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IN THE
Supreme Court of the United States

FERMIN GUERRERO,

Petitioner,

v.

MARTIN BITER,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 25 2019

FOR THE NINTH CIRCUIT

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

FERMIN GUERRERO,

No. 18-55202

Petitioner-Appellant,

D.C. No.

v.

2:10-cv-08257-ODW-DFM

MARTIN BITER, Warden,

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted February 7, 2019
Pasadena, California

Before: WARDLAW and BEA, Circuit Judges, and MURPHY,** District Judge.

Fermin Guerrero appeals the district court’s denial of his 28 U.S.C. § 2254 petition for habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253 and review the district court’s denial of Guerrero’s petition de novo. *Fox v. Johnson*, 832 F.3d 978, 985 (9th Cir. 2016).

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

** The Honorable Stephen J. Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

In 2003, a jury convicted Guerrero for the first-degree murder of Jose Ortiz, and the state court sentenced him to 60 years to life in prison. Jimmy Richardson testified as the government's key witness against Guerrero. Guerrero impeached Richardson by demonstrating that he had received leniency for separate criminal charges in return for providing information to law enforcement.

In addition to Richardson's testimony, the government introduced evidence that (1) Guerrero owned a dark-colored Camaro; (2) Guerrero was driving the car in Los Angeles on the day of Ortiz's murder; (3) the initial account of the murder provided to law enforcement by two eyewitnesses—Catalina and Lawrence Avalos—matched Richardson's account of the murder (as told to him by Guerrero); (4) Ortiz was murdered in Paramount, an area controlled by Guerrero's gang; (5) Richardson testified Guerrero killed Ortiz with a 9-mm handgun with an extended magazine, a 9-mm handgun was found at co-worker Raul Macias's home, and Macias first told police that Guerrero sold him the gun and later testified that Richardson sold him the gun with Guerrero present; (6) police found in Guerrero's house an extended magazine that fit the 9-mm handgun; and (7) Richardson asked Guerrero during a recorded conversation about "shit out back," and Guerrero mentioned he "did" the "fool from Paramount" who was "from 18th," a rival gang of which Ortiz was a member.

Guerrero appealed his conviction and sentence. The California Court of Appeal modified his sentence but otherwise affirmed the conviction. Guerrero then filed a petition for review in the California Supreme Court, which that court denied.

On October 15, 2010, Guerrero filed his original federal petition for a writ of habeas corpus. In January 2014, Guerrero filed a habeas petition in the California Supreme Court to exhaust the claims raised in his federal habeas petition. The California Supreme Court denied the petition.

In 2015, Guerrero's post-conviction counsel interviewed Richardson. Richardson revealed that he received "between \$6,000 and \$10,000" from state and federal law enforcement agencies to provide information in Guerrero's case.

In November 2015, Guerrero filed an amended federal habeas petition adding two claims—including an allegation that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing evidence of payments to Richardson. Guerrero then filed a second habeas petition in the California Supreme Court that included his *Brady* claim. On March 29, 2017, the California Supreme Court summarily denied Guerrero's second habeas petition.

When "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98

(2011). Because the California Supreme Court summarily denied Guerrero's claims, we must determine whether fairminded jurists could disagree about whether the California Supreme Court unreasonably applied binding Supreme Court precedent or made an unreasonable determination of fact. 28 U.S.C. § 2254(d); *see also Haney v. Adams*, 641 F.3d 1168, 1171 (9th Cir. 2011) ("A habeas court must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.").

A *Brady* violation has three elements: (1) the evidence was favorable to the defendant as exculpatory or impeachment evidence; (2) the state suppressed the evidence; and (3) prejudice resulted from the failure to disclose that evidence.

United States v. Wilkes, 662 F.3d 524, 535 (9th Cir. 2011) (citation omitted).

"[T]he terms 'material' and 'prejudicial' are used interchangeably in *Brady* cases."

Runnigeagle v. Ryan, 686 F.3d 758, 769 (9th Cir. 2012) (quoting *Benn v.*

Lambert, 283 F.3d 1040, 1053 n.9 (9th Cir. 2002)). Undisclosed evidence is

material "when there is a reasonable probability that, had the evidence been

disclosed [to the defense], the result of the proceeding would have been different."

Id. (quoting *Cone v. Bell*, 556 U.S. 449, 470 (2009)).

Here, only the third element is in dispute. To reverse the district court's decision and grant Guerrero federal habeas relief, we must find that the California Supreme Court could not reasonably decide that the *Brady* nondisclosure was not material. The government's failure to disclose that it paid Richardson for his testimony is troubling. Given the evidence presented at trial, however, the California Supreme Court could have reasonably concluded that there was not a reasonable probability that the result would have been different had the evidence of the payments to Richardson been disclosed to the defense. Although Richardson's credibility was at issue, the government presented overwhelming evidence of Guerrero's guilt at trial that was untainted by Richardson's testimony. Furthermore, Richardson was already impeached, and the trial court gave a cautionary instruction as to the credibility of his testimony.

AFFIRMED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FERMIN GUERRERO, Petitioner, v. RAUL LOPEZ, Respondent.	No. CV 10-8257-ODW (DFM) ORDER GRANTING A CERTIFICATE OF APPEALABILITY
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Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of

1 appeals under Federal Rule of Appellate Procedure 22. A motion
2 to reconsider a denial does not extend the time to appeal.

3 (b) Time to Appeal. Federal Rule of Appellate Procedure
4 4(a) governs the time to appeal an order entered under these rules.
5 A timely notice of appeal must be filed even if the district court
6 issues a certificate of appealability.

7 Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue
8 “only if the applicant has made a substantial showing of the denial of a
9 constitutional right.” The Supreme Court has held that this standard means a
10 showing that “reasonable jurists could debate whether (or, for that matter,
11 agree that) the petition should have been resolved in a different manner or that
12 the issues presented were “adequate to deserve encouragement to proceed
13 further.”” Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (citation omitted).

14 Here, after considering the arguments made in Petitioner’s objections to
15 the Magistrate Judge’s Report and Recommendation, see Dkt. 205, the Court
16 finds that Petitioner has made the requisite showing with respect to whether
17 the prosecution violated Petitioner’s due process rights by failing to disclose
18 material impeachment evidence regarding Jimmy Richardson in violation of
19 Brady v. Maryland, 373 U.S. 83 (1963). Accordingly, a Certificate of
20 Appealability as to that issue is GRANTED.

21
22 Dated: February 2, 2018



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24 OTIS D. WRIGHT II
25 United States District Judge
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FERMIN GUERRERO,
Petitioner,
v.
RAUL LOPEZ,
Respondent.

No. CV 10-8257-ODW (DFM)
JUDGMENT

Under the Order Accepting Findings and Recommendations of the
United States Magistrate Judge,

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

Dated: February 2, 2018



OTIS D. WRIGHT II
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FERMIN GUERRERO,
Petitioner,
v.
RAUL LOPEZ,
Respondent.

Case No. CV 10-8257-ODW-DFM
Order Accepting Findings and
Recommendation of United States
Magistrate Judge

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended
Petition, the other records on file herein, and the Final Report and
Recommendation of the United States Magistrate Judge. Further, the Court
has engaged in a de novo review of those portions of the Final Report and
Recommendation to which objections have been made. The Court accepts the
findings and recommendation of the Magistrate Judge.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FERMIN GUERRERO,
Petitioner,
v.
RAUL LOPEZ,
Respondent.

Case No. CV 10-8257-ODW (DFM)
Final Report and Recommendation
of United States Magistrate Judge

This Final Report and Recommendation is submitted to the Honorable Otis D. Wright, II, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

BACKGROUND

A. Federal Court Proceedings

On October 15, 2010, Fermin Guerrero (“Petitioner”) filed a Petition for Writ of Habeas Corpus by a Person in State Custody, challenging his 2003

1 convictions for first-degree murder and various enhancements.¹ See Dkt. 1.
2 Petitioner also filed an “Application for Certificate of Appealability Excusing
3 Potential Procedural Default Under A.E.D.P.A. Time Limitations,” arguing
4 that he is entitled to equitable tolling based on his attorney’s misconduct. Dkt.
5 3. On April 20, 2011, Respondent moved to dismiss the Petition as barred by
6 the statute of limitations and partially unexhausted. See Dkt. 24.

7 On March 5, 2014, the previously assigned Magistrate Judge issued an
8 Amended Report and Recommendation, finding that Petitioner had alleged
9 sufficient facts to warrant an evidentiary hearing on his equitable-tolling claim
10 and recommending that the motion to dismiss be denied. See Dkt. 67. On
11 April 11, 2014, the District Judge accepted the Amended Report and
12 Recommendation and denied the motion to dismiss without prejudice. See
13 Dkt. 73. On April 28, 2014, the Court appointed the Office of the Federal
14 Public Defender (“FPD”) to represent Petitioner. See Dkt. 76.

15 On July 22, 2015, this case was transferred to the undersigned
16 Magistrate Judge. See Dkt. 99. Respondent requested that he be permitted to
17 defer the equitable-tolling issue and answer the Petition, see Dkt. 100, and on
18 August 10, 2015, he filed an Answer and Memorandum of Points and
19 Authorities. See Dkt. 103. On November 19, 2015, Petitioner moved for leave
20 to amend and lodged a proposed First Amended Petition (“FAP”). See Dkt.

21 ¹ Under the “mailbox rule,” a pro se prisoner’s habeas petition is
22 constructively filed when he gives it to prison authorities for mailing to the
23 court clerk. Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014); see
24 also Houston v. Lack, 487 U.S. 266, 276 (1988). Under this rule, a court
25 generally deems a habeas petition filed on the day it is signed, Roberts v.
26 Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010), because it assumes that the
27 petitioner turned the petition over to prison authorities for mailing that day,
28 see Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) (per curiam) (as
amended). Here, Petitioner signed and dated the Petition on October 15, 2010.
See Petition at 8.

1 111. On December 15, 2015, Respondent opposed the motion for leave to
2 amend, see Dkt. 114, and on January 12, 2016, Petitioner replied, see Dkt.
3 117. On January 26, 2016, the Court granted Petitioner’s motion for leave to
4 amend, ordered the FAP filed as of November 19, 2015, and set a date by
5 which Respondent must file a motion to dismiss. See Dkt. 118.

6 On March 8, 2016, Respondent moved to dismiss the FAP, arguing that
7 both the original Petition and the FAP were time-barred. See Dkt. 125. On
8 April 19, 2016, Petitioner filed an opposition and motion for partial summary
9 judgment, see Dkt. 133, and on June 2, 2016, Respondent filed a reply, see
10 Dkt. 145. On September 28 and 29, 2016, the Court held an evidentiary
11 hearing regarding Petitioner’s entitlement to equitable tolling. See Dkts. 167-
12 68.

13 The Court issued a Final Report and Recommendation on April 17,
14 2017. See Dkt. 190. On April 25, 2017, the District Judge accepted the Final
15 Report and Recommendation, granted Respondent’s motion to dismiss the
16 FAP in part and denied it in part, and denied Petitioner’s motion for partial
17 summary judgment. See Dkt. 191.

18 Respondent filed an answer to the FAP’s remaining claims on June 22,
19 2017. See Dkt. 194 (“Answer”). On August 21, 2017, Petitioner filed a
20 traverse. See Dkt. 200 (“Traverse”).

21 **B. The FAP’s Remaining Claims**

- 22 • Ground One: Trial counsel was constitutionally ineffective for:
- 23 ○ prematurely declaring ready for trial, without having
 - 24 conducted any investigation, see FAP at 49-50 (Subclaim
 - 25 C);
 - 26 ○ failing to obtain investigative notes from the Public
 - 27 Defender’s office, see id. at 51-52 (Subclaim D);
 - 28 ○ failing to introduce Catalina Avalos’s photographic

- 1 lineup statement to corroborate her testimony that
2 Petitioner was not the shooter, see id. at 53-55 (Subclaim
3 E);
- 4 ○ failing to interview witnesses, including the Avaloses'
5 neighbors, Frederico Hernandez, Richard Adams, and
6 "Teri," who could have corroborated that the shooter's
7 car was green and that the shooter drove by the scene
8 earlier that day, see id. at 56-67 (portion of Subclaim F);
 - 9 ○ failing to interview Richardson, who would have
10 revealed that law enforcement paid him to provide
11 information implicating Petitioner in the shooting,
12 provided information rebutting the prosecution's claim
13 that Petitioner had confessed to committing the shooting,
14 and revealed that a coworker drove a green Camaro, see
15 id. at 67-70 (Subclaim G); and
 - 16 ○ failing to rebut Richardson's claim that Petitioner altered
17 his Camaro because it was "hot" with Richardson's prior
18 inconsistent statement and records from the body shop
19 that performed the work, see id. at 70-72 (Subclaim H).
- 20 • Ground Two: The trial court violated Petitioner's due process
21 rights by denying defense counsel's requested continuance. See
22 id. at 89-93.
 - 23 • Ground Three: The prosecutor violated Petitioner's due process
24 rights by failing to disclose material impeachment evidence
25 regarding Jimmy Richardson. See id. at 93-100.
 - 26 • Ground Four: The trial court violated Petitioner's right to a fair
27 trial by admitting multiple forms of evidence demonstrating his
28

1 possession of several firearms when it was conclusively
2 established that none was the murder weapon. See id. at 100-
3 17.

- 4 • Ground Five: The trial court prejudicially erred in failing to sua
5 sponte instruct the jury that it must determine whether
6 Petitioner made an extrajudicial admission and, if so, that
7 certain of the statements must be viewed with caution as set
8 forth in CALJIC No. 2.71. See id. at 118-23.
- 9 • Ground Six: The cumulative effect of the constitutional
10 violations listed above rendered Petitioner’s trial fundamentally
11 unfair. See id. at 123-26.

12 **C. State-Court Proceedings**

13 On August 12, 2003, a Los Angeles County Superior Court jury
14 convicted Petitioner of first-degree murder and found true gun and gang
15 enhancements. See Lodged Document (“LD”) 12, 1 Clerk’s Transcript (“CT”) 16
232-33.² On September 19, 2003, the trial court sentenced him to 60 years to
17 life in prison. See id. at 241-42.

18 Petitioner appealed, raising claims corresponding to the FAP’s Ground
19 Four and the state-law portion of Ground Five. See LD 2-3. On March 22,
20 2005, the California Court of Appeal struck a 10-year sentence for the gang
21 enhancement but otherwise affirmed the judgment. See LD 6. Petitioner filed a
22 petition for review in the California Supreme Court, raising the same two
23 claims. See LD 7. The California Supreme Court summarily denied the
24 petition on June 8, 2005. See LD 8.

25 ² Lodged documents referenced herein correspond to the following
26 docket entries and notices of lodging: Dkt. 25, Notice of Lodging, LD 1-11;
27 Dkt. 104, Notice of Lodging, LD 12-15; and Dkt. 195, Supplemental Notice of
28 Lodging, LD 16-17).

1 Nearly 9 years later, on January 26, 2014, Petitioner filed a habeas
2 petition in the California Supreme Court, raising claims corresponding to some
3 of the FAP's Grounds One and Six.³ See LD 14. On April 23, 2014, the
4 California Supreme Court denied the petition with citations to People v.
5 Duvall, 9 Cal. 4th 464, 474 (1995), and In re Swain, 34 Cal. 2d 300, 304
6 (1949), indicating that the claims were not raised with sufficient particularity.
7 See LD 15.

8 On January 12, 2016, Petitioner, now represented by the FPD, filed a
9 second habeas petition in the California Supreme Court, raising all of the
10 grounds in the FAP. See Dkt. 182, Notice of Lodging, Petitioner's Lodged
11 Document ("Petitioner's LD") 1. Petitioner also filed three volumes of exhibits
12 in support of his petition. See LD 16. On July 13, 2016, the California
13 Supreme Court directed the respondent to file an informal response to
14 Petitioner's ineffective assistance of counsel claims and his due process claim
15 based on the prosecutions' failure to disclose that Richardson "received
16 monetary benefits in exchange for his testimony against [P]etitioner."
17 Petitioner's LD 2. The respondent filed an informal response on October 18,
18 2016. See Petitioner's LD 3. On November 23, 2016, Petitioner filed a reply to
19 the informal response along with several exhibits. See Petitioner's LD 4-5. On
20 March 29, 2017, the California Supreme Court summarily denied the petition.
21 See Petitioner's LD 6.

22 **D. Summary of Evidence**

23 The Court has independently reviewed the state-court record and finds
24 the following to be an accurate recitation of what the evidence showed at trial.
25 See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

26
27 ³ The prison mailbox rule applies to state habeas petitions. Stillman v.
28 LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003).

1 **1. Testimony Regarding the Shooting Incident**

2 At approximately 10:20 p.m. on July 14, 2002, Catalina Avalos and her
3 son, Lawrence, were in the front yard of their home on Virginia Avenue in the
4 city of Paramount. See 3 Reporter’s Transcript (“RT”) 424, 431-33; 4 RT 605,
5 610. Catalina’s ex-husband was also outside, working on his truck. See 3 RT
6 432; 4 RT 610, 615. Catalina and Lawrence both testified that Catalina’s ex-
7 husband—Lawrence’s father—was a member of the East Side Paramount gang
8 (“ESP”) and that ESP controlled the area where they lived. See 3 RT 424-25; 4
9 RT 605-06. Catalina testified that she and her children had a “friendly
10 relationship” with her ex-husband, that he still stayed at her house, and that
11 she saw him on a “regular day basis” unless he was away for his work as a
12 truck driver. 3 RT 432, 491.

13 Catalina and Lawrence saw a Hispanic man, later identified as Jose
14 Ortiz, walking north on the east side of the street. See 3 RT 432-33; 4 RT 615-
15 16. They then saw a Camaro, which was also heading north, stop next to the
16 man. See 3 RT 433; 4 RT 619-20. Catalina noticed that the Camaro was
17 emerald or forest green, with colored graphic lines drawn on the passenger-side
18 wheel well. See 3 RT 433, 454. Lawrence saw that it was a dark color, either
19 black, blue, or green. See 4 RT 625. He was certain that it was not grey, red, or
20 burgundy. See 4 RT 648-49. The Camaro’s driver and Ortiz appeared to
21 converse for a moment. See 3 RT 433, 437; 4 RT 620. The driver then drove
22 forward, made a u-turn, and parked about two houses down from the
23 Avaloses’ home. See 3 RT 437-38; 4 RT 621-22. The driver got out of the car,
24 hesitated, and then began walking toward Ortiz. See 3 RT 438-39; 4 RT 621.
25 At the same time, the Avaloses saw Ortiz walk back toward the driver,
26 crossing the street diagonally. See 3 RT 439; 4 RT 623. He was carrying a gun
27 behind his back. See 3 RT 439; 4 RT 623. The driver told Ortiz, “Put your gun
28 away, dog. Let’s talk about this like men,” or words to that effect. 3 RT 440; 4

1 RT 623-24. Ortiz put his gun back in his waistband or pocket and continued to
2 walk toward the driver. See 3 RT 440; 4 RT 623-24. Without speaking, the
3 driver pulled out a gun and began shooting at Ortiz, discharging at least five to
4 seven shots. See 3 RT 440-41; 4 RT 624-25. As Ortiz staggered and fell to the
5 ground, the driver either walked up to him and shot him several more times
6 while standing or shot him two more times after getting back into his car. See 3
7 RT 441; 4 RT 627-28. The driver then drove away. See 3 RT 441; 4 RT 627-28.
8 Lawrence estimated that the driver fired 15 shots in all. See 4 RT 627.

9 At trial, Catalina described the shooter as a male Hispanic who was
10 “kind of dark,” slender, and wearing a baseball cap and leather sandals. 3 RT
11 442, 447-48. Lawrence described the driver as a tall, thin Hispanic man in his
12 20s.⁴ 4 RT 630-33, 635. He recalled that he had seen the Camaro drive by
13 earlier that day at about 1:00 p.m. and again at 4:00 p.m., and that it had
14 returned to the scene the day after the shooting. See 4 RT 638-39, 647-48, 651-
15 52. Both Catalina and Lawrence examined the photographs of a Camaro and
16 said the Camaro driven by the shooter had the same body style as the car in the
17 photographs. See 3 RT 435; 4 RT 618-19.

18 Both Catalina and Lawrence testified that Petitioner did not look like the
19 shooter.⁵ See 3 RT 444-45, 459-50; 4 RT 639-41, 650-53. Catalina testified that
20 the shooter had a more narrow face and was taller, thinner, younger, and
21 darker-skinned than Petitioner. See 3 RT 447-48, 452-53, 458-60. She testified

22 ⁴ Lawrence testified that the shooter “looked dark and when he moved,
23 he looked lighter” and that Lawrence “couldn’t really tell” what kind of
24 complexion he had. See 4 RT 631-32, 641-42. He estimated that 46 feet were
25 between him and the shooter. See 4 RT 631-32.

26 ⁵ Catalina and Lawrence first gave this information to a defense
27 investigator, who had prepared statements for them to sign. See 3 RT 444-45,
28 458, 485-86; 4 RT 639-40. Catalina’s statement was read to the jury. See 3 RT
486.

1 that she told a defense investigator that Petitioner was not the shooter, but she
2 did not tell the sheriff's department or the district attorney's office, even after
3 the preliminary hearing. See 3 RT 445. Lawrence testified that the shooter was
4 taller and skinnier than Petitioner. See 4 RT 650-51.

5 Investigator Boyd Zumwalt investigated the shooting. See 5 RT 1056,
6 1078. When he arrived at the scene, he observed expended shell casings,
7 projectiles, a bloody shirt, and some sandals. See 5 RT 1056. He also observed
8 an unfired weapon that belonged to Ortiz. See 5 RT 1059. Catalina told the
9 investigating officers that she had seen the shooting and thereafter saw a hard-
10 top green Camaro drive away at a high rate of speed. See 5 RT 1060-61, 1079.
11 Four days later, Zumwalt returned to interview Catalina, who referred him to
12 her ex-husband, who was not at home, for information about the shooting. See
13 See 5 RT 1061-62, 1094. The officer left his pager number for Catalina's ex-
14 husband, but he was never contacted. See 5 RT 1062, 1081-82. Zumwalt
15 testified that Catalina's ex-husband was an ESP member. See 5 RT 1062-63.

16 In July 2002, Kathy Lainez was Petitioner's girlfriend. See 5 RT 986,
17 1007. Lainez lived in Los Angeles and had never been to Petitioner's home in
18 Rialto. See 5 RT 984-85. She saw him mostly on the weekends and never saw
19 any graffiti associated with Petitioner, nor had she seen him with guns. See 5
20 RT 985-86. Lainez testified that Petitioner was not a gang member. See 5 RT
21 984.

22 On July 14, 2002, Lainez and her aunt returned home together from a
23 trip to Miami. See 5 RT 989-90, 1005. Her plane arrived at 1:00 or 1:30 pm
24 and Petitioner met her at the airport. See 5 RT 990, 1004. They drove in
25 Petitioner's Camaro to her home in Los Angeles. See 5 RT 991-92. Lainez
26 testified that the Camaro was dark burgundy when Petitioner bought it but it
27 was gray on July 14, 2002. See 5 RT 991-92, 1014. The car was never green.
28 See 5 RT 1003, 1014. After leaving her home, Lainez and Petitioner went to a

1 nearby motel for 2 or 3 hours. See 5 RT 992-93. Lainez first estimated that
2 they arrived at the motel at 3:00 or 4:00 p.m. and stayed until 9:00 p.m., but
3 when she was shown motel records, she realized that they actually arrived
4 there shortly after 6:00 p.m. and checked out at 8:14 p.m. See 5 RT 992-97.
5 From the motel, Petitioner and Lainez got food from a Jack-in-the-Box and ate
6 in the car in front of Lainez's home. See 5 RT 995, 999, 1008-09. Petitioner
7 then left to go home. See 5 RT 999-1000. Lainez was not sure where she or
8 Petitioner was at 10:20 p.m., the time of the shooting. See 5 RT 999-1001,
9 1004.

10 In July 2002, Jimmy Richardson worked with Petitioner at Thor
11 California, which was located in Moreno Valley in Riverside County. See 4
12 RT 670-71. Petitioner and Richardson drove together to work. See 4 RT 671-
13 72. Richardson testified that Petitioner owned a burgundy Camaro in July
14 2012, but he later acquired a Buick Regal and Toyota Camry. See 4 RT 672-
15 73, 680-81, 725. Richardson knew that Petitioner was an active member of a
16 Paramount street gang. See 4 RT 677-78. Although Petitioner lived in Rialto,
17 he told Richardson that he had "gone back" to Paramount. 4 RT 678.
18 Petitioner always had a weapon with him, which he usually kept in his car. See
19 4 RT 681. Petitioner carried a nine-millimeter Beretta handgun with "night
20 sights" and a special clip that held additional bullets. 4 RT 681, 685-88.

21 One Monday morning in July 2002, Petitioner told Richardson that over
22 the weekend he had to "smoke some fool" who was "mad-dogging him" in
23 Paramount. 4 RT 676-77, 681-82. Petitioner described how he drove up the
24 block, turned around, and got out of his car. See 4 RT 681-82. Petitioner said
25 that the man had a gun and he told the man to put the gun away to "handle it"
26 like men. See 4 RT 681-82. Petitioner then described how he shot the man, and
27 once he was on the ground, shot him again "point blank." 4 RT 682-84.
28 Petitioner then showed Richardson a nine-millimeter Beretta with a long clip,

1 saying it was the gun used in the shooting. See 4 RT 685.

2 A week or two later, Petitioner handed Richardson a copy of a
3 newspaper article that described Ortiz's murder. See 4 RT 696-99. The article's
4 description of the incident was consistent with Petitioner's. See 4 RT 700. The
5 article referred to the perpetrator as "the unknown assailant," and thereafter
6 Richardson began calling Petitioner "the unknown." 4 RT 701.

7 According to Richardson, Petitioner continued to drive the Camaro for
8 two weeks before he had it repainted gray. See 4 RT 681, 684, 725-26. After
9 that, Richardson testified, Petitioner had other body work done on the
10 Camaro, including replacing the headlights and rims. See 4 RT 680-81, 684-85.
11 Petitioner told Richardson that the Camaro was "hot" because it had been
12 used in the shooting. 4 RT 681, 725.

13 Raul Macias worked at Thor California and knew Petitioner and
14 Richardson. See 5 RT 910. He did not spend any personal time with Petitioner
15 and saw him only at work. See 5 RT 910, 917. Macias testified that in
16 November 2002, he bought a nine-milimeter Beretta handgun from Richardson
17 for \$400. See 5 RT 912-13, 917. Macias testified that Richardson was telling
18 people at work that he had a Beretta handgun for sale, and when Macias
19 expressed interest, Richardson arranged to meet him after work at 5:00 p.m. at
20 a gas station in Riverside. See 5 RT 925-27. Petitioner and another man,
21 "Steve," were also present. 5 RT 925, 927. Richardson handed the gun to
22 Macias, and Macias paid him the next day. See 5 RT 926-27.

23 **2. Testimony and Evidence Regarding the Investigation**

24 In October 2002, Richardson was arrested by the United States Secret
25 Service and the Department of Alcohol, Tobacco, and Firearms ("ATF"), and
26 he was charged in state court for offenses involving counterfeit money and
27 methamphetamine. See 4 RT 673-74. Richardson had purchased some of the
28 counterfeit money and a large amount of the methamphetamine from

1 Petitioner. See 4 RT 673-76, 754.

2 Richardson pleaded guilty to two felonies and received a suspended
3 sentence based on his agreement to cooperate with law enforcement in
4 counterfeit and sting operations. See 4 RT 674-76, 727, 754. At some point in
5 November 2002, Richardson told federal authorities about Petitioner’s
6 admission to the murder. See 4 RT 676, 712-13, 755-58. Richardson also
7 reported that Petitioner had sold the gun used in the shooting to a coworker at
8 Thor California. See 4 RT 714, 721-22, 758. On December 23, 2002, federal
9 authorities contacted Zumwalt and told him about Richardson’s statements.
10 See 5 RT 1063-64. Zumwalt personally interviewed Richardson on December
11 30, 2002. See 5 RT 1064.

12 On January 8, 2003, Richardson called Petitioner on a monitored phone
13 in an effort to elicit corroborating and incriminating statements. See 4 RT 702-
14 03; 5 RT 1064-65. During the telephone call, Petitioner referred to work being
15 done on his Camaro. See 4 RT 703-05; CT 158-61. On January 9, 2003,
16 Richardson wore a “wire” to a meeting with Petitioner to buy
17 methamphetamine. 4 RT 705, 731-32; 5 RT 1065-66. During the taped
18 conversation, Petitioner discussed firearms, discussed the body work being
19 done on his car, responded to a question from Richardson about “Paramount,”
20 and discussed other gang-related incidents. 4 RT 715-16, 728-29, 734, 737-38;
21 CT 163-67. At one point, Richardson tried to shift the conversation to Ortiz’s
22 murder, asking, “Ain’t no shit ever happened over that shit out back?
23 Remember that?” 4 RT 715-16; CT 166. Petitioner responded, “From 18th?”
24 and asked, “What dude?” CT 166. Richardson said, “Out there in
25 Paramount.” Id. Petitioner responded, “The last one I did—will be the last of
26 the month, 40.” Id. Richardson laughed, and Petitioner said, “Oh yeah, that
27 fool from Paramount?” Id. Richardson did not understand what “18th” meant
28

1 at the time.⁶ 4 RT 716.

2 On January 14, 2003, Zumwalt returned to Paramount to interview
3 Catalina and Lawrence Avalos about the shooting. See 5 RT 1067-68, 1082-83.
4 At that time, Catalina described the shooter as a Hispanic, 18-to-21-year-old
5 man wearing a brown silky shirt and a baseball cap. See 5 RT 1075-76.
6 Lawrence described the shooter as a light-skinned Hispanic man in his 20s
7 wearing blue or black pants. See 5 RT 1076-77; 4 RT 630.

8 Also on January 14, 2003, investigators showed Catalina a six-pack
9 photographic lineup; she circled a photograph as depicting someone who
10 “look[ed] similar” to the shooter.⁷ 3 RT 457, 483-84. At that time, she told the
11 investigator that based on the time that she saw the person and where she was
12 standing, she was not comfortable making an identification. See 3 RT 484.

13 On March 6, 2003, federal agents and Zumwalt went to Macias’s home
14 and asked whether he had a gun in the house. See 5 RT 915-16, 1070-73.
15 Macias said that he did and, in front of the officers, he retrieved a loaded nine-

16 _____
17 ⁶ Some evidence suggested that Ortiz was an 18th Street gang member.
18 See 3 RT 389-90 (counsel saying outside presence of jury that Ortiz had tattoo
19 that said “XVIII”); 5 RT 1027 (stating that coroner’s report was marked as
20 Exhibit 24 and autopsy report was marked as Exhibit 25); 6 RT 1209
21 (admitting those exhibits into evidence); LD 17 at 3 (autopsy report listing
22 tattoos, including one saying “XVIII”). Catalina described Ortiz as a “cholo,”
23 which Zumwalt explained was slang for gang member. 5 RT 1083. The gang
expert, Lyle Raymond, testified that if an 18th Street gang member was
walking in ESP’s neighborhood, he was going to “get challenged” by other
gang members. 5 RT 971-72.

24 ⁷ The six-pack photographic lineup was contained in the police file
25 provided to Petitioner’s trial counsel but it was not introduced as an exhibit at
26 trial. See LD 16, Ex. 4 (Farrand Decl. at ¶ 7). The lineup, which was submitted
27 to the state court on habeas corpus, included Petitioner’s photo, but that was
28 not the one Catalina selected as looking similar to the shooter. See LD 16, Ex.
4, Ex. 25; FAP at 54, Ex. 25.

1 millimeter Beretta from a floor heating vent. See 5 RT 915-16, 1074. Macias
2 told officers that he had purchased the handgun from Petitioner for \$400.⁸ See
3 5 RT 920; CT 168-69. Macias said he had hidden it in the floor vent so his
4 brother would not find it. See CT 170. Macias also stated that he and
5 Petitioner were from the same neighborhood and that Macias was in a gang
6 called “MTC.”⁹ CT 173.

7 At trial, Macias explained that he lied during the police interview and
8 that it was in fact Richardson who had sold him the gun. See 5 RT 920, 922.
9 Macias testified that he had lied because the police had threatened to charge
10 Macias with the crime if he did not implicate Petitioner. See 5 RT 922-23.
11 Macias also testified that when the officers arrived at his home, their guns were
12 drawn and they forced him and his family to exit the home with their hands up
13 and lie on the floor with their arms and legs spread.¹⁰ See 5 RT 928-32. Macias
14 was frightened for his family and himself, so he showed the police where the
15 gun was hidden. See 5 RT 932-33. When the officers activated the tape
16 recorder, they told him to say that Petitioner had sold him the gun. See 5 RT
17 933-34, 936. Macias testified that they also told him not to mention that
18 Richardson was involved in the gun exchange or that he had called Macias
19 before the search to ask whether he still had the gun. See 5 RT 937-38.

20
21 ⁸ A recording of Macias’s interview was played for the jury. See 5 RT
22 919.

23 ⁹ Lyle Raymond, a gang expert, testified that MTC, or Mexicans Taking
24 Control, started in Paramount and was a group of younger Hispanic males.
25 See 5 RT 953-54. Raymond also testified that the graffiti found in Petitioner’s
home was of MTC and “PRMT,” indicating Paramount. 5 RT 958-59.

26 ¹⁰ Zumwalt testified that Macias and his family were not required to lie
27 down on the ground and that Macias’s account was “a fabrication.” 5 RT
28 1091-92.

1 On March 6, 2003, the ATF executed a search warrant at Petitioner's
2 home. See 4 RT 741. During the search, Special Agent Greg Estes saw what
3 appeared to be graffiti on the inside walls of the house. See 4 RT 742-43. He
4 also recovered a box of nine-millimeter ammunition and an extended
5 magazine that used that ammunition. See 4 RT 743-44. Estes determined that
6 the magazine fit the Beretta nine-millimeter handgun recovered from Macias's
7 home. See 4 RT 745-46. Estes recovered an assault weapon from Petitioner's
8 bedroom, a pistol magazine compatible with a .40-caliber handgun, and a
9 photo of Petitioner pointing a .40-caliber handgun at a person flashing a gang
10 sign. See 4 RT 746-49.

11 The Secret Service executed a search warrant at Thor California on the
12 same day. See 4 RT 750-51. At that location, Special Agent Michael Gutierrez
13 searched Petitioner's Buick and found a nine-millimeter handgun under the
14 floor mat on the driver's side. See 4 RT 751-53.

15 Ortiz's autopsy revealed that he suffered ten gunshot wounds. See 5 RT
16 1026, 1028, 1031. The coroner recovered bullets from each of the fatal wounds
17 to Ortiz's chest. See 5 RT 1028, 1035. He also retrieved bullet fragments
18 associated with other nonfatal wounds. See 5 RT 1028-29, 1035. A ballistics
19 analysis showed that the bullets and fragments retrieved from Ortiz's body and
20 the casings and bullets recovered from the crime scene were fired from the
21 Berretta handgun seized from Macias's home. See 5 RT 1045-48, 1050, 1053-
22 54.

23 A gang expert, Lyle Raymond, testified that Petitioner was an admitted
24 member of ESP. See 5 RT 958. Raymond testified that ESP "claims" the
25 neighborhood where the shooting took place. 5 RT 957-58. Raymond also
26 testified that a family in which a husband and father is an ESP member may
27 have problems if a family member were to testify against another ESP member
28 who is charged with a crime. See 5 RT 960.

1 At some point, Zumwalt examined Petitioner’s Camaro and determined
2 that it had been metallic maroon before it had been painted gray. See 5 RT
3 1097.

4 **3. Defense Evidence**

5 Ovidio Lainez is Kathy Lainez’s father. See 5 RT 1099-100. He recalled
6 that Kathy returned home from her trip to Florida at about 2:00 p.m. on July
7 14, 2002, and that Petitioner had been with her at that time. See 5 RT 1100-01.
8 Frances Levern, Kathy Lainez’s aunt, testified that she and Kathy returned to
9 Los Angeles from Florida at 1:00 or 1:30 p.m. on July 14, 2002, and that
10 Petitioner met Kathy at the airport and the two of them left together. See 6 RT
11 1205-07.

12 **IV.**

13 **STANDARD OF REVIEW**

14 Petitioner’s claims are subject to the provisions of the Antiterrorism and
15 Effective Death Penalty Act (“AEDPA”). Under AEDPA, federal courts may
16 grant habeas relief to a state prisoner “with respect to any claim that was
17 adjudicated on the merits in State court proceedings” only if that adjudication:

- 18 (1) resulted in a decision that was contrary to, or involved an
19 unreasonable application of, clearly established Federal law, as
20 determined by the Supreme Court of the United States; or (2)
21 resulted in a decision that was based on an unreasonable
22 determination of the facts in light of the evidence presented in the
23 State court proceeding.

24 28 U.S.C. § 2254(d).

25 Overall, AEDPA presents “a formidable barrier to federal habeas relief
26 for prisoners whose claims have been adjudicated in state court.” Burt v.
27 Titlow, — U.S. —, 134 S. Ct. 10, 16 (2013). AEDPA presents a difficult to
28 meet and highly deferential standard for evaluating state-court rulings, which

1 demands that state-court decisions be given the benefit of the doubt. See Cullen
2 v. Pinholster, 563 U.S. 170, 180-81 (2011). The prisoner bears the burden to
3 show that the state-court’s decision “was so lacking in justification that there
4 was an error well understood and comprehended in existing law beyond any
5 possibility for fairminded disagreement.” Harrington v. Richter, 562 U.S. 86,
6 103 (2011). In other words, a state-court determination that a claim lacks merit
7 precludes federal habeas relief so long as “fairminded jurists could disagree” on
8 the correctness of that ruling. Id. at 101 (citation omitted). Federal habeas
9 corpus review therefore serves as “a ‘guard against extreme malfunctions in the
10 state criminal justice systems,’ not a substitute for ordinary error correction
11 through appeal.” Id. at 102-03 (citation omitted).

12 Here, Petitioner raised Ground Four on direct appeal and the California
13 Court of Appeal rejected it in a reasoned decision. See LD 2-3, 6. The
14 California Court of Appeal did not specifically address the federal
15 constitutional portion of Ground Four but it rejected the related state-law
16 claim on the merits. See LD 6. “When a state court rejects a federal claim
17 without expressly addressing that claim, a federal habeas court must presume
18 that the federal claim was adjudicated on the merits—but that presumption can
19 in some limited circumstances be rebutted.” Johnson v. Williams, 568 U.S.
20 289, 301 (2013). Petitioner has failed to rebut that presumption.¹¹ The

21
22 ¹¹ Petitioner argues that the Court should review Ground Four de novo
23 because “the state evidentiary claim raised here does not subsume the federal
24 habeas violation, and the state court denied relief while ‘mak[ing] no reference
25 to federal law.’” Traverse at 49 (quoting Johnson, 568 U.S. at 301). Petitioner’s
26 argument is insufficient to rebut the “strong presumption” that that state court
27 denied Petitioner’s federal due process claim on the merits. See Johnson, 568
28 U.S. at 302 (noting that presumption is “a strong one that may be rebutted
only in unusual circumstances”). The state appellate court’s determination that
the admission of the gun evidence did not violate state law because it was

1 California Supreme Court summarily denied Petitioner’s subsequent petition
2 for review. See LD 7, 8. Petitioner also raised Ground Four in a habeas
3 petition to the California Supreme Court, which summarily denied it. See
4 Petitioner’s LD 1, 6. Because the state courts at no point expressly addressed
5 Ground Four’s federal constitutional claim, the Court conducts an
6 independent review of the record to determine whether the state courts were
7 objectively unreasonable in applying controlling federal law. See Haney v.
8 Adams, 641 F.3d 1168, 1171 (9th Cir. 2011) (independent review “is not de
9 novo review of the constitutional issue, but only a means to determine whether
10 the ‘state court decision is objectively unreasonable’” (citation omitted)); see
11 also Richter, 562 U.S. at 98, 102 (holding that petitioner still has burden of
12 “showing there was no reasonable basis for the state court to deny relief,” and
13 reviewing court “must determine what arguments or theories supported or . . .
14 could have supported[] the state court’s decision” and “whether it is possible
15 fairminded jurists could disagree that those arguments or theories are
16 inconsistent with” Supreme Court precedent).

17 Petitioner also raised the state-law portion of Ground Five on direct
18 appeal and the California Court of Appeal denied it in a reasoned decision. See
19 relevant and did not create a danger of undue prejudice would necessarily lead
20 to the conclusion that no federal due process violation occurred. See id. at 301
21 (stating that “if the state-law rule subsumes the federal standard—that is, if it is
22 at least as protective as the federal standard—then the federal claim may be
23 regarded as having been adjudicated on the merits”); Thiecke v. Kernan, __ F.
24 App’x __, 2017 WL 2445056, at *1-2 (9th Cir. June 6, 2017) (applying
25 AEDPA deference to claims including due process claim based on admission
26 of evidence because “although the California Court of Appeal’s opinion
27 discusses California law, the relevant California standards are ‘at least as
28 protective’ as the relevant federal standards, so ‘the federal claim[s] may be
regarded as having been adjudicated on the merits’” (quoting Johnson, 568
U.S. at 301)). Thus, the highly deferential standard of review established by
AEDPA applies to Ground Four.

1 LD 2-3, 6. The California Supreme Court summarily denied Petitioner’s
2 subsequent petition for review. See LD 7-8. Petitioner first raised the federal
3 portion of Ground Five in a habeas corpus petition to the California Supreme
4 Court, which summarily denied it. See Petitioner’s LD 1, 6. Because no
5 reasoned state-court decision on the federal portion of Ground Five exists, the
6 Court conducts an independent review of the record to determine whether the
7 state supreme court, in summarily denying that claim, was objectively
8 unreasonable in applying controlling federal law. See Haney, 641 F.3d at 1171;
9 Richter, 562 U.S. at 98, 102.

10 Petitioner initially raised portions of Ground One and Ground Six in a
11 habeas petition in the California Supreme Court, which denied the petition on
12 procedural grounds. See LD 14-15. Petitioner then raised Grounds One, Two,
13 Three, and Six in a habeas petition to the California Supreme Court, which
14 summarily denied them. See Petitioner’s LD 1, 6. Because no reasoned state-
15 court decision on Grounds One, Two, Three, and Six exist, the Court conducts
16 an independent review of the record to determine whether the California
17 Supreme Court, in summarily denying those claims, was objectively
18 unreasonable in applying controlling federal law. See Haney, 641 F.3d at 1171;
19 Richter, 562 U.S. at 98, 102.

20 V.

21 DISCUSSION¹²

22 A. **Failure to Disclose Impeachment Evidence (Ground Three)**

23 Petitioner contends that the prosecutor violated his due process rights
24 under Brady and Napue by failing to disclose material impeachment evidence
25 regarding the government’s main witness, Jimmy Richardson—specifically,

26 _____
27 ¹² The Court addresses the issues in an order different from that followed
28 by the parties.

1 that law enforcement agencies paid him between \$6,000 and \$10,000 for
2 information about the Paramount shooting. See FAC at 93-100, Ex. 11.

3 **1. Evidence Presented on Habeas Review**

4 In 2016, Petitioner submitted to the California Supreme Court with his
5 habeas corpus petition a declaration from Richardson in which he stated that
6 Petitioner had driven a burgundy Camaro that he later had painted gray, and
7 that Richardson had been “friendly” with a different employee at Thor who
8 drove a green Camaro. LD 16, Ex. 11. Richardson stated that he did not
9 remember that employee’s name. See id. Richardson also stated that during the
10 recorded conversation with Petitioner that was played at trial, Petitioner said
11 “the last one I did—will be the last of the month, 40” but that Richardson did
12 not know what that phrase meant and did not believe that Petitioner was
13 admitting the Paramount shooting. Id. Richardson stated that, had defense
14 counsel asked him, before or during trial, what that phrase meant, Richardson
15 would have said he did not know. See id. Richardson also stated:

16 [A]t some point when I knew him, [Petitioner] took his Camaro to
17 a body shop for repairs. Shortly before he took the Camaro to the
18 body shop, he mentioned that the Camaro had been in a crash. If
19 [Petitioner’s] trial counsel had asked me about this before or
20 during trial, I would have said that [Petitioner] had a car crash in
21 the Camaro shortly before having the repairs done on it.

22 Id. Finally, Richardson stated that he had been paid for providing information
23 to law enforcement:

24 In 2002, I gave information about [Petitioner] and the shooting in
25 Paramount to several law enforcement agencies, including the
26 FBI, the United States Secret Service, the Bureau of Alcohol,
27 Tobacco, and Firearms (“ATF”), and the Los Angeles County
28 Sheriff’s Department. In exchange for this information, agents of

1 the several agencies gave me between \$6,000 and \$10,000. I
2 provided the information in exchange for this money, as well as to
3 avoid prison time on the other criminal charges I was then facing.

4 Id.¹³

5 Richardson also stated that before Petitioner's trial, no one working on
6 Petitioner's defense ever spoke to or interviewed him. See id. at 65. He stated
7 he would have revealed that he had been paid had he been asked about it by
8 defense counsel or an investigator before or during trial. See id.

9 **2. Brady**

10 Petitioner contends that that the prosecution's failure to disclose law
11 enforcement's payments to Richardson violated Brady.

12 a. Applicable Law

13 In Brady v. Maryland, the Supreme Court held that "the suppression by
14 the prosecution of evidence favorable to an accused upon request violates due
15 process where the evidence is material either to guilt or to punishment,
16 irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87
17 (1963). Three elements must be proved to establish a Brady violation: (1) the
18 evidence at issue was favorable to the defendant, either as exculpatory
19 evidence or impeachment material; (2) the evidence was suppressed by the
20 state, either willfully or inadvertently; and (3) prejudice resulted from failure to
21 disclose the evidence. United States v. Wilkes, 662 F.3d 524, 535 (9th Cir.
22 2011). Suppression of evidence is prejudicial if a reasonable probability exists
23 that had the evidence been disclosed to the defense, the result of the trial would
24 have been different. See Sivak v. Hardison, 658 F.3d 898, 911-12 (9th Cir.

25
26 ¹³ Respondent has confirmed that Richardson was paid \$3,750 by ATF
27 for "relocation and incidental expenses in relation to [Petitioner's] case."
28 Petitioner's LD 5 at 14. Trial counsel's file contained no evidence of any
payments. See id. at 7.

1 2011). Thus, suppression of “merely cumulative” evidence generally is not
2 prejudicial under Brady. United States v. Kohring, 637 F.3d 895, 902 (9th Cir.
3 2011).

4 b. Discussion

5 On habeas review, and in light of AEDPA deference, the Court cannot
6 conclude that the California Supreme Court was objectively unreasonable in
7 denying Petitioner’s Brady claim. It is undisputed that law enforcement paid
8 Richardson, the key witness against Petitioner, several thousand dollars; it is
9 also undisputed that this evidence was never disclosed to the defense. This
10 evidence was impeachment material that was favorable to the defense. See
11 Amado v. Gonzalez, 758 F.3d 1119, 1134 (9th Cir. 2014) (holding that Brady’s
12 disclosure requirement applies to evidence that “impeaches a prosecution
13 witness”); Barker v. Fleming, 423 F.3d 1085, 1095 (9th Cir. 2005) (“It is well
14 settled that evidence impeaching the testimony of a government witness falls
15 within the Brady rule[.]”); Bagley v. Lumpkin, 798 F.2d 1297, 1302 (9th Cir.
16 1986) (holding that payments to witnesses are Brady material). As a result, the
17 prosecution was obligated to produce it to the defense, which it apparently
18 failed to do. See Amado, 758 F.3d at 1135-36 (holding that “defense counsel
19 may rely on the prosecutor’s obligation to produce that which Brady . . .
20 require[s] him to produce”).¹⁴

21 But it would not have been objectively unreasonable for the California
22 Supreme Court to conclude that Petitioner failed to show a reasonable
23 probability that the outcome of his trial would have been different had the
24 prosecution disclosed that additional impeachment evidence. At trial, the jury

25
26 ¹⁴ Respondent attempts to avoid this conclusion by arguing that the
27 payments may have been for “witness relocation” or to “reimburse Richardson
28 for expenses” and, thus, could not have impacted his credibility. Answer at 37-
37. This argument is unpersuasive and the Court rejects it.

1 heard evidence that Richardson was arrested in October 2002 for possession of
2 about \$600 in counterfeit currency and an ounce of methamphetamine. See 4
3 RT 673, 727. Richardson testified that after his arrest, he pleaded guilty to two
4 felonies, received a suspended sentence, and agreed to cooperate with law
5 enforcement by getting “three gun buys and two counterfeit money buys” so
6 that law enforcement could “get cases on other people dealing guns and
7 drugs.” 4 RT 674-75. On cross-examination, Petitioner’s trial counsel elicited
8 Richardson’s testimony that he had informed on people to avoid going to jail
9 for his two felony convictions:

10 Q And it was clearly understood that unless these people
11 were actually—unless there was action taken on the information
12 that you gave, that you wouldn’t get the benefit of your bargain
13 which was a suspended prison sentence, right?

14 A If you want to call that a bargain.

15 Q You don’t think it was a bargain?

16 A I believe it was a good deal.

17 4 RT 726-27.

18 Thus, the jury was presented with evidence tending to show that
19 Richardson may have had a motivation to fabricate evidence in Petitioner’s
20 case in order to receive a benefit from law enforcement. Evidence that
21 Richardson received payments in exchange for providing information therefore
22 would not have provided a “new and different ground of impeachment.”
23 Barker, 423 F.3d at 1097-98 (citation omitted); Heishman v. Ayers, 621 F.3d
24 1030, 1035 (9th Cir. 2010) (holding that there was no likelihood that the
25 suppressed evidence, including proof of perjury, criminal activity, and
26 remuneration for testimony, would have changed jury’s verdict because it was
27 “similar to and cumulative of the extremely thorough impeachment during
28 [the witness’s] cross-examination”); cf. Horton v. Mayle, 408 F.3d 570, 578-79

1 (9th Cir. 2005) (holding that prosecution’s failure to disclose leniency deal was
2 material because witness’s testimony was “central to the prosecution’s case”
3 and “the deal would have provided powerful and unique impeachment
4 evidence demonstrating that [the witness] had an interest in fabricating his
5 testimony”). The jury also heard other evidence bearing on Richardson’s
6 credibility, including that he had been convicted of two felonies for possession
7 of counterfeit money and methamphetamine and that he had engaged in
8 criminal conduct with Petitioner.

9 Moreover, although Richardson was a key prosecution witness, other
10 evidence introduced at trial supported his testimony and the jury’s conclusion
11 that Petitioner was the shooter. The evidence showed that Petitioner owned a
12 dark-colored Camaro and had been driving it in Los Angeles while visiting his
13 girlfriend shortly before the murder. The details Richardson provided about the
14 shooting, as told to him by Petitioner, matched those provided by the Avaloses
15 and law enforcement.¹⁵ The shooting took place in Paramount, in an area
16 controlled by ESP, and the gang expert and others testified that Petitioner was
17 an ESP member. Richardson testified that Petitioner said he had committed
18 the murder with a nine-millimeter handgun with an extended magazine. The
19 murder weapon, a nine-millimeter handgun, was later found in Macias’s
20 house; Macias told police that Petitioner had sold him the gun, and he later
21 testified that Richardson had sold it to him but that Petitioner was present
22 during the exchange. During a search of Petitioner’s home, police found an
23 extended magazine that fit the murder weapon. And when Richardson asked
24 Petitioner, during a recorded conversation, about that “shit out back” with the

25
26 ¹⁵ As the California Court of Appeal found, moreover, although the
27 Avaloses “failed to identify [Petitioner], they had reasons for not being
28 forthcoming”—their association, through Catalina’s ex-husband and
Lawrence’s father, with Petitioner’s gang, ESP. See LD 6 at 5.

1 “dude” from Paramount, Petitioner referred to a “fool from Paramount” who
2 was “from 18th,” an apparent reference to the victim.

3 In light of the other impeachment evidence and all of the evidence
4 introduced at trial, the California Supreme Court could have reasonably found
5 that the evidence that Richardson was paid for providing information about
6 the Paramount shooting would not have put the case “in such a different light
7 as to undermine confidence in the verdict.” Kyles v. Whitley, 514 U.S. 419,
8 435 (1995); see also Hewson v. Key, 683 F. App’x 578, 579 (9th Cir. 2017)
9 (finding that suppressed information was not material “in light of the full body
10 of evidence introduced at trial”), cert. denied, __ S. Ct. __, 2017 WL 3324737
11 (2017); United States v. Djeredjian, 532 F. App’x 732, 733 (9th Cir. 2013)
12 (finding on direct review that prosecution’s suppression of impeachment
13 evidence was immaterial given the “ample impeachment evidence already
14 introduced” and the “extremely strong evidence” of defendant’s guilt);
15 Williams v. Yarborough, 228 F. App’x 705, 707 (9th Cir. 2007) (finding on
16 independent review that even “assuming that the State had a duty to disclose
17 the witness protection program payments, the state courts reasonably could
18 have determined that this evidence would not have put the entire case ‘in such
19 a different light as to undermine confidence in the verdict’” (citation omitted)).

20 Thus, although the prosecution’s failure to disclose impeachment
21 evidence is obviously troubling, “‘troubling’ is not the relevant standard. It is
22 materiality, evaluated in light of AEDPA deference, that controls.” Reis-
23 Campos v. Biter, 832 F.3d 968, 978 (9th Cir. 2016), cert. denied, 137 S. Ct.
24 1447 (2017). Habeas relief is not warranted on this claim.

25 **3. Napue**

26 Petitioner further asserts that Petitioner’s convictions were based on false
27 testimony because the prosecution elicited “testimony from Richardson that
28 the entire extent of his bargain with law enforcement was that he would inform

1 on [Petitioner] in exchange for a reduced sentence.” FAP at 97-98 (citing
2 Napue v. Illinois, 360 U.S. 264, 269 (1959)).

3 a. Applicable Law

4 To establish a constitutional claim based on the prosecutor’s
5 introduction of perjured testimony at trial, “the petitioner must show that (1)
6 the testimony (or evidence) was actually false, (2) the prosecution knew or
7 should have known that the testimony was actually false, and (3) that the false
8 testimony was material.” United States v. Zuno-Arce, 339 F.3d 886, 889 (9th
9 Cir. 2003) (citing Napue, 360 U.S. at 269-71). In this context, false testimony is
10 material “if ‘there is any reasonable likelihood that the false testimony could
11 have affected the judgment of the jury.’” Hayes v. Ayers, 632 F.3d 500, 520
12 (9th Cir. 2011) (quoting Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en
13 banc)). While this materiality standard is essentially a form of harmless error
14 review, a far lesser showing of harm is required than under ordinary harmless
15 error review. See Dow v. Virga, 729 F.3d 1041, 1048 (9th Cir. 2013). In other
16 words, “Napue requires [the court] to determine only whether the error could
17 have affected the judgment of the jury, whereas ordinary harmless error review
18 requires [the court] to determine whether the error would have done so.” Id.

19 b. Discussion

20 Petitioner’s Napue claim does not warrant habeas relief. Nothing in the
21 record demonstrates that Richardson testified falsely. Rather, as previously
22 discussed, he testified that he was arrested in October 2002 for possession of
23 counterfeit currency and methamphetamine and that he received a suspended
24 sentence in exchange for cooperating with law enforcement on other cases. See
25 4 RT 673-76. On cross-examination, Richardson confirmed that he had been
26 arrested for possession of counterfeit money and methamphetamine and that
27 he “didn’t want to go to jail for that.” 4 RT 727. Richardson confirmed that to
28 avoid going to jail, he gave law enforcement information about other crimes,

1 and he said he would receive his suspended sentence only if law enforcement
2 acted on the information he provided. See id. No one asked Richardson
3 whether law enforcement had paid him to provide information, whether he
4 had received any other benefit for his cooperation, or whether he had
5 explained the full extent of his deal with law enforcement; nothing shows that
6 his answers to the questions posed were false. Indeed, Richardson himself
7 stated in his declaration that he would have “testified as to these things at trial,
8 if asked about them.” LD 16, Ex. 11.

9 Petitioner argues that he need not “establish that Richardson overtly lied
10 on the stand in order to state a claim under Napue” because “Napue applies
11 both to perjured testimony and to the failure to correct omissions which lead to
12 false evidence.” Traverse at 42. But nothing in the record shows that the
13 prosecutor failed to correct omissions in Richardson’s testimony.¹⁶ Thus, it
14

15 ¹⁶ Petitioner relies heavily on Hayes v. Brown, but that case is readily
16 distinguishable on its facts. In Hayes, the prosecutor had reached a deal with a
17 witness’s attorney to dismiss a felony charge and obtained a promise from the
18 attorney that he would not tell his client about the deal. See 399 F.3d at 977.
19 Then the witness could testify that there was no deal, unaware of the attorneys’
20 arrangement. See id. The prosecutor then misled the court and defense
21 counsel, affirmatively stating that there had been “absolutely no negotiations
22 whatsoever in regard to [the witness’s] testimony” and “no discussions in
23 regard to any pending charges.” Id. at 979-80. The prosecutor later elicited the
24 witness’s testimony that no one had made him any promises or offered him
25 any benefits in exchange for his testimony. See id. at 980. The Ninth Circuit
26 found that the state’s actions violated the petitioner’s rights under Napue
27 because “the record [was] clear that: (1) before [petitioner’s] trial, the State had
28 made a deal with [the witness’s] attorney for the dismissal of pending felony
charges after his testimony; (2) the State specifically represented to the trial
judge that there was no such deal; (3) the State elicited sworn testimony from
[the witness] at trial that there was no such deal, both on direct and re-direct
examination; and (4) the State failed to correct the record at trial to reflect the
truth.” Id. The Ninth Circuit rejected the state’s argument that Napue was not

1 would have been reasonable for the California Supreme Court to reject
2 Petitioner’s Napue claim on the basis that Richardson did not testify falsely.
3 See Williams, 228 F. App’x at 707 (finding that state court reasonably could
4 have concluded that witness did not testify falsely about receiving witness-
5 protection funds when she was not “squarely asked” whether she had received
6 them and “her answers to the specific questions posed were not shown to be
7 false”); Schessler v. McDonald, No. 11-9077, 2015 WL 10582201, at *15 (C.D.
8 Cal. Nov. 2, 2015) (denying habeas relief on Napue claim in part because
9 “neither the prosecutor nor trial counsel questioned [the witness] about the
10 [pending charges that were allegedly dismissed], or asked her whether she had
11 received any inducement to testify” and “[t]here was no testimony by [the
12 witness] regarding the matter”), accepted by 2016 WL 1328051 (C.D. Cal.
13 Apr. 4, 2016).

14 **B. Failure to Instruct the Jury Regarding Extrajudicial Admissions**
15 **(Ground Five)**

16 Petitioner contends that the trial court prejudicially erred in failing to sua
17 sponte instruct the jury that it must determine whether Petitioner made an
18 extrajudicial admission and, if so, that certain of the statements must be
19 viewed with caution as set forth in CALJIC No. 2.71. See FAP at 118-23.

20 **1. Relevant Facts**

21 CALJIC No. 2.71 provides as follows:

22 An admission is a statement made by [a] [the] defendant which
23 does not by itself acknowledge [his] [her] guilt of the crime[s] for
24 which the defendant is on trial, but which statement tends to prove
25 [his] [her] guilt when considered with the rest of the evidence.

26 violated because the witness did not commit perjury, finding that “Napue, by
27 its terms, addresses the presentation of false evidence, not just subornation of
28 perjury.” Id. at 980-81.

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You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.

[Evidence of an oral admission of [a] [the] defendant not contained in an audio or video recording and not made in court should be viewed with caution.]

The California Court of Appeal rejected the state-law portion of this claim, finding that although the trial court’s failure to sua sponte instruct the jury with CALJIC No. 2.71 was error under then-existing state law,¹⁷ it was harmless:

[A trial court’s failure to sua sponte instruct the jury with CALJIC No. 2.71] is harmless if it is not reasonably probable that a result more favorable to the defendant would have been reached had the instruction been given. (People v. Stankewitz (1990) 51 Cal.3d 72, 93-94; People v. Pensinger (1991) 52 Cal.3d 1210, 1268-1269; People v. Bunyard (1988) 45 Cal.3d 1189, 1224-1225.)

With regard to Richardson’s testimony about [Petitioner’s] statements, there was no issue about the precise words used, their meaning or content, or whether the statements were remembered

¹⁷ California law no longer requires that a trial court sua sponte instruct the jury with CALJIC No. 2.71 whenever there is testimony regarding a criminal defendant’s out-of-court admission. See People v. Diaz, 60 Cal. 4th 1176, 1189 (2015) (“We now conclude that in light of a change in the law that requires the general instructions on witness credibility to be given sua sponte in every case, the cautionary instruction is not one of the general principles of law upon which a court is required to instruct the jury in the absence of a request.”).

1 and repeated accurately. (People v. Bunyard, supra, 45 Cal.3d at p.
2 1224.) Instead, the issue was whether the statements were made at
3 all. As noted, Richardson’s testimony was corroborated by the
4 eyewitnesses and by the physical evidence found at the scene of
5 the crime, in [Petitioner’s] car, and at his house, and the issue of
6 Richardson’s credibility was one for the jury-and the jury was fully
7 instructed to view Richardson’s testimony with caution. (E.g.,
8 CALJIC Nos. 1.00 [jurors to determine what facts have been
9 proved from the evidence], 2.13 [prior consistent or inconsistent
10 statements], 2.20 [jurors are the sole judges of the believability of a
11 witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness
12 willfully false], 2.23 [a witness’s conviction of a felony is a
13 circumstance jurors may consider in weighing credibility].) It is
14 not reasonably probable that [Petitioner] would have obtained a
15 more favorable result had the court instructed the jury pursuant to
16 CALJIC No. 2.71. (People v. Stankewitz, supra, 51 Cal.3d at pp.
17 93-94; People v. Bunyard, supra, 45 Cal.3d at pp. 1224-1225;
18 People v. Williams (1988) 45 Cal.3d 1268, 1315.)

19 LD 6 at 7.

20 **2. Discussion**

21 Whether a jury instruction violated state law generally is not a federal
22 question or a proper ground for habeas corpus relief. Estelle v. McGuire, 502
23 U.S. 62, 67-68 (1991); Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir.
24 2005). Habeas relief is available only when a petitioner demonstrates that the
25 instructional error “by itself so infected the entire trial that the resulting
26 conviction violates due process.” McGuire, 502 U.S. at 72 (quoting Cupp v.
27 Naughten, 414 U.S. 141, 147 (1973)). When the alleged error involves the
28 failure to give an instruction, the petitioner’s burden is “especially heavy”

1 because “[a]n omission, or an incomplete instruction, is less likely to be
2 prejudicial than a misstatement of the law.” Henderson v. Kibbe, 431 U.S.
3 145, 155 (1977). And even if the petitioner can demonstrate an instructional
4 error that violated his right to due process, habeas corpus relief may be granted
5 only if the error had a “substantial and injurious effect or influence in
6 determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 637
7 (1993); see also Hanna v. Riveland, 87 F.3d 1034, 1039 (9th Cir. 1996).

8 Habeas relief is not warranted on Petitioner’s claim of instructional
9 error. First, to the extent Petitioner argues that the trial court’s failure to
10 instruct with CALJIC No. 2.71 violated state law, that is not a cognizable
11 habeas claim. And Petitioner has not carried his heavy burden of showing that
12 the trial court’s failure to instruct the jury with CALJIC No. 2.71 prevented
13 him from having a fair trial. Rather, as the Court of Appeal found, see LD 6 at
14 7, Richardson’s testimony was corroborated by eyewitness accounts and
15 physical evidence recovered from the crime scene, Petitioner’s car and house,
16 and Macias’s home. Moreover, the other instructions properly informed the
17 jury how to assess Richardson’s testimony. The jury was instructed that it
18 determines what facts have been proved by the evidence (CALJIC No. 100); it
19 was told how to evaluate prior consistent or inconsistent statements (CALJIC
20 No. 2.13); the believability of witnesses, the weight to be accorded to their
21 testimony (CALJIC 2.20), and discrepancies in testimony (CALJIC No.
22 2.21.1); and it was informed that witnesses who were “willfully false” in one
23 part of their testimony were to be distrusted in others (CALJIC No. 2.21.2)
24 and that it may consider the fact that a witness has been convicted of a felony
25 in determining his or her believability (CALJIC No. 2.23). See CT 1079, 1090-
26 95. Nothing shows that Plaintiff’s trial was rendered fundamentally unfair by
27 the trial court’s failure to instruct the jury that it should view the evidence of
28 Petitioner’s admission with caution and that the jury must determine whether

1 Petitioner made such an admission. See Nunn v. Evans, No. 08-5284, 2011
2 WL 4949047, at *7 (N.D. Cal. Oct. 17, 2011) (finding that petitioner was not
3 denied due process by court’s failure to instruct with CALJIC No. 2.71 when
4 jury was instructed with CALJIC Nos. 2.20, 2.22, 2.13, 2.21.2, and 2.27,
5 because “[t]he combined effect of these instructions was to inform the jury as
6 to as to how witnesses’ credibility and the credibility of witnesses’ testimony
7 should be evaluated”), aff’d, 555 F. App’x 723 (9th Cir. 2014). Because the
8 California state courts were not objectively unreasonable in denying this claim,
9 habeas relief is not warranted.

10 **C. Admission of Evidence of Petitioner’s Possession of Firearms**
11 **(Ground Four)**

12 Petitioner contends that the trial court violated Petitioner’s right to a fair
13 trial by admitting evidence about his possession of several firearms when it was
14 conclusively established that none was the murder weapon. See FAP at 100-
15 17.

16 **1. Relevant Facts**

17 The California Court of Appeal summarized the relevant facts as
18 follows:

19 *Admission of the Gun Found in the Buick.* [Petitioner] moved in
20 limine to exclude evidence about the firearms found in his Buick
21 Regal and at his house on the grounds that the evidence was
22 irrelevant (since these were not the murder weapon), more
23 prejudicial than probative, and improper propensity evidence
24 (“intended to prejudice the jury against [him] for his apparent
25 affinity to guns and the gun culture”).

26 The prosecutor’s position was Richardson’s credibility, as a
27 key prosecution witness and a man with a criminal record, would
28 be a significant issue at trial, and that the weapons evidence was

1 relevant to Richardson’s credibility and to corroborate the
2 information Richardson provided to law enforcement, including
3 evidence that [Petitioner] was “always packing and always at the
4 ready” and generally carried a weapon in his car. The court agreed
5 that the evidence had “great weight” and suggested a limiting
6 instruction to tell the jury that the evidence should be considered
7 only for the limited purpose of assessing Richardson’s credibility.
8 The court allowed evidence about only one other gun, the one
9 found in [Petitioner’s] car, and the prosecutor later elicited
10 testimony from Secret Service Special Agent Michael Gutierrez
11 that he found a nine-millimeter semi-automatic handgun under the
12 driver’s side floor mat of [Petitioner’s] Buick.

13

14 *Admission of the Assault Weapon, Magazines, Ammunition, and*
15 *the Photograph.* Following eyewitness testimony (from Catalina and
16 Lawrence Avalos) and before Richardson testified, the court and
17 counsel discussed the admissibility of the transcript of the tape-
18 recorded conversation between Richardson and [Petitioner].
19 [Petitioner] claimed that a certain portion (page 18, lines 12 to 21)
20 pertained to another incident, and objected on the ground that it
21 was impermissible propensity evidence. The prosecutor claimed
22 the discussion on page 18 related to several events, including the
23 charged offense. Defense counsel told the court that, if it would
24 not limit admission of the tape to the portions he requested, the
25 entire tape should be admitted. After further discussion, the parties
26 agreed to the admission of page 10, line 19, through page 25, line
27 1.

28 After copies of the transcript were distributed to the jurors

1 and the tape was played for the jury, the prosecutor asked the trial
2 court to reconsider its prior rulings. In the recorded conversation
3 (at page 11 of the transcript), he said, [Petitioner] mentioned he
4 “only pack[ed] assault rifles” with “lasers” and said he had gotten
5 rid of his “.40.” Richardson had told federal agents and sheriff’s
6 deputies that he had seen [Petitioner] with a machine gun and a
7 .40-caliber weapon. The prosecutor said the assault weapon and
8 the photograph of [Petitioner] holding a .40-caliber weapon were
9 consequently relevant to Richardson’s credibility.[FN2] Defense
10 counsel objected, claiming the evidence was irrelevant and unduly
11 prejudicial. The court deferred its ruling until after Richardson’s
12 cross-examination.

13 [FN2] During pretrial, the prosecutor had
14 asked for permission to introduce the photograph as
15 evidence of [Petitioner’s] gang affiliation. The trial
16 court denied the motion when [Petitioner] stipulated
17 that the murder was committed for the benefit of a
18 criminal street gang within the meaning of section
19 186.22, subdivision (b)(1).

20 On cross-examination, defense counsel inquired about a
21 portion of the tape (pages 18 and 19) where [Petitioner] mentioned
22 “40” and “running with [his] homies in [his] Regal.” When
23 defense counsel suggested the latter reference was conversation
24 about the charged crime (an effort to discredit eyewitness
25 descriptions of the car as a Camaro), Richardson said the
26 conversation jumped from one incident to another and that the
27 Regal reference concerned a different incident in Pomona.

28 At side-bar during re-direct, the prosecutor pointed to

1 references in the admitted portion of the transcript to the .40-
2 caliber and assault weapons, and requested permission to ask
3 Richardson about [Petitioner's] other weapons and to show him
4 the photograph to see what he recognized. Over a defense
5 objection, the trial court ruled that the jury could hear "everything
6 reasonable" because it had to determine Richardson's credibility.
7 The court found the evidence more probative than prejudicial.

8 Richardson testified that when [Petitioner] referred to a "40"
9 during the taped conversation, he believed [Petitioner] was
10 referring to his .40-caliber handgun, and he had seen [Petitioner]
11 with a .40-caliber Smith and Wesson. The prosecutor showed
12 Richardson the photograph, and Richardson identified [Petitioner]
13 as the man holding the gun (which looked like a .40-caliber and
14 resembled one of [Petitioner's] guns). Richardson also testified that
15 when [Petitioner] stated during the taped conversation that "[t]his
16 mother fucker explodes," he believed [Petitioner] was referring to
17 an assault rifle (although he had not seen [Petitioner] with an
18 assault weapon).

19 ATF Special Agent Greg Estes testified that during the
20 search of [Petitioner's] house, he recovered an assault weapon
21 with laser sights, an extended pistol magazine with a box of nine-
22 millimeter ammunition, and a pistol magazine compatible with a
23 .40-millimeter handgun. Estes also testified that the gun
24 [Petitioner] was holding in the photograph found during the search
25 of his house appeared to be a .40-caliber Smith and Wesson.
26 Special Agent Gutierrez testified that all the information
27 Richardson provided about [Petitioner's] involvement in Ortiz's
28 murder was corroborated.

1 LD 6 at 3-4.

2 **2. The California Court of Appeal’s Decision**

3 The California Court of Appeal rejected the state-law portion of this
4 claim on direct review:

5 We reject [Petitioner’s] contentions (1) that the firearms
6 evidence was not relevant to any material fact at issue in the case
7 or, if relevant, (2) that it should have been excluded because it was
8 more prejudicial than probative. The evidence was highly relevant
9 and probative of Richardson’s credibility, which was a critical
10 issue at trial.

11 The eyewitnesses failed to identify [Petitioner] at trial, and
12 had told a defense investigator that he was not the shooter.
13 Richardson testified that [Petitioner] admitted shooting Ortiz and
14 shared details of the crime, showed him the murder weapon, and
15 changed the appearance of his Camaro because he had been
16 driving it at the time of the murder and it was “hot.” But because
17 Richardson had participated in other crimes with [Petitioner],
18 cooperated with law enforcement, and received a suspended
19 sentence in a recent case, and because the defense theorized that
20 Richardson rather than [Petitioner] was the one to sell Macias the
21 murder weapon, Richardson’s credibility was very much in
22 question.

23 The firearms evidence corroborated the details Richardson
24 provided to law enforcement, and thus was relevant and more
25 probative than prejudicial. It follows that it was not an abuse of
26 discretion to admit the evidence. (Evid. Code, §§ 210, 350, 351,
27 352; People v. Cox (2003) 30 Cal. 4th 916, 955 [abuse of discretion
28 standard]; People v. Smith (2003) 30 Cal.4th 581, 613-614 [gun

1 other than the murder weapon was relevant to an issue of
2 credibility and admissible on that ground]; see also People v.
3 Carpenter (1999) 21 Cal. 4th 1016, 1052; People v. Lane (1961) 56
4 Cal.2d 773, 785.)

5 LD 6 at 4-6.

6 **3. Discussion**

7 As a preliminary matter, to the extent Petitioner contends that the trial
8 court abused its discretion under California state evidentiary law, this claim
9 fails to give rise to a cognizable federal habeas claim. See McGuire, 502 U.S.
10 at 67-68; Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011)
11 (“[E]videntiary rulings based on state law cannot form an independent basis
12 for habeas relief.”). The California Court of Appeal held that the trial court did
13 not abuse its discretion when it found the evidence relevant and not unduly
14 prejudicial. See LD 6 at 4-6. This Court is bound by the state appellate court’s
15 conclusion that the trial court did not err, as a matter of California law, in
16 ruling that evidence was admissible under California Evidence Code § 352. See
17 Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Medley v. Runnels, 506 F.3d 857,
18 862 (9th Cir. 2007).

19 Generally, a state court’s decision to admit specific evidence is not
20 subject to federal habeas review unless the evidentiary ruling violates federal
21 law or deprives the defendant of a fundamentally fair trial. See McGuire, 502
22 U.S. at 75 (finding federal habeas relief inappropriate where admission of
23 evidence was not so unfair as to result in denial of due process); Dowling v.
24 United States, 493 U.S. 342, 352 (1990) (analyzing “whether the introduction
25 of this type of evidence is so extremely unfair that its admission violates
26 ‘fundamental conceptions of justice’” (citation omitted)). The Supreme Court
27 has made “very few rulings regarding the admission of evidence as a violation
28 of due process.” Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009);

1 see McGuire, 502 U.S. at 70. The Ninth Circuit has found that a habeas
2 petitioner bears a “heavy burden” in demonstrating a due process violation on
3 the basis of a state court’s evidentiary decision, as he must show that there
4 were “no permissible inferences” the jury could draw from the challenged
5 evidence and that it necessarily prevented a fair trial. Boyde v. Brown, 404
6 F.3d 1159, 1172 (9th Cir. 2005); accord Windham v. Merkle, 163 F.3d 1092,
7 1103 (9th Cir. 1998); Hovey v. Ayers, 458 F.3d 892, 923 (9th Cir. 2006).

8 Petitioner has not met this heavy burden. As the California Court of
9 Appeal found, the jury could have drawn a permissible inference from the
10 evidence that Petitioner possessed guns other than the murder weapon,
11 magazines, and night sights because it corroborated Richardson’s statements to
12 law enforcement and at trial that Petitioner always had a gun with him, which
13 he usually kept in his car, that he had seen Petitioner with a .40 caliber Smith
14 and Wesson, and that Petitioner owned an assault rifle. See 4 RT 681-82, 686-
15 88, 734-38. Because the gun evidence was probative of Richardson’s
16 credibility, the California Court of Appeal was not objectively unreasonable in
17 denying this claim. See Starr v. Lindsey, No. 97-4154, 1999 WL 300661, at *7
18 (N.D. Cal. May 3, 1999) (finding no due process violation in admission of gun
19 evidence when it was “probative on the question of witness credibility”), aff’d,
20 3 F. App’x 607 (9th Cir. 2001). On independent review, therefore, habeas relief
21 is not warranted on this claim.

22 **D. Trial Court’s Denial of Counsel’s Request for a Continuance (Ground**
23 **Two)**

24 Petitioner contends that the trial court violated Petitioner’s due process
25 rights by denying defense counsel’s request to continue trial. See FAC at 89-93.

26 **1. Relevant Facts**

27 Petitioner’s preliminary hearing was on May 22, 2003. See CT 1. He was
28 represented by private counsel Diane Carey. See CT 1C. At the close of

1 evidence, the trial court held Petitioner to answer the charges, see CT 136-37,
2 and the state filed the information against Petitioner on June 6, 2003, see CT
3 139. That same day, Petitioner, represented by private counsel Traci Jefferson,
4 was arraigned and pleaded not guilty. See CT 141. The court's minute order
5 indicates that the matter was continued to June 12, 2003, to "get discovery
6 from private counsel." Id. The trial court set June 12, 2003, as the compliance
7 date for discovery; scheduled a pretrial conference for July 8, 2003; and
8 scheduled the trial for August 5, 2003. See CT 141-42.

9 On June 11, 2003, Deputy Public Defender Sanders Smith filed a written
10 motion to continue the trial date to September 5. See LD 16, Ex. 32. Smith
11 stated that he was "not prepared to announce ready for trial" on August 5
12 because he had been assigned the case on June 9 while he was engaged in
13 another trial and he had not received any discovery from Carey.¹⁸ Id.

14 On June 12, 2003, Petitioner appeared in court and was represented by
15 Smith. See CT 143. The trial court ordered investigating officer "Zumwalt
16 and/or Lugo" to appear at the July 8 pretrial conference "with the entire
17 investigative file." Id.

18 On June 23, 2003, Smith sent the district attorney an "informal request
19 for discovery," asking for Richardson's rapsheet, the "tape (and notes) of the
20 FBI/ATF interview of Jimmy Richardson," and the plea agreement given to
21 Richardson in exchange for his testimony, among other things. LD 16, Ex. 30.

22 On June 27, 2003, private attorney Vincent Oliver filed a motion to
23 substitute attorneys. See LD 16, Ex. 33. That day, or the day before, Oliver
24 had obtained Smith's file. See 3 RT 467.

25 On July 1, 2003, Petitioner appeared in court and was represented by

26 ¹⁸ Petitioner states that Smith's motion was granted, see Traverse at 29,
27 but that is not reflected in the trial court's subsequent minute orders. See CT
28 143-44.

1 Oliver. See CT 144. The minute order from that hearing shows that the trial
2 court “approved” Oliver’s “request to substitute as counsel of record” because
3 Oliver “represents [to] the court that he has received discovery from . . .
4 Sanders Smith and will be ready for trial on 8-5-03.” Id. The pretrial
5 conference was continued to July 10, 2003. See id.

6 On July 10, 2003, Petitioner and Oliver appeared at the pretrial
7 conference. See CT 145. The minute order shows that the parties conferred
8 regarding discovery, that the prosecution made a plea offer, and that the offer
9 would remain open until July 15, 2003. See CT 145.

10 On July 30, 2003, Oliver moved for a continuance. See Petitioner’s LD 1
11 at 106.¹⁹ The motion explained that Oliver had not received two items of
12 discovery that had been requested from the state: “a copy of the FBI/ATF
13 audio taped interview of [Jimmy] RICHARDSON and a copy of the plea
14 agreement entered into between RICHARDSON and the government in
15 exchange for his testimony.” Id. (quoting Oliver’s motion to continue). Oliver
16 asked that the court continue Petitioner’s trial “for a reasonable time and to
17 enable the prosecution to comply with the court’s discovery order and to give
18 the defense a reasonable amount of time to obtain transcripts of the tape and to
19 investigate further the extent of cooperation given to the government by

20
21 ¹⁹ Petitioner quoted the motion to continue in his habeas petition to the
22 state supreme court and in his FAP, citing “Ex. 33, Motion to Continue.” See
23 Petitioner’s LD 1 at 121; FAP at 91. But Exhibit 33 to both petitions is Oliver’s
24 motion to substitute attorneys, and it does not appear that the correct exhibit
25 was attached to either petition. See LD 16 at 234; FAP, Ex. 33. Petitioner,
26 however, attached the motion for a continuance to his Traverse, and the Court
27 has confirmed that Petitioner’s summary of its contents is accurate. See
28 Traverse, Ex. 113. In the motion, Oliver also confirmed that he had “received
from Mr. Sanders [sic] two audio-tapes and transcripts of an interview of
RICHARDSON by local law enforcement and an audio tape of an interview
of witness MACIAS by local law enforcement.” Id.

1 RICHARDSON, including the names and case numbers of all cases in which
2 he has been a witness for the government.” Id. (quoting Oliver’s motion).
3 Oliver stated that “[i]n the absence of the above requested discovery, I do not
4 believe [Petitioner] will be afforded his constitutional due process right to a fair
5 trial under either the California or the Unites States Constitutions.” Id.
6 (quoting Oliver’s motion, alteration omitted).

7 Neither Respondent nor Petitioner was able to obtain a transcript of the
8 August 5 hearing on Oliver’s motion. See Traverse at 28 n.15; Answer at 28
9 n.16. A minute order shows that Oliver’s motion to continue was “heard,
10 argued and denied.” CT 146. The trial court noted that the prosecution
11 “answer[ed] ready” and the matter was “transferred forthwith to SC/J for
12 trial.” Id. The parties began jury selection later that day. See 2 RT 15.

13 **2. Applicable Law**

14 Trial courts are granted “broad discretion” on whether to continue a
15 trial. Morris v. Slappy, 461 U.S. 1, 11-12 (1983). Thus, “it is not every denial
16 of a request for more time that violates due process even if the party fails to
17 offer evidence or is compelled to defend without counsel.” Ungar v. Sarafite,
18 376 U.S. 575, 589 (1964).

19 In Ungar, the U.S. Supreme Court held that “[t]here are no mechanical
20 tests for deciding when a denial of a continuance is so arbitrary as to violate
21 due process.” Ungar, 376 U.S. at 589. Rather, “[t]he answer must be found in
22 the circumstances present in every case, particularly in the reasons presented to
23 the trial judge at the time the request is denied.” Id. Similarly, in Morris, the
24 U.S. Supreme Court held that “only an unreasoning and arbitrary ‘insistence
25 upon expeditiousness in the face of a justifiable request for delay’ violates the
26 right to the assistance of counsel.” 461 U.S. at 11-12.

27 The Ninth Circuit has identified four factors to consider when
28 determining whether a court’s denial of a continuance was an abuse of

1 discretion: (1) the petitioner’s diligence prior to the requested continuance; (2)
2 whether a continuance would have served a useful purpose; (3) whether a
3 continuance would have caused the court or the government inconvenience;
4 and (4) the amount of prejudice suffered by the petitioner as a consequence of
5 the denial of the requested continuance. See Armant v. Marquez, 772 F.2d
6 552, 556 (9th Cir. 1985) (citing United States v. Flynt, 756 F.2d 1352, 1359-61
7 (9th Cir. 1985)); see also Reynolds v. Gerstel, 624 F. App’x 522, 523 (9th Cir.
8 2015). Although the weight given to any one factor may vary from case to
9 case, “at a minimum,” the petitioner must show prejudice. Armant, 772 F.2d
10 at 556-57; see also Gallego v. McDaniel, 124 F.3d 1065, 1072 (9th Cir. 1997)
11 (no error to deny habeas relief when petitioner fails to show actual prejudice
12 resulting from trial court’s refusal to grant continuance).

13 3. Discussion

14 Petitioner has failed to show that the California Supreme Court’s
15 rejection of this claim was an unreasonable application of the Supreme Court’s
16 holdings in Ungar or Morris. As an initial matter, given that neither Petitioner
17 nor Respondent have been able to locate a transcript or any other evidence
18 showing the trial court’s reasoning in denying the continuance, nothing
19 establishes that the trial court had an “unreasoning and arbitrary ‘insistence
20 upon expeditiousness in the face of a justifiable request for delay.’” Morris, 461
21 U.S. at 11-12 (citation omitted); see Jones v. Gomez, 66 F.3d 199, 204 (9th
22 Cir. 1995) (“It is well-settled that ‘[c]onclusory allegations which are not
23 supported by a statement of specific facts do not warrant habeas relief.’”
24 (quoting James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994))).

25 Moreover, the California Supreme Court could have reasonably
26 concluded that the trial court did not abuse its discretion in denying the
27 continuance because Petitioner failed to show that he was diligent. See FAP at
28 92 (stating that trial counsel was not diligent). Oliver received Smith’s file on

1 June 26 or 27, 2003; he therefore presumably knew, at that time, what
2 discovery had been produced and what was missing. On July 1, 2003, the trial
3 court approved Oliver's request to substitute in as Petitioner's attorney based
4 on Oliver's representation that he had received discovery and would be ready
5 for trial on August 5. Oliver appeared at a pretrial conference on July 10, at
6 which the parties conferred regarding discovery. Oliver nevertheless waited
7 until just a few days before the August 5 trial date to request a one-month
8 continuance. See Corona v. Almager, 449 F. App'x 672, 675 (9th Cir. 2011)
9 (finding that state court reasonably concluded that defense investigator "should
10 have been more diligent in searching for the witness and that a one-month
11 delay was unreasonable in light of the lack of diligence by" petitioner).

12 The California Supreme Court also could have reasonably concluded
13 that the denial of Oliver's request for a continuance did not result in prejudice.
14 Oliver stated that he needed the continuance in order to obtain "a copy of the
15 FBI/ATF audio taped interview of [Jimmy] RICHARDSON" and "a copy of
16 the plea agreement entered into between RICHARDSON and the government
17 in exchange for his testimony." LD 1 at 121. But at trial, Oliver questioned
18 Richardson about his statements to ATF Agent Estes on November 20, 2002;
19 it therefore appears that Oliver at some point may have received either a
20 recording or a transcript of the "FBI/ATF" interview. See 4 RT 721 (Oliver
21 asking Richardson, "And isn't it true that on November the 20th, 2002, you
22 met with special investigator Estes and you told him then that . . . [Petitioner]
23 had sold the gun to an individual he works with named Gabriel?"). And in any
24 event, Petitioner has not shown what that evidence or Richardson's plea
25 agreement would have revealed or how they would have affected his trial,
26 particularly given that both parties questioned Richardson about his plea
27 agreement and Oliver had already received audio tapes and a transcript of local
28 law enforcement's interview of Richardson. See Traverse, Ex. 113. In his

1 motion, Oliver also argued that he needed a continuance so he could
2 “investigate the extent of cooperation given to the government by
3 RICHARDSON, including the names and case numbers of all cases in which
4 he has been a witness for the government,” LD 1 at 121, but it is not clear what
5 that investigation would have entailed or how the case numbers of other cases
6 would have assisted in Petitioner’s defense. Indeed, it is not even clear whether
7 Oliver ultimately received the information he cited in his motion.

8 Because nothing indicates that the additional discovery cited by Oliver in
9 his motion for a continuance would have been helpful to the defense, habeas
10 relief is not warranted on this claim.²⁰ See Phillips v. Yates, No. 10-1368, 2012
11 WL 2995675, at *6 (E.D. Cal. July 23, 2012) (denying habeas claim based on
12 trial court’s denial of continuance when “there is no evidence in the record of
13 any further investigation or interview of potential expert witnesses, and thus no
14 showing of how the additional evidence would have been helpful to the
15 defense”); Walton v. Clark, No. 08-1527, 2010 WL 4672251, at *9 (C.D. Cal.
16 July 20, 2010) (“a trial court does not err in failing to grant a continuance to
17 allow further defense investigation when there is no evidence the investigation
18 will favor the defense”), accepted by 2010 WL 4672353 (C.D. Cal. Nov. 8,
19 2010).

20 ///

21 ///

22
23 ²⁰ Petitioner argues that, had the trial court granted the continuance,
24 Oliver would have interviewed Richardson and “discover[ed] that the
25 prosecution had given Richardson monetary inducements” and that Oliver
26 would have “obtain[ed] testimony from witnesses described in the public
27 defender investigator’s reports.” FAP at 92-93. But that is pure speculation
28 given that Oliver did not state that he needed to interview Richardson or other
witnesses, and given that Oliver could have interviewed Richardson at any
point before the August 5 trial date but apparently did not do so.

1 **E. Ineffective Assistance of Counsel (Ground One)**

2 **1. Applicable Law**

3 A petitioner claiming ineffective assistance of counsel must show that
4 counsel's performance was deficient and that the deficient performance
5 prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687
6 (1984). "Deficient performance" means unreasonable representation falling
7 below professional norms prevailing at the time of trial. Id. at 688-89. To show
8 deficient performance, the petitioner must overcome a "strong presumption"
9 that his lawyer "rendered adequate assistance and made all significant
10 decisions in the exercise of reasonable professional judgment." Id. at 689-90;
11 see also Richter, 562 U.S. at 105 ("Even under de novo review, the standard
12 for judging counsel's representation is a most deferential one."). Further, the
13 petitioner "must identify the acts or omissions of counsel that are alleged not
14 to have been the result of reasonable professional judgment." Strickland, 466
15 U.S. at 690. The initial court considering the claim must then "determine
16 whether, in light of all the circumstances, the identified acts or omissions were
17 outside the wide range of professionally competent assistance." Id.

18 To meet his burden of showing the distinctive kind of "prejudice"
19 required by Strickland, the petitioner must affirmatively "show that there is a
20 reasonable probability that, but for counsel's unprofessional errors, the result of
21 the proceeding would have been different. A reasonable probability is a
22 probability sufficient to undermine confidence in the outcome." Id. at 694; see
23 also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the
24 question is not whether a court can be certain counsel's performance had no
25 effect on the outcome or whether it is possible a reasonable doubt might have
26 been established if counsel acted differently."). A court deciding an ineffective
27 assistance of counsel claim need not address both components of the inquiry if
28 the petitioner makes an insufficient showing on one. See Strickland, 466 U.S.

1 at 697.

2 Where, as here, the state court has rejected an ineffective assistance of
3 counsel claim, AEDPA requires an additional level of deference:

4 The standards created by Strickland and § 2254(d) are both “highly
5 deferential,” and when the two apply in tandem, review is
6 “doubly” so. . . . Federal habeas courts must guard against the
7 danger of equating unreasonableness under Strickland with
8 unreasonableness under § 2254(d). When § 2254(d) applies, the
9 question is not whether counsel’s actions were reasonable. The
10 question is whether there is any reasonable argument that counsel
11 satisfied Strickland’s deferential standard.

12 562 U.S. at 105 (citations omitted).

13 **2. Failing to Obtain Investigative Notes from the Public**
14 **Defender’s Office (Subclaim D)**

15 Petitioner contends that trial counsel should have obtained interview
16 notes from the Public Defender’s office. See FAP at 51-52. He argues that
17 “presenting testimony by other neighborhood witnesses would have bolstered”
18 the Avaloses’ testimony “that the shooter’s car was green (instead of burgundy
19 or grey like [Petitioner’s]), and that the shooter drove by the location numerous
20 times during the day on July 14, 2002, when [Petitioner] had an alibi.”

21 Traverse at 15.

22 a. Relevant Facts

23 Oliver became Petitioner’s counsel of record on June 27, 2003, and the
24 record shows that he obtained Petitioner’s file from Smith on or before that
25 date. See 3 RT 467; LD 16, Ex. 33. But Smith’s investigator, R.J. Fox,
26 remained unaware that the Public Defender’s office no longer represented
27 Petitioner; as a result, he went to Paramount on July 3 and 8 to interview
28 several witnesses who lived on the block where Ortiz was shot: Catalina

1 Avalos, Lawrence Avalos, Esperanza Ozuna, Loise Stitt, Bernadette
2 Mendoza, Eloise Rambo, Mary Lou Stout, Leo Garcia, Carlos Ortiz, and
3 Richard Adams. See 3 RT 465-66; FAP, Ex. 31. Fox tape-recorded his
4 interviews with the Avaloses. See 3 RT 465. Fox’s notes summarized his
5 interviews. See FAP, Ex. 31. Fox stated that Ozuna, Stitt, Rambo, Stout,
6 Garcia, and Ortiz reported that they had heard gunshots on the night of the
7 shooting but did not see anything. See FAP, Ex. 31. Mendoza reported that he
8 had been at work and that his wife heard the gunshots but did not see
9 anything. See id. Rambo, who lived at the same house as Catalina and
10 Lawrence, said she heard “a lot of gunshots and a vehicle speed away” but did
11 not go outside until the suspect had driven off. Id. Rambo reported that “[h]er
12 daughter and her son,” presumably Catalina and her ex-husband, “witness[ed
13 the] shooting.” Id. Adams stated that he heard two volleys of gunfire from “a
14 large caliber gun” and saw a “dark color vehicle speeding away as he went to
15 his front door.” Id.

16 On July 9, 2003, Smith notified Fox that Petitioner had retained private
17 counsel and instructed him to stop his investigation. See FAP, Ex. 31. Fox
18 apparently did not provide Oliver with his notes or the taped interviews of the
19 Avaloses. See 3 RT 465.

20 After trial began, Catalina testified that after the preliminary hearing, she
21 had talked with a defense investigator at her home and that the interview had
22 been taped. See 3 RT 427. At a subsequent sidebar, the prosecutor asked Oliver
23 for a copy of the “tape and the report.” 3 RT 463. During the ensuing
24 discussion, Oliver informed the trial court that he “just got [a copy of the tape]
25 this morning” and had not yet listened to it. 3 RT 463, 466. Oliver explained
26 that he had contacted Smith a couple weeks after he took over the case, and
27 that at that time Smith had told him that Fox had continued working on the
28 case after Smith was relieved and had conducted interviews of witnesses, and

1 that at least some of those interviews were tape-recorded. See 3 RT 466, 470-
2 71. Oliver stated that he had repeatedly asked Smith to give him the tape,
3 including by going “screaming” to the Public Defender’s office the previous
4 day and then again that morning, at which time he threatened to go to the state
5 bar. 3 RT 466, 470, 473, 477. Oliver said he “knew [he] wouldn’t get the tape,”
6 so had sent his own investigator out to interview witnesses. 4 RT 471. The
7 court then contacted a representative of the Public Defender’s office, who
8 confirmed that the tape that had been turned over to Oliver that morning
9 contained statements from both Catalina and Lawrence. See 3 RT 472, 480,
10 503. The representative confirmed that there were “no other tapes that contain
11 statements from any other witnesses.” 3 RT 503. The court and parties listened
12 to the tape the next morning before resuming trial. See 4 RT 601-02. It does
13 not appear that Oliver ever obtained Fox’s notes.

14 b. Discussion

15 The California Supreme Court’s rejection of this claim was not
16 objectively unreasonable. First, the California Supreme Court could have
17 reasonably concluded that Petitioner failed to establish that counsel performed
18 deficiently by failing to obtain Fox’s report. The report was generated after
19 Oliver obtained the Public Defender’s file and took over Petitioner’s case, as
20 such, Oliver would have had no reason to suspect that such a report existed.
21 Moreover, according to Oliver’s account of his conversation with Smith, Smith
22 mentioned only that his investigator had interviewed witnesses and taped
23 interviews of the Avaloses; Oliver did not represent that Smith revealed the
24 investigator had written a report summarizing interviews of the Avaloses and
25 their neighbors.²¹ Oliver diligently sought to obtain that tape from the date of
26

27 ²¹ The only report Oliver referenced during the conversation about the
28 tapes was his own investigator’s report of his interviews with the Avaloses. See

1 that conversation until the first day of trial, when it was finally provided to
2 him. Given that nothing seems to have alerted Oliver to the report's existence,
3 his failure to obtain a copy was not unreasonable.

4 Second, the California Supreme Court also could have reasonably
5 concluded that Petitioner failed to establish any prejudice resulting from
6 counsel's alleged failure to obtain Fox's report. The report summarized Fox's
7 interviews with the Avaloses, but Oliver was provided the recordings of those
8 interviews and Oliver's own investigator also interviewed them and obtained
9 statements. The report therefore would not have provided any additional
10 information about the Avaloses. And almost all of the other people Fox
11 interviewed only heard gunshots and did not see the shooting, the shooter, or
12 the shooter's car. In fact, only Adams provided any information about the
13 shooting, stating that he had seen a "dark color vehicle" speeding away, which
14 was consistent with the prosecution's theory that Petitioner had been driving a
15 burgundy-colored Camaro. Thus, nothing supports Petitioner's argument that
16 had Oliver obtained the report, "other neighborhood witnesses" could have
17 "bolstered" the credibility of the Avaloses' exculpatory testimony that the
18 shooter's care was green and that the shooter had driven by the shooting
19 location "numerous times" on the day of the shooting. See *Traverse* at 15;
20 Womack v. McDaniel, 497 F.3d 998, 1004 (9th Cir. 2007) (petitioner's own
21 self-serving statements insufficient to support claim of ineffective assistance of
22 counsel without corroborating evidence). Habeas relief is not warranted on this
23 ground.

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28 3 RT 464, 471, 474.

1 **3. Failing to Introduce Catalina’s Photographic Lineup Statement**
2 **to Corroborate Her Testimony that Petitioner Was Not the**
3 **Shooter (Subclaim E)**

4 Petitioner contends that trial counsel should have introduced a
5 photographic lineup showing that Catalina had not identified Petitioner but
6 had instead selected a different person, who she said looked “similar” to the
7 shooter. FAP at 53-55. Petitioner argues that Catalina’s selection was “leaner
8 and darker” than Petitioner, which was consistent with Catalina’s testimony at
9 trial.²² See Traverse at 17. Petitioner argues that introducing the photographic
10 lineup therefore would have rebutted the prosecutor’s argument that Catalina
11 and Lawrence fabricated their trial testimony about the shooter’s appearance
12 due to pressure from members of Petitioner’s gang. See FAP at 53-55.

13 a. Relevant Facts

14 On direct examination, Catalina testified that the events surrounding the
15 shooting happened “very fast.” 3 RT 443. When asked, “[A]s far as the
16 shooter, did you ever get a look where you were comfortable being able to
17 identify anybody?” Catalina answered, “Not positively.” 3 RT 443-44. She
18 later testified that after seeing Petitioner at the preliminary hearing,

19 A part of me was, like, what if . . . it is not the guy because from
20 . . . what I had seen that night, it did not look like the person I saw
21

22 ²² Petitioner attached to the FAP and his California Supreme Court
23 petition a black and white photocopy of the “six-pack” photographic lineup.
24 See FAP, Ex. 25; LD 16 at Ex. 25. The person Catalina identified appears to
25 have a thinner face than Petitioner, at least as he is reflected in the photo used
26 in the six pack. See FAP, Ex. 25; LD 16 at Ex. 25. It is difficult to tell from the
27 photocopy which person has the lighter complexion, but the Court assumes
28 without deciding that the identified person is in fact darker. In the photos, the
man Catalina selected and Petitioner appear to be about the same age. See
FAP, Ex. 25; LD 16 at Ex. 25.

1 that night. But then the same thing, maybe I did not see what I
2 thought I saw. Maybe this is the person according to what
3 evidence has [sic].

4 3 RT 447.

5 On cross-examination, Petitioner’s counsel elicited that she had told the
6 defense investigator that Petitioner was not the person she saw commit the
7 shooting. See 3 RT 458-59. She testified that the shooter was a “cholo, a
8 Mexican” who was “darker” and “very older looking . . . maybe almost 30,”
9 with a “narrow” face. 3 RT 459-60. She testified that Petitioner “looks like a
10 kid” and was “only 21, 22 maybe.” 3 RT 460.

11 On redirect, Catalina testified that she had told Zumwalt on the night of
12 the shooting that the shooter was a male Hispanic, 18 to 21 years old, wearing
13 a baseball cap and a brown silky shirt. See 3 RT 462. She testified that about
14 six months later, officers had shown her a “six-pack” and she had circled the
15 photograph of a man who “look[ed] similar” to the shooter. 3 RT 483-84; see
16 also FAP, Ex. 25. The prosecutor questioned Catalina about this identification:

17 Q And in that six-pack, you recall looking at individuals and
18 indicating one looks similar?

19 A Similar as in face shape.

20

21 Q . . . You circled somebody just about face shape?

22 A Yes.

23 Q Didn’t you tell the investigator that based upon the time you
24 saw the person and where you were standing, the distance, that
25 you really weren’t comfortable making any kind of an
26 identification?

27 A Yes.

28 Q . . . [W]hat has changed now that makes you feel

1 comfortable in either identifying somebody or uncomfortable for
2 [Petitioner], who is on trial?

3 A I keep playing it back in my head. What I keep seeing back
4 in my head, it becomes clear, more accurate.

5 Q Has anything changed about where your position was and
6 the time of night and how fast the incident happened? Have any of
7 those facts changed as you have played it over in your head?

8 A No.

9 3 RT 483-84. The prosecutor later asked, “And you can’t say whether
10 [Petitioner] was the shooter on July 14th, 2002, can you, because you didn’t
11 get a good look at him?” 3 RT 495-96. Catalina responded, “No, I can’t.” 3 RT
12 496.

13 A photograph of Petitioner was included in the “six-pack” but Catalina
14 did not select it. See FAP, Ex. 25. It appears that the jury did not hear
15 testimony establishing that Petitioner’s photograph was included.

16 b. Discussion

17 The California Supreme Court’s rejection of this subclaim was not
18 objectively unreasonable. First, the Supreme Court could have reasonably
19 concluded that trial counsel’s decision not to introduce the photographic
20 lineup was a reasonable professional judgment. Counsel was aware of the
21 photographic lineup, as it was contained in his file and Catalina testified about
22 it at trial. See FAP, Ex. 4; 3 RT 457-58, 483. And the jury heard Catalina’s
23 testimony that six months after the shooting, she was shown the photographic
24 lineup and identified someone other than Petitioner as looking “similar” to the
25 shooter. Given Catalina’s testimony that, at that time, she was unable to make
26 an identification because she had not gotten a good look at the shooter but that
27 her memory had become “more accurate” over time, and given that the person
28 she selected appears to have been about the same age as Petitioner was in his

1 photo, see FAP, Ex. 25, counsel could have reasonably decided not to
2 emphasize the photographic lineup itself and to instead focus on Catalina’s
3 statements at trial that Petitioner was not the shooter and that the shooter was
4 older, taller, thinner, and darker than Petitioner. Counsel’s decision not to
5 introduce the photographic lineup into evidence therefore was not “outside the
6 wide range of professionally competent assistance.” Strickland, 466 U.S. at
7 690.

8 The California Supreme Court also could have reasonable concluded
9 that Petitioner had not shown a reasonable probability that the outcome of his
10 trial would have been different had his counsel introduced the photographic
11 lineup to bolster Catalina’s testimony. Catalina was fully questioned on both
12 direct and cross-examination about her statements to police, to investigators,
13 and at the preliminary hearing. And Catalina testified that when she viewed
14 the photographic lineup in January 2003, she told the investigator that she had
15 not gotten a good enough look at the shooter to make an identification.

16 Moreover, the other evidence that Petitioner was the shooter was strong.
17 The shooting occurred in ESP territory in Paramount and Petitioner was an
18 ESP member with ties to that area. Shortly before the shooting, Petitioner,
19 who lived in Rialto and drove a gray or burgundy Camaro, was in Los Angeles
20 with his girlfriend. Shortly after the shooting, Catalina told police that the
21 shooter was a Hispanic, 18-to-21-year-old man wearing a brown silky shirt and
22 a baseball cap, and Lawrence described the shooter as a light-skinned Hispanic
23 man in his twenties wearing blue or black pants. Both testified that the shooter
24 drove a Camaro. Richardson testified that on a Monday in July 2002,
25 Petitioner had said he had had to “smoke some fool” in Paramount over the
26 weekend. Richardson testified that Petitioner had described the shooting,
27 stating that he had driven up the block, turned around, gotten out of the car,
28 and told the other man to put his gun away so they could handle the situation

1 like men; Petitioner then shot the man while he was standing and again while
2 he was on the ground. Those details matched the Avaloses' account of the
3 shooting. Richardson also stated that Petitioner had shown him the murder
4 weapon, a nine-millimeter Berretta with an extended clip. Richardson told
5 police that Petitioner had sold the murder weapon to Macias, who worked
6 with Richardson and Petitioner at Thor California. Officers located the gun at
7 Macias's house and ballistics testing revealed that the bullets retrieved from
8 Ortiz's body and the casings and bullets recovered from the crime scene were
9 fired from the gun found in Macias's home. Officers searched Petitioner's
10 house and found, among other things, an extended clip that fit the murder
11 weapon and nine-millimeter ammunition. Macias initially told police that
12 Petitioner had sold him the gun, and then he later testified that Richardson had
13 sold it to him while Petitioner and another man were present. And in a
14 recorded conversation with Richardson, Petitioner referred to "that fool from
15 Paramount." Given the substantial evidence establishing Petitioner's guilt, the
16 California Superior Court could have reasonably concluded that the result of
17 the proceeding would not have been different had the photographic lineup
18 been introduced to bolster Catalina's testimony.

19 Habeas relief is not warranted on this subclaim of ineffective assistance
20 of counsel.

21 **4. Failing to Interview Witnesses (Portion of Subclaim F)**

22 Petitioner contends that counsel should have interviewed three of the
23 Avaloses' neighbors who could have corroborated that the shooter's car was
24 green and that the shooter drove by the scene earlier that day. See FAP at 56-
25 67. Petitioner argues his trial counsel's file "clearly shows he did not interview
26 them" because "it contains no interview notes, memoranda, or other
27 documentation reflecting [that] any interviews ever occurred." Traverse at 19.
28 ///

1 a. Relevant Facts

2 i. Richard Adams

3 Zumwalt spoke to neighbor Richard Adams on the night of the shooting.
4 See FAP, Ex. 23 at 7-8. Adams reported that at the time of the shooting, he
5 had his doors open and heard five or six shots followed by four or five more.
6 See id. at 7. He looked out his front door and saw a car go south on the street.
7 See id. Adams reported that he then heard a neighbor say, “They shot him,”
8 and a call for help. Id. at 7-8. Adams “then heard another yell, ‘green
9 Camaro.’” Id. at 8. He then saw “the son-in-law of Eloise walking out to check
10 the victim.” Id.²³

11 ii. “Teri”

12 In Fox’s July 2003 tape-recorded interview with Catalina, Catalina
13 described a conversation with a neighbor on the night of the shooting:
14 that very night she told me, I go, “It was a dark green Camaro.”
15 She goes, “It was.” She goes, “I saw it.” And she, she said it was a
16 dark green, like an emerald green or forest green car, Camaro.
17 And she was like, I go, “I bet you money it was that color, that
18 color.”
19 Supp. CT at 19. Later Fox asked, “you had mentioned this young lady and,
20 and said that it was definitely a forest green?” Supp. CT at 24. Catalina replied,
21 “Teri, she lives down the street.” Id. Petitioner has been unable to obtain a
22 declaration from “Teri.” See Traverse at 21.

23 iii. Frederico Hernandez

24 On the night of the shooting, Frederico Hernandez stated that he had
25 heard shots but had not seen a vehicle leaving the area. See FAP, Ex. 22a.

26 ²³ Petitioner states that he was unable to obtain a declaration from
27 Adams because he died in 2009. See Traverse 21, Ex. 110 (Adams’s death
28 certificate).

1 Hernandez stated that he “recall[ed] seeing a similar veh[icle] fitting the
2 description of the one given by [Catalina], driving past the location numerous
3 times, at approximately 1500 hours on the date of this incident.” Id.

4 In a declaration obtained by Petitioner’s habeas counsel in October 2016,
5 Hernandez stated that

6 [d]uring the daytime on July 14, 2002, I saw a dark-colored
7 Camaro car driving slowly down the block. I saw the car drive by
8 about five times throughout the day. Only one person, the driver,
9 was in the car.

10 Sometime after ten o’clock p.m. on July 14, 2002, I was at
11 my home on Virginia Avenue. I heard several gunshots and then
12 heard a car drive away. I am familiar with the way Camaro cars
13 sound, and the car that drove away sounded like a Camaro to me.
14 Soon after that, I learned that someone had been shot and killed
15 on my block.

16 Traverse, Ex. 109; Petitioner’s LD 5, Ex. 109.

17 b. Discussion

18 The California Supreme Court’s rejection of this claim was not
19 objectively unreasonable. As an initial matter, the California Supreme Court
20 could have reasonably concluded that counsel’s performance was not deficient
21 due to a failure to interview either Adams or “Teri.” The police report shows
22 only that Adams saw a car drive by after the shooting and heard an
23 unidentified person yell, “green Camaro.” The fact that Adams heard an
24 unidentified person yell “green Camaro” after the shooting would have been of
25 little value; the unidentified person could have been Catalina, who consistently
26 reported that she believed that the car was green. It would have been
27 reasonable for counsel to decide to forego interviewing Adams and focus
28 instead on Catalina and Lawrence’s testimony about the shooting and the

1 color and type of the shooter’s car.

2 Nor does the record support a finding that counsel’s performance was
3 deficient for failing to locate and interview “Teri.” Nothing indicates that
4 counsel knew or should have known that someone named “Teri” allegedly had
5 seen that the shooter drove a green Camaro. Petitioner cites Fox’s interview of
6 Catalina, in which she said a neighbor named “Teri” had seen the green
7 Camaro, but as discussed in Section V.E.3, counsel was initially unaware that
8 Fox, the Public Defender’s investigator, had interviewed the Avaloses. Once
9 counsel discovered that information, he diligently sought to obtain the tape
10 recording of the interview and he sent his own investigator to interview the
11 Avaloses. But the Public Defender’s office did not provide the tape to Oliver
12 until trial had already started. And nothing indicates that Catalina told Oliver’s
13 investigator about “Teri” or what she had allegedly seen. See FAP, Exs. 12-13
14 (Catalina’s and Lawrence’s statements obtained by Oliver’s investigators).
15 Given that nothing shows that counsel would have been aware, until after trial
16 was underway, that “Teri” existed or saw the shooter’s car, he was not
17 ineffective for not interviewing her. See Weber v. Sinclair, 679 F. App’x 639,
18 640 (9th Cir. 2017) (finding that district court did not err in concluding trial
19 counsel was not constitutionally ineffective for failing to interview potential
20 alibi witness when “[c]ounsel had no reason before trial to search for the
21 [witness], as there was no prior indication that he had witnessed the crime”);
22 Khan v. Glebe, 633 F. App’x 879, 881 (9th Cir. 2015) (stating that to show
23 counsel was ineffective for not calling particularly witness, petitioner “had to
24 demonstrate that his trial counsel knew of [the witness] or should have known
25 of [the witness]”).

26 But even if counsel rendered deficient performance by failing to
27 interview one or more of these three witnesses, it would not have been
28 objectively unreasonable for the California Supreme Court to conclude that

1 Petitioner has not shown a reasonable probability that but for counsel’s errors
2 the outcome of the trial would have been different. At most, these witnesses
3 would have corroborated the Avaloses’ testimony that the shooter’s car was
4 green and that a similar car had been seen in the neighborhood earlier in the
5 day. But as discussed above in Section V.E.4, the evidence that Petitioner was
6 the shooter was strong: the shooting occurred in ESP gang territory and
7 Petitioner was an ESP gang member, Petitioner had been in Los Angeles
8 shortly before the shooting and had been driving a gray or burgundy Camaro,
9 eyewitnesses testified that the shooter drove a green or dark colored Camaro,
10 Richardson testified that Petitioner admitted to committing the shooting and
11 provided details about the shooting that were consistent with eyewitness
12 accounts and evidence, and the murder weapon was found at the home of one
13 of Petitioner’s coworkers, who stated that either Petitioner or Richardson—in
14 Petitioner’s presence—had sold him the gun. Given the strength of that
15 evidence, the California Supreme Court could have reasonably concluded that
16 even if counsel had interviewed the additional witnesses, the result of the trial
17 would not have been different.

18 Habeas relief is not warranted on this subclaim of ineffective assistance
19 of counsel.

20 **5. Failing to Interview Richardson (Subclaim G)**

21 Petitioner contends that trial counsel should have interviewed
22 Richardson, who would have revealed that (1) law enforcement paid him to
23 provide information implicating Petitioner in the shooting, (2) he had not
24 understood one of Petitioner’s statements during their recorded conversation—
25 “[t]he last one I did—will be the last of the month, 40”—to be a confession,
26 and (3) Richardson’s coworker drove a green Camaro. FAP at 67-70.

27 Even if the Court assumes that Petitioner’s counsel rendered deficient
28 performance by failing to interview Richardson, see Baumann v. United States,

1 692 F.2d 565, 580 (9th Cir. 1982) (“We have clearly held that defense
2 counsel’s failure to interview witnesses that the prosecution intends to call
3 during trial may constitute ineffective assistance of counsel.”), it would have
4 been objectively reasonable for the California Supreme Court to conclude that
5 Petitioner failed to establish a reasonable probability that the outcome of the
6 trial would have been different. As discussed in Section V.A.2 above, even if
7 the jury had been presented with evidence showing that law enforcement paid
8 Richardson for providing information regarding the shooting, the outcome of
9 the proceeding would not have been different given that defense counsel
10 presented other impeachment evidence and that substantial other evidence
11 supported Richardson’s account.

12 Moreover, the California Supreme Court could have reasonably
13 concluded that the result of the trial would not have been different had the jury
14 been presented with evidence that Richardson did not believe that Petitioner’s
15 recorded statement that “[t]he last one I did—will be the last of the month, 40”
16 was a confession. During the taped conversation, Richardson tried to bring up
17 Ortiz’s murder, asking, “Ain’t no shit ever happened over that shit out back?
18 Remember that.” 4 RT 715-16; CT 166. Petitioner responded, “From 18th?”
19 and asked, “What dude?” CT 166. Richardson said, “Out there in
20 Paramount.” *Id.* Petitioner responded, “The last one I did—will be the last of
21 the month, 40.” *Id.* Richardson laughed, and Petitioner said, “Oh yeah, that
22 fool from Paramount?” *Id.* Richardson testified that he had not understood
23 what “18th” meant at the time. 4 RT 716. Richardson’s further testimony that
24 he did not understand Petitioner’s next sentence—“The last one I did—will be
25 the last of the month, 40”—would not have undercut the prosecutor’s
26 argument that Petitioner’s reference to “18th” was a reference to Ortiz’s
27 murder. Moreover, Richardson never recanted his testimony that in July 2002,
28 Petitioner expressly confessed to the murder, and as previously discussed,

1 extensive evidence demonstrates that Petitioner was the shooter.

2 Finally, the California Supreme Court could reasonably have found that
3 the outcome of the trial would not have been different even if the jury had
4 heard evidence that Richardson had worked with someone who drove a green
5 Camaro. Richardson stated in his declaration that “[t]here was another
6 employee at Thor, who I was friendly with, who owned a different Camaro car
7 that was green. I do not remember that employee’s name.” FAP, Ex. 11.
8 Petitioner argues that “[i]nformation that Richardson actually knew and
9 worked with the owner of a green Camaro—the same type and color of car
10 observed at the shooting—together with Raul Macias’s testimony that
11 Richardson was in possession of the murder weapon, would have indicated to
12 the jury that Richardson himself was the likely shooter.” FAP at 70.

13 But nothing shows that Richardson ever drove his coworker’s green
14 Camaro, let alone that he was driving it in Paramount on the night of the
15 murder. Moreover, Richardson was a “light-skinned Black man,” FAP at 61,
16 but the eyewitnesses consistently identified the shooter as Hispanic. For
17 example, Catalina told Zumwalt on the night of the shooting that the shooter
18 was a Hispanic man and Lawrence said the shooter was a light-skinned
19 Hispanic man. See 5 RT 1075-76; 4 RT 630. Catalina later selected a Hispanic
20 man in a photographic lineup, stating that he looked similar to the shooter. See
21 FAP, Ex. 25, 3 RT 457-58, 483-84. When interviewed by the Public Defender’s
22 investigator, Catalina stated that the shooter was Hispanic and looked like a
23 “wetback.” Supp. CT 16-17. At trial, Catalina described the shooter as a
24 Hispanic male who was “kind of dark,” but “not dark as to be a black man but
25 brown color like a Hispanic or Latin,” 3 RT 434, 442, 447-48, and said he
26 looked like “[a] cholo, a Mexican,” 3 RT 459. Although Catalina at one point
27 testified that it was possible that the shooter was a light-skinned African
28 American, not a Hispanic man, see 3 RT 453-54, she later testified that the

1 shooter was a “different color than a lighter black man,” 3 RT 498-99. And
2 Lawrence described the driver as a tall, thin Hispanic man in his 20s. See 4 RT
3 630-33. Moreover, as previously discussed, the evidence showed that
4 Petitioner, a Hispanic man, was in the Los Angeles area, driving a dark
5 Camaro on the night of the murder; the shooting occurred in ESP gang
6 territory and Petitioner was an ESP gang member; and a clip and ammunition
7 fitting the murder weapon was found in his house. Because Petitioner failed to
8 show a reasonable probability that the result of his trial would have been
9 different had the jury known that one of Richardson’s coworkers drove a green
10 Camaro, the California Supreme Court did not err in denying this subclaim of
11 ineffective assistance of counsel.

12 **6. Failing to Rebut Richardson’s Claim that Petitioner Altered His**
13 **Camaro Because It Was “Hot” (Subclaim H)**

14 Petitioner contends that counsel was ineffective for failing to rebut
15 Richardson’s claim that Petitioner altered his Camaro because it was “hot”
16 with Richardson’s prior inconsistent statement and records from the body shop
17 that performed the work. FAP at 70-72.

18 a. Relevant Facts

19 At trial, Richardson testified that a couple of weeks after Petitioner told
20 him about the murder, in July 2002, Petitioner had his burgundy Camaro
21 painted “smoked gray” and a new “front cap” put on. 4 RT 681, 684. Later,
22 Petitioner had other work done on the Camaro, including installing new
23 exhaust and rims. See 4 RT 681, 685. Richardson testified that Petitioner told
24 him that he had had the Camaro’s appearance changed because the Camaro
25 was “hot” because he had used it in the shooting. 4 RT 681.

26 Richardson testified that he made a phone call to Petitioner on January
27 8, 2003, which was recorded by police. See 4 RT 702. During the call,
28 Petitioner commented about getting work done on his Camaro and stated that

1 it was still in the shop. See 4 RT 703, 705; CT 159-62 (transcript of call). The
2 prosecutor asked Richardson, “And did [Petitioner] get in any kind of a car
3 accident or get body damage to his car?” Richardson answered, “No,” and
4 said he “guess[ed]” that Petitioner was getting a “painted front end.” Id. On
5 January 9, 2003, Richardson, wearing a wire, met up with Petitioner in person.
6 See 4 RT at 714-15. Petitioner again talked about his Camaro being in the
7 shop. See id.

8 On cross-examination, defense counsel asked Richardson,

9 Q Now, you told Zumwalt that [Petitioner] had the car
10 painted and changed because it had been in a murder; is that what
11 you said?

12 A Yes, sir.

13 Q Did you ever tell Zumwalt that [Petitioner] had
14 crashed the car, and that’s why he was getting it painted and
15 remodeled?

16 A He crashed the car after he already had got it painted
17 and remodeled.

18 4 RT 726-27.

19 An affidavit for a search warrant stated that on December 30, 2002,
20 investigators interviewed Richardson. See FAP, Ex. 26. The affidavit said
21 “[Richardson] stated that after the murder [Petitioner] painted the car red. He
22 recently crashed the Camaro and it is in an unknown body shop being
23 repaired.” Id.

24 b. Discussion

25 The California Supreme Court’s rejection of this ineffective assistance of
26 counsel claim was not objectively unreasonable. Petitioner argues that
27 counsel’s performance was deficient on the basis of counsel’s failure to rebut
28 Richardson’s claim that Petitioner altered the Camaro because it was “hot”

1 with his statements to law enforcement that the Camaro was in the shop
2 because Petitioner had crashed it. FAP at 71. But counsel did, in fact, ask
3 Richardson whether he had told Zumwalt that Petitioner was having work
4 done on the Camaro because he had crashed it. See 4 RT 726-27. Richardson
5 responded that Petitioner had crashed the Camaro after he had already had
6 painted and remodeled, which was consistent with his earlier testimony that
7 Petitioner had had the Camaro painted and remodeled a couple weeks after the
8 shooting. Although Richardson was somewhat inconsistent about whether the
9 Camaro was in the shop around December 2002 and January 2003 because it
10 had been in a crash or for some other reason, Richardson was not inconsistent
11 in his testimony that Petitioner had had the Camaro repainted a couple weeks
12 after the shooting because it was “hot.” The California Supreme Court
13 therefore could have reasonably concluded both that counsel was not
14 ineffective for further questioning Richardson about whether the Camaro had
15 been in a crash and that his failure to do so did not result in prejudice.

16 Petitioner also argues that counsel was ineffective for failing to introduce
17 records from the body shop to show the dates and substance of the repairs. But
18 he has offered no evidence of what the records would have shown or how they
19 would have helped the defense. Because this portion of his claim is speculative
20 and conclusory, the California Supreme Court was not objectively
21 unreasonable in rejecting it. See Dows v. Wood, 211 F.3d 480, 486-87 (9th Cir.
22 2000) (conclusory allegations of ineffective assistance of counsel which are not
23 supported by statement of specific facts or affidavits do not warrant habeas
24 relief).

25 Habeas relief is not warranted on this claim.

26 ///

27 ///

28 ///

1 **7. Prematurely Declaring Ready for Trial, Without Having**
2 **Conducted Any Investigation (Subclaim C)**

3 Petitioner argues that trial counsel should not have declared ready for
4 trial only a few weeks after substituting in as Petitioner’s counsel and without
5 having conducted an adequate investigation. See FAP at 49-50.

6 a. Relevant Facts

7 As explained in Section V.D, Petitioner’s preliminary hearing took place
8 on May 22, 2003. He was represented by a private attorney for the hearing and
9 for a period of time after the hearing, until Deputy Public Defender Smith
10 assumed representation. Trial was set for August 5, 2003. On June 11, 2003,
11 Smith moved for a continuance, stating that he would not be ready for trial on
12 August 5 because he had just been assigned the case and had not received
13 discovery from Petitioner’s previous counsel. On June 12, 2001, the trial court
14 ordered Zumwalt or another officer to appear in court on July 8 with the entire
15 investigative file.

16 On June 27, 2003, Oliver moved to substitute in as Petitioner’s attorney,
17 and he obtained Petitioner’s file from the Public Defender on or before that
18 date. On July 1, 2003, the trial court granted the substitution, stating that
19 Oliver had stated that he would be ready for trial on August 5. On July 30,
20 2003, Oliver moved for a continuance, stating that he had not received certain
21 discovery from the prosecutor. On August 5, 2003, the trial court denied the
22 motion; voir dire began later that day. During a sidebar discussion on August
23 6, 2003, Oliver commented, in regard to his inability to obtain tapes from the
24 Public Defender’s office, that he had been “rushed and pressured to go to
25 trial.” 3 RT 467.

26 b. Discussion

27 Reasonable arguments support the California Supreme Court’s denial of
28 this claim. First, the California Supreme Court could have reasonably found

1 that trial counsel did not act deficiently. Oliver was involved in the case and in
2 possession of the Public Defender's file by June 27, 2003; on July 1, he stated
3 that he would be ready for trial on August 5, nearly six weeks after he filed his
4 motion to substitute. Oliver later sought a continuance because the
5 government had failed to provide certain items of discovery, but the trial court
6 denied that motion for reasons that are not clear from the record. Nothing
7 shows that Oliver's actions in stating he would be ready for trial on August 5
8 was outside of the wide range of professional assistance. Second, the California
9 Supreme Court could have reasonably found that, given the strength of the
10 evidence showing that Petitioner was the shooter, the outcome of the trial
11 would not have been different even if Oliver had not stated that he would be
12 ready for trial on August 5, 2003.²⁴

13 In his Traverse, Petitioner argues for the first time that Oliver was
14 constitutionally ineffective for not visiting Petitioner in jail, pointing to his own
15 declaration stating that Oliver "never came to the jail to visit me before my
16 trial or during my trial." Traverse, Ex. 105. Petitioner, however, may not raise
17 new grounds for relief in the traverse. See Cacoperdo v. Demosthenes, 37 F.3d
18 504, 507 (9th Cir. 1994) (holding that traverse is not proper pleading to raise
19 additional grounds for relief or amend petition). And in any event, in his
20 declaration, Petitioner also stated that Oliver spoke with him "in court and in
21 lockup before court." Traverse, Ex. 105. Nothing indicates that Oliver was
22 unable to sufficiently interview Petitioner during those times or that the
23 outcome of Petitioner's trial would have been different had Oliver visited
24 Petitioner in jail. Because this portion of Petitioner's claim is speculative and

25
26 ²⁴ In his Traverse, Petitioner points to Oliver's failure to interview
27 various witnesses or obtain the Public Defender's investigative report. See
28 Traverse at 7, 10. But to the extent those claims survived the earlier motion to
dismiss, they are discussed separately in previous sections. See id.

1 conclusory, the California Supreme Court was not objectively unreasonable in
2 rejecting it. See Dows, 211 F.3d at 486-87.

3 **F. Cumulative Error (Ground Six)**

4 Finally, Petitioner contends that the cumulative effect of the
5 constitutional violations listed above rendered Petitioner’s trial fundamentally
6 unfair. See FAP at 123-26.

7 The Ninth Circuit has found that “even if no single error were
8 prejudicial, where there are several substantial errors, ‘their cumulative effect
9 may nevertheless be so prejudicial as to require reversal.’” Killian v. Poole, 282
10 F.3d 1204, 1211 (9th Cir. 2002) (quoting United States v. de Cruz, 82 F.3d
11 856, 868 (9th Cir. 1996)). However, as discussed above, there were no
12 substantial constitutional errors at Petitioner’s trial; and if there was any error,
13 it was harmless. Thus, the California Supreme Court reasonably rejected
14 Petitioner’s cumulative-error claim. See Hayes, 632 F.3d at 524 (“Because we
15 conclude that no error of constitutional magnitude occurred, no cumulative
16 prejudice is possible.”); United States v. Pineda-Doval, 614 F.3d 1019, 1036
17 (9th Cir. 2010) (finding that even three errors by the trial court, where all were
18 independently harmless, resulted in “no prejudice, cumulative or otherwise”).
19 Therefore, Petitioner is not entitled to federal habeas relief with respect to his
20 allegation of cumulative error.

21 **G. Request for Evidentiary Hearing**

22 Petitioner requests an evidentiary hearing. See Traverse at 57. An
23 evidentiary hearing is not required on issues that can be resolved by reference
24 to the state-court record under § 2254(d), as Petitioner’s claims can be. See
25 Pinholster, 563 U.S. at 183 (“[W]hen the state-court record ‘precludes habeas
26 relief’ under the limitations of § 2254(d), a district court is ‘not required to hold
27 an evidentiary hearing.’” (quoting Schriro v. Landrigan, 550 U.S. 465, 474
28 (2007))). Petitioner’s request for an evidentiary hearing therefore should be

1 denied.

2 V.

3 **CONCLUSION**

4 IT IS THEREFORE RECOMMENDED that the District Court issue an
5 Order: (1) approving and accepting this Final Report and Recommendation;
6 (2) denying Petitioner's request for an evidentiary hearing; and (3) directing
7 that Judgment be entered denying the FAP and dismissing this action with
8 prejudice.²⁵

9
10 Dated: January 30, 2018

11 
12 _____
13 DOUGLAS F. McCORMICK
14 United States Magistrate Judge
15
16
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21

22 _____
23 ²⁵ The Court issued its original Report and Recommendation on
24 December 15, 2017. Dkt. 203. Petitioner filed objections. See Dkt. 205.
25 Respondent also moved to clarify the Report and Recommendation, correctly
26 noting that page 22 of the original Report and Recommendation omitted the
27 word "not," thus changing the import of a critical sentence. The Court now
28 withdraws the original Report and Recommendation and issues this corrected
Final Report and Recommendation. Because the Court's recommendation is
entirely unchanged, the parties have not been given an opportunity to file
additional objections.

SUPREME COURT
FILED

MAR 29 2017

Jorge Navarrete Clerk

S231775

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re FERMIN GUERRERO on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FERMIN GUERRERO,

Defendant and Appellant.

B170230

(Los Angeles County
Super. Ct. No. TA069079)

COURT OF APPEAL - SECOND DIST.

FILED

MAR 22 2005

JOSEPH A. LANE

Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Jack W. Morgan, Judge. Modified, affirmed and remanded with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte and Karen Bissonnette, Deputy Attorneys General, for Plaintiff and Respondent.

Fermin Guerrero was convicted of first degree murder, with weapon use and criminal street gang enhancements found true. He was sentenced to state prison for a term of 60 years to life. He appeals, claiming evidentiary, instructional, and sentencing error. We modify Guerrero's sentence and, as modified, affirm.

FACTS

A.

At about 10:20 p.m. on a Sunday night in July 2002, Catalina Avalos and her 12-year-old son, Lawrence, were in their front yard on Virginia Street in Paramount, a street within the "turf" of the "East Side Paramount" street gang (ESP). Catalina's ex-husband was in the driveway, working on a truck. As Catalina watched, a man (Jose Ortiz, the victim) walked northbound on the opposite side of the street, and a dark green Camaro drove up, also traveling northbound. Ortiz started to talk to the man driving the Camaro (Guerrero), then walked toward the car and leaned in the passenger side window as he and Guerrero continued to speak.

Guerrero then pulled the Camaro forward, made a U-turn, parked about two houses down from Catalina, got out of the car, and met Ortiz in the middle of the street. Guerrero told Ortiz, who was holding a gun, "Put your gun away, Dog. Let's talk about this like men." Ortiz complied and put the gun away. Without another word, Guerrero started shooting, fired about seven shots at Ortiz, who staggered across the street, fell to the ground, and stopped. Guerrero then walked up to Ortiz and fired another four or five shots at him as he

lay on the ground. Ortiz suffered 10 gunshot wounds and died. Guerrero got back in the Camaro and "took off," firing two more shots.

At the scene of the shooting, Los Angeles County Deputy Sheriff Boyd Zumwalt III, a homicide investigator, found expended shell casings in the street and sidewalk area, blood and a bloody shirt, and rubber flip-flop sandals belonging to Ortiz. Other officers found a loaded revolver that had not been fired, which had apparently been in Ortiz's possession. The officers spoke to people at the scene, "but nobody said they saw anything." The day after the shooting, Lawrence Avalos (Catalina's son) saw the shooter in a car with another person driving southbound down Virginia Street, slowly, as if they were looking around.

B.

On a Monday in July 2002, Guerrero told Jimmy Richardson (Guerrero's co-worker at Thor California in Riverside, with whom he carpooled) that he had to "smoke some fool in Paramount" over the weekend because the man was "mad-dogging" him. Guerrero described the events leading up to the shooting, said he shot the victim point blank after the victim was on the ground, and showed Richardson the gun he had used. Later, Guerrero showed Richardson a newspaper article that reported information consistent with what Guerrero had previously told Richardson and which described the shooter as the "unknown assailant." After that, Richardson called Guerrero "the unknown." In the months after July 2002, Guerrero did some work on his Camaro to change its appearance, and painted it gray -- he told Richardson that he used the car in the murder and that the car was "hot."

In October, Richardson was arrested for possession of counterfeit money and narcotics. As part of a negotiated plea, he received a suspended sentence and agreed to cooperate with law enforcement. In November, he told federal authorities about Guerrero's statements concerning Ortiz's murder, and said Guerrero had sold the murder weapon (a Baretta) to Raul Macias, another Thor co-worker. In December, Investigator Zumwalt met with federal agents and Richardson, who repeated his statement about what Guerrero had told him about Ortiz's murder. On January 8, 2003, Richardson called Guerrero, who discussed the work being done on his Camaro (the conversation was tape-recorded). The following day, Richardson (wearing a recording device) met with Guerrero, and the two talked about the work being done on the car, firearms, and another gang-related incident involving Guerrero.

On March 6, the police found a Baretta handgun at Macias's house, and Macias told the police (in a taped interview) that Guerrero had sold him the gun. The police established that bullets and bullet fragments removed from Ortiz's body and found at the scene had been fired from the Baretta. That same day, federal agents executed a search warrant at Guerrero's house, observed gang graffiti on the walls, and found a box of nine-millimeter ammunition, an extended magazine that fit the murder weapon, an assault weapon with a laser sight, a .40-caliber magazine, and a photo of Guerrero pointing what appeared to be a .40-caliber Smith and Wesson handgun at another person who appeared to be flashing a gang sign. A gray Camaro was parked at the house. Also the same day, agents executed a warrant at Thor California, where they found a nine-millimeter handgun under the driver's side floor mat of Guerrero's other car, a Buick Regal, which was parked at Thor. Guerrero was arrested.

Investigator Zumwalt subsequently interviewed Catalina and Lawrence Avalos, and they described the shooting and the shooter (light-complected Hispanic in his 20's with a baseball cap). At some point, Investigator Zumwalt examined Guerrero's Camaro and determined it had been maroon before it was gray. Guerrero was charged with Ortiz's murder, with allegations that a principal personally discharged a firearm causing great bodily injury and that the crime was committed for the benefit of a criminal street gang. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b), (c), (d), (e), 186.22, subd. (b)(1).)¹

C.

At trial, the People offered evidence of the facts summarized above. In addition, Guerrero's girlfriend, Kathy Lainez, testified that although she had spent some time with Guerrero on the day of the shooting, Guerrero had dropped her off sometime after 8:00 p.m. and she did not know where he was at the time of Ortiz's murder. She said Guerrero's Camaro was burgundy-colored when he bought it, but it was gray on the day of Ortiz's murder. Macias recanted the statements he had made to the police and testified that he had been coerced by the police to lie during his interview, and that he had actually bought the Baretta from Richardson. Neither Catalina nor Lawrence Avalos identified Guerrero at trial. Catalina testified that, sometime after the preliminary hearing, she had told investigators that they had the wrong guy. She also testified that Lawrence had been approached by someone in the neighborhood about what they had seen and what they had told the police. A Sheriff's Department gang expert testified that there were ongoing gang wars in Paramount, that ESP

¹ Undesignated section references are to the Penal Code.

controlled the area where Ortiz was murdered, that Guerrero was an ESP member, and that gang members "absolutely" boast about their crimes to earn respect and protect gang territory. He also testified that Catalina Avalos's ex-husband was a former ESP member, and that his family would likely have "problems" if a family member testified in court against a member of the gang.

The jury convicted Guerrero of first degree murder, and found the weapon and gang enhancements were true. Guerrero was sentenced to state prison for a term of 60 years to life (25 years to life on the murder count, plus 25 years to life for the weapon enhancement (§ 12022.53, subd. (d)), and 10 years for the street gang enhancement).

DISCUSSION

I.

Guerrero contends the trial court should not have admitted evidence of his possession of firearms other than the murder weapon and, at a minimum, should have admonished the jury that it could not draw adverse character inferences about Guerrero based on the firearms evidence. (Evid. Code, §§ 352, 1101, subd. (b); *People v. Riser* (1956) 47 Cal.2d 566, 577.) We disagree.

A.

Admission of the Gun Found in the Buick. Guerrero moved in limine to exclude evidence about the firearms found in his Buick Regal and at his house on the grounds that the evidence was irrelevant (since these were not the murder weapon), more prejudicial than probative, and improper propensity

evidence ("intended to prejudice the jury against [him] for his apparent affinity to guns and the gun culture").

The prosecutor's position was Richardson's credibility, as a key prosecution witness and a man with a criminal record, would be a significant issue at trial, and that the weapons evidence was relevant to Richardson's credibility and to corroborate the information Richardson provided to law enforcement, including evidence that Guerrero was "always packing and always at the ready" and generally carried a weapon in his car. The court agreed that the evidence had "great weight" and suggested a limiting instruction to tell the jury that the evidence should be considered only for the limited purpose of assessing Richardson's credibility. The court allowed evidence about only one other gun, the one found in Guerrero's car, and the prosecutor later elicited testimony from Secret Service Special Agent Michael Gutierrez that he found a nine-millimeter semi-automatic handgun under the driver's side floor mat of Guerrero's Buick.

B.

Admission of the Assault Weapon, Magazines, Ammunition, and the Photograph. Following eyewitness testimony (from Catalina and Lawrence Avalos) and before Richardson testified, the court and counsel discussed the admissibility of the transcript of the tape-recorded conversation between Richardson and Guerrero. Guerrero claimed that a certain portion (page 18, lines 12 to 21) pertained to another incident, and objected on the ground that it was impermissible propensity evidence. The prosecutor claimed the discussion on page 18 related to several events, including the charged offense. Defense counsel told the court that, if it would not limit admission of the tape to the

portions he requested, the entire tape should be admitted. After further discussion, the parties agreed to the admission of page 10, line 19, through page 25, line 1.

After copies of the transcript were distributed to the jurors and the tape was played for the jury, the prosecutor asked the trial court to reconsider its prior rulings. In the recorded conversation (at page 11 of the transcript), he said, Guerrero mentioned he "only pack[ed] assault rifles" with "lasers" and said he had gotten rid of his ".40." Richardson had told federal agents and sheriff's deputies that he had seen Guerrero with a machine gun and a .40-caliber weapon. The prosecutor said the assault weapon and the photograph of Guerrero holding a .40-caliber weapon were consequently relevant to Richardson's credibility.² Defense counsel objected, claiming the evidence was irrelevant and unduly prejudicial. The court deferred its ruling until after Richardson's cross-examination.

On cross-examination, defense counsel inquired about a portion of the tape (pages 18 and 19) where Guerrero mentioned "40" and "running with [his] homies in [his] Regal." When defense counsel suggested the latter reference was conversation about the charged crime (an effort to discredit eyewitness descriptions of the car as a Camaro), Richardson said the conversation jumped

² During pretrial, the prosecutor had asked for permission to introduce the photograph as evidence of Guerrero's gang affiliation. The trial court denied the motion when Guerrero stipulated that the murder was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1).

from one incident to another and that the Regal reference concerned a different incident in Pomona.

At side-bar during re-direct, the prosecutor pointed to references in the admitted portion of the transcript to the .40-caliber and assault weapons, and requested permission to ask Richardson about Guerrero's other weapons and to show him the photograph to see what he recognized. Over a defense objection, the trial court ruled that the jury could hear "everything reasonable" because it had to determine Richardson's credibility. The court found the evidence more probative than prejudicial.

Richardson testified that when Guerrero referred to a "40" during the taped conversation, he believed Guerrero was referring to his .40-caliber handgun, and he had seen Guerrero with a .40-caliber Smith and Wesson. The prosecutor showed Richardson the photograph, and Richardson identified Guerrero as the man holding the gun (which looked like a .40-caliber and resembled one of Guerrero's guns). Richardson also testified that when Guerrero stated during the taped conversation that "[t]his mother fucker explodes," he believed Guerrero was referring to an assault rifle (although he had not seen Guerrero with an assault weapon).

ATF Special Agent Greg Estes testified that during the search of Guerrero's house, he recovered an assault weapon with laser sights, an extended pistol magazine with a box of nine-millimeter ammunition, and a pistol magazine compatible with a .40-millimeter handgun. Estes also testified that the gun Guerrero was holding in the photograph found during the search of his house

appeared to be a .40-caliber Smith and Wesson. Special Agent Gutierrez testified that all the information Richardson provided about Guerrero's involvement in Ortiz's murder was corroborated.

C.

Relevant Instruction of the Jury. The trial court did not give a limiting instruction at the time the evidence about the firearms other than the murder weapon was introduced, but at the close of evidence instructed the jury pursuant to CALJIC No. 2.09 that "[c]ertain evidence was admitted for a limited purpose. At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted." In closing, the prosecutor argued that all of Richardson's statements to the police had been corroborated by other evidence, and that the murder as described by the eyewitnesses occurred exactly as Richardson said Guerrero had described it to him.

D.

We reject Guerrero's contentions (1) that the firearms evidence was not relevant to any material fact at issue in the case or, if relevant, (2) that it should have been excluded because it was more prejudicial than probative. The evidence was highly relevant and probative of Richardson's credibility, which was a critical issue at trial.

The eyewitnesses failed to identify Guerrero at trial, and had told a defense investigator that he was not the shooter. Richardson testified that Guerrero admitted shooting Ortiz and shared details of the crime, showed him

the murder weapon, and changed the appearance of his Camaro because he had been driving it at the time of the murder and it was "hot." But because Richardson had participated in other crimes with Guerrero, cooperated with law enforcement, and received a suspended sentence in a recent case, and because the defense theorized that Richardson rather than Guerrero was the one to sell Macias the murder weapon, Richardson's credibility was very much in question.

The firearms evidence corroborated the details Richardson provided to law enforcement, and thus was relevant and more probative than prejudicial. It follows that it was not an abuse of discretion to admit the evidence. (Evid. Code, §§ 210, 350, 351, 352; *People v. Cox* (2003) 30 Cal.4th 916, 955 [abuse of discretion standard]; *People v. Smith* (2003) 30 Cal.4th 581, 613-614 [gun other than the murder weapon was relevant to an issue of credibility and admissible on that ground]; see also *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052; *People v. Lane* (1961) 56 Cal.2d 773, 785.)

E.

Assuming without deciding that Guerrero did not waive the issue, and assuming that the limiting instruction initially suggested by the trial court should have been given (see *People v. Lomeli* (1993) 19 Cal.App.4th 649, 654-656, overruled on another point in *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052, fn. 3), the error was harmless. Apart from the weapons evidence, Guerrero's guilt was proved by very substantial evidence: Guerrero was an ESP member and the shooting happened within ESP territory; Guerrero told Richardson that he committed the crime and provided details consistent with those reported by

eyewitnesses (including the manner in which Guerrero shot Ortiz at point blank range as he lay on the ground); Guerrero told Richardson his Camaro was "hot" because he had used it in the murder and that he was doing work on it; Richardson saw the Camaro in an altered state and painted gray; Guerrero showed Richardson a newspaper article about Ortiz's murder with details consistent with those Guerrero had told Richardson; Richardson carpooled with Guerrero and knew he generally carried a nine-millimeter Baretta in his car; after the murder, Guerrero sold a Baretta to Macias, which was determined to be the murder weapon; Guerrero made various references on tape to "that fool from Paramount," to his use and ownership of weapons, and to the body work completed on his car; and while Catalina and Lawrence Avalos failed to identify Guerrero, they had reasons for not being forthcoming.

Moreover, although the jury was instructed that certain evidence was admitted for a limited purpose but was not told what evidence or what purpose (CALJIC No. 2.09), it is not reasonably probable that the jury was confused. In his opening statement, the prosecutor addressed the critical need for corroborating the information provided by Richardson to law enforcement, and by the questions the prosecutor posed to law enforcement officers, and in his closing statement to the jury, the prosecutor informed the jurors that the weapons evidence was admitted for the purpose of corroboration. (*People v. Lomeli, supra*, 19 Cal.App.4th at p. 656.) Accordingly, there is no reasonable probability that a miscarriage of justice resulted from the trial court's failure to give the limiting instruction. (*Ibid.*; *People v. Callahan* (1999) 74 Cal.App.4th 356, 363.)

II.

Guerrero contends the trial court erred prejudicially in failing to sua sponte instruct the jury to determine whether he made extrajudicial admissions and, if so, to view the statements with caution. (CALJIC No. 2.71.)³ Given that the prosecutor relied heavily on Richardson's testimony about what Guerrero told him about the shooting, altering his car, and other matters, we agree -- but find the error harmless.⁴

When called for by the evidence, CALJIC No. 2.71 must be given sua sponte because of the inherent dangers that exist whenever a witness is permitted to testify about the oral statements of an accused, and the purpose of the instruction is to assist the jury in determining whether the statement was in fact made. But the failure to give the instruction is harmless if it is not reasonably probable that a result more favorable to the defendant would have been reached had the instruction been given. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 93-94; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268-1269; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224-1225.)

³ CALJIC No. 2.71 states that "[a]n admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crime for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] Evidence of an oral admission of the defendant not made in court should be viewed with caution."

⁴ The instruction does not apply to tape-recorded admissions. (*People v. Franco* (1994) 24 Cal.App.4th 1528, 1541.)

With regard to Richardson's testimony about Guerrero's statements, there was no issue about the precise words used, their meaning or content, or whether the statements were remembered and repeated accurately. (*People v. Bunyard, supra*, 45 Cal.3d at p. 1224.) Instead, the issue was whether the statements were made at all. As noted, Richardson's testimony was corroborated by the eyewitnesses and by the physical evidence found at the scene of the crime, in Guerrero's car, and at his house, and the issue of Richardson's credibility was one for the jury -- and the jury was fully instructed to view Richardson's testimony with caution. (E.g., CALJIC Nos. 1.00 [jurors to determine what facts have been proved from the evidence], 2.13 [prior consistent or inconsistent statements], 2.20 [jurors are the sole judges of the believability of a witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.23 [a witness's conviction of a felony is a circumstance jurors may consider in weighing credibility].) It is not reasonably probable that Guerrero would have obtained a more favorable result had the court instructed the jury pursuant to CALJIC No. 2.71. (*People v. Stankewitz, supra*, 51 Cal.3d at pp. 93-94; *People v. Bunyard, supra*, 45 Cal.3d at pp. 1224-1225; *People v. Williams* (1988) 45 Cal.3d 1268, 1315.)

III.

We reject Guerrero's contention that reversal is required because cumulative errors undermined the fundamental fairness of his trial. While there was instructional error as discussed above, it was harmless and did not result in a denial of his right to a fair trial. (*People v. Price* (1991) 1 Cal.4th 324, 491; *People v. Miranda* (1987) 44 Cal.3d 57, 123.)

IV.

In a supplemental opening brief, Guerrero contends the trial court erred in sentencing him to a 10-year consecutive term for the true finding on the criminal street gang enhancement (§ 186.22, subd. (b)(1)). We agree.

In a letter to the court while this appeal was pending, the Attorney General informed us that the Supreme Court was about to hear argument in a case in which it would consider the "identical" issue. On January 6, 2005, the Supreme Court filed its opinion in that case, *People v. Lopez* (2005) 34 Cal.4th 1002, which compels our agreement with Guerrero. In *Lopez*, the Court held that "first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22[, subdivision] (b)(1)(C)." Instead, in *Lopez* and in this case, there is a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5). (*People v. Lopez, supra*, 34 Cal.4th at p. 1004.)

DISPOSITION

Guerrero's sentence is modified by striking the 10-year sentence imposed pursuant to section 186.22, subdivision (b)(1), and by reflecting that Guerrero's sentence is 50 years to life (25 years to life on count 1, with a consecutive 25 years to life for the section 12022.53, subdivision (d), enhancement) with a minimum parole eligibility of 15 calendar years having been served; as modified, the judgment is affirmed and the cause is remanded to the trial court with directions to issue a corrected abstract of judgment and forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

SUZUKAWA, J.*

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

DECLARATION OF FEDERICO HERNANDEZ

I, Federico Hernandez, declare as follows:

1. On July 14, 2002, I lived in the 15500 block of Virginia Avenue in Paramount, California.
2. During the daytime on July 14, 2002, I saw a dark-colored Camaro car driving slowly down the block. I saw the car drive by about five times throughout the day. Only one person, the driver, was in the car.
3. Some time after ten o'clock p.m. on July 14, 2002, I was at my home on Virginia Avenue. I heard several gunshots and then heard a car drive away. I am familiar with the way Camaro cars sound, and the car that drove away sounded like a Camaro to me. Soon after that, I learned that someone had been shot and killed on my block.
4. On October 20, 2016, an investigator from the Federal Public Defender's office interviewed me about the July 2002 shooting. Before that time, no one representing Fermin Guerrero had ever interviewed me about that incident. I was only ever interviewed by police, shortly after the incident happened in 2002.

I declare under penalty of perjury under the laws of the state of the United States of America and the state of California that the foregoing is true and correct and that this declaration was executed this 27 day of 10, 2016, at Paramount, California.


Federico Hernandez

DECLARATION OF MARGARET A. FARRAND

I, Margaret A. Farrand, declare as follows:

1. I am an attorney with the Office of the Federal Public Defender in Los Angeles, California. Together with my co-counsel, Celeste Bacchi, I am assigned to the state habeas corpus case *In re Fermin Guerrero on Habeas Corpus*, Cal. Supreme Court case number S231775, and the federal habeas corpus case *Fermin Guerrero v. Raul Lopez*, United States District Court case number CV 10-08257-ODW-DFM.

2. I have reviewed the case file of attorney Vincent Oliver, who represented Mr. Guerrero at his 2003 murder trial in *People v. Guerrero*, Los Angeles Superior Court case number TA069079. Mr. Oliver's file does not contain any documents or materials referring to or referencing any payments to Jimmy Richardson by any law enforcement agents or organizations.

3. I have also reviewed the case file of Los Angeles County Deputy Public Defender Sanders Smith, who represented Mr. Guerrero in pretrial proceedings in Los Angeles Superior Court case no. TA069079. Mr. Smith's file also does not contain any documents or materials referring to or referencing any payments to Jimmy Richardson by any law enforcement agents or organizations.

4. In July 2015, I spoke by telephone with witness Gabriel Marin. I previously described my conversation with Mr. Marin in a prior declaration, dated August 13, 2015, which I submitted in Mr. Guerrero's case

5. On August 14, 2015, I spoke by telephone with witness Lorenzo Quezada. I set forth Mr. Quezada's statements during that conversation in a prior declaration, dated August 31, 2015, which I submitted in Mr. Guerrero's case.

6. On August 28, 2015, I called Mr. Quezada back to ask where I could send him a draft declaration for his review, setting forth the statements he had

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made to me in our conversation on August 14, 2015. Mr. Quezada picked up the telephone, but hung up after I said who I was. I was not able to reach Mr. Quezada by telephone after that.

7. On January 26, 2016, I received an email message from Colleen Tiedemann, the Deputy Attorney General assigned to Mr. Guerrero's state and federal habeas corpus cases. A true and correct copy of the January 26, 2016 email I received from Ms. Tiedemann is attached as Exhibit 1 to this declaration.

8. On March 8, 2016, I spoke by telephone with Ms. Tiedemann and asked her for permission to view the Los Angeles County District Attorney's file ("DA File") on Mr. Guerrero's case, as well as the file maintained by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") for Jimmy Richardson. Ms. Tiedemann told me to speak with Lowell Anger, Assistant Head Deputy of the Hardcore Gang Division of the Los Angeles County District Attorney's Office, about my request to view the DA File. Ms. Tiedemann also told me that she did not have a copy of the ATF's file for Mr. Richardson. However, she said that the ATF file for Mr. Richardson contained information that was not limited to Mr. Guerrero's case, but pertained to Mr. Richardson's involvement in other cases as well. She told me that she was working on figuring out which ATF official I should contact regarding my request to view Mr. Richardson's ATF file.

9. Also on March 8, 2016, after speaking with Ms. Tiedemann, I called Mr. Anger and asked him whether he would permit me to view the DA File on Mr. Guerrero's case. Mr. Anger said he would defer to Ms. Tiedemann and follow her direction in deciding whether to let me view the file.

10. Also on March 8, 2016, after speaking with Mr. Anger, I called Ms. Tiedemann back and told her that Mr. Anger had said he would defer to her on the issue of whether I would be permitted to view the DA File. I asked Ms.

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Tiedemann for her position on whether I could view that file. She said she needed to speak with her supervisors, and that she would call me back on March 10 or 11, 2016, and let me know what her office's position was on my request.

11. On March 11, 2016, I spoke again by telephone with Ms. Tiedemann. She said that she would not authorize Mr. Anger to allow me to view the DA File on Mr. Guerrero's case, and that she objected to my office doing so. Regarding my request to view the ATF file for Mr. Richardson, Ms. Tiedemann gave me the name and telephone number of Paul Ware, division counsel for the Los Angeles Field Division of ATF. Ms. Tiedemann also suggested that I call her supervisor, Deputy Attorney General Bill Bilderback, regarding my request.

12. Also on March 11, 2016, after speaking with Ms. Tiedemann, I called Mr. Ware at the telephone number Ms. Tiedemann had provided, and spoke with him. I told him who I was and that I represented Mr. Guerrero in his habeas corpus case, and asked to view the ATF file for Mr. Richardson. Mr. Ware told me to request the information about Mr. Richardson from him in writing, and told me that if Ms. Tiedemann requested that he release the information to me he would be amenable to doing so, after redacting any information necessary to protect Mr. Richardson's privacy. Mr. Ware told me to email my written request to him at paul.ware@atf.gov.

13. Also on March 11, 2016, I emailed a written request to Mr. Ware for permission to view and copy the ATF's file on Richardson.

14. A true and correct copy of my letter to Mr. Ware, dated March 11, 2016, is attached as Exhibit 2 to this declaration.

15. A true and correct copy of the email I sent to Mr. Ware, attaching the letter, on March 11, 2016, is attached as Exhibit 3 to this declaration.

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16. I received a return email from Mr. Ware, also on March 11, 2016, confirming that he had received my email. A true and correct copy of Mr. Ware's email to me is attached as Exhibit 4 to this declaration.

17. Also on March 11, 2016, I sent an email to Ms. Tiedemann describing my conversation with Mr. Ware and asking Ms. Tiedemann to make a written request to Mr. Ware that he send me the information in ATF's files pertaining to Mr. Richardson's receipt of money or other benefits in connection with his assistance to law enforcement in Mr. Guerrero's case. A true and correct copy of the email I sent to Ms. Tiedemann on March 11, 2016 is attached as Exhibit 5 to this declaration.

18. On March 14, 2016, I spoke by telephone with Ms. Tiedemann's supervisor, Deputy Attorney General Bilderback, who Ms. Tiedemann had suggested I contact. I told Mr. Bilderback that I had spoken with Mr. Ware and requested the ATF's file on Mr. Richardson. I told Mr. Bilderback that Mr. Ware had said that ATF would release the file to me if Mr. Bilderback's office asked that he do so. I asked Mr. Bilderback to make a written request to Mr. Ware that the information be released to me. Mr. Bilderback said that his office would not ask ATF to release any information to me or my office.

19. I never received any response from ATF to my request to view its file on Mr. Richardson.

20. In a prior declaration, I described efforts I made during 2015 to contact and interview Vincent Oliver, the attorney who represented Fermin Guerrero at his 2003 murder trial.

21. On October 20, 2016, I called Mr. Oliver again at his law office. His secretary answered, and said he was not available. I left a message and my telephone number, and told her who I was and that I represented Fermin Guerrero,

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and that I would like to speak with Mr. Oliver about Mr. Guerrero's case. The secretary said she would give the message to Mr. Oliver. I never received a return telephone call or any other communication from Mr. Oliver.

22. On November 1, 2016, I spoke by telephone with Sergeant Raymond Lugo, one of the two Los Angeles Sheriff's Department officers who investigated Mr. Guerrero's homicide case in 2002 and 2003. I asked Sergeant Lugo to run searches for Mr. Guerrero and Raul Macias in the CalGang database to see whether the database indicated that they had any gang affiliation. Sergeant Lugo said that CalGang information is ordinarily purged every five years, but that he would run CalGang searches for both names.

23. Also on November 1, 2016, I sent an email message to Sergeant Lugo setting forth my request that he run the CalGang searches. A true and correct copy of my email to Mr. Lugo is attached as Exhibit 6 to this declaration.

24. On November 7, 2016, I spoke again with Mr. Lugo by telephone. He told me that he had an analyst in his office run CalGang searches for Mr. Guerrero and Raul Macias, and that no information for either individual came up in CalGang.

25. On November 21, 2016, I received an email message from Mr. Lugo, that forwarded an email message from Alex Mancia, a Crime Analyst with the Los Angeles County Sheriff's Department. The message from Mr. Mancia said that he had checked "Palantir, Coplink, and RAPS," but that no gang ties came up in any of the databases for either Mr. Guerrero or Raul Macias.

26. A true and correct copy of the forwarded email message I received from Mr. Lugo is attached as Exhibit 7 to this declaration.

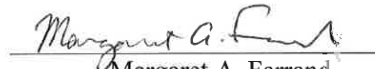
27. Also on November 21, 2016, I spoke by telephone with Sergeant Lugo about the forwarded email from Mr. Mancia. Mr. Lugo told me that the

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Palantir database contains information about gang affiliations of family members of the individuals for whom searches are conducted.

28. Also on November 21, 2016, I spoke by telephone with Mr. Mancia and asked him about the Palantir, Coplink, and RAPS databases. Mr. Mancia said that they are different databases, which search different categories of documents. The Palantir database searches all documents in the Los Angeles County Sheriff's Department records management system, including but not limited to arrest reports. Palantir also searches records of visits by the subject individuals to other individuals who are incarcerated and gang affiliated. Thus, a Palantir search will show, among other things, whether the individual being searched visited a gang-affiliated person in jail or prison. Mr. Mancia said that the Coplink database accesses criminal records from other counties, to show the individual's police contacts in those counties. He said that the RAPS database accesses individuals' rap sheets, or criminal histories, including any information about the individual's gang affiliation contained in the rap sheets. He said that rap sheets and criminal histories are never purged.

I declare under penalty of perjury under the laws of the state of the United States of America and the state of California that the foregoing is true and correct and that this declaration was executed this 21st day of November, 2016, at Los Angeles, California.


Margaret A. Farrand

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EXHIBIT 1 TO EXHIBIT 106



FW: Guerrero
Colleen M. Tiedemann
to:
Margaret Farrand (Margaret_Farrand@fd.org)
01/26/2016 12:33 PM
Hide Details
From: "Colleen M. Tiedemann" <Colleen.Tiedemann@doj.ca.gov>
To: "Margaret Farrand (Margaret_Farrand@fd.org)" <Margaret_Farrand@fd.org>
History: This message has been replied to and forwarded.

[Here's the email I sent yesterday.](#)

From: Colleen M. Tiedemann
Sent: Monday, January 25, 2016 2:26 PM
To: Alyssa Bell (Alyssa_Bell@fd.org)
Subject: Guerrero

Hi Alyssa. I have reviewed the ATF CI file for Richardson, but I did not make copies and I do not have possession of any copies. Based on my review and discussions with agents, it appears that Richardson was working with various federal agencies on cases. ATF paid him \$3750 for relocation and incidental fees in relation to the Guerrero case.

Colleen

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

EXHIBIT 2 TO EXHIBIT 106

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST 2nd STREET
LOS ANGELES, CALIFORNIA 90012-4202
213-894-2854
213-894-1221 FAX

HILARY POTASHNER
Acting Federal Public Defender
CHRISTOPHER W. DYBWAD
Chief Deputy

MARGO A. ROCCONI
Supervising Attorney
Capital Habeas Unit

Direct Dial: (213) 894-7528

March 11, 2016

Paul Ware
Division Counsel, Los Angeles Field Division
Bureau of Alcohol, Tobacco, and Firearms
550 North Brand Blvd.
Glendale, CA 91203
[REDACTED]

Re: Fermin Guerrero v. Raul Lopez, U.S. District Court Case number 10-cv-08257-ODW

Dear Mr. Ware:

Together with my co-counsel, Celeste Bacchi, I represent Fermin Guerrero in his currently-pending federal habeas corpus case, *Fermin Guerrero v. Raul Lopez*, U.S. District Court case number 10-cv-08257-ODW. You and I spoke by telephone earlier today, March 11, 2016, regarding my request to obtain access to your agency's file regarding an individual named Jimmy Richardson, who acted as a confidential informant in Mr. Guerrero's case in 2002 and 2003.

As I mentioned in our telephone conversation today, counsel for the government in Mr. Guerrero's case, Deputy Attorney General Colleen Tiedemann, has told me that she previously reviewed Mr. Richardson's ATF file, and that it contains records showing that ATF paid Mr. Richardson at least \$3,750 in connection with his assistance in Mr. Guerrero's case. Therefore, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), I am writing to request permission to view and obtain a copy of Mr. Richardson's entire CI file.

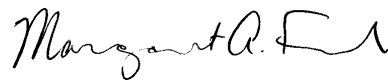
If your office is not willing to permit my co-counsel and me to examine Mr. Richardson's entire file, I am requesting, in the alternative, copies of any and all information contained in the file that reflect and/or relate to any payments and/or other inducements to Mr. Richardson from any government agency or agencies, in connection with Mr. Guerrero's case. My request includes all documents reflecting and/or relating to any and all indications made to Mr. Richardson and/or his legal counsel, by any government agency, that Mr. Richardson could potentially benefit from assisting the state in its investigation and/or prosecution of Mr. Guerrero, and/or in connection with other cases during the 2002-2003 time period. This includes

March 10, 2016
Margaret A. Farrand to Lowell Anger

any and all indications of possible leniency in other cases and/or warrants pending or outstanding against Mr. Richardson, and/or other indications of possible benefit in connection with Mr. Guerrero's and/or other cases. It also includes any actual benefits conferred.

Please feel free to call me at (213) 894-7528, should you have any questions. Thank you for your attention to this matter.

Sincerely,



Margaret A. Farrand
Deputy Federal Public Defender

EXHIBIT 3 TO EXHIBIT 106



{In Archive} Request for Jimmy Richardson File

Margaret Farrand to: paul.ware

Cc: Celeste Bacchi

03/11/2016 04:45 PM

Archive: This message is being viewed in an archive.

Dear Mr. Ware:

Per our telephone conversation today, I am sending you the attached letter pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), requesting to view and copy, or alternatively receive copies of certain information contained in, the file of confidential informant Jimmy Richardson. Please send me an email confirming you received this request.

Thank you,

Margaret A. Farrand
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012
213.894.7528



- 2016-03-11 Letter to ATF Agent Paul Ware.pdf

EXHIBIT 4 TO EXHIBIT 106



{In Archive} Re: Request for Jimmy Richardson File
Paul.J.Ware to: Margaret_Farrand

03/11/2016 11:22 PM

History: This message has been replied to.
Archive: This message is being viewed in an archive.

Ms. Farrand,

I received the email and will work on this Monday. Have a great weekend.

Best Regards,

Paul

Sent from my iPhone

> On Mar 11, 2016, at 4:47 PM, Margaret Farrand <Margaret_Farrand@fd.org>
> wrote:

>

>

> Dear Mr. Ware:

>

> Per our telephone conversation today, I am sending you the attached letter
> pursuant to Brady v. Maryland, 373 U.S. 83 (1963), requesting to view and
> copy, or alternatively receive copies of certain information contained in,
> the file of confidential informant Jimmy Richardson. Please send me an
> email confirming you received this request.

>

> Thank you,

>

> Margaret A. Farrand
> Deputy Federal Public Defender
> 321 East 2nd Street
> Los Angeles, CA 90012
> 213.894.7528

>

>

>

>

>

> (See attached file: 2016-03-11 Letter to ATF Agent Paul Ware.pdf)
> <2016-03-11 Letter to ATF Agent Paul Ware.pdf>

EXHIBIT 5 TO EXHIBIT 106



{In Archive} Guerrero v. Lopez: Conversation re DA and ATF Files

Margaret Farrand to: Colleen M. Tiedemann

03/11/2016 04:02 PM

Cc: Celeste Bacchi

Archive:

This message is being viewed in an archive.

Colleen:

I wanted to send you this email to confirm our discussion today about my request to access the District Attorney's file in Fermin Guerrero's federal habeas corpus case, as well as the file maintained on Jimmy Richardson by the bureau of Alcohol, Tobacco, and Firearms (ATF). You mentioned in a January 25, 2016 email to my co-counsel, Alyssa Bell, (which you then forwarded to me), that you had reviewed Mr. Richardson's ATF file and had "discussions with agents" regarding the file, and that your review and discussions confirmed that ATF had paid Mr. Richardson \$3,750 "for relocation and incidental fees in relation to the Guerrero case." However, you said in that email that you did not make a copy of the ATF file and did not have possession of any copies.

This past Tuesday, March 8, 2016, you and I spoke by telephone and you gave me the name and telephone number of Lowell Anger, the Deputy District Attorney in charge of releasing the district attorney's file on Mr. Guerrero's case. I spoke with Mr. Anger by telephone on March 8, 2016, after my discussion with you, and Mr. Anger said his office would release the file to us if you told him you had no objection. Today, when I spoke with you, you said that you do object to Mr. Anger releasing the district attorney's file to our office "at this point," and that you will not permit him to do that.

You also, this afternoon, gave me the name, address, and telephone number of Paul Ware, the Division Counsel of the Los Angeles Field Division for the Bureau of Alcohol, Tobacco, and Firearms, who you advised me to contact regarding my request for Mr. Richardson's ATF CI file. I called Mr. Ware today at the number you provided, [REDACTED], and spoke with him, and he said that he was not aware that you had viewed the ATF file for Mr. Richardson, but that the ordinary procedure followed by his office is that counsel for the state (such as you, in this case), views the file and requests copies of all Brady material, which his office then copies and releases to counsel for both sides. He said his office is amenable to providing me with documents in Mr. Richardson's ATF file regarding the payments made to Richardson, upon written request from you.

Based on my conversation with Mr. Ware, I am planning to make a written request to him to view and obtain copies of all information in Mr. Richardson's file relating to his receipt of monetary or other benefits or inducements, including any and all offers or indications of possible benefits, in exchange for his assistance in Mr. Guerrero's case. I also ask that you make a written request of Mr. Ware that he send such information to us, per his description of his office's ordinary procedures. Please let me know if you have any questions regarding this request.

Thank you,
Margaret

Margaret A. Farrand
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012
213.894.7528

EXHIBIT 6 TO EXHIBIT 106



Fermin Guerrero homicide case
Margaret Farrand to: RELUGO

11/01/2016 05:40 PM

Dear Sergeant Lugo:

Thank you for speaking with me today about the 2003 homicide case People v. Fermin Guerrero, Compton Superior Court case TA069079. As I mentioned, I currently represent Mr. Guerrero in his federal and state habeas corpus cases. His federal habeas corpus case is Guerrero v. Madden, U.S. District Court case number 10-08257. His state habeas corpus case is currently pending in the California Supreme Court, case number S231775.

As I mentioned, there was testimony presented at trial that Mr. Guerrero was an admitted member of the Eastside Paramount street gang, according to the CalGang database, but there was not testimony about the specific field identification (FI) card that provided that information. If you could please check CalGang for Mr. Guerrero, to see if there is any information in there for him, I would appreciate it.

Mr. Guerrero's information is:

Full name: Fermin Acedo Guerrero
DOB: [REDACTED] 1979.

If you could please also check CalGang for a person named **Raul Macias (DOB [REDACTED] 1982; address [REDACTED] Perris, California)**, that would be much appreciated.

Please feel free to contact me if you have any questions. I am also attaching some of the police reports from the case, to help refresh your memory of the incident.

Thank you for your attention to this matter,

Margaret A. Farrand
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012
213.894.7528



Guerrero Police Reports.pdf

EXHIBIT 7 TO EXHIBIT 106

Gmail - Fwd: Guerrero and Macias

Page 1 of 2



Margaret Farrand <[REDACTED]@[REDACTED]>

Fwd: Guerrero and Macias

Lugo, Raymond E. <[REDACTED]>
To: "Margaret Farrand" <[REDACTED]@[REDACTED]>

Sun, Nov 20, 2016 at 7:21 PM

Sent from my iPhone

Begin forwarded message:

From: "Lugo, Raymond E." <[REDACTED]>
Date: November 20, 2016 at 7:06:05 PM PST
To: "margaret.farrand@fd.org" <margaret.farrand@fd.org>
Subject: Fwd: Guerrero and Macias

Sent from my iPhone

Begin forwarded message:

From: "Lugo, Raymond E." <[REDACTED]>
Date: November 18, 2016 at 10:20:17 AM PST
To: "Lugo, Raymond E." <[REDACTED]>
Subject: Fwd: Guerrero and Macias

Sent from my iPhone

Begin forwarded message:

From: "Mancia, Alex" <[REDACTED]>
Date: November 9, 2016 at 7:01:21 PM PST
To: "Lugo, Raymond E." <[REDACTED]>
Subject: FW: Guerrero and Macias

Hey Ray, when you get a chance, can I get a file number to submit OT for this?

Thanks,

Alex Mancia

Crime Analyst- Homicide

Desk: [REDACTED]

Cell: [REDACTED]

From: Mancia, Alex
Sent: Monday, November 07, 2016 9:57 PM

<https://mail.google.com/mail/u/0/?tf=1&ui=2&ik=3dadfb7a68&view=pt&search=inbox&...> 11/21/2016

Exhibit 106 - 541

Appx. 116

Gmail - Fwd: Guerrero and Macias

Page 2 of 2

To: Lugo, Raymond E. <[REDACTED]>
Subject: Guerrero and Macias

Ray,

I searched Palantir, Coplink, and RAPS. I was not able to locate any gang ties for Guerrero nor Macias.

Alex Mancía

Crime Analyst- Homicide

Desk: [REDACTED]
[REDACTED]

Cell: [REDACTED]

<https://mail.google.com/mail/u/0/?tf=1&ui=2&ik=3dadfb7a68&view=pt&search=inbox&...> 11/21/2016

CASH BOND
RECOMMENDED \$ 25,000.00
GROVER C. TRASK
DISTRICT ATTORNEY



AGENCY#: P102318010/RPD
FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

NOV 15 2002

ja

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
(Riverside)

THE PEOPLE OF THE STATE OF CALIFORNIA,

D.A.# 153131

Plaintiff,

CASE NO. *Rif106814*

v.

FELONY COMPLAINT

JIMMY MARVIN RICHARDSON
DOB: [REDACTED] 1976
BOOKING# 200244015

DRUG CALENDAR
PC 1000 DIVERSION PC 1210.1 REFERRED
Eligible _____ YES _____
Not Eligible X NO X
Unknown if Eligible _____

Defendant.

COUNT 1

The undersigned, under penalty of perjury upon information and belief, declares: That the above named defendant, JIMMY MARVIN RICHARDSON, committed a violation of Health and Safety Code section 11378, a Felony, in that on or about November 13, 2002, in the County of Riverside, State of California, he did wilfully and unlawfully possess for sale a controlled substance, to wit, METHAMPHETAMINE.

COUNT 2

That the above named defendant, JIMMY MARVIN RICHARDSON, committed a violation of Penal Code section 476, a Felony, in that on or about November 13, 2002, in the County of Riverside, State of California, he did wilfully and unlawfully make, pass, utter, publish, or possess, with intent to defraud any other person, 100 DOLLAR BILLS.

I declare under penalty of perjury upon information and belief under the laws of the State of California that the foregoing is true and correct.

Dated: November 15, 2002
MGS:smg

Grace B. Brundell
Complainant

COURT ORIGINAL

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): ANN GOTTESMAN, ESQ. 740 E. Colorado Blvd., Suite 204, Pasadena TELEPHONE NO.: 818-606-3142 FAX NO. (Optional): 626-792-0087 E-MAIL ADDRESS (Optional): anngottesman@hotmail.com ATTORNEY FOR (Name): JIMMY RICHARDSON		Ca bar 243220 FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE MAR 09 2009 M RICO
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: JIMMY M. RICHARDSON		CASE NUMBER: RIF106814
PETITION FOR DISMISSAL (Pen. Code, §§ 17, 1203.4, 1203.4a)		
DEFENDANT'S INFORMATION CII: DRIVER'S LIC #: MS [REDACTED] SSN # (LAST FOUR DIGITS ONLY): DATE OF BIRTH: [REDACTED]/1976		


MAR 17 2009
 1:13

- On (date): 3/12/2003 the defendant in the above-entitled criminal action was convicted of a violation of section(s) (specify): HS 11378, PC476 of the (specify): Health & Safety and Penal Code.
- The offense was a misdemeanor felony.
 Felony offense (Pen. Code, § 17):
 The offense listed above is a felony that may be reduced to a misdemeanor under Penal Code section 17.
- Offense with probation granted (Pen. Code, § 1203.4):
 Probation was granted on the terms and conditions set forth in the docket of the above-entitled court; the defendant is not serving a sentence for any offense, nor on probation for any offense, nor under charge of commission of any crime, and the defendant has
 - fulfilled the conditions of probation for the entire period thereof.
 - been discharged from probation prior to the termination of the period thereof.
- Offense with sentence other than probation (Pen. Code, § 1203.4a):
 Probation was not granted; more than one year has elapsed since the date of pronouncement of judgment. The defendant has complied with the sentence of the court and is not serving a sentence for any offense nor under charge of commission of any crime, and since said pronouncement of judgment has lived an honest and upright life and conformed to and obeyed the laws of the land.

Petitioner requests that defendant be permitted to withdraw the plea of guilty, or that the verdict or finding of guilt be set aside and a plea of not guilty be entered and the court dismiss this action under section 1203.4 or 1203.4a of the Penal Code.

Petitioner requests that the felony charge be reduced to a misdemeanor under Penal Code section 17.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on: 2/18/2009 at Gulfport, Mississippi California

 (SIGNATURE OF PETITIONER OR ATTORNEY)

 (ADDRESS, DEFENDANT) Gulfport MS 39503
 (CITY) (STATE) (ZIP CODE)

Law Office of Ann Gottesman
740 E. Colorado Blvd., Suite 204
Pasadena, CA 91101
Ph: (818) 606-3142 / Fax: (626) 792-0087
anngottesman@hotmail.com

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and a resident of the County of Los Angeles. My business address is 740 E. Colorado Blvd., Suite 204, Pasadena, CA 91101. I am over the age of eighteen years and not a party to the within-entitled action.

That on February 20, 2008, I caused a copy of the within:


PETITION FOR DISMISSAL (Expungement pursuant to Penal Code section 1203.4 and 1203.4a)

to be served on the following recipients:

1. **Riverside Superior Court
4100 Main Street
Riverside, CA. 92501**
2. **District Attorney
4075 Main Street
Riverside, CA. 92501**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 20, 2008, at Pasadena, California.


Ann Gottesman, Esq.

Tabri 210



ROD PACHECO
DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF RIVERSIDE

RECEIVED F / 3 4 09

MAR 5 PM 12:42

REQUEST FOR DISPOSITION OR RULING

DATE: 3/4/09

TO: SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

CASE NUMBER: RIF106814

DEFENDANT NAME: Richardson, Jimmy

OFFENSE CHARGED: 11378 HS, 476 PC

The office of the District Attorney of Riverside County requests the following disposition or ruling:

(GRANT) (DENY) request for relief pursuant to section 1203.4 P.C. for the following reason(s):

Very truly yours,

ROD PACHECO
District Attorney

Deputy District Attorney

Forms 1203.4

4075 MAIN STREET • RIVERSIDE, CA 92501
951-955-5400


CR-181

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): ANN GOTTESMAN, ESQ. Cal No. 243220 740 E. Colorado Blvd., Suite 204 Pasadena, CA 91101 TELEPHONE NO: 818-606-3142 FAX NO. (Optional): 626-792-0087 E-MAIL ADDRESS (Optional): anngottesman@hotmail.com ATTORNEY FOR (Name): JIMMY RICHARDSON		FOR COURT USE ONLY FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE MAR 09 2009 M RICO
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: JIMMY RICHARDSON		CASE NUMBER: RJF106814
ORDER FOR DISMISSAL (Pen. Code, §§ 17, 1203.4, 1203.4a)		
DEFENDANT'S INFORMATION CI: DRIVER'S LIC #: MS [REDACTED] SSN # (LAST FOUR DIGITS ONLY): [REDACTED] DATE OF BIRTH: [REDACTED]/1976		

MAR 17 2009 102

- The court denies the petition.
- The court grants the petition. The court finds from the records on file in this case, and from the foregoing petition, that the defendant is eligible for the relief requested.
- The court reduces the felony offense to a misdemeanor.
- It is ordered that the plea, verdict, or finding of guilt in the above-entitled action be set aside and vacated and a plea of not guilty be entered and that the complaint be, and is hereby, dismissed. If this order is granted under the provisions of Penal Code section 1203.4, the defendant is required to disclose the above conviction in response to any direct question contained in any questionnaire or application for public office or for licensure by any state or local agency, or for contracting with the California State Lottery. Further, if this order is granted under the provisions of Penal Code section 1203.4, the defendant may also be eligible to obtain a certificate of rehabilitation and pardon under the procedure set forth in Penal Code section 4852.01 et seq.
- If the order is granted under the provisions of either Penal Code section 1203.4 or 1203.4a, the defendant is released from all penalties and disabilities resulting from the offense except as provided in Penal Code sections 12021 and 12021.1 and Vehicle Code section 13555. The dismissal does not permit a person to own, possess, or have in his or her control a firearm if prevented by Penal Code sections 12021 or 12021.1. In addition, as required by Penal Code section 299(f), relief under Penal Code sections 17, 1203.4, or 1203.4a does not release defendant from the separate administrative duty to provide specimens, samples, or print impressions under the DNA and Forensic Identification Database and Data Bank Act (Pen. Code, § 295 et seq.) if defendant was found guilty by a trier of fact, not guilty by reason of insanity, or pled no contest to a qualifying offense as defined in Penal Code section 296(a).

Date: 3/4/09


 (JUDICIAL OFFICER)



RIVERSIDE SUPERIOR COURT

PUBLIC ACCESS

Minute Order

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 11/15/2002	Action Time: 1:30 PM	Department: 100
Action Description: Felony Incustody Arraignment		
<p>Honorable Judge Richard T. Fields Presiding.</p> <p>Courtroom Assistant: T. Koenig</p> <p>Court Reporter: T. Casal.</p> <p>People represented by Deputy District Attorney: STRINGER.</p> <p>Defendant represented by DPD-DILLE.</p> <p>Defendant Present.</p> <p>At 14:38, the following proceedings were held:</p> <p>Hearing Continued at the request of Defense. Matter continued to 11/19/2002 at 8:30 in Department 34.</p> <p>Defendant ordered to return.</p> <p>Defendant waives time for ARRAIGNMENT.</p> <p>Defendant ordered to return.</p> <p>Bail Set in Amount of \$25000.00.</p> <p>Remains remanded to custody of Riverside Sheriff.</p> <p>Minute Order printed to Robert Presley Detention Center.</p>		

RIVERSIDE SUPERIOR COURT

PUBLIC ACCESS

Minute Order

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 11/19/2002	Action Time: 8:30 AM	Department: 00
Action Description: Felony Incustody Arraignment		
<p>Honorable Judge Richard T. Fields Presiding.</p> <p>Clerk: T.KOENIG.</p> <p>Court Reporter: J.WILLIAMS</p> <p>People represented by Deputy District Attorney: AKI.</p> <p>Defendant represented by DPD-DILLE.</p> <p>Defendant Present.</p> <p>At 14:12, the following proceedings were held:</p> <p>Defendant waives formal arraignment.</p> <p>Defendant withdraws plea of not guilty as to count(s) 1 2 and is rearraigned.</p> <p>Defendant Waives Constitutional Rights.</p> <p>Defendant advised of right to trial by jury.</p> <p>Defendant advised of right to confront and cross examine witnesses; right to present evidence on own behalf.</p> <p>Defendant advised of privilege against self-incrimination.</p> <p>Defendant advised of charges and consequences of his/her plea and statutory sentencing.</p> <p>Court finds based on inquiry and examination of deft, that deft has the ability to understand and does understand his/her constitutional rights.</p> <p>Defendant waives right to Trial by Jury.</p> <p>Defendant waives right to confront and cross examine witnesses.</p> <p>Defendant waives privilege against self incrimination.</p> <p>Defendant waives rights to Preliminary Hearing. District Attorney and Court consent to waiver.</p> <p>Defendant pleads Guilty to Count(s) 1 2.</p> <p>Defense counsel concurs in defendants plea and/or admissions.</p> <p>Case certified to Superior Court</p> <p>Commence Certification.</p> <p>Court finds plea is free and voluntary. Court finds deft. knows and understands constitutional rights, nature of charges and consequences of plea.</p> <p>Court finds factual basis for: PLEA.</p>		

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 11/19/2002	Action Time: 8:30 AM	Department: 00
Action Description: Felony Incustody Arraignment		
Defendant waives probation referral.		
Specification of Plea: LT 16 MOS SP		
Sentencing is set for 12/19/2002 at 8:30 in Dept. 34.		
Defendant ordered to return.		
Defendant waives time for SENTENCING PLUS 15 CT DAYS.		
Released on O.R.		
Minute Order printed to Robert Presley Detention Center.		

RIVERSIDE SUPERIOR COURT

PUBLIC ACCESS

Minute Order

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 12/19/2002	Action Time: 8:30 AM	Department: 01
Action Description: Sentencing		
<p>Counsel/Parties stipulate the Judge Pro Tem/Commissioner, as indicated above, may hear this matter.</p> <p>Honorable Judge Jay P. Grossman Presiding.</p> <p>Courtroom Assistant: T. Koenig</p> <p>Court Reporter: T. Casal.</p> <p>People represented by Deputy District Attorney: AKI.</p> <p>Defendant represented by DPD=RICE.</p> <p>Defendant Present.</p> <p>At 10:37, the following proceedings were held:</p> <p>Hearing Continued at the request of Defense. Matter continued to 01/22/2003 at 8:30 in Department 34.</p> <p>Defendant ordered to return.</p> <p>Defendant waives time for SENTENCING PLUS 15 CT DAYS.</p> <p>Defendant ordered to return.</p> <p>Own Recognizance (O.R.) release continued.</p>		

RIVERSIDE SUPERIOR COURT

PUBLIC ACCESS

Minute Order

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 1/22/2003	Action Time: 8:30 AM	Department: 01
Action Description: Sentencing		
<p>Honorable Judge Helios J. Hernandez Presiding.</p> <p>Clerk: J.MARTIN/KL.</p> <p>Court Reporter: K. Gunn.</p> <p>People represented by Deputy District Attorney: M.LOMAZOW.</p> <p>Defendant represented by DPD D.RICE.</p> <p>Defendant Present.</p> <p>Hearing Continued at the request of Defense. Matter continued to 04/22/2003 at 8:30 in Department 34.</p> <p>Defendant waives time.</p> <p>Defendant ordered to return.</p> <p>Own Recognizance (O.R.) release continued.</p>		

RIVERSIDE SUPERIOR COURT

PUBLIC ACCESS

Minute Order

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 3/12/2003	Action Time: 8:30 AM	Department: 00
Action Description: Sentencing		
<p>Honorable Judge Helios J. Hernandez Presiding.</p> <p>Courtroom Assistant: D. Mathieu</p> <p>Court Reporter: K. Gunn.</p> <p>People represented by Deputy District Attorney: S. Rothman.</p> <p>Defendant represented by DPD-D. Rice.</p> <p>Defendant Present.</p> <p>No legal cause why sentence should not now be pronounced.</p> <p>Proceedings Are Suspended. (SENT)</p> <p>For The Charge(s) 1 2.</p> <p>Formal Probation is granted for a period of 36 months under the following terms and conditions:</p> <p>Obey all laws and ordinances</p> <p>Be committed to custody of RSO for moderate period of time, 8 days;</p> <p>Credit for time served (presentence) of 6 actual days plus 2 days pursuant to 4019 PC for a total of 8 days.</p> <p>Not possess/use/have in your control any controlled substances/drug related paraphernalia unless medically prescribed; prescribed useage rptd to P.O..</p> <p>Submit to immed search of person,auto,home,premises,garage,storage areas & personal/leased property with or w/o cause by PO or law enforcement officer</p> <p>Pay the actual cost of court ordered drug testing through and as directed by the Probation Officer;</p> <p>Report any law enforcement contacts to the Probation Officer within 48 hours.</p> <p>Register immediately/upon release from custody and thereafter as reqd by law, with local law enforcement agency as to your residence purs. 11590 H&S;</p> <p>Deft is not required to report to probation nor is he required to pay costs or fines/fees.</p> <p>Defendant accepts terms and conditions of probation.</p> <p>Close Case.</p> <p>Released On Probation</p> <p>Close Case.</p>		

RIVERSIDE SUPERIOR COURT

PUBLIC ACCESS

Minute Order

Defendant Name: JIMMY MARVIN RICHARDSON		
Case Number: RIF106814		File Date: 11/15/2002
Action Date: 3/9/2009	Action Time: 8:30 AM	Department: 00
Action Description: Ex Parte Hearing Re: Petition for Dismissal		
<p>Honorable Judge John D. Molloy Presiding.</p> <p>Courtroom Assistant: M. Rico</p> <p>Court reporter was not present for the following proceedings:</p> <p>Defendant represented by Pvt-Ann Gottesman (not present).</p> <p>Defendant is not present.</p> <p>1203.4/1203.4(a)PC motion granted. Plea of guilty/conviction set aside. Plea of not guilty entered. Case ordered dismissed.</p> <p>Defendant Released.</p> <p>Copy of Petition and Order furnished to Attorney A. Gottesman by mail. .</p> <p>Save Minute Order to case.</p> <p>MINUTE ORDER OF COURT PROCEEDING</p> <p>Close Case.</p>		

FILE NUMBER 002-17255-1368-011

WITNESS ADMONITION - MUG SHOW UP

1. YOU ARE ABOUT TO VIEW A SERIES OF SIX PHOTOGRAPHS OF SIMILAR APPEARING INDIVIDUALS.
2. THE SUBJECT WHO WAS INVOLVED IN THIS CRIME MAY OR MAY NOT BE AMONG THESE PHOTOGRAPHS.
3. YOU ARE UNDER NO OBLIGATION TO MAKE AN IDENTIFICATION.
4. THE PURPOSE OF SHOWING YOU THESE PHOTOGRAPHS IS TO ELIMINATE THE INNOCENT AS WELL AS TO IDENTIFY THE PERSON RESPONSIBLE.

SIGNATURE: Catalina R Avila

DATE: 1-14-03 TIME: _____

WITNESS: [Signature]

AMONESTACION A TESTIGOS - NOSTRACION DE FOTOGRAFIA "MUG"

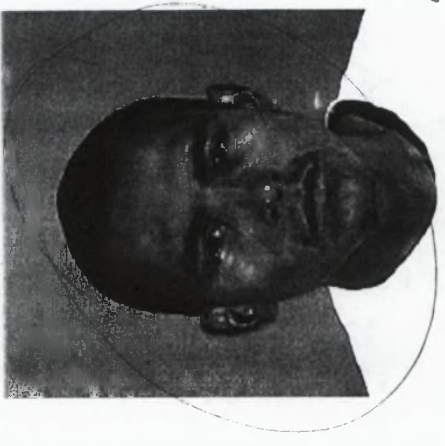
1. USTED VA A MIRAR UN SERIE DE SEIS FOTOGRAFIAS DE INDIVIDOS DE APARENCIA PARECIDA.
2. EL SOSPECHADO IMPLICADO EN ESTE CRIMEN PUEDE O NO PUEDE ESTAR ENTRE ESTAS FOTOGRAFIAS.
3. USTED NO ESTA OBLIGADO DE HACER UNA IDENTIFICACION.
4. EL OBJETO DE DEMOSTRARLE ESTAS FOTOGRAFIAS ES PARA ELIMINAR A PERSONAS INOCENTES Y PARA IDENTIFICAR A LA PERSONA QUE ES CULPABLE.

FIRMA: _____

FECHA: _____ HORA: _____

TESTIGO: _____

45



*look like
S*

46



ID:49249 Name:02-17255

X Catherine Duval
<http://lacris/print.asp>

1/14/03

COUNTY OF LOS ANGELES - SHERIFF'S DEPARTMENT - SUPPLEMENTARY REPORT

DATE: JANUARY 15, 2003

FILE NO.: 002-17255-1368-011

C: MURDER - 187 P.C.

ACTION: ACTIVE/INVESTIGATION
CONDUCTED/EVIDENCE SEIZED/
WITNESSES INTERVIEWED/
CORONER'S CASE #2002-05277

V: ORTIZ, JOSE MH, DOB: [REDACTED]-1977

D: 07-14-2002 (SUNDAY) AT 2219 HOURS

L: [REDACTED]
PARAMOUNT, CALIFORNIA 90723

S: (SEE NARRATIVE)

EVIDENCE HELD:

- Item #1: Bloody gray shirt.
- Item #2: Small clear plastic baggy containing a white powdery substance resembling methamphetamine.
- Item #3: Copper bullet jacket fragment.
- Item #4: Two expended bullets.
- Item #5: Copper bullet jacket fragment.
- Item #6: Black and white rubber sandal, right side.
- Item #7: Black and white rubber sandal, left side.
- Item #8: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #9: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #10: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."

JANUARY 15, 2003

-2-

002-17255-1368-011

- Item #11: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #12: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #13: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #14: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #15: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #16: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #17: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #18: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #19: Expended 9mm shell casing, head stamped "Winchester 9mm Luger."
- Item #20: Revolver, Colt, .38 caliber, Serial #752971.
- Item #21: Coroner's evidence envelope containing one lead core and copper bullet jacket.
- Item #22: Coroner's evidence envelope containing one lead core, bullet fragments, and copper bullet jacket fragments.
- Item #23: Coroner's evidence envelope containing one lead bullet core.
- Item #24: Coroner's evidence envelope containing one medium caliber copper-jacketed bullet.
- Item #25: Coroner's evidence envelope containing one medium caliber copper-jacketed bullet.
- Item #26: Coroner's evidence envelope containing one medium caliber copper-jacketed bullet.
- Item #27: Coroner's evidence envelope containing one corroded lead bullet, small caliber.

Evidence Items #21 through #27 were booked into Homicide Bureau evidence, Book #2, page 58.

15

JANUARY 15, 2003

-3-

002-17255-1368-011

On 07-15-2002 at 0045 hours, Investigators Boyd Zumwalt and Raymond Lugo were dispatched from their respective residences to the [REDACTED] Avenue in the city of Paramount to investigate the circumstances surrounding the murder of Victim Jose Ortiz.

Investigators arrived at 0145 hours. Upon their arrival, they met with the handling deputy, Deputy Joe Esqueda, #412552, assigned to Paramount Substation Unit #136B, early mornings, 2200 to 0600 hours. Deputy Esqueda related the following:

Deputy Esqueda received a call at approximately 2215 hours on 07-14-2002 that stated a 245 just occurred (Tag #536). He arrived at approximately 2220 hours. The first unit to arrive was Unit #136G9, p.m.'s, Deputy DeLeon, #438031. Deputy DeLeon apparently had arrived from the south and saw the victim in the street.

The call indicated the victim was 417 (armed with a gun). Deputy DeLeon approached the victim, who was conscious but unresponsive. There was a gun in his right hand, his finger was on the trigger, and the hammer was back. It was later determined that the gun, a .38 caliber Colt revolver, was loaded with six rounds in the cylinder. None of the rounds had apparently been fired. The serial number on the revolver is 752971.

The victim was then transported by Engine Company #31, under the command of Captain Ansida, to St. Francis Hospital, where he was pronounced dead.

There were apparently two witnesses in the area who heard shots, came out, and saw a green newer-model Camaro traveling southbound out of view from the location. According to Deputy Esqueda, the victim had "18th Street" tattooed on his stomach. The victim was identified at the scene by his sister, Maria Ortiz, who lives one street east of the location, at [REDACTED], phone number [REDACTED].

Deputy Esqueda, who works in the area, stated that the area is claimed by the "East Side Paramount" gang as their turf. Paramount detectives at the scene related to Deputy Esqueda that a Paramount gangster named Frank, who lives at [REDACTED], may know who did the shooting.

Investigators were then given a walk-through of the location. On the ground in the area, Investigators observed numerous shell casings.

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Deputy Esqueda also stated that a lady's mom at [REDACTED] was apparently coming out of her house earlier when she saw four "gang bangers" in front of her house. She then left. She did not see what happened.

Deputy Esqueda also stated that a man apparently saw a green car at about 1500 hours and a female named Catalina Avalos also saw a green car.

SCENE

The location where the murder occurred, in the street in front of [REDACTED] in the city of Paramount, is an area consisting mainly of single-story, single-family dwellings. The [REDACTED] is a north/south residential street. There are two lanes of travel in either direction and parking lanes on either side of the street. [REDACTED] at this area is unusually wide, wider than a normal street.

The locations on the west side of the street have two houses per lot. The locations on the east side have one house per lot. In addition, both sides of the street have a concrete sidewalk and a grass median separating the sidewalk from the street, which is paved with asphalt. The location is bordered on the south by Madison Avenue, on the north by Adams Street, on the east by Indiana Avenue, and on the west by Orizaba Avenue.

Investigators observed streetlights on the east side of the street, every third house, running from the north corner. In addition, there are small trees in front of these houses and there is a speed bump in front of [REDACTED].

On 07-15-2002 at 0330 hours, Investigators checked the firearm that was taken from the victim by patrol deputies at the scene. This gun was photographed by Deputy Calzada of the Sheriff's Crime Lab, who, at the direction of Investigators, photographed the scene. Upon examining the gun, it was found to be a Colt .38 caliber Special revolver. In the cylinder were six live .38 caliber rounds; two were head stamped "WCC +P+ 38 Special" and were copper-jacketed hollow point bullets; one was head stamped "WW Super 38 Special +P"; one was head stamped "Winchester 38 Special +P"; one was head stamped "Winchester 38 Special"; and one was head stamped "RP 38 Special +P."

On 07-15-2002 at 1000 hours, Investigators met with Operation Safe Streets Detective Diviak, assigned to Paramount Station. Per Detective Diviak, members of the "T-Flats" gang, "Boo Boo" and a male named "Chucko," were in the neighborhood apparently trying to take it over. Both of these males hang out in the area of Jefferson and Virginia Avenue. Per unknown sources, Detective Diviak stated "the word" was that T-Flats "smoked" the victim. Another anonymous informant told Detective Diviak that the victim was shot and finished off while he was on the ground.

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On 07-16-2002 at 1445 hours, Investigators responded to the victim's residence at [REDACTED]. There they met the victim's father, **JOSE ORTIZ**, MH, DOB: [REDACTED]-1944, and his mother, **LUZ ORTIZ**, FH, DOB: [REDACTED]1953, phone number [REDACTED]. The victim's parents apparently last spoke to the victim the night he was murdered at approximately 2200 hours. The victim had said he was going to sleep. The victim sleeps in a converted garage, which was shown to Investigators by his parents. The victim apparently had said he was going to bed, and that was the last they saw of him.

When asked to take a look inside the victim's room, the parents stated that the room was locked and nobody had a key.

On 07-16-2002 at 1500 hours, Investigators interviewed **MARIA ORTIZ**, FH, DOB: [REDACTED] 1978, the victim's sister, regarding what she knew about the victim's murder. Maria Ortiz recalled her brother at the house talking. He received a phone call from Perla approximately one hour before the shooting. The line clicked and the victim hung up the phone. He then talked with his mom and left the house, going out to his room. Maria was in the kitchen when she heard his door slam. Her mother and father were in the bedroom.

Maria said she was in the kitchen when she heard the shots. The phone then rang and Ruben called looking for "Chito." The guy said it was an emergency. His mom said, "Do you know where Ruben is?" and Maria responded, "No." This same person called again and said, "Wake up Chito. It has to do with your brother." Maria told the male, "What the fuck do you want?" The male said, "Your brother Jose just got shot." Maria did not believe this and said, "Yeah, right. He's in his room." The male then said, "Chito got shot," then, "No, it's Jose." Maria told the person on the phone, "No, he's asleep," and then she asked, "Where is he?" and was told he was on Madison and Virginia. Maria said she and her "old man" then drove over to the location, where they saw the victim.

When asked about the victim's drug use and involvement in sales of drugs, Maria at first denied that he either used or sold drugs. She then later acknowledged that the victim would purchase a quantity of methamphetamine, split it in half, sell one half, and then use the other half.

Maria claimed she did not know the victim possessed a gun and said that somebody had told her that he had a gun. When asked about Ruben, she said he was a male who lived on [REDACTED] and was a drug user. When asked about the "Tortilla Flats" gang, Maria stated that her brother, the victim, got in a fight with one of the T-Flats while he was in jail. She also added that Ruben "kicks it" with the T-Flats. When asked what kind of person the victim was, whether he would leave the house undressed, Maria stated, "No." She stated that the victim never left the house without his shoes on and would never walk through Paramount.

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Maria had nothing further to add, and the interview was terminated.

On 07-17-2002 at 1520 hours, Investigators interviewed **MARIO RUIZ JR.**, the brother-in-law of the victim. Mario stated that on the night of the murder, he was at home with his stepson when he received a phone call from someone who stated that his girlfriend's brother, Jose, the victim, had been shot. The girlfriend, Maria, spoke to a male named Ruben. He then exited the house, ran around the corner to the scene, and saw numerous paramedics working on Jose.

Mario admitted he knew Jose sold methamphetamine but said he did not use it or sell large quantities; he just sold enough to keep himself on methamphetamine. When asked about the victim's personal habits and whether he would wander the streets late at night alone, Mario said, "No," that Jose never walked alone in Paramount.

Mario had nothing further to add at that time, and the interview was terminated.

Investigator Lugo contacted Deputy Barton at Lakewood Sheriff's Station. Deputy Barton advised Investigator Lugo that Ruben was Ruben Michael Novak, with an address of [REDACTED] in the city of Paramount and California driver's license number of # [REDACTED]

On 07-17-2002, an autopsy was conducted on the body of Victim Ortiz by Dr. Golden of the Los Angeles County Coroner's Office. At this time Dr. Golden stated that the victim had died as a result of multiple gunshot wounds and the mode of death was homicide. Investigator Zumwalt took custody of Evidence Items #21 through 27, which were removed from the victim. These items were transported to the Homicide Bureau and booked into evidence.

On 07-18-2002 at 1400 hours, Investigators interviewed **ALFONSO ORTIZ**, the victim's brother. Alfonso, who sleeps in the living room, was asleep when he heard his sister scream that his brother Jose had been shot. His sister said she knew Jose drank and when he drank, he used methamphetamine.

When asked if he knew who Ruben was, Alfonso said that Ruben is a local "tweaker" (methamphetamine user) who tries to "freeload" from gangsters. Alfonso said that his brother always wore his sandals when he left the house. He identified the sandals described to him that are in evidence as belonging to his brother.

Alfonso added that the victim had a problem with Tortilla Flats gang members. He had been previously "jammed up" by the Tortilla Flats gang members, who pointed a gun at him and were later arrested. After the shooting Ruben apparently tried to get Alfonso's attention but

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did not. Alfonso had also been told by his mother that a black Escalade had been driving around the house checking out their residence before the murder.

On the night of 07-18-2002, Investigators conducted a canvass of the area surrounding the murder.

On 07-18-2002 at 2230 hours, Investigator Zumwalt spoke with **NEAL GARCIA** at [REDACTED]. Mr. Garcia stated he heard shots and the sound of a car engine leaving the area fast. He came out and saw the victim lying on the street. When asked how many shots he heard, Mr. Garcia stated he first heard six shots, then an additional two shots.

Mr. Garcia had nothing further to add, and the interview was terminated.

On 07-18-2002 at 2230 hours, Investigator Lugo interviewed **FRANK MENDOZA** at [REDACTED] in the city of Paramount. Mr. Mendoza stated he was at work at the time of this shooting.

On 07-18-2002 at 2235 hours, Investigator Zumwalt interviewed **CARLOS ORTIZ**, MH/47, at [REDACTED]. Mr. Ortiz stated that at the time of the shooting, he was watching TV. He heard some shots, six or more, then the sound of the motor of a car driving off.

Mr. Ortiz had nothing further to add, and the interview was terminated.

On 07-18-2002 at 2240 hours, Investigator Zumwalt interviewed **FEDERICO HERNANDEZ**, MH/32, at [REDACTED]. Mr. Hernandez stated that he recalled hearing nine shots, then two more shots. He looked out his window and saw some guy on the ground.

Mr. Hernandez had nothing further to add, and the interview was terminated.

On 07-18-2002 at 2245 hours, Investigator Lugo spoke to **CATALINA AVALOS** at [REDACTED]. She stated that her husband, Francisco, may have some information but was not home. He is a truck driver and his hours vary. A card was left with Mrs. Avalos with pager numbers to both Investigators, but neither Investigator ever received a call from Francisco.

On 07-18-2002 at 2245 hours, Investigator Zumwalt spoke with **RICHARD ADAMS**, MW/52, at [REDACTED]. Mr. Adams stated that at the time of the incident, he had his doors open and heard the shots. First he heard five or six shots, then four or five others. As soon as Mr. Adams heard the shots, he hit the mute button on his TV. He looked out his door and saw a car go southbound on the street. He then heard a neighbor say, "They shot

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him," from across the street. He then heard a call for help. He then heard another yell, "Green Camaro." He then recalled seeing the son-in-law of Eloise walking out to check the victim.

Mr. Adams had nothing further to add, and the interview was terminated.

On 07-18-2002 at 2248 hours, Investigator Zumwalt spoke to **LUZ QUINTANILLA**, FH/36, at [REDACTED]. Ms. Quintanilla stated that at the time of the incident, she was in bed. She recalled hearing the shots and the sound of a car leaving.

Ms. Quintanilla had nothing further to add, and the interview was terminated.

On 12-23-2002, Investigator Zumwalt received a telephone message from Special Agent Mike Cote of the United States Bureau of Alcohol, Tobacco and Firearms, Riverside office. Agent Cote stated that an individual had related information to him regarding a murder committed in July of 2002 in the Paramount area. The person who committed the murder had been driving a dark Camaro and used a 9mm pistol to commit the murder. Investigators made arrangements to meet with the informant and interview him.

On 12-30-2002, Investigators Zumwalt and Lugo met with Special Agent Mike Cote of the Bureau of Alcohol, Tobacco and Firearms and United States Secret Service Agent Mike Gutierrez of the Riverside office of the United States Secret Service. This meeting was conducted at the Riverside office of the Bureau of Alcohol, Tobacco and Firearms. There Investigators were briefed by Special Agents Cote and Gutierrez regarding the informant, Jimmy Marvin Richardson, who had been arrested with a quantity of counterfeit currency and in a plea agreement agreed to cooperate with law enforcement officers who investigate various crimes he knew about.

One of the crimes Jimmy Richardson knew of was a murder that a co-worker had committed in July of 2002. The co-worker stated he had shot a guy with a 9mm pistol in the city of Paramount after engaging him in a verbal altercation. The suspect, by the name of Fermin, had apparently intended to sell the gun he used in the murder to the informant for \$450, but the informant did not purchase it. This gun was later purchased by another co-worker by the name of Raul at Thor Industries, a trailer manufacturing company in the city of Moreno Valley.

Investigators were then introduced to **JIMMY MARVIN RICHARDSON** and interviewed him. Jimmy said that he and the suspect were carpooling together in July of last year. Both were working for Thor Trailers in Moreno Valley. He knew it was a Monday because they would always talk about what they did over the weekend.

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Fermin asked Jimmy what he did over the weekend and he told him. Jimmy asked Fermin what he did. Fermin was driving when he said he went down to his old neighborhood and had to "smoke some fool." Jimmy stated that Fermin claimed to be a member of the "East Side Paramount" gang. Jimmy asked him, "Who'd you shoot now?" Fermin said he was driving down some street in his old neighborhood and he saw some "fool mad-dogging" him. He turned his vehicle around and parked on the same side of the street as the guy. He got out with his "shit" (his gun). He asked the guy, "Where you from?" and the guy said something. Then Fermin asked the guy, "Why you mad-dogging me?" and the guy told him he could mad-dog anyone he wanted to. Jimmy said that "Fermin stays ready, so he don't have to get ready." Fermin said he thought the guy was going to get his "shit" (gun) and was turning, and at that time he shot him. Fermin told Jimmy he shot the victim close up approximately four to five times and may have shot him while he was on the ground. Fermin said that after the shooting, he got in his car and drove it away "nice and slow," not fast, which is the manner in which he usually drives.

A week after that conversation, Jimmy was driving down the road with Fermin when Fermin told him to look in the glove compartment. Jimmy opened the glove compartment and took out a photocopy of an article from a newspaper. This article was an interview with the victim's father, who had stated that his son was no longer involved in gangs. He recalled the article stated that the victim was killed by an unknown assailant. So for awhile Jimmy called Fermin "The Unknown Assailant." Now he refers to Fermin as "Killer," and he apparently likes this name.

Jimmy stated that when Fermin first told him about the murder, he offered to sell Jimmy the gun he used. The gun was kept up underneath the steering wheel of the Camaro. Fermin took the gun out from under the steering column and handed it to Jimmy. Jimmy described the gun as a black Beretta 9mm semiautomatic pistol with night sites. He added that the gun had a "big clip" (magazine). Jimmy stated that Fermin apparently sold the gun but not the magazine, which he described as having an extended magazine containing more than the normal 15 rounds. Fermin said he wanted \$450 for the gun and later sold it to Raul at Thor. Raul apparently gave him \$350 and then one week later another \$100. When asked if Gabriel knew about the history of the gun, Jimmy said, "Probably," and that he has family in Paramount. Jimmy Richardson stated that Fermin is a drug dealer who sells methamphetamine. He said that he and Fermin were involved in the ripping off of drug dealers.

Investigators then re-interviewed Jimmy Richardson on audiotape. Prior to the interview Investigators swore him in under penalty of perjury. During the interview Jimmy related the same as above. For further details regarding the interview, refer to the tape recording.

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On 01-07-2003 at 1300 hours, Investigators had a meeting with Special Agents Cote and Gutierrez at their office. Also present was Jimmy Richardson. At this time, under control of the federal agents, Jimmy Richardson made a monitored telephone call to Fermin. At this time he arranged to purchase 1/4 ounce of methamphetamine for approximately \$300. This telephone conversation was recorded, and a copy of this was provided to Investigators by Special Agent Gutierrez.

During this telephone conversation Jimmy Richardson brought up the subject of the murder in Paramount. During this conversation Fermin acknowledged committing the murder and stated that the victim was from the 18th Street gang. Fermin mentioned being in possession of a machine gun.

Investigators have checked Homicide Bureau records for murders committed in the Paramount area during the month of July, and the only murder in which an 18th Street gang member was killed with a 9mm pistol in the area of Paramount was on 07-14-2002 and the victim in that murder was Jose Ortiz.

During the meeting with Jimmy Richardson, Investigators showed him a series of photographs provided by Special Agent Gutierrez. Photograph #1 was a Department of Motor Vehicles photograph of a male giving his name as Gabriel Macias, DOB: [REDACTED] 1982. Jimmy Richardson identified this photograph as a male he knew as Gabriel, the cousin of Raul. He wrote this information on the photograph and signed and dated the photograph.

Photograph #2 was handed to Jimmy Richardson. He identified this photograph, which was a California driver's license photograph of Raul Macias, DOB: [REDACTED] 1982, and said this was Raul, the cousin of Gabriel. He then put his somewhat signature and dated the photograph in front of Investigators.

Investigators then gave Jimmy Richardson Photograph #3, which is a California driver's license photograph of a male named Raul Carmona, DOB: [REDACTED] 1952. Jimmy identified this photograph as Raul, the cousin of Gabriel. He also wrote on this photograph, "This is the guy that bought the Beretta from Fermin." He then signed and dated the photograph.

Jimmy Richardson was then handed a black and white photograph and asked if he knew this individual. Jimmy Richardson identified this photograph as a photograph of Fermin. He then signed and dated the photograph. Jimmy Richardson stated that this was the Fermin he was talking about who admitted committing the murder in Paramount in July of 2002.

Special Agent Gutierrez provided Investigators with the criminal history on Fermin Gutierrez. This information identified him as Fermin Guerrero, MH, DOB: [REDACTED]-1979, CII # [REDACTED], California Driver's License # [REDACTED], address of [REDACTED] in the city of [REDACTED].

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Rialto. Upon examining the criminal history, Investigators found that Fermin Guerrero had been convicted of carrying a loaded firearm in San Diego and was placed on three years probation as of 04-17-2002.

On 01-08-2003, Jimmy Richardson, under the control of Special Agent Gutierrez, met with Fermin Guerrero. Jimmy purchased approximately 1/4 ounce of methamphetamine from Fermin. During the sale Fermin discussed a shooting he committed where he shot at some gang members. For further details, refer to the audio recording.

On 01-14-2003 at 1445 hours, Investigators interviewed **CATALINA AVALOS** at [REDACTED]. Regarding the incident, Mrs. Avalos stated that it was about 10 p.m. when she was standing outside with her son when she noticed a "cholo" walking northbound on the east sidewalk. A green Camaro came northbound, and the driver of the Camaro exchanged words with the cholo. The vehicle then drove northbound and made a U-turn, parking on the west side of the street, two houses north of her residence. The victim crossed the street westbound towards the parked Camaro. She noticed the victim was armed with a handgun. The driver of the car exited his car and walked around the rear of it. The driver told the victim, "Let's just handle this like men," when suddenly he produced a handgun and fired four to five times as he was walking towards the victim. As the victim fell to the ground, the suspect walked over to him and shot him an additional two or three times.

Mrs. Avalos described the suspect as a male Hispanic, 18 to 21 years old, wearing a baseball cap and tan brown silky shirt.

At this time Investigators advised Mrs. Avalos of photo lineup procedures and asked if she understood. Mrs. Avalos stated she understood the admonition. She then read and signed the admonition. Upon examining a photo lineup containing a photograph of Fermin Guerrero, she circled the photo in the upper right-hand corner of the lineup and said that this male looked similar. This was not the photo of Fermin Guerrero.

Mrs. Avalos had nothing further to add, and the interview was terminated.

On 01-14-2003 at 1500 hours, Investigators interviewed **LAWRENCE AVALOS**, MH/13, at his residence. Regarding the incident, Lawrence stated that he was at home in his living room at the time of the shooting when he heard two guys arguing. He looked out the front screen door and noticed that one of the males was walking. At this time he pointed out the screen door from the east side of the street to the west side. Lawrence stated he was outside with his mom when he saw a guy walking in a north direction (to which he pointed) on the east sidewalk of the street.

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Lawrence said that a car passed by with music on. He described the car as a Camaro, dark in color; blue, black or green. The guy who was walking stopped the guy in the car. The guy walking called to the guy in the car. The guy in the car stopped. The guy walking then walked up to the car. The car then made a U-turn and parked. The guy who started walking towards the car looked like he had a gun, which is what his mother said, and she told him to get in the house.

Lawrence said he was looking through the door as the guy in the car got out. The guy in the car yelled, "Put your gun away," and the guy walking tucked the gun in his pants. The guy was on the passenger side crossing the driver. The driver of the car pulled out a gun, and he then slammed his door. Shots were fired. The guy in the car then drove away southbound real fast.

When asked to describe the male, Lawrence described him as a male Hispanic in his 20's, light complexion, wearing a baseball cap, light beige shirt, black or blue pants, and unknown shoes.

Lawrence was then advised of photo lineup procedures and was asked if he understood. Lawrence said he understood. He was read the admonition, and he then read it himself and signed it. Lawrence was unable to identify anyone at this time.

Lawrence had nothing further to add, and the interview was terminated. For further details, refer to the tape recording.

Investigation continuing, with further reports to follow.

BY: INVESTIGATOR BOYD ZUMWALT, #183036

INVESTIGATOR RAYMOND LUGO, #201641

APPROVED BY: LIEUTENANT JOSEPH HARTSHORNE, #211231 *JH 03-27-03*

HOMICIDE BUREAU - DETECTIVE DIVISION

ah/bz

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COUNTY OF LOS ANGELES-SHERIFF'S DEPARTMENT SUPPLEMENTAL REPORT

DATE: July 15, 2002 FILE: 002-17255-1 368-011
C: MURDER 187PC-F/011 ACTION: ACTIVE
V: ORTIZ, JOSE (MH [REDACTED]-77)
D: _____
S: Unknown

NARRATIVE

THE PURPOSE OF THIS REPORT IS TO PROVIDE ADDITIONAL INFORMATION REGARDING THE INCIDENT UNDER ABOVE FILE NUMBER.

ON JULY 14TH, 2002 AT APPROXIMATELY 2230 HRS, I RESPONDED TO [REDACTED] IN THE CITY OF PARAMOUNT, REGARDING AN ASSIST ON A ASSAULT WITH A DEADLY WEAPON JUST OCCURED CALL. UPON ARRIVAL, I WAS CONTACTED BY THE HANDLING UNIT, DEPUTY AND ADVISED ESQUEDA TO CANVAS THE AREA FOR ANY WITNESSES.

I CONTACTED W/CATALINA AVALOS FH/[REDACTED] 71, AT [REDACTED]. SHE TOLD ME THAT DURING THE TIME OF THIS INCIDENT, SHE WAS INSIDE HER HOUSE, SHE HEARD NUMEROUS GUNSHOTS, AND AS SHE CAME OUT OF HER HOUSE, SHE SAW A NEWER MODEL GREEN CAMARO HARD TOP DRIVE AWAY FROM THE LOCATION OF THIS INCIDENT AT A HIGH RATE OF SPEED.

I ALSO CONTACTED W/FEDERICO HERNANDEZ MH/[REDACTED] 69 AT [REDACTED]. HE TOLD ME THAT, HE ALSO HEARD NUMEROUS SHOTS, ALTHOUGH HE DID NOT SEE A VEHICLE LEAVING THE AREA. HE RECALLS SEEING A SIMILAR VEH FITTING THE DESCRIPTION OF THE ONE GIVEN BY W/AVALOS, DRIVING PAST THE LOCATION NUMEROUS TIMES, AT APPROXIMATELY 1500 HRS ON THE DATE OF THIS INCIDENT.

I CONTACTED THE FOLLOWING POSSIBLE WITNESSES, WHO TOLD ME, THEY ONLY HEARD THE GUNSHOTS WHILE INSIDE THEIR HOMES BUT DID NOT SEE ANYTHING.

- RAMIREZ, ROLANDO MH/[REDACTED]
- OZUNA, ESPERANZA FH/[REDACTED]
- ACEDO, AUDOR MH/[REDACTED] 64,
- CHAVEZ, JOE MH/[REDACTED] 39
- STITT, LOISE FW/[REDACTED] 23
- MENDOZA BERNADETTE FH/[REDACTED] 74
- RAMBO ELOISE FH/[REDACTED] 31
- HERNANDEZ SILVIA FH/[REDACTED]

BY: DE LA TORRE, LUIS
APPROVED: Sgt. G.B. Ramirez #4-8260
ASSIGNED: HEMICIDE
SECRETARY: _____

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT SUPPLEMENTAL REPORT
NARRATIVE CONTINUATION

PAGE 2

DATE: July 15,2002

FILE NO. 02-17255-1368-011

STOUT MARYLOU FW/ [REDACTED] 41 [REDACTED] [REDACTED]

GARCIA LEO MH/ [REDACTED] 63 [REDACTED] [REDACTED]

ORTIZ, CARLOS MH [REDACTED] 55 [REDACTED] ([REDACTED])

ADAMS,RICHARD MW/ [REDACTED] 49 1 [REDACTED] ([REDACTED])

DECLARATION OF JIMMY RICHARDSON

I, Jimmy Richardson, declare as follows:

1. In 2002, I worked with Fermin Guerrero at a company called Thor Industries, in the Moreno Valley in California. I testified at Guerrero's murder trial in 2003.

2. When Guerrero and I worked at Thor Industries, Guerrero drove a Chevrolet Camaro car that was burgundy. At some point, Guerrero had his Camaro re-painted from burgundy to grey. There was another employee at Thor, who I was friendly with, who owned a different Camaro car that was green. I do not remember that employee's name.

3. I do not know what the phrase "the last one I did—will be the last of the month, 40" means. I understand that that Guerrero used the phrase during a conversation with me that was taperecorded and played at Guerrero's trial. If Guerrero's trial attorney had asked me before trial, or at trial, what the phrase meant, I would have said I did not know. I did not believe that Guerrero was admitting to the Paramount shooting by using that phrase, or at any point in the taperecorded conversation.

4. At some point when I knew him, Guerrero took his Camaro to a body shop for repairs. Shortly before he took the Camaro to the body shop, he mentioned that the Camaro had been in a crash. If Guerrero's trial counsel had asked me about this before or during trial, I would have said that Guerrero had a car crash in the Camaro shortly before *having the repairs done on it*.

5. In 2002, I gave information about Guerrero and the shooting in Paramount to several law enforcement agencies, including the FBI, the United States Secret Service, the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and the Los Angeles County Sheriff's Department. In exchange for this information,


Initials

agents of the several agencies gave me between \$6,000 and \$10,000. I provided the information in exchange for this money, as well as to avoid prison time on other criminal charges I was then facing.

6. As part of my cooperation with law enforcement on Guerrero's case, I made at least two telephone calls to Raul Macias, who had the gun I believe was used in the Paramount shooting. I made both calls at the urging of agents of the Los Angeles County Sheriff's Department, as well as the FBI, ATF, and/or Secret Service.

7. When I made the first call to Macias, I knew Macias was in Mexico. To make him come back to the United States, I told Macias that he was needed back at work at Thor, for a special project.

8. I made the second call after Macias had returned from Mexico, and asked him whether he still had the gun at his house. Macias confirmed that he still had the gun. I believe agents of the law enforcement agencies—Los Angeles County Sheriff's Department, ATF, FBI, and/or Secret Service—went to Macias's house to get the gun within a couple of days after I made the second call.

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9. Before Guerrero's trial, no one working for his defense—no attorney, investigator, or anyone else—ever spoke to me or interviewed me. If I had been interviewed by Guerrero's attorney or investigator, I would have told them the information in this declaration. I would also have testified to these things at trial, if asked about them.

10. I have read and reviewed this three-page declaration.

I declare under penalty of perjury under the laws of the United States of America and the state of California that the foregoing is true and correct and that this declaration was executed this 20th day of Aug, 2015, at Long Beach, Mississippi.


Jimmy Richardson


Initials

DECLARATION OF MARGARET A. FARRAND

I, Margaret A. Farrand, declare as follows:

1. I am an attorney with the Office of the Federal Public Defender in Los Angeles, California. Together with my co-counsel, Alyssa Bell, I am assigned to the habeas corpus case of Fermin Guerrero.

2. As part of our investigation of Mr. Guerrero's claims, Ms. Bell and I travelled to the Compton Courthouse, viewed the trial file and obtained copies of the portions of the file not included in the appellate record, and photographed the trial exhibits.

3. On April 6, 2015 I traveled to the law office of attorney Vincent Oliver, who represented Mr. Guerrero at his 2003 trial, and obtained his trial file. The file was one banker's box of documents. I spoke to Mr. Oliver's secretary at his office, and she said that this box was Mr. Oliver's complete file.

4. On April 17, 2015 I traveled to the office of Deputy Los Angeles County Public Defender Sanders Smith, who represented Mr. Guerrero in pretrial proceedings in 2003. Mr. Smith gave all the materials he had—that is, his complete file—on Mr. Guerrero's 2003 murder case.

5. I have reviewed the case files I obtained from Mr. Oliver and Mr. Smith. The file of Mr. Oliver contained, among other documents, an "Affidavit in Support of Search Warrant," executed by Investigator Boyd R. Zumwalt III, stating that on January 14, 2003 Catalina Avalos had been shown a photographic lineup containing a photograph of Fermin Guerrero, and "could not identify anyone."

6. Mr. Oliver's case file also contained a Los Angeles County Sheriff's Department Supplementary Report dated January 15, 2003, that stated that Ms. Avalos had been shown a photographic lineup containing a photograph of Fermin Guerrero, that she had circled a photograph in the upper right-hand corner of the

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lineup, and that she said “that this male looked similar.” The report further said “This was not the photo of Fermin Guerrero.”

7. Mr. Oliver’s case file also contained a copy of the photographic lineup with a “Witness Admonition” dated January 14, 2003 and signed by Catalina Avalos, which contained a photograph of Fermin Guerrero. On the photo lineup a photograph other than Guerrero’s is circled, and the words “Looks Similar” are written next to the circled photograph.

8. Mr. Oliver’s case file also contained a copy of a 333-page document constituting the Los Angeles County Sheriff’s Department file, or “murder book,” as it is commonly called, regarding the murder of Jose Ortiz.

9. Mr. Oliver’s case file does not contain any notes, interview memoranda, or other material reflecting investigation conducted by Mr. Oliver or anyone acting on his behalf.

10. Mr. Smith’s case file contains a document with the heading “Public Defender County of Los Angeles,” and titled “Investigation Report.” This document contained notes of interviews conducted by an investigator with the Los Angeles County Public Defender’s Office, identified in the report as “R.J. Fox,” on July 3, 2003 and July 8, 2003 with various witnesses in Paramount. This document is not among the materials in Mr. Oliver’s case file.

11. As part of our investigation Ms. Bell and I, together with our investigator, interviewed numerous witnesses. Sometimes only one or two of us would conduct the interviews. The witnesses we interviewed included, but were not limited to, Raul Macias, Jimmy Richardson, Gabriel Marin, Lorenzo Quezada, and Daisy Guerrero. We also interviewed Mr. Guerrero’s mother, Ana Castro, and his sister, Maria del Rosario Galindo.

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12. Also as part of our investigation, Ms. Bell and I made numerous attempts to interview Mr. Oliver and obtain a declaration from him. Our efforts were unsuccessful because Mr. Oliver refused to speak with us, return our phone calls, or respond to a letter we sent him enclosing questions.

13. In August and September, 2015, Ms. Bell and I made several telephone calls to Mr. Oliver's office and left voicemail messages with Mr. Oliver's secretary asking to speak with him regarding Mr. Guerrero's case. He did not return our calls.

14. On August 12, 2015, I called Mr. Oliver by telephone and he answered. I asked him whether my co-counsel and I could schedule a one-hour meeting with him to discuss Mr. Guerrero's case. Mr. Oliver said he could not meet because he was in trial that week and was going to be in trial the following week as well. I asked if I could call him the week after his trial ended, which was going to be the week of August 24, 2015, and Mr. Oliver said that would be fine.

15. I called Mr. Oliver's office the week of August 24, 2015, and on several occasions after that, and left messages for Mr. Oliver asking him to call me. I never heard from Mr. Oliver in response to any of the calls.

16. Ms. Bell and I also traveled to Mr. Oliver's office at least three times in August and early September, 2015, but Mr. Oliver was not there on any of our visits.

17. On August 9, 2015, Ms. Bell informed me that she had traveled to Mr. Oliver's office with our investigator, Loida Montemayor, and had encountered Mr. Oliver as he was leaving his office. Ms. Bell informed me that Mr. Oliver had refused to speak with them and instructed Ms. Bell to send him a letter instead.

18. In accordance with Mr. Oliver's instructions, I sent him a letter on September 14, 2015, enclosing a list of questions regarding his work on Mr.

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Guerrero's case and asking him to respond to them in the form of a sworn declaration and mail that declaration to me. To date, I have not received any response to those questions from Mr. Oliver, in the form of a declaration or otherwise.

19. On or about September 16, 2015, I received a letter from Mr. Oliver, stating that Mr. Oliver knew that Ms. Bell and I had come to his office "on at least three occasions that I am aware of," and saying, "I only wish to communicate with you in writing concerning this matter. . . . [s]o please no more telephone calls or unannounced visits."

20. On September 22, 2015, I sent Mr. Oliver a letter enclosing a compact disc with an electronic copy of his trial file on it.

21. On or about October 5, 2015, I received a letter from Mr. Oliver asking for supplemental materials regarding Mr. Guerrero's case.

22. On October 7, 2015, I responded to Mr. Oliver's request by sending him supplemental materials and a cover letter.

23. On October 23, 2015, I sent Mr. Oliver a letter asking for a response to the questions I had enclosed with my September 22, 2015 letter. I did not receive a response to this letter, or to my earlier questions.

I declare under penalty of perjury under the laws of the state of the United States of America and the state of California that the foregoing is true and correct and that this declaration was executed this 12th day of November, 2015, at San Diego, California.

Margaret A. Farrand
Margaret A. Farrand

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TYPE OF HEARING Jury Trial
CASE NO. TA069079
200 EXH. NO. 2
ADMITTED IN EVIDENCE
DATE AUG 11 2011
BY: [Signature] COUNTY CLERK / EXECUTIVE OFFICER
[Signature] DEPUTY

P-2



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Relevant Constitutional and Statutory Provisions

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

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

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