedule to the Court no later than one week from the date
20 of this tentative order. After the supplemental briefing is completed, the Court will issue an order
21 adopting its tentative order to the extent that it remains reasonable to do so.

22 IT IS SO ORDERED.

23 Dated: February 25, 1999

24
25 
26 J. SPENCER LETTS
27 United States District Judge
28

FILED
CLERK, U.S. DISTRICT COURT

SEP 18 1997

CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICARDO RENE SANDERS

Petitioner,

v.

ARTHUR CALDERON, Warden of
California State Prison at San Quentin,

Respondent.

CASE NO. CV 96-7429 JSL

DEATH PENALTY

ORDER DIRECTING THAT THE 42
UNIDENTIFIED FINGERPRINTS LIFTED
AT THE CRIME SCENE BE ANALYZED
FOR POSSIBLE IDENTIFICATION BY
LAPD'S AUTOMATED FINGERPRINT
IDENTIFICATION SYSTEM (TENTATIVE)

I. INTRODUCTION

The Court has reviewed Petitioner's Motion for Order Directing That The 42 Unidentified Fingerprints Lifted at the Crime Scene be Analyzed for Possible Identification by LAPD's Automated Fingerprint Identification System, as well as the Opposition and Reply filed by the parties. For the reasons set forth below the Court hereby GRANTS Petitioner's Motion and issues this order to permit the 42 unidentified fingerprints lifted at the crime scene to be analyzed by the Los Angeles Police Department's Automated Fingerprint Identification System.

II. BACKGROUND

Ricardo Rene Sanders is an inmate on California's death row. He was convicted of the first degree murder of four individuals who were shot when petitioner robbed a Bob's Big Boy restaurant in Los Angeles on December 14, 1980. On appeal the California Supreme Court upheld the following

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1 findings and verdicts: (1) the jury's finding of true on one of the four multiple murder allegations, (2)
2 the felony murder robbery special circumstances allegations, (3) the verdicts finding petitioner guilty
3 of multiple counts of robbery, attempted robbery, assault with a deadly weapon, and conspiracy to
4 commit robbery, and (4) the finding that, as to all but one count, petitioner used a firearm. People v.
5 Sanders, 11 Cal. 4th 475, 497-98, 566 (1995), cert. denied, 117 S. Ct. 115 (1996). After a penalty trial,
6 the jury recommended that Sanders be sentenced to death.

7 Petitioner filed a petition which he refers to as a 2241 petition seeking declaratory and injunctive
8 relief from federal court on December 7, 1995. Sanders v. Calderon, CV 95-8481 MRP(E). In this
9 action Petitioner requested that the federal court intervene in the California habeas corpus proceeding
10 by issuing an order requiring the California Supreme Court to review his state petition immediately to
11 determine if a prima facie case for relief had been made and to enter the appropriate order. Once the
12 California Supreme Court denied Petitioner's habeas petition in its entirety on February 14, 1996, his
13 federal petition was dismissed, without prejudice, as moot on April 3, 1996. He now petitions this
14 Court for a writ of habeas corpus. The petition was filed on April 7, 1997. Petitioner filed the instant
15 motion for discovery on May 30, 1997. Due to the fact that Respondent filed a Motion to Dismiss,
16 which if granted would negate the need for discovery, the motion for discovery was taken off calendar
17 and set for hearing on the same date as the motion to dismiss, which was set for September 8, 1997. The
18 hearing date has since been vacated. In an effort to limit the oral argument to meaningful issues, the
19 Court issues this tentative order to be reviewed by the parties. After such a review, the parties are to
20 contact the Court to reset the matter for hearing.

21 III. DISCUSSION

22 A. Summary of the Legal Principles Governing Habeas Discovery

23 This Court has the discretion on a showing of "good cause" to grant leave to Petitioner to
24 conduct discovery under Rule 6 of the Rules Governing § 2254 Cases. The standard was laid out in two
25 alternative formulations in *Harris v. Nelson*, 394 U.S. 286 (1969), wherein the Supreme Court stated
26 that when a district court is "confronted by a petition for habeas corpus which establishes a prima facie
27 case for relief [the court] may use or authorize the use of suitable discovery procedures ... reasonably
28 fashioned to elicit facts necessary to help the court to dispose of the matter as law and justice require."

1 *Id.* at 290. Further in the opinion, the Supreme Court held:

2 where specific allegations before the court show reason to believe that the
3 petitioner may, if the facts are fully developed, be able to demonstrate
4 that he is confined illegally and is therefore, entitled to relief, it is the
 duty of the court to provide the necessary facilities and procedures for an
 adequate inquiry.

5 *Id.* at 300.

6 Discovery is a well-accepted part of habeas litigation. Unlike ordinary civil actions, however,
7 it is available after securing approval from the Court. Habeas discovery is governed by Rule 6 of the
8 Rules Governing § 2254 Cases, which provides in relevant part:

9 A party shall be entitled to invoke the processes of discovery available
10 under the Federal Rules of Civil Procedure if, and to the extent that, the
11 judge in the exercise of his discretion and for good cause shown grants
 leave to do so, but not otherwise.

12 Rule 6, Rules Governing § 2254 Cases.¹

13 Overall Rule 6 warrants discovery “when[ever] it would help the court make a reliable
14 determination with respect to the petitioner’s claim.” *Herrera v. Collins*, 506 U.S. 390, 444 (1993)
15 (Blackmun, J., dissenting on other grounds). The Advisory Committee, in adopting Rule 6, expressed
16 its intention that Rule 6 was intended to be consistent with the Supreme Court’s decision in *Harris v.*
17 *Nelson*, 394 U.S. 286 (1969).² In *Harris*, the Supreme Court held that limited access to discovery
18 vehicles should be permitted when it would be helpful to aid in fully and fairly resolving the case. The
19 Supreme Court cautioned, however, that it did not intend for discovery to become automatic or routinely
20 granted. Rather, the Court -- aware that it was crafting rules applicable to all prisoner petitions --
21 expressed concern that, without judicial oversight, prisoners might be tempted to misuse or abuse the
22 discovery process. Noting that under the discovery rules then in effect the responding party had the
23 burden to not only serve objections, but also to bring a motion to obtain a ruling on the objections, the
24 Court explained:

25 Unavoidably, unless there is a measure of responsibility in the

26 ¹ Similarly, this Court’s Local Rules provide that, in habeas cases -- including capital habeas
27 cases -- “No discovery shall be had without leave of the Court.” Local Rule 26.8.8(e).

28 ² As discussed *infra* arguably Rule 6 actually articulates a more lenient standard for granting
 discovery.

1 originator of the proceeding, the “plaintiff” or petitioner, this
2 procedure can be exceedingly burdensome and vexatious. The
3 interrogatory procedure would be available to the prisoners
4 themselves since most habeas petitions are prepared and filed by
5 prisoners, generally without the guidance or restraint of members
6 of the bar.

7 *Harris*, 394 U.S. at 297.

8 On the other hand, the Court also recognized that access to some sort of discovery mechanisms
9 was desirable. Discovery would, according to the Court, assist petitioners “in developing the evidence
10 needed to support in necessary detail the facts alleged in his petition.” *Harris*, 394 U.S. at 291. The
11 Court also noted that discovery might be a useful tool to determine whether facts actually conflicted so
12 as to avoid the need for an evidentiary hearing. *Id.* at 300. Bringing the two themes together, the
13 Supreme Court ruled:

14 [W]here specific allegations before the court show reason to believe that
15 the petitioner may, if the facts are fully developed, be able to demonstrate
16 that he is confined illegally and is therefore, entitled to relief, it is the
17 duty of the court to provide the necessary facilities and procedures for an
18 adequate inquiry.

19 *Id.* at 300.

20 Phrased slightly differently, the Court confirmed that “a district court, confronted by a petition
21 for habeas corpus which establishes a prima facie case for relief may use or authorize use of suitable
22 discovery procedures . . . reasonably fashioned to elicit facts necessary to help the court ‘dispose of the
23 matter as law and justice require.’” *Id.* at 290. Reaffirming, however, that discovery was intended to be
24 limited and focused, the Supreme Court confirmed that “[w]e do not assume that courts in the exercise
25 of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware
26 that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in
27 fact.” *Id.* at 300. Nevertheless, the Court possesses the discretion to grant discovery if it “would help
28 the court make a reliable determination with respect to the petitioner’s claim.” *Herrera*, 506 U.S. at 444
(Blackmun, J., dissenting on other grounds).

29 The other consideration is that the bulk of the cases regarding discovery in habeas corpus
30 proceedings are non-capital cases, and there is a theme running through the case law that “death is
31 qualitatively different” from any other sentence. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citing

1 *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). As a result courts often require “a greater
2 degree of reliability when the death sentence is imposed.” *Id.* 438 U.S. at 604; *accord Hamilton v.*
3 *Vasquez*, 17 F.3d 1149 (9th Cir.), *cert. denied*, 512 U.S. 1220 (1994). Moreover, the Supreme Court
4 has recognized the that “carefully crafted doctrines of waiver and abuse of the writ make it especially
5 important that the first petition adequately set forth all of a state prisoner’s colorable grounds for relief.”
6 *McFarland v. Scott*, 512 U.S. 849, 114 S. Ct. 2568, 2574 (1994) (O’Connor, J., concurring in the
7 judgment in part), *accord id.* at 2572 (majority opinion).

8 **B. Petitioner’s Motion for Discovery is not Premature**

9 1. Whether Discovery is Premature Because There is not an Exhausted Petition on File
10 Respondent argues that this discovery request is premature because there is not yet an exhausted
11 petition on file. Respondent is correct that ““until [a petitioner] has filed a federal habeas petition on an
12 exhausted claim, he cannot avail himself of Rule 6 discovery.”” *Calderon v. United States District Court*
13 *for Northern District of California (Hill)*, 110 F.3d 714, 715 (9th Cir. 1997), *as amended*, No. 96-70039,
14 1997 WL 447943, *2 (9th Cir. Aug. 8, 1997) (quoting *Calderon v. United States District Court for*
15 *Northern District of California (Nicolaus)*, 98 F.3d 1102, 1109 (9th Cir. 1996) (Schroeder, J.,
16 concurring), *cert. denied*, 117 S. Ct. 1830 (1997)); *see also Calderon v. United States District Court for*
17 *Eastern District of California (Roberts)*, 113 F.3d 149, 149 (9th Cir. 1997).

18 The Court has found that if exhibits 50 and 51 are included in the petition, they will render the
19 claims they support unexhausted. However, if Petitioner deletes these two exhibits from the petition,
20 the petition on file will be properly exhausted and discovery would be proper. Therefore whether
21 discovery is proper at this juncture depends on Petitioner’s response to this Court’s determination on
22 the exhaustion issue regarding exhibits 50 and 51.

23 2. The Right to Discovery Is Not Tied to the Grant of an Evidentiary Hearing

24 Respondent argues that the right to discovery is based on the need for an evidentiary hearing, and
25 “[d]iscovery should be limited to issues which will be litigated at an evidentiary hearing, and petitioner
26 has made no showing that such a hearing is permissible in this case.” Opp’n to Petitioner’s Mot. for
27 Discovery, 2:12-15. However, several years after *Harris* the Rules Governing Section 2254 Cases were
28 adopted. Rule 6, which governs discovery, affords courts considerable discretion as to discovery.

1 Rule 6 articulates a more liberal standard for granting discovery in several ways. Despite the fact
2 that in *Harris*, the Supreme Court implied that in order to obtain discovery the petitioner might have to
3 establish “a prima facie case for relief,” the language of Rule 6 simply requires “good cause” to be
4 shown, which permits the use of discovery to establish a prima facie case for relief.³ In addition, the
5 Advisory Committee Note to Rule 6 discusses pre-hearing discovery, stating that “[w]hile requests for
6 discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be
7 instances in which discovery would be appropriate beforehand.” The Advisory Committee Note further
8 states that “[t]he court in *Harris* alluded to such a possibility when it said ‘the court may ... authorize
9 such proceedings with respect to development, *before or in conjunction with the hearing* of the facts ...’
10 [emphasis added] 394 U.S. at 300.”

11 More importantly, the Ninth Circuit recently stated that: “contrary to [the Warden’s] argument,
12 discovery is available to habeas petitioner at the discretion of the district court judge for good cause
13 shown, *regardless of whether there is to be an evidentiary hearing.*” *Jones v. Wood*, 114 F.3d 1002,
14 1009 (9th Cir. 1997) (citing Rules Governing § 2254 Cases Rule 6(a); *Calderon v. United States District*
15 *Court for the Northern District of California*, 98 F.3d 1102, 1104 (9th Cir. 1996)). As Petitioner points
16 out, when the Supreme Court recently discussed the propriety of discovery in a habeas case, finding that
17 good cause existed, there was no mention of a requirement that the discovery be conducted in
18 conjunction with an evidentiary hearing. *Bracy v. Gramley*, 117 S. Ct. 1793, 1799 (1997).

19 Respondent cites *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991),⁴ in support of his
20 argument that discovery should only be permitted “as it relates to those issues to be considered at the
21 evidentiary hearing.” *Id.* at 1529. However, the circumstances in *Jeffries* were different. At the time
22 the motion for discovery was made, the Court already had a motion for summary judgment before it.
23 *Id.* at 1531. Simultaneously with the motion for discovery, the petitioner also requested an evidentiary

24
25 ³ “The Advisory Committee’s discussion of *Harris* omits the ‘prima facie case’ language the
26 Court used in *Harris*. See Advisory Committee Note to Rule 6 of the Rules Governing § 2254 Cases;
Coleman v. Zant, 708 F.2d 541, 547 n. 9 (11th Cir. 1983) (applying ‘good cause’ standard).” Liebman
& Hertz, *Federal Habeas Corpus Practice and Procedure* (2d ed. 1994), §19.4c.

27 ⁴ *Jeffries v. Blodgett*, 771 F. Supp. 1520, was affirmed at 974 F. 2d 1179 (9th Cir. 1992). A
28 substituted opinion was filed and the case remanded at 988 F.2d 923 (9th Cir. 1993). The opinion was
amended at 5 F.3d 1180 (9th Cir. 1993). Certiorari was denied *sub nom.* *Blodgett v. Jeffries*, 510 U.S.
1191 (1994).

1 hearing on issues pertaining to the same claims that were included in the motion for summary judgment.
2 *Id.* at 1532. The Court granted the motion for evidentiary hearing, therefore granting the petitioner the
3 opportunity to present evidence on several of the claims. *Id.* at 1528-29. However the Court found that
4 the discovery would be limited to those claims that were the subject of the evidentiary hearing. *Id.* at
5 1529. Other discovery would be premature as respondent's motion for summary judgment was
6 "necessarily predicated upon the assumption that there are no disputed material facts." *Id.* If the motion
7 for summary judgment was denied, then additional discovery might be appropriate. *Id.*

8 In other words, the denial of the discovery was not tied to the motion for evidentiary hearing, but
9 rather was based upon the fact that the discovery was requested for claims that were the subject of a
10 motion for summary judgment. The Court reasoned that only if a claim survived the motion for
11 summary judgment, due to the finding that there were material disputed facts, then discovery could be
12 justified. But if there were no material facts in dispute, thus making the claim ripe for summary
13 judgment, then no discovery on such a claim would be necessary. On this basis, *Jeffries* is
14 distinguishable from the instant case. Accordingly, Respondent's is rejected.

15 Moreover, this view was supported by the Supreme Court in *Blackledge v. Allison*, 431 U.S. 63
16 (1977), wherein the Court found that a district court should not have dismissed a petition summarily
17 without further factual inquiry. The Court cited the Advisory Committee's recommendation regarding
18 pre-hearing discovery with approval, stating that pre-hearing discovery could be employed to avoid
19 resorting to an evidentiary hearing. *Id.*, 431 U.S. at 81. The Court recommended that district courts,
20 when faced with a discovery request on a claim that is not so "palpably incredible" or "patently frivolous
21 or false" such that it would be subject to summary dismissal, order discovery prior to deciding whether
22 an evidentiary hearings will ultimately be necessary. *Id.* 431 U.S. at 76, 82-83 (citations omitted). To
23 reiterate, as stated by Justice Blackmun in a dissenting opinion, Rule 6 warrants discovery "when[ever]
24 it would help the court make a reliable determination with respect to the petitioner's claim." *Herrera*,
25 506 U.S. at 444.

26 In addition, even cases decided prior to the adoption of Rule 6 allowed for pre-hearing discovery.
27 *Wilson v. Weigel*, 387 F.2d 632, 634 (9th Cir. 1967) (the trial court has the discretion to permit
28 depositions in a habeas corpus case prior to an evidentiary hearing being ordered), *cert. denied*, *Roberts*

1 *v. Nelson*, 394 U.S. 961 (1969); *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1969) (the trial
2 court could permit interrogatories, provide for depositions and “take such other pre-hearing steps as may
3 be appropriate”).⁵

4 Therefore Respondent’s objection to the requested discovery on the grounds that no evidentiary
5 hearing has been ordered is rejected.

6 **C. Petitioner Has Demonstrated Good Cause for the Requested Discovery**

7 As noted by the Supreme Court, petitioner need not evidentially establish his right to relief in
8 order to obtain discovery; it is sufficient that the Court be “confronted by a petition for writ of habeas
9 corpus which establishes a prima facie claim for relief.” *Harris*, 394 U.S. at 290. If the petition includes
10 “specific allegations,” which are not patently frivolous, and provided that they state a prima facie claim
11 for relief, Petitioner should be permitted the requested discovery. *Id.*, 394 U.S. at 300. The standard
12 is whether there is “reason to believe that the petitioner may, if the facts are fully developed, be able to
13 demonstrate that he is confined illegally and is, therefore, entitled to relief.” *Id.* The discovery sought
14 should be “reasonably fashioned to elicit facts necessary to help the court to ‘dispose of the matter as
15 law and justice require.’” *Id.*, 394 U.S. at 290. If Petitioner satisfies this standard, it is “the duty of the
16 court to provide the necessary facilities and procedures for an adequate inquiry.” *Id.*, 394 U.S. at 300.

17 Petitioner alleges that 66 identifiable latent fingerprints were lifted from along the path taken by
18 the robbers at Bob’s Big Boy restaurant, but no prints belonging to Petitioner or his codefendant,
19 Freeman, were found. RT at 13,345. After comparison of these prints to those of 31 employees, police
20 officers, Petitioner and Freeman, 42 prints lifted from non-public areas remained unmatched to anyone.
21 RT at 13,415. This includes prints taken from the back door and door frame, the electric board on the
22 north wall of the back hallway, the office door, the inside office wall, the top of the desk, the office
23 phone receiver, the freezer door and frame, the refrigerator door, the wall between the refrigerator and
24 the freezer, and the storeroom door and frame. RT at 13,362-13,386.

25 At the time of Petitioner’s state court trial, there was no method to identify the unknown
26 fingerprints without having suspects whose prints were on file for visual comparison. However in 1987

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28 ⁵ Although this case involved an action under § 2255, the analysis would not differ when applied
to habeas corpus petitions by state prisoners, as illustrated by the fact that this case is cited in the
Advisory Committee Note to Rule 6 of the Rules Governing § 2254 Cases.

1 the LAPD acquired the Automated Fingerprint Identification System (AFIS), which is a computerized
2 data base containing millions of records that is capable of matching fingerprints in a matter of hours.
3 Petitioner has attempted to informally gain access to the AFIS, however counsel was told that
4 authorization from the District Attorney's Office was required. Thus far the District Attorney's Office
5 has refused to provide such authorization.

6 Petitioner contends that the prosecution's case relied exclusively upon eyewitness identification
7 and criminal informants, which he alleges are inherently suspect methods of proof and potentially
8 unreliable items of evidence. Petitioner contends there was no physical evidence connecting Petitioner
9 or his codefendant to the crimes. Respondent argues that the jury at this trial was informed of the fact
10 that there were 42 unmatched fingerprints, as well as the fact that Petitioner's fingerprints were not
11 found. Respondent also disputes that there was no physical evidence tying Petitioner to the crimes.
12 Respondent points out that eyewitness identification testimony came from four victim/witnesses.
13 Evidence from six other people showed that Petitioner had conspired with former employee Carletha
14 Stewart to rob the restaurant six months before the crimes occurred. In addition the police found
15 shotguns, shells, and casings in the apartment where Petitioner resided which were consistent with the
16 murder weapons. The police also found money in the form of single dollar bills and rolled coins which
17 was consistent with the money stolen from the restaurant in the possession of co-conspirator Carletha
18 Stewart.

19 Respondent thus contends that Petitioner has failed to provide "any justification or showing of
20 good cause of any kind." Opp'n at 10:5-6. Respondent argues that the restaurant was a busy
21 establishment which had been patronized by thousands of people, including many employees and service
22 people. Petitioner points out that the fingerprints at issue were found in non-public portions of the
23 restaurant along the path allegedly taken by the robbers, and that the police had already ruled out the
24 fingerprints of the employees. Moreover, Petitioner contends that if fingerprints are ultimately found
25 which match the description of the robbers, who had no legitimate reasons for being in the non-public
26 areas of the restaurant, and who could have been in the area on the night in question, an investigation
27 into these individuals would be warranted.

28 Respondent also argues that Petitioner did not assert a defense that some other individual actually

1 committed the crime. However Respondent points out that throughout the trial Petitioner mounted a
2 defense of mistaken identity and that because he could not identify the fingerprints at trial, he was unable
3 to specifically identify another individual who was responsible for the crimes. Petitioner has raised 27
4 claims regarding the prosecution's reliance upon eyewitness identification and criminal informants
5 which support his consistent defense of mistaken identification.

6 Respondent asserts that if this discovery request is granted, "prisoners in every case in which
7 unidentified fingerprints were found will have a basis for a discovery order requiring law enforcement
8 agencies to use improved technology to help them find the 'real perpetrator.'" Opp'n at 12:16-20.
9 Petitioner points out that good cause would not exist in every case. Here because none of Petitioner's
10 own fingerprints were found and because there is not substantial other evidence showing his guilt, there
11 is good cause for discovery. Such circumstances would not arise in every case. It is true that the
12 Supreme Court found:

13 It may well be, as the Court of Appeals predicted, that petitioner will be
14 unable to obtain evidence sufficient to support a finding of actual judicial
15 bias in the trial of his case, but we hold that he had made a sufficient
16 showing, as required by Habeas Corpus Rule 6(a), to establish "good
17 cause" for discovery. Although, given the facts of this particular case, it
18 would be an abuse of discretion not to permit any discovery, Rule 6(a)
19 makes it clear that the scope and extent of such discovery is a matter
20 confided to the discretion of the District Court.

21 *Bracy*, 117 S. Ct. at 1799.

22 Respondent also complains that the discovery sought is not specifically correlated to a
23 identifiable claim in the petition. Respondent points out that claims of actual innocence based upon
24 newly discovered evidence do not state a basis for federal habeas relief standing on their own. *Herrera*,
25 506 U.S. at 398. Petitioner does not disagree, but points out that the Supreme Court has found that
26 claims of actual innocence that are tied to other constitutional errors at trial do merit review:

27 If there were no question about the fairness of the criminal trial, a
28 *Herrera*-type claim would have to fail unless the federal habeas court is
 itself convinced that those new facts unquestionably establish Schlup's
 innocence. On the other hand, if the habeas court were merely convinced
 that those new facts raised sufficient doubt about Schlup's guilt to
 undermine confidence in the result of the trial without the assurance that
 the trial was untainted by constitutional error, Schlup's threshold
 showing of innocence would justify a review of the merits of the
 constitutional claims.

1 *Schlup v. Delo*, 115 S. Ct. 851, 862 (1995).

2 The applicable standard dictated by *Schlup* "requires the habeas petitioner to show that 'a
3 constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Id.* at
4 867 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Petitioner here is not raising the claim of
5 actual innocence on its own. Rather Petitioner asserts that his claim of actual innocence only supports
6 the claims before the Court which are indirectly based upon his innocence. Accordingly, Petitioner
7 claims that the requested discovery is tied to a number of claims. Reply, at 8-10. In particular Petitioner
8 identifies the claims which are not being litigated in the Motion to Dismiss. Petitioner believes that the
9 fingerprint evidence supports several claims that the state suborned perjured testimony from several
10 eyewitness/victims, as well as the claims that the admission of perjured and/or false testimony from
11 these witnesses prejudiced Petitioner. See claims 1, 2, 6, 7, 8, 11. Similarly the fingerprint evidence
12 would go to support the claim that the prosecution failed to disclose that it and its agents pressured
13 witnesses to identify or implicate Petitioner. See claim 12. In addition the evidence would support the
14 claim that perjured and/or false testimony of Andre Gilcrest and Brenda Givens⁶ violated Petitioner's
15 rights. See claims 17, 19.

16 Here the type of discovery requested goes to the issue of whether Petitioner is actually innocent
17 of the crimes. Petitioner has demonstrated good cause for this limited discovery. Accordingly, based
18 upon the circumstances in this case, Respondent's perfunctory argument that there is no good cause for
19 this discovery is rejected.

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23
24 ⁶ Andre Gilcrest contacted the police with information regarding the Bob's Big Boy robbery-
25 homicides. He had information about the robbery/homicides which he had obtained from Carletha
26 Stewart, one of the co-conspirators. Sanders, 46 Cal. Rptr.2d at 761. Petitioner contends that Gilcrest
27 was Stewart's former boyfriend and that he wrote her graphic love letters during the trial. Gilcrest
28 apparently knew that Stewart was petitioner's girlfriend at the time of the incident. His testimony at
petitioner's trial and the separate trial of petitioner's co-defendant Franklin Freeman, along with
documents authored by the prosecutor, DDA Harvey Giss, and a letter from the City Attorney's Office
regarding Gilcrest and the reward money, form the basis for three claims in the petition.

Brenda Givens was a waitress at Bob's Big Boy Restaurant who testified that Carletha Stewart
told her there was a plan to rob the restaurant.

1 **D. Whether the Information Sought by Petitioner Cannot be Used in This Federal Habeas**
2 **Proceeding Because Such Information Would be Both Unexhausted and Procedurally**
3 **Barred**

4 Respondent also asserts that discovery should be denied because the introduction of any
5 additional facts will render the claims unexhausted. This argument is without merit.

6 “The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider
7 allegations of legal error without interference from the federal judiciary.” *Vasquez v. Hillery*, 474 U.S.
8 254, 257 (1986). To comply with the exhaustion requirement, a federal habeas petitioner must “provide
9 the state court with a ‘fair opportunity’ to apply controlling legal principles to the facts bearing on his
10 constitutional claim.” *Anderson v. Harless*, 459 U.S. 4, 6 (1982). “[O]nce the federal claim has been
11 fairly presented to the state courts, the exhaustion requirement is satisfied.” *Hillery*, 474 U.S. at 257.

12 Respondent concedes that all the claims raised in the petition currently before the Court have
13 been technically exhausted. However Respondent argues that the development of additional facts will
14 transform these exhausted claims into unexhausted ones. In *Hillery*, the Supreme Court expressly
15 observed that it had “never held that presentation of additional facts to the district court . . . evades the
16 exhaustion requirement when a petitioner has presented the substance of his claim to the state courts.”
17 *Hillery*, 474 U.S. at 257-58. Recognizing that excessive factual transformation could effectively change
18 the nature of the claim that had been considered by the state courts, the Supreme Court held that
19 supplemental evidence that “[does] not fundamentally alter the legal claim” will not vitiate the exhausted
20 status of a claim that was “already considered by the state courts.” *Hillery*, 474 U.S. at 260.

21 It is speculative for the Court to decide that whatever evidence is discovered through the
22 discovery, that such evidence would “fundamentally alter the legal claim[s] already considered by the
23 state courts,” *Id.* At this juncture the exhaustion doctrine is not a valid objection to the current
24 discovery request. While it is clear that this Court cannot adjudicate unexhausted claims, upon a
25 showing of good cause this Court can allow petitioner to take discovery in an effort to investigate claims
26 contained in an exhausted petition.

27 In *Nicolaus* the Ninth Circuit found discovery improper when the petitioner was seeking
28 discovery on claims which he had never presented to the California Supreme Court. *Nicolaus*, 98 F.3d

1 at 1107. The circuit stated:

2 Prisoners, such a Nicolaus, who come to federal court after having
3 been denied habeas relief by the highest court of a state, may file a
4 federal habeas petition that raises the same issues contained in their state
5 habeas proceedings. **Here Nicolaus could have done that, but has not.**
6 In his state habeas proceedings, Nicolaus alleged juror misconduct,
7 erroneous penalty instructions, and improper denial of separate guilt and
8 penalty phase juries. **Because Nicolaus exhausted these claims in state
court, the could simply file a federal habeas petition raising these
issues.** In short, if Nicolaus wishes to allege formally that the FBI has
withheld documents that he believes may tend to exonerate him, he
should first bring such an unexhausted claim before the California state
court.

8 *Nicolaus*, 98 F.3d at 1107 (emphasis added).

9 Petitioner here has done exactly that, he has raised all the same claims as were raised before the
10 California Supreme Court. Yet Respondent still argues that to grant discovery is to risk creating an
11 unexhausted claim. Respondent does not explain how his position can be reconciled with the Ninth
12 Circuit's seeming approval of raising the same claims in federal court which were raised in state court,
13 and then seeking discovery on those same claims. *Id.*

14 Therefore the Court has evaluated the propriety of discovery in light of the fact that all the claims
15 currently before the Court have been previously presented to the state court. If the requested discovery
16 leads to evidence that fundamentally alters these claims, then and only then does the exhaustion doctrine
17 become a tangible, as opposed to speculative, issue. Accordingly, Respondent's argument that discovery
18 should not be granted because it might turn an exhausted claim into one that is unexhausted is rejected.

19 **E. Whether Petitioner's Motion for Discovery Should Be Denied Because the Parties From**
20 **Whom Petitioner Seeks Discovery Are Not Before the Court, And Are Not Represented by**
21 **the Attorney General**

22 Respondent contends that he only represents the Warden of San Quentin and cannot order the
23 L.A.P.D. or the Los Angeles District Attorney to conduct the tests, or even order the Los Angeles
24 Superior Court to release the evidence to be tested. Specifically Respondent contends that "Respondent
25 is the Warden of San Quentin, and his counsel is the Attorney General of California. The Attorney
26 General of California does not represent, and cannot order, the Los Angeles Police Department or the
27 Los Angeles District Attorney or the Los Angeles Superior Court to perform the time-consuming and
28 expensive tests petitioner seeks." Opp'n at 17:6-11.

1 This argument is not only factually unsound, but it is premised on a misunderstanding of the
2 obligations imposed by discovery. Nor has Respondent attempted to support this position by citing any
3 legal authority.⁷ First this argument is without legal support in that the habeas rules place the burden
4 on the petitioner to seek prior permission to engage in discovery. Rule 6. The permission must be
5 sought from the Court -- not from the Attorney General or from the party to whom the petitioner intends
6 to seek discovery. Rule 6; Local Rule 26.8.8(e). While it would certainly be preferable to have
7 preliminary objections ruled upon at the outset, Respondent cites no authority suggesting that a
8 petitioner must notify non-parties prior to filing a motion with the Court. Equally significantly,
9 however, if Respondent is only seeking to protect notice to third parties, he should have looked at the
10 proof of service attached to Petitioner's motion: it reflects that a copy of the motion and related
11 documents were served on the Los Angeles Police Department.

12 Second, even if the Warden and Attorney General do not have personal possession of the
13 fingerprint evidence, this does not defeat Petitioner's request for discovery from them. A party may seek
14 production of any items "within the scope of Rule 26(b) . . . which are in the possession, custody or
15 control of the party upon whom the request is served." Fed.R.Civ.P. 34(a), *United States v. International*
16 *Union of Petrol. and Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989). As such, litigants may be
17 required to "to produce every pertinent document in their 'possession, custody or control' . . . even if
18 it [is] not in their physical possession." *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th
19 Cir. 1993). "Control is defined as the legal right to obtain documents upon demand." *International*
20 *Union*, 870 F.2d at 1452, *accord Chaveriat*, 11 F.3d at 1426.

21 The Attorney General acknowledges that the items requested might be in the possession of the
22 Los Angeles County Superior Court. In defending the judgment of conviction and sentence of death,
23 the Attorney General has, in effect, taken over the role of the district attorney for purposes of appellate
24 and collateral review. The warden, Arthur Calderon, is a party in his official capacity as custodian only
25 and is represented by the Attorney General who, by statute, "has charge, as attorney, of all legal matters

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27 ⁷ Respondent only notes that a subpoena would have to be issued to obtain evidence possessed
28 by non-parties. However, Petitioner's Motion for Discovery is essentially a request to obtain
authorization to issue just such a subpoena. Even if the documents are truly outside the reach of the
Attorney General, the Court is certainly empowered to grant Petitioner permission to access this
evidence through the power of subpoenas under Rule 45. Fed.R.Civ.P. 45.

1 in which the State is interested” and who is charged with “prosecut[ing] and defend[ing] all causes to
2 which the State, or any State officer is a party in his official capacity.” Cal. Gov’t Code §§ 12511,
3 12512.⁸

4 The Attorney General’s position of authority over the district attorney is clearly established in
5 California law. The California Constitution designates the Attorney General as the “chief law officer
6 of the State.” Cal. Const., art. V, § 13. In this capacity, the Attorney General is vested with explicit
7 authority to supervise and control the district attorneys throughout the State.

8 The Attorney General shall have direct supervision over every district
9 attorney and sheriff and over such other law enforcement officers as may
10 be designated by law, in all matters pertaining to the duties of their
11 respective offices, and may require any of said officers to make reports
12 concerning the investigation, detection, prosecution, and punishment of
13 crime in their respective jurisdictions . . .

14 Cal. Const., art. V, § 13.

15 This power has been confirmed by the State legislature. Cal. Gov’t Code § 12550. Not only is
16 the Attorney General empowered to supervise the district attorney, but he may “assist any district
17 attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any
18 investigation or prosecution.” Cal. Gov’t Code § 12550. Acting in this capacity, the Attorney General
19 “has all the powers of the district attorney.” Cal. Gov’t Code § 12550. These powers necessarily include
20 access to the exhibits maintained by the Los Angeles County Superior Court, as well as the district
21 attorney’s investigative and prosecutorial files. Similarly, the Attorney General has constitutional
22 authority to control and supervise the Los Angeles Police Department. Cal. Const., art. V, § 13.

23 Since the Attorney General has a legal interest in defending the judgment of the state courts, and
24 has “the legal right to obtain documents upon demand,” (*International Union*, 870 F.2d at 1452), an
25 order to produce documents may properly be directed at him. However, in order to ensure that this
26 authorization of discovery will be effectual, this Court’s order is directed at both the Attorney General
27 and the District Attorney.

28 ⁸The warden is a party because a writ of habeas corpus is aimed at custody and the warden is the
custodian. The State, however, not the warden, is the party that has an interest in ensuring that the
custodial relationship continues. The warden’s only legal interest is in ascertaining whether the
judgment of conviction and sentence are constitutional; he can hardly be said to have any substantial
interest in the validity or invalidity of the criminal judgment.

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IV. CONCLUSION

Good cause appearing, it is hereby ordered that the 42 unidentified fingerprints lifted at the crime scene of the above captioned case be analyzed for possible identification by the Los Angeles Police Department's Automated Fingerprint Identification System (AFIS). The Los Angeles Police Department "DR" number for the fingerprint investigation of this case is DR 80-822096. See also People v. Ricardo Sanders, et. al., Los Angeles County Superior Court Nos. A368603 c/w A3647692.

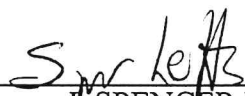
If any or all of the 42 fingerprints are subsequently identified, the names, addresses, and criminal history information (e.g. FBI and California "rap sheets") of these individuals should be provided to the following:

Counsel for Petitioner: Verna Wefald
William J. Genego
35 S. Raymond Avenue, Suite 420
Pasadena, California 91105
Telephone: (818) 432-5100

Counsel for Respondent: Kristofer Jorstad
Deputy Attorney General
300 S. Spring Street, 5th Floor
Los Angeles, California 90013
Telephone: (213) 897-2275

IT IS SO ORDERED.

Dated: September 18, 1997



J. SPENCER LETTS
United States District Judge