IN THE

Supreme Court of the United States

ALVARO QUEZADA,

Petitioner,

v.

JAMES HILL,

Respondent.

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

APPENDIX

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INDEX OF APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

ALVARO QUEZADA,

Petitioner - Appellant,

v.

JAMES HILL,

Respondent - Appellee.

No. 24-1797

D.C. No. 2:04-cv-07532-KK-GJS
Central District of California,
Los Angeles

ORDER

Before: GRABER and JOHNSTONE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALVARO QUEZADA, Petitioner v. AL K. SCRIBNER, Respondent.	Case No. 2:04-cv-07532-KK (GJS) **JUDGMENT**

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

IT IS ADJUDGED THAT this action is dismissed with prejudice.

DATE: February 21, 2024

KENLY KIYA KATO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALVARO QUEZADA,
Petitioner

v.

AL K. SCRIBNER,
Respondent.

Case No. 2:04-cv-07532-KK (GJS)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative habeas petition [Dkt. 38, "Petition"], all relevant documents filed and lodged in this action, the Report and Recommendation of United States Magistrate Judge [Dkt. 247, "Report"], and Petitioner's Objections to the Report [Dkt. 253]. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated.

In his Objections to the Report, Petitioner reiterates his argument that his claim under Napue v. Illinois, 360 U.S. 264 (1959) ("Napue") is subject to de novo review. See dkt. 253 at 8-10. As set forth in the Report, the Court finds this claim must be reviewed pursuant to the Section 2254(d) standard. See dkt. 247 at 23. However, even under a de novo standard of review, the Court finds Petitioner's Napue claim fails for the reasons stated in the Report. See id. at 28-42.

Having completed its review, the Court accepts the findings and recommendations set forth in the Report. Accordingly, **IT IS ORDERED** that: the Petition is DENIED; and Judgment shall be entered dismissing this action with prejudice.

DATE: February 21, 2024

KENLY KIYA KATO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARTUTO QUEZADA,
Petitioner

v.

AL K. SCRIBNER,
Respondent.

Case No. 2:04-cv-07523-KK (GJS)

ORDER DENYING CERTIFICATE OF APPEALABILTY

By separate Order and Judgment filed concurrently, the Court has determined that habeas relief should be denied and this 28 U.S.C. § 2254 action should be dismissed with prejudice. Under 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court" unless the appellant first obtains a certificate of appealability ("COA"). Petitioner has requested a COA, and accordingly, the Court now addresses the COA question pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court clarified the showing

required to satisfy Section 2253(c)(2) when, as here, a habeas petition has been denied on the merits:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under Barefoot [Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues were "'adequate to deserve encouragement to proceed further.'" [cit. om.]
>
> Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Id. at 483-84. *See also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (a petitioner satisfies Section 2253(c)(2) "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further").

In her Report and Recommendation, the United States Magistrate Judge concluded that federal habeas relief was not warranted based on the claims alleged in the operative habeas petition. After carefully considering the record and the Report and Recommendation in light of Petitioner's Objections, the Court has accepted the Magistrate Judge's findings and conclusions in a concurrently-filed Order. The Court has further concluded that: reasonable jurists would not find its resolution of the habeas petition to be "debatable or wrong"; and the issues raised by Petitioner are not "adequate to deserve encouragement to proceed further." *Slack*,

529 U.S. at 484. Accordingly, issuance of a certificate of appealability is not warranted and a COA is DENIED.

IT IS SO ORDERED.

DATE: February 21, 2024

KENLY KIYA KATO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALVARO QUEZADA,
Petitioner

v.

AL K. SCRIBNER,
Respondent.

Case No. CV 04-7532-PSG (GJS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

INTRODUCTION

This is a 28 U.S.C. § 2254 habeas action brought by a state prisoner who is represented by counsel. As outlined below, the case had a long and complicated procedural history before being referred to the undersigned and thereafter becoming ready for its final resolution. For the reasons set forth below, the Court recommends that habeas relief be denied with respect to Petitioner's remaining two claims.

BACKGROUND

In Los Angeles Superior Court Case No. BA163991, Petitioner Alvaro Quezada and two co-defendants – his brother Jose Quezada ("Jose") and their cousin Rebecca Cleland – were charged with the murder of Rebecca Cleland's husband and conspiracy to commit murder. In addition, a special circumstance was alleged, *i.e.*, that the three defendants committed the murder intentionally while lying in wait and for financial gain. [Dkt. 17, December 29, 2004 Notice of Lodging ("Lodg.") No. 1, Clerk's Transcript ("CT") 556-63, 564-72.[1]] Following a jury trial, the three co-defendants were found guilty of the crimes charged and the special circumstance allegation was found to be true. [CT 1023-32.] They were sentenced to life in prison based on the murder count, with the sentence on the conspiracy count stayed. [CT 1033-36, 1046-49.]

Petitioner appealed.[2] [CT 1050-51.] On May 27, 2003, the California Court of Appeal affirmed his conviction. [Lodg. No. 3.] Petitioner sought review in the California Supreme Court, and on August 27, 2003, the state high court denied his petition without comment. [Lodg. Nos. 4-5.]

On September 10, 2004, Petitioner initiated this action on a pro se basis by filing a Section 2254 habeas petition raising six grounds for relief. [Dkt. 1.] On December 6, 2004, United States Magistrate Judge Marc L. Goldman appointed counsel for Petitioner. [Dkt. 13.]

On March 7, 2005, Petitioner moved to stay this action while he returned to

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[1] It seems two different versions of the four-volume primary Clerk's Transcript were lodged with the District Court in hard copy on December 29, 2004, along with slim augmented and supplemental transcript volumes. The Court cites to the four-volume version of the Clerk's Transcript that references Petitioner and co-defendant Jose in the caption and bears an October 27, 2000 stamp.

[2] The Court will not discuss the state appeal and/or habeas proceedings, as well as the federal habeas proceedings, initiated by co-defendants Rebecca Cleland and Jose, as they are not relevant to resolving the claims at issue in Petitioner's federal habeas case.

state court to exhaust a newly discovered claim for relief based on the prosecution's alleged failure to disclose material impeachment evidence regarding prosecution witness Joseph Aflague ("Aflague"). [Dkt. 23.] On October 28, 2005, Magistrate Judge Goldman granted the motion and stayed the case pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). [Dkt. 26.] In the meantime, Petitioner already had commenced seeking habeas relief in the state courts based on his Aflague-related claim.

On April 6, 2005, Petitioner filed a habeas petition in the Los Angeles County Superior Court, raising what are commonly known as *Brady* and *Napue* claims.[3] [Dkt. 217-12 at 1451-1498.] On February 21, 2006, the trial court denied the petition for procedural and other reasons. [*See* Order attached to Dkt. 28.] Petitioner then filed a habeas petition in the California Court of Appeal on May 1, 2006, which was denied summarily on August 1, 2006. [Dkt. 217-12 at 1499.] When Petitioner sought habeas relief in the California Supreme Court, that petition was denied without comment on April 11, 2007. [Dkt. 217-12 at 1500.]

On July 27, 2007, Petitioner filed his First Amended Petition, which is the operative habeas petition in this case, and a related memorandum in support. [Dkt. 38, "Petition"; Dkt. 39, "Pet. Mem."] The First Amended Petition raised eight Grounds, although the related memorandum raised nine.

On October 26, 2007, Magistrate Judge Goldman issued a Report and Recommendation, in which he: found Grounds One and Two to be procedurally barred; rejected the remaining Grounds on their respective merits (including the *Brady* and *Napue* claims); and, in a footnote, opined that the *Brady* claim likely was procedurally barred. [Dkt. 47, "2007 Report."] On November 21, 2007, United States District Judge Ronald S.W. Lew issued an Order accepting the 2007 Report and Judgment was entered. [Dkts. 49-50.]

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959).

Petitioner appealed as to six Grounds (including the *Brady* claim) and District Judge Lew granted a certificate of appealability as to two claims, but not as to the *Brady* claim. [Dkts. 51-53.] In his opening brief in his appeal [No. 08-55310], Petitioner asked the United States Court of Appeals for the Ninth Circuit to add three uncertified issues, including the *Brady* claim. However, on November 12, 2009, Petitioner moved to remand based on newly discovered evidence related to the compensation Aflague had received as an informant. On July 16, 2010, the Ninth Circuit issued an Order remanding the case to the District Court with instructions to conduct an evidentiary hearing to determine the admissibility, credibility, veracity, and materiality of the newly discovered evidence. In addition, the Ninth Circuit directed that, following the evidentiary hearing, the District Court should determine: whether the new facts rendered Petitioner's *Brady* claim unexhausted; if unexhausted, whether Petitioner would be procedurally barred from proceeding in state court; and if procedurally barred, whether he could show cause and prejudice to permit federal habeas review of the claim. In addition, the Ninth Circuit directed that, should there be a finding that the claim was not procedurally barred, the case was to be stayed pursuant to *Rhines,* so that Petitioner could exhaust the claim in state court. [Dkt. 65.] (Hereafter, the "First Appeal.")

Following the Ninth Circuit's remand, discovery commenced but was halted following the Supreme Court's issuance of *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and *Walker v. Martin*, 562 U.S. 307 (2011). Based on those decisions, Respondent filed a motion in the Ninth Circuit to recall the mandate. [Dkt. 86.] On June 15, 2011, the Ninth Circuit denied the motion, but noted that Respondent was free to argue that the District Court should deviate from the mandate based on *Pinholster*. [Dkt. 88.]

Respondent then filed a motion to depart from the mandate, arguing that the *Brady* claim was procedurally barred and that *Pinholster* precluded factual development of the claim. [Dkt. 92.] On August 19, 2011, Magistrate Judge

Goldman: found that the state courts had denied the *Brady* claim purely on a procedural ground instead of its merits and, thus, rejected Respondent's *Pinholster* argument; determined to depart from the mandate insofar as it required him to hold an evidentiary hearing on the merits of the *Brady* claim; and determined to hold an evidentiary hearing on the cause and prejudice issue that arose from his finding that the claim was procedurally defaulted. [Dkt. 97.] District Judge Lew thereafter denied review of the August 19, 2011 Order. [Dkts. 98, 106.]

Discovery ensued. An evidentiary hearing was held over three days (November 27-29, 2012) and numerous witnesses testified (the "November 2012 EH"). The parties filed briefing following the November 2012 EH. [Dkts. 143-53.] On February 20, 2013, Magistrate Goldman issued another Report and Recommendation, in which he concluded that: Petitioner had shown cause for his procedural default of the *Brady* claim but had not established prejudice, and thus, the claim was procedurally defaulted[4]; and the *Napue* claim failed on its merits, because Petitioner had not shown that the Aflague testimony in issue was either clearly false or material. [Dkt. 155, the "Second Report."] District Judge Lew accepted the Second Report on April 5, 2013, and the case again closed. [Dkts. 161-162.]

Petitioner appealed, and District Judge Lew granted a certificate of appealability on the question of whether the *Brady* claim was procedurally defaulted. [Dkt. 163.] In his appellate briefing, Petitioner made arguments related only to the *Brady* claim, Ground Three of the Petition, and an uncertified cumulative error claim. [No. 13-55750.] Following oral argument, on March 26, 2015, the Ninth Circuit issued a Memorandum Decision rejecting Ground Three on its merits,

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[4] Magistrate Goldman noted that his finding Petitioner "has failed to establish prejudice because it is not reasonably probable that the impeachment of Joseph Aflague with the undisclosed evidence would have led to a different result at trial" "would be the same under a straight forward *Brady* analysis." [Second Report at 26 & n.9.]

declining to consider the cumulative error claim, and again remanding the case in connection with the *Brady* and *Napue* claims. The Ninth Circuit found that the District Court had failed to resolve the preliminary issue of whether the *Brady* and *Napue* claims were unexhausted in light of the newly discovered evidence. The Ninth Circuit directed the District Court: to determine whether the new evidence rendered the claims unexhausted; if so, to determine whether the claims were "clearly procedurally barred" under California law; and if the answer to that question was unclear, then to again stay the case under *Rhines* to allow Petitioner to exhaust the claims in state court. [Dkt. 175.] (Hereafter, the "Second Appeal.")

Thus, following the Second Appeal and depending on the resolution of the possible procedural impediments noted by the Ninth Circuit, the only claims remaining to be resolved in this case were the *Brady* claim and the related *Napue* claim. After the above second remand and the retirement of Magistrate Judge Goldman, the case was referred to United States Magistrate Judge Patrick J. Walsh. [Dkt. 177.] Briefing ensued with respect to the exhaustion and procedural bar issues identified in the Ninth Circuit's Second Appeal Decision. [Dkt. 181-191.] On January 22, 2016, Magistrate Judge Walsh issued an Order in which he found that the newly discovered evidence fundamentally altered the *Brady* claim and rendered it unexhausted, and that the claim would not be clearly procedurally barred by California law were Petitioner to pursue exhaustion in the state courts. In accordance with the Ninth Circuit's Decision, Magistrate Judge Walsh then issued a second *Rhines* stay of this case. Petitioner objected to the January 22, 2016 Order and sought a certificate of appealability to pursue an immediate appeal. [Dkt. 195.] On May 10, 2017, District Judge Lew overruled the objections, found that the January 22, 2016 Order was not a final appealable order, and denied a certificate of appealability. [Dkt. 201.]

Petitioner filed a habeas petition in the trial court on July 19, 2017, raising his

Brady/Napue claims, and he proffered with it voluminous exhibits.[5] [Dkt. 217-1 – 217-4.] On May 20, 2019, in a reasoned decision, the trial court denied habeas relief. [Dkt. 217-5, the "Trial Court Habeas Decision."] The trial court agreed with Magistrate Judge Goldman's "no prejudice" analysis in his Second Report, and it found that even if the jury had known of the newly discovered evidence about Aflague, it is not reasonably probable that there would have been a different result at trial. The trial court explained that Aflague's testimony focused on his contacts with co-defendant Jose, rather than Petitioner, and Aflague's testimony that Petitioner had agreed to act as a driver was "brief and unchallenged." The trial court opined that "it was the other evidence of Petitioner's involvement in the murder conspiracy that led to his conviction." [*Id.* at 8.] As the trial court concluded:

> Petitioner Alvaro Quezada willfully joined and participated in the conspiracy to murder unsuspecting Bruce Cleland so many years ago. The jury was well aware that Joseph Aflague was a narcotics trafficker, police informant, and overall unsavory character. Aflague's evidence principally related to Petitioner's brother, Jose Quezada, who was seen running from the shooting scene with gun in hand. Having heard the evidence in the separate jury trials of Rebecca Cleland and then Jose Quezada, and having read and considered the lengthy opinion of Magistrate Judge Goldman, and the petition, reply, and Petitioner's reply, this Court remains convinced that full and complete disclosure of the post-trial discovered impeaching evidence of Joseph Aflague would not have altered the jury's verdict.
>
> Petitioner's live-in relationship with principal co-conspirator Rebecca Cleland provided an obvious powerful motive to engage in the conspiracy to murder her husband. Petitioner's phone contacts with Rebecca up to the moment of the ambush killing, the location of his phone in the immediate area of the murder, and his attempt to fashion a false alibi for his whereabouts during the murder clearly established his willful participation in

[5] Petitioner also raised a state law-based claim related to cell tower and call record-related evidence presented at his trial, which he alleged was false, and sought to proffer new "expert" evidence. That claim was not raised in the Petition, and thus, is not a part of this case.

> the conspiracy. While helpful to the prosecution, Joseph Aflague's testimony was not essential to the proof of Petitioner's guilt. The jury considered Petitioner's testimony and understandably rejected his claims of innocence.

[*Id.* at 8-9.]

Petitioner then filed a habeas petition in the California Court of Appeal, which raised the same claims as in the trial court and proffered some additional argument and nine additional exhibits. [Dkt. 217-6 – 217-9.] On July 24, 2019, the California Court of Appeal denied the petition without comment or citation to authority. [Dkt. 217-10.] Petitioner filed a similar habeas petition, with the additional argument and exhibits, in the California Supreme Court. [Dkt. 217-11 – 217-17.] On January 22, 2020, the California Supreme Court denied the petition without comment or citation to authority. [Dkt. 217-18.]

On March 9, 2020, Magistrate Judge Walsh lifted the *Rhines* stay imposed in this case and ordered briefing regarding the merits of the *Brady/Napue* claims. In particular, the Order directed Petitioner to file a brief "detailing his *Brady/Napue* claim and the supporting evidence," and directed Respondent to thereafter file a reply. [Dkt. 218.] Following the retirement of Magistrate Judge Walsh, on August 21, 2020, this case was referred to the undersigned. [Dkt. 230.] Petitioner thereafter filed the ordered brief; Respondent filed his brief; and Petitioner filed a reply. [Dkts. 234, 237, 242.] Briefing then was completed.

SUMMARY OF THE EVIDENCE AT TRIAL

In his Petition Memorandum, Petitioner adopted the statement of facts set forth in the California Court of Appeal's 2003 decision on direct appeal. [Pet. Mem. at 1.] For purposes of an initial factual overview of the trial evidence, the Court also now quotes the California Court of Appeal's statement of facts. The additional relevant portions of the record – trial and post-trial – will be discussed further in

connection with the Court's analysis of Petitioner's *Brady/Napue* claims.[6]

> Bruce Cleland, a shy and frugal bachelor, worked as a software engineer for TRW, earning a substantial salary. He had not dated much until he met Rebecca Quesada Salcedo at a swap meet in late 1995. After the two began dating, Bruce Cleland became more outgoing.
>
> While they were dating, Bruce Cleland showered Rebecca Salcedo with gifts including cars, trips, cosmetic surgery, clothes, a boat, furniture and a diamond ring. Salcedo told her friends Bruce Cleland was "pretty well off" and "made good money." She disclosed her plan to marry Bruce Cleland, have a child, and then divorce him so she could collect child support and be "set for life." Prior to their marriage Salcedo used Bruce Cleland's credit cards, without his knowledge, to pay for furniture and breast augmentation surgery.
>
> Bruce Cleland and Rebecca Salcedo were married in October 1996 in a secret civil ceremony. Although a large church wedding was already planned for January 1997, Salcedo insisted the two be married before purchasing a house. After the civil marriage Bruce Cleland bought a large home in Whittier. Rebecca Cleland, as she became known, moved into the house alone; and Bruce Cleland moved in with his parents until the January 1997 church wedding. Rebecca Cleland, who was having sexual relationships with several other people at the time, required Bruce Cleland to phone before visiting the Whittier house.
>
> Both before and after the church wedding, Cleland[7] told friends and acquaintances she did not love Bruce Cleland, did

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[6] On federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *see also Brown v. Harrell*, 644 F.3d 969, 972 (9th Cir. 2011) (according California Court of Appeal's summary of evidence at trial the Section 2254(e)(1) presumption of correctness).

[7] Footnote 1 in original: "Rebecca Cleland will hereafter be referred to as 'Cleland.' Her late husband will be identified as 'Bruce Cleland.'"

not want to marry him, was unhappy with his sexual performance, had married him for his money and planned to divorce him quickly to obtain financial security. She also asked her sister, Lorraine Salcedo, to help her find someone to kill Bruce and make it look like an accident.

Bruce Cleland moved back to his parents' home just three months later. A. Quesada [Petitioner][8] moved into the Whittier house after Bruce Cleland moved back to his parents' home. Cleland and [Petitioner] were seen to be "very affectionate towards one another" and "always hugging and kissing." Cleland also resumed a sexual relationship with Steven Rivera, a male stripper and former boyfriend.

In April 1997 Cleland consulted with a divorce attorney and presented Bruce Cleland with a draft separation agreement that would allow her to continue living in the Whittier house and would require Bruce Cleland to pay the mortgage and give Cleland spending money. When Bruce Cleland refused to sign the agreement, Cleland threatened to retaliate by claiming he had molested her young son. Bruce Cleland contacted a divorce attorney of his own, who opined that if the marriage were dissolved, Cleland would not be entitled to a sizeable property settlement or substantial spousal support.

Notwithstanding all these difficulties, Bruce Cleland apparently wanted his marriage to succeed. On July 25, 1997 he told his parents he was going to meet with Cleland to try and work out their differences. The two had dinner together that evening. During dinner, Cleland called [Petitioner] or his father Arturo Quesada several times on the restaurant's pay telephone and her cellular telephone. The couple then went to Arturo Quesada's house for drinks. When they left Arturo Quesada's home at about 1:00 a.m., Cleland was driving.

Telephone records introduced at trial indicated that

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[8] Footnote 2 in original: "[Petitioner] and Jose Quesada, as well as the other parties, disagree on the proper spelling of the brothers' last name. In conformity with the information and abstract of judgment, we use 'Quesada' instead of 'Quezada.'" The Court notes that, in this case, Petitioner filed his original petition and the operative Petition utilizing the spelling 'Quezada.'"

> [Petitioner] telephoned Arturo Quesada's house several times between 12:35 a.m. and 12:49 a.m. Cleland phoned [Petitioner] several times between 1:00 a.m. and 1:01 a.m. on her cellular telephone. Some of these calls placed [Petitioner] and his cellular telephone close to the location where Bruce Cleland was killed.
>
> Cleland subsequently reported to the police that, shortly after leaving Arturo Quesada's house, she noticed a warning light on the dashboard indicating the rear hatch was open. She stopped near the entrance to the Interstate 5 freeway, got out of the car to shut the hatch and was struck on the back of the head and knocked to the ground. Residents of nearby houses heard gunshots, saw a man running away from the scene and heard a car door slam and a car speed away from the area. A passing taxi driver summoned emergency personnel, who arrived within minutes of the shooting and found Bruce Cleland face-down in a nearby driveway, dead from multiple gunshot wounds.
>
> When the police arrived, Cleland's car engine was still running. Cleland's keys, purse, cellular telephone and jewelry were on the front seat. Cleland told police her diamond ring was missing. She identified Bruce Cleland as her husband, but did not attempt to approach his body or ask about his condition. She was taken to the police station, where her demeanor was described as "relaxed, lackadaisical, uninterested."
>
> After Bruce Cleland's death, Cleland told a friend she would support herself from Bruce Cleland's life insurance policies. She quickly retained counsel and set about obtaining the proceeds from Bruce Cleland's basic life insurance policy from TRW, which would pay a sum equal to half of Bruce Cleland's annual salary, a TRW optional accidental death policy for $517,000; a $25,000 accidental death policy; a mortgage life insurance policy from Minnesota Life Insurance Company, which would pay the balance on the Whittier house in the event of Bruce Cleland's death; and the $196,000 proceeds of Bruce Cleland's TRW stock savings plan. After the murder, [Petitioner] continued to live with Cleland at the Whittier house.

[Lodg. No. 3 at 2-5.]

PETITIONER'S HABEAS CLAIMS

The nature of Petitioner's *Brady/Napue* claims has evolved over time as he has discovered additional evidence (including through the November 2012 EH, discovery, and otherwise) and submitted additional briefing, and as the above-noted proceedings in both this Court and the Ninth Circuit have transpired. Moreover, as determined earlier in this case, these claims were not fully exhausted until Petitioner pursued his second round of state habeas proceedings that commenced in 2017, and concluded in 2020. Thus, the only versions of the *Brady/Napue* claims properly before the Court at this time are the versions of the claims raised and exhausted through that 2017-2020 round of state habeas proceedings and, in particular, as Petitioner raised his claims before the California Supreme Court [Dkt. 217-17 – 217-11].

Following the exhaustion of the *Brady/Napue* claims in early 2020, in his March 9, 2020 Order, Magistrate Judge Walsh directed Petitioner to "detail[]" his *Brady/Napue* claims and the evidence that supports them in the briefing being ordered. [Dkt. 218.] In his September 2, 2020 brief filed in response to that Order [Dkt. 234], Petitioner stated that, by that brief, he was amending the version of the *Brady/Napue* claims asserted in the Petition. [Dkt. 234 at 5 n.5.] Given that the earlier, pre-2020 briefing by both parties in this case would have addressed different and unexhausted versions of the claims, and given both Judge Walsh's Order and Petitioner's September 2020 amendment of his claims, the Court has relied on the briefing filed by the parties in 2020 [Dkts. 234, 237, 242] in order to ascertain the actual nature of the claims remaining to be resolved.[9]

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[9] As noted earlier, the 2013 Second Report issued by former Magistrate Judge Goldman and accepted by District Judge Lew addressed Petitioner's then-unexhausted *Brady/Napue* claims. The Ninth Circuit remanded, finding that the District Court had erred in considering both claims without first resolving their exhaustion status. Since the Second Report issued, Petitioner has raised and exhausted the *Brady/Napue* claims in the state courts, including by submitting additional briefing and evidence. Accordingly, while the Court has reviewed the Second Report, it declines to adopt the factual findings made therein or its legal conclusions (as Respondent

In brief summary, Petitioner contends that he was deprived of due process in connection with the testimony of prosecution witness Aflague, who Petitioner characterizes as the only witness who provided direct evidence of Petitioner's guilt. While Petitioner knew, prior to trial, that Aflague had served as an informant for the Los Angeles Police Department ("LAPD"), Petitioner contends that the prosecutor failed to disclose evidence of the depth of Aflague's informant activities, including the extent of the monies he received from the LAPD based on his informant activities, as well as other matters related to Aflague. Petitioner asserts that there is evidence of a "quid pro quo" relationship between Aflague and the LAPD that was discovered after trial, which would have provided a basis for finding that Aflague had an incentive to lie at Petitioner's trial, and had the jury known of this evidence, it is reasonably probable that at least one juror would not have found him not guilty. Petitioner also contends that the prosecutor knowingly presented and/or failed to correct certain false testimony by Aflague.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), when the state court has rendered a decision on the merits, federal habeas relief is barred "unless one of two narrow exceptions set forth in 28 U.S.C. § 2254(d)(1) or (2) applies, which are "the state court's decision was (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,' at the time the state court adjudicated the claim, '. . . or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Ochoa v. Davis*, 16 F.4th 1314, 1325 (9th Cir. 2021) (quoting Section 2254(d)(1) and (2)), *cert. denied,* 143 S. Ct 126 (2022); *see also Pinholster*, 563 U.S. at 181 (characterizing the Section 2254(d)

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suggests should occur) and, instead, has independently reviewed the record and made its own findings, factual and legal.

requirements as a "limit" and "restriction" on the power of federal courts to grant habeas relief to state prisoners); *Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)."). The above AEDPA standard is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

For purposes of Section 2254(d)(1), the relevant "clearly established Federal law" consists of Supreme Court holdings (not dicta), applied in the same context that Petitioner seeks to apply it, existing at the time of the relevant state court decision. *See Lopez v. Smith*, 574 U.S. 1, 2, 4 (2014) (*per curiam*); *see also Greene v. Fisher*, 565 U.S. 34, 40 (2011) ("clearly established Federal law" under Section 2254(d)(1) is the law that exists at the time of the state court adjudication on the merits). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably appli[es]" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand; however, Section 2254(d)(1) "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 425-27 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* at 419 (citation omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Landrigan*, 550 U.S. at 473. To meet the Section 2254(d)(1) standard, "a prisoner must show far more than that the state court's decision was 'merely wrong" or 'clear error.'" *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per

curiam) (cit. om.).

For purposes of Section 2254(d)(2), a federal court may not find a state court's factual determination to be unreasonable simply because it "would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). If reasonable minds reviewing the record might disagree about the state court's factual finding, that will not suffice to supersede the trial court's factual determination. *Wood*, 558 U.S. at 301; *see also Pizzuto v. Yordy*, 947 F.3d 510, 530 (9th Cir. 2019). To pass the Section 2254(d)(2) threshold, a petitioner must show that the state court's decision was based on factual findings that were not merely incorrect but objectively unreasonable. *Landrigan*, 550 U.S. at 473. Section 2254(d)(2), thus, "imposes a 'daunting standard' to disrupt a state court's factual findings, which precludes relief in all but 'relatively few cases.'" *McGill v. Shinn*, 16 F.4th 666, 685 (9th Cir. 2021) (citation omitted).

When a state court's merits decision does not contain an explanation of the state court's underlying reasoning, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. In such an instance, a federal habeas court must determine what arguments or theories "could have supported" the state court's decision and then assess whether the foregoing AEDPA standards are met as to any such arguments or theories. *Id.* at 102; *see also id.* at 105 ("[t]he question is whether there is any reasonable argument" that would support the state court decision).

Finally, for claims governed by the Section 2254(d) standard of review, federal habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 562 U.S. at 102. To obtain habeas relief, a petitioner "must show that" the state decision "was so lacking in justification that there was an error

well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (*per curiam*); *see also Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam) (for purposes of Section 2254(d) review, "[a]ll that mattered was whether the [state court] . . . still managed to blunder so badly that every fairminded jurist would disagree"); *Kayer*, 141 S. Ct. at 526 (it is error for a federal habeas court to reject a state court decision "which was not so obviously wrong as to be 'beyond any possibility for fairminded disagreement,'" which under Section 2254(d), "is 'the only question that matters'") (cit. om.). This standard is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id*. at 101 (citation omitted); *see also Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (*per curiam*) ("If such disagreement is possible, then the petitioner's claim must be denied."). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' … and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

The parties agree that Petitioner's *Brady* claim is subject to review under the Section 2254(d) standard, although they disagree as to how to conduct that review. As to the *Napue* claim, Petitioner argues that the claim must receive de novo review and Respondent contends that it should be reviewed pursuant to Section 2254(d). Both parties are right and wrong in certain respects.

The Brady Claim:

The parties agree that the Trial Court Habeas Decision did address the *Brady* claim on its merits in a reasoned decision and that the California Court of Appeal and the California Supreme Court thereafter issued silent denials of relief. The parties also agree that, under this situation, the claim is deemed to have been denied on its merits and therefore is governed by Section 2254(d). They disagree, however, on the manner of Section 2254(d) review that applies here.

Petitioner contends that in conducting Section 2254(d) review of the *Brady* claim, the Court must apply the "look through" presumption.[10] Petitioner argues that the Court must assume that the silent denials of relief by the state appellate and high courts rest on the reasoning set forth in the Trial Court Habeas Decision and that the Court may look only to the trial court's actual reasoning in deciding whether the demanding standards of Section 2254(d)(1) or (d)(2) have been met.

Respondent disputes that the look through presumption applies in this case, arguing that: the California Supreme Court's decision in *Robinson v. Lewis*, 9 Cal. 5th 883, 895 (Cal. 2020), effectively precludes applying that presumption; and given the silent nature of the state high court's denial of relief, the Court must apply *Richter's* "any reasonable argument" standard (562 U.S. at 105) from the outset in reviewing the *Brady* claim rather than relying only on the trial court's rationale. As Respondent correctly notes, in *Robinson*, the state high court reaffirmed that each time a habeas petition is filed in a particular level of the California court system, "it is a new petition invoking the higher court's *original* jurisdiction," and it further explained that the higher court is "not bound by" any factual findings made by the lower court, although it will give them great weight, and, critically, it does "not directly review the lower courts' rulings." *Id.* at 896. In addition, when a habeas

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[10] *See, e.g., Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that a federal habeas court "look[s] through" a summary denial of a claim to the last reasoned decision from state courts to address the claim).

petition is filed in the California Court of Appeal following the trial court's denial of habeas relief, the state appellate court "does not directly review the superior court's ruling but makes its own ruling." *Id.* Respondent contends that, under *Robinson*, when the California Supreme Court considered Petitioner's habeas petition raising the most recent iteration of his *Brady* claim, it did not actually review the Trial Court Habeas Decision, and thus, the look through presumption has been rebutted.

Respondent's argument is correct if the Court credits only the California Supreme Court's recent description of how it conducts original habeas jurisdiction review. *Robinson's* statement that, when California's supreme and appellate courts are faced with original jurisdiction habeas petitions, they do "not directly review the lower courts' ruling," could be viewed as setting forth a straightforward reason for finding the look through presumption to be rebutted in the circumstances involved here. The Supreme Court, however, has indicated otherwise and that further analysis would be needed to find the presumption to have been rebutted.

In *Wilson*, *supra*, the Supreme Court explained that even when a state supreme court issues a decision stating that "its summary decisions should not be read to adopt the lower court's reasoning," a federal habeas court should still "look through" an unexplained state supreme court decision to the last related lower court decision, unless the "look through" presumption has been rebutted by showing that the unexplained supreme court decision most likely relied on different grounds than the lower state court. 138 S. Ct. at 1196 (rejecting argument that "look through" presumption was rebutted by Georgia Supreme Court's decision holding that when it summarily denied habeas relief, it did not necessarily agree with everything said in lower court's order denying relief). More recently, in *Flemming v. Matteson*, 26 F.4th 1136 (9th Cir. 2022), the Ninth Circuit opined that, in *Wilson*, the Supreme Court "has specifically *rejected* the argument that the general 'look through' presumption is rebutted by internal state procedures for a state supreme court indicating that its summary, unreasoned orders do *not* adopt the lower court's

rationale." *Id.* at 1143.

In light of *Wilson* and *Flemming*, the Court concludes that *Robinson* did not vitiate an initial application of the look through presumption in this case. While *Wilson* indicated that, in certain circumstances, the look through presumption can be rebutted notwithstanding a silent state high court denial following a reasoned lower court decision (*see* 138 S. Ct. at 1196 and at 1197 (Gorsuch, J. dissenting, joined by Thomas, J. and Alito, J.)), those circumstances have not been shown to be applicable here. Accordingly, the Court will start off its analysis of the *Brady* claim by assuming that the look through presumption applies and initially will examine the Trial Court Habeas Decision to determine whether it was factually and/or legally unreasonable within the meaning of Section 2254(d)(1) and/or (d)(2).

The Napue Claim:

Petitioner correctly observes that the Trial Court Habeas Decision did not expressly address the *Napue* claim he raised in his trial court habeas petition. Relying on *Johnson v. Williams*, 568 U.S. 289, 292-23 (2013), Petitioner contends that the trial court's failure to address the *Napue* claim removes it from the scope of Section 2254(d) and requires that the Court review the claim on a de novo basis.

The *Williams* decision on which Petitioner relies stands for the rule that when a state court decision addresses some of the federal claims raised by a petitioner but fails to address one of them, a federal habeas court "must presume (subject to rebuttal) that the federal claim was adjudicated on its merits." *Williams*, 568 U.S. at 293. The Supreme Court opined that there are a number of reasons why a state court may choose not to address a particular federal claim and that it is "by no means uncommon for a state court to fail to address separately a federal claim that the court has not simply overlooked." *Id.* at 300-01. As a result, the Supreme Court held that the *Richter* presumption – *i.e.,* that a silent denial constitutes an adjudication on the merits – applies in this situation, although the presumption can

be rebutted in "limited" or "unusual" circumstances. *Id.* at 301-02.

Petitioner's reliance on *Williams* – which establishes a "presumption of merits adjudication" when a state court addresses some but not all federal claims – is puzzling given that Petitioner has not made any effort to rebut that presumption. In any event, the record does not provide any basis for finding that presumption to have been rebutted with respect to the California Supreme Court's denial of habeas relief.

It is well established by now that when a state court presented with a federal claim denies relief summarily, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law principles to the contrary," and this presumption can be overcome only "when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 562 U.S. at 99-100. As the Supreme Court has explained, "[a] spare order denying a petition without explanation or citation ordinarily ranks as a disposition on the merits." *Walker*, 562 U.S. at 310. California law makes this even clearer. The California Supreme Court has held explicitly that "[u]nless otherwise stated in the order," its summary denials of habeas petitions "indicate this court has considered and rejected the merits of each claim raised." *In re Reno*, 55 Cal. 4th 428, 447 (2012) (citing both federal and California decisions and opining that when it denies a petition summarily, this is a denial on the merits unless it states otherwise); *see also Robinson*, 9 Cal. 5th at 897 (noting that it is the California Supreme Court's practice in noncapital cases to "sometimes simply deny with a summary order petitions that clearly lack merit").

In this case, the California Supreme Court had before it a habeas petition that raised three claims: the *Brady* claim; the *Napue* claim; and the cell tower/call evidence claim not raised in this case. In resolving the habeas petition, the state high court denied Petitioner's three claims summarily and gave no indication that any of the three claims had not been considered. The only reasonable interpretation

of the California Supreme Court's summary denial order is that all three claims had been denied on their merits, in accordance with the foregoing federal and California law. Again, under *Robinson*, the California Supreme Court did not directly review the trial court's rulings on the three claims and considered them independently. Thus, the fact that the Trial Court Habeas Decision did not explicitly mention the *Napue* claim does not mean that the California Supreme Court, when faced with the claim, overlooked it or declined to consider it when it conducted its own original jurisdiction review of the petition before it. Given that summary denials under California law *are* merits denials absent an order stating otherwise (*Reno, supra*), had the California Supreme Court declined to consider the *Napue* claim at all or on its merits, it would have been required to say that it was doing so. Instead, the state high court issued a single sentence order summarily denying the petition as a whole, without comment or citation to authority. Under *Reno*, this rendered the state high court's order one on the merits as to all three claims. *See Crittenden v. Ayers*, 624 F.3d 943, 959-60 (9th Cir. 2010) (when the California Supreme Court's order denying a habeas petition said that "[t]he petition is denied in its entirety" and then noted that a specific ineffective assistance claim was denied on its merits, the Ninth Circuit rejected the argument that only the ineffective assistance claim had been denied on its merits and held that the first sentence demonstrated that there had been a summary denial of the merits of all claims raised and AEDPA deference was required as to all of them).

The Court's conclusion is bolstered by a decision from another District – *Garcia v. Burton*, 536 F. Supp. 3d 560 (N.D. Cal 2021), *aff'd by* 2022 WL 2593517 (9th Cir. July 8, 2022). Petitioner Garcia filed a habeas petition in the trial court raising seven claims premised on the asserted ineffective assistance of his trial counsel. The trial court held an evidentiary hearing limited to specified issues, which did not pertain to about half of the ineffective assistance claims raised. In its order denying the habeas petition, the trial court addressed only the claims that were

the subject of the evidentiary hearing, and did not mention several of Garcia's ineffective assistance claims. When Garcia thereafter filed habeas petitions raising all seven ineffective assistance claims in the California Court of Appeal and the California Supreme Court, those two state courts issued summary denial orders. *Id.* at 580-81. When Garcia raised all of these claims in his federal habeas petition, he asserted that he was entitled to receive de novo review of the claims that the trial court had failed to discuss in its order denying habeas relief. United States District Judge Vince Chhabria disagreed.

As a threshold matter, Judge Chhabria concluded that the *Williams* presumption that the trial court had denied all of the claims had been rebutted, citing, *inter alia*, factually specific reasons for believing that the trial court had forgotten the undiscussed claims. He observed that if the trial court had been the only court to have addressed Garcia's petition, then it "would be easy" to conclude that review of the claims the trial court had failed to discuss would be de novo. *Garcia*, 536 F. Supp. 3d at 582-83. However, two higher state courts had been presented with all of the claims in similar petitions and had denied relief in a summary fashion, and under *Richter*, summary denials of this nature are presumed to be adjudications on the merits. Judge Chabbria found the *Richter* presumption to apply "with particular force" in light of California's unique habeas procedure as stated in *Robinson*, namely, that each petition filed at each level is a new petition invoking original jurisdiction and when the California Supreme Court adjudicates such a petition, it does not directly review the lower court's rulings. *Id.* at 583.

Judge Chabbria then found that the look through presumption had been rebutted as to the claims the trial court did not discuss, concluding that there were "good reasons to believe that the California Supreme Court did not overlook half the claims the way that the Superior Court did." *Garcia*, 536 F. Supp. 3d at 584.

> First, as noted, the California Supreme Court adjudicated Garcia's habeas petition as an exercise of its original jurisdiction, and did not merely review the Superior

> Court's rulings. *See Robinson*, 9 Cal. 5th at 896-97, 266 Cal.Rptr.3d 13, 469 P.3d 414. Second, all of Garcia's claims—including the ones that the Superior Court forgot to decide—were fully briefed and presented in Garcia's petition to the California Supreme Court. *See Wilson*, 138 S. Ct. at 1192 (noting one way to rebut the presumption that a summary decision adopted a lower court's reasoning is by showing that "alternative grounds ... were briefed or argued to the state supreme court"). Under these circumstances, a federal habeas court may not treat the California Supreme Court as having rubber-stamped the Superior Court's partial analysis, and must presume instead that the Supreme Court considered and rejected on the merits the claims that the Superior Court overlooked.

Id. Judge Chabbria concluded that, under these circumstances, the claims that the trial court failed to discuss must be deemed to have been adjudicated on the merits by the California Supreme Court and, therefore, to be subject to the deferential Section 2254(d) standard of review and to be reviewed under the *Richter* "any reasonable argument" standards discussed earlier. *Id.* at 585. On appeal, the Ninth Circuit agreed, concluding that the look through presumption had been rebutted, because all of the ineffective assistance claims had been presented to and briefed in the California Court of Appeal and the California Supreme Court and the trial court's failure to rule on Garcia's strongest ineffective assistance claims was unreasonable. The Ninth Circuit found that it was more likely than not that the California Supreme court performed its own merits analysis and did not rely on the trial court's incomplete reasoning, particularly in light of *Robinson's* articulation of how original jurisdiction works in California's appellate courts. 2022 WL 2593517, at *1.

The Court finds the *Garcia* decision persuasive under the facts and procedural posture here. The California Supreme Court's summary denial of the habeas petition presented to it was a merits adjudication of all three claims in the petition, regardless of the trial court's earlier failure to discuss the *Napue* claim. As a result, the *Napue* claim must be reviewed pursuant to the Section 2254(d) standard.

DISCUSSION

I. The *Napue* Claim

As discussed earlier, Petitioner's brief and his related reply filed following the exhaustion of his *Brady/Napue* claims constitute the operative statement of those claims at this point in time. In the portion of his briefing devoted to the *Napue* claim, Petitioner identified two aspects of Aflague's testimony that Petitioner contends were false and fall "squarely within *Napue*": specifically, Aflague's testimony about a shoplifting incident (the "Shoplifting Testimony"); and his disavowal of having received any benefit in exchange for his testimony at Petitioner's trial (the "Benefits Testimony"). [Dkt. 234 at p. 19; Dkt. 242 at p. 12.][11]

A. Background

1. The Benefits Testimony

On direct examination, Aflague testified that he was friends with Petitioner and Jose and essentially had grown up with them. In 1997, Aflague was selling crack cocaine, weed, heroin, and guns. [Lodg. No. 2, Reporter's Transcript ("RT") 1326.] Some time before the murder of Bruce Cleland, Jose approached Aflague seeking to buy drugs and a handgun. Jose asked if Aflague knew anyone who could act as a driver for an unidentified purpose. Aflague agreed to obtain the handgun and a driver. [RT 1327-28.] Jose returned another time and advised Aflague that he needed the handgun as soon as possible, because he had "a hit he had to take care of," but said he no longer needed a driver, because he and Petitioner would take care of it. [RT 1328-29.][12]

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[11] This two-pronged iteration of Petitioner's *Napue* claim is consistent with the version Petitioner asserted in his post-evidentiary hearing brief, which in turn led to the Second Report on the merits of the *Napue* claim. [*See* Dkt. 153 at p. 7.]

[12] Aflague's testimony regarding the timing of the conversations he had with Jose is a bit uncertain. Aflague appeared to place the conversations in late 1996 or early 1997, around the holidays or in winter. [*See* RT 1327, 1341-42, 1357-59.]

The prosecutor asked Aflague if anyone had promised him anything for his trial testimony and he responded "No." [RT 1330.] The prosecutor then asked specifically if he or Detective Herman had promised Aflague anything, and Aflague again said "No." [*Id.*] On cross-examination, defense counsel asked Aflague if he received relocation money from the police when he moved out of state in 1995, following an incident in which he had been shot, and he responded "No," but then clarified that he had received some reimbursement from the District Attorney's Office for his moving expenses. Aflague indicated that he had moved far away and "they gave me relocation money to get closer, so I could testify over here." [RT 1362-63.] When then asked, "But as far as this case, you got nothing?," Aflague responded, "No, it has nothing to do with this case whatsoever." [RT 1363-64.]

2. The Shoplifting Testimony

During cross-examination, defense counsel asked Aflague about a November 13, 1999 shoplifting incident at a Robinsons-May department store. Aflague alluded to "a couple of incidents," denied having been arrested at the scene, denied having walked out of the store with any items, and conceded that he had been charged with a crime or two, although said he could not recall the actual charge(s). [RT 1346-49.] Aflague acknowledged that he was with a juvenile named Marcus Navarette at the store and claimed that he was "working on a case that involved" Navarette, so he was doing what it took to get close to him. [RT 1348, 1351-52; *see also* RT 1342 (Aflague's general testimony that he would act as a thief "when I have to do my work," *i.e.*, "have to go undercover").] Aflague admitted to shoplifting at a Robinsons-May on December 8, 1999, but he did not claim that this incident was part of any informant or undercover work. [RT 1357.]

3. The Assertedly False Nature Of The Benefits And Shoplifting Testimony

With respect to the Aflague's testimony indicating that he was conducting some sort of undercover work when he was caught shoplifting on November 13, 1999, Petitioner correctly notes that Aflague has admitted this testimony was not true. Aflague testified at the November 2012 EH held in this case. [*See* Dkt. 217-14 at ECF #6909-#6940, "Aflague EH Testimony."] At that hearing, Petitioner's counsel asked Aflague about the November 13, 1999 incident, and Aflague testified that he was with Marcus Navarette at the time but was not actually shoplifting, and that he did not get arrested until two days later. Aflague testified that, when Marcus was arrested on November 13, 1999, Aflague told the officers that the items were "my stuff to try to cover up for him, because I was trying to work something with his dad buying weapons." [*Id.* at 553-54.] Aflague acknowledged that: he "was not working undercover" at the time of the incident but nonetheless had said he was when he testified at Petitioner's trial; was not working as a sanctioned undercover operation for any law enforcement entity at the time; and his trial testimony indicating he was working undercover at the time of the shoplifting incident was "not true." [*Id.* at 554.]

With respect to Aflague's testimony that he did not receive any benefit in exchange for his testimony at Petitioner's trial, Petitioner proffers two theories for why this testimony was false: (1) there was an "implicit promise" that Aflague would receive relocation funds in exchange for his testimony against Petitioner; and (2) Aflague's testimony was in "exchange for the benefits he had already received." [Dkt. 234 at 19.] Petitioner asserts, without citation, that Detective Lisa Sanchez testified at the November 2012 EH that she told Aflague he had to testify at Petitioner's trial, because he already had been relocated. [*Id.*] Petitioner also asserts, again without citation, that Aflague "was actively seeking a relocation payment" when he was interviewed by detectives prior to Petitioner's trial. [*Id.*]

B. The Governing Clearly Established Federal Law

A prosecutor's knowing use of perjured testimony violates a criminal defendant's federal right to due process of law. *See Napue*, 360 U.S. 268-70; *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"). "In addition, the state violates a criminal defendant's right to due process of law when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears." *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (*en banc*); *see also United States v. Bagley*, 473 U.S. 667, 680 n.8 (1985) ("the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared.").

A habeas petitioner seeking relief based on the presentation of false testimony by a prosecution witness must show "'(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material.'" *Gentry v. Sinclair*, 705 F.3d 884, 903 (9th Cir. 2013) (quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003)); *see also Reis-Campos v. Biter*, 832 F.3d 968, 976 (9th Cir. 2016). As to the third factor, false testimony is material if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes*, 399 F.3d at 985 (internal quotation marks and citations omitted). Under this materiality standard, the question is whether in the absence of the false testimony the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 984 (internal quotation marks and citations omitted); *see also Soto v. Ryan*, 760 F.3d 947, 958 (9th Cir. 2014) (same).

Relying on a Ninth Circuit decision not governed by the Section 2254(d) standard of review, Petitioner asserts that if there is a finding that the prosecutor

knowingly permitted false testimony, habeas relief is automatic. [Dkt. 242 at 8.] No such rule applies, however, when a case is governed by the Section 2254(d) standard of review, in which the threshold issue is the objective reasonableness, or not, of the state court's decision under clearly established Supreme Court precedent. Moreover, contrary to Petitioner's contention, the Ninth Circuit has stated repeatedly that *Napue* does not create "a per se rule of reversal," the error is not structural, and relief is warranted only if the constitutional error was material. *Hayes*, 399 F.3d at 984; *see also Panah v. Chappell*, 935 F.3d 657, 664 (9th Cir. 2019) (materiality must be shown, because there is no per se rule of reversal under *Napue*).

C. The *Napue* Claim Fails.

For the following reasons, the Court concludes that Petitioner has failed to show that it was objectively unreasonable, factually or legally, for the state court to reject the *Napue* claim. As explained below, only one aspect of Aflague's testimony actually has been shown to be false; the remainder of his challenged testimony cannot support finding a *Napue* violation. Even though one aspect of Aflague's testimony was false, that testimony was not material, as it was wholly ancillary and did not relate in any way to or render not credible the only aspect of Aflague's testimony that actually mattered, *i.e.,* his testimony about his conversations with Jose.

1. Even If Aflague's Shoplifting Testimony Was False, It Was Not Material.

The Court agrees with Petitioner that Aflague's trial testimony intimating that he was working as an informant and/or undercover in connection with the November 13, 1999 shoplifting incident was false. Aflague has said that the testimony was not true, and there is no reason of record to doubt his admission. Aflague's trial testimony that he was acting as an undercover agent for law

enforcement was patently implausible and, indeed, in closing argument, the prosecutor conceded that the defense had "prove[n]" that Aflague "is a shoplifter." [RT 1713.] Thus, the initial element of a *Napue* violation – that false testimony was given – is met. Given the prosecutor's above concession to the jury, a fairminded jurist could conclude that the prosecutor did not let Aflague's false testimony stand uncorrected. But even if, *arguendo*, every fairminded jurist would conclude that the prosecutor's concession was not enough to "correct" the false nature of Aflague's shoplifting testimony for *Napue* purposes – a conclusion that strikes the Court as unrealistic – Petitioner's claim would fail nonetheless, because a fairminded jurist reasonably could conclude that this testimony was not material.

The Court has reviewed the record carefully, and the obvious conclusion to be drawn is that the jury at Petitioner's trial could not have been under any illusions about Aflague's status as a well less than reputable citizen. He readily admitted that he dealt drugs (including heroin and crack cocaine) and guns, had committed shoplifting less than a month after the November 13, 1999 incident, and had lied to the police in connection with the 1995 incident in which he was shot. [RT 1326-27, 1344, 1361-62.] Aflague also admitted that he had been working as an informant with the police, ATF, "narcotics," and others prior to 1999. [RT 1333, 1346.] In closing argument, the prosecutor conceded Aflague's disreputable nature, stating, "You saw him. You heard him. You saw him exactly as he is. Nobody tried to dress him up or pretend he was somebody that he wasn't because you are entitled to see him and hear him and know him exactly as he is," a witness the prosecutor labeled "a drug dealer" and "gun runner." [RT 1712; *see also* RT 1807 (noting that "[i]t's easy to attack Joseph Aflague" given that he admittedly is a drug dealer and a gun dealer).][13]

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[13] In its May 27, 2003 decision reversing the convictions of Jose and Rebecca Cleland, the California Court of Appeal noted that Aflague's "credibility was questionable from the outset." *People v. Cleland*, 134 Cal. Rptr. 2d 479, 491 (Ct. App. 2003).

Apart from Aflague's own testimony about his criminality and the prosecutor's related concessions, the jury heard defense counsel trash Aflague's credibility in closing arguments. Jose's counsel described him as an "admitted liar and a criminal every which way you want to cut it," and characterized his testimony about the asserted conversations with Jose as "what people like him do," namely, as "a snitch who is involved in criminal activity" and who "is telling the police what they want to know." [RT 1742, 1744.] Rebecca Cleland's counsel described Aflague as a "worthless street criminal" who committed daily felonies by selling drugs and who got shot because he "screwed over someone else" and who sold himself as an informant to multiple law enforcement agencies, adding as a parting shot that Aflague was "arrogant" and "defiant" and would "be worthless the rest of his life." [RT 1761-63.] Petitioner's counsel described Aflague as the type of person who would swear to tell the truth and then lie, opining that the jurors knew he was "willing to lie" based on what happened in the courtroom. [RT 1771-72.] Counsel described Aflague as a "sneak thief" whose testimony about the November 13, 1999 shoplifting incident was inconsistent and riddled with lies and as someone who survives as a "dishonest person" "by breaking the law to be in good with the police" by acting as an informant. [RT 1772-73, 1775.] In response, the prosecutor agreed that it was "easy to attack" Aflague given his status as "a gun dealer and a drug dealer," which he had admitted. [RT 1807.]

In short, both sides were in agreement that Aflague was not an honorable person, and thus, the jury had reason to be suspicious of Aflague's credibility in general. Moreover, given the plainly dubious nature of Aflague's testimony about the November 13, 199 shoplifting incident itself, the jury had even further reason to believe that he was not telling the truth when he claimed to have been acting in some sort of undercover or informant capacity at the time.

When asked about the November 13, 1999 incident, Aflague: first asserted that "someone else" "got caught walking out" with stolen items and that he did not,

even though he was shown the criminal complaint filed against him describing his participation in the crime; disputed the allegations of the criminal complaint through weak or unconvincing denials; disputed that he had been arrested, even though he conceded that criminal charges were brought against him; and denied that he cursed at a female security guard but conceded he called her a dyke. [RT 1347, 1349-51, 1352, 1356.] Aflague claimed to have been "working on a case" that involved the juvenile caught shoplifting with him, but proffered no details about any such "case" or any explanation of why shoplifting would have been a part of his "undercover" work. Moreover, the jury heard Aflague readily admit that he acted as a thief on occasion and that he committed the crime of shoplifting at another Robinsons-May less than a month after the November 13, 1999 incident. [RT 1342, 1357.]

It is entirely reasonable to conclude that any rational juror would have rejected Aflague's assertion that he was acting as an "undercover" agent at the time of the November 13, 1999 shoplifting incident based purely on the contradictory, implausible, and ultimately unconvincing nature of his testimony in this respect. As a result, it was not objectively unreasonable for the state court to find that this false testimony was not material. Under Section 2254(d), the *Napue* analysis, thus, necessarily would stop there but for a contention Petitioner makes. Petitioner argues that, regardless of the likelihood that the jury rejected Aflague's "shoplifting while acting as an undercover informant" testimony as untrue, a portion of the prosecutor's closing argument nonetheless rendered Aflague's obviously untrue informant testimony material. Specifically, Petitioner cites to the prosecutor's closing argument statement that, despite Aflague's criminal status, Aflague had "no reason to lie" about the two conversations he had with Jose. [RT 1712-13, 1803, 1808.] Petitioner argues that this statement by the prosecutor was improper vouching and, thus, "decreases exponentially the confidence this Court can have in [Petitioner's] conviction and sentence." [Dkt. 234 at 20.] This argument is wholly unpersuasive.

While Aflague's testimony about the conversations he had with Jose was relevant to the question of Petitioner's guilt or innocence, Aflague's implausible testimony that he was acting in an undercover basis during the November 13, 1999 shoplifting incident clearly was not. More importantly, the prosecutor never claimed that Aflague had "no reason to lie" about the Shoplifting Testimony (or the Benefit Testimony); Petitioner conveniently omits that fact and the context of the prosecution's cited remark. The prosecutor's "no reason to lie" argument was directed solely to Aflague's testimony about the conversations he had with Jose, namely, the prosecutor argued that Aflague would not have a reason to lie about those conversations given that Petitioner and Jose were Aflague's friends and he grew up with them. [*See* RT 1712-13, 1807-08.] The prosecutor plainly did not argue that Aflague had "no reason to lie" about any other aspect of his testimony.

In any event, whether or not the prosecutor's "no reason to lie" comment constituted impermissible vouching regarding the conversations Aflague claimed to have had with Jose is not at issue here, given that Petitioner has never raised an extant prosecutorial misconduct claim based on vouching in this case. At issue is the falsity and materiality, or not, of Aflague's Shoplifting and Benefits Testimony under the clearly established federal law set forth in *Napue* and related Supreme Court cases. More precisely, the salient question is whether or not it was objectively unreasonable for the state high court to find such testimony to be not false and/or not material. Petitioner's attempt to muddy the waters by arguing that his conviction is not worthy of confidence based on a vouching theory not even raised as a claim in this case is a red herring.[14]

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[14] Petitioner also asserts that the state court's "fact-finding process" was unreasonable for purposes of Section 2254(d)(2), because the Trial Court Habeas Decision failed to address Petitioner's argument regarding the legal effect of the prosecutor's "no reason to lie" statement on the materiality assessment. [Dkt. 234 at 34.] The threshold problem with this argument is that Petitioner fails to identify any "fact" pertinent to the prosecutor's statement that the trial court failed to find for Section 2254(d)(2) purposes. The prosecutor's "no reason to lie" statement was his argument based on his view of the evidence, including the fact that Aflague, Petitioner, and

Somewhat relatedly, in his Reply brief [Dkt. 242 at 8], Petitioner asserts that the prosecutor "doubled down" on Aflague's Shoplifting and Benefits Testimony "to avoid the otherwise mandatory jury instructions regarding Aflague's credibility." Petitioner fails to provide any citations to the record for this assertion, much less explain how the prosecutor purportedly was able to utilize Aflague's Shoplifting and Benefits Testimony somehow to persuade the trial judge to refrain from giving any relevant witness credibility instructions. Moreover, Petitioner's unsupported assertion as to the prosecutor's alleged motivation is rank speculation at best. The jury received the standard instructions regarding evaluating witness credibility, was told that a witness who was willfully false in one material portion of his testimony should be distrusted in other portions of his testimony, and was told that Aflague's past criminal conduct could be considered for purposes of assessing his believability. [CT 998-998A.] The jury, thus, was adequately instructed about the

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Jose had grown up together. "Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir.1996) (internal quotation marks omitted and citation omitted); *see also United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991) ("freedom to argue reasonable inferences based on the evidence" is inherent in the prosecution's latitude to fashion closing arguments). Petitioner has not pointed to any evidence proving, or tending to prove, that Aflague's testimony about his conversations with Jose was, in fact, false. Rather, Petitioner's pitch in connection with both of his habeas claims is that Aflague was a longtime informant and overall bad person whose credibility therefore was suspect in toto and, so, the prosecutor's statement wrongly bolstered Aflague's credibility about everything. This is legal argument, not a "fact" that required a state court finding following an evidentiary process.

Petitioner's Section 2254(d)(2) argument, in actuality, is that he thinks it wrong that the trial court did not address his legal argument that the prosecutor's "no reason to lie" statement rendered the falsity of Aflague's testimony and/or the undisclosed evidence related to Aflague (as discussed *infra* in connection with the *Brady* claim) material under prevailing federal law. This is a Section 2254(d)(1) argument, not a valid invocation of Section 2254(d)(2). Given the absence of any vouching/prosecutorial misconduct claim and Petitioner's failure to identify any additional facts that the trial court should have found and failed to find, there was nothing unreasonable under Section 2254(d)(2) about the trial court's "fact-finding" based on its failure to specifically address Petitioner's argument about the legal effect of the prosecutor's "no reason to lie" statement, and Petitioner's Section 2254(d)(2) contention is unpersuasive.

effect of Aflague's patently false Shoplifting Testimony on his credibility as a whole.

In sum, a fair reading of the record ineluctably leads to the conclusion that a rational jury would have seen through Aflague's claim that he was acting in an undercover basis at the time of the November 13, 1999 shoplifting incident and surmised that he was lying or, at the very least, been highly suspicious about the truth of this assertion. Apart from the not credible nature of Aflague's "undercover" testimony, the testimony related to an ancillary matter not pertinent to Petitioner's guilt; indeed, it was an immaterial part of the State's case against Petitioner. In fact, the testimony could be said to have worked to Petitioner's advantage, as it demonstrated not only that Aflague had committed a crime, thus raising a question as to his credibility in general (as the jury was instructed), but moreover, that he was willing to lie about its circumstances despite being under oath and to do so in a wholly implausible manner, thereby providing a further basis for calling his veracity as a whole into question.

In any event, even if Aflague's "undercover" testimony had never happened, Petitioner's jury would not have been presented with a significantly different presentation of evidence relevant to Petitioner's guilt, given that Aflague's status as an informant or undercover operative in November 1999 was not an issue of importance to the prosecution's case. More importantly for Section 2254(d) purposes, at a minimum, a fairminded jurist could draw these same conclusions, and thus, it would not have been objectively reasonable for the California Supreme Court to have determined that *Napue*'s materiality requirement was unsatisfied. *See Panah*, 935 F.3d at 667 (finding that a *Napue* claim failed when the false testimony at issue was not the "centerpiece" of the prosecution's case and even if the jury disbelieved the false testimony, there was no reasonable likelihood that it could have affected the jury's judgment, and the California Supreme Court reasonably could have has full confidence that the jury would have returned the same verdict in the

absence of the testimony).

There simply is no reason to believe that Aflague's false Shoplifting Testimony could have affected the judgment of the jury with respect to Petitioner's guilt in connection with Bruce Cleland's murder. Aflague's credibility already was so much of an issue for the jury that even if the jury had been told expressly that the Shoplifting Testimony was false, this would have had an immaterial effect, if any, on the jury's assessment of Aflague's testimony about his conversations with Jose. Put otherwise, Aflague's credibility (or lack thereof) in the jury's eyes would have remained unchanged even had Aflague not testified falsely in this respect or the prosecutor explicitly stated that Aflague had lied in this respect. This, regardless of the obviously false nature of this testimony, it was not unreasonable to conclude that Petitioner's trial nonetheless resulted in a verdict that was worthy of confidence. It therefore was not objectively unreasonable for the state high court to conclude that this false testimony by Aflague was immaterial. As a result, this portion of Petitioner's *Napue* claim necessarily fails.[15]

2. A Fairminded Jurist Could Conclude That Aflague's Benefit Testimony Was Not False.

As noted above, Petitioner contends that Aflague's testimony that he had not received any benefit in exchange for testifying at Petitioner's trial was false, because (1) there was an "implicit promise" that Petitioner would receive relocation benefits if he testified at Petitioner's trial, and (2) his trial testimony was provided in exchange for benefits he already had received.

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[15] Even though the Court has not found the Shoplifting Testimony to be material under the *Napue* standard for materiality, the effect of this item of false testimony will be considered collectively with the effect of the undisclosed evidence at issue in Petitioner's *Brady* claim, as discussed *infra*. *See Reis-Campos*, 832 F.3d at 977 (even if the *Napue* errors are not material "standing alone," they should be considered collectively with any instances of nondisclosure within the meaning of *Brady* to assess *Brady's* materiality requirement).

To prove the above two assertions, Petitioner relies primarily on his representation that, at the November 2012 EH, Detective Lisa Sanchez testified that "she told Aflague he had to testify, because he had already been relocated." [Dkt. 234 at 19.] Petitioner did not provide any citation for this alleged testimony by Detective Sanchez, and so, the Court has reviewed the detective's testimony as a whole in an attempt to find it. [*See* Dkt. 217-14 at ECF #7126-7210, the "Sanchez EH Testimony."] In salient part, Sanchez testified as follows.

Sanchez stated that the purpose of relocating a witness is to keep him safe and that she relocated Aflague twice, both times based on threats to him. [Sanchez EH Testimony at 764-65.][16] The first relocation in which she was involved took place in June 1999, and Sanchez repeatedly stated that the June 1999 relocation pertained to a different murder case (the Guzman case), *not* the Bruce Cleland murder investigation. [*Id.* at 768, 783, 787-88.] In the course of interviewing Aflague in connection with the Guzman case, Sanchez and another detective asked Aflague if he knew of any other murders and learned he had information relating to the Bruce Cleland murder. [*Id.* at 779-80.] Sanchez recalled that Aflague was afraid to testify in the Cleland murder case, and although Petitioner's counsel asked her three times if Aflague had said, or she believed, that he would not testify in the Cleland case without relocation, each time she responded, "I don't know." [*Id.* at 784-85, 786, 787.] The second relocation in which Sanchez was involved took place in July 2000, *after* Aflague testified at Petitioner's trial, and it stemmed from an event that

[16] The Court notes that the record contains evidence of multiple times in which Aflague was relocated (as discussed *infra*), but that only two of those relocations are relevant to the instant *Napue* discussion, because Sanchez testified about only two of them. The relocation that occurred in June 1999, a year prior to Aflague's testimony at Petitioner's trial, was referred to as the "first" relocation when Sanchez was questioned at the November 2012 EH, and the relocation that occurred in July 2000, the month after Aflague testified at Petitioner's trial, was referred to as the "second" relocation. For clarity's sake, the Court has not adopted those descriptors here, because there is an earlier relocation at issue in connection with the *Brady* claim. Accordingly, the Court will use the terms "June 1999 relocation" and "July 2000 relocation" in this discussion and in its later *Brady* discussion.

occurred after Aflague testified and that he perceived to be a threat. [*Id.* at 767-68.]

Subsequently, Sanchez was asked about whether she had difficulty locating Aflague for the purpose of testifying in the Bruce Cleland case. At first, Sanchez indicated that this happened in connection with the 2006 retrial of Rebecca Cleland and Jose or with the 2007 second retrial of Jose,[17] but Sanchez later conceded that she was not sure if this occurred in connection with the 2006 or 2007 retrials or in connection with the initial 2000 trial of all three co-defendants. [Sanchez EH Testimony at 793, 796, 802-03.] Sanchez reiterated that the June 1999 relocation of Aflague was solely for the Guzman case, but noted it was during the investigation of that case when they learned that Aflague had information related to the Bruce Cleland murder, so the two separate murder cases were a "little bit of intertwined." [*Id.* at 802-04.]

When first asked if Aflague did not want to testify at Petitioner's trial, Sanchez stated that she did not remember. [Sanchez EH Testimony at 811-12.] When presented with her earlier deposition testimony, Sanchez stated that on one occasion when she went to find Aflague, he was reluctant or hesitant to testify, but again, she did not remember if this occurred in connection with the original 2000 trial of all three co-defendants or in connection with 2006 and 2007 retrials of Rebecca Cleland and Jose. [*Id.* at 813.] Sanchez noted that every time they needed to have Aflague testify, he was hesitant, and on one occasion, she reminded him "we moved you[,] the agreement is you need to cooperate with us during the trial," but she could not remember when this incident had occurred, *i.e.*, whether in connection with Petitioner's 2000 trial or, instead, in connection with the subsequent 2006 and 2007 retrials of his two co-defendants. [*Id.* at 814.]

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[17] Petitioner, Rebecca Cleland, and Jose were tried and convicted together in 2000, which is the trial at issue in this case. Rebecca Cleland and Jose later had their convictions overturned on appeal and were retried together in 2006; Rebecca was convicted. and Jose obtained a mistrial due to prejudicial statements made by Rebecca's counsel. Jose was retried in early 2007, and he was convicted. *See People v. Quesada*, 2008 WL 4635836, at *3-*4 (Ct. App. Oct. 20, 2008).

During Sanchez's examination by Petitioner's counsel, she was shown a relocation-related form that had the "No" box checked in response to a question about whether the witness would have testified without relocation. Sanchez had no independent recollection of checking that box but surmised that she would have checked it because she thought so at the time. [Sanchez EH Testimony at 789-90.] On later questioning, however, it was revealed that this same form contained an entry regarding the threat Aflague had received *after* he testified at Petitioner's 2000 trial, and thus, the form necessarily pertained to the July 2000 relocation, *i.e.*, after Petitioner already had been convicted. [*Id.* at 833-35.] When asked why she would have checked the "No" box if relocation happened after Aflague's testimony was given, Sanchez did not recall but posited that the box was checked in error. [*Id.* at 844.]

Petitioner's unqualified assertion that Detective Sanchez testified that she told Aflague he had to testify at Petitioner's trial because he already had received relocation benefits, thus, plainly is not a fair or accurate characterization of her actual evidentiary hearing testimony. While Sanchez testified that she had made a statement of this sort, her other testimony qualified it, because she also testified that: (1) the June 1999 relocation pertained to the Guzman case and a related threat; (2) the July 2000 relocation occurred after Aflague already had testified at Petitioner's trial and been threatened subsequently; and (3) she did not know if her statement was made before Petitioner's trial or after, *i.e.,* after the July 2000 relocation and before the second and third retrials of Rebecca Cleland and Jose. Clearly, Sanchez's testimony did not establish, as Petitioner claims, that there was an "implicit promise" that Aflague would receive relocation if he testified at Petitioner's trial, nor did her testimony establish that he testified at Petitioner's trial because he already had received relocation. At most, Sanchez's uncertainty about when she made this statement gives some room to argue that she might have made it before Petitioner's trial, but her testimony also readily supports a finding of just the

opposite, *i.e.*, that Sanchez made her statement after Aflague already had testified at Petitioner's trial, he had been relocated due to a post-trial threat, and his testimony was needed at the future trials of Petitioner's co-defendants.[18] If the latter, Sanchez's testimony plainly does not show that Aflague was lying when he testified that he had not received any benefit in exchange for testifying at Petitioner's trial.

Petitioner's *Napue* theory about the Benefits Testimony, thus, has as its foundation an inaccurate characterization of Detective Sanchez's testimony. Moreover, Petitioner fails to acknowledge two relevant items of evidence that further detract from his theory.

First, Detective Thomas E. Herman – a co-investigating detective with Sanchez – also testified at the November 2012 EH. Herman flatly stated that the June 1999 relocation of Aflague had "no" ties to the Bruce Cleland murder case and, instead, related only to the Guzman case. [Dkt. 217-15 at ECF #7388, #7400; *see also id.* at ECF #7404: "the first relocation was -- didn't have anything to do with the Cleland case, whatsoever."] Herman testified that he did *not* tell Aflague that the June 1999 relocation had anything to do with the Bruce Cleland investigation but that, in his own mind, Herman thought that when he relocated Aflague in connection with the Guzman case, Aflague eventually might become a witness in the Cleland case. [*Id.* at ECF #7406-#7407.]

Second, Petitioner's Exhibit 4 for the November 2012 EH contained paperwork related to the June 1999 and July 2000 relocations. [A copy of this exhibit also was Exhibit 4 presented in Petitioner's California Supreme Court habeas petition and has been docketed at Dkt. 217-12, ECF #6504-#6549 ("Relocation Paperwork").] On May 12, 1999, Detective Herman filled out a witness protection program assistance request (No. 9804-22390) pertaining to the

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[18] At the November 2012 EH, Aflague was asked if Sanchez told him that, because he had been relocated, he had to testify at the Bruce Cleland trial. He responded, "I don't recall." [Aflague EH Testimony at 561.]

1998 Guzman double homicide and Aflague's potential testimony, which was approved for a total amount of $2,590, on June 21, 1999. [Relocation Paperwork at 154-55.] The LAPD requested separate reimbursement payments of $2,000 (7/6/99 letter) and $595 (9/29/99 letter). [*Id.* at 145, 151.] The $2,000 amount was paid to Aflague in late June 1999 (supposedly for rent he had paid to his landlord[19]), and the $595 amount was paid to Aflague on August 11, 1999. [*Id.* at 146, 151-53.][20] Aflague did not provide any information about the Bruce Cleland murder to Sanchez or Herman, however, until early August 1999, after he had been approved (on June 21, 1999) to receive $2,590 in connection with relocation related to the Guzman case and already had received the bulk of those relocation funds.[21] The Relocation Paperwork for the June 1999 relocation refers only to the Guzman case and makes no mention of the Bruce Cleland murder investigation.

Both Detective Herman's testimony and the Relocation Paperwork support a finding that the June 1999 relocation related only to the Guzman case and that the $2,595 that Aflague received for the June 1999 location was tied only to his potential witness testimony in the Guzman case. There was some temporal overlap for the time period the Guzman case relocation monies were intended to cover and the date on which Aflague first mentioned he had information about the Bruce Cleland murder (August 2, 1999) and the date on which Aflague received his $595

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[19] As part of his *Brady* claim, Petitioner contends that Aflague defrauded the LAPD in connection with this $2,000 payment, because he did not actually pay it to the landlord whose name was set forth on the rental receipt he provided to the LAPD. [Dkt. 234 at 13-14.] Even if this is true, it has no bearing on Petitioner's *Napue* claim, although the issue will be addressed in connection with the *Brady* claim.

[20] Petitioner contends that Aflague received both $2,590 and $595, but this appears to be incorrect.

[21] Exhibits utilized at the November 2012 EH establish that Aflague first spoke to the detectives about his conversations with Jose on August 2, 1999, and then again on August 9, 1999. [*See, e.g.,* Respondent's Ex. 1005 (Deposition of Detective Tom Herman taken October 10, 2012) at 123, 125, 139 and Exs. 4 and 8 to the deposition.]

payment (August 11, 1999). Critically, however, the fact remains that both the $2,000 Aflague was paid and the $595 he was paid later on were both requested as relocation monies for his Guzman case witness status and approved *well over a month before* Aflague ever advised the police that he knew something relevant to the Cleland murder, *i.e.,* at a time when the only information he had provided to police related to the Guzman case. Moreover, the $2,000 payment happened *well over a month* before Aflague said anything about Bruce Cleland. Petitioner's argument that this situation shows that there existed some sort of quid pro quo for Aflague's potential testimony about Petitioner is baseless, because the timeline repudiates any such conclusion.

Finally, as noted earlier, Petitioner asserts that Aflague's trial testimony that he did not receive any benefits in exchange for testifying was false, because he was "actively seeking a relocation payment" when he was interviewed in connection with the Bruce Cleland murder case. Petitioner provides no citation to the record or any explanation for this contention, and the Court, quite frankly, is not sure what point he believes it serves. It is undisputed that relocation efforts already had commenced for Aflague in connection with the Guzman case *before* he first mentioned (on August 2, 1999) his conversations with Jose. Aflague had received $2,000 in relocation monies approximately a month before he first spoke with detectives about the Bruce Cleland matter, and while Aflague received another $595 approximately a week after he spoke with them, the record shows that these monies were related to Aflague's witness status in the Guzman case, not the Cleland case, and had been approved for payment well before Aflague ever mentioned anything related to the Cleland matter. That Aflague may have "actively" sought such funds in connection with the existing Guzman case in the months before he mentioned the conversations he had with Jose does not show that Aflague's Guzman-related June 1999 relocation was a quid pro quo for future testimony in connection with the Cleland investigation. Nothing about this situation renders false Aflague's

testimony that he did not receive benefits – relocation or otherwise – for testifying at Petitioner's trial.

The evidence before the Court does not persuade it that Aflague testified falsely at trial on June 23, 2000, when he stated that he had not been promised anything in exchange for his trial testimony and that the relocation he had described and the related monies he had received were in connection with an earlier case and had nothing to do with the Bruce Cleland case. The California Supreme Court, thus reasonably could have concluded that no *Napue* violation occurred based on Aflague's Benefit Testimony, because his testimony in this respect was not false. *See Panah*, 935 F.3d at 664 ("a *Napue* claim succeeds only if three elements are satisfied," including that the testimony in question was false). Perhaps another fairminded jurist might agree with Petitioner's view of the evidence but, at a minimum, fairminded jurists could disagree on this issue. This circumstance is fatal to Petitioner's *Napue* claim based on the Benefits Testimony under Section 2254(d)'s governing standard, and thus, the state court's rejection of this aspect of Petitioner's *Napue* claim was not objectively unreasonable, factually or legally.

* * * * *

Petitioner has not shown that the state court's rejection of his *Napue* claim was objectively unreasonable under the clearly established federal law and the evidence of record. As a result, Section 2254(d) forecloses federal habeas relief based on this claim.

II. The Brady Claim

In exhausting his *Brady* claim in the California Supreme Court, Petitioner asserted that the following four categories of evidence serve as the basis for the claim:

(1) Although the prosecution did disclose that Aflague had been relocated after he was the victim of a 1995 shooting (the *Padilla/Eulloqui* cases),

that disclosure was "inadequate," because the prosecution did not also disclose that Aflague received relocation monies after he testified in the *Padilla/Eulloqui* cases and had been relocated three times rather than once in connection with those cases. In addition, the prosecution failed to disclose that, in connection with one or more of the *Padilla/Eulloqui* relocations, Aflague reported to the LAPD that he was "unwilling to return to California" due to the ongoing threat to his life resulting from the 1995 incident in which he was shot. [Dkt. 217-11 (the "CSC Habeas Petition") at 48-49.]

(2) The prosecution failed to disclose the details of Aflague's informant activities for the LAPD, specifically: (a) Aflague's aid to the Hollenbeck Homicide Division, *i.e.*, a statement he made in the Gutierrez investigation identifying gang members; (b) Aflague's statements in the Guzman investigation, for which he was later relocated; and (c) Aflague's help with three other Hollenbeck shootings "that were disclosed to the trial court in the in camera meeting." [CSC Habeas Petition at 50-51.]

(3) The prosecution failed to disclose that Aflague was relocated in 1999, and that Aflague defrauded the LAPD in connection with the 1999 relocation by forging a lease document to obtain relocation funds. [CSC Habeas Petition at 51-54.]

(4) The prosecution failed to disclose that Aflague was relocated in 2000, pursuant to an implied promise that Aflague would receive benefits if he testified against Petitioner. [CSC Habeas Petition at 54-57.]

As the above served as the basis for the *Brady* claim that Petitioner exhausted, these same four categories of evidence will form the basis for the Court's analysis of Petitioner's currently operative *Brady* claim.

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A. The Clearly Established Federal Law

Due process requires that a prosecutor disclose material evidence favorable to the defense. *See Brady*, 373 U.S. at 87; *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Three elements must be proved to establish a *Brady* violation: (1) the evidence at issue was favorable to the defendant, either as exculpatory evidence or impeachment material; (2) the evidence was suppressed by the state, willfully or inadvertently; and (3) prejudice resulted from the failure to disclose the evidence. *See id.* at 281-82; *see also Ochoa*, 16 F.4th at 1326..

Evidence is "material" under *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler,* 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).[22] The Supreme Court has further explained that while the Court must first "evaluate the tendency and force of the undisclosed evidence item by item," the materiality of multiple items of suppressed evidence ultimately must be considered on a collective, rather than solely an item-by-item, basis. *Kyles*, 514 U.S. at 436 & n.10 ("The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item"; and "We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at

[22] Relying on a Supreme Court decision addressing an ineffective assistance of counsel claim in a capital case, Plaintiff asserts that the test for materiality under *Brady* is whether at least one juror would have found reasonable doubt. [Dkt. 234 at 25.] This is not the clearly established federal law that governs the *Brady* claim raised in this case. Under clearly established Supreme Court precedent, the test for materiality is as set forth above.

the end of the discussion"). The question of materiality "'must be analyzed in the context of the entire record.'" *Ochoa*, 14 F. 4th at 1330 (citation omitted); *see also United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

The Ninth Circuit has interpreted the above-quoted language from *Kyles* to mean that in cases in which both *Napue* and *Brady* violations are alleged, while the tests for prejudice/materiality differ somewhat for each such type of claim, a "collective prejudice" analysis should be performed nonetheless to assess the combined effect of these two different types of violations on the court's confidence in the jury's verdict. *See Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (initially formulating this collective prejudice test in a capital case not governed by the AEDPA standard of review). More specifically, the Ninth Circuit has indicated that if a court has concluded that false testimony was provided and allowed to stand uncorrected but that any such *Napue* violation is not material (and thus, relief based on the *Napue* claim would not be warranted based on that claim standing alone), and further finds that the *Brady* disclosure obligation was not met in some respect, it should consider the *Napue* false testimony and *Brady* nondisclosure events collectively to determine whether there is a reasonable probability that, but for their occurrence, the result of the trial would have been different. *See, e.g., Reis-Campos*, 832 F.3d at 977.

As previously discussed, the Court has found that the "undercover" portion of Aflague's Shoplifting Testimony was false, albeit not material, for *Napue* purposes. Thus, given the above Ninth Circuit precedent, the effect of the false Shoplifting Testimony will be considered collectively with Petitioner's assertions of *Brady* violations in assessing the third/materiality element of the *Brady* claim.

The Court begins its Section 2254(d) analysis by looking through to the Trial Court Habeas Decision on the *Brady* claim. The trial court did not address the first two elements of the alleged *Brady* violation (favorability and suppression) and, instead, proceeded directly to the third element (materiality), finding that it had not

been satisfied.

There is authority that when "a state court has adjudicated a claim on the merits with a written decision denying relief based on one element of the claim and therefore does not reach the others, federal courts should give § 2254 deference to the element on which the state court rules and review *de novo* the elements on which the state court did not rule." *Amado v. Gonzalez*, 758 F.3d 1119, 1131 (9th Cir. 2014); *see also Kipp v. Davis*, 971 F.3d 939, 949 (9th Cir. 2020) (same, citing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005)). At the same time, if a claim involves a multi-part test in which each element must be proven to establish a right to relief and it is shown that a claim fails on at least one element, then relief necessarily is unavailable and addressing the other elements is an unnecessary exercise. *See, e.g., Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (because the test for an ineffective assistance of counsel claim requires satisfaction of two prongs, the failure to satisfy either one "obviates the need to consider the other"); *cf. Kayer*, 141 S. Ct. at 524 ("if a fairminded jurist could agree with" the state judge's conclusion on either of the two ineffective assistance prongs, "the reasonableness of the other is 'beside the point'") (citation omitted). This is true in the *Brady* context. *See, e.g., In re Coleman*, 344 Fed. Appx. 913, 916 (5th Cir. 2009) ("'Where a defendant fails to establish any one element of *Brady*, we need not inquire into the other components.'") (citation omitted); *Berkley v. Quarterman*, 310 Fed. Appx. 665, 674 (10th Cir. 2009) (noting the same and that, therefore, it was appropriate to assume that the petitioner had met the first two *Brady* elements and "thus confine ourselves solely to determining whether the suppressed evidence was material").

In his relevant briefing, Petitioner addresses the first and second elements of a *Brady* claim (favorability and suppression) with respect to the four categories of evidence at issue in a fairly cursory fashion, and Respondent does not address these two elements at all. Rather, both parties devote the bulk of their arguments and efforts to the third element (materiality), in apparent recognition that the

materiality/prejudice question is the determinative one here. The Court agrees that materiality is the dispositive question before it with respect to Petitioner's *Brady* claim and the one on which the claim will prevail or founder.

Federal courts have the discretion to proceed directly to the materiality inquiry when doing so is the key to resolving a *Brady* claim. *See, e.g., Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018) ("We exercise our discretion to proceed directly to the prejudice/materiality question"; and ultimately denying relief on the *Brady* claim, because even assuming the petitioner could show suppression, he could not establish materiality); *United States v. Chavez*, 894 F. 3d 593, 600 (4th Cir. 2018) ("Where, as here, a *Brady* claim falters so clearly on materiality, we may proceed directly to that element."); *Johnson v. Bell*, 525 F.2d 466, 475 (6th Cir. 2008) ("We proceed directly to the issue of materiality, which is determinative of the *Brady* claim."). Doing so is appropriate here as well. The Court, therefore, will assume for argument's sake that the first two elements of a *Brady* violation are satisfied and will turn to the question of the materiality of the four categories of evidence at issue, first on an item-by-item basis and then collectively. *See Kyles*, 514 U.S. at 436 & n.10.

B. Category One: The Asserted Inadequacy Of The Prosecutor's Disclosure Related To The *Padilla/Eulloqui* Cases Relocations And The Failure To Disclose Aflague's Unwillingness To Return To California

As noted earlier, Aflague was the victim of a shooting in 1995. This led to two related state prosecutions: the *Eulloqui* prosecution, L.A.S.C. No. BA160668; and the *Padilla* prosecution, L.A.S.C. No. BA142010. At some point, Aflague was relocated in connection with those two cases – apparently more than once – and it seems that he received some relocation monies. Petitioner does not dispute that the prosecution disclosed to his counsel that Aflague had been relocated in connection with the *Padilla/Eulloqui* cases. Petitioner contends, however, that the disclosure

was inadequate, because the prosecutor did not also disclose the fact that Aflague had received relocation monies after he testified as a prosecution witness/victim in the *Padilla/Eulloqui* cases, nor did the prosecutor disclose that Aflague was relocated twice thereafter, *i.e.*, three times total in connection with those cases rather than once. Petitioner also complains that the prosecutor did not disclose that, as of December 1997, following Aflague's testimony in the *Padilla* case, he had expressed an unwillingness to return to California to testify in the *Eulloqui* case absent receiving assistance.[23]

Petitioner contends that the number of Aflague relocations related to the *Padilla/Eulloqui* cases and the related relocation monies Aflague received would have been valuable impeachment evidence, because this evidence could have been used to discredit Aflague's testimony at Petitioner's 2000 trial that he had not received anything in exchange for his testimony (the earlier-discussed Benefits Testimony). Petitioner characterizes the *Padilla/Eulloqui* relocations as the start of a pattern in which Aflague would cooperate with the LAPD and be compensated as a result. Petitioner reasons that evidence Aflague was relocated three times in connection with the *Padilla/Eulloqui* cases would have proven that: (1) as a general matter, a quid pro quo relationship existed between Aflague and the LAPD; and (2) specifically in connection with the prosecution of Petitioner, there existed an implicit promise or tacit agreement between Aflague and the police that if Aflague testified at Petitioner's trial, he would be compensated financially.

The Court has reviewed the record carefully with respect to the matters that Petitioner contends should have been disclosed. At Petitioner's trial, including on

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[23] The documents cited by Petitioner indicate that: the prosecutor believed that Aflague's life was in danger due to his testimony in the *Padilla* case, and as a result, relocation assistance for Aflague and his family was warranted; and Aflague "was aware of a reported contract on his life, and will be unwilling to return to California to testify in the pending [*Eulloqui* case] if he does not receive assistance in obtaining protection for his wife and child." [Dkt. 217-12 at ECF #6418-#6420.]

cross-examination, Aflague testified that: in 1995, shortly after he was shot, he relocated his family to Nogales on his own; subsequently, the district attorney's office gave him some relocation monies to move closer to Los Angeles, where the shooters would be tried; and he testified in the trials of the shooters and they were convicted. [RT 1331-32, 1361-63.] The remainder of the record does not afford much further clarity about to the dates of any relocation(s) after that initial 1995 relocation, much less about the total amounts of monies paid to Aflague, in connection with the *Eulloqui* and *Padilla* cases.

Petitioner asserts that, after the 1995 relocation, Aflague was relocated again twice, namely, after he testified against Padilla (1997) and Eulloqui (1998), and that Aflague received relocation monies in connection with these two relocations. [Dkt. 184 at 15; Dkt. 234 at 12, 23.] However, the documents on which Petitioner relies for this proposition [*Id.* at 12, citing CSC Habeas Petition Ex. 1 at 11-12, 48-50, Ex. 4, Ex. 7, Ex. 11, and Ex. 50] all pertain to relocations that occurred well after 1998, and with one exception, do not identify any monies paid to Aflague in connection with any 1997 and 1998 relocations in connection with the *Eulloqui* and *Padilla* cases.[24] The testimony that Petitioner cites from the November 2012 EH in this case and from hearings in other cases [*Id.,* citing CSC Habeas Petition Ex. 29 at 512-13, Ex. 38 at 848-49, Ex. 45 at 1052-54, 1064-65, 1074, Ex. 62 at 1552-54, Exs. 63-64] is far from clear and at most indicates only that: Aflague was relocated in 1995, and again later on (relocating from Nogales to Las Vegas); and he received an

[24] CSC Habeas Petition Ex. 75 reflects that on December 19, 1997 (in between Aflague's testimony in the *Padilla* case and his later testimony in the *Eulloqui* case), the prosecutor filed a motion asking that the LAPD be reimbursed in the amount of $2,414 for expenses related to relocating Aflague and his family, because detectives believed that they were in "immediate danger" due to a threat from gang members because of Aflague's testimony in the *Padilla* case and, therefore, "should be relocated as soon as possible." [See Dkt. 217-17 at ECF #8432-#8437.] Thus, it seems likely that Aflague received $2,414 for at least one relocation in connection with the *Padilla* and *Eulloqui* cases, although the record does not show when he received these relocation funds.

unspecified amount of relocation funds at some point, apparently after he testified in one of the two cases. The most that the Court can find with any degree of confidence is that Aflague may have relocated himself to Nogales right after the 1995 shooting, that he may have received some relocation funds to move from Nogales to a location closer to the California courthouse at some unspecified point in time, and that he likely received $2,414 in relocation monies either before or after he testified in 1997, in the *Padilla* case. [See Dkt. 217-15 at ECF #7418-#7419, #7429-#7430, #7439; Dkt. 217-17 at ECF #8436-#8437.]

The Court does not believe that the undisclosed evidence of one or two (or even three) post-1995 relocations, and any related relocation monies paid, would have had the impeachment value that Petitioner now argues. The jury at Petitioner's trial was aware that the prosecutor had asked Aflague to move closer to Los Angeles to be able to testify in the *Eulloqui* and *Padilla* cases and had given him unspecified relocation funds to do so, because Aflague admitted to this in his testimony. Thus, the jury already knew that the prosecution had paid for Aflague to relocate in connection with his intended trial testimony in those earlier cases and that Aflague had relocated twice following his shooting.

Even if the jury had learned of the inconclusive evidence on which Petitioner now relies as to a possible third relocation and a payment of relocation funds in the amount of $2,414 (and possibly more) on some uncertain date(s), this would not have materially altered the fact of which the jury already was aware, namely, Aflague's admission that the prosecution had paid him relocation monies so that he would testify in the *Eulloqui* and *Padilla* cases, *to wit*, "they gave me relocation money to get closer so I could testify over here" [RT 1363]. It is not reasonably probable that learning that this might have happened more than once and/or learning of the specific amounts of relocation monies paid would have had the impeachment value in the jury's eyes that Petitioner now urges. Based on Aflague's own testimony at Petitioner's trial, defense counsel already had a basis for arguing that

Aflague had a history of being paid relocation funds in connection with testimony as a prosecution witness. And while Petitioner seeks to make much of the fact that any 1997 and 1998 relocations in connection with the *Eulloqui* and *Padilla* cases would have overlapped with the ongoing investigation of Bruce Cleland's 1997 murder, there is no basis for finding this circumstance to be material to the jury's consideration. The record is undisputed that any Aflague relocations related to the *Eulloqui* and *Padilla* cases occurred over a year or more before Aflague ever mentioned anything related to the Cleland matter to investigators (which occurred on August 2 and 9, 1999). The jury already knew that Aflague did not speak to investigators about his conversations with Jose until the start of August 1999.

Turning to Petitioner's second contention in connection with this first category of evidence, he argues that he was prejudiced by the prosecutor's failure to disclose that, during the *Eulloqui* and *Padilla* cases, Aflague had reported to the LAPD that he was unwilling to return to California based on ongoing danger he faced from the 1995 shooting incident. Petitioner reasons that, had the jury learned of this, it would have disbelieved Aflague's testimony that he had conversations with Jose in late 1996 or early 1997, *i.e.*, the jury would have concluded that Aflague would not have been in California at that time due to his fear and thus was lying about having had these conversations with Jose.[25]

When cross-examined at Petitioner's trial, Aflague indicated that one of the reasons he was living out of state was due to a problem with the White Fence gang and that, following his shooting in 1995, he was concerned about his family's safety and had to get his family out of state before he would talk to the police about the

[25] Petitioner also posits that: if Aflague had been questioned at Petitioner's trial about his asserted unwillingness to return to California absent relocation assistance, it is possible he might have denied any such unwillingness; and in such an event, the defense could have argued that Aflague had misled the police about being unwilling to return in order to obtain relocation monies. This speculation about what Aflague might or might not have done in response to hypothetical questioning is much too attenuated to support a materiality finding.

shooting. [RT 1339, 1345, 1362.] Shortly after that, a bench conference was held after Jose's counsel asked Aflague if he had a dispute over drug territory with the White Fence gang and Aflague responded that he would rather not speak about it. [RT 1339-40.] After questioning resumed, the following confusing exchange occurred:

> Q. So, Mr. Aflague, without telling me the name of the gang, it was a dispute with a gang over drug territory that was one of the reasons --
> A. No
> Q. All right, what was --
> A. There was -- it was nothing because of a gang at all.
> Q. Are you talking about the dispute over drug territory?
> A. Territory was over something else. But it wasn't because of a gang exactly. That's why I'd rather not talk about it.

[RT 1341.] Given the sloppy nature of this exchange, it is unclear whether Aflague was referring to why he moved out of state or something else entirely. As noted earlier, Aflague testified that he initially moved his family to Nogales shortly after the shooting because of safety concerns and paid for the move himself, and then he later moved to another location at the request of the detectives, and received some relocation funds, so that he would be closer to Los Angeles for the trials in the *Eulloqui* and *Padilla* cases.

The Court does not believe that the evidence of Aflague's unwillingness to return to California would have had the impeachment value that Petitioner ascribes to it. Regardless of the confusing nature of the above exchange, Aflague's testimony conveyed to the jurors the impression that, after he was shot in 1995, he was worried about his family's safety and therefore moved his family on his own out of state. The evidence regarding Aflague's unwillingness to return to California, however, is dated December 17 and 19, 1997, five months after Bruce Cleland was murdered, and it refers to recent threats and immediate danger. [See CSC Habeas Petition, Ex. 1, Dkt. 217-12 at ECF #6418-#6420, and Ex. 75, Dkt. 217-17 at ECF #8432-#8437.] As noted earlier, Aflague's testimony indicated that his

conversations with Jose took place at the end of 1996 or early in 1997, a half a year or so before Bruce Cleland was murdered on July 26, 1997. Evidence that Aflague may have been "unwilling" to return to California in December 1997, well after the murder, could not and would not have disproved his testimony about the conversations he claims he had with Jose almost a year before then.

Accordingly, the Court concludes that it was not objectively unreasonable, factually or legally, for the state court to conclude that the *Brady* materiality requirement was not satisfied with respect to this category of evidence.

C. Category Two: Details Of Aflague's Informant Activities

The second category of evidence that Petitioner claims was suppressed in violation of *Brady* relates to Aflague's informant activities in connection with several other cases. Petitioner complains about the prosecutor's failure to disclose: a statement Aflague gave to LAPD detectives about the Gutierrez murder investigation, which identified gang members; a statement Aflague gave to the police regarding the Guzman investigation, which stemmed from a 1998 double murder, and for which Aflague was relocated; and unspecified "help" provided by Aflague in connection with three other shootings besides the Gutierrez and Guzman cases, as reflected in the prosecutor's single page of notes stemming from an in camera meeting with the trial court. Petitioner contends that this evidence would have proven that Aflague was deeply involved with the LAPD in 1999 – the same year in which Aflague spoke with the police about his conversations with Jose – and was receiving continuous monies during that time, thus demonstrating an ongoing pattern of Aflague exchanging information for benefits.

Petitioner also observes that, based on other evidence obtained in connection with this case, he has learned that Aflague was no longer an LAPD informant by November and December 1999. Petitioner contends that, if he had known of this evidence, his trial counsel could have refuted Aflague's testimony that one of the

shoplifting incidents discussed earlier in connection with the *Napue* claim were related to his informant work.

As to the latter point, the Court's earlier discussion in connection with Petitioner's *Napue* claim makes clear that this argument fails to raise any concerns about a *Brady* violation. As discussed earlier, the record amply supports the conclusion that any rational juror at Petitioner's trial would have found highly dubious, if not outright ludicrous, Aflague's testimony that he was acting as an undercover informant in connection with the November 13, 1999 shoplifting incident and more likely concluded that he was lying in this respect. It is not reasonably probable that disclosure to the jury of evidence that Aflague actually was not acting as an LAPD informant during this same timeframe would have affected the jury's likely incredulous view of Aflague's implausible Shoplifting Testimony, and there is no tenable basis for finding confidence in the trial outcome to be undermined by the failure to present such evidence to the jury.

Turning to the prior point, Petitioner relies on the following belatedly-obtained documents and information. On April 10, 1996, Aflague gave a statement to the police about the shooting of Sal Gutierrez, in which he stated he had heard that four men (who he identified by their nicknames and in a photographic line-up) had shot Gutierrez because he was talking too much about the 1995 incident in which Aflague had been shot. [CSC Habeas Petition, Ex. 3, Dkt. 217-12 at ECF #6499-#6503.] At some point before Aflague had mentioned the Cleland murder to police and in connection with the separate Guzman case, Aflague advised the police that his brother (Hector) had witnessed a September 1998 double murder and gave them information on where the brother was living. As discussed in connection with the *Napue* claim, in June 1999, Aflague was approved to receive $2,590 in relocation assistance funds in connection with the Guzman matter. [*Id.*, Ex. 44, Dkt. 217-15 at ECF #7385-#7386 (Herman Testimony); and Relocation Paperwork at 154-57.] Further, Petitioner points to a single page of notes written by the

prosecutor (Craig Hum) on November 17, 1999, which indicated that Aflague provided police with information about three other shootings, one on "6/19," one on "6/22," and one on "8/30/99." [CSC Habeas Petition, Ex. 7, Dkt. 217-12 at ECF #6557; *see also id.,* Ex. 29, Dkt. 217-14 at #6928-#6931 (Aflague EH Testimony).]

Petitioner contends that this information and evidence would have shown that Aflague was deeply involved with the LAPD in 1999, the same year in which he told police about his late 1996/early 1997 conversations with Petitioner's brother Jose, and that the evidence therefore would have demonstrated Aflague's "ongoing pattern" of exchanging information for benefits, thus disproving Aflague's trial testimony that he received "nothing" in exchange for testifying against Petitioner. The Court agrees that this evidence can be interpreted to show that, in 1996 (the Gutierrez case) and in 1999 (the Guzman case and three others), Aflague had provided information to the police about various shootings and that in mid-1999, he received relocation funds in connection with the Guzman matter. This evidence would have supported an argument to the jury that, before Aflague provided information to the police (in early August 1999) about his conversations with Petitioner's brother, he had provided information earlier that year about other shootings and had been given relocation funds in connection with one of them (the Guzman murder). The Court, however, does not believe that the evidence would had the impeaching effect that Petitioner argues.

While this evidence could have been used to show a "pattern" of Aflague providing information about shootings before he did so in connection with Petitioner's case, it does not show the particular "pattern" Petitioner argues. As discussed previously, Petitioner did receive relocation assistance in connection with *Eulloqui* and *Padilla* cases some time in 1997, in which he *testified as a victim* rather than as an informant. The jury at Petitioner's trial knew of this, because Aflague mentioned it. [RT 1363.] The evidence cited by Petitioner shows that the only instance of Aflague receiving relocation assistance in 1999 is the Guzman case-

related relocation monies, which were approved in full and paid in substantial part before Aflague told police about his conversations with Jose. Had Petitioner chosen to present evidence of Aflague's June 1999 relocation assistance, the prosecution, in turn, could have presented evidence about *why* those Guzman-related relocation funds were provided, *i.e.*, that Aflague had received threats, earlier his life was threatened by gang members in connection with his testimony in the *Eulloqui* and *Padilla* cases, and it would be too dangerous for him to testify absent relocation. [CSC HC Petition, Ex. 4, Dkt. 217-12 at ECF #6519-#6520; Sanchez EH Testimony at 766-68.] It is not reasonably probable that the belatedly-disclosed evidence on which Petitioner relies here would have impeached Aflague's testimony that he was not promised anything and/or had not received anything in connection with his August 1999 provision of information to the police about his conversations with Jose and his subsequent testimony against *Petitioner*.

More importantly, nothing about this undisclosed information about Aflague's other informant activities showed or could be said to show that Aflague had a pattern of providing false information about shootings. The detectives questioned at the November 2012 EH did not state that the information Aflague provided to police in 1999 or about the above-noted other cases had proven to be false. Put otherwise, nothing about this undisclosed evidence could be said to be support any argument that Aflague had a practice of providing false information in exchange for receiving financial or other benefits. Nothing about this undisclosed evidence tends to undercut Aflague's testimony that he received nothing for testifying at Petitioner's trial – testimony that the Court, in connection with the *Napue* claim, has concluded has not been shown to be false.

Accordingly, the Court concludes that it was not objectively unreasonable, factually or legally, for the state court to conclude that the *Brady* materiality requirement was not satisfied with respect to this category of undisclosed evidence on its own.

D. Category Three: The 1999 Relocation And Aflague's Lease Fraud

The third category of evidence alleged to have been suppressed in violation of *Brady* relates to Aflague's June 1999 relocation in connection with the Guzman case and the related monies paid to him, which the Court had addressed at some length earlier in connection with Petitioner's *Napue* claim based on Aflague's Benefit Testimony. As shown, the June 1999 relocation happened, and Aflague received the bulk of his related relocation monies, before Aflague first spoke with the LAPD in early August 1999 about his conversations with Petitioner's brother Jose. As previously summarized, the November 2012 EH testimony of Detectives Sanchez and Herman was that: Aflague's June 1999 relocation happened in connection with the separate Guzman case and had "no ties" to the Bruce Cleland murder investigation; and while they were investigating the Guzman murder, they learned that Aflague had information related to the Bruce Cleland murder, so the two separate murder cases were "a little bit intertwined."

Petitioner argues that the prosecution's failure to disclose Aflague's June 1999 relocation for the Guzman case was material under *Brady*, because "it could have been used to demonstrate Aflague's bias in favor of the state." [CSC Habeas Petition at 52-53.] Petitioner notes Detective Sanchez's "a little bit intertwined" testimony and Detective Herman's testimony that the June 1999 relocation in connection with the Guzman case "opened the door" for the detective to be able to talk to Aflague about other matters, including to ask him if he knew Petitioner and his brother. [Dkt. 217-15 at ECF #7403.] Petitioner contends that had this information been presented to the jury, the jurors thereby would have believed that Aflague was biased in favor of the prosecution and thus was lying about his conversations with Jose.[26]

[26] Petitioner also asserts that during one of Aflague's August 1999 interviews in connection with the Bruce Cleland investigation, Aflague asked about the status of his remaining $595 payment in connection with the June 1999 Guzman case relocation, which he received two days

In addition, Petitioner contends that Aflague forged the lease documents that he submitted to the LAPD in order to obtain the June 1999 relocation payments. Petitioner does not explain why he believes this undisclosed information was material under *Brady*, but argues that it should form a part of "the cumulative materiality calculus." [CSC Habeas Petition at 53-54; *see also* Dkt. 234 at 13-14.][27]

Considering both matters together, the Court concludes that it was not objectively unreasonable to find that they were not material within the *Brady* standard. The Court finds particularly unpersuasive Petitioner's argument that the fact of the June 1999 relocation could have been used to demonstrate to the jury that Aflague was biased in favor of the prosecution. The jury at Petitioner's trial already was aware that Aflague had acted as an informant on prior occasions, because he so testified. [*See, e.g.*, RT 1333, 1346 (Aflague's testimony that he worked with ATF,

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later. [CSC Habeas Petition at 53, citing the prosecutor's testimony, a July 6, 2009 request for the $2,000 relocation payment, and a transcript of an undated interview of Aflague.] The portions of the record cited by Petitioner do not directly establish that this occurred. At most, the interview transcript shows (at a different page than that cited by Petitioner) that, during the interview, Aflague said, "you got to tell the lady so she can do my thing" and that he "just want[s] to get this thing out of the way so bad," and Detective Sanchez responded that she had just given "it to her" and "she's working on it." [See Dkt. 217-2 at ECF #2997.] Perhaps these comments did relate to the June 1999 relocation payment of $595 Aflague received in August 1999, but drawing that conclusion requires an inferential leap given the transcript's cryptic nature.

Petitioner also repeats his contention – discussed earlier in connection with the *Napue* claim based on Aflague's Benefit Testimony – that Detective Sanchez purportedly testified at the November 2012 EH that "each time" Aflague was reluctant to testify against Petitioner, she told him that he had agreed to do so in exchange for receiving relocation monies. [CSC Habeas Petition at 53, citing Sanchez EH Testimony at 804, 812-14.] As set forth *infra*, the Court has found this characterization of Detective Sanchez's testimony to be inaccurate.

[27] Respondent disputes that the LAPD and/or the prosecutor were aware the lease documents were fraudulent and argues that, therefore, there was no failure to disclose. In the Second Report, the prior Magistrate Judge so found, concluding that "there is no evidence that either the LAPD or the prosecutor were aware that Aflague had misused funds designated for the [June 1999] relocation, and they were therefore under no obligation to disclose information about it to [the] defense." [Second Report at 19-20.] As noted earlier, the Court has determined that it is not bound by the Second Report's findings and conclusions and, in any event, the Court is proceeding as if the first two *Brady* requirements are satisfied as to all of the undisclosed evidence at issue. Thus, the only question as to the lease fraud evidence is whether it was material.

narcotics and other law enforcement agencies as an informant).] The jury also heard Aflague tell them that, when he testified several years earlier in the two cases in which he had been shot, the district attorney's office gave him relocation monies to induce him to testify. [RT 1331-32, 1361-63.] In closing argument, defense counsel vigorously argued that Aflague was a snitch, had been acting as an informant in connection with another case when he spoke to police about his conversations with Jose, that he was a snitch who told the police what they wanted to know, that he was an informant for the LAPD and who "goes around and sells information," and that he was a "witness to the police" who "help[s] them out on a case." [RT 1742, 1744, 1761, 1775.] Indisputably, the jury knew that Aflague had acted as a police informant. Evidence of a particular incident in which he did so and received related relocation assistance (in June 1999) would not have told the jury anything more about Aflague that the jurors did not already know.

In addition, that the detectives considered the Guzman case and the Bruce Cleland case a bit "intertwined" due to the time overlap in the investigations – *i.e.,* because Aflague told police about his conversations with Jose after he had provided information to the police in connection with the Guzman case but was still cooperating with them in that case – does not logically show, or tend to show, that he was biased in favor of the prosecution. The fact that it was easier for the detectives to elicit information about the Cleland case from Aflague because they already were talking to him in connection with the Guzman case – as Detective Herman put it, this "opened the door" – does not demonstrate that Aflague himself was "biased" in law enforcement's favor and therefore was lying about the conversations with Jose. The coincidence of the timing does not equate to proof of bias.[28]

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[28] Petitioner asserts that Detective Herman testified at the November 2012 EH that Aflague would not have cooperated in the Cleland investigation absent the June 1999 relocation, and therefore, his counsel could have used that information to prove a "pattern" of Aflague refusing to

Evidence that Aflague presented a forged lease to the LAPD could have been used by Petitioner's counsel as a basis for arguing that Aflague was willing to lie to the LAPD about how relocation monies provided to him would be used. Such evidence, however, could not have shown that the information Aflague provided to the LAPD – whether about the Guzman murder or the Bruce Cleland murder later on – was false. To the extent Petitioner's argument is that the lease fraud evidence could have been used to show that Aflague was a liar in general, his counsel plainly made that argument to the jury at trial, supported by Aflague's implausible Shoplifting Testimony and admitted snitch status. [*See* prior description at p. 30 of defense counsel's arguments depicting Aflague as, *inter alia*, an "admitted liar," a "dishonest person," someone who is "telling the police what they want to know," someone who sold himself to law enforcement, someone who would swear to tell the truth and then lie, and someone whose own trial testimony showed that he was "willing to lie."]

Evidence about the June 1999 relocation in connection with the Guzman case, including that Aflague submitted a false lease document to the police to support his request for relocation monies, would have been cumulative of other information already provided to the jury, including that Aflague had acted as an informant before and had lied about ancillary things. A fairminded jurist could conclude that even if

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testify absent relocation and that this "pattern" encompassed his testimony at Petitioner's trial. [CSC Habeas Petition at 60, relying on CSC Habeas Petition Ex. 44 at 1023, 1038.] This argument rests on an inaccurate characterization of Herman's testimony and necessarily fails. The detective testified that he relocated Aflague in June 1999, because he had a "greenlight" on him and would not cooperate unless he was relocated. [*Id.* at 1023.] This happened **before** Aflague first mentioned to police the conversations he had with Jose. When asked how the June 1999 relocation assisted the Cleland investigation, Detective Herman replied, "None," then stated that it only "opened the door" to talking to Aflague about other things. [*Id.* at 1038.] Nothing about this testimony supports the argument that Aflague testified at Petitioner's trial based on the June 1999 relocation assistance he received in connection with the Guzman case. While Detective Herman's testimony might show that Aflague only provided further cooperation in the Guzman case after he was relocated based on threats he faced, this testimony simply could not have been used to show a "pattern" of testimony in exchange for relocation that included Aflague's testimony at Petitioner's trial.

this undisclosed evidence had been provided to the defense, there nonetheless is not a reasonable probability that the result of Petitioner's trial would have been different, that is, could find that there is no likelihood of a different result that is great enough to undermine confidence in the verdict rendered. As a result, the state court's conclusion that the evidence was not material was not objectively unreasonable, factually or legally.

E. Category Four: The "Implied" Promise To Relocate Aflague In 2000, In Exchange For Testifying Against Petitioner

The fourth and final category of undisclosed evidence at issue involves an alleged "implied promise" law enforcement made to Aflague. Petitioner contends that Aflague's July 2000 relocation – the month after he testified at Petitioner's trial – was pursuant to an earlier implied promise by law enforcement that Aflague would receive benefits if he testified against Petitioner. As alleged when he exhausted the claim, Petitioner asserts that Aflague sought relocation assistance at the same time that he provided information to police about his conversations with Jose. Petitioner alleges that both Aflague and the detectives "understood" that Aflague might be relocated if he cooperated in the Bruce Cleland murder investigation and that Aflague had a history of being relocated after he testified for the prosecution in prior cases. Petitioner further argues that belatedly-disclosed evidence proves that Aflague, in fact, "received the benefit he expected" when he was relocated in July 2000 following Petitioner's trial. [CSC Habeas Petition at 55-56.]

Earlier, the Court rejected Petitioner's argument made in support of his *Napue* claim that there existed an "implicit promise" that Aflague would receive relocation if he testified against Petitioner, which is essentially the same as that repeated now to show a *Brady* violation. [*See, supra*, at pp. 35-41.] Rather than repeat that discussion, the Court incorporates it by reference herein. As described earlier, the

Court has found much of Petitioner's description of the evidence of record to be inaccurate if not misleading. His revamp of the "implied promise" argument in the context of this *Brady* claim does not fare any better.

Relying on Detective Herman's November 2012 EH testimony, Petitioner asserts that "Aflague sought out relocation at the same time that he had information to offer Detective Herman." [CSC Habeas Petition at 55-56, citing CSC Habeas Petition Ex. 44 at 1024-25; Dkt. 234 at 24.][29] But the cited testimony does not say any such thing. Rather, when asked who initiated the discussion of relocation in connection with the June 1999 and July 2000 Aflague relocations, Detective Herman simply stated that it would have been Aflague, because it was not the detective's practice to volunteer such assistance. Even assuming Aflague initiated the request for both the June 1999 and July 2000 relocations, as the record shows: the June 1999 relocation related solely to the Guzman investigation and was put into motion before Aflague mentioned to police that he knew anything about the Cleland matter in early August 1999; and Detective Sanchez testified that the July 2000 relocation occurred because of a threatening event that occurred after Aflague already had testified against Petitioner. And, in fact, the paperwork for the July 2000 relocation states the following as the justification for the relocation funds requested: "Witness testified at the trial [of Petitioner, Jose and Rebecca Cleland]. The next weekend, unknown male subjects went to his residence numerous times

[29] As discussed in connection with the *Napue* claim, the record shows that relocation benefits for Aflague in connection with the Guzman murder case already had been approved and paid in substantial part *before* Aflague ever mentioned the Bruce Cleland murder to law enforcement, with a final partial Guzman-related payment made shortly after those early August 1999 conversations between Aflague and the detectives. No evidence had been produced showing that, at the time he spoke with detectives in early August 1999 about the Bruce Cleland murder, Aflague sought any further or separate relocation benefits in connection with his potential testimony at any trial related to that murder. Instead, Petitioner asks the Court to surmise that Aflague did so simply because he had received relocation benefits in the past in other cases.

looking for him. Witness is convinced that the subjects are searching for him seeking retaliation." [CSC HC Petition, Ex. 4, Dkt. 217-12 at ECF #6540.]

In short, the record refutes Petitioner's contention that Aflague sought out relocation benefits in exchange for his Bruce Cleland-related information in late July or early August 1999. Significantly, Aflague was not relocated prior to or during the Cleland murder trial. Rather, the July 2000 relocation was effected only because a threatening event actually occurred *after* Petitioner's trial. There is no evidence of record to support a finding that, had there been no such post-trial threat, Aflague nonetheless would have been relocated post-trial, whether in July 2000 or otherwise.[30] Nothing about Detective Herman's cited testimony supports the notion that an implied promise had been made to Aflague ahead of time – whether in early August 1999 or after – that he would be relocated simply if he testified at Petitioner's trial.

Petitioner further argues that an implied promise existed because, at the November 2012 EH, Aflague testified that the LAPD promised that it would "protect" him if he cooperated in the Bruce Cleland investigation. [CSC Habeas Petition at 56, citing CSC Habeas Petition Ex. 29 at 575; Dkt. 234 at 24.] Petitioner fails to provide the context for this testimony. Aflague was asked by Petitioner's counsel at the evidentiary hearing if, *at the time he testified at the trial of Petitioner, Jose, and Rebecca Cleland in 2000*, he was scared and so told detectives and he responded "yes"; and then was asked if "they promise[d] to protect" him and responded, "yes, they did." [Aflague EH Testimony at 575 (Dkt. 217-14 at ECF #6940), asking Aflague: "When you testified against the Quezadas and Rebecca Cleland the first time, were you scared to testify?"] Aflague did not testify that this

[30] As discussed earlier in connection with the *Napue* claim, in the July 2000 relocation paperwork Detective Sanchez filled out, she checked the "No" box in response to a question asking if the witness would gave testified without relocation. At the November 2012 EH, Sanchez testified that she did not recall why she checked the box but assumed it was a mistake.

discussion occurred when he first spoke to detectives about the Cleland matter in August 1999, or at any time between then and his June 2000 trial testimony; he was not asked that question. Moreover, Petitioner's counsel made no effort to adduce evidence of who Aflague spoke to in this respect and what words were said by the detectives that served as such a "promise." In her cited evidentiary hearing testimony, Detective Sanchez agreed that Aflague had told her he was afraid to testify in the Cleland case, but she demurred when asked if Aflague also said he would not testify without relocation, stating that she did not recall and did not know if he said such a thing. [Sanchez EH Testimony at 784-85 (Dkt. 217-14 at ECF #7149-#7150).]

The next piece of evidence cited by Petitioner is a portion of Detective Herman's November 2012 EH testimony allegedly stating that the detective anticipated having to relocate Aflague in connection with the Cleland investigation. [CSC Habeas Petition at 56, citing CSC Habeas Petition Ex. 44 at 1040-41; Dkt. 234 at 24.] At the transcript pages Petitioner cites, Herman stated that, with respect to the June 1999 relocation for the Guzman case: he did not know at the time that it might help with the Cleland investigation, but "down the road… as it turned out," it did, because this opened the door to talking to Aflague about other matters; and he thought that if the information Aflague provided on the Cleland matter proved to be good, they might need to relocate him for that case as well. [CSC HC Petition, Ex. 44, Dkt. 217-15 at ECF #7405-#7406.] Petitioner fails to note, however, that Detective Herman then clarified that he did not tell Aflague any such thing and that this was solely the detective's own personal thought. [*Id.* at ECF #7406-#7407.] Detective Herman's internal thinking – never conveyed to Aflague – hardly can constitute an implied promise to Aflague.

Finally, Petitioner notes that Aflague had been relocated multiple times in connection with the *Padilla* and *Eulloqui* cases, which Petitioner characterizes as Aflague having a "history" of being relocated in exchange for prior testimony.

[CSC Habeas Petition at 56; Dkt. 234 at 24.] While the evidence cited by Petitioner does show that Aflague was relocated twice in connection with the *Padilla* and *Eulloqui* cases in which he testified as a victim, this does not establish a "history" of relocation in exchange for testimony already given, particularly as, in Petitioner's case, as a third party witness. Moreover, as shown earlier, the record shows that Aflague was reimbursed for two relocations, one that occurred before his testimony in the *Padilla* trial, and then again after that testimony to induce Aflague to return to California to testify at the upcoming *Eulloqui* trial.

Thus, the only evidence that supports Petitioner's "implied promise" argument is Aflague's vague November 2012 EH testimony that when he testified at Petitioner's trial in June 2000, he was scared at that point in time and so told unspecified detectives, and in response, they generally promised to protect him. The Court finds this evidence insufficient to establish that an "implied promise" existed between the LAPD and Aflague as of August 1999, and continuing up to the trial in 2000, that Aflague would be relocated if he testified against Petitioner at his trial. Perhaps a fairminded jurist could find such a promise inherent in Aflague's vague testimony, but it is reasonable to conclude that a fairminded jurist also could find that no such promise, implied or express, existed based on the evidence of record. In connection with Petitioner's *Napue* claim, the Court has explained at length why it finds Petitioner's "implicit promise" of relocation in exchange for testimony assertion to be unpersuasive and will not repeat that discussion here. Petitioner's additional arguments in support of that theory made in connection with his *Brady* claim do not change the Court's mind. Under the deferential standard of review that governs here, it was not objectively unreasonable for the state court to conclude that Petitioner's "implied promise" theory of a *Brady* violation failed.

F. Collective Assessment of Materiality/Prejudice

The Court has reviewed each of the four categories of undisclosed evidence

that serve as the basis for Petitioner's *Brady* claim and has concluded that this evidence would not have the impeachment value that Petitioner ascribes to it when such evidence is assessed individually. *See Kyles*, 514 U.S. at 436 & n.10 (making clear that the Court must "evaluate the tendency and force of the undisclosed evidence item by item" first). As the Supreme Court has instructed, however, that is not the end of the analysis, because the suppressed evidence then must be considered collectively to finally resolve the *Brady* materiality question. *Id*. And as the Ninth Circuit has advised, any *Napue* evidence found to have been false should be thrown into this collective analysis pot in order to consider its effect on the whole. *See Reis-Campos*, 832 F.3d at 977.[31]

Plaintiff's argument that *Brady* materiality exists rests on the premise that, if defense counsel had been provided with the above-discussed items of evidence that were not disclosed prior to or at trial, the defense could have been able to thoroughly and wholly discredit Aflague as a witness. Petitioner reasons that had such an impeachment effort been made, the jurors – or at least one of them – would not have believed Aflague's testimony about the two conversations with Jose and therefore would have had reasonable doubt about Petitioner's guilt, because the circumstantial evidence against him was weak and the jury would have viewed it in a manner favorable to Petitioner. Petitioner argues that the prosecutor's failure to disclose the subject evidence, coupled with the prosecutor's asserted *Napue* violations, "maximized" the effect of Aflague's testimony on the jury, and thus, the undisclosed evidence was material within the meaning of the *Brady* standard.

Petitioner's *Brady* materiality argument, thus, rises or falls on the premises that: had the undisclosed *Brady* evidence been produced, defense counsel would

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[31] As discussed earlier, the Court has concluded that Aflague's Shoplifting Testimony was false in terms of his assertion that one of his shoplifting incidents occurred as part of his informant and/or undercover duties. Thus, based on Ninth Circuit precedent, this testimony will be considered as part of the *Brady* collective analysis for materiality. Because the Court found that Aflague's Benefit Testimony was not false, it will not be so included.

have been able to persuade the jurors that Aflague's testimony in full, including about his conversations with Jose, should be rejected; and therefore, the jurors would have found the remaining circumstantial evidence against Petitioner inadequate to support a guilty verdict against him. The Court concludes that even when the effects of above-discussed undisclosed evidence and the Shoplifting Testimony are considered collectively, the reasonable probability of a different result at trial is not great enough to undermine confidence in the trial's outcome, and as a result, *Brady*'s materiality requirement is not met. More importantly, for purposes of the Section 2254(d) standard that governs this Court's initial review, a fairminded jurist could draw such a conclusion. The Court reaches this conclusion based on the following matters.

Petitioner testified about his relationship with his cousin (and co-defendant) Rebecca Cleland ("Rebecca") and moving into her home. He had not spoken to his Rebecca for several years until her January 1997 wedding to Bruce Cleland ("Bruce"). Petitioner spoke to Rebecca at the wedding and once or twice thereafter in 1997, and then she asked him to move into the home that Bruce had purchased. [RT 1572-75.] Petitioner moved into the Cleland home after Mother's Day and lived with Rebecca; Bruce no longer lived in the home, because Rebecca had thrown him out. Petitioner described the house as "big" and "beautiful." Prior to that, he lived in a camper. Petitioner did not pay rent to Rebecca but helped out with chores and food and occasionally gave her some money. Petitioner had his own room. Rebecca would buy Petitioner things and help him out, including giving him a check for $500 to fix his car. [RT 1527-28, 1549, 1565-68, 1579; *see also* RT 465 (third party witness testimony about seeing Rebecca's check register and the $500 payment to Petitioner entered on it).] Petitioner loved Rebecca and hugged and kissed her "a lot."[32] They both took their clothes off in front of each other and had

[32] Frank Mastroianni, an acquaintance of Rebecca's, testified that he went to the home on a couple occasions when Petitioner was present and that Petitioner and Rebecca were "very

slept in the same bed at the Cleland home. [RT 1554-55.] While no witness testified expressly that Petitioner and Cleland were involved in a romantic or sexual relationship, a rational juror could have inferred that one existed based on the above undisputed evidence. In the Trial Court Decision (at 9), the state court concluded that this evidence of Petitioner's "live-in relationship" "provided a powerful motive" for him to engage in a conspiracy to murder Bruce. While such a conclusion may not have been compelled by the above evidence, it was one that reasonably could be drawn.

Petitioner was questioned about his usage of his cell phone to call Rebecca. Specifically, he was asked if, prior to the evening on which Bruce was murdered, Petitioner had ever used his cell phone to call Rebecca, and he responded, "Not that I recall. I don't know, sir." [RT 1557; *see also* RT 1581 (later stating that he "might, might have not" and did not recall).] Petitioner agreed with his counsel's statement that, prior to then, he did not need to speak with Rebecca by cell phone, because they saw each other at the house every day during July 1997, and would speak and catch up then. [RT 1580.] Records for Petitioner's cell phone showed that, prior to the evening of July 25, 1997, there were "zero" calls made by Petitioner to Rebecca. [RT 1194.]

Starting two weeks before Bruce's murder, however, 13 calls were made from Rebecca's cellphone to Petitioner's cellphone. [RT 1193.] Starting on the night of Bruce's murder,[33] the frequency of calls between the two cell phones increased

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affectionate toward each other" with a "lot of hugging and kissing." When asked if this "seem[ed] to be some type of intimate contact," Mastroianni responded, "A little too close for my comfort, yes." [RT 906.]

[33] As described in the California Court of Appeal's summary of the evidence quoted earlier, Rebecca and Bruce went to dinner on the evening of July 25, 1997, then to the home of Petitioner's father for drinks, which they left at approximately 1:00 a.m. on July 26, 1997, with Rebecca driving. Minutes later, Rebecca stopped the car and Bruce was shot and killed. [*See* RT 607-08 (witness testimony that shots were heard shortly after 1:00 a.m. on July 26, 1997).]

substantially. At 9:18 p.m. on July 25, 1997, Petitioner called Rebecca and the call lasted 35 seconds, and at 9:30 p.m., Rebecca called Petitioner, and that call also lasted 35 seconds. Rebecca and Bruce arrived at La Parilla Restaurant some time before 10:00 p.m., probably around 9:30 p.m. [RT 920-21.] While at the restaurant, Rebecca went into the restaurant's hallway, where Bruce could not see her, and used both her cellphone and the restaurant's payphone. [RT 924-25.] At 10:01 p.m., Rebecca called Petitioner, and that call lasted 21 seconds. [RT 1190.] At 10:03 p.m., someone (presumably Rebecca) used the payphone and made a call and asked for Jose, which went to the residence of Ilma Lopez and lasted for 144 seconds.[34] [RT 1190.] At 10:24 p.m., Petitioner called Rebecca, and that call lasted 60 seconds. He called her again at 10:52 p.m., and that call lasted 300 seconds, and she called him at 11:13 p.m., and that call lasted 120 seconds. [RT 1190.] At 11:16 p.m., Rebecca called the phone number for the home of Petitioner's father (Arturo), and that call lasted 32 seconds. [RT 1190-91.] At 11:57 p.m., Petitioner called Rebecca, and that call lasted 60 seconds. [RT 1191.] Just after midnight on July 26, 1997, at 12:13 p.m., a call was made from the residence of Petitioner's father to Rebecca, and that call lasted 53 seconds; and another was made from the residence to her at 12:36 a.m. [*Id.*] At 12:36 a.m., Petitioner called his father's residence, and that call lasted 180 seconds, and Petitioner called the residence again at 12:48 a.m., again lasting 180 seconds. [*Id.*] At 1:01 a.m., Rebecca called Petitioner, and that call lasted 90 seconds. [RT 1191-92.] Bruce was murdered a few minutes later. At 1:20 a.m., Rebecca called the residence of Petitioner's father, and that call lasted 246 seconds. [RT 1192.]

Petitioner testified that every call logged on his cell phone records for the evening of January 25, 1997, was a call in which he was a participant; no one else

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[34] Ms. Lopez testified that the call was made by a woman speaking Spanish and who asked for Jose Quezada, she told the caller that no one by that name lived at her house, and she does not know anyone by that name. [RT 924-25.]

used his phone. On direct examination, while Petitioner recalled using his phone a lot that night, he did not recall any of the calls made and received that night, other than a call with the mother of his son to make arrangements to see his son and a call he made to Officer Pedroza at about 2:30 in the morning. [RT 1539-40, 1542-45.] In his subsequent cross-examination, however, Petitioner recalled calling Rebecca up to five times on that evening and speaking to her, although he did not remember the substance of the conversations they had. [RT 1557-61.] Petitioner could not recall receiving any calls from Rebecca, but recalled that he phoned his father's home in the early morning hours of July 26, 1997 and spoke to both his father and Rebecca. [RT 1561-65.]

A rational juror could have found this evidence highly suspicious, given that Petitioner, admittedly, never spoke with Rebecca by cell phone in the month or so prior to Bruce's murder, yet engaged in a flurry of short calls with her throughout the evening of the murder, including one minutes before Bruce was killed. The Trial Court Decision found the short duration of these calls to be "incriminating" and described these call records as leaving "little doubt of Petitioner's involvement" in Bruce's murder. The state court's conclusion was a reasonable one that could be drawn by a fairminded jurist based on the evidence of record.[35]

The jurors also were presented with evidence of cell phone records that appeared to place Petitioner within close physical proximity to the location of Bruce's murder around the time it occurred. Saiful Huq, who worked for the

[35] Petitioner speculates that the call records may not reflect the precise number of times that Petitioner and Rebecca spoke that night, because the cellular carrier's system logged calls even when the recipient did not pick up. [Dkt. 234 at 31, citing RT 1070-71.] Petitioner ignores that an engineer for the carrier testified that if the cell phone records showed a cell site, that meant that the call had connected and been answered. [RT 1602-03.] In any event, the length of many of the calls indicate that the recipient picked up and Petitioner admitted he repeatedly called and spoke with Rebecca that night. It remains unusual that Petitioner did so regardless of exactly how many conversations the two of them occurred over the course of the evening and up until moments before Bruce's murder, given that he never had called Rebecca before.

relevant carrier at the time in question, testified that when a cell phone call is made, whether to another cell phone or a land line, the strongest signal is searched for, which is usually the nearest cell site; the call then connects to the appropriate sector at that site and the information downloads to a switch. [RT 1028-29, 1032, 1038, 1042.] The switch records the date and time of the call made, the phone number called from and to, and the cell site and sector that the phone making the call connects to. [RT 1042-43.] At the time of Bruce's murder, in that area, cell sites were designed to cover one to two mile areas, and within that area, the three sectors of each cell site were designed to cover specific portions of the pertinent area. [RT 1048.] Just before 12:36 a.m. on July 26, 1997, Petitioner's cell phone made a call to the phone registered to his father's residence, which connected to cell site LA061, sector C, which was near the crime scene. [RT 1055, 1057-59.] At 12:49 a.m., Petitioner's cell phone made a second call to his father's home phone, and Petitioner's phone connected to cell site LA060, sector C, which was two blocks from the site of Bruce's murder; as did Petitioner's cell phone when he received a 1:00 a.m. call from Rebecca. [RT 1059-62 (Huq testimony), 1195-2000 (Detective Herman's testimony describing the distance from the cell cite to where Bruce was shot.][36]

Petitioner attempts to discount this evidence putting Petitioner's cell phone in close physical proximity to Bruce's murder scene just before Bruce was shot. [Dkt. 234 at 9.] He cites Huq's testimony that Bruce's murder occurred during the cell company's 11:00 p.m. to 5:00 a.m. maintenance window, when individual cellphone sites might be shut down for maintenance, and that the maximum range of

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[36] In addition, Philip Brown, who also worked for the carrier at the time in question, testified about how the network of cell sites transmitted calls at the time of Bruce Cleland's murder, including that the cell sites and sectors where calls were made or received on a particular date at a particular time could be determined. [RT 1116, 1117-21.] Brown testified that Cleland called Petitioner at 1:01 a.m. and Arturo's home at 1:20 a.m. on July 26, 1997, and each call was made from the same area. [RT 1123-25.]

connection to a cell site is 16 miles. [RT 1066-67, 1069, 1073.] Petitioner also notes that the carrier's cell service had commenced weeks before the murder. [RT 1063.] Petitioner appears to intimate that cell service that night might have been fraught with problems due to the recency of the carrier's implementation of service, and speculates that perhaps there were "atmospheric factors" or other unspecified "conditions" that night that could have impacted the transmission of cellular signals, or that the connection of the relevant calls to a cell site near the murder scene could have been the result of the calls having been unable to connect to the closest cell site, because it was shut down for maintenance or otherwise unreliable because service had started recently, and having bounced to cell site 60, which could have been as much as 16 miles away. [*See* Dkt. 184 at 41.]

Petitioner does not cite any evidence to support his speculation that this litany of hypothetical events might have occurred on the night in question. That it is theoretically possible atmospheric conditions, buildings, vehicular movement, etc. can affect cellular transmission as a general proposition, as Huq testified [RT 1072], is not evidence that they did so on the night Bruce was murdered, particularly given Huq's straightforward testimony about the evidence establishing the cell site connections for the calls in question and the related documentary cell phone records. Petitioner's belated speculation – unsupported by any evidence that any of these theoretically possible happenstances actually occurred – is inadequate to detract from the power of the cell site proximity evidence. Moreover, Petitioner ignores Huq's testimony that: at the time of the murder, if a call was made that should be connected to a particular cell site and sector but could not connect – whether due to equipment failure or capacity – the call would not "skip" or "hop" to another cell site but, rather, a busy signal would result and the call would not go through; and as to the 16 mile outer connectivity range, that 16 miles applies only when there are no other closer cell sites (such as in the desert) and if there were closer cell sites, the call would connect to them. [RT 1067-68, 1086-87.]

Petitioner also tries to discount the cell site/proximity evidence by citing a July 14, 2017 declaration of Manfred Schenck, which was signed ten years after Petitioner's trial and presented in Petitioner's state habeas proceedings. [CSC Habeas Petition Ex. 73 at ECF #8289-#8293 ("Schenck Declaration").] Mr. Schenk opines, in brief, that Huq testified falsely when he said that, at the time in question, the cell calls made connected to the closest cell site, with Schenck characterizing Huq's testimony as scientifically unsubstantiated and "pure conjecture without any scientific or technological basis." Petitioner asserts that Section 2254(d)(2) is satisfied with respect to the Trial Court Decision, because the trial court declined to accept Schenk's opinion and declined to hold an evidentiary hearing on Schenk's challenge to the cell phone/proximity evidence presented at trial ten years earlier.

In the trial court habeas proceeding, in support of all three claims raised (*Brady*, *Napue*, and state law attack on the cell-related evidence), Petitioner relied on the Schenk Declaration in an attempt to discredit Huq's trial testimony. [Dkt. 217-1 at ECF #2710-#2711.] According to the trial court, Respondent challenged Schenk's qualifications to serve as an expert, noting Schenk's testimony in other cases that "he had never worked for a cell phone provider, had no understanding of cell provider software functions, had never actually determined the coverage area of any cell tower, had never received any training in modern cell phone technology, and that his opinion of a cell tower's range was strictly theoretical and factual." [Trial Court Decision at 6-7.] The trial court rejected Schenk's opinion, concluding that it was not persuaded that Schenk was qualified to testify as an expert on the subject, and it denied Petitioner's request for an evidentiary hearing with respect to Schenk's opinion. [*Id.* at 7.]

As a threshold matter, Petitioner's reliance on the Schenk Declaration to support his *Brady* claim is sorely misplaced. The sole issue before the Court is whether the prosecutor's failure to disclose various items of evidence related to witness Aflague was material within the meaning of the case law. It is not the

Court's task – and indeed not properly within the province of Section 2254(d) review of the *Brady* claim – to entertain belated attempts to introduce new evidence designed to denigrate other trial witnesses whose testimony had nothing to do with that provided by Aflague. While the Court has reviewed the evidence of guilt presented at trial in connection with its materiality analysis, including the Huq testimony about cell sites tied to particular phone calls on the night of Bruce's murder, it has done so for the necessary purpose of deciding whether the prosecutor's failure to disclose certain evidence related to Aflague had the requisite effect, *i.e.,* whether it rendered it reasonably probable that the result of the trial would have been different had the evidence been disclosed. Ten years after-the-fact evidence not related to Aflague and his credibility and purporting to attack other witness testimony completely untied to anything Aflague said has no legitimate part in that analysis. Petitioner's complaint that the trial court have should conducted an evidentiary hearing on the Schenk Declaration fares no better. If the Schenk Declaration is not germane to the *Brady* materiality question, there was no reason to hold an evidentiary hearing about it, and the failure to do so necessarily was not objectively unreasonable. The state court's failure to hold an evidentiary hearing on an irrelevant matter does not satisfy Section 2254(d)(2).[37]

Given the evidence actually before the jury at Petitioner's trial, a rational juror could have found the evidence that Petitioner's cell phone was physically close

[37] The Court also draws the same conclusion with respect to Petitioner's complaint that the state court failed to hold an evidentiary hearing on the question of exactly how much money the LAPD paid to Aflague for his informant activities over time. For the reasons discussed herein many times, the Court does not believe that the jury learning of this precise total amount would have made any difference to the verdict or alter confidence in that verdict. This is a factual "dispute" that did not require resolution before the *Brady* claim could be analyzed properly. Moreover, had Petitioner actually believed this information to be important but incomplete, before he returned to state court, he already had received the opportunity to develop this information through the discovery he undertook and the evidentiary hearing he received in federal court. Thus, the state court's declination to conduct further evidentiary development in this respect does not implicate, much less satisfy, Section 2254(d)(2).

to the scene when Bruce was murdered to be compelling evidence of his guilt, particularly when coupled with the evidence that Petitioner had not called Rebecca on his cell phone before that night. The Trial Court Decision so found (at 6), and there is nothing objectively unreasonable about that finding.

In addition to the above evidence, the jury was presented with evidence that shortly after Bruce's murder, Petitioner attempted to manufacture a false alibi. Petitioner met LAPD Officer John Pedroza earlier in 1997, in Las Vegas. Officer Pedroza subsequently attended a party at Rebecca's house and, while there, met two of Petitioner's co-workers, Mark Garcia and Steve Rivera. Officer Pedroza also socialized over the Fourth of July weekend in 1997 with Petitioner and Rebecca in Lake Havasu. [RT 946-58, 951-52.]

As noted earlier, Bruce was shot shortly after 1:00 a.m. on July 26, 1997. At 2:30 a.m. on July 26, 1997, Petitioner called Officer Pedroza at home and said that he was at a particular street corner in East Los Angeles with Mark Garcia and Steve Rivera and was upset, because he had fought with the mother of his child. [RT 953-54.] It was unusual for Petitioner to call Pedroza about this issue, as they were acquaintances rather than close friends. [RT 954.] Officer Pedroza told Petitioner that perhaps they could discuss this tomorrow, when the officer came to Rebecca's home to pick up some things he had left on her boat when they were in Lake Havasu. [RT 954-55.] At 4:20 a.m., Petitioner called Officer Pedroza again and told him that Bruce was dead. [RT 955.] Mark Garcia testified that he remembered meeting Officer Pedroza at a party at Rebecca's house. Garcia also testified that he was not with Petitioner on the evening of July 25, 1997, or the early morning hours of July 26, 1997. [RT 943.] Steve Rivera testified consistently, *i.e.*, that he had met Officer Pedroza at a party at Rebecca's house and had not been with Petitioner on the evening of July 25, 1997, or the morning of July 26, 1997. [RT 571-74.]

A rational juror could have found this evidence to be compelling with respect to the question of Petitioner's guilt. *See, e.g., People v. Vu*, 143 Cal. App. 4th 1009,

1029-30 (2006) (use of a false alibi shows consciousness of guilt). After all, what reason would Petitioner have to call Officer Pedroza and make the representations he did other than to attempt to create an alibi? At the very least, this would be a legitimate inference to draw from this undisputed evidence. Petitioner speculates that, had the jury disbelieved Aflague's testimony, it also might have disbelieved Officer Pedroza's testimony, particularly given that the officer testified that he was asleep when the call came in and that the defense theory was that Petitioner was drunk and at a noisy taco stand that evening, perhaps making it difficult for the officer to accurately hear what Petitioner said. Officer Pedroza did not testify that he had any trouble hearing or understanding Petitioner even though Petitioner sounded like he had been drinking. In fact, Pedroza testified that he was "sure" that Petitioner said he was out with Mark and Steve. [RT 981.] Petitioner's speculation that the jury might have disbelieved Officer Pedroza had it disbelieved Aflague is neither logical nor persuasive. The trial court's conclusion that this attempt to fabricate an alibi was "strong evidence" of Petitioner's involvement in Bruce's murder [Trial Court Decision at 7] was objectively reasonable, or at least a fairminded jurist could so conclude.

Finally, two eyewitnesses identified Jose as the person who had shot Bruce. Virginia Selva lived near the site of Bruce's killing. [RT 603-06.] On the night in question, at a little after 1:00 a.m., Selva was awakened by the sound of a gunshot and what sounded like two people arguing. [RT 607-08.] Selva got out of bed, looked out of her window, and saw a flash of gunfire and a man firing the gun. [RT 608-10.] She heard more shots and then the man ran down the street. She also saw a stopped vehicle with its lights on. [RT 611-12.] In addition, during her testimony, Selva stated she recognized Jose as the man she saw shooting the gun, based on his build and height. [RT 652-53.]

Guadalupe Hernandez lived on the same block. [RT 785.] Between 1:05 a.m. and 1:10 a.m. on July 26, 1997, she was awake and getting ready to go to bed.

[RT 786.] She heard a gunshot and then more after a pause, as well as a woman yelling and screaming. Hernandez looked out her bedroom window and saw a man running away. [RT 788-90.] She moved to the kitchen window and then her living room window and continued to watch the man running down the street until she lost sight of him. [RT 792-94.] The next thing that happened was that she heard a car door slam and a car speed off immediately; she did not hear a car engine start up. [RT 794-95.] Hernandez saw three-quarters of the man's face but not his whole face, but this was enough to recognize him if she saw him again. [RT 799-801.] Hernandez later identified Jose in a photographic line-up and later at a live line-up. [RT 805-13, 850-56, 870, 1163-67, 1181-82, 1186-87.] While testifying at trial, Hernandez identified Jose as the man she had seen running. [RT 836-37.] In addition, the jury received evidence that, like Petitioner and Rebecca, Jose and Rebecca were cousins, but unlike Petitioner and Rebecca, Jose and Rebecca did not socialize or have a relationship. [See, e.g., RT 478, 1262-63.] The phone records did not show any telephone contact between Jose and Rebecca. [RT 1230-31.] This too was circumstantial evidence of Petitioner's involvement in the murder, namely, a rational juror could infer that Petitioner was the intermediary between Rebecca and Jose. Thus, the jury received evidence that, if believed, provided some independent corroboration of Aflague's testimony about his conversations with Jose.

To rebut the prosecution's case, Petitioner presented an alibi defense. He testified that on July 25, 1997, his girlfriend broke up with him, and because he was down about it, he made plans to go out that night. [RT 1536-37.] Petitioner called Jerry Valdez, who picked him up and drove Petitioner and another man to Peppers, a night club in the City of Industry. [RT 1537-39.] They left Peppers just after 1:30 a.m. on July 26, 1997, planning to go to King Taco to get some food. [RT 1540-41.] Instead, however, Petitioner asked Jerry to go by the workplace of his son's mother (Ordonaz, a restaurant) to make arrangements for Petitioner to have his son the next day. Petitioner went inside and talked to her and she made fun of his red shirt. The

three men then went to King Taco around 2:00 a.m., from which Petitioner called Officer Pedroza. [RT 1543-44.] Petitioner got home between 3:00 and 3:20 a.m., and then called the girlfriend who had broken up with him. [RT 1546.]

Petitioner's girlfriend (Alejandra Delgado) testified as a defense witness. She currently was Petitioner's girlfriend and they previously had lived together for ten months. [RT 1392, 1394.] Delgado was unhappy that Petitioner was going to be working as a male dancer and broke up with him by telephone on the evening of July 25, 1997. Petitioner called her at 3:30 a.m. on July 26, 1997, and it sounded like he had been drinking. [RT 1397-99.]

Gerardo (Jerry) Valdez testified as a defense witness. On a Friday night in the Summer of 1997 – he did not recall the date – he went to a nightclub (Peppers) with Petitioner and another man; Valdez drove and picked Petitioner up.[38] There were two or three times that summer that he went to a nightclub with Petitioner. [RT 1426-28.] They left Peppers when it closed (1:30 a.m.), stopped by Ordonaz at Petitioner's request, and then went to King Taco. They were there until around 2:30 a.m., then Valdez took Petitioner home. [RT 1430-34.] Valdez did not remember what Petitioner was wearing that night, although on one of the two or three occasions they went out, he wore an all red shirt. [RT 1434-35.] On cross-examination, Valdez admitted that he had told the police that the Friday night trip to Peppers with Petitioner could have been on any Friday night from June to August 1997. [RT 1437.] After Bruce Cleland's murder, Petitioner called Valdez from jail and asked him if he remembered the visit to Peppers, telling Valdez that this happened on the same night that Bruce Cleland was murdered. Valdez, however, has no memory about what night it was that they went to Peppers, other than that it was a Friday in the summer. [RT 1440-41.]

Eneida Moreno, the mother of Petitioner's son, testified that between 1995

[38] The parties stipulated that July 25, 1997 was a Friday. [RT 1427.]

and 1997, on every other weekend, Petitioner would pick up their son on a Friday and have him for the weekend. [RT 1447.] In July 1997, Moreno worked at Ordonaz restaurant. [RT 1449, 1451-52.] One night, Petitioner came by Ordonaz in between 1:20 a.m. and 1:30 a.m., with Jerry Valdez, after leaving Peppers. Petitioner wanted to drop off some money for their son and take him swimming in the morning. Petitioner and Valdez were going to go to King Taco. Petitioner was wearing a bright red satin shirt, and Moreno told him it was tacky. [RT 1453-57.] Later that same morning, Petitioner called her to tell her not to bring their son by, because Bruce Cleland had been murdered. [RT 1450-51.]

Had the jury believed Petitioner's alibi evidence, the jury would have been required to acquit him. The guilty verdict rendered, instead, shows the jurors did not find the alibi defense to be credible and that the evidence presented established guilt beyond a reasonable doubt. [*See* CT 996-97, 1001-02 (instruction regarding finding guilt based on circumstantial evidence and reasonable doubt).] Given the nature of both the circumstantial evidence of guilt and the alibi evidence, the Court does not find it reasonably probable that, had Aflague been further impeached as Petitioner claims would have occurred had he been provided with the above-discussed undisclosed evidence, the jury then would have rejected the circumstantial evidence of guilt and instead found the alibi evidence credible.

In sum, even if the jury had disregarded Aflague's testimony about his conversations with Jose – whether based on additional impeachments efforts that could have been made by the defense had it possessed the undisclosed evidence in issue here or for other reasons – there was ample evidence supporting finding Petitioner guilty. Put otherwise, the jury at Petitioner's trial plainly could have found him guilty even if Aflague had never testified at all or if the jury had believed him to be the biggest liar in the world. The circumstantial evidence of Petitioner's guilt was ample, even without Aflague's testimony. "[C]ircumstantial evidence alone can be sufficient to demonstrate a defendant's guilt." *United States v.*

Cordova Barajas, 360 F.3d 1037, 1041 (9th Cir. 2004); *see also United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992) ("circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction"); *People v. Snow*, 30 Cal. 4th 43, 66-68 (2003) (holding that circumstantial evidence alone was sufficient to support the defendant's murder conviction); *People v. Thomas*, 2 Cal. 4th 489, 514-16 (1992) (circumstantial evidence sufficient to support murder conviction where evidence showed that defendant had opportunity and means to commit murder and there was consciousness of guilt evidence).

The inclusion of Aflague's false Shoplifting Testimony into the mix does not alter that conclusion. As discussed in connection with the *Napue* claim, there is ample reason to believe that the jurors would have concluded that Aflague was lying when he claimed to have been acting as an undercover agent at the time of the incident, particularly in the light of the implausible nature of the testimony and defense counsel's concerted and aggressive attacks on Aflague's credibility. Moreover, the Shoplifting Testimony related to a wholly extraneous and ancillary matter having nothing to do with the Bruce Cleland murder and Petitioner's guilt.

Indeed, the undisclosed evidence as a whole, and Petitioner's related arguments, revolve around ancillary matters, such as how many times Aflague had been relocated in connection with the *Padilla/Eulloqui* cases and how much relocation money he received, the details of Aflague's informant activities for the LAPD in other cases, and the fact of the Guzman case relocation and Aflague's related submission of a fraudulent lease form to support the relocation funds requested. While Petitioner argues that the undisclosed evidence would have proven that Aflague had a motive to fabricate his conversations with Jose because he had a history of acting as a paid informant, the Court does not find this argument persuasive.

As discussed earlier, the jury already knew that Aflague had acted as a paid informant and snitch, even if it did not know the actual amounts of monies he had

received for doing drug buys and the like or exactly how many times he had been relocated in connection with testifying at trials as a victim or witness. In Petitioner's case, Aflague was acting as a third party witness in testifying about his conversations with Jose, not as a paid informant.[39] That Aflague had testified as a victim in the *Padilla/Eulloqui* cases and relatedly been relocated multiple times, had been relocated in connection with information he provided in the Guzman case shortly before he spoke to officers about the Cleland matter, and had done substantial drug-related paid informant work for the LAPD does show, as Petitioner argues, that Aflague had a significant history of providing information to the LAPD about drug matters and homicides and, on occasion, receiving benefits for doing so such as relocation monies. But critically, there is no evidence before the Court that Aflague provided *false* information to the LAPD on any of these occasions about the crimes at issue.[40] Absent that, the history of Aflague's involvement with the LAPD and any related compensation/relocation assistance he received does not show, or tend to show, that he lied when he told the police about his conversations with Jose and testified at trial accordingly. As a result, Petitioner's arguments about what a terrible person Aflague is and how enmeshed he was with the LAPD for a while, and how his counsel could have shown this to the jury had the undisclosed evidence been provided, do not support the conclusion that the asserted *Brady* violation here satisfied the materiality requirement. When all is said and done and when the record is examined as a whole, even if defense counsel had confronted Aflague with the

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[39] This is why Petitioner's repeated complaint that informant-related jury instructions were not given is of no moment, apart from the fact that he did not exhaust and then raise any such instructional error claim here.

[40] Indeed, had the jury been presented with the full history and details of Aflague's involvement with the LAPD – as Petitioner argues should have happened but did not due to the failure to disclose evidence of such – the jurors might have drawn the inference that Aflague was someone who provided the police with reliable, valuable, and true information, because otherwise, why would the LAPD have continued to deal with him to the extent it did?

undisclosed evidence, Aflague's testimony about his conversations with Jose would not have been "exposed" as false. *See Hein v. Sullivan*, 601 F.3d 897, 917-18 (9th Cir. 2010) (combined effect of prosecutor's argument and nondisclosure of witness's use immunity did not deprive the petitioner of a verdict worthy of confidence, because even if the use immunity evidence had been disclosed and the witness confronted with it, none of his testimony would have been "exposed as untruthful.").

In the Trial Court Decision (at 8), the state court reviewed the evidence adduced at trial and concluded that "had all the previously unknown impeaching evidence about Joseph Aflague been known to the jury it is not reasonably probable it would have led to a different result in Petitioner's trial," noting that it was convinced that it was "the other evidence of Petitioner's involvement in the murder conspiracy that led to his conviction." The trial court noted the above-described evidence of Petitioner's motive in light of his relationship with Rebecca, his phone contacts with Rebecca on the night in question up to the moment when Bruce was ambushed and killed, the evidence regarding the location of Petitioner's cell phone at the relevant times, and Petitioner's attempt to fashion a false alibi, and it concluded that, while Aflague's testimony was helpful to the prosecution, it was not essential to establishing Petitioner's guilt. [Trial Court Decision at 5-7, 9.] The trial court also noted – as this Court had found – that the jury was well aware that Aflague "was a narcotics trafficker, police informant, and overall unsavory character." [*Id.* at 8.] Applying the look through presumption, the California Court of Appeal's and California Supreme Court's silent denials of the claim would be deemed to rest on the same reasoning.

When all is said and done, Petitioner's materiality theory rests on the premise that Aflague's testimony about his conversations with Jose was the only "direct" evidence of Petitioner's guilt and, therefore, had Aflague been impeached on other wholly ancillary matters, the jury would have rejected his conversations with Jose

testimony and necessarily found Petitioner not guilty. But this theory ignores the strength of the prosecution's circumstantial case and the weakness of Petitioner's alibi defense. Under Section 2254(d)'s deferential standards, it was not objectively unreasonable for the state courts to conclude that – even if Aflague had been thoroughly impeached as Petitioner claims would have happened had disclosure been in full – the likelihood of a different result at Petitioner's trial was not so great that confidence in the guilty verdict is undermined.

The Court concludes that the state courts' resolution of the *Brady* claim – based on a finding of a lack of materiality – was not objectively unreasonable factually or legally. This is not a situation in which "there is no possibility fairminded jurists could disagree that the state court's precedents conflict with" clearly established federal law, or that the state courts' decision so lacked justification that the error is "beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 102-03. This Court agrees with the state courts that the failure to disclose the Aflague-related evidence at issue here was not material within the meaning of *Brady* and the related clearly established federal law. Fairminded jurists may disagree, but if the possibility for fairminded disagreement exists, Section 2254(d)'s threshold for relief is not satisfied and de novo review is barred. Accordingly, federal habeas relief based on the *Brady* claim is foreclosed.

RECOMMENDATION

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

DATED: August 9, 2023

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

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

S257684

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ALVARO QUEZADA on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re	B298971
	(Super. Ct. No. BA163991)
ALVARO QUEZADA	ORDER
on Habeas Corpus.	

THE COURT:

The petition for writ of habeas corpus filed on July 10, 2019 has been read and considered. The petition is denied.

PERLUSS, P. J. ZELON, J. STONE, J. (Assigned)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re:	Case No.: BA163991
	RULING
ALVARO QUEZADA	
On Habeas Corpus	

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man. It is an unreal dream. Judge Learned Hand (United States v. Garsson, 291 F. 646, 649 (D.N.Y. 1923)

I. INTRODUCTION

The Court has received and read the petition for habeas corpus, the informal reply, and the informal response.

Bruce Cleland was shot to death the night of July 25, 1997. His wife Rebecca Cleland, her cousin and lover Petitioner Alvaro Quezada, and his brother Jose Quezada were arrested for his murder. They were tried by a jury and convicted of conspiracy to commit murder and special circumstance murder on June 29, 2000. Petitioner's conviction was affirmed on

appeal, but the convictions of Rebecca Cleland and Jose Quezada were reversed. Both were retried before separate juries and again convicted. Their convictions were affirmed.[1]

Since his conviction in 2000, Alvaro Quezada has filed several petitions for habeas relief. All were denied. In November 2012, he received a hearing to contest his conviction before a federal Magistrate Judge. The hearing lasted three days and included fifteen witnesses. On February 20, 2013, the Magistrate Judge issued a detailed twenty-six page report recommending denial of Petitioner's claims. The District Court adopted the Magistrate Judge's findings and denied Petitioner's habeas petition. Petitioner appealed to the 9th Circuit, which remanded to the District Court, which determined Petitioner's claims to be unexhausted. On July 19, 2017, Petitioner filed the instant habeas petition challenging the findings of the Magistrate Judge.

For the reasons stated herein, this Court finds Petitioner's challenge to his conviction to be unpersuasive.

II. BRUCE CLELAND'S MURDER

The sad history of this case is detailed in *Honeymoon with a Killer,* a true-crime book by Don Lasseter (Pinnacle Books, 2009).

Bruce Cleland was a successful software engineer at TRW. In his early forties, he was shy and socially inexperienced with women. In November 1995, he met his future wife Rebecca, who was selling goods at a swap meet. She was perky and friendly and they agreed

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[1] Petitioner's conviction was affirmed in *People v. Cleland* (2003) 109 Cal. App. 4th 121. Cleland's conviction was affirmed in *People v. Cleland,* 2008 Cal. App. Unpub. LEXIS 5834. Jose Quezada's conviction was affirmed in *People v. Quesada,* 2008 Cal. App. Unpub. LEXIS 9032. (For continuity, the Court spells "Quezada" with a "z" in this opinion.)

to meet. They began dating. Cleland never suspected that within two years, the beguiling Rebecca would conspire with her cousins to have him murdered.

Cleland showered expensive gifts on Rebecca, an unwed mother of a small son. He gave her cars, trips, clothes, a boat, furniture, a diamond ring, and paid for cosmetic surgery. Without his knowledge, she used his credit cards to buy furniture and breast augmentation surgery. All the while, Rebecca confided in her sister and others that Cleland was a "dumb American" and a "good catch," and that she planned to marry him, have his child, divorce him, and be "set for life."

At Rebecca's insistence, they married in a secret civil ceremony in October 1996, before purchasing a large house in Whittier, even though they had planned a lavish church wedding for January 1997. After the secret wedding, Rebecca moved into the house alone. Cleland moved in with his parents. She had sexual relations with several men in the house, and required Cleland to phone before visiting.

After their lavish church wedding in January, Cleland moved into the house, but their relationship quickly deteriorated, and he moved back to his parents' home. Petitioner Alvaro Quezada moved into the house. Rebecca and Petitioner were observed being "very affectionate towards one another" and "always hugging and kissing."[2] They had an affectionate relationship which included hugging, kissing, undressing in front of one another and sleeping together in the same bed.

In April 1997, Rebecca consulted a divorce attorney and presented Cleland with a draft separation agreement that would allow her to continue living in the Whittier house and require him to pay the mortgage and to give her spending money. He refused to sign the agreement. She threatened to retaliate by saying he had molested her young son. He consulted a divorce lawyer.

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[2] *People v. Cleland* (2003) 109 Cal. App. 4th 121, 127.

Rebecca asked her sister, who worked with bail bonds, to help find someone to kill Cleland and make it appear to be an accident.

Petitioner's brother Jose Quezada asked Joseph Aflague, a police informant and drug dealer, to find him a gun and someone to drive because he had a "hit" to do.

Later, Jose told Aflague he no longer needed a driver because Petitioner was going to take care of it. (RT, Vol. 10, p. 1329.)

On July 25, 1997, the night of the murder, Cleland told his parents he was meeting with Rebecca to settle their differences. They met at a restaurant. During dinner, Rebecca called Petitioner several times using the restaurant's pay phone or her cell phone. He also called her cell. She and Cleland then drove to Petitioner's father's home and remained there until 1:00 a.m.

Shortly after 1:00 a.m., residents near Beswick Street and Concord Street in East Los Angeles heard gunshots, saw a man with a gun running down Concord Street, and heard a car door slam and a car speed away. Bruce Cleland lay face-down in a nearby driveway, dead from multiple gun shots.

The evidence of Rebecca Cleland's and Jose Quezada's roles in the conspiracy to kill Bruce Cleland is described in the Court of Appeal opinions referenced in footnote 1.

Evidence of Petitioner's involvement in the murder conspiracy included his obvious motive due to his physical relationship with Rebecca, highly incriminating call records showing frequent calls to and from Rebecca leading up to and immediately preceding the ambush murder, cell phone site evidence placing Petitioner within blocks of the shooting at the time of the murder, an attempt to fabricate an alibi within hours of the murder, and the testimony of police informant and admitted drug dealer Joseph Aflague which indirectly linked him to the conspiracy through the statements of his co-conspirator brother Jose. Witness Joseph Aflague's testimony, character, and promises made to him are the principal subjects of this habeas petition.

III. THE HIGHLY INCRIMINATING CALL RECORD EVIDENCE

A. PETITIONER'S CALLS WITH REBECCA THE NIGHT OF THE MURDER

The record of calls between Petitioner and Rebecca immediately preceding Bruce Cleland's ambush murder left little doubt of Petitioner's involvement. That Rebecca used the restaurant's pay phone where she and Cleveland were dining to make some of the calls added to their incriminating nature. Her cell phone was clearly operating. The only reason for her to use the pay phone was that it was beyond her unsuspecting husband's sight and hearing. The short duration of the calls adds to their incriminating nature, and refutes Petitioner's later claim the calls were inspired by a breakup with a girlfriend.

The calls, which began the afternoon of the murder, are set out below.

Time	**Parties**
4:37 p.m.	Rebecca called Arturo Quesada (Petitioner's father)
5:36 p.m.	Rebecca called Petitioner's cell
9:30 p.m.	Rebecca called Petitioner's cell
10:01 p.m.	Rebecca called Petitioner's cell
10:03 p.m.	the restaurant pay phone called Ilma Lopes, a stranger to Rebecca; Lopes testified the female caller asked for Jose Quesada[3]
10:24 p.m.	Petitioner's cell called Rebecca's cell
10:52 p.m.	Petitioner's cell called Rebecca's cell
11:13 p.m.	Rebecca called Petitioner's cell
11:56 p.m.	Petitioner's cell called Rebecca's cell
11:57 p.m.	Petitioner's cell called Rebecca's cell
1:01 a.m.	Rebecca called Petitioner's cell

[3] The Court of Appeal considered Lopez' testimony to be "tainted" because the police reminded her of the date of the call and the last name for whom the caller asked. (*People v. Cleland* (2003) 109 Cal. App. 4th 121, 138.) This Court places little weight on this evidence.

Cleland was murdered approximately ten minutes after Rebecca's final call to Petitioner. Petitioner's cell also made several calls to his father's house between 12:35 a.m. and 12:49 a.m., when Rebecca and Cleland were there.

B. PETITIONER'S CELL PHONE PLACED HIM NEAR THE MURDER

In addition to the highly incriminating cell phone contacts between Petitioner and Rebecca immediately preceding the murder, Petitioner's cell phone placed him in close proximity to the location within minutes of the shooting.

Saiful Huq, director of engineering at Pacific Bell testified at trial that cell phones connect to the tower with the strongest signal, which is usually the closest tower. At the time of the murder, cell towers east of Los Angeles were designed to cover approximately a one to three-mile area. The evidence showed that Petitioner's cell phone called his father's house at 12:35 a.m. when Rebecca and Cleland were visiting. Petitioner's cell used a cell tower near the crime scene. (RT, Vol. 8, pp. 1055, 1059.) A second call from Petitioner's cell at 12:49 a.m. to his father's house used a cell tower within two blocks from where the murder would occur twenty minutes later. (RT, Vol. 8, pp. 1059; Vol. 9, p.1197.) A call from Rebecca's cell to Petitioner's cell at 1:01 a.m.--10 minutes before the murder--used the same cell tower two blocks from the murder. (RT, Vol. 8, 1062; Vol. 9, p. 1197.) Petitioner testified and admitted making the calls, but claimed to not recall the nature of the conversations. (RT, Vol 11, pp. 1539-1540, 1560.)

Petitioner claims Huq offered false testimony regarding Petitioner's cell phone locations based on cell tower use on the night of the murder. Counsel states in 2017, she discovered an expert to refute Huq's testimony by reading a magazine article and ultimately located Manfred Schenk who can testify Petitioner's phone at the time of the critical calls could have been up to 21 miles from where the murder occurred. Respondent challenges Schenk's qualifications to offer such an opinion and points to testimony Schenk gave in other cases which included his startling admissions that he had never worked for a cell phone provider, had no understanding of cell provider software functions, had never actually determined the coverage area of any cell tower, had never received any training in modern cell phone technology, and that his opinion of

a cell tower's range was strictly theoretical and not factual. Respondent cites *State of Ohio v. Oden* (2015) B-1300802-B and other reported cases wherein courts criticized or rejected Schenk's theories.

Petitioner counters that Schenk has been permitted to testify as an expert on cell phone location evidence in several cases, that his reliance on Schenk is timely and at a minimum should require this Court conduct an evidentiary hearing on this issue.

The Court rejects Schenk's evidence and Petitioner's request for a hearing. The use of cell phone location evidence is widespread and accepted in courts throughout the United States. It is also reliable. The Court is not persuaded that Schenk is qualified to testify as an expert on this subject. The Court also finds Petitioner's attempt to insert Schenk's unsupported opinions into this case more than twenty years after the murder to be time barred. Petitioner's request for a hearing on this subject is denied.

IV. PETITIONER'S FALSE ALIBI EVIDENCE

Within hours of the murder, Petitioner called a Los Angeles police officer he knew. He was agitated and told the officer he was with Steve Rivera and Mark Garcia. Both Rivera and Garcia testified they were not with Petitioner that morning. The attempt to fabricate an alibi is strong evidence of Petitioner's involvement in the murder conspiracy.

IV. JOSEPH AFLAGUE

Petitioner's principal claim in this habeas petition revolves around the testimony of Joseph Aflague, a police informant and drug dealer. Petitioner asserts that had the jury known of certain information regarding Aflague that came to light after the trial, Petitioner's trial counsel could have used the information to discredit Aflague and that would have influenced the jury to reject his testimony. The 9th Circuit accepted this argument and ordered a hearing.

The hearing occurred over three days in November 2012 before United States Magistrate Judge Marc L. Goldman. The hearing involved the testimony of 15 witnesses including witness Aflague, the original trial prosecutor, and detectives.

On February 20, 2013, Magistrate Judge Goldman issued his detailed Report and Recommendation which recommended Petitioner's habeas petition be denied. Magistrate

Judge Goldman found Petitioner had failed to establish prejudice "because it is not reasonably probable that the impeachment of Joseph Aflague with the undisclosed evidence would have led to a different result at trial." (Report and Recommendation of United States Magistrate Judge, (February 20, 2013), p. 26.)[4]

On April 5, 2013, District Court Judge Ronald S.W. Lew adopted the Magistrate Judge's report and denied Alvaro Quezada's habeas petition.

On July 19, 2017, Petitioner filed the instant petition for habeas relief. He now challenges the conclusion reached by Magistrate Judge Goldman, and accepted by District Court Judge Lew, that the impeaching evidence about Aflague discovered after trial would not have influenced the jury to acquit him. He claims the impeaching evidence "decimates" Aflague's credibility that Aflague's trial testimony was false, and he was denied his right to a fair trial.

The Court is not persuaded. The Court accepts and concurs in the magistrate's conclusion that had all the previously unknown impeaching evidence about Joseph Aflague been known to the jury it is not reasonably probable it would have led to a different result in Petitioner's trial. Aflague's trial testimony had little to do with Petitioner, but focused principally on his contacts with Petitioner's brother Jose. Aflague's testimony that Jose initially asked him to find a driver to do the "hit," but later told him that would be unnecessary because Petitioner had agreed to drive was brief and unchallenged. The Court is convinced that it was the other evidence of Petitioner's involvement in the murder conspiracy that led to his conviction.

V. CONCLUSION

Petitioner Alvaro Quezada willfully joined and participated in the conspiracy to murder unsuspecting Bruce Cleland so many years ago. The jury was well aware that Joseph Aflague was a narcotics trafficker, police informant and overall unsavory character. Aflague's evidence principally related to Petitioner's brother, Jose Quezada, who was seen running from the shooting scene with gun in hand. Having heard the evidence in the separate jury trials of

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[4] Informal Response, Ex. 1.

Rebecca Cleland and then Jose Quezada, and having read and considered the lengthy opinion of Magistrate Judge Goldman, and the petition, the reply, and Petitioner's reply, this Court remains convinced that full and complete disclosure of the post-trial discovered impeaching evidence of Joseph Aflague would not have altered the jury's verdict.

Petitioner's live-in relationship with principal co-conspirator Rebecca Cleland provided an obvious powerful motive to engage in the conspiracy to murder her husband. Petitioner's phone contacts with Rebecca up to the moment of the ambush killing, the location of his phone in the immediate area of the murder, and his attempt to fashion a false alibi for his whereabouts during the murder clearly established his willful participation in the conspiracy. While helpful to the prosecution, Joseph Aflague's testimony was not essential to the proof of Petitioner's guilt. The jury considered Petitioner's testimony and understandably rejected his claims of innocence.

The petition for writ of habeas corpus is unmeritorious and is denied.

Dated: May 20, 2019

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES

Robert J. Perry, Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: CLARA SHORTRIDGE-FOLTZ CRIMINAL JUSTICE CENTER 210 W. TEMPLE STREET LOS ANGELES, CA 90012	CONFORMED COPY ORIGINAL FILED Superior Court of California County of Los Angeles MAY 20 2019 Sherri R. Carter, Executive Officer/Clerk By Yolanda Reza Deputy
PLAINTIFF/PETITIONER: **PEOPLE OF THE STATE OF CALIFORNIA**	
DEFENDANT/RESPONDENT: ALVARO QUEZADA	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: BA163991-03

I, SHERRI R. CARTER, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles, do hereby certify that I am not a party to the cause herein, and that on this date ***the following***:

☐ Order / Document entitled _____ (Document Title) filed _____ (Date).

☑ Order on Petition for Writ of Habeas Corpus filed 5-20-19 (Date).

☐ Other: _____ (Document Title) filed _____ (Date).

was served upon each party or counsel named below by depositing in the United States mail at the courthouse in the city of LOS ANGELES, County of Los Angeles, State of California, one copy of the original document in a separate sealed envelope to each address as shown below with postage thereon fully prepaid, ***in accordance with standard court practices.***

Robert Rabbani, Deputy District Attorney
Office of District Attorney-Habeas Corpus Litigation Team
320 W. Temple Street, Suite 540
Los Angeles, CA 90012

Tracy Casadio, Deputy Federal Public Defender
Office of Federal Public Defender
321 E. 2nd Street
Los Angeles, CA 90012-4202

SHERRI R. CARTER, Executive Officer/Clerk

Dated: 5-20-19

By: _____ Deputy Clerk

CRIM 154 (Rev. 09/13) **CLERK'S CERTIFICATE OF MAILING**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALVARO QUEZADA, Petitioner, v. A. K. SCRIBNER, Warden Respondent.	CASE NO. CV 04-7532-RSWL (PJW) ORDER OVERRULING OBJECTIONS TO STAY AND ABEYANCE AND DENYING CERTIFICATE OF APPEALABILITY

In 2015, the Ninth Circuit Court of Appeals remanded this matter for this Court to determine whether newly discovered evidence rendered Petitioner's *Brady/Napue* claims unexhausted and, if so, whether the claims were "clearly" procedurally barred. (Docket Nos. 175-76.) Thereafter, the magistrate judge found that the claims were unexhausted and not clearly procedurally barred under California law and ordered a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), so that Petitioner could present his *Brady/Napue* claims to the California Supreme Court. (Docket No. 194 ("Order").) Petitioner objects to the Order. (Docket No. 195 ("Objections").) He argues that his *Brady/Napue* claims are exhausted and that the magistrate judge's application of *Cullen v. Pinholster*, 563 U.S. 184 (2010), was

erroneous. (Objections at 1-12.) For the following reasons, Petitioner's objections are overruled.

Petitioner contends that much of the evidence he is using to substantiate his *Brady/Napue* claims was before the trial court when it denied his request for additional discovery. (Objections at 2.) While it is true that *some* of the evidence was known by the trial court at the time of trial, as the magistrate concluded in the Order, newly discovered evidence that was not before the trial court has substantially improved the evidentiary basis for Petitioner's claim. (Order at 5.) As such, Petitioner's federal *Brady/Napue* claims are unexhausted. *See Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (en banc) ("A claim has not been fairly presented in state court if new factual allegations either fundamentally alter the legal claim already considered by the state courts, or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." (internal quotations and citations omitted)).

Petitioner also suggests that *Pinholster* does not prohibit this Court from considering new evidence not presented to the state courts because he has been diligent in his efforts to investigate and develop the factual basis of his *Brady/Napue* claims. (Objections at 9-11.) While Petitioner's diligence in attempting to develop his *Brady/Napue* claims is not in question, Petitioner points to no authority that allows his diligence in attempting to discover all the facts supporting his claim to be a substitute for actual exhaustion of that claim by presenting his newly discovered factual allegations to the state supreme court. In fact, the Supreme Court authority is contra and provides that a petitioner's diligence in pursuing state court

remedies may justify a stay and abeyance in federal court to return to state court to exhaust an unexhausted claim, *see Rhines*, 544 U.S. at 277-78, which is exactly what the magistrate judge has ordered in this case. Accordingly, Petitioner's objections to the Order are without merit.

Petitioner's request for a Certificate of Appealability on this issue is denied without prejudice because it is premature. Under 28 U.S.C. § 2253, a Certificate of Appealability may only be issued after a final order is issued. *See* 28 U.S.C. § 2253. Generally, even the denial of a stay is not considered an appealable final order. *See, e.g., Haithcock v. Veal,* 310 F. App'x 121, 122 (9th Cir. 2009) (finding the district court's order denying stay and abeyance of a "habeas corpus action is not a final, appealable order under 28 U.S.C. § 1291"). Here, Petitioner's argument that he is entitled to an immediate appeal is even less persuasive because he is being *granted* a stay and abeyance so that he may ultimately have his claims considered by this Court.[1] None of Petitioner's claims are being dismissed and Petitioner is not being foreclosed from obtaining the ultimate relief he seeks in federal court--i.e., habeas relief on his *Brady/Napue* claims. As such, the Court's Order is not a final, appealable order. In any event, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and, therefore, is not entitled to a Certificate of Appealability at this

[1] The fact that Petitioner contends the stay is unnecessary because, in his opinion, his claims are already exhausted does not render the ruling adverse to him.

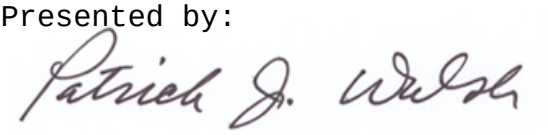
time. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

IT IS SO ORDERED

DATED: 5/10/2017.

S/ RONALD S.W. LEW
RONALD S. W. LEW
UNITED STATES DISTRICT JUDGE

Presented by:



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALVARO QUEZADA, Petitioner, v. A. K. SCRIBNER, WARDEN, Respondent.	CASE NO. CV 04-7532-RSWL (PJW) ORDER GRANTING STAY AND ABEYANCE FOLLOWING REMAND FROM THE NINTH CIRCUIT COURT OF APPEALS

I.

INTRODUCTION

Petitioner is a California state prisoner currently serving a sentence of life in prison without the possibility of parole for the murder and conspiracy to commit the murder of Bruce Cleland in 1997. In 2004, Petitioner filed a habeas corpus petition in this court raising six grounds for relief. (Docket No. 1.) Thereafter, he was granted a stay to return to state court to exhaust a *Brady*[1] claim regarding the prosecution's failure to disclose evidence that could have been used to impeach police informant Joseph Aflague's trial testimony. (Docket No. 26.) The state court subsequently denied the

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

claim and, after Petitioner amended his federal Petition to include the *Brady* claim, it too was denied in 2007.[2]

In 2009, while appealing his case to the Ninth Circuit Court of Appeals, Petitioner discovered new evidence supporting his *Brady* claim, namely that informant Aflague had received money for his cooperation with law enforcement and that he had admitted lying while testifying in another case in 2007. *See Quezada v. Scribner*, 611 F.3d 1165, 1167 (9th Cir. 2010). The Ninth Circuit Court of Appeals remanded the case to this court for an evidentiary hearing to evaluate the newly discovered evidence and to determine whether Petitioner should be granted a stay and abeyance to exhaust his *Brady* claim in state court in light of the new evidence. *Id*. at 1168. Prior to any hearing, however, the United States Supreme Court issued *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011), which generally precludes a federal court from further developing the factual record. Nevertheless, the magistrate judge held a hearing on the *Brady* claim "to more fully develop the facts related to whether there was cause and prejudice for the Petitioner's procedural default" in state court. (Docket No. 155 at 5.)

In 2013, the Court rejected Petitioner's *Brady* claim on procedural grounds, finding that there was sufficient cause to excuse the state procedural default but that there was no prejudice because it was not reasonably probable that the newly discovered impeachment

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[2] The California courts denied the *Brady* claim because it was untimely and because Petitioner had failed to make a prima facie showing that he was entitled to relief. This Court subsequently rejected the claim because Petitioner had "provided no factual basis to support his accusations" and his argument was "based on nothing more than conjecture and speculation." (Docket No. 47 at 38-39.)

evidence would have changed the outcome of Petitioner's trial. (Docket No. 155 at 26.) The decision did not, however, address whether Petitioner's *Brady* claim was exhausted in light of the new evidence and, if it was not, whether the new claim was procedurally barred in state court.

Petitioner appealed to the Ninth Circuit Court of Appeals, which again remanded the case for further proceedings:

> [W]e remand this case to the district court and echo the instructions of our 2010 decision. On remand, we request that the district court first determine whether the new evidence discovered during the district court's evidentiary hearing renders [Petitioner's] claims unexhausted. *See Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999), *Aiken*, 841 F.2d at 883. If the district court concludes that the claims are not exhausted, we then request that the district court determine whether, under California law, [Petitioner's] claims are clearly procedurally barred. *See Franklin v. Johnson*, 290 F.3d 1223, 1230–31 (9th Cir. 2002). When determining whether [Petitioner's] claims are clearly procedurally barred, the district court must determine whether, in light of the new evidence, the state court would clearly consider the claim barred under its procedural rules. *See Harris v. Reed*, 489 U.S. 255, 263 & n.9, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). If it is not clear what the state court would do, the district court should stay and abey federal proceedings so that [Petitioner] may present his claims to the state court. *See Rhines*

v. Weber, 544 U.S. 269, 275–76, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005).

Quezada v. Scribner, 604 Fed. App'x 550, 551-52 (9th Cir. 2015).

II.

ANALYSIS

A. Exhaustion

Respondent contends that Petitioner's current *Brady* claim is technically unexhausted because it is based on newly discovered facts that were not included in his initial *Brady* claim in state court. (Respondent's Reply Brief Regarding Exhaustion and Procedural Bar; Memorandum of Points and Authorities ("Respondent's Reply Brief") at 1.) In Respondent's view, Petitioner's newly discovered evidence that Aflague received payment from the prosecution for his testimony has "fundamentally altered" Petitioner's claim. (Respondent's Reply Brief at 1-2.) Respondent also contends that Petitioner has presented new facts relating to his claim that the prosecution knowingly presented false testimony–-i.e., that Aflague had not received any money for his testimony and had not shoplifted--in violation of *Napue v. Illinois,* 360 U.S. 264 (1959). (Respondent's Reply Brief at 2.) Respondent asks that the Court stay the case while Petitioner returns to the state court and exhausts his claims. For the following reasons, the Court agrees with Respondent and orders Petitioner to return to the state court and exhaust these claims.

Before bringing habeas claims in federal court, a state prisoner is required to present his claims to the state supreme court so that the state court has a "fair opportunity to act" to correct any mistakes. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). Where a prisoner tries to fundamentally alter his claims between state

and federal court by relying on different facts in federal court than he did in state court, the claims are technically unexhausted because they were never really presented to the state court. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). In such situations, the prisoner is required to return to the state court with the new factual allegations and allow the state court to rule on his claims in the first instance. *Aiken,* 841 F.2d at 883 (noting, if claim in federal court includes new evidence that "substantially improves the evidentiary basis" for the claim, then "the state should consider it in the first instance"); *accord Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (finding new evidence "fundamentally altered" petitioner's ineffective assistance claim so that it bore "little resemblance to the naked *Strickland* claim raised before the state courts").

Petitioner's initial *Brady* claim presented to the state courts was largely speculative and unsupported by any evidence. Indeed, the California courts denied the claim based, in part, on the fact that Petitioner failed to assert any facts entitling him to relief. Similarly, this Court initially rejected the claim because Petitioner had failed to establish that the prosecution had "withheld any information at all" from the defense. (*See* Docket No. 47 at 40.) In light of the newly discovered evidence, Petitioner has substantially improved the evidentiary basis for the claim and, as such, it is unexhausted. *See Dickens*, 740 F.3d at 1319; *Aiken*, 841 F.2d at 883.

Petitioner concedes that the evidence supporting his claims is stronger now than it was during his initial round of state habeas review, but contends that any technical failure to exhaust this claim in state court should be excused because he was diligent in attempting

to discover the evidence supporting his claim. He argues that the reason he was not able to obtain it earlier was because the state courts refused to hold an evidentiary hearing. (Petitioner's Brief on Exhaustion, Procedural Bar, and Cause and Prejudice ("Petitioner's Brief") at 10-13, 19-22; Petitioner's Reply to Respondent's Reply Brief Regarding Exhaustion and Procedural Bar ("Petitioner's Reply Brief") at 1-5.) The Court is not persuaded by this argument.

First, though Petitioner cites several cases in which a district court considered additional evidence in support of a claim without finding that such evidence rendered the claim unexhausted, those cases were all decided before *Pinholster.* In *Pinholster*, the Supreme Court held that, once the state court has decided a claim on the merits, "evidence later introduced in federal court is irrelevant." *Pinholster*, 563 U.S. at 184, 186 ("Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so."). Thus, generally speaking, the district court is limited to the record that was before the state court when it issued its decision. Although *Pinholster* did not directly address the exhaustion doctrine, it "substantially tighten[ed] the exhaustion requirement":

> *Pinholster* significantly altered what petitioner must do to exhaust his federal constitutional claims so that the federal court can review them de novo. Under the traditional test, exhaustion occurs when a habeas petitioner has 'fairly presented' his or her claim to the highest state court. . . . Under traditional analysis, new evidence presented for the first time in federal court does not render a claim unexhausted unless it 'fundamentally alter[s]

> the legal claim already considered by the state courts.' Prior to *Pinholster*, the Court consistently held that [the] traditional exhaustion doctrine was unaffected by AEDPA. Although *Pinholster* does not, by its terms, purport to alter the exhaustion requirement, *Pinholster* holds that, in determining whether a habeas petitioner's claim survives review under AEDPA, 'review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.' . . . After *Pinholster*, if a federal habeas petitioner wishes for a federal court to consider new evidence in deciding whether his claims survive review under Section 2254(d)(1), he must first present that evidence in state court.

Salcido v. Martel, 2013 WL 5442267, at *4 (N.D. Cal. Sept. 30, 2013) (quoting *Martinez v. Martel, Order Granting Leave To Amend And A Stay Pursuant To Rhines v. Weber,* CV 04-09090 (C.D. Cal. July 17, 2011)). For these reasons, the Court concludes that Petitioner must first present his new evidence supporting his *Brady* claim to the state court in order to properly exhaust that claim before proceeding in this court.[3]

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[3] Petitioner argues that *Pinholster* and its progeny apply only to claims raised under § 2254(d)(1) and that his claim is being presented under § 2254(e)(2). In his view, this difference means that he does not have to present his newly discovered facts to the state courts. The Court disagrees. The Ninth Circuit has directed this Court to determine whether the new evidence requires Petitioner to return to state court to exhaust his claim. (Doc. No. 175 at 2-3.) Regardless of how Petitioner characterizes his claim, he is seeking to have his conviction overturned based on evidence that he never presented to the state courts. The system in place not only encourages, it compels, that these facts be presented to the state courts first so that the state courts can consider them.

B. State Procedural Bar

Petitioner contends that, even if the claim is technically unexhausted, there is no reason to send him back to state court because the claim would be procedurally barred because it is untimely and/or successive. (Petitioner's Brief at 22-25; Petitioner's Reply Brief at 5-6.) Respondent disagrees, arguing that he would not assert any procedural defenses were Petitioner to present his new and improved *Brady* claim in state court and would, instead, request that the state court decide the claim on the merits. (Respondent's Reply Brief at 17.) For the following reasons, the Court sides with Respondent.

The exhaustion requirement is satisfied if it is clear that a petitioner's unexhausted claim is procedurally barred under state law. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."). Here, however, it is not clear that the state court would find Petitioner's unexhausted *Brady* claim to be procedurally barred under state law for being successive or untimely, particularly in light of the fact that the Attorney General would be asking that the court reach the merits of the claim.[4]

It is true that California law generally forbids the filing of claims in a piecemeal fashion via successive habeas corpus petitions.

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[4] This is not to say that the state court will not find that the claim is procedurally barred, only that it is not certain that the state court would do so. This finding complies with the Ninth Circuit Court of Appeal's remand order to "determine whether, in light of the new evidence, the state court would *clearly* consider the claim barred under its procedural rules." *Quezada v. Scribner,* 604 Fed. Appx. 550, 551-52 (9th Cir. 2015) (emphasis added).

In re Clark, 5 Cal.4th 750, 767-68 (1993). The California Supreme Court, however, "possesses discretionary power to review a previously decided issue." *In re Reno*, 55 Cal.4th 428, 520 (2012). A claim will not be deemed successive if the petitioner convinces the court that the factual basis for any such repetitious claim was unknown to him at the time and he was diligent in pursuing and developing the claim. *See Clark*, 5 Cal.4th at 775. In light of Petitioner's noted attempts to uncover the facts supporting his *Brady* claim in both state and federal court proceedings, it is not clear that a subsequent petition in state court presenting the newly discovered evidence will be barred for being successive.

California's untimeliness bar also prohibits habeas petitions filed after "substantial delay." *Clark*, 5 Cal.4th at 782. There are, however, no concrete rules for determining what constitutes "substantial delay" in noncapital cases. *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006); *see also Evans v. Chavis*, 546 U.S. 189, 202 (2006) ("California's time limit for the filing of a habeas corpus petition in a noncapital case is more forgiving and more flexible than that employed by most states.") (Stevens, J., concurring). Moreover, the state supreme court has recognized that a new petition based on newly discovered facts is justified if the facts could not have been discovered earlier and the petitioner acted with due diligence in attempting to uncover them. *Clark,* 5 Cal. 4th at 775, 781.

Here, Petitioner first discovered the facts supporting his *Brady* claim in 2010, during appellate proceedings in the Ninth Circuit Court of Appeals. (Docket No. 155 at 3, 26.) In the five years since, the federal courts have been continuously attempting to determine whether the claim is exhausted and whether it should be remanded to the state

court for consideration. In light of this, it is simply not *clear* to the Court that the state court would conclude that a restructured *Brady* claim at this juncture was untimely. *See, e.g., Reiswig v. Miller*, 2014 WL 1379233, at *13 (C.D. Cal. Mar. 3, 2014) ("Likewise, while it is conceivable that the California Supreme Court would hold that a subsequent habeas petition filed by petitioner was procedurally barred for being untimely and/or successive, it would be premature for this Court to speculate on the likelihood of the California Supreme Court accepting petitioner's explanation and justification for any filing delay.").

C. Stay and Abeyance

Under *Rhines v. Weber*, 544 U.S. 269 (2005), a district court has discretion to grant a stay and abey of a mixed petition if: (1) "the petitioner had good cause for his failure to exhaust"; (2) "his unexhausted claims are potentially meritorious"; and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278. Both Petitioner and Respondent agree that a stay and abey is appropriate in this case to allow Petitioner to return to the state court to exhaust his *Brady* claim. (Respondent's Reply Brief at 16-18; Petitioner's Reply Brief at 25-26.) Further, the Ninth Circuit's remand order specifically instructed the Court to stay the proceedings if the Court determined that the claim was not clearly barred in state court. *Quezada,* 604 Fed. App'x at 552. That is the case here and, accordingly, a stay of the proceedings is granted.

III.

CONCLUSION

Petitioner is ordered to file a habeas corpus petition in state court, raising his *Brady/Napue* claim and including the recently discovered supporting evidence no later than 30 days after entry of a final order on this motion (assuming he appeals it). He is also ordered to thereafter provide this Court and opposing counsel with a copy of the petition and any subsequent petitions. Petitioner is further ordered to file a status report regarding the status of the newly filed state petition every 90 days thereafter until the state courts have finally decided his case. Once the California Supreme Court has ruled on the petition, Petitioner shall file the state courts' orders/decisions within 30 days. Once the state supreme court has ruled on the unexhausted claim(s), this Court will enter an order regarding further proceedings. Petitioner is warned that, if he does not adhere to this Court's order, he risks being barred from proceeding on his unexhausted claims.

IT IS SO ORDERED.

DATED: January 22, 2016

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

S:\PJW\Cases-State Habeas\QUEZADA, A 7532\Ord granting habeas stay.wpd

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 26 2015

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

ALVARO QUEZADA, Petitioner - Appellant, v. ALBERT K. SCRIBNER, Respondent - Appellee.	No. 13-55750 D.C. No. 2:04-cv-07532-RSWL-MLG MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, Senior District Judge, Presiding

Argued and Submitted March 4, 2015
Pasadena, California

Before: REINHARDT, N.R. SMITH, and HURWITZ, Circuit Judges.

1. Alvaro Quezada first appealed his *Brady* and *Napue* claims to this court in 2008. Shortly after the parties filed their briefs in that appeal, Quezada filed a motion to remand based on newly discovered evidence. This court granted Quezada's motion and remanded the case to the district court "with instructions to

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

conduct an evidentiary hearing" and "to determine whether the new facts render[ed] Quezada's *Brady* claim unexhausted." *Quezada v. Scribner*, 611 F.3d 1165, 1168 (9th Cir. 2010). Further, this court instructed that "[i]f the district court concludes that the new facts render Quezada's *Brady* claim unexhausted, the district court should consider whether[, in light of the new facts,] Quezada is procedurally barred from proceeding in state court." *Id.* If the district court concluded that, under California law, Quezada was not procedurally barred, "the court [was to] stay and abey federal proceedings so that Quezada may exhaust his claims in state court." *Id.* Only if the district court determined that Quezada's claims were exhausted and clearly barred by California law was the district court to determine whether Quezada could demonstrate cause and prejudice or manifest injustice to permit federal review of his claims. *Id.*

The magistrate judge (whose recommendations and findings the district court adopted) provided substantial analysis concerning Quezada's ability to demonstrate cause and prejudice to allow federal review of his claims, but did not address the preliminary issues of whether Quezada's claims were exhausted or procedurally barred in light of the newly discovered evidence.

We are mindful that "[w]here a federal habeas petitioner presents newly discovered evidence or other evidence not before the state courts such as to place

the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it, the state courts must be given an opportunity to consider the evidence." *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988) (quoting *Dispensa v. Lynaugh*, 826 F.2d 375, 377 (5th Cir. 1987)). Further, "a federal court may deny an unexhausted petition on the merits *only* when it is perfectly clear that the applicant does not raise even a colorable federal claim." *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (emphasis added). The district court found that Quezada had shown cause for his failure to present the newly discovered evidence to the state court, indicating that Quezada had, at a minimum, presented a colorable claim.

With this precedent in mind, we remand this case to the district court and echo the instructions of our 2010 decision. On remand, we request that the district court first determine whether the new evidence discovered during the district court's evidentiary hearing renders Quezada's claims unexhausted. *See Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999), *Aiken*, 841 F.2d at 883. If the district court concludes that the claims are not exhausted, we then request that the district court determine whether, under California law, Quezada's claims are clearly procedurally barred. *See Franklin v. Johnson*, 290 F.3d 1223, 1230-31 (9th Cir. 2002). When determining whether Quezada's claims are clearly procedurally

barred, the district court must determine whether, in light of the new evidence, the state court would clearly consider the claim barred under its procedural rules. *See Harris v. Reed*, 489 U.S. 255, 263 & n.9 (1989). If it is not clear what the state court would do, the district court should stay and abey federal proceedings so that Quezada may present his claims to the state court. *See Rhines v. Weber*, 544 U.S. 269, 275-76 (2005).

2. In addition to his *Brady* and *Napue* claims, Quezada claims that the state trial court improperly excluded a co-defendant's out-of-court statement in violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973). The trial court excluded the statement (made to the co-defendant's cellmate) as hearsay that did not meet the declarations against interest exception in Cal. Evid. Code § 1230. The California Court of Appeal addressed this claim on the merits and concluded that the district court had not abused its discretion in excluding the statement. The Court of Appeal reasoned that "only those portions of the declarant's statements that are actually against his or her penal interest are admissible." Reviewing the California Court of Appeal's decision under the Antiterrorism and Effective Death Penalty Act standard in 28 U.S.C. § 2254(d), we conclude that the California Court of Appeal's decision was not an unreasonable application of clearly established Federal law or an unreasonable determination of the facts. *See Williamson v.*

United States, 512 U.S. 594, 600-01 (1994) (holding that the statement against interest exception in Federal Rule of Evidence 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.").

3. On appeal, Quezada also raised the uncertified issue that the cumulative effect of his alleged errors rendered his trial fundamentally unfair. While we have the authority to expand the certificate of appealablity, *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) (per curiam), we decline to do so at this time. In light of our remand of Quezada's *Brady* and *Napue* claims, a decision concerning Quezada's uncertified issue is premature.

4. We also deny Quezada's request for judicial notice, without prejudice, as the motion is rendered moot by this disposition.

REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA, Petitioner, v. AL K. SCRIBNER, Warden, Respondent.	Case No. CV 04-7532-RSWL (MLG) ORDER AMENDING AND AUGMENTING CERTIFICATE OF APPEALABILITY

On February 14, 2008, the Court granted a Certificate of Appealability on two of the claims for relief presented by Petitioner Alvaro Quezada: 1) whether the introduction of the silence of Petitioner's co-defendants was unconstitutionally used against him, as well as the related issue of whether his counsel's failure to object to that testimony amounted to ineffective assistance of counsel; and 2) whether the trial court's exclusion of his co-defendant's statement to a fellow inmate, exculpating Petitioner, violated Petitioner's due process rights. On August 18, 2010, the United States Court of Appeals for the Ninth Circuit remanded the matter for an evidentiary hearing to determine whether newly

discovered evidence warranted relief on Petitioner's *Brady v. Maryland* claim.[1] After much litigation and an evidentiary hearing, it was determined that Petitioner's claims under *Brady* and *Napue v. Illinois*, 360 U.S. 264 (1959), were procedurally defaulted and that Petitioner had failed to establish prejudice because it was not reasonably probable that any undisclosed evidence would have led to a different result at trial.

In his objections, Petitioner has requested a COA on this issue. The court determines whether to issue or deny a COA pursuant to standards established in *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000); and 28 U.S.C. § 2253(c). A COA may be issued only where there has been a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2); *Miller-El*, 537 U.S. at 330. As part of that analysis, the Court must determine whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484, *See also Miller-El*, 537 U.S. at 338.

Under this standard of review, a certificate of appealability should be granted on the procedural default finding. Although this Court found that Petitioner had failed to show prejudice sufficient to excuse the procedural default, Petitioner has made a colorable claim that jurists of reason could find debatable or wrong. Thus, Petitioner is entitled to a certificate of appealability on this claim for relief.

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[1] 373 U.S. 83 (1963).

Therefore, pursuant to 28 U.S.C. § 2253, the Court amends the original Certificate of Appealability and GRANTS the request for a certificate of appealability on the remanded claim.

Dated: April 4, 2013

RONALD S.W. LEW

Ronald S.W. Lew
Senior United States District Judge

Presented on April 1, 2013 by:

Marc L. Goldman
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA,

Petitioner,

v.

AL K. SCRIBNER, Warden,

Respondent.

Case No. CV 04-7532-RSWL (MLG)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the records on file and the Report and Recommendation of the United States Magistrate Judge filed on February 20, 2013, following the evidentiary hearing. The Court has also conducted a *de novo* review of those portions of the Report and Recommendation to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

Dated: April 4, 2013

RONALD S.W. LEW
Ronald S.W. Lew
Senior United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA,

Petitioner,

v.

A. K. SCRIBNER, Warden

Respondent.

Case No. CV 04-7532-RSWL (MLG)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

I. Procedural History

This petition for writ of habeas corpus is before the Court on remand from the United States Court of Appeals for the Ninth Circuit. *See Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010). On June 29, 2000, Petitioner Alvaro Quezada, his brother Jose Quezada, and their cousin Rebecca Cleland were convicted by a Los Angeles County Superior Court jury of the first degree murder of Rebecca's husband, Bruce Cleland, as well as conspiracy to commit that murder, Cal. Penal Code §§ 182, 187. The jury also found that the murder was committed for financial gain and while lying in wait, Cal. Penal Code §§ 190.2(a)(1), 190.2(a)(15). The three were sentenced to life in prison without the possibility of parole.

On May 27, 2003, the California Court of Appeal affirmed Petitioner's conviction, but reversed the convictions of Jose Quezada and Rebecca Cleland. *People v. Cleland*, No. B143757, slip op. (Cal. Ct. App. May 27, 2003).[1] Petitioner filed a petition for review in the California Supreme Court, which was denied on August 27, 2003. Petitioner then filed this *pro se* petition for writ of habeas corpus on September 10, 2004, raising six grounds for relief. On December 6, 2004, counsel was appointed to represent Petitioner.

On March 9, 2005, the Court granted Petitioner's motion to stay proceedings in order to permit him to return to state court to exhaust a newly discovered claim for relief: that the prosecution had failed to disclose material impeachment evidence regarding prosecution witness Joseph Aflague. Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on April 6, 2005. The superior court denied the petition in a reasoned opinion, finding first that the petition was not timely and alternatively, that Petitioner had failed to assert facts entitling him to relief. Petitioner then filed unsuccessful habeas corpus petitions in the California Court of Appeal and the California Supreme Court.

Having exhausted all of his claims in state court, Petitioner filed a first amended petition in this Court on July 27, 2007, which raised the additional claim that the prosecution had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose material evidence that would have undermined the credibility of Aflague. In a

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[1] Cleland and Jose Quezada were subsequently re-tried, re-convicted, and again sentenced to life without parole in separate trials.

Report and Recommendation filed October 26, 2007, it was recommended that the petition be denied. It was determined that Petitioner's *Brady* claim was most likely procedurally barred because the Los Angeles County Superior Court had denied Petitioner's 2005 state habeas corpus petition as untimely. (Docket No. 47 at 37-38 & n.16.) Nevertheless, the *Brady* claim was addressed on the merits without a specific finding on the question of procedural default, given the uncertainty at that time about whether California's timeliness bar was an independent and adequate state basis for denying collateral relief. *See Townsend v. Knowles*, 562 F.3d 1200, 1208 (9th Cir. 2009), *abrogated by Walker v. Martin*, ---- U.S. ----, 131 S.Ct. 1120, 1128 (2011). It was recommended that the *Brady* claim be denied based on the finding that Petitioner had failed to produce evidence establishing that the prosecution "withheld any information at all, let alone favorable evidence." The Report and Recommendation was adopted by Senior District Judge Ronald S.W. Lew on November 21, 2007, and a judgment was entered denying the petition for writ of habeas corpus. (Docket Nos. 47-50.) A certificate of appealability was granted on two claims raised in the petition, but not on the *Brady* claim. (Docket No. 53.)

During appellate proceedings in the Ninth Circuit, Petitioner filed a motion to remand the petition based on newly discovered evidence that money had in fact been given to Aflague for his cooperation with police. *Quezada*, 611 F.3d at 1166. On July 16, 2010, the Ninth Circuit remanded the case to this Court, finding that Petitioner was entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293, 313 (1963), because he had presented newly discovered evidence that he had been diligent in trying to obtain and

which, if proven, would entitle him to relief. The Ninth Circuit rejected Respondent's argument that remand was inappropriate because Quezada's claim was procedurally barred, and remanded the petition for an evidentiary hearing to:

> [1] determine the admissibility, credibility, veracity, and materiality of newly discovered evidence, [...and then] [2] determine whether the new facts render Petitioner's Brady claim unexhausted, [...and then] [3] consider whether Petitioner is procedurally barred from proceeding in state court, [...] [4] if [Petitioner] is not procedurally barred, the court should stay and abey federal proceedings so that Petitioner may exhaust his claims in state court, [...] [5] if [Petitioner's] claim is procedurally barred, the district court should proceed to determine whether [Petitioner] can show cause and prejudice or manifest injustice to permit federal review of the claim.

Id.

On remand, the Federal Public Defender was appointed to represent Petitioner and discovery began in preperation for the evidentiary hearing. However, in the aftermath of the United States Supreme Court decisions in *Cullen v. Pinholster*, ---- U.S. ----, 131 S.Ct. 1388 (Apr. 4, 2011) and *Walker v. Martin*, ---- U.S. ----, 131 S.Ct. 1120 (Feb. 23, 2011), Respondent filed a motion in the Ninth Circuit to recall the mandate. On May 24, 2011, discovery was stayed pending resolution of Respondent's motion by the court of appeals. (Docket Nos. 81, 86.)

The Ninth Circuit denied Respondent's motion on June 16, 2011, but indicated that Respondent was "free to argue to the district

court that [*Pinholster*] is intervening controlling authority that requires the district court to depart from the mandate of this court." (Docket No. 89, Ex. A.) Respondent then filed a motion in this Court to depart from the mandate, and on August 19, 2011, an order was issued granting in part and denying in part Respondent's motion. (Docket Nos. 92, 97.) Petitioner conceded that *Pinholster* precluded an evidentiary hearing on the *Brady* claim. However, Petitioner argued, and this Court found, that the superior court had rejected Petitioner's most recent habeas corpus petition based upon the timeliness bar, and that an evidentiary hearing was still required for the narrow purpose of resolving whether there was cause and prejudice excusing the state procedural default of Petitioner's *Brady* claim. (Doc. No. 97.)

After several discovery related delays, an evidentiary hearing was held from November 27 through 29, 2012, to more fully develop the facts related to whether there was cause and prejudice for Petitioner's procedural default of his *Brady* claim. Both parties filed supplemental briefs on December 28, 2012. This matter is ready for decision.

II. Facts

A. Underlying Crime and Trial[2]

Bruce Cleland, a successful software engineer, met Rebecca Quezada Salcedo in late 1995. They began dating, and Cleland showered Salcedo with gifts. Salcedo told her friends that Cleland was

[2] This factual summary, which is confirmed by a review of the record, is taken from the California Court of Appeal's decision on direct appeal. *People v. Cleland*, No. B143757, slip op. at 2-5. Additional facts are taken from the trial transcript.

wealthy. She disclosed her plan to marry him, have a child, and then divorce him so she could collect child support and be "set for life." Prior to their marriage, Salcedo used Bruce Cleland's credit cards, without his knowledge, to pay for furniture and breast augmentation surgery.

Bruce Cleland and Rebecca Salcedo were married in October 1996 in a secret civil ceremony. Although a large church wedding was already planned for January 1997, Salcedo insisted the two be married before purchasing a house. After the civil marriage, Bruce Cleland bought a large home in Whittier. Rebecca Cleland, as she became known, moved into the house alone, and Bruce Cleland moved in with his parents until the January 1997 wedding.

Both before and after the wedding, Rebecca told friends and acquaintances she did not love Bruce and planned to divorce him quickly to obtain financial security. She asked her sister, Lorraine Salcedo, to help her find someone to kill Bruce and make it look like an accident. Rebecca also purchased several insurance policies on Bruce Cleland's life.

Bruce moved back to his parents' home just three months after the January wedding, while Rebecca stayed in the Whittier house. Petitioner Alvaro Quezada moved into the Whittier house, and Rebecca and Petitioner were seen to be "very affectionate towards one another" and "always hugging and kissing."

In April 1997, Rebecca consulted with a divorce attorney and presented Bruce with a draft separation agreement that would allow her to continue living in the Whittier house and would require Bruce to pay the mortgage and give Rebecca spending money. When Bruce refused to sign the agreement, Rebecca threatened to retaliate by

claiming he had molested her young son. Bruce contacted a divorce attorney of his own, who opined that Rebecca would not be entitled to a sizeable property settlement or substantial spousal support.

On July 25, 1997, Bruce told his parents he was going to meet with Rebecca to try and work out their differences. The two had dinner together that evening. During dinner, Rebecca called Petitioner or his father Arturo Quezada's land line several times on the restaurant's pay telephone and her cellular telephone. Phone records and testimony showed that she attempted to call Jose Quezada from the restaurant pay phone, but dialed the wrong number. The couple then went to Arturo Quezada's house for drinks. When they left Arturo Quezada's home at about 1:00 a.m., Rebecca was driving.

Telephone records introduced at trial indicated that Petitioner telephoned Arturo Quezada's house several times between 12:35 a.m. and 12:49 a.m., while Bruce and Rebecca were still there. Rebecca phoned Petitioner several times between 1:00 a.m. and 1:01 a.m. from her cellular telephone. The last call was placed only 10 minutes before the murder. Expert testimony placed Petitioner and his cellular telephone in the general vicinity of where Bruce Cleland was murdered at the time the calls were made.

Rebecca subsequently reported to the police that shortly after leaving Arturo Quezada's house, she noticed a warning light on the dashboard indicating the rear hatch was open. She stopped near the entrance to the Interstate 5 freeway, got out of the car to shut the hatch and was struck on the back of the head and knocked to the ground. Residents of nearby houses heard gunshots, saw a man running away from the scene and heard a car door slam and a car speed away from the area. One of these residents, Guadalupe Hernandez, testified

at trial that the man she saw running away from the area was co-defendant Jose Quezada. Hernandez further testified that she did not hear the car start its engine before leaving, from which the prosecution inferred and argued that there was a getaway driver, and that the driver was Petitioner. A passing taxi driver summoned emergency personnel, who arrived within minutes of the shooting and found Bruce Cleland face-down in a nearby driveway, dead from multiple gunshot wounds.

When the police arrived, Rebecca's car engine was still running. Rebecca's keys, purse, cellular telephone and jewelry were on the front seat. Rebecca told police her diamond ring was missing. She identified Bruce Cleland as her husband, but did not attempt to approach his body or ask about his condition. She was taken to the police station, where her demeanor was described as "relaxed, lackadaisical, uninterested."

After Bruce Cleland's death, Rebecca quickly retained counsel and set about obtaining the proceeds from Bruce's life and accidental death insurance policies, the proceeds of a stock savings plan, and a mortgage life insurance policy which would pay the balance on the Whittier house. Petitioner continued to live with Rebecca Cleland at the Whittier house.

Approximately seven months after the murder, Petitioner, Rebecca Cleland, and Jose Quezada were arrested and charged with the crimes for which they were convicted. Approximately two years after the murder, detectives investigating an unrelated homicide were informed by Joseph Aflague, who had known Petitioner and Jose Quezada for twenty years, that Jose Quezada had approached him seeking a gun for a murder prior to Bruce Cleland's death.

Petitioner, along with his two co-defendants, were tried in June 2000. Aflague testified on behalf of the prosecution and was cross-examined by both Petitioner's trial counsel, Richard Lasting, and trial counsel for Jose Quezada. (Reporter's Transcript of Petitioner's Trial ("Trial RT") at 1325-64.) On direct examination, Aflague testified that in 1997, he was selling guns and drugs, including cocaine, marijuana, and heroin. At some point that year, he was approached by Jose Quezada, who wanted to purchase drugs. Jose also asked Aflague for a gun and inquired whether Aflague knew anybody that could be a "driver." (Trial RT at 1327.) Sometime later, Jose approached Aflague again and stated that he needed the gun as soon as possible for a "hit" (murder) that he and "Al" were going to do, referring to his brother, Alvaro Quezada (Petitioner). Aflague testified that he had not been promised anything for his testimony. (Trial RT at 1330.)

On cross examination, Aflague was questioned about a 1995 shooting in which he was the victim, his work as an informant, two shoplifting incidents, and the timing of his conversations with Quezada. Regarding the 1995 shooting, Aflague initially testified that he had been shot in a dispute over drug territory, and that soon after the shooting he left California due to problems with a gang. (Trial RT at 1332, 1339.) However, he subsequently stated that his decision to leave the state was "nothing because of a gang at all." (Trial RT at 1341.) He testified that he had received relocation benefits from the district attorney's office in connection with his testimony at the trial of his attackers. (Trial RT at 1362-63.)

Aflague also testified that he worked with the LAPD, as well as other law enforcement entities, as an informant. (Trial RT at 1333,

1346.) When asked whether he was promised that he was not going to be prosecuted for his drug offenses in exchange for providing information, Aflague was evasive. (Trial RT at 1333.)

Aflague was questioned about a November 13, 1999, shoplifting incident at a Robinsons-May. He initially denied being involved, but then admitted to some involvement. (Trial RT at 1347-50.) He implied that his participation in the shoplifting was part of his informant activities. (Trial RT at 1351-52.) He was then asked about a second shoplifting incident, and admitted that he had stolen from Robinsons-May a second time. (Trial RT at 1357.)

When questioned about the timing of his conversation with Jose Quezada, Aflague stated that he remembered it occurring sometime around the winter holidays, but did not remember the exact date. (Trial RT at 1358-59.)

In closing arguments, the prosecutor acknowledged that Aflague was a drug dealer and gun runner, and that defense counsel had shown he was a shoplifter, but emphasized repeatedly that Aflague had no reason to lie. (Trial RT at 1712-13.) The three defense counsel highlighted that Aflague's testimony had been contradictory and evasive, that he was a criminal, and that he was an informant. (Trial RT at 1742-43, 1761-62, 1771-76.)

B. The Evidentiary Hearing

At the evidentiary hearing held in November 2012, testimony was taken on the issue of whether the prosecution failed to disclose information to Petitioner's trial counsel that could have been used to impeach Aflague. Testimony was heard from, among others: Los Angeles Police Department ("LAPD") Detectives Sanchez and Herman, who had contact with Aflague around the time of the trial; Assistant

District Attorney Craig Hum, the trial prosecutor; Retired Los Angeles Superior Court Judge Jacqueline Connor, the trial judge; Petitioner's two trial counsel, Richard Sternfeld and Richard Lasting; and Joseph Aflague. Due to the passage of time, many of the witnesses were unable to recall various facts related to Petitioner's trial, as well as Aflague's informant activities and the benefits he received.

Nevertheless, it became clear that Aflague received police funds for at least three relocations in the time prior to and immediately following Petitioner's trial. (Reporter's Transcript of the Evidentiary Hearing ("EH RT") at 223-224.) The first relocation occurred in December 1997 in connection with a case in which Aflague was the victim of a shooting and provided testimony at trial against his attackers (the "Padilla/Eulloqui case"). (Pet'r's Ex. 1.) A second relocation occurred in June 1999, approximately one year prior to Aflague's testimony at Petitioner's trial. At the time of the second relocation, Aflague was providing assistance to the LAPD in a double homicide case (the "Guzman case"), telling detectives that his brother had knowledge of the murders and informing them where to find his brother. Paperwork about this second relocation notes that it was related to the Guzman case. A third relocation occurred in July 2000, immediately following Aflague's testimony at Petitioner's trial.

III. Analysis

A. Procedural Default and *Brady*

When Petitioner attempted to raise his *Brady* claim on state habeas review, the Los Angeles County Superior Court denied the petition because it was untimely. "Under the doctrine of procedural

default, a petitioner who has defaulted on his claims in state court is barred from raising them in federal court so long as the default is 'pursuant to an independent and adequate state procedural rule.'" *Jackson v. Roe*, 425 F.3d 654, 656 n.2 (9th Cir. 2005) (quoting *Coleman v. Thompson*, 501 U.S. 722 (1991)). The Supreme Court recently made clear that California's timeliness requirement for habeas corpus petitions is an independent and adequate procedural bar. *See Walker v. Martin*, ---- U.S. ----, 131 S.Ct. 1120, 1128 (2011). Thus, the failure to file a timely state habeas corpus petition results in a procedural default that bars federal consideration of the claim, unless a petitioner can demonstrate both "cause" for the delay and actual "prejudice" accruing from the error. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Cook v. Schriro*, 538 F.3d 1000, 1025-26 (9th Cir. 2008) (petitioner is barred from raising a claim on federal habeas review where he failed to meet state's contemporaneous objection rule absent a showing of cause and prejudice).

"Cause and prejudice" for a procedural default parallels two of the three components of an alleged *Brady* violation. *Gentry v. Sinclair*, 693 F.3d 867, 884 (9th Cir. 2012) (citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). The three components of a *Brady* violation are: 1) the material evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) that evidence must have been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Thus a petitioner shows "cause" for procedural default of a *Brady* claim when the reason for his failure to bring a timely claim results from the State's suppression of the relevant evidence, and shows prejudice when the

suppressed evidence is material for *Brady* purposes. *Gentry*, 693 F.3d at 884 (citing *Banks*, 540 U.S. at 691)). In *Brady* cases, "the terms 'material' and 'prejudicial' are used interchangeably." *Runningeagle v. Ryan*, 686 F.3d 758, 770 (9th Cir. 2012). Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449 (2009) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The Court will first address whether the evidence Petitioner claims was withheld was exculpatory due to its impeachment value and whether it was actually suppressed. *See Strickler*, 527 U.S. at 281-82. The Court will then consider any favorable evidence found to have been suppressed as a whole to determine whether it was material. *See Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (finding that in determining materiality, the Court must consider the suppressed evidence "collectively, not item by item").

1. Cause: Whether the Prosecutor Failed to Disclose Exculpatory Evidence

Petitioner alleges that several categories of information were never disclosed to the defense: (1) the fact that the second relocation occurred the specifics surrounding it; (2) details about Aflague's informant activities; (3) details about the first relocation; (4) the fact that a third relocation occurred following trial; and (5) Aflague's misuse of the 1999 relocation funds. (Pet'r's Brief at 2-6.) Each category will be addressed in turn.

a. The Second Relocation

Aflague received relocation benefits in June 1999 to cover his living expenses between June 20, 1999, and September 30, 1999.

(Pet'r's Ex. 4 at 135-52.) The parties dispute whether the relocation was tied to Aflague's assistance in the Guzman case only, or whether it was also related to his assistance in the Cleland investigation. Regardless, the parties do not dispute that Aflague's receipt of these relocation benefits constituted impeachment material, and that disclosure was required.

However, the parties disagree about whether evidence of the second relocation was disclosed. Respondent contends that the second relocation was disclosed to defense counsel prior to trial. (Resp.'s Brief at 2.) District Attorney Hum testified that he orally disclosed the fact of the second relocation to Petitioner's counsel, as well as to counsel for the co-defendants. (EH RT at 179-80, 263, 279-80.) Yet he did not remember any specific details about this disclosure, such as when it took place or whether it was made to Attorney Sternfeld, who was Petitioner's counsel until January 2000, or Attorney Lasting, who was Petitioner's counsel from January 2000 through trial. (EH RT at 179, 279-80.) Both Sternfeld and Lasting testified that Hum never informed them of the second relocation. (EH RT at 494, 502, 585.) Though there is documentary evidence reflecting other disclosures Hum made to defense counsel, there is no documentary evidence recording Hum's supposed transmission of this information. (EH RT at 173, 229, 280-811, 491; Pet'r's Ex 19.) Moreover, nothing in Petitioner's counsels' files, or in the substance of their cross-examination of Aflague, suggests that they were aware of this second relocation.[3] The

[3] At the evidentiary hearing, Respondent attempted to show that a reference made by Judge Connor at a pre-trial hearing to relocation papers in the presence of defense counsel demonstrated that defense counsel was aware of the second relocation. However, it is not clear which relocation is being referenced, and there is nothing to suggest

record therefore supports the conclusion that Attorney Hum is mistaken, and that Aflague's receipt of funds for a second relocation was never disclosed to the defense. The evidence is likewise clear that Petitioner was not made aware of the second relocation until after judgment was entered denying the current petition. Accordingly, Petitioner has shown "cause" for failing to bring a *Brady* claim based on the prosecutor's failure to disclose evidence of the second relocation in the 2005 state habeas corpus petition. Whether prejudice resulted will be considered below.

b. Details about Aflague's Informant Activities

Petitioner contends that the prosecutor suppressed details related to Aflague's informant activities, including their timing and ongoing nature, and the fact that Aflague had provided assistance in other homicide investigations. (Pet'r's Brief at 5-6.) Information demonstrating the extent of the relationship between Aflague and the LAPD constitutes favorable impeachment evidence that should have been disclosed to defense counsel. The prejudicial impact of this non-disclosure will also be addressed below.

c. Details about the First Relocation

The parties do not dispute that payments to Aflague relating to the first relocation were disclosed. (EH RT at 180.) Petitioner contends, however, that details about the relocation showing that Aflague was living out-of-state in 1997 due to threats from an East Los Angeles gang, and that the request for relocation funds states Aflague was "unwilling to return to California," should have also been disclosed. (Pet'r's Brief at 5.) According to Petitioner, this

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that this vague reference alerted defense counsel to the existence of a second relocation. (EH RT at 258-60.)

information was exculpatory because it could have been used to undermine Aflague's testimony that he had conversations with Jose Quezada in California during the time period he was supposedly living in Nevada.

At trial, Aflague stated on cross-examination that in 1996, due to problems with a Los Angeles gang, he moved his family out-of-state and lived with them part of the time, while maintaining a place in California and continuing to spend part of the time in California. (Trial RT at 1339, 1345.) He then backtracked, stating that his decision to leave was not because of "a gang exactly." (Trial RT at 1341.) He also explained that while he initially moved out-of-state without financial assistance, he later received relocation benefits to move from one out-of-state location to another. (Trial RT at 1363.)

Thus, at least at the time of trial, defense counsel was aware that in 1997, when the conversation with Jose Quezada occurred, Aflague was maintaining a residence out-of-state, and that the relocation funds had been used to move from one out-of-state location to another. While Aflague's testimony regarding whether his move was related to gang problems was somewhat equivocal, the testimony as a whole left the impression that Aflague was indeed facing threats in Los Angeles and that this triggered his move out-of-state.[4]

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[4] Furthermore, the specific notation in the December 1997 relocation paperwork that Aflague was "unwilling to return to California" is of questionable impeachment value. The paperwork makes clear that the threats precipitating the relocation request were tied to Aflague's testimony in the Padilla trial, which took place in December 1997. (Pet'r's Ex. 1, p. 48-50.) The conversations with Jose Quezada took place more than five months earlier, prior to the murder of Bruce Cleland on July 26, 1997. Thus, it appears that the threats making him "unwilling to return to California" occurred sometime after

Accordingly, Petitioner has not demonstrated "cause" for failing to bring a timely *Brady* claim based on this evidence.

d. The Third Relocation

Aflague received $3,200 in relocation funds on July 13, 2000, following his testimony in Petitioner's trial. (Pet'r's Ex. 26 at 440.) It is undisputed that this third relocation was related to Aflague's testimony in the Cleland murder trial, and that it was never disclosed to the defense. (EH RT at 496-97.) Petitioner argues that the relocation should have been disclosed, even though it occurred after Petitioner's trial, because a motion for new trial was pending.[5] (Pet'r's Brief at 4.) He asserts that the third relocation shows that there was a tacit understanding between Aflague and the LAPD prior to trial that Aflague would receive relocation benefits in exchange for his testimony. (Pet'r's Brief at 4.)

As the third relocation occurred too late to constitute useful impeachment material for defense counsel on its own, Petitioner appears to be essentially arguing that the fact that Aflague was promised relocation benefits in exchange for his trial testimony should have been disclosed prior to trial. Yet Petitioner has not established that any such agreement existed. Petitioner rests this theory on the fact that the relocation occurred, and Aflague's

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the conversations with Quezada.

[5] In the Ninth Circuit, the *Brady* disclosure obligation continues after conviction. *See Tennison v. City and Cnty of San Francisco*, 570 F.3d 1078, 1094 (9th Cir. 2009) (finding that prosecutors had continuing duty to turn over exculpatory material after the guilty verdict while they were still involved in the new trial and post-conviction proceedings for the defendants); *but see United States v. Jones*, 399 F.3d 640, 647 (6th Cir. 2005) ("As such evidence did not exist at the time of trial, it was not *Brady* material."); *United States v. Maldonado-Rivera*, 489 F.3d 60 (1st Cir. 2007) (evidence unknown to prosecution until after trial not *Brady* material).

testimony at the evidentiary hearing that prior to Petitioner's trial, he had communicated his fear of testifying to the LAPD and they had promised to protect him. (EH RT at 380.) Additionally, a form filled out by Detective Sanchez as part of obtaining the relocation funds indicated a response of "No" to the question "Would witness have testified without protection?" (Pet'r's Ex. 26 at 442.)

However, the paperwork was not filled out until after Petitioner's trial, and Sanchez testified that she may have checked the box in error. (EH RT at 123-24, 133.) More tellingly, the same paperwork explains that the "threat information" necessitating the relocation funds as: "Witness testified at the trial. The next weekend, unknown male subjects went to his residence numerous times looking for him. Witness is convinced that the subjects are searching for him seeking retaliation for his testifying." (Pet'r's Ex. 26 at 436; EH RT at 124-25.) Neither the paperwork nor Aflague's evidentiary hearing testimony suggest that any concrete promise of relocation benefits was made to Aflague prior to his testimony. Instead, the evidence shows nothing more than the LAPD generally responding to Aflague's safety concerns by promising to protect him to the extent necessary. It was only when Aflague received specific threats following his testimony that relocation benefits were sought and given. Accordingly, evidence of the third relocation does not constitute exculpatory material that should have been disclosed.

e. Misuse of the Relocation Funds

Petitioner argues that the LAPD "knew or should have known" that Aflague did not use the second set of relocation funds to relocate, and that his misuse of the funds should have been disclosed to the defense. (Pet'r's Brief at 6.) As part of receiving relocation funds

in 1999, Aflague gave LAPD officers a receipt dated June 30, 1999, purporting to be from his landlord, Laura Gutierrez, confirming that she had collected rent from Aflague. (Pet'r's Ex. 4 at 147.) Gutierrez is related to Ruth Navarette, who was Aflague's girlfriend at the time. At the evidentiary hearing, Gutierrez was called as a witness and testified that she lives at the address listed on the receipt, that the signature on the receipt was not hers, and that she never rented her home or any other apartment to Aflague. (EH RT at 537-38.)

Both Detectives Herman and Sanchez testified that they had no knowledge of Aflague misusing relocation funds while they were working with him. (EH RT at 98, 145.) According to Petitioner, the LAPD must have had notice that Aflague had not relocated to Gutierrez's residence because when Sanchez attempted to contact him there regarding his testimony for the Cleland trial, she could not find him. (Pet'r's Brief at 6.) Sanchez testified at the evidentiary hearing that while she remembered an occasion where she was unable to find Aflague when he was needed for testimony, she did not remember the timing or which of the three Cleland trials it was related to.[6] (EH RT at 85, 102-04.) Likewise, Gutierrez testified that she remembered that Sanchez contacted her in an attempt to locate Aflague, but she did not remember when this occurred. (EH RT at 538-39.) Even assuming that it was around the time of the first Cleland trial, there is nothing to suggest that Sanchez or other detectives were actually aware that Aflague never relocated to the Gutierrez

[6] As mentioned above, Petitioner, Rebecca Cleland, and Jose Quezada were all initially tried together for the murder of Bruce Cleland. After the convictions for Cleland and Quezada were overturned on appeal, they were re-tried and re-convicted in separate trials.

residence. The first Cleland trial took place about a year after the relocation occurred, and Aflague received reimbursement for only a few months rent. (*See* Pet'r's Ex 4 at 152 (noting that the witness was being reimbursed for living expenses for the period of June 20, 1999 to September 30, 1999.)) It would have been reasonable for the LAPD to assume that Aflague had moved yet again after initially relocating to the Gutierrez residence. Furthermore, Gutierrez testified that Aflague and Navarette stayed with her on occasion and had paid her money to store furniture in her garage. (EH RT at 540.) Had any LAPD detectives asked Gutierrez about whether Aflague had rented from her, this information could have led them to assume Aflague had used the funds appropriately.

In short, there is no evidence that either the LAPD or the prosecutor were aware that Aflague had misused funds designated for the second relocation, and they were therefore under no obligation to disclose information about it to defense. *See United States v. Price*, 566 F.3d 900, 910 n. 11 (9th Cir. 2009) (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 2009) ("[T]he 'government has no obligation to produce information which it does not possess or of which it is unaware.'") In the absence of any suppression by the prosecution, Petitioner cannot show "cause" for procedural default of his *Brady* claim based on evidence that Aflague misused relocation funds. *See Banks*, 540 U.S. at 671.

2. Prejudice: Whether the Undisclosed Evidence Was Material

Petitioner has shown that the prosecutor failed to disclose evidence relating to the second relocation and other details about Aflague's informant activities prior to trial. However, he has failed to demonstrate that there "is a reasonable probability that, had the

evidence been disclosed, the result of the proceeding would have been different." *See Cone*, 556 U.S. at 449.

Defense counsel had significant impeachment material with which to confront Aflague. Aflague admitted to being a drug dealer and gun runner. He testified about being shot in a drug territory dispute that lead to his move out of state. He explained that he received relocation benefits from the LAPD in connection with his testimony against his attackers. (Trial RT at 1362-63.) He also testified that he maintained a relationship with the LAPD and other entities as an informant, or "snitch." (Trial RT at 1333, 1346.) He was evasive when questioned specifically about whether he had received promises of leniency for his drug offences in exchange for his informant activities. (Trial RT at 1333.) When questioned about one shoplifting incident in which he was involved, he changed his story several times, eventually admitting having been charged but offering a flimsy explanation about having participated in the theft as part of his informant activities. (Trial RT at 1346-52.) He was questioned about a second incident, and admitted to stealing from the store on that occasion. (Trial RT at 1357.)

All of this information painted the picture of a criminal who was benefitting from regular cooperation with the authorities and was motivated to provide them with more information. Indeed, defense counsel emphasized in their closing arguments that Aflague was a "snitch" who sells information. Petitioner has not shown how additional information about the details of Aflague's informant activities would have provided the jury with any further material reasons to doubt the veracity of his statements regarding his conversations with Jose Quezada.

In particular, much of the evidentiary hearing was focused on the second relocation. Petitioner attempted to show that the relocation benefits given to Aflague were actually for his assistance in the Cleland case and not for the Guzman case. (EH RT at 76-77.) Yet the paperwork regarding the second relocation mentions only the Guzman case, and does not make any reference to the Cleland case. (Pet'r's Ex. 4.) Additionally, the paperwork indicates that the relocation funds were requested in June 1999, (Pet'r's Ex. 4) while Aflague did not begin giving detectives information about the Cleland case until early August 1999.[7] (EH RT at 114; Trial RT at 1742.) Furthermore, when asked about the second relocation at the evidentiary hearing, both Detectives Herman and Sanchez, who were Aflague's handlers at the time, testified initially that the relocation was made in connection with the Guzman case and was not related to the Cleland case. (EH RT at 57, 140, 152.) When pressed by Petitioner's counsel, both detectives surmised that the relocation may have been intertwined with the Cleland case, given that Aflague was providing assistance in both at the time of the relocation period. (EH RT at 91, 156-59.)

Thus, the evidence shows that, at best, the relocation benefits that were given to Aflague in connection with his assistance in the Guzman case were perhaps somewhat intertwined with his assistance in the Cleland case. It does not appear that benefits for the second relocation were contingent on Aflague's testimony at the Cleland trial, or that Aflague had otherwise been promised benefits for his

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[7] However, the funds covered the period from June 20 to September 30, 1999, and were not actually given to Aflague until August 11, 1999. (Pet'r's Ex. 4.)

testimony. Under these circumstances, evidence of Aflague's receipt of benefits for the second relocation, much like other details about Aflague's informant activities, would have been helpful to defense counsel only to show that Aflague was cooperating with the LAPD - a fact that was already before the jury.

Furthermore, if defense counsel had been permitted to introduce evidence regarding Aflague's receipt of relocation benefits, the prosecution would have been able to introduce evidence about the threats precipitating the relocation request. *See People v. Verdugo*, 50 Cal. 4th 263, 285 (2010). As Hum explained at the evidentiary hearing, the issue of relocation is often helpful to the prosecution by showing the jury that the witness's life is in danger and that the witness is taken seriously by police and the prosecution. (EH RT at 261-62.) The fact that evidence about the second relocation benefits may have further enhanced Aflague's credibility weighs against a finding that the failure to disclose it was prejudicial.

Finally, Petitioner's conviction did not rest on Aflague's testimony alone. Petitioner was living with Rebecca at the time of the murder. They appeared to be having a romantic or sexual relationship. Cell phone records placed Petitioner within close proximity to the location of the murder around the time it occurred, and showed that there had been frequent telephone contact between Petitioner and Rebecca Cleland in the hours and minutes prior to the murder. (Trial RT 1060-62, 1124-25, 1190-1200.)[8] At trial, Petitioner testified that he could not remember what he had spoken to Rebecca about when he called her phone on the evening of July 25, 1997.

[8] In contrast, Petitioner and Rebecca had little cell phone contact prior to the evening of the murder. (Trial RT at 1193-94, 1557).

(Trial RT at 1557-60.)

The evidence also showed that Petitioner attempted to fabricate an alibi immediately after the murder. John Pedroza, a Los Angeles police officer who had become friendly with Petitioner and Rebecca in the months leading up to the murder, testified that at 2:30 a.m. on July 26, 1997, less than two hours after the murder, Petitioner called him in an agitated state, told him that he was with Steve Rivera and Mark Garcia, and that he had just had an argument with the mother of his daughter. (Trial RT 953.) Petitioner called again a few hours later to inform Pedroza that Bruce was dead. (Trial RT 955.) Both Steve Rivera and Mark Garcia testified that they were not with Petitioner on the morning of July 26, 1997. (Trial RT 574, 943.)

Petitioner had a motive to kill Bruce Cleland, as he was living in the couple's Whittier home with Rebecca, with whom he had a close and possibly romantic relationship. (Trial RT at 1554-55, 1566-67.) And finally, Petitioner's brother, Jose, was identified as fleeing the murder scene immediately after the shots were fired, and there was testimony from which it could be inferred that a getaway driver was involved.

In sum, Petitioner has not shown that prejudice resulted from the prosecutor's failure to disclose impeachment evidence similar to evidence previously disclosed regarding a witness who had already been thoroughly impeached, particularly where the witness's testimony alone was not the sole basis on which a jury could have based its conviction. As such, Petitioner has failed to demonstrate that the result of the trial would have been different had counsel been aware of the undisclosed information.

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B. False Testimony

Petitioner also claims that his constitutional rights were violated when the prosecutor failed to correct Aflague's false testimony that he received "nothing" for his testimony and was "undercover" at the time he was arrested for shoplifting. (Pet'r's Brief at 7-10.) In a federal habeas action, relief is warranted if a petitioner can establish that a prosecutor knowingly used false evidence to obtain the conviction. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005). This includes the use of perjured testimony, whether the prosecutor solicits the testimony or simply allows it to go uncorrected when it appears. *See Napue, 360 U.S. at 269*. A *Napue* claim requires the petitioner to show that "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

Here, Aflague's statements that he was not receiving benefits for his testimony were true, as the second relocation was made in connection with Aflague's assistance in the Guzman case. To the extent Prosecutor Hum should have qualified this statement by explaining that Aflague received relocation benefits in another case, which may have been intertwined with his assistance in the Cleland case, Petitioner cannot show prejudice for the reasons discussed above.

Nor can Petitioner demonstrate prejudice from Prosecutor Hum's failure to correct Aflague's testimony about the shoplifting incident. Aflague changed his story about the incident several times

while on the stand, minimizing the chance that the jury actually believed his "undercover" explanation. Additionally, he admitted to committing theft in a second incident that he did not contend was part of his informant activities. Moreover, in closing, Prosecutor Hum acknowledged that defense counsel had "prove[]d he was a shoplifter." (Trial RT at 1713.) Accordingly, Petitioner has failed to show that Aflague's testimony was either clearly false or material.

V. Conclusion

Petitioner has established cause for failing to timely raise certain of the underlying facts of his *Brady* claim in the state courts because he was not aware of those facts until his appeal was pending in the Ninth Circuit. However, he has failed to establish prejudice because it is not reasonably probable that the impeachment of Joseph Aflague with the undisclosed evidence would have led to a different result at trial.[9] It is again recommended that the petition for writ of habeas corpus be denied.

Dated: February 20, 2013

Marc L. Goldman
United States Magistrate Judge

[9] This conclusion would be the same under a straight forward *Brady* analysis.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Alvaro Quezada, Petitioner, v. Al K. Scribner, Respondent.	CV 04-07532-RSWL(MLGx) **ORDER re: Respondent's Motion for Review of United States Magistrate Judge's Partial Denial of Respondent's Motion to Depart From Mandate [98]**

On October 4, 2011, Respondent Al K. Scribner's ("Respondent") Motion for Review of United States Magistrate Judge's Partial Denial of Respondent's Motion to Depart From Mandate came on for regular calendar before the Court [98]. The Court having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court **NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **OVERRULES** Respondent's Motion and **AFFIRMS** the Magistrate Judge's order.

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I. BACKGROUND

This Action stems from a Writ of Habeas Corpus filed by Petitioner Alvaro Quezada ("Petitioner") on September 10, 2004 [1]. This Court originally denied Petitioner's Writ of Habeas Corpus on November 21, 2007. However, on August 18, 2010, the Ninth Circuit remanded Petitioner's Writ back to this Court and issued a mandate for an evidentiary hearing regarding the admissibility of new evidence pertaining to Petitioner's Brady violation claim [65]. In response, Respondent filed a Motion with Magistrate Judge Marc L. Goldman to stop the hearing and depart from the Ninth Circuit's Mandate pursuant to Supreme Court precedent [92].[1] Magistrate Judge Goldman, however, issued an Order partially denying Respondent's Motion, finding that Pinholster does not apply to Petitioner's Brady violation claim because the Superior Court did not reject the Brady violation claim on the merits [97].[2]

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[1]Cullen v. Pinholster, ---- U.S. ----, 131 S. Ct. 1388 (Apr. 4, 2011) and Walker v. Martin, ---- U.S. ----, 131 S. Ct. 1120 (Feb. 23, 2011).

[2]The Supreme Court in Cullen v. Pinholster held that a federal court's review of a state court's habeas corpus decision is "limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. The Pinholster Court explicitly noted that its holding only applied to habeas corpus claims that "fall within the scope of § 2254(d)," meaning claims adjudicated on the merits of the federal claim in state court proceedings. Id. at 1400-01.

On September 2, 2011, Respondent filed this present Motion for Review of the Magistrate's Partial Denial of Respondent's Motion to Depart from Mandate [98].

II. LEGAL STANDARD

"When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge" and the magistrate judge issues an order stating the decision, a party may object to the magistrate judge's order by filing a motion for the district judge to overrule the magistrate judge. Fed. R. Civ. Pro. 72(a). In reviewing the order from the magistrate judge, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law." Fed. R. Civ. Pro. 72(a).

To conclude that a magistrate judge is "clearly erroneous, the district court must arrive at a 'definite and firm conviction that a mistake has been committed.'" Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1168 (C.D. Cal. 1998)(quoting Federal Sav. & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co., 130 F.R.D. 507 (D.D.C. 1990)).

III. DISCUSSION

The Court finds that the Magistrate Judge did not clearly err in concluding that the Superior Court disposed of Petitioner's Brady violation claim solely on procedural grounds.

Upon review, the Court finds that the language of the Superior Court's decision is in accordance with the Magistrate Judge's ruling that the Superior Court did not rule on the merits. More specifically, the Superior Court was explicit in rejecting Petitioner's Brady violation claim as untimely and hence procedurally barred. At the beginning of its ruling, the Superior Court stated in pertinent part that:

> Petitioner contends that he has met a timeliness exception by virtue of recent discovery of new evidence. . . . **As discussed subsequently**, [Petitioner] fails to demonstrate the 'constitutional magnitude' necessary to be granted an exception. **This petition is not timely**."

Resp. Mot. at Ex. B. at 22 (emphasis added). The Court finds that this excerpt makes it clear that the Superior Court denied Petitioner's Brady habeas claim as untimely and not within the "constitutional magnitude" exception to timeliness.[3]

Respondent argues that the Superior Court's decision should be viewed as containing two alternate rulings, one on procedural grounds and one on the merits. To support its argument, Respondent highlights various passages that allegedly indicate that the

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[3]The constitutional magnitude exception requires that the "error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." In re Robbins, 18 Cal. 4th 770, 780 (1998).

Superior Court made a ruling on the merits. When read in isolation, the passages highlighted by Respondent may be misinterpreted as an analysis on the merits given that the standard for proof for the "constitutional magnitude" exception to timeliness is similar to a discussion of the merits of a habeas claim.[4] The Court finds, however, that when read in the context of the Superior Court's decision as a whole, these passages can only be interpreted to be a discussion of the "constitutional magnitude" exception to timeliness. More specifically, all these passages follow the Superior Court's explicit statement that the "constitutional magnitude" exception will be "discussed subsequently." Resp. Mot. at Ex. B. at 22

In sum, the Court finds that the language of the Superior Court's decision supports the Magistrate Judge's ruling.

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[4]To prove an error of constitutional magnitude occurred, "the petitioner would have to persuade the court that had the excluded evidence been presented, he would have been acquitted or convicted of a lesser offense. As is required when newly discovered evidence is the basis for a habeas corpus petition, the evidence must be such that it would 'undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'" Clark, 5 Cal.4th at 797, n.32 (quoting People v. Gonzalez, 51 Cal.3d 1179, 1246 (1990)).

IV. CONCLUSION

Accordingly, the Court finds that the Magistrate Judge was not clearly erroneous in deciding that the Superior Court made a ruling solely on procedural grounds and that Pinholster does not apply. As such, the Court **OVERRULES** Respondent's objections to the Magistrate Judge's order and **AFFIRMS** the Magistrate Judge's order.

DATED: October 13, 2011

IT IS SO ORDERED.

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW

Senior, U.S. District Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA, Petitioner, v. A. K. SCRIBNER, Warden, Respondent.	Case No. CV 04-7532-RSWL (MLG) ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO DEPART FROM THE NINTH CIRCUIT MANDATE

I. Background

This case is before the Court on remand from the Ninth Circuit for an evidentiary hearing and additional proceedings. *See Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010). Petitioner Alvaro Quezada was convicted of first degree murder and conspiracy to commit murder, Cal. Penal Code §§ 182, 187, and is currently serving a sentence of life without the possibility of parole. The parties are familiar with the facts and lengthy procedural history of this case, (*see* Docket No. 47 at 1-3), and only the relevant portions will be repeated here.

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The Ninth Circuit's remand order was issued during the pendency of an appeal from Senior District Judge Ronald S.W. Lew's November 21, 2007, judgment denying this petition for writ of habeas corpus. (Docket Nos. 47-50.) One of the grounds for relief was Petitioner's claim that the prosecution withheld exculpatory evidence about benefits provided to informant Joseph Aflague in exchange for his testimony at Petitioner's trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In an October 26, 2007, Report and Recommendation, I concluded that Petitioner's *Brady* claim was likely subject to a procedural bar because the Los Angeles County Superior Court had denied Petitioner's state habeas corpus petition as untimely.[1] (Docket No. 47 at 37-38 & n.16.) However, given the uncertainty about whether California's timeliness bar was an independent and adequate state basis for denying collateral relief, *see Townsend v. Knowles*, 562 F.3d 1200, 1208 (9th Cir. 2009), *abrogated by Walker v. Martin*, ---- U.S. ----, 131 S.Ct. 1120, 1128 (2011), I addressed Petitioner's *Brady* claim on the merits without deciding if the claim was procedurally barred. (Docket No. 47 at 37-41.) The denial of Petitioner's *Brady* claim was based on the finding that Petitioner had failed to produce evidence establishing that the prosecution "withheld any information at all, let alone favorable evidence." (Id.) A certificate of appealability was granted on a different claim in the petition, but not on the *Brady* claim. (Docket No. 53.)

During appellate proceedings in the Ninth Circuit, Petitioner filed a motion to remand the petition based on newly discovered

[1] It should be noted that the petition was stayed from October 28, 2005, through May 25, 2007, so that Petitioner could return to the state courts to develop the *Brady* claim. (Docket No. 26, 31.)

evidence that money had in fact been given to Aflague for his cooperation with police. *Quezada*, 611 F.3d at 1166. On July 16, 2010, the Ninth Circuit remanded the case to this Court, finding that Petitioner was entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293, 313 (1963), because he had presented newly discovered evidence that he had been diligent in trying to obtain and which, if proven, would entitle him to relief:

> Quezada presents evidence that Aflague reported that from 1997 to 2007 he received between $9,000 and $25,000 for his cooperation with law enforcement. In a December 11, 2008, declaration, Aflague stated that, contrary to what was previously represented to the court, the relocation funds and compensation he received were not for his testimony in the *Eulloqui* case. He also indicated that he lied about his compensation while testifying in another case in 2007, because he was angry and frustrated with the defense attorney in that case. This satisfies the fourth prong of *Townsend*. *See id*.
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> ...
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> The evidence allegedly withheld by the state in this case is favorable impeachment evidence involving a key government witness. The evidence indicates that the government never informed Quezada or his counsel of substantial compensation that the government paid to Aflague, the only witness that linked Quezada directly to the murder of Bruce Cleland.
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> ...
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> The evidence also indicates that this witness, Joseph Aflague, has previously perjured himself, in this case or another case, regarding the compensation that he received from

the government.

Quezada, 611 F.3d at 1167.

The Ninth Circuit noted that Respondent did not deny the allegations regarding the newly discovered evidence, "but instead assert[ed] that remand is inappropriate because Quezada's claim is procedurally barred. The government argues that Quezada must seek leave to file a successive habeas petition. There is no support for this contention. *Townsend* mandates an evidentiary hearing." *Id*. Accordingly, the Ninth Circuit remanded the petition for an evidentiary hearing to:

> [1] determine the admissibility, credibility, veracity, and materiality of newly discovered evidence, […and then] [2] determine whether the new facts render Petitioner's Brady claim unexhausted, […and then] [3] consider whether Petitioner is procedurally barred from proceeding in state court, […] [4] if [Petitioner] is not procedurally barred, the court should stay and abey federal proceedings so that Petitioner may exhaust his claims in state court, […] [5] if [Petitioner's] claim is procedurally barred, the district court should proceed to determine whether [Petitioner] can show cause and prejudice or manifest injustice to permit federal review of the claim.

Id.

On remand, the Federal Public Defender was appointed to represent Petitioner, and on August 26, 2010, the parties' entered into a stipulation for discovery in preparation for the evidentiary hearing. (Docket Nos. 59, 66, 68.) The Court resolved one discovery dispute, but discovery otherwise proceeded without incident until May 2, 2011, when

Respondent filed a motion to stay discovery pending resolution of his motion in the Ninth Circuit to recall the mandate based on the United States Supreme Court decisions in *Cullen v. Pinholster*, ---- U.S. ----, 131 S.Ct. 1388 (Apr. 4, 2011) and *Walker v. Martin*, ---- U.S. ----, 131 S.Ct. 1120 (Feb. 23, 2011). Discovery was stayed on May 24, 2011. (Docket Nos. 81, 86.)

On June 16, 2011, the Ninth Circuit denied Respondent's motion to recall the mandate, but indicated that Respondent was "free to argue to the district court that [*Pinholster*] is intervening controlling authority that requires the district court to depart from the mandate of this court." (Docket No. 89, Ex. A.) On June 24, 2011, Respondent filed a motion to depart from the mandate in this Court, and on July 22, 2011, Petitioner filed an opposition. (Docket Nos. 92, 94.) Argument on the motion was heard on August 2, 2011.

II. Standard of Review

A decision on whether to depart from the mandate of an appellate court is generally evaluated under the law of the case doctrine. *See e.g., Lindy Pen Co., Inc. v. Bic Pen Corp.,* 982 F.2d 1400, 1404 (9th Cir. 1993). In the Ninth Circuit, "'The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.'" *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996) (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993)); *see also Thompson v. Paul*, 657 F.Supp.2d 1113, 1120 n.5 (D. Ariz. 2009) (explaining discretionary nature of the doctrine: "The difference between the law of the case and res judicata is that 'one directs discretion, the other supersedes it and compels judgment.'") (quoting

United States v. Miller, 822 F.2d 828, 832 (9th Cir. 1987)). An exception to this rule applies when "intervening controlling authority makes reconsideration appropriate." *Rainbow*, 77 F.3d at 281. Intervening controlling authority "includes changes in statutory as well as case law." *Jeffries v. Wood*, 114 F.3d 1484, 1489 n.1 (9th Cir. 1997), overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320 (1997). Thus, this Court must determine whether intervening Supreme Court precedent, specifically *Pinholster*, 131 S.Ct. 1388, or *Walker*, 131 S.Ct. 1120, warrants departure from the Ninth Circuit's order.

III. Analysis

Respondent first contends that the Court should not allow evidentiary development because *Pinholster* precludes consideration of new evidence not presented to the state courts in its 28 U.S.C. § 2254(d)(1) analysis. (Resp't's Mot. to Depart From The Mandate ("Resp't's Mot.") at 2-5.) He contends that Petitioner's claim should be dismissed on the merits without further proceedings. (Id.) Second, Respondent argues that *Walker* makes it clear that Petitioner's claim is procedurally defaulted, which provides the Court with an independent reason to dismiss Petitioner's *Brady* claim without the factual development contemplated in the Ninth Circuit's remand order. (Resp't's Mot. at 11.)

In response, Petitioner concedes that the *Brady* issue was not addressed on the merits by the superior court. He agrees that the state court petition was denied because it was untimely, an independent state procedural ground, and that the *Brady* claim is therefore subject to the argument that it is procedurally barred. However, Petitioner contends this renders *Pinholster* inapplicable to Petitioner's case, because

Pinholster only applies to claims adjudicated on the merits by the state court, and *Walker* demonstrates that the state court decision was not on the merits. (Pet'r's Opp. at 8-9.) More specifically, Petitioner argues that *Walker* requires a finding that the Los Angeles County Superior Court's reliance on California's timeliness bar in rejecting his *Brady* claim was an independent and adequate state procedural ground for decision, which precludes federal review of the claim in this Court unless he can demonstrate cause and prejudice. (Id. at 6-10.) Petitioner further argues that the Ninth Circuit mandate makes clear that he has presented sufficient evidence to warrant a hearing on his ability to overcome the procedural bar by demonstrating cause and prejudice, making departure from the mandate and dismissal of the petition inappropriate. (Pet'r's Opp. at 10-12.)

The Court agrees with Petitioner that under *Walker,* his *Brady* claim is procedurally barred unless he can demonstrate cause and prejudice. But, if he can show cause and prejudice for the procedural default, *Pinholster* would not be applicable to this petition because the *Brady* claim was not addressed on the merits by the state courts.

A. *Cullen v. Pinholster*

In *Pinholster*, 131 S.Ct. 1388, the Supreme Court reversed the Ninth Circuit's grant of a capital habeas corpus petition based on ineffective assistance of counsel during the penalty phase of trial. In granting the petition, the Ninth Circuit considered evidence outside the state court record to conclude that the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in denying relief. *Id.* at 1397. The specific questions before the Supreme Court were (1) "whether review under 28 U.S.C. 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before

the federal habeas court," and (2) "whether the [Ninth Circuit] properly granted Pinholster habeas relief on his claim of penalty-phase ineffective assistance of counsel." *Id.* at 1398. Regarding the first question, the California Attorney General argued that review under § 2254(d)(1) is limited to the evidence before the state court that adjudicated the claim on the merits, and the Supreme Court agreed: "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," because the statutory language of § 2254(d)(1) is written in the past tense, and the "broader context of the statute as a whole...demonstrates Congress' intent to channel prisoners' claims first to state courts." *Id.* at 1398-99.

Practically, this holding imposes a significant limitation on federal district courts' ability to hold evidentiary hearings: if the §2254(d)(1) analysis is limited to the state court record, the reasons for federal courts to develop facts not presented to the state court are substantially limited. Similarly, because discovery in habeas proceedings is only justified upon a showing of good cause, *Pinholster's* limitation on evidentiary hearings has consequences for discovery in habeas cases. *See, e.g.*, *Lewis v. Ayers*, 2011 WL 2260784, at *7 (E.D. Cal. June 7, 2011) (taking previously ordered evidentiary hearing off calendar and suggesting no discovery is available until after a petitioner survives the § 2254(d)(1) analysis: "[H]ow could a district court ever find good cause for federal habeas discovery...if it could not be put to use in federal court at an evidentiary hearing or otherwise[?]").

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However, the *Pinholster* Court explicitly noted that its holding

only applied to habeas corpus claims that "fall within the scope of § 2254(d)," meaning claims adjudicated on the merits in state court proceedings. *Pinholster*, 131 S.Ct. at 1400-01. The *Pinholster* Court was clear that its holding did not reach claims that were not adjudicated on the merits in state court. *Id*. For claims not adjudicated on the merits in state court, such as claims subject to a procedural bar, 28 U.S.C. § 2254(e)(2) continues to govern district court discretion to consider new evidence in habeas corpus cases. *Id*. Accordingly, the question previously deferred by this court, whether or not Petitioner's *Brady* claim is subject to a procedural bar, must be answered in determining whether *Pinholster* controls this case and justifies departure from the Ninth Circuit's remand order.

B. *Walker v. Martin*

Although California does not specify exact time limits on collateral review, California courts have developed a discretionary timeliness doctrine that requires prisoners to seek collateral review "as promptly as circumstances allow" and "without substantial delay," subject to four exceptions. *See In re Clark*, 5 Cal.4th 750, 765 n.1, 797-98 (1995); *In re Robbins*, 18 Cal.4th 770, 780, 811-12 (1998). In *Walker*, 131 S.Ct. 1120, the United States Supreme Court concluded that California's timeliness requirement constitutes an independent and adequate state procedural basis for decision that bars federal review absent a showing of cause and prejudice or a fundamental miscarriage of justice. *Id*. at 1125, 1128-30 (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) and *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977)). The *Walker* Court reasoned that although the California timeliness requirement is discretionary, it is both firmly established and regularly followed. *Id*.

C. Analysis

Without question, *Pinholster* and *Walker* have significant consequences for habeas corpus petitioners in federal court. However, *Pinholster* and *Walker* generally apply to distinctly different types of cases, and most federal habeas corpus petitioners will not be impacted by both decisions. This is because *Pinholster's* restriction on consideration of evidence outside the state court record only applies to petitions adjudicated on the merits by the state court, and *Walker* only applies to California prisoners whose state habeas corpus petitions were rejected by California courts based on the state law procedural ground of untimeliness. In other words, unless a California court rejects a petitioner's claims by making alternative findings on the merits and on procedural grounds, *Pinholster* and *Walker* will not apply simultaneously to the same federal petition. Determining whether Petitioner's *Brady* claim was adjudicated on the merits or rejected on state procedural grounds, or both, is critical to deciding whether to depart from the Ninth Circuit mandate in this case.

Although I previously determined that Petitioner's *Brady* claim was "likely" subject to a procedural bar, (Docket No. 47 at 38 n.16), I declined to conclusively decide the issue because, at that time, it was unclear whether California's timeliness rule was an adequate state law basis for imposition of a procedural bar. *See Townsend*, 562 F.3d at 1208. *Walker* resolved the uncertainty, and it is now necessary to determine the exact basis for the state court's rejection of Petitioner's *Brady* claim.

The California Supreme Court and California Court of Appeal summarily rejected Petitioner's *Brady* claim, and this Court is required to look to the Los Angeles County Superior Court's reasoned decision

rejecting Petitioner's *Brady* claim as the basis for the California Supreme Court decision. *See Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir. 2009)(citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)). On February 21, 2006, the Los Angeles County Superior Court, *inter alia*, summarized Petitioner's *Brady* claim involving alleged payments to Aflague, described Petitioner's evidentiary burden on habeas corpus, and then moved to a timeliness determination:

> **Timeliness**
>
> Petitioner contends that he has met a timeliness exception by virtue of the recent discovery of new evidence. His description of the circumstances surrounding this discovery is dubious and unconvincing. If the Court assumes, *arguendo*, that this vague contrivance is accurate, it still remains for the "new" evidence to qualify for a timeliness exception. "For purposes of the exception to the procedural bar against successive or untimely petitions, a 'fundamental miscarriage of justice' will have occurred in any proceeding in which it can be demonstrated: (1) that the error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner...' (*In re Clark* (1993) 5 Cal.4th 750, 761.) Ordinarily, evidence which merely serves to impeach a witness is not sufficiently significant to warrant a new trial. (*People v. Long* (1940) 15 Cal.2d 590, 607-08.) As discussed subsequently, Petitioner fails to demonstrate the "constitutional magnitude" necessary to be granted an exception. This petition is not timely.
>
> **Alleged Brady Violations and False Testimony**

> Petitioner cites *Napue v. Illinois* (1959) 360 U.S. 264, to justify his allegations regarding both *Brady* violations and Aflague's purported false testimony. For *Napue* to apply, it must be clear that the prosecutor at trial not only knew of an arrangement for consideration between state agents and the informant witness, but allowed false testimony to the contrary to be brought into court.
>
> Petitioner bases his complaint on an unproven undisclosed agreement between the state and Aflague whereby he would avoid prosecution for his ongoing or past crimes, in exchange for his testimony against [Petitioner]. Petitioner proceeds on the theory that an arrangement must exist; therefore, both Aflague's denial and the prosecutor's 'failure' to produce evidence of such arrangement constitute errors. Petitioner fails to provide credible evidence of such an arrangement and fails to make a prima facie case supporting these allegations. (*In re Crow* (1971) 4 Cal.3d 613, 624.).

(Lodgment 7 to First Am. Pet. ("FAP") at 3-5.) The superior court went on to discuss Petitioner's allegation that the prosecutor allowed Aflague to testify falsely, and discussed alleged errors relating to other witnesses before concluding: "For the reasons stated above, Petitioner has failed to meet his burden. The Petition for Writ of *Habeas Corpus* is denied." (Lodgment 7 to FAP at 9.)

Respondent contends that the decision represents the superior court's rejection of Petitioner's *Brady* claim both on the merits, requiring review under 28 U.S.C. § 2254(d), and as untimely, resulting in a procedural bar that precludes federal review unless Petitioner demonstrates cause and prejudice. (Resp't's Mot. at 1.) He contends

that this Court's prior rejection of Petitioner's *Brady* claim involved a conclusive and unreviewable determination that the state court decision was on the merits. (Resp't's Mot. at 3.) However, in the Report and Recommendation, I explicitly declined to decide whether the state court's decision was based on an independent and adequate state procedural rule, and instead addressed with the merits because it was legally permissible and a simpler basis for decision.[2] (*See* Docket No. 47 at 37-41.) Given the speculative nature of Petitioner's *Brady* claim at that time, I found that the claim was "clearly without merit" such that it could be denied without deciding the procedural bar issue.

In light of the decision in *Walker*, I agree with Petitioner that the Los Angeles County Superior Court's denial of the habeas corpus petition rested on its untimeliness under state law. The superior court judge explicitly said so. Moreover, the superior court's review of the facts underlying the *Brady* claim does not transform the decision to one on the merits. As noted, under California law, a prisoner whose claim on habeas review is found to be untimely may still be entitled to review on the merits if he shows that a state law exception applies by demonstrating:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (3) that the death

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[2] *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (where it is easier to resolve a petitioner's claims on the merits, the interests of judicial economy counsel against deciding the often more complicated issue of procedural default); *Walters v. Maass*, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995).

> penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted or sentenced under an invalid statute.

Robbins, 18 Cal.4th at 780-81, 811 (quoting *Clark*, 5 Cal.4th at 797-98). Here, the superior court considered whether Petitioner's claim fell within the first listed exception, and concluded: "As discussed *subsequently*, Petitioner fails to demonstrate the 'constitutional magnitude' necessary to be granted an exception. This petition is not timely." (Lodgment 7 to FAP at 4) (emphasis added).

This demonstrates that the superior court's discussion of Petitioner's *Brady* claim involved a determination about whether Petitioner had demonstrated entitlement to the "constitutional magnitude" exception to the timeliness bar. And, as Petitioner correctly argues, the California Supreme Court has made clear that when a California court considers the applicability of that exception, it does so only by reference to state law and does not consider the merits of the petitioner's federal claim:

> Although the exception is phrased in terms of error of constitutional magnitude-which obviously may include federal constitutional claims-in applying this exception and finding it inapplicable we shall, in this case and in the future, adopt the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation. Instead, we shall assume, for the purpose of addressing the procedural

> issue, that a federal constitutional error is stated, and we shall find the exception inapposite if, based upon our application of state law, it cannot be said that the asserted error "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner."

Robbins, 18 Cal.4th at 811-12. The California courts do not consider the federal constitutional merits in this context in order to preserve the independence of the state procedural bar. *Id*. at n.32. ("We are aware that federal courts will not honor bars that rest 'primarily' on resolution of the merits of federal claims, or that are 'interwoven' with such claims...As explained in the text above and following, whenever we apply the first three *Clark* exceptions, we do so exclusively by reference to state law.")(internal citations omitted). Accordingly, the superior court's conclusion that Petitioner's *Brady* claim did not fall within the first exception to California's time-bar rested solely on state law grounds and did not address the merits of Petitioner's *Brady* claim under federal law.

Respondent argues that the superior court decision should be viewed as containing two alternate rulings, one on procedural grounds and one on the merits. At the hearing, Respondent asserted that the basis for viewing the decision as containing two alternative holdings is that state courts do so "all the time." However, the specific language in the state court order must be examined in deciding the basis for decision. Given the superior court's explicit language, it is clear that the petition was found to be untimely and that Petitioner's *Brady* claim did not fall within *Clark's* first exception to untimeliness. There was no alternative basis for decision in the

superior court's opinion. This conclusion is supported by the state court's near exclusive reference to state law in accordance with the principles announced in *Robbins*. Although the superior court referenced *Napue v. Illinois*, 360 U.S. 264 (1959), when it described Petitioner's arguments, it otherwise relied exclusively on California cases. (*See* Lodgment 7 to FAP.) For these reasons, I conclude the court rejected Petitioner's *Brady* claim on the basis of untimeliness only.

Under these circumstances, Petitioner's claim is procedurally barred unless he can demonstrate "'cause for the default and actual prejudice as a result of the alleged violation of federal law.'" *Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999) (quoting *Coleman*, 501 U.S. at 750). In order to demonstrate cause for a procedural default, "a petitioner must demonstrate that the default is due to an external objective factor that 'cannot fairly be attributed to him.'" *Smith v. Baldwin*, 510 F.3d 1127, 1146 (9th Cir. 2007) (citing *Manning v. Foster*, 224 F.3d 1129, 1133 (2000) and *Coleman*, 501 U.S. at 753). In order to demonstrate prejudice as a result of the default, Petitioner must demonstrate there is a "reasonable probability" of a different outcome absent the constitutional violation. *Id*. at 1148; *see also Strickler v. Greene*, 527 U.S. 263, 290 (1999).[3] Respondent contends, without citation, that Petitioner is not entitled to factual development to overcome the procedural bar with evidence developed for the first time in federal court. (Resp't's Mot. at 11 n.6.) There is no support for this assertion. To the extent Respondent is asserting that *Pinholster* precludes consideration of new facts in the cause and

[3] The Court is cognizant that demonstrating cause and prejudice to overcome a procedural bar of a *Brady* claim parallels the suppression and materiality elements of a successful *Brady* claim. *See Strickler*, 527 U.S. at 282.

prejudice analysis, Respondent is wrong because *Pinholster's* prohibition on consideration of new evidence only applies to claims "adjudicated on the merits." *Pinholster*, 131 S.Ct. at 1400-01. Indeed, at least one court since the *Pinholster* decision has concluded that federal court evidentiary hearings may be warranted in determining whether a petitioner can overcome a procedural bar. *See United States ex rel. Brady v. Hardy*, 2011 WL 1575662, at *1-3 (N.D. Ill. Apr. 25, 2011) (granting in part the state's motion for reconsideration of evidentiary hearing order and ruling that the evidentiary hearing previously ordered would only address whether the petitioner could overcome a procedural bar by demonstrating actual innocence). I agree with this analysis, and given that the Ninth Circuit already determined that Petitioner has consistently been diligent, *see* 28 U.S.C. § 2254(e)(2), factual development on cause and prejudice is appropriate in this case.

In sum, the *Walker* and *Pinholster* cases change the complexion of this case, albeit not dramatically. *Walker* supplied the intervening controlling authority that affects Petitioner's *Brady* claim and clarifies that the superior court's timeliness ruling was based in an independent state procedural rule. The Ninth Circuit directed this Court to conduct an evidentiary hearing to determine whether there was a *Brady* violation. But it also directed the Court to determine whether the *Brady* claim was procedurally barred, and if so, whether there existed cause and prejudice which excuses state procedural default. Having determined that the procedural bar is applicable, the next step is an evaluation of whether there was cause for the failure to adhere to the state procedures and prejudice arising from the imposition of the bar. *Pinholster* does not apply to the cause and prejudice

evaluation. A petitioner may overcome a procedural bar by presenting new evidence on the issues of cause and prejudice even in *Pinholster's* wake. *See Hardy*, 2011 WL 1575662, at *1-3.

For these reasons, a limited departure from the Ninth Circuit mandate is justified. The petition will not simply be denied with prejudice, either under § 2254(d) review or based on a procedural bar, as Respondent urges. However, to the extent the Ninth Circuit's remand order contemplated development and introduction of new evidence for the purpose of resolving Petitioner's *Brady* claim under § 2254(d)(1), the Court will depart from the mandate. This is because no § 2254(d)(1) analysis is warranted under AEDPA, given that the state court's ruling rested solely on an independent and adequate state law ground.

However, that does not end the inquiry, as Petitioner's claim is subject to a procedural bar unless he can demonstrate cause and prejudice. Such a procedure was contemplated by the Ninth Circuit's order, and the Court will not depart from that portion of the mandate. Instead, Petitioner may use the new evidence presented to the Ninth Circuit and adduced in discovery in attempting to overcome the procedural bar.

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Whether additional discovery is necessary to litigate the cause and prejudice issue will be determined at a future status conference.[4]

Dated: August 19, 2011

MARC L. GOLDMAN

Marc L. Goldman
United States Magistrate Judge

[4] It is premature to determine whether Petitioner's newly discovered evidence renders his *Brady* claim unexhausted. Once the Court is informed of the exact nature and scope of the newly discovered evidence, it may be necessary to litigate the exhaustion issue.

FILED

JUN 15 2011

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALVARO QUEZADA, Petitioner - Appellant, v. A. K. SCRIBNER, Respondent - Appellee.	No. 08-55310 D.C. No. CV-04-07532-RSWL-MLG Central District of California, Los Angeles ORDER

Before: D.W. NELSON and GOULD, Circuit Judges, and GWIN, District Judge.*

The motion to recall the mandate filed by Respondent-Appellee is DENIED.

Respondent-Appellee is free to argue to the district court that *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), is intervening controlling authority that requires the district court to depart from the mandate of this court. *See In re Rainbow Magazine, Inc.*, 77 F.3d 278, 282 (9th Cir. 1996).

* The Honorable James S. Gwin, District Judge for the U.S. District Court for Northern Ohio, Cleveland, sitting by designation.

FILED

AUG 10 2010

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALVARO QUEZADA, Petitioner - Appellant, v. A. K. SCRIBNER, Respondent - Appellee.	No. 08-55310 D.C. No. CV-04-07532-RSWL-MLG Central District of California, Los Angeles ORDER

Before: D.W. NELSON and GOULD, Circuit Judges, and GWIN, District Judge. *

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Appellee's Petition for Rehearing is DENIED.

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALVARO QUEZADA, *Petitioner-Appellant,* v. A. K. SCRIBNER, *Respondent-Appellee.*	No. 08-55310 D.C. No. CV-04-07532- RSWL-MLG ORDER

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, Senior District Judge, Presiding

Argued and Submitted
June 10, 2010—Pasadena, California

Filed July 16, 2010

Before: Dorothy W. Nelson and Ronald M. Gould,
Circuit Judges, and James S. Gwin, District Judge.*

COUNSEL

Argued by Karyn H. Bucur, Esq., Laguna Hills, California, for petitioner-appellant Alvaro Quezada.

Argued by Colleen Tiedemann, Deputy Attorney General, Los Angeles, California, for respondent-appellee A.K. Scribner. Stephanie A. Miyoshi, Deputy Attorney General, filed the briefs.

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

ORDER

On July 27, 2007, Alvaro Quezada[1] filed a first amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This amended petition included a claim that the government withheld evidence of compensation paid to a government witness in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). On November 20, 2007, the district court adopted the Report and Recommendation of the Magistrate Judge and denied Quezada's First Amended Petition, stating:

> Petitioner has provided no factual basis to support his accusations, instead relying primarily on a the [sic] Los Angeles County grand jury report from 1990. . . . Petitioner argues that "the circumstances of Mr. Aflague's sudden appearance, his refusal to discuss other cases and the benefits he may have received from those cases, viewed in light of the transcripts of his prior testimony, place him squarely within the description of the corrupt and misleading informant system described in that report."
>
> Petitioner's argument is based on nothing more than conjecture and speculation. . . . Petitioner . . . fails to provide any support for his contention that "Aflague clearly received substantial benefits for his cooperation with police," beyond the bald assertion that Aflague's "allegedly 'free' " testimony was "highly suspect."

Quezada filed a timely appeal.

On November 12, 2009, after the parties filed their briefs, Quezada filed a motion to remand based on newly discovered

[1]The record indicates disagreement about whether the Petitioner's last name is spelled "Quezada" or "Quesada." In conformity with the judgment of the district court, we refer to Petitioner as "Quezada."

evidence. At a November 2, 1999 hearing, Quezada requested information about the compensation paid to Joseph Aflague, a government witness in his state murder and conspiracy trial. The government informed him that Aflague received relocation expenses in one other case, and no payment in this case. Quezada now claims to have discovered evidence in the spring of 2009 that Aflague received substantial compensation and that none of it was related to the other case. Quezada seeks a remand so the district court can consider whether the prosecution violated *Brady* by withholding and misrepresenting evidence of compensation which could have been used to impeach Aflague, a key government witness.

In *Townsend v. Sain*, the Supreme Court identified six circumstances in which a federal court must grant an evidentiary hearing to a habeas applicant. 372 U.S. 293, 313 (1963) (holding that the federal court must grant an evidentiary hearing where "(4) there is a substantial allegation of newly discovered evidence"), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). "Assuming that the petitioner has not failed to develop his claim and can meet one of the *Townsend* factors, '[a]n evidentiary hearing on a habeas corpus petition is required whenever petitioner's allegations, if proved, would entitle him to relief.' " *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005) (citing *Turner v. Marshall*, 63 F.3d 807, 815 (9th Cir. 1995)).

To prevail, Quezada must make a substantial allegation of newly discovered evidence, and he must allege facts that, if proven, would entitle him to relief. *Townsend*, 372 U.S. 312-13. He has. Quezada presents evidence that could not have been discovered earlier through the exercise of reasonable diligence. Before trial, Quezada requested information about the financial remuneration that Aflague received from the government. Around that time, Aflague was cooperating with the prosecution in two other cases. He testified in December 1997 in *People v. Padilla* (Case No. BA 142910) and in May 1998 in *People v. Eulloqui* (Case No. BA

160668). Quezada's counsel interviewed Aflague and asked him about his relationship with the police department and the money he received as a result of his testimony in this and other cases. Aflague refused to answer. Quezada's counsel then asked the court for assistance obtaining this information. The California Superior Court directed the prosecutor to find out anything about Aflague's relationship or ongoing contact with law enforcement, and indicated that any rewards, support, or benefits might be relevant, "to the extent Mr. Aflague might feel he is generating support or building up future brownie points."

The prosecutor represented to the court that Aflague received no benefits for his testimony in this case, and relocation assistance for his testimony in the *Eulloqui* case. Aflague testified that no one promised him anything for his testimony in this case, and that he got "something" from the district attorney's office to relocate because of his testimony in a separate case.

Quezada now sets forth substantial allegations of newly discovered facts pursuant to *Townsend*. 372 U.S. at 313. Quezada presents evidence that Aflague reported that from 1997 to 2007 he received between $9,000 and $25,000 for his cooperation with law enforcement. In a December 11, 2008, declaration, Aflague stated that, contrary to what was previously represented to the court, the relocation funds and compensation he received were *not* for his testimony in the *Eulloqui* case. He also indicated that he lied about his compensation while testifying in another case in 2007, because he was angry and frustrated with the defense attorney in that case. This satisfies the fourth prong of *Townsend*. *See id*.

"In habeas proceedings, an evidentiary hearing is required when the petitioner's allegations, if proven, would establish the right to relief." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). The evidence allegedly withheld by the state in this case is favorable impeachment evidence involving a key

government witness. The evidence indicates that the government never informed Quezada or his counsel of substantial compensation that the government paid to Aflague, the only witness that linked Quezada directly to the murder of Bruce Cleland. Quezada has set forth a colorable claim that this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). The evidence also indicates that this witness, Joseph Aflague, has previously perjured himself, in this case or another case, regarding the compensation that he received from the government. "Evidence of bias and prejudice is certainly material for impeachment, but lies under oath to conceal bias and prejudice raise the impeachment evidence to such a level that it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial." *Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir. 1986).

The government does not at this point deny Quezada's allegations, but instead asserts that remand is inappropriate because Quezada's *Brady* claim is procedurally barred. The government argues that Quezada must seek leave to file a successive habeas petition. There is no support for this contention. *Townsend* mandates an evidentiary hearing. *See* 372 U.S. at 313. Additionally, the government argues that Quezada's claim is time-barred. But AEDPA's one-year limitation does not run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). As discussed above, Quezada requested compensation information from the court, from the government and from Aflague. Quezada's attempts to acquire this information were repeatedly rebuffed by silence on the part of the informant, or an outright denial of the existence of missing compensation information by the government. On December 11, 2008, Aflague changed his testimony. Quezada discovered this in the spring of 2009. On the record before us it is clear that

Quezada did exercise reasonable diligence yet was unable to acquire this information earlier. Thus, AEDPA's statute of limitations does not present a bar to the district court's consideration of this newly discovered evidence on remand.

We therefore remand to the district court with instructions to conduct an evidentiary hearing to determine the admissibility, credibility, veracity and materiality of the newly discovered evidence. *See Harris v. Vasquez*, 928 F.2d 891, 893 (9th Cir. 1991) (order). After conducting an evidentiary hearing, the district court will be in an appropriate position to determine whether the new facts render Quezada's *Brady* claim unexhausted. The district court should determine whether the new facts "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

If the district court concludes that the new facts render Quezada's *Brady* claim unexhausted, the district court should consider whether Quezada is procedurally barred from proceeding in state court. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *Loveland v. Hatcher*, 231 F.3d 640, 643-44 (9th Cir. 2000). If Quezada is not procedurally barred, the court should stay and abey federal proceedings so that Quezada may exhaust his claims in state court. *See Rhines v. Weber*, 544 U.S. 269, 275-76 (2005). If Quezada's claim is procedurally barred, the district court should proceed to determine whether Quezada can show cause and prejudice or manifest injustice to permit federal review of the claim. *Strickler v. Greene*, 527 U.S. 263, 282 (1999).

REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA, Petitioner, v. AL K. SCRIBNER, Warden, Respondent.	Case No. CV 04-7532-RSWL (MLG) ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR CERTIFICATE OF APPEALABILITY

Petitioner Alvaro Quezada, a California state prisoner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 20, 2007, this Court entered an order and judgment denying the petition. On December 19, 2007, petitioner filed a notice of appeal and a request for a certificate of appealability on six of the claims raised in the petition. Before Petitioner may appeal the Court's dispositive decision denying his petition, a COA must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). The Court must either issue a COA indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b).

The court reviews requests for a COA pursuant to standards established in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); and 28 U.S.C. § 2253(c). A COA may be issued only where the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2); *Miller-El*, 123 S.Ct at 1036. As part of that showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484, *See also Miller-El*, 123 S.Ct. at 1036.

In *Silva v. Woodford*, 279 F.3d 825, 832-33 (9th Cir. 2002), the court noted that this amounts to a "modest standard". *Id.* at 832 (quoting *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000)). Indeed, the standard for granting a COA has been characterized as "relatively low". *Beardlee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004). The petitioner need not show that he would prevail on the merits in order to warrant issuing the COA. *Miller-El*, 123 S.Ct. at 1040; *Silva*, 279 F.3d at 833. He must merely show that the issues presented are "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483-84, (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)); *see also Miller-El*, at *Id.*; *Silva*, 279 F.3d at 833. If a petitioner is able to show that reasonable jurists could "debate" whether the petition could be resolved in a different manner, then the COA should issue. *Miller-El*, 123 S.Ct. at 1036.

Under this standard of review, a certificate of appealability should be granted in part and denied in part. In denying the petition for writ of habeas corpus, the Court rejected all of

Petitioner's claims. For the reasons stated in the Magistrate Judge's Report and Recommendation, Petitioner cannot make a colorable claim that jurists of reason would find debatable or wrong this Court's decisions denying the petition with respect to four of the claims: 1) the four insufficiency of the evidence claims; 2) the free-standing ineffective assistance of counsel claims relating to telephone records and alibi witnesses; 3) the claim relating to the introduction of evidence concerning Petitioner's relationship with his co-defendant Rebecca Cleland; or 4) his *Brady v. Maryland* claim.[1] Thus, petitioner is not entitled to a certificate of appealability on these four issues.

On the other hand, a certificate of appealability should be granted on the following issues: 1) whether the introduction of the silence of Petitioner's co-defendants was unconstitutionally used against him, as well as the related issue of whether his counsel's failure to object to that testimony amounted to ineffective assistance of counsel; and 2) whether the trial court's exclusion of his co-defendant's statement to a fellow inmate, exculpating Petitioner, violated Petitioner's due process rights. Although this Court denied these claims on the merits, petitioner has made a colorable claim that jurists of reason could find debatable or wrong this Court's findings on these two issues. Thus, petitioner is entitled to a certificate of appealability on these two claims.

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[1] 373 U.S. 83 (1963).

Therefore, pursuant to 28 U.S.C. § 2253, the Court GRANTS the request for a certificate of appealability on the two claims described above.

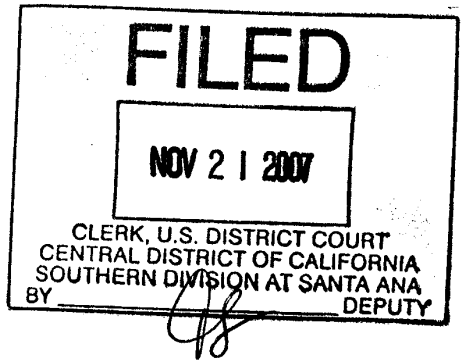
Dated: Feb 13, 2008

RONALD S.W. LEW

Ronald S.W. Lew
Senior United States District Judge

Presented By:

Marc L. Goldman
United States Magistrate Judge



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA, Petitioner, v. AL K. SCRIBNER, Warden, Respondent.	Case No. CV 04-7532-RSWL (MLG) JUDGMENT

IT IS ADJUDGED that the petition herein is denied with prejudice.

Dated: Nov 20, 2007

RONALD S.W. LEW

Ronald S.W. Lew
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA,

Petitioner,

v.

AL K. SCRIBNER, Warden,

Respondent.

Case No. CV 04-7532-RSWL (MLG)

ORDER ACCEPTING AND ADOPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the petition and all of the records and files and has conducted a de novo review of that portion of the Report and Recommendation of the United States Magistrate Judge to which objections were filed. The Court accepts and adopts the findings and recommendations in the Report and Recommendation and orders that judgment be entered denying the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Judgment on all parties.

Dated: Nov 20, 2007

RONALD S.W. LEW

Ronald S.W. Lew
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALVARO QUEZADA,

Petitioner,

v.

AL K. SCRIBNER, Warden,

Respondent.

Case No. CV 04-07532-RSWL (MLG)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

I. Procedural Background

On June 29, 2000, a Los Angeles County Superior Court jury convicted Petitioner Alvaro Quezada ("Petitioner"), his brother Jose Quezada ("Quezada")[1], and his cousin Rebecca Cleland ("Cleland"), of first degree murder, Cal. Penal Code ("CPC") § 187, and conspiracy to commit murder, CPC §§ 182, 187. (Clerk's Tr. ("CT") 1023-27.[2]) The jury also found that the murder was committed for financial gain and

[1] There apparently is some disagreement between the brothers about the spelling of the last name, as reflected in the California Court of Appeal's decision. This Court will use "Quezada", which is the spelling used by Petitioner, rather than "Quesada".

[2] Two sets of nearly identical Clerk's Transcripts were lodged with the Court. All citations to the Clerk's Transcript in this report are to the set stamped by the California Court of Appeal as docketed on November 6, 2000.

while lying in wait, CPC §§ 190.2(a)(1), 190.2(a)(15). (CT 1023-27.) The trial court sentenced Petitioner and his co-defendants to life in prison without the possibility of parole. (CT 1046-49.)

On May 27, 2003, the California Court of Appeal affirmed Petitioner's convictions, but reversed the convictions of Quezada and Cleland. *People v. Cleland*, No. B143757, slip op. (Cal. Ct. App. May 27, 2003).[3] On July 7, 2003, Petitioner filed a petition for review in the California Supreme Court (Pet. for Review), which was denied on August 27, 2003 (Order Den. Pet. for Review). Petitioner filed a *pro se* petition for writ of habeas corpus in this Court on September 10, 2004, raising the following grounds for relief: 1) the prosecutor's use of his co-defendants' silence against Petitioner violated Petitioner's Sixth Amendment rights; 2) the exclusion of an exculpatory statement by Petitioner's co-defendant violated Petitioner's right to due process; 3) the evidence was constitutionally insufficient to sustain the jury's verdict; 4) Petitioner's trial counsel was ineffective; 5) the trial court abused its discretion by denying Petitioner's motion for a new trial; and 6) the trial court improperly admitted prejudicial evidence of Petitioner's romantic relationship with Rebecca Cleland. (Mem. in Supp. of Pet. ("Pet."))

On December 6, 2004, counsel was appointed to represent Petitioner, and on December 29, 2004, Respondent filed an answer. On March 9, 2005, the Court granted Petitioner's motion to stay proceedings in order to permit him to return to the California courts

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[3] It appears that Cleland and Quezada were convicted again upon retrial, although the details of the convictions and sentences have not been provided to the Court.

to exhaust a newly discovered claim. Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on April 6, 2005. The superior court denied the petition in a reasoned opinion on February 21, 2006. (Pet'r Status Report, Mar. 24, 2006.) The Court found that the petition was not timely and that Petitioner had failed to assert facts entitling him to relief. (Id.) Petitioner next filed a habeas corpus petition in the California Court of Appeal,[4] which was denied on August 1, 2006. (Pet'r Status Report, Sept. 1, 2006.) On August 31, 2006, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which was denied without comment on April 11, 2007.

Having exhausted all of his claims in state court, Petitioner filed a First Amended Petition on July 27, 2007. The amended petition raises one additional claim: that the prosecution failed to disclose material evidence that would have undermined the credibility of a key government witness. Respondent filed a supplemental answer to the amended petition on September 14, 2007, and Petitioner filed a reply on October 5, 2007. This matter is ready for decision.

II. Facts

The following factual summary, which was adopted by Petitioner (Pet. 1) and confirmed by a review of the record, was recounted by the California Court of Appeal on direct appeal:

> Bruce Cleland, a shy and frugal bachelor, worked as a software engineer for TRW, earning a substantial salary. He

[4] The petition lodged with this Court is not file stamped, but the proof of service page states that the petition was served on April 28, 2006.

had not dated much until he met Rebecca Quezada Salcedo at a swap meet in late 1995. After the two began dating, Bruce Cleland became more outgoing.

While they were dating, Bruce Cleland showered Rebecca Salcedo with gifts including cars, trips, cosmetic surgery, clothes, a boat, furniture and a diamond ring. Salcedo told her friends Bruce Cleland was "pretty well off" and "made good money." She disclosed her plan to marry Bruce Cleland, have a child, and then divorce him so she could collect child support and be "set for life." Prior to their marriage Salcedo used Bruce Cleland's credit cards, without his knowledge, to pay for furniture and breast augmentation surgery.

Bruce Cleland and Rebecca Salcedo were married in October 1996 in a secret civil ceremony. Although a large church wedding was already planned for January 1997, Salcedo insisted the two be married before purchasing a house. After the civil marriage Bruce Cleland bought a large home in Whittier. Rebecca Cleland, as she became known, moved into the house alone; and Bruce Cleland moved in with his parents until the January 1997 church wedding. Rebecca Cleland, who was having sexual relationships with several other people at the time, required Bruce Cleland to phone before visiting the Whittier house.

Both before and after the church wedding, Cleland told friends and acquaintances she did not love Bruce Cleland, did not want to marry him, was unhappy with his sexual performance, had married him for his money and planned to

divorce him quickly to obtain financial security. She also asked her sister, Lorraine Salcedo, to help her find someone to kill Bruce and make it look like an accident.

Bruce Cleland moved back to his parents' home just three months later. A. Quezada moved into the Whittier house after Bruce Cleland moved back to his parents' home. Cleland and A. Quezada were seen to be "very affectionate towards one another" and "always hugging and kissing." Cleland also resumed a sexual relationship with Steven Rivera, a male stripper and former boyfriend.

In April 1997 Cleland consulted with a divorce attorney and presented Bruce Cleland with a draft separation agreement that would allow her to continue living in the Whittier house and would require Bruce Cleland to pay the mortgage and give Cleland spending money. When Bruce Cleland refused to sign the agreement, Cleland threatened to retaliate by claiming he had molested her young son. Bruce Cleland contacted a divorce attorney of his own, who opined that if the marriage were dissolved, Cleland would not be entitled to a sizeable property settlement or substantial spousal support.

Notwithstanding all these difficulties, Bruce Cleland apparently wanted his marriage to succeed. On July 25, 1997 he told his parents he was going to meet with Cleland to try and work out their differences. The two had dinner together that evening. During dinner, Cleland called A. Quezada or his father Arturo Quezada several times on the restaurant's pay telephone and her cellular telephone. The couple then went to Arturo Quezada's house for drinks. When they left Arturo

Quezada's home at about 1:00 a.m., Cleland was driving.

Telephone records introduced at trial indicated that A. Quezada telephoned Arturo Quezada's house several times between 12:35 a.m. and 12:49 a.m. Cleland phoned A. Quezada several times between 1:00 a.m. and 1:01 a.m. on her cellular telephone. Some of these calls placed A. Quezada and his cellular telephone close to the location where Bruce Cleland was killed.

Cleland subsequently reported to the police that, shortly after leaving Arturo Quezada's house, she noticed a warning light on the dashboard indicating the rear hatch was open. She stopped near the entrance to the Interstate 5 freeway, got out of the car to shut the hatch and was struck on the back of the head and knocked to the ground. Residents of nearby houses heard gunshots, saw a man running away from the scene and heard a car door slam and a car speed away from the area. A passing taxi driver summoned emergency personnel, who arrived within minutes of the shooting and found Bruce Cleland face-down in a nearby driveway, dead from multiple gunshot wounds.

When the police arrived, Cleland's car engine was still running. Cleland's keys, purse, cellular telephone and jewelry were on the front seat. Cleland told police her diamond ring was missing. She identified Bruce Cleland as her husband, but did not attempt to approach his body or ask about his condition. She was taken to the police station, where her demeanor was described as "relaxed, lackadaisical, uninterested."

After Bruce Cleland's death, Cleland told a friend she would support herself from Bruce Cleland's life insurance policies. She quickly retained counsel and set about obtaining the proceeds from Bruce Cleland's basic life insurance policy from TRW, which would pay a sum equal to half of Bruce Cleland's annual salary, a TRW optional accidental death policy for $517,000; a $25,000 accidental death policy; a mortgage life insurance policy from Minnesota Life Insurance Company, which would pay the balance on the Whittier house in the event of Bruce Cleland's death; and the $196,000 proceeds of Bruce Cleland's TRW stock savings plan. After the murder, A. Quezada continued to live with Cleland at the Whittier house.

Cleland, A. Quezada and J. Quezada were ultimately arrested and charged with conspiracy to commit murder and first degree murder, with special allegations the murder was committed for financial gain and while lying in wait.

People v. Cleland, No. B143757, slip op. at 2-5 (footnotes omitted).

III. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), a federal court may grant a writ of habeas corpus to a state prisoner on a claim that was decided on the merits in state court only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The only source for clearly established federal law is the holdings of the Supreme Court, as opposed to the dicta, at the time of the state

court decision, *Carey v. Musladin*, 127 S. Ct. 649, 653 (2007), although circuit law may be "persuasive authority" for determining the correct application of Supreme Court law. *Horton v. Mayle*, 408 F.3d 570, 581 n.5 (9th Cir. 2005)(citing *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003)).

The Supreme Court has explained that a state court decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005). "A state court need not cite or even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003)(per curiam)(quoting *Early v. Packer*, 537 U.S. 3, 8 (2002)(per curiam)).

A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court, but unreasonably applies that principle to the facts of the case. *Brown*, 544 U.S. at 141; *Williams v. Taylor*, 529 U.S. 362, 407-08, 413 (2000). It is not enough that a federal court conclude "in its independent judgment" that the state court decision is incorrect or erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004)(quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002)(per curiam)). "The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). AEDPA imposes a "'highly deferential standard for evaluating state-court rulings' which demands that state-court decisions be given the

benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455 (2005)(quoting *Woodford*, 537 U.S. at 24).

As explained above, the California Supreme Court summarily denied both the petition for review and the petition for writ of habeas corpus. "In reviewing a state court's summary denial of a habeas petition, this court must 'look through' the summary disposition to the last reasoned decision." *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005). In this case, the California Court of Appeal addressed some of Petitioner's claims in a reasoned decision on direct appeal. The Los Angeles County Superior Court addressed Petitioner's remaining claim in a reasoned decision in denying his petition for writ of habeas corpus.

IV. Use of Co-Defendants' Silence

Rebecca Cleland and Jose Quezada were arrested at different locations about seven months after the murder of Bruce Cleland. Rebecca was immediately driven to the location where Quezada was in custody. Without reading Cleland or Quezada their *Miranda* rights, the arresting officers placed them together in a patrol car equipped with a recording device so that the officers could listen in. (RT 857, 859-60.) The two exchanged initial greetings, but were otherwise silent for about fifteen minutes. Before the testimony of the arresting officers concerning Cleland's and Quezada's silence was offered, Quezada's attorney objected at side bar that such evidence would violate his client's Fifth Amendment right to remain silent. The trial court overruled the objection and allowed the testimony to be introduced. Neither Cleland nor Petitioner objected to the testimony.

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The prosecutor went on to emphasize the fifteen minutes of silence in his closing argument:

> Now, we also have Defendant Jose Quezada's behavior when he was arrested on February 17, 1998. Remember the testimony. He is put in the back seat of a police car with his cousin, Defendant Rebecca Cleland. And what do we have? Absolute silence. We have, "How are you doing?" And then that's it. For 15 minutes, not another word is spoken. No small talk. Nothing. Why not?
>
> Now, Defendant Jose Quezada tries to claim, gosh, I didn't know it was my cousin, I had never seen her before.[5] Nonsense. Of course he knows it's his cousin. And even if he didn't, you are sitting in the back of a police car with somebody, you are not going to say a word to them? And defendant Rebecca Cleland admits, she knows this is her cousin sitting in the car with her. She doesn't say a word either. Nothing. 15 minutes of silence. Why? Because they are afraid the police might be listening in and they don't want to say anything.
>
> Think about it. You have been arrested for something. You don't have any idea what you are doing there. You are in the back seat of a police car with your cousin and you just kind of sit there for 15 minutes? Nonsense.
>
> Ladies and gentlemen, that silence speaks volumes because what really happened? Defendant Rebecca Cleland,

[5] The prosecution had elicited testimony stating that following Quezada and Cleland's time in the patrol car, Quezada told an officer, in response to the officer's question, that he did not know Cleland.

> defendant Jose Quezada, and defendant Alvaro Quezada had set up the murder of Bruce. They thought they had gotten away with it. All of a sudden, defendant Jose Quezada and defendant Rebecca Cleland are sitting in the back of a police car with each other and they are looking at each other but they are not saying a word.

(RT 1711-12.)

The prosecutor revisited the topic on rebuttal, stating that "there is no innocent explanation" for Cleland's and Quezada's silence in the police car.

> If they hadn't done anything and they are both sitting in the back of a police car, why didn't defendant Rebecca Cleland turn to her cousin and say, "what are you doing here?" And why didn't he say, "what are you doing here?" Why? Because they both knew what they were doing there. That's why there was no conversation. It all fits.

(RT 1809.)

The California Court of Appeal held that the use of the long silence between Cleland and Quezada "impermissibly drew attention to their decision not to testify at trial to explain their conduct in the police car or otherwise to establish their innocence," thereby violating their Fifth Amendment rights. *Cleland*, No. B143757, slip op. at 13. The appellate court further found that the violation was not harmless, and reversed Cleland's and Quezada's convictions. *Id.* at 15-18. In reaching this decision, the appellate court found that Cleland did not waived her Fifth Amendment claim by failing to join Quezada's objection, reasoning that because the trial court had overruled Quezada's objection, any objection by Cleland would have been futile.

Id. at 7.

However, the California Court of Appeal held that, by failing to object at trial, Petitioner had waived his claim that the prosecution's use of Cleland's and Quezada's silence against him violated his Sixth Amendment right to confrontation, as set forth in *Bruton v. United States*, 391 U.S. 123 (1968). *Cleland*, No. B143757, slip op. at 18. As opposed to Cleland, who would have raised the same Fifth Amendment objection that was raised by Quezada, Petitioner's objection would have been rooted in the Sixth Amendment and therefore would not necessarily have been futile. *Id.* Because the trial court was never presented with an objection based on the confrontation clause, the appellate court concluded that Petitioner had waived the claim of error on appeal. *Id.*

Petitioner contends that the impermissible use of Cleland's and Quezada's silence infringed upon his constitutional right to confrontation under *Bruton*.[6] (Pet. 2-4.) Respondent claims that the Court of Appeal's finding of waiver procedurally bars this Court from reviewing Petitioner's *Bruton* claim. (Answer 5-7.)

A. Procedural Bar

A federal court will not review questions of federal law when the state court denied relief on the basis of an independent and adequate state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *King v. Lamarque*, 464 F.3d 963, 965 (9th Cir. 2006). A state procedural rule is independent if the state law basis for the decision is not interwoven with federal law. *Carter v. Giurbino*, 385 F.3d 1194,

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[6] Petitioner raises this claim as two separate grounds for relief, the first addressing the substance of the *Bruton* claim and the second arguing that the claim is not procedurally barred. Whether a claim is procedurally barred is more properly addressed as a threshold issue to the substantive claim rather than a separate ground for relief.

1197 (9th Cir. 2004). To be adequate, the state procedural ground must be "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Collier v. Bayer*, 408 F.3d 1279, 1284 (9th Cir. 2005)(quoting *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996)). A federal court "should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996)(quoting *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994)).

The Ninth Circuit has explained that the respondent bears the initial burden to plead the independent and adequate procedural ground as an affirmative defense. *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). The burden then shifts to the petitioner to "place that defense in issue...by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* If the petitioner meets his burden, the ultimate burden of proving the adequacy of the procedural bar lies with the respondent. *Id.*

Respondent has satisfied his initial burden by arguing that Petitioner's claim is procedurally barred under California's contemporaneous objection rule. The burden then shifts to Petitioner to demonstrate the inadequacy or inconsistent application of the rule. Petitioner makes no argument that the contemporaneous objection rule is inadequate or inconsistently applied, so the procedural bar applies

here.[7]

A federal court may still reach the merits of a procedurally defaulted claim if the petitioner demonstrates sufficient cause for the procedural default and resulting prejudice. *Harris v. Reed*, 489 U.S. 255, 262 (1989). Petitioner attempts to establish cause with two arguments: 1) that his trial counsel reasonably concluded that his Sixth Amendment objection would be overruled after the trial judge rejected the co-defendant's Fifth Amendment objection; and 2) that his trial counsel's failure to object, if he was required to do so, constitutes ineffective assistance of counsel. (Reply to Answer to Amended Pet. for Writ of Habeas Corpus ("Reply") 9-10.) These arguments will be examined in turn.

Petitioner argues his counsel's failure to object was reasonable under the circumstances, and that the California Court of Appeal erred in concluding otherwise. (Reply 5.) In presenting this argument, Petitioner essentially asks the Court to revisit the state court's decision that his lawyer should have objected to the evidence's admission at the time. To find that counsel's failure to object was reasonable and constituted cause sufficient to overcome the procedural default would require an implicit rejection of the state court's decision and a circumvention of the procedural bar rules. This is just another attempt to get the Court to override the state court's decision

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[7] Under the California Evidence Code, a verdict will not be reversed on the basis of an erroneous evidentiary ruling unless an objection or motion challenging the evidence was timely made. (Cal. Evid. Code § 353). The Ninth Circuit has held that California's contemporaneous objection rule is well established and consistently applied in affirming the denial of a federal habeas petition on grounds of procedural default. *See, e.g., Van Sicket v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999); *Bonin v. Calderon*, 59 F.3d 815, 842-43 (9th Cir. 1995); *Melendez v. Pliler*, 288 F.3d 1120, 1125 (9th Cir. 2002).

that Petitioner waived the argument.

Moreover, Petitioner has not established that the Court of Appeal's waiver finding is clearly at odds with California law, as established by the California Supreme Court or other panels of the Court of Appeal. This Court will not substitute its independent judgment for that of the state court by considering whether the court could or should have come to a different conclusion on the issue.

Petitioner's next claims that his trial counsel was ineffective in failing to object. The United States Supreme Court has determined that "[a]ttorney error that constitutes ineffective assistance of counsel is cause," which may excuse a procedural default. *Coleman*, 501 U.S. at 753-54. In order to establish ineffective assistance of counsel, Petitioner must show both that counsel's performance was deficient and that prejudice flowed from the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 686-88, 691-94 (1984). The Court finds that the trial court's admission of the evidence did not violate Petitioner's constitutional rights, as discussed in further detail below. Therefore, counsel's failure to object to the evidence's admission, even if deficient in a Constitutional sense, did not prejudice Petitioner at trial, because Petitioner would not have prevailed if the objection had been made. Petitioner has failed to establish ineffective assistance of counsel, and, accordingly, he has failed to show cause for the default. Petitioner's claim is procedurally barred.

B. Petitioner Was Not Prejudiced by the Admission of His Co-Defendants' Silence Upon Their Arrest

Petitioner has failed to show either that the prosecution used his co-defendants' silence against him in any meaningful way or, if it were

used against him, that the use was a violation of clearly established federal law. Petitioner bases his claim on *Bruton v. United States*, 391 U.S. at 126, which held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. *Richardson v. Marsh*, 481 U.S. 200, 201-02 (1987) (explaining *Bruton*). The problem raised by *Bruton* can be avoided, however, if any reference to the defendant is redacted from the co-defendant's confession. *Id.* at 211. Accordingly, under *Richardson*, even if Cleland and Quezada had explicitly incriminated themselves, Petitioner's right to confrontation would not be implicated so long as any mention of Petitioner's complicity was redacted. The rights protected under the Confrontation Clause are even less threatened by a situation like this where the co-defendants not only did not mention Petitioner, they said nothing at all.

In addition, the record does not support Petitioner's argument that the prosecution used the co-defendants' silence against Petitioner. The prosecutor made extensive use of the silence in his closing argument, but there was only a single tangential reference to Petitioner regarding the silence: "Ladies and gentleman, that silence speaks volumes because what really happened? Defendant Rebecca Cleland, defendant Jose Quezada, and defendant Alvaro Quezada had set up the murder of Bruce. They thought they had gotten away with it." (RT 1712.) The prosecutor only mentions Petitioner's name in restating the prosecution's most basic allegation: that the co-defendants planned and carried out Bruce's murder. The prosecutor made no effort to impute the incriminating silence of Cleland and Quezada to Petitioner.

In conclusion, Petitioner's claim is procedurally barred. Petitioner has failed to establish either cause for the default or prejudice therefrom, as the introduction of the challenged evidence did not implicate Petitioner, and his counsel was not constitutionally ineffective for failing to object.

V. Exclusion of Co-Defendant's Exculpatory Statement

Prior to trial, Cleland was detained in the county jail and at one point shared a cell with Penny Johnson.[8] In interviews with investigators and Petitioner's trial attorney, Johnson stated that Cleland admitted she and Jose Quezada had orchestrated the murder of Bruce Cleland for financial gain, but expressed remorse that Petitioner was implicated in the crime because he had nothing to do with it. (RT 4-5, 7-8.) Prior to trial, Petitioner moved to admit Cleland's exculpatory comment about him under the statement against penal interest exception to the hearsay rule. (CT 766-69.) The trial court denied the motion because the portion which exculpated Petitioner was not against Cleland's interest, and the statement as a whole lacked sufficient indicia of reliability. (RT 25-28.) The California Court of Appeal held that the trial court did not abuse its discretion in excluding the statement, relying upon the California Supreme Court's determination "that the hearsay exception [at issue] should not apply to collateral assertions within declarations against penal interest." *Cleland*, No. B143757, slip op. at 19 (quoting *People v. Lawley*, 27 Cal. 4th 102, 153 (2002)). Petitioner claims that the exclusion of Cleland's exculpatory statement violated his right to due process and to present

[8] Johnson's true name is apparently Carol Ann Endowski. (RT 3.)

a defense. (Pet. 4-7.)

The Supreme Court has "stated many times that federal habeas corpus relief does not lie for errors of state law....[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)(internal citations omitted). Indeed, states have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," so long as the rules are not "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998)(quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). In the specific context of the hearsay rule, the Supreme Court has stated that the rule should not be applied "mechanistically" where "constitutional rights directly affecting the ascertainment of guilt are implicated." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Petitioner argues that "the trial court's decision to exclude material evidence which the court itself had found to be reliable constituted an unreasonable application of clearly established federal law." (Reply 12.) Petitioner bases this argument on *Chambers*, but that case addressed a different question than the one presented here. *Chambers* concerned the exclusion of hearsay statements that were made against the declarant's penal interests. At the time of Chambers' trial, Mississippi's rules of evidence did not include such an exception to the hearsay rule. The Supreme Court held that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurances of their reliability," and excluding the statements violated Chambers' right to a fair trial. *Id.* at 300-03.

The hearsay statements at issue in *Chambers* directly inculpated the declarant, while the excluded statement at issue in this case exculpates Petitioner. Petitioner argues that Cleland's statement to Johnson must be taken as a whole; that the portion which exculpates Petitioner cannot be separated from the portion that inculpates Cleland. Petitioner has not presented any Supreme Court authority stating that the constitution prohibits the parsing of a hearsay statement to exclude the portion that is not covered by the statement against penal interest exception.[9] To the contrary, the Ninth Circuit has explained that "a statement that includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of the declarant, must be separated and only that portion that is actually incriminating of the declarant admitted under the exception." *LaGrand v. Stewart*, 133 F.3d 1253, 1267-68 (9th Cir. 1998). Cleland's statement about Petitioner, taken alone, clearly does not inculpate Cleland, and thus the California Court of Appeal's decision was not contrary to or an unreasonable application of federal law.

Petitioner's alternative argument that the trial court erred by denying his severance motion is also not persuasive. Petitioner contends that he would have been able to present evidence of Cleland's statement had the court severed the trial. (Reply 12.) However, the only avenue by which Petitioner could introduce such evidence is if

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[9] Petitioner's reliance upon *United States v. Paguio*, 114 F.3d 928 (9th Cir. 1997), is misplaced. Ninth Circuit precedent is not "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Moreover, *Paguio* concerned the application of Federal Rule of Evidence 804(b)(3), the exception for statements against penal interest in federal cases. The question is not whether California's rules of evidence are inconsistent with the federal rules, but whether the state rules comport with the baseline requirements of the federal constitution.

Cleland herself testified at his trial; otherwise, no hearsay exception would permit her out-of-court statement to come in. Absent a showing that Cleland would have testified, Petitioner has failed to provide any basis for establishing that the joinder was improper, let alone that a constitutional violation occurred. *See United States v. Lane*, 474 U.S. 438, 446 n. 8 (1986)("Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."). Petitioner's argument must be rejected.

VI. Sufficiency of the Evidence

Petitioner claims that the evidence was insufficient to sustain his convictions for first degree murder, CPC § 187(a), and conspiracy to commit murder, CPC §§ 182, 187, as well as the special circumstances findings that the murder was committed for financial gain and while lying in wait, CPC §§ 190.2(a)(1), (a)(15). (Pet. 7-9.)

Under the Due Process Clause of the Fourteenth Amendment, a defendant cannot be convicted of a crime unless he has been found guilty of every fact necessary to establish the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). To determine whether a criminal conviction satisfies this baseline requirement, "[a] state court must decide under *Jackson* [*v. Virginia*, 443 U.S. 307 (1979),] whether the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the defendant guilty beyond a reasonable doubt." *Sarausad v. Porter*, 479 F.3d 671, 677 (9th Cir. 2007). The *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal

offense as defined by state law." *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004)(en banc)(internal quotation marks omitted). The role of a federal habeas court under AEDPA is then to determine "whether a state court determination that evidence was sufficient to support a conviction was an 'objectively unreasonable' application of *Jackson*."[10] *Sarausad*, 479 F.3d at 677.

The California Court of Appeal denied Petitioner's sufficiency of the evidence claim with three sentences of explanation, without reference to the *Jackson* standard or the substantive elements of each crime or special circumstance. Nonetheless, failure to cite the correct Supreme Court authority has no bearing on the reasonableness of a state court's decision, *Early v. Packer*, 537 U.S. 3, 8 (2002)(per curiam); nor does "the paucity of reasoning employed by the state court... establish that its result is objectively unreasonable." *Sarausad*, 479 F.3d at 678 (quoting *Hurtado v. Tucker*, 245 F.3d 7, 18 (1st Cir. 2001)).

A. Conspiracy to Commit Murder

Section 182(a)(1) of the penal code makes it a crime "If two or more persons conspire[] [t]o commit any crime."

> A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.

[10] Under *Sarausad v. Porter*, it is no longer an open question in this Circuit whether sufficiency of the evidence claims are evaluated under AEDPA's added level of deference. *Cf.* Answer 19 n.3.

People v. Morante, 20 Cal. 4th 403, 416 (1999) (citing CPC § 184). "Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy." *Id.*

The prosecution presented sufficient evidence that Petitioner conspired with Cleland and Quezada to kill Bruce Cleland. Joseph Aflague testified that prior to the killing, Quezada sought to purchase a gun from him. (RT 1327.) Quezada initially asked Aflague if he knew anyone who could act as a driver to help "take care of something." (RT 1328.) Quezada later met with Aflague again to get the gun, saying there was "a hit he had to take care of." (RT 1329.) He also told Aflague that he no longer needed a driver, because he and Petitioner were "going to take care of it." (Id.) In addition to Aflague's testimony, there was also evidence that Petitioner and Rebecca were in frequent telephone contact just prior to the murder, and that Petitioner made and received calls while near the murder site. (RT 1060-62, 1124-25, 1190-92, 1195-97.)

A rational trier of fact could conclude that Petitioner entered into an agreement with his brother to murder Bruce Cleland based on Aflague's testimony, and that Petitioner conspired with Cleland to murder her husband based on the multiple phone calls with Cleland, coupled with evidence of Petitioner's location, leading up to the murder. In attacking the sufficiency of this evidence, Petitioner makes much of the fact that Aflague was an admitted drug dealer whose testimony was of questionable reliability. Indeed, in reversing Quezada's conviction because of the violation of his Fifth Amendment rights, the California Court of Appeal found that Aflague's testimony was not strong enough to render the error harmless. *Cleland*, No. B143757, slip op. at 16-17. The appellate court noted that Aflague's

"credibility was questionable from the outset," and that his testimony conflicted with the timeline of events. *Id.*

But this Court's role on habeas review in the context of a sufficiency of the evidence claim significantly differs from the appellate court's role in determining whether a separate constitutional error is harmless on direct review. Aflague's testimony may be susceptible to conflicting interpretations, but this Court "must presume...that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Wright v. West*, 505 U.S. 277, 296-97 (1992)(plurality opinion)(quoting *Jackson*, 443 U.S. at 326). Despite Aflague's questionable character, his testimony provided a legitimate basis for the jury to conclude that Petitioner conspired with Quezada to murder Bruce Cleland. When this testimony is considered along with the evidence of Petitioner's phone calls with Cleland, there was ample reason for the jury to conclude that Petitioner was guilty of conspiracy to murder.

B. First Degree Murder

Pursuant to section 187(a), "Murder is the unlawful killing of a human being...with malice aforethought." "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." CPC § 188.

Premeditated murder is murder in the first degree. CPC § 189. "Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. When evidence of all three categories is not

present, [the California Supreme Court] require[s] either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." *People v. Prince*, 40 Cal. 4th 1179, 1253 (2007)(internal quotations omitted). The prosecution need not show that a defendant actually killed the victim in order to convict the defendant of first degree murder. "All persons concerned in the commission of a crime, whether...they directly commit the act constituting the offense, or aid and abet in its commission" are principals. CPC § 31. "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense." *People v. Avila*, 38 Cal. 4th 491, 564 (2006).

The evidence discussed above in the context of the conspiracy conviction was sufficient to sustain Petitioner's conviction for first degree murder. Aflague's testimony provided evidence of planning on the part of Petitioner and Quezada. The evidence of cell phone calls between Petitioner and Cleland also demonstrate tactical planning on Petitioner's part to carry out the murder. That there was no evidence that Petitioner was the actual killer is irrelevant. Considering Aflague's testimony and the phone call evidence in a light most favorable to the prosecution, *Jackson*, 443 U.S. at 319, it is sufficient to lead a rational trier of fact to conclude that Petitioner facilitated the murder by coordinating with Cleland to ascertain her and her husband's whereabouts.

C. Murder for Financial Gain

Pursuant to section 190.2(a), the penalty for first degree murder is death or life imprisonment without the possibility of parole if certain special circumstances are found to be true. One such

circumstance that was found true was that "[t]he murder was intentional and carried out for financial gain." CPC § 190.2(a)(1). To prove this special circumstance, the prosecution must establish that "the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." *People v. Crew*, 31 Cal. 4th 822, 843 (2003)(quoting *People v. Howard*, 44 Cal. 3d 375, 409 (1988)). "It is not required that the murder be committed exclusively or even primarily for financial gain." *Id.* Nor is it required that the murder was carried out for the defendant's financial gain; it is enough that the defendant aided and abetted another person for that person's financial gain. *See People v. Singer*, 226 Cal. App. 3d 23, 43 (1990) (citing *People v. Freeman*, 193 Cal. App. 3d 337, 339-40 (1987)).

The prosecution presented evidence that Cleland paid Petitioner $500 at some time after the murder and also paid some of Petitioner's bills, which is sufficient to show that Petitioner assisted in the murder with the expectation of financial gain. (RT 465, 906-07.) But leaving aside the issue of Petitioner's expectation of financial gain, there was ample evidence that Cleland wanted her husband killed because of the financial windfall it would provide her. Indeed, the prosecution focused on Cleland's desire for money as the primary motive for murdering Bruce Cleland, and Rebecca's financial gain can be used to satisfy the special circumstance as to Petitioner. Evidence showed that Cleland stood to gain a sum equal to half of Bruce Cleland's annual salary under his basic life insurance policy from TRW; $517,000 under a TRW optional accidental death policy; $25,000 under an accidental death policy; payment of the balance on the Whittier house under a mortgage life insurance policy from Minnesota Life Insurance Company; and the $196,000 proceeds of Bruce Cleland's TRW stock savings plan.

(RT 485, 896-98, 996-1003, 1016-20.) Evidence that the murder was carried out for financial gain was not only sufficient, it was overwhelming.

D. Murder by Means of Lying in Wait

Another special circumstance that was found true by the jury was that Petitioner "intentionally killed the victim by means of lying in wait." CPC § 190.2(a)(15).

> The lying-in-wait special circumstance requires an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.

People v. Moon, 37 Cal. 4th 1, 22 (2006)(internal quotations and citations omitted).

The evidence at trial painted a classic picture of a murder by means of lying in wait. Evidence showed that Cleland placed several phone calls to Petitioner and Petitioner's father while she was dining with her husband on the night of the murder. (RT 1190.) After dinner the Clelands went to Petitioner's father's house for drinks, and Cleland and Petitioner exchanged multiple phone calls. (RT 1190-91.) Petitioner called his father's house at 12:36 a.m. and 12:48 a.m. (RT 1191.) Phone records showed that after departing from Petitioner's father's house, and immediately prior to Bruce Cleland's murder,

Cleland called Petitioner again. (RT 1191-92.) Evidence demonstrated that Petitioner was in the vicinity of the murder when he placed and received these last three calls. (RT 1195-1200.) A rational jury could infer from this evidence that Cleland was calling Petitioner to coordinate the murder, and that Petitioner was awaiting the Clelands' arrival at a designated point where the murder was to occur. Moreover, Cleland's statement to the police about the circumstances of the killing provide a reasonable basis for the conclusion that Bruce Cleland's killers were lying in wait. Cleland told police that she pulled the car over near the entrance to the Interstate 5 freeway in order to check the rear hatch of the car, at which point she was hit over the head and Bruce Cleland was shot and killed. (RT 699-701.) Taking all of this evidence together, a rational jury could conclude that Cleland, Quezada, and Petitioner lured Bruce Cleland into a night out with Cleland under the pretense of reconciling their relationship, only to deliver Bruce to a designated location where he was murdered without any advance warning.

VII. Ineffective Assistance of Counsel

Petitioner claims that his trial counsel was ineffective for 1) failing to challenge the admissibility of novel scientific evidence (Pet. 9-14); and 2) failing to present the testimony of a key alibi witness (Pet. 14-16.)

The Sixth Amendment guarantees the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish a violation of this right, a habeas petitioner must show that: 1) counsel's performance was "deficient," in that it fell below an objective standard of reasonableness under prevailing professional

norms; and 2) prejudice flowed from counsel's deficient performance. *Id.* at 687-88, 691-94. A failure to make either showing is grounds for denying a petitioner's claim. *Id.* at 697. ("The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...that course should be followed.").

As to the deficiency requirement, the relevant inquiry under *Strickland* is not what defense counsel could have done, but rather whether counsel's choices were reasonable under the circumstances. *Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007). When determining "reasonableness," the court must "indulge a strong presumption" that the counsel's judgments were part of a sound trial strategy. *Hovey v. Ayers*, 458 F.3d 892, 904 (9th Cir. 2006)(quoting *Strickland*, 466 U.S. at 689). To overcome this presumption, petitioner must show counsel's representation fell below an objective standard of reasonableness. *Correll v. Ryan*, 465 F.3d 1006, 1010 (9th Cir. 2006).

To establish prejudice, it is not enough to show that counsel's error might have had some effect on the outcome. The measure of prejudice is a reasonable probability that, but for counsel's actions, the result of the proceedings would have been different. *Reynoso v. Giurbino*, 462 F.3d 1099, 1116 (9th Cir. 2006)(citing *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In other words, the prejudice inquiry focuses on the totality of the evidence before the jury and asks whether counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Reynoso*, 462 F.3d at 1116.

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In reviewing a habeas corpus petition, the question is whether the state court's decision was contrary to or an unreasonable application of the *Strickland* standard. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005).

A. Failing to Challenge Scientific Evidence Concerning Cell Phones

Telephone records introduced by the prosecution demonstrated that Petitioner and Cleland exchanged multiple phone calls leading up to the murder, and that Petitioner was present in the vicinity of the murder just prior to the crime. At trial, the prosecution called Saiful Huq, the director of engineering for Pacific Bell Wireless. (RT 1026.) Huq provided a technical overview of how a phone call is made from a cell phone associated with one network, i.e., Pacific Bell, to a cell phone associated with a different network, i.e., AT&T Wireless, and also how a phone call is made between a cell phone and a land line. (RT 1028-31.) Huq explained that Pacific Bell maintains a system of cell sites, which are essentially large antennas, situated around the greater Los Angeles area. (RT 1029-33.) Each cell site has three sides or sectors, and each sector covers roughly 120 degrees of the area around each cell site. (RT 1033-34.) When a phone call is made or received, the cell phone will search for the cell site and sector that provides the strongest signal, which is usually the sector facing the user on the nearest cell site. (RT 1038.) Information about the phone call is also recorded by the network computers: the date and time of the phone call, the originating and receiving phone numbers, and the cell site and sector through which the call is transmitted. (RT 1043.)

Huq then reviewed phone records associated with Petitioner's cell phone. Huq testified that Petitioner called his uncle's home at 12:49

a.m. and received a phone call from Cleland at 1:00 a.m. on July 26, 1997, shortly before the time of the murder. (RT 1062.) According to the phone records, Petitioner was located in a one- to two-square-mile area covered by sector C of cell site 60 when those calls were transmitted, the same area in which the murder occurred. (RT 1060.)

The prosecution also called Philip Brown, an engineering manager for AT&T Wireless.[11] (RT 1116.) Like Huq, Brown explained how the network of cell sites transmits calls, and how one can determine the area in which the cell phone user was located according to the cell site and sector through which a call is routed. (RT 1118-20.) Brown testified that according to the cell phone records, calls were made from Cleland to Petitioner at 1:01 a.m. and to her uncle's home at 1:20 a.m. on July 26, 1997. (RT 1023-25, 1124-25.) According to the cell site and sector through which the calls were transmitted, each call was made from the same area. (*Id.*)

Bradley Hooper, a former police detective and the fraud investigations supervisor for AT&T Wireless also testified at trial, but his testimony was much more limited in scope. Hooper authenticated Cleland's phone records, and testified that, according to the records, she cancelled her husband's cell phone account on the same day that he was murdered. (RT 1100-15.)

Petitioner claims that his attorney was ineffective for failing to request a hearing pursuant to *People v. Kelly*, 17 Cal. 3d 24, 30 (1976), on the use of cell site and sector data to indicate the general area of a cell phone user during a particular call. (Pet. 9-14.) Petitioner alternatively argues that, even if the cell site and sector

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[11] At the time of the murder the company was known as L.A. Cellular. (RT 1116.)

testimony was admissible, his attorney was ineffective for failing to undermine the testimony of the cell phone engineers. (Pet. 14.)

In *People v. Kelly*, the California Supreme Court set forth the following two-step process for the admission of expert testimony based on new scientific techniques: "1) [T]he reliability of the method must be established, usually by expert testimony, and 2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." 17 Cal. 3d at 30 (citations omitted). In considering the appropriate test for determining the reliability of a new scientific technique, the *Kelly* court adopted the approach articulated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), that the technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[12] *Kelly*, 17 Cal. 3d at 30.

The California Court of Appeal held that it was not unreasonable for Petitioner's counsel to determine that the evidence regarding cell phone technology did not fall within the *Kelly* definition of "scientific evidence." *Cleland*, No. B143757, slip op. at 22. The appellate court noted that "the reports relied upon by the witnesses did not analyze data, but merely compiled the data into a usable form." *Id.*

It was reasonable for the appellate court to conclude that Petitioner's trial attorney did not provide deficient representation.

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[12] The California Supreme Court has reaffirmed its allegiance to this standard, even in light of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which held that the Federal Rules of Evidence superceded *Frye*. *People v. Leahy*, 8 Cal. 4th 587, 612 (1994).

It is clear that the evidence at issue—the cell site and sector technology utilized by cell phone companies—does not trigger the threshold *Kelly* concern that the evidence involves a scientific technique. Neither the witnesses nor the cell phone technology analyzed any data; rather, the cell sites transmitted signals between phones, and then compiled a history of those signals. The witnesses simply read and explained the meaning of the data. It was not unreasonable for an attorney to decline to ask for a hearing on evidence that does not fall within *Kelly*'s ambit.

Moreover, even if it was unreasonable for Petitioner's attorney to fail to ask for a *Kelly* hearing, Petitioner has not shown that he would have prevailed at such a hearing. To the contrary, evidence in the record demonstrates that the reliability and accuracy of the cell site technology was widely accepted in the cellular phone industry. At the preliminary hearing and trial, four different cell phone engineers explained the technology and how it would reveal the general location of a cell phone user when a call was placed or received. (CT 243-53, 283-313; RT 1026-43, 1116-25.) If cell site technology can be considered a scientific technique, it is clear that it is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Kelly*, 17 Cal. 3d at 30.

Petitioner alternatively claims that his counsel was ineffective for failing to present testimonial evidence from the preliminary hearing which undermined "the reliability of the technical conclusion that Petitioner could be pinpointed at the murder scene."[13] (Pet. 14.)

[13] Petitioner's framing of the issue misstates the evidence, as there was only testimony that Petitioner's cell phone could be reliably placed within a certain general area.

At the preliminary hearing Bradley Hooper testified more extensively about AT&T Wireless' network, and Robert Easther, a network performance manager for Pacific Bell Wireless, also testified. On cross-examination Hooper testified that Cleland received two calls on the night of the murder, at 11:56 and 11:57 p.m., for which the phone records did not list an associated cell site. (CT 262-63.) Hooper also stated that phone records would not indicate if a cell phone user moved from one cell site to another mid-call. (CT 264.) Hooper further testified that if the nearest cell site is down when a cell user places a call, the call will be transmitted through the next closest cell site, provided that the next closest site is within range. (CT 270.) Hooper also acknowledged that at the time of the murder, AT&T Wireless did not possess the technology to pinpoint the location of a cell phone user. (CT 272-73.) Easther also acknowledged on cross-examination that locating the area of a cell phone transmission is not an "exact science," that it is based on probabilities and the ability to pinpoint the cell site that transmits a phone call is less certain when the cell user is near the edge of a coverage area. (CT 324-25.)

Rather than call Hooper or Easther as his own witnesses at trial, or call other witnesses to provide similar information in order to undermine the prosecution's witnesses, Petitioner's attorney made a tactical decision, as stated on the record, "to utilize the witnesses called by the prosecution rather than having to go through it again." (RT 40.) Of course an attorney's tactical decision to present evidence one way rather than another, or to present evidence at all, is shown great deference. And in this case the attorney's decision is beyond reproach. Petitioner's attorney thoroughly cross-examined Huq and elicited much of the same testimony provided by Hooper and Easter at

the preliminary hearing. (RT 1063-85.) Petitioner's attorney was not unreasonable in his approach.

B. Failing to Present Testimony of Alibi Witness

Petitioner's first attorney interviewed Caesar Lopez, a promoter who booked entertainment at Peppers, a night club where Petitioner worked in the summer of 1997. Lopez told the attorney that he saw Petitioner at Peppers at about the time of the murder. Petitioner was represented by a different attorney at trial. The trial attorney reviewed notes on the interview with Lopez and attempted to find him prior to trial, but was unable to locate him because he no longer lived at the same address. (RT 1843-45.) Because Lopez's whereabouts at the time of trial were unknown, Petitioner's attorney did not call him as a witness. Petitioner claims that his attorney was ineffective for failing to track down Lopez.

"Defense counsel 'has a duty to make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary.'" *Reynoso*, 462 F.3d at 1112 (quoting *Strickland*, 466 U.S. at 691). There is no indication that Petitioner's attorney did not fulfill this duty. Upon reviewing the summary of the interview with Lopez and recognizing the potential significance of his testimony, Petitioner's attorney sent his investigator to find Lopez. (RT 1845.) The investigator simply was unable to locate him. Petitioner does not suggest what other methods his attorney could have employed to find Lopez, and why his attorney was unreasonable for failing to use these methods.

Even if a reasonable investigation would have turned up Lopez, the California Court of Appeal reasonably concluded that his testimony would not have led to a different outcome in the case. *Cleland*, No.

B143757, slip op. at 24. The jury heard extensive testimony from a witness who said he was with Petitioner at Peppers at the time of the murder. (RT 1425-37.) The Court of Appeal stated, "The jury apparently rejected that testimony, and we have no reason to believe the testimony of an additional witness would have been accepted." *Cleland*, No. B143757, slip op. at 25. Given the redundancy of Lopez's testimony, the appellate court reasonably concluded that Petitioner was not prejudiced by its absence.

VIII. Trial Court's Denial of Motion for New Trial

Soon after the verdict, Lopez contacted Petitioner's attorney. Now knowing Lopez's whereabouts, Petitioner's attorney filed a motion for new trial pursuant to CPC § 1181(8), which the trial court denied. (RT 1854.) Petitioner claims that relief is warranted because the trial court abused its discretion in denying the motion. (Pet. 16-17.) Respondent argues that relief should be denied because Petitioner fails to raise a federal claim. (Answer 30.) The Court agrees.

"[A] violation of state law standing alone is not cognizable in federal court on habeas." *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000). Petitioner must show that the trial court's decision has somehow violated the constitution, laws, or treaties of the United States. *Little v. Crawford*, 449 F.3d 1075, 1083 (9th Cir. 2006).

Petitioner has not even attempted to raise this ground for relief as a federal claim. And as suggested by Petitioner's citation to only a single California case in support of his claim, the claim is clearly rooted in state law. (Pet. 16-17.) A motion for new trial is created and governed by state law; the California Court of Appeal denied Petitioner's abuse of discretion claim based exclusively on state

authority. *Cleland*, No. B143757, slip op. at 25. Because the trial court's decision in no way implicates "clearly established federal law as determined by the Supreme Court of the United States", the issue is inappropriate for review under 28 U.S.C. § 2254. *See Neverson v. Bissonnette*, 242 F. Supp. 2d 78, 94-95 (D. Mass. 2003) (challenge of trial court's ruling on motion for new trial is based upon state law, and therefore does not provide a ground for federal habeas relief).

IX. Admission of Prejudicial Evidence

Two witnesses testified at trial that Petitioner and Cleland were very affectionate with each other and often seen hugging and kissing. Petitioner also testified on cross-examination that he and Cleland sometimes slept in the same bed. Petitioner argues that such evidence "was irrelevant under [California] Evidence Code § 1101 and highly prejudicial." (Pet. 17.) Petitioner does not claim that the trial court's decision to admit the evidence of his relationship with Cleland in any way violates his constitutional rights, and he has therefore failed to state a federal claim upon which relief may be granted. *Estelle*, 502 U.S. at 67-68.

Even if Petitioner's claim is construed to state a cognizable federal basis for relief, the claim is nonetheless without merit. In order for the admission of the challenged evidence to rise to the level of a constitutional violation, Petitioner must show that "the admission rendered the trial so fundamentally unfair as to deny [Petitioner] due process." *Leavitt v. Arave*, 383 F.3d 809, 829 (9th Cir. 2004); *accord Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). The admission of the evidence can only violate due process if "'there are *no* permissible inferences that the jury may draw' from it." *Leavitt*, 383

F.3d at 829 (emphasis in original)(quoting *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993)). "Even then, the evidence must be of such a quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920 (internal quote and citations omitted).

In this case, Petitioner is not able to overcome the first hurdle by demonstrating that there are no permissible inferences that the jury may draw from his relationship with Cleland. The apparently romantic dimension of Petitioner's relationship with his cousin provided legitimate evidence of Petitioner's motive for participating in the murder of Bruce Cleland. The claim should accordingly be denied.

X. Disclosure of Witness' Prior Testimony in Other Cases

In his amended petition, Petitioner alleges that the prosecution failed to provide the defense with impeachment evidence relating to one of its key witnesses, Joseph Aflague, before trial.[14] (Pet. 6a.) Petitioner contends that this alleged failure violated his Fifth, Sixth, and Fourteenth Amendment rights. (Memo. In Support of Amended Pet. For Writ of Habeas Corpus ("Amended Pet.") 20.) In his supplemental answer, Respondent argues that Plaintiff's claim should be dismissed on both procedural grounds (timeliness and procedural default) and on the merits. Petitioner's claim is clearly without merit and can be resolved without first determining whether the claim was

[14] Aflague, an admitted felon, drug dealer and informant, testified that Jose Quezada told him that he was going to make a "hit" and Petitioner was going to assist him. (RT at 1329.)

timely presented[15] or is procedurally barred.[16]

Petitioner claims that the prosecution failed to disclose that Aflague's testimony in prior unrelated trials conflicted with his testimony in Petitioner's trial; that Aflague received benefits for testifying as an informant in this and other cases; and that Aflague was a gang member. (Amended Pet. 20-21.) Petitioner supports his contentions with references to the transcripts from Petitioner's trial and from two other trials in which Aflague testified, along with vague and conclusory allegations that the state must have solicited fabricated testimony from Aflague in exchange for prosecutorial leniency. All of these arguments were rejected by the superior court because they were based upon vague and conclusory allegations and failed to make out a prima facie showing an entitlement to relief. (Pet'r Status Report, filed March 24, 2006.)

The determination by the superior court was not objectively unreasonable. Petitioner has provided no factual basis to support his accusations, instead relying primarily on a the Los Angeles County grand jury report from 1990, nine years before Petitioner's trial, which apparently concluded that the county's informant system was seriously flawed. Though acknowledging that Petitioner's trial occurred "outside of the specific time frame discussed by the grand jury in its report," Petitioner argues that "the circumstances of Mr.

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[15] "For the purposes of this case we do not need to reach the complex questions lurking in the time bar of the AEDPA." *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1083 (9th Cir. 2001).

[16] This claim is likely procedurally barred because the superior court, which issued the last reasoned decision, denied Petitioner's most recent state habeas corpus, in part, because the petition as untimely filed. (Supp. Answer 4.) Respondent raised the procedural bar and Petitioner did not challenge the state's consistency in applying the rule. *See King v. Lamarque*, 464 F.3d 963, 965 (9th Cir. 2006).

Aflague's sudden appearance, his refusal to discuss other cases and the benefits he may have received from those cases, viewed in light of the transcripts of his prior testimony, place him squarely within the description of the corrupt and misleading informant system described in that report." (Amended Pet. 27.)

Petitioner's argument is based on nothing more than conjecture and speculation. He provides no evidence to suggest that the circumstances described in the 1990 grand jury report continued to exist at the time of Petitioner's trial nine years later. Petitioner also fails to provide any support for his contention that "Aflague clearly received substantial benefits for his cooperation with police," beyond the bald assertion that Aflague's "allegedly 'free'" testimony was "highly suspect." (Amended Pet. 23.)

Petitioner's claim that "Aflague's testimony in [the prior two cases] was materially different from his testimony at Petitioner's trial in almost every key respect," (*Id.* at 21-22.), is belied by the record. The Court sees no meaningful difference in Aflague's testimony at any of the three trials.[17] Additionally, the prosecutor in the first case stated on the record that he would not prosecute Aflague for crimes he admitted to while testifying, so the fact that the prosecutor offered a Aflague a benefit beyond relocation expenses was a matter of public record at the time of Petitioner's trial. Petitioner's argument that Aflague must have received some further benefit is not persuasive.

Petitioner contends that the prosecution's failure to disclose this supposed impeachment evidence constitutes a *Brady* violation. *See*

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[17] For example, contrary to Petitioner's assertion, Aflague denied that he was a gang member in the prior trials. (Exhibits in Support of Amended Petition for Writ of Habeas Corpus ("Amended Pet. Exh."), Exh. 4-3, p. 604, ln. 22-24; Exh. 4-4, p. 272, ln. 26-27.)

Brady v. Maryland, 373 U.S. 83 (1963). The government has a duty to disclose evidence favorable to the accused when it is material to guilt or punishment. *Id.* at 87. There are three components to a *Brady* violation: 1) the material evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) that evidence must have been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The duty to disclose is not limited to "exculpatory" information, but also includes information that could be used to impeach government witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972). It is irrelevant whether the evidence was suppressed willfully or inadvertently. *United States v. Ciccone*, 219 F.3d 1078, 1084 (9th Cir. 2000)(citing *Strickler*, 527 U.S. at 280.) For *Brady* purposes, evidence is deemed material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Bagley v. United States*, 473 U.S. 667, 676 (1985).

Petitioner has failed to establish that the prosecution withheld any evidence at all, let alone favorable evidence. Because Petitioner has provided the Court with no credible evidence showing that Aflague made an implicit "deal" with the prosecution in exchange for his testimony at any of the three trials, or that Aflague's testimony was inconsistent, the prosecution's alleged failure to inform Petitioner of these non-issues prior to trial cannot possibly be a *Brady* violation.[18]

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[18] Furthermore, Petitioner was aware of this information during his trial. Petitioner identifies Aflague's alleged theft offenses and narcotics and weapons trafficking, for which prosecutors did not bring charges, as examples of the information the prosecution should have

Petitioner further contends that Aflague's allegedly conflicting testimony establishes that his testimony in Petitioner's case was false, and that the prosecution knew or should have known that his testimony was false. (Amended Pet. 38.) Petitioner argues that the prosecution's actions violate *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), which provides that "the state may not use false evidence to obtain a criminal conviction." *See also Miller v. Pate*, 386 U.S. 1, 7 (1967); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991). Likewise, a prosecutor has a constitutional duty to correct the false impression of facts. *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000).

Because Petitioner has failed to establish that Aflague testified falsely at trial, much less that the prosecution knew or should have known of the alleged falsity, he cannot prevail on this claim.

XI. Conclusion

For the reasons stated above, it is recommended that the petition for writ of habeas corpus be **DENIED**.

Dated: October 26, 2007

Marc L. Goldman
United States Magistrate Judge

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given the defense, as evidence of prosecutorial leniency. However, at the time of trial, Petitioner knew that Aflague had not been charged with the theft offenses, as evidenced by his trial counsel's thorough cross-examination of Aflague on that very issue. As for narcotics and weapons trafficking, the prosecutor stated on the record during the first trial at which Aflague testified that he would not bring charges against Aflague for those offenses. The Court is not convinced that the prosecution concealed this information from Petitioner.

S146212

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ALVARO QUEZADA on Habeas Corpus

The petition for writ of habeas corpus is denied.

George, C. J., was absent and did not participate.

MORENO

Acting Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re

ALVARO QUEZADA

on Habeas Corpus.

B190651

(Super. Ct. No. BA163991)

ORDER

THE COURT*:

The court has read and considered the petition for writ of habeas corpus filed herein May 1, 2006, and the informal response filed by the Attorney General July 18, 2006. The petition is denied.

*JOHNSON, Acting P.J.,

ZELON, J.

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

ATE PRINTED: 02/23/06

ASE NO. BA163991

HE PEOPLE OF THE STATE OF CALIFORNIA
VS.
EFENDANT 03: ALVARO QUESADA

NFORMATION FILED ON 12/08/98.

OUNT 01: 187(A) PC FEL - MURDER.
OUNT 02: 182(A)(1)-187(A) PC FEL - CONSPIRACY TO COMMIT MURDER.

J 02/21/06 AT 830 AM IN CENTRAL DISTRICT DEPT 109

ASE CALLED FOR HABEAS CORPUS PETITION

ARTIES: KATHLEEN KENNEDY-POWELL (JUDGE) GAYNA SQUALLS (CLERK)
NONE (REP) NONE (DDA)

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

DICIAL ACTION DATE OF 3/16/06 IS ADVANCED TO THIS DATE AND
ACATED.

RDER DENYING PETITION FOR WRIT OF HABEAS CORPUS IS ISSUED BY
HE COURT ON THIS DATE. SAID ORDER IS INCORPORATED INTO THIS
INUTE ORDER BY REFERENCE AND FILED WITHIN THE COURT'S FILE.

COPY OF THE COURT'S ORDER AND THIS MINUTE ORDER ARE FORWARDED
IA U.S. MAIL IN ENVELOPES ADDRESSED AS FOLLOWS:

TER LEEMING
08 LOCUST ST, STE 7
ANTA CRUZ, 95060

FFICE OF THE DISTRICT ATTORNEY
20 WEST TEMPLE ST, STE 540
OS ANGELES, CA 90012
TN: DDA HYMAN SISMAN

OURT ORDERS AND FINDINGS:

ETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

XT SCHEDULED EVENT:
ROCEEDINGS TERMINATED

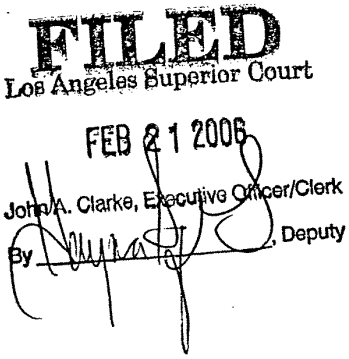
ASE NO. BA163991
EF NO. 03 DATE PRINTED 02/23/06

2/23/06

HEREBY CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE ELECTRONIC MINUTE RDER ON FILE IN THIS OFFICE AS OF THE ABOVE DATE.

OHN A. CLARKE , EXECUTIVE OFFICER/CLERK OF SUPERIOR COURT, COUNTY OF LOS NGELES, STATE OF CALIFORNIA

_____, DEPUTY



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re **ALVARO QUEZADA,** Petitioner, On Habeas Corpus	CASE NO. BA163991 ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The court has read and considered the Petition for Writ of Habeas Corpus filed on April 6, 2005, along with all other related documents, motions and materials. The court now rules as follows:

Petitioner filed his petition on grounds that the state violated his various rights, as set forth in the United States Constitution's Article I, section 9, clause 2, and the Fifth, Sixth and Fourteenth Amendments. He presents the following five allegations:

1. "[T]he state has failed to disclose favorable, impeaching material, exculpatory information to petitioner, before, during and after trial, including but not limited to impeaching, material information pertaining to the prosecution's testifying informant,

Joseph Aflauge, and related prosecution team and/or state practices and policies regarding informant and/or cooperating witnesses." (Petition for Writ of Habeas Corpus, p. 3.)

2. "[T]he state presented testimony which it knew or should have known to be false, by informant witness Aflauge, and failed to disclose or correct that false testimony, which is material." (Petition for Writ of Habeas Corpus, p. 3.)

3. "[T]he state presented testimony which it knew or should have known to be false, by informant witness Hernandez, and failed to disclose or correct that false testimony, which is material." (Petition for Writ of Habeas Corpus, p. 3.)

4. "[T]he state failed to disclose favorable, impeaching material, exculpatory information to petitioner, before, during and after trial, including but not limited to impeaching, material information pertaining to the investigating officers, including evidence of their pattern and practice of influencing witnesses to testify falsely against criminal defendants." (Petition for Writ of Habeas Corpus, p. 4.)

5. "[T]he state failed to disclose favorable, impeaching material, exculpatory information to petitioner, before, during and after trial, including but not limited to impeaching, material information pertaining to the investigating officers, including evidence of complaints maintained in police files pursuant to *Pitchess*..." (Petition for Writ of Habeas Corpus, p. 4.)

Custody Requirement

The threshold requirement for bringing a habeas corpus petition is that the aggrieved party be in either actual or constructive custody. (Pen Code § 1473(a); see *In re Wessley W.*

(1981) 125 Cal.App.3d 240.) It is Petitioner's burden to prove that he is in fact in actual or constructive custody. (*Id.* at 247.) Based on the facts alleged in the petition filed herein, Petitioner has met this burden because he is currently in the custody of the California Department of Corrections at the Corcoran State Prison in Corcoran, California.

Petitioner's Evidentiary Burden

Petitioner carries the burden to establish by a "*preponderance of substantial, credible evidence*," the contentions upon which he seeks habeas relief. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945.) "For purposes of collateral attack, all presumptions favor the truth, accuracy and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, emphasis in original; *Johnson v. Zerbst* (1937) 304 US 458, 468.) (Informal Response, p. 3.)

It is not sufficient for Petitioner to make raw, unsubstantiated allegations to justify his petition. If this Court does not find the petition adequately states a prima facie case for relief, the petition may be summarily denied without an evidentiary hearing. (*In re Clark* (1993) 5 Cal.4th 750, 769, fn. 9.)

Timeliness

Petitioner contends that he has met a timeliness exception by virtue of the recent discovery of new evidence. His description of the circumstances surrounding this discovery is dubious and unconvincing. If the Court assumes, *arguendo*, that this vague contrivance is accurate, it still remains for the "new" evidence to qualify for a timeliness exception.

"[F]or purposes of the exception to the procedural bar against successive or untimely petitions, a 'fundamental miscarriage of justice' will have occurred in any proceeding in which it can be demonstrated: (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner..." (*In re Clark* (1993) 5 Cal.4th 750, 761.) Ordinarily, evidence which merely serves to impeach a witness is not sufficiently significant to warrant a new trial. (*People v. Long* (1940) 15 Cal.2d 590, 607-608.) As discussed subsequently, Petitioner fails to demonstrate the "constitutional magnitude" necessary to be granted an exception. This petition is not timely.

Alleged Brady Violations and False Testimony

Petitioner cites *Napue v. Illinois* (1959) 360 U.S. 264, to justify his allegations regarding both *Brady* violations and Aflague's purported false testimony. For *Napue* to apply, it must be clear that the prosecutor at trial not only knew of an arrangement for consideration between state agents and the informant witness, but allowed false testimony to the contrary to be brought into court.

Petitioner bases his complaint on an unproven undisclosed agreement between the state and Aflague whereby he would avoid prosecution for his ongoing or past crimes, in exchange for his testimony against Alvaro Quezada. Petitioner proceeds on the theory that an arrangement must exist; therefore, both Aflague's denial and the prosecutor's "failure" to produce evidence of such arrangement constitute errors. Petitioner fails to provide credible evidence of such an arrangement and fails to make a prima facie case supporting these allegations. (*In re Crow* (1971) 4 Cal.3d 613, 624.)

Petitioner contends that "Aflague's testimony in the *Eulloqui* and *Padilla* cases is materially different from his testimony at petitioner's trial in *almost every key respect.*" (Petition for Writ of Habeas Corpus, p. 11, emphasis added.) Petitioner then fails, in "almost every key respect," to illustrate convincingly the specific points on which the testimony differs and how this would have affected the trial outcome. In fact, Aflague's testimony in *Quezada*, though occasionally contentious, is consistent with his testimony at previous unrelated trials.

Petitioner repeatedly misstates the record. For example, Petitioner contends that Aflague made contradictory statements regarding a dispute with the gang "spiders," (Petition for Writ of Habeas Corpus, p. 11, line 14), but fails to identify this testimony in the *Eulloqui* and *Padilla* trials, or its relevance to the present case. The only mention of "spiders" found in the record provided is a police report concerning Aflague's 1995 shooting incident. (Petitioner's Exhibit 1, p. 3.) The source and accuracy of this report are unknown. There are no further references to the "spider" gang in subsequent transcripts. At no point does Petitioner identify a line of questioning where Aflague's "denial" took place, documentary evidence of said denial, or how such a denial would be relevant grounds for his petition. (*In re Harris* (1993) 5 Cal.4th 813, 827, fn.5; *People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition contains only vague, conclusory allegations. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief. (*People v. Karis* (1988) 46 Cal.3d 612, 656; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

Duty of Prosecution to Correct False and "Misleading" Testimony

Petitioner argues that not only false, but "misleading" testimony which "conceals the witness' bias against the defendant" must be corrected by the prosecution, citing *People v.*

Morris (1988) 46 Cal.3d 1, 29-30 and *In re Jackson* (1992) 3 Cal.4th 578, 595. (Petition for Writ of Habeas Corpus, p. 17, lines 6-12.) While both cases speak to the Petitioner's case in the most general terms regarding interested parties' testimony, neither is considered persuasive in the current context. Both *Morris* and *Jackson* specify that the prosecutorial error involved failure to disclose inducements which were known, or should have been known, to the prosecutor. Petitioner has failed to convince the Court that any inducements were made, or likely to have been made, to Aflague.

Furthermore, the material relevance of this phantom "misleading" evidence is questionable. Given that broad definitions of "materiality" as presented in *Morris* and *Jackson* were declared erroneous and disapproved[1], the Court refuses to employ either case as the basis for adopting Petitioner's similarly broad application of "misleading" evidence and its subsequent materiality in the present petition.

Testimony by Informant Witness

It is long held that habeas corpus relief is not available to review the credibility of witnesses or to reweigh the evidence supporting the judgment of conviction. (*In re La Due*

[1] "To the extent that California decisions define the materiality of evidence under the Fourteenth Amendment's due process clause more broadly (see, e.g., *People v. Morris*, supra, 46 Cal.3d at p. 30, fn. 14, 249 Cal.Rptr. 119, 756 P.2d 843; see also *In re Jackson* (1992) 3 Cal.4th 578, 595, 11 Cal.Rptr.2d 531, 835 P.2d 371 [declining to reconsider Morris as unnecessary on the record therein]), they are *erroneous and are hereby disapproved.* It is plain that the federal constitutional provision treats as material only such evidence as raises a 'reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different' [Citations] -- that is to say, a probability sufficient to 'undermine[ ] confidence in the outcome' [Citations]. Hence, it is not correct to state, for example, that 'evidence is 'material' which 'tends to influence the trier of fact because of its logical connection with the issue.' " [Citations] (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6, emphasis added.)

(1911) 161 Cal. 632, 635). Absent any proof or convincing argument, Petitioner bases his claims on the supposition that Aflague, who may have been involved in a shoplifting incident, would only have testified against Quezada had there been some form of a pre-existing immunity arrangement with the state. Petitioner assumes, but does not prove, that because an immunity agreement existed in a prior unrelated case involving Aflague, that a similar arrangement must also have existed in the present case. "A witness's reduced sentence, without 'more specific proof of a deal,' has little probative value of the witness's state of mind or improper motive. [Citations.] [S]ubsequent, favorable treatment of informant's sentence [is] insufficient to show 'informant was motivated to inform by prosecutorial promises of leniency.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 348.)

In his attempt to undermine Aflague's testimony, Petitioner offers broad attacks on informant credibility. Petitioner asks the Court to take judicial notice of the 1989-1990 report of the Los Angeles County Grand Jury, regarding jailhouse informants and the criminal justice system. This report describes activities which took place nearly nine years prior to Aflague's conversations with investigating detectives. In addition, Petitioner infers that Aflague's informant activities necessarily place him in the same suspicious category as jailhouse informants. Courts have denied previous habeas petitions which fielded similar unsubstantiated claims against witness informants. (*People v. Wilson, supra*, 36 Cal.4th at p. 347.) "We have consistently rejected claims that informant testimony must be excluded because it is 'inherently unreliable.'" (*Id.* citing *People v. Ramos* (1997) 15 Cal.4th 1133, 1165.)

Among the many violations alleged by Petitioner, he agues that Aflague's testimony violated Petitioner's rights to "confrontation and cross-examination." (Petition for Writ of Habeas Corpus, p. 3-4.) This argument lacks merit. As demonstrated by the record, Aflague

was clearly cross-examined on a variety of topics: regarding his activities as an informant; his recollections of conversations held with Jose Quezada; his prior drug-related activities; accusations of shoplifting; and his involvement in the *Eulloqui* and *Padilla* cases. An opportunity to cross-examine the witness moots Petitioner's confrontation violation claim. (*People v. Wilson, supra*, 36 Cal.4th at p. 347; *see generally People v. Jenkins* (2000) 22 Cal.4th 900, 950.) It is clear from the record that trial attorneys were fully aware of Aflague's past activities, and aggressively attacked his credibility. Ultimately, "it was up to the jury as trier of fact to determine what weight to assign each person's testimony and to resolve any conflicts in testimony." (*People v. Wilson, supra*, 36 Cal.4th at p. 347 [Citation].) "[D]oubts about the credibility of an in-court witness should be left for the jury's resolution. (*People v. Mayfield* (1997) 14 Cal.4th 668, 735.)

Lastly, Petitioner draws unnecessary attention to the testimony of "Mark Mikles." Mr. Mikles is neither a party nor witness to the present case. He is, however, a jailhouse informant involved in other unrelated petitions concerning the reliability of jailhouse informants as discussed by the LA County Grand Jury report, as well as an apparent participant in *In re Jackson*, which addresses issues similar to those argued in the present petition. He has no place in the present petition and only further erodes the Court's faith in the veracity of Petitioner's argument.

Testimony by Hernandez

Beyond bare allegations, Petitioner fails to provide any substantiating evidence of police misconduct in the "evolving identification" of Jose Quezada by Ms. Hernandez. Petitioner fails

to provide any exhibit, evidence or credible argument which would substantiate his allegations. Furthermore, this allegation is untimely.

Conclusion

For the reasons stated above, Petitioner has failed to meet his burden. The Petition for Writ of *Habeas Corpus* is denied.

DATED: 2/21/06

KATHLEEN KENNEDY-POWELL
Judge of the Superior Court

Clerk to give notice.

Appellate Courts Case Information

Supreme Court

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Case Summary
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Briefs
Disposition
Parties and Attorneys
Lower Court

Disposition

PEOPLE v. CLELAND
Division LA
Case Number S117252

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation:
none

Date	Description
08/27/2003	Petitions for review denied

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109 Cal.App.4th 121, 134 Cal.Rptr.2d 479, 03 Cal. Daily Op. Serv. 4439, 03 Cal. Daily Op. Serv. 7873, 2003 Daily Journal D.A.R. 5641

Ordered Not Published Previously published at: 109 Cal.App.4th 121 (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125)

(Cite as: 134 Cal.Rptr.2d 479)

Court of Appeal, Second District, Division 7, California.

The PEOPLE, Plaintiff and Respondent,

v.

Rebecca **CLELAND** et al., Defendants and Appellants.

No. B143757.

May 27, 2003.

Certified for Partial Publication.[FN*]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through VII of the Discussion.

As Modified on Denial of Rehearing June 16, 2003.

Review Denied Aug. 27, 2003.[FN**]

FN** In denying review, the Supreme Court ordered that the opinion be not officially published. (See California Rules of Court—Rules 976 and 977).

Three defendants were convicted in joint trial by the Superior Court, Los Angeles County, No. BA 163991, Jacqueline A. Connor, J., of murder and conspiracy to commit murder. Defendants appealed. The Court of Appeal, Perluss, P.J., held that: (1) anti-nullification instruction did not deprive defendants of fair trial; (2) police officer's post-arrest inquiry as to whether defendant knew other person placed in back seat of police cruiser constituted interrogation, for *Miranda* purposes; (3) prosecutor's comments that defendant's and co-defendant's post-arrest silence while together in back seat of police cruiser constituted affirmative evidence of guilt violated right to remain silent and against self incrimination; and (4) errors in admitting testimony regarding defendant's statement that he did not know other person in back seat of police car and in prosecutor's comments on post-arrest silence were not harmless.

Affirmed in part; reversed and remanded in part.

***481** Peter Gold, under appointment by the Court of Appeal, San Francisco, for Defendant and Appellant Rebecca Cleland.

***482** Colleen M. Rohan, under appointment by the Court of Appeal, for Defendant and Appellant Jose J. Quesada.

Peter A. Leeming, under appointment by the Court of Appeal, Santa Cruz, for Defendant and Appellant Alvaro Quesada.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

PERLUSS, P.J.

A jury convicted two brothers, Alvaro Quesada (A. Quesada) and Jose J. Quesada (J. Quesada), and their cousin Rebecca Cleland of conspiring to murder and murdering (with special circumstances) Rebecca Cleland's husband, Bruce Cleland. During trial, over defense counsel's objection, the prosecutor introduced evidence of an incriminating statement made by Jose Quesada in response to police questioning following his arrest but prior to being advised of his right to remain silent and to the presence of an attorney. During the People's case-in-chief, the prosecutor also introduced evidence of J. Quesada's and Rebecca Cleland's postarrest silence and argued to the jury their silence constituted affirmative evidence of guilt. Because these actions violated J. Quesada's and Rebecca Cleland's Fifth Amendment rights, we reverse their convictions and remand for a new trial. We affirm the conviction of A. Quesada.

FACTUAL AND PROCEDURAL BACKGROUND

109 Cal.App.4th 121, 134 Cal.Rptr.2d 479, 03 Cal. Daily Op. Serv. 4439, 03 Cal. Daily Op. Serv. 7873, 2003 Daily Journal D.A.R. 5641
Ordered Not Published Previously published at: 109 Cal.App.4th 121 (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125)
(Cite as: 134 Cal.Rptr.2d 479)

Bruce Cleland, a shy and frugal bachelor, worked as a software engineer for TRW, earning a substantial salary. He had not dated much until he met Rebecca Quesada Salcedo at a swap meet in late 1995. After the two began dating, Bruce Cleland became more outgoing.

While they were dating, Bruce Cleland showered Rebecca Salcedo with gifts including cars, trips, cosmetic surgery, clothes, a boat, furniture and a diamond ring. Salcedo told her friends Bruce Cleland was "pretty well off" and "made good money." She disclosed her plan to marry Bruce Cleland, have a child, and then divorce him so she could collect child support and be "set for life." Prior to their marriage Salcedo used Bruce Cleland's credit cards, without his knowledge, to pay for furniture and breast augmentation surgery.

Bruce Cleland and Rebecca Salcedo were married in October 1996 in a secret civil ceremony. Although a large church wedding was already planned for January 1997, Salcedo insisted the two be married before purchasing a house. After the civil marriage Bruce Cleland bought a large home in Whittier. Rebecca Cleland, as she became known, moved into the house alone; and Bruce Cleland moved in with his parents until the January 1997 church wedding. Rebecca Cleland, who was having sexual relationships with several other people at the time, required Bruce Cleland to phone before visiting the Whittier house.

Both before and after the church wedding, Cleland [FN1] told friends and acquaintances she did not love Bruce Cleland, did not want to marry him, was unhappy with his sexual performance, had married him for his money and planned to divorce him ***483** quickly to obtain financial security. She also asked her sister, Lorraine Salcedo, to help her find someone to kill Bruce and make it look like an accident.

FN1. Rebecca Cleland will hereafter be referred to as "Cleland." Her late husband will be identified as "Bruce Cleland."

Bruce Cleland moved back to his parents' home just three months later. A. Quesada [FN2] moved into the Whittier house after Bruce Cleland moved back to his parents' home. Cleland and A. Quesada were seen to be "very affectionate towards one another" and "always hugging and kissing." Cleland also resumed a sexual relationship with Steven Rivera, a male stripper and former boyfriend.

FN2. Alvaro and Jose Quesada, as well as the other parties, disagree on the proper spelling of the brothers' last name. In conformity with the information and abstract of judgment, we use "Quesada" instead of "Quezada."

In April 1997 Cleland consulted with a divorce attorney and presented Bruce Cleland with a draft separation agreement that would allow her to continue living in the Whittier house and would require Bruce Cleland to pay the mortgage and give Cleland spending money. When Bruce Cleland refused to sign the agreement, Cleland threatened to retaliate by claiming he had molested her young son. Bruce Cleland contacted a divorce attorney of his own, who opined that if the marriage were dissolved, Cleland would not be entitled to a sizeable property settlement or substantial spousal support.

Notwithstanding all these difficulties, Bruce Cleland apparently wanted his marriage to succeed. On July 25, 1997 he told his parents he was going to meet with Cleland to try and work out their differences. The two had dinner together that evening. During dinner, Cleland called A. Quesada or his father Arturo Quesada several times on the restaurant's pay telephone and her cellular telephone. The couple then went to Arturo Quesada's house for drinks. When they left Arturo Quesada's home at about 1:00 a.m., Cleland was driving.

Telephone records introduced at trial indicated that A. Quesada telephoned Arturo Quesada's house several times between 12:35 a.m. and 12:49 a.m. Cleland phoned A. Quesada several times between 1:00 a.m. and 1:01 a.m. on her cellular telephone.

Some of these calls placed A. Quesada and his cellular telephone close to the location where Bruce Cleland was killed.

Cleland subsequently reported to the police that, shortly after leaving Arturo Quesada's house, she noticed a warning light on the dashboard indicating the rear hatch was open. She stopped near the entrance to the Interstate 5 freeway, got out of the car to shut the hatch and was struck on the back of the head and knocked to the ground. Residents of nearby houses heard gunshots, saw a man running away from the scene and heard a car door slam and a car speed away from the area. A passing taxi driver summoned emergency personnel, who arrived within minutes of the shooting and found Bruce Cleland face-down in a nearby driveway, dead from multiple gunshot wounds.

When the police arrived, Cleland's car engine was still running. Cleland's keys, purse, cellular telephone and jewelry were on the front seat. Cleland told police her diamond ring was missing. She identified Bruce Cleland as her husband, but did not attempt to approach his body or ask about his condition. She was taken to the police station, where her demeanor was described as “relaxed, lackadaisical, uninterested.”

After Bruce Cleland's death, Cleland told a friend she would support herself from Bruce Cleland's life insurance policies. She quickly retained counsel and set about obtaining the proceeds from Bruce ***484** Cleland's basic life insurance policy from TRW, which would pay a sum equal to half of Bruce Cleland's annual salary, a TRW optional accidental death policy for $517,000; a $25,000 accidental death policy; a mortgage life insurance policy from Minnesota Life Insurance Company, which would pay the balance on the Whittier house in the event of Bruce Cleland's death; and the $196,000 proceeds of Bruce Cleland's TRW stock savings plan. After the murder, A. Quesada continued to live with Cleland at the Whittier house.

Cleland, A. Quesada and J. Quesada were ultimately arrested and charged with conspiracy to commit murder and first degree murder, with special allegations the murder was committed for financial gain and while lying in wait. After a jury trial, all three defendants were convicted on both counts; and the jury found the special circumstances allegations to be true. New trial motions by Cleland and A. Quesada were denied. All three defendants were sentenced to life in prison without the possibility of parole.

CONTENTIONS

Cleland contends that her Fifth Amendment privilege against self incrimination was violated by the use of her postarrest silence as affirmative evidence of guilt and by the prosecutor's comments on her silence during closing argument and that the prosecutor also impermissibly commented on the exercise of her Sixth Amendment right to counsel. J. Quesada contends his Fifth Amendment rights were violated by admission of a postarrest, pre-*Miranda* incriminating statement and by the use of his postarrest silence and the prosecutor's comments on that silence. A. Quesada contends there was insufficient evidence to support his convictions, that the trial court improperly excluded an exculpatory statement made by Cleland and that he was denied the effective assistance of counsel.[FN3]

FN3. All three appellants also contend the trial court improperly instructed the jury with CALJIC No. 17.41.1, the “anti-nullification” instruction. The contention this instruction deprives a defendant of the right to a fair trial and to due process of law was rejected in *People v. Engelman* (2002) 28 Cal.4th 436, 121 Cal.Rptr.2d 862, 49 P.3d 209, in which the Supreme Court held CALJIC No. 17.41.1 does not infringe upon a defendant's federal or state constitutional right to trial by jury or state constitutional right to a unanimous verdict. However, the challenged instruction may not be given at the retrial of Cleland and J. Quesada. (*Id.* at p. 449, 121

Cal.Rptr.2d 862, 49 P.3d 209 [directing that instruction not be given in trial conducted in the future because it creates an unnecessary and inadvisable risk to the proper function of jury deliberations].)

It is unnecessary for us to consider several additional claims of trial error raised by Cleland and J. Quesada in light of our decision to remand the case as to them for a new trial.

DISCUSSION

I. *The Prosecutor's Comments on Cleland's and J. Quesada's Postarrest Silence and Use of J. Quesada's Postarrest Statement as Evidence of Guilt Violated Their Constitutional Privilege Against Self–Incrimination*

On February 17, 1998 Los Angeles Police Department homicide detective Rick Peterson arrested Cleland at her home, put her in his police car and drove to a parking lot near the Interstate 605 freeway where he waited for his partner Detective Thomas Herman to deliver J. Quesada, who had been separately arrested by Herman. After Herman arrived with J. Quesada, the detectives moved J. Quesada to Peterson's car, which was equipped with an activated, hidden recording device. The detectives then left Cleland and J. ***485** Quesada alone in the car for approximately 15 minutes. As Peterson explained, "We did it to see what the topic of discussion would be if [we] put them together in a police vehicle." However, other than an initial greeting by J. Quesada, neither defendant spoke to the other during that time.[FN4]

FN4. The tape recording was not played at trial. Peterson was permitted to testify as to the contents of the recording in apparent violation of Evidence Code section 1523, which provides that oral testimony generally is not admissible to prove the content of a "writing," including a tape recording. Because no defendant raised this objection at trial, it has been waived. (See *People v. Green* (1980) 27 Cal.3d 1, 27, 164 Cal.Rptr. 1, 609 P.2d 468.)

Following the silent reunion in Peterson's car, Herman returned J. Quesada to his police car and drove him to the Hollenbeck division police station. After they arrived at the station, Herman asked J. Quesada to identify the person with whom he had been left in the police car. Herman initially testified J. Quesada replied to his question by stating "he didn't know who it was." He later testified J. Quesada answered the question, " 'I've never seen her before.' "[FN5]

FN5. When asked the same question by Herman, Cleland replied " 'My cousin, Joe.' "

J. Quesada objected to the introduction of this evidence on the ground it violated his "right to remain silent." The trial court overruled the objection and subsequently denied a new trial motion brought by J. Quesada on the same ground.

A. *Cleland and J. Quesada Have Not Waived Their Constitutional Claim*

The People erroneously contend Cleland and J. Quesada waived their constitutional claim by failing to raise it at trial. J. Quesada unsuccessfully objected at a sidebar conference to this testimony before it was admitted. His objection was sufficient to give the trial court the opportunity to correct or avoid any error and thus preserved the issue for appeal. (*People v. Green, supra,* 27 Cal.3d at p. 27, 164 Cal.Rptr. 1, 609 P.2d 468 [purpose of rule requiring timely objection is to give trial court the opportunity to correct the error].)[FN6] In light of the trial court's ruling on J. Quesada's objection to the testimony, any objection by Cleland would have been futile. Accordingly, a separate objection was not required. (*People v. Chavez, supra,* 26 Cal.3d at p. 350, fn. 5, 161 Cal.Rptr. 762, 605 P.2d 401 [objection not required where it would have been futile]; *People v. Roberto v., supra,* 93 Cal.App.4th at p. 1365, fn. 8, 113 Cal.Rptr.2d 804 [argument or objection not required to preserve point when it would have been futile].)

FN6. The People assert J. Quesada objected only to the use of his response to Detective Herman's question about the identity of the other suspect in custody and not to testimony regarding his postarrest silence in the police car. We disagree with the People's reading of the record. Even if the People were correct, however, in light of the trial court's erroneous ruling permitting testimony regarding his pre- *Miranda* statement, it plainly would have been futile for J. Quesada to object to use of his postarrest silence to establish his guilt. Accordingly no objection was required to preserve this point for appeal. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5, 161 Cal.Rptr. 762, 605 P.2d 401; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8, 113 Cal.Rptr.2d 804.)

B. *The Use of J. Quesada's Postarrest, Pre–Miranda Statement to Police Violated His Privilege Against Self–Incrimination*

Conceding the record does not reflect that J. Quesada had been advised of his right to remain silent, to the presence of an attorney and, if indigent, to appointed***486** counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]) prior to being asked whether he recognized the person he had been with in the patrol car, the People necessarily assume for purposes of this appeal, as do we, that no such advisements had been given. (*Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.) They also concede the *Miranda* admonitions must be given and a suspect in custody, as was J. Quesada, must knowingly and intelligently waive those rights before being subjected to either express questioning or its "functional equivalent." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300–301, 100 S.Ct. 1682, 64 L.Ed.2d 297; *People v. Ray* (1996) 13 Cal.4th 313, 336, 52 Cal.Rptr.2d 296, 914 P.2d 846.) " 'Interrogation' consists of express questioning, or words or actions on the part of the police that 'are reasonably likely to elicit an incriminating response from the suspect.' [Citations.] 'The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 993, 108 Cal.Rptr.2d 291, 25 P.3d 519.)

Relying on *U.S. v. Guiterrez* (7th Cir.1996) 92 F.3d 468, the People contend the question to J. Quesada was merely a "request for identification information" and not reasonably likely to elicit an incriminating response. In *Guiterrez* a suspect who had just been arrested and not yet advised of his *Miranda* rights was asked if he could identify other people on the premises. He identified several individuals and made other, incriminating statements. (*Id.* at pp. 470–472.) The Seventh Circuit allowed use of the statements at trial, holding that police officers may properly ask preliminary questions concerning the suspect's identity or the identity of others before giving *Miranda* warnings. (*Id.* at p. 471.)

The rule articulated in *U.S. v. Guiterrez, supra,* 92 F.3d 468 is consistent with governing California law: "Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response. [Citations.]" (*People v. Clark* (1993) 5 Cal.4th 950, 985, 22 Cal.Rptr.2d 689, 857 P.2d 1099; *People v. Clair* (1992) 2 Cal.4th 629, 679–680, 7 Cal.Rptr.2d 564, 828 P.2d 705 ["interrogation" does not extend to "inquiries" limited to identifying a person found under suspicious circumstances or near the scene of a recent crime]; see *People v. Ray, supra,* 13 Cal.4th at p. 338, 52 Cal.Rptr.2d 296, 914 P.2d 846 ["not all questioning of a person in custody constitutes interrogation under *Miranda* "]; *People v. Herbst* (1986) 186 Cal.App.3d 793, 798–800, 233 Cal.Rptr. 123 [answers to routine booking questions need not be preceded by *Miranda* warnings to be admissible].) In the present case, however, the police were well aware of Cleland's identity and her relationship to J. Quesada at the time they ques-

tioned J. Quesada. Asking him to identify Cleland had no legitimate purpose; it was simply a technique intended to elicit an incriminating statement. Such questioning was improper in the absence of admonitions under *Miranda*. (*People v. Cunningham, supra,* 25 Cal.4th at p. 993, 108 Cal.Rptr.2d 291, 25 P.3d 519; see *People v. Sims* (1993) 5 Cal.4th 405, 443–444, 20 Cal.Rptr.2d 537, 853 P.2d 992 [where the defendant asked about extradition and officer instead responded by talking about the crime, the officer's questions served no legitimate purpose and were instead a technique of persuasion likely to induce the defendant to incriminate himself].) Accordingly, it was error to admit J. Quesada's response into evidence. As we explain in section D, below, that error was not harmless beyond a reasonable doubt. (*Cunningham*, at p. 994, 108 Cal.Rptr.2d 291, 25 P.3d 519; ***487***Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

C. *The Trial Court Erred in Admitting Evidence of Cleland's and J. Quesada's Postarrest Silence, and the Prosecutor Committed Misconduct by Arguing that Silence Was Evidence of Guilt*

Police officers may monitor conversations in a police car between suspects in an effort to obtain incriminating statements, as Detectives Peterson and Herman attempted to do in this case. (*People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn. 14, 119 Cal.Rptr.2d 360, 45 P.3d 296; *Arizona v. Mauro* (1987) 481 U.S. 520, 529, 107 S.Ct. 1931, 95 L.Ed.2d 458 ["Officers do not interrogate a suspect simply by hoping that he will incriminate himself."].) "When there is *custody* but not *interrogation Miranda* does not apply. [¶] When appellant and Daniels conversed in the back of the police car, secretly being recorded, there was *custody* but no *interrogation.* " (*People v. Harmon* (1992) 7 Cal.App.4th 845, 853, 9 Cal.Rptr.2d 265; see also *People v. Grant* (1988) 45 Cal.3d 829, 842, 248 Cal.Rptr. 444, 755 P.2d 894 ["Transportation of a prisoner by car, listening for voluntary incriminating remarks, and custodial restraint of potentially dangerous individuals are not inherently suspect police activities."]; *People v. Crowson* (1983) 33 Cal.3d 623, 628–630, 190 Cal.Rptr. 165, 660 P.2d 389.) Thus, it would have been constitutionally permissible for the People to introduce evidence of any postarrest statements made by Cleland or J. Quesada when they were together in Peterson's police car, whether or not they had been advised of their *Miranda* rights.

In addition, it would have been permissible for the People to cross-examine Cleland and J. Quesada regarding their postarrest, pre- *Miranda* silence to impeach them if they had elected to testify on their own behalf at trial: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings,[FN7] we do not believe that it violates due process of law for a State to permit *cross-examination* as to postarrest silence *when a defendant chooses to take the stand.*" (*Fletcher v. Weir* (1982) 455 U.S. 603, 607, 102 S.Ct. 1309, 71 L.Ed.2d 490, italics added; *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842, 13 Cal.Rptr.2d 703; see *People v. Redmond* (1981) 29 Cal.3d 904, 910–911, 176 Cal.Rptr. 780, 633 P.2d 976 ["When a defendant elects to testify in his own defense a comment on his prior muteness does not necessarily violate his privilege against self-incrimination."].)

> FN7. In *Doyle v. Ohio* (1976) 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 the Supreme Court found an implied assurance in the warnings given pursuant to *Miranda* that silence will carry no penalty and stated it "would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Id.* at p. 618, 96 S.Ct. 2240.)

Use of Cleland's and J. Quesada's postarrest silence as affirmative evidence to establish guilt during the prosecution's case-in-chief, rather than as impeachment evidence, however, stands on a different constitutional footing. (See *Harris v. New York* (1971) 401 U.S. 222, 224, 226, 91 S.Ct. 643, 28 L.Ed.2d 1 [statements that are inadmissible as af-

firmative evidence because of a failure to comply with *Miranda* can nevertheless be used for impeachment purposes to attack the credibility of a defendant's trial testimony as long as the statements were not "coerced" or "involuntary"]; *Oregon v. Hass* (1975) 420 U.S. 714, 722, 95 S.Ct. 1215, 43 L.Ed.2d 570 [statement taken after police fail to honor suspect's invocation of the right to counsel during interrogation is admissible for impeachment ***488** purposes]; see also *People v. Peevy* (1998) 17 Cal.4th 1184, 1193–1195, 1202, 73 Cal.Rptr.2d 865, 953 P.2d 1212 [explaining balance being struck in *Harris* and its progeny between exposing defendants who commit perjury at trial and safeguarding a suspect's privilege against self-incrimination].)

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself...." [FN8] Although a defendant who volunteers an admission or statement before questioning or who testifies on his or her own behalf at trial may be held to have waived the protection of that right, the defendant who stands silent cannot. To allow affirmative evidence regarding such silence in the prosecution's case-in-chief, together with argument that such silence equates with guilt, impermissibly burdens the privilege against self-incrimination. (*Griffin v. California* (1965) 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 ["the Fifth Amendment ... forbids ... comment by the prosecution on the accused's silence ...."]; see *Miranda v. Arizona*, *supra*, 384 U.S. at p. 468, fn. 37, 86 S.Ct. 1602["[t]he prosecution may not ... use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation" when he was "under police custodial interrogation"].)

> FN8. The Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination against the states with "the same standards" as in a federal proceeding. (*Malloy v. Hogan* (1964) 378 U.S. 1, 11, 84 S.Ct. 1489, 12 L.Ed.2d 653.) Following the adoption of California Constitution, article I, section 28, subdivision (d), statements (or silence) obtained in violation of a defendant's constitutional privilege against self-incrimination may not be excluded from evidence unless such exclusion is compelled by federal law. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 993, 108 Cal.Rptr.2d 291, 25 P.3d 519; *People v. May* (1988) 44 Cal.3d 309, 316, 243 Cal.Rptr. 369, 748 P.2d 307.)

Although *Griffin* itself concerned the prosecution's comment on defendant's failure to testify at trial and did not expressly determine the propriety of prosecutorial comment on a defendant's pretrial silence, the holding of *Griffin* has been extended to " 'either direct or indirect comment upon the failure of the defendant to take the witness stand....' " (*People v. Hovey* (1988) 44 Cal.3d 543, 572, 244 Cal.Rptr. 121, 749 P.2d 776.) "Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 670, 106 Cal.Rptr.2d 629, 22 P.3d 392.)

"Prosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify, and which implies that the jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional rights. [Citation.] ... [¶] California decisions reach the same result. In *People v. Vargas* (1973) 9 Cal.3d 470 [108 Cal.Rptr. 15, 509 P.2d 959], the prosecutor commented that 'there is no denial at all that they [defendants] were there'; we held that comment improperly reflected on defendants' failure to testify. [Citation.] *In People v. Medina* (1974) 41 Cal.App.3d 438 [116 Cal.Rptr. 133], the prosecutor said the testimony of his witnesses

was 'unrefuted'; the Court of Appeal found *Griffin* error because 'the defendants, who were the only ones who could have refuted it, did not take the stand.' [Citations, fn. ***489** omitted.]" (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757, 175 Cal.Rptr. 738, 631 P.2d 446.)

We need not decide in this case whether any use of postarrest, pre- *Miranda* silence as affirmative evidence of guilt necessarily violates a defendant's Fifth Amendment rights, even if the prosecutor has not drawn attention to the defendant's failure to testify at trial, although we note that several federal courts of appeals have reached that result. (See, e.g., *U.S. v. Whitehead* (9th Cir.2000) 200 F.3d 634, 638 [fact of silence in the face of arrest without reference to *Miranda* warnings could not be used as substantive evidence of guilt, because that would " 'act[ ] as an impermissible penalty on the exercise of the ... right to remain silent.' "]; *U.S. v. Moore* (D.C.Cir.1997) 104 F.3d 377, 384–389 [government may not affirmatively use postarrest silence as evidence of guilt, even where silence preceded *Miranda* warnings].) In the present case there can be no doubt the prosecutor's emphasis on Cleland's and J. Quesada's 15 minutes of silence during closing argument impermissibly drew attention to their decision not to testify at trial to explain their conduct in the police car or otherwise to establish their innocence.[FN9]

FN9. Neither Cleland nor J. Quesada objected to the prosecutor's remarks or requested an admonition from the trial court to cure the potential harm caused by those comments, actions that are normally necessary to preserve this issue for appeal. (*People v. Lewis, supra,* 25 Cal.4th at p. 670, 106 Cal.Rptr.2d 629, 22 P.3d 392.) In light of the trial court's earlier ruling permitting introduction of the evidence of Cleland's and J. Quesada's postarrest silence, however, an objection would likely have been futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159, 51 Cal.Rptr.2d 770, 913 P.2d 980 [failure to object and request an admonition waives a misconduct claim on appeal unless an objection would have been futile or an admonition ineffective].)

Both Cleland and J. Quesada also argue that, if objections to the prosecutor's argument and a request for an admonition were required, their counsels' omissions deprived them of the effective assistance of counsel. We agree. Failure to preserve the claim of *Griffin* error in this case would fall below an objective standard of reasonableness and, as explained in section D, below, there is a reasonable probability that, but for counsels' deficient performance (assuming it was deficient), the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Williams* (1997) 16 Cal.4th 153, 215, 66 Cal.Rptr.2d 123, 940 P.2d 710.) Furthermore, the record demonstrates there could have been no rational tactical purpose for counsels' omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442, 48 Cal.Rptr.2d 525, 907 P.2d 373.)

The prosecutor argued, "Now, we also have Defendant Jose Que[s]ada's behavior when he was arrested on February 17, 1998. Remember the testimony. He is put in the back seat of a police car with his cousin, Defendant Rebecca Cleland. And what do we have? Absolute silence. We have, 'How are you doing?' And then that's it. For 15 minutes, not another word is spoken. No small talk. Nothing. Why not?

"Now, Defendant Jose Que[s]ada tries to claim, gosh, I didn't know it was my cousin, I had never seen her before. Nonsense. Of course he knows it's his cousin. And even if he didn't, you are sitting in the back of a police car with somebody, you are not going to say a word to them? And defendant Rebecca Cleland admits, she knows this is her cousin

sitting in the car with her. She doesn't say a word either. Nothing. 15 minutes of silence. Why? Because they are afraid the police might be listening in and they don't want to say anything.

"Think about it. You have been arrested for something. You don't have any idea ***490** what you are doing there. You are in the back seat of a police car with your cousin and you just kind of sit there for 15 minutes? Nonsense.

"Ladies and gentlemen, that silence speaks volumes because what really happened? Defendant Rebecca Cleland, defendant Jose Que[s]ada, and defendant Alvaro Que[s]ada had set up the murder of Bruce. They thought they had gotten away with it. All of a sudden, defendant Jose Que[s]ada and defendant Rebecca Cleland are sitting in the back of a police car with each other and they are looking at each other but they are not saying a word."

In rebuttal, the prosecutor asserted "there is no innocent explanation" for Cleland's and J. Quesada's silence in the police car. "If they hadn't done anything and they are both sitting in the back of a police car, why didn't defendant Rebecca Cleland turn to her cousin and say, 'what are you doing here?' And why didn't he say, 'what are you doing here?' Why? Because they both knew what they were doing there. That's why there was no conversation. It all fits."

Because Cleland and J. Quesada were the only people who could have answered the question "why" and provide an innocent explanation for their silence in the police car,[FN10] this argument and the evidence upon which it was based constituted *Griffin* error. (*People v. Lewis, supra,* 25 Cal.4th at p. 670, 106 Cal.Rptr.2d 629, 22 P.3d 392; *People v. Bradford* (1997) 15 Cal.4th 1229, 1339, 65 Cal.Rptr.2d 145, 939 P.2d 259 ["a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand"]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1229, 14 Cal.Rptr.2d 702, 842 P.2d 1 ["a prosecutor errs by referring to evidence as 'uncontradicted' when the defendant, who elects not to testify, is the only person who could have refuted it."].)

> FN10. Contrary to the prosecutor's insistence that postarrest silence is tantamount to an admission of guilt, both the United States and California Supreme Courts have recognized that one who is innocent of any crime might well react to the frightening circumstances surrounding arrest by remaining silent. (E.g., *United States v. Hale* (1975) 422 U.S. 171, 177, 95 S.Ct. 2133, 45 L.Ed.2d 99 ["At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision.... [An arrestee] may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention."]; *People v. Redmond, supra,* 29 Cal.3d at p. 919, 176 Cal.Rptr. 780, 633 P.2d 976 ["A defendant's silence is generally 'so ambiguous that it is of little probative force.' [Citation.]"].)

D. *The Federal Constitutional Errors Were Not Harmless beyond a Reasonable Doubt*

When federal constitutional error has been established, we must reverse the conviction unless the People have established, beyond a reasonable doubt, that the error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24, 87 S.Ct. 824 [federal constitutional error requires proof of harmlessness beyond a reasonable doubt]; *People v. Cunningham, supra,* 25 Cal.4th at p. 994, 108 Cal.Rptr.2d 291, 25 P.3d 519 [prejudicial effect of violations of defendant's Fifth

Amendment rights must be evaluated under *Chapman* standard].) "Under this test, the appropriate inquiry is 'not whether, in a trial that occurred without the ***491** error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.' [Citation, italics original.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621, 66 Cal.Rptr.2d 609, 941 P.2d 788.) The People have not met their burden in this case.

The case against Cleland was entirely circumstantial. The prosecutor presented considerable evidence she was a person of bad character who apparently married Bruce Cleland for his money; she had affairs with other people during the time she was involved with Bruce Cleland; she took out insurance policies on his life and forged his signature on at least one policy application; and she attempted to obtain a favorable divorce settlement by threatening to accuse Bruce Cleland of sexually molesting her son. With respect to events on the night of the murder, Cleland arranged a meeting with Bruce Cleland; she had multiple cell phone conversations with A. Quesada, who was apparently near the murder scene, that night; she suffered no discernable physical injuries as a result of the supposed attempted carjacking that led to Bruce Cleland's murder; she was wearing a wedding ring during a post-murder search of her home, even though she claimed her diamond ring had been taken by carjackers; and she paid $500 to A. Quesada after the murder.

Although this evidence surely established Cleland's greed and her poor treatment of Bruce Cleland, none of it tied her directly to the murder. Moreover, Cleland presented evidence to blunt some of the more damaging evidence. For example, she established the life insurance policies were purchased in response to solicitations by the insurance companies rather than as a result of her own initiative. She also presented testimony that A. Quesada was upset on the night of the murder and wanted to talk to her because he had just broken up with his girlfriend. On this record it is not possible to conclude that the finding of guilt as to Cleland " 'was surely unattributable to the error' " in repeatedly commenting on her postarrest silence. (*People v. Quartermain, supra,* 16 Cal.4th at p. 622, 66 Cal.Rptr.2d 609, 941 P.2d 788.)

The evidence against J. Quesada was somewhat stronger, but we must evaluate not only the prejudicial effect of the prosecutor's comments on his postarrest silence but also the erroneous admission of his highly incriminating denial of knowing Cleland. The People's primary witness against J. Quesada was an admitted drug dealer and paid informant who testified J. Quesada approached him and asked for a gun and a driver because he had a "hit he had to take care of." The witness, whose credibility was questionable from the outset, also testified J. Quesada approached him approximately three months before J. Quesada was arrested for the murder. Bruce Cleland was killed on July 26, 1997, and J. Quesada was not arrested until February 17, 1998—almost seven months later. If the conversation took place as described, therefore, it necessarily occurred after Bruce Cleland was killed.

The People's "eyewitness" evidence was similarly uncompelling. Virginia Selva saw the shooter running away from the murder scene, but did not see his face and could not identify J. Quesada as the shooter, either at the time of the incident or when she initially testified at trial. In the middle of the trial, however, she was recalled to testify that J. Quesada's "back looked the same as the [shooter], only not as heavy." Lupe Hernandez did identify J. Quesada as the shooter at trial, but her testimony was impeached by prior statements to the police that she did not see the person's face. Moreover, although she ***492** picked J. Quesada's photograph out of a photographic lineup, she did not identify him as the shooter but merely wrote on the form "Photo 4 is the closest to the person I saw running down the street" after the shooting. Similarly, when presented with a live lineup, Hernandez wrote "From the six I would say number 6 looks most like

the man I saw that night." Hernandez told the police the shooter was a "gang member" and was 18 to 20 years old, 5'5" tall, weighing 150 to 160 pounds. However, the undisputed evidence established that at the time of the shooting J. Quesada was 30 years old, weighed 180 pounds, and wore glasses and had a splint on his arm.

Ilma Lopez testified she received a telephone call on the night of the shooting and that the person asked for "Jose Quesada." Evidence was presented that the phone call was made by Cleland from the restaurant where she was having dinner with Bruce Cleland. However, Lopez's testimony was tainted by the fact that the police reminded her of both the date of the call and the last name of the person for whom the caller asked.

J. Quesada presented evidence that he fractured his right wrist on May 25, 1997, and wore a cast for six weeks thereafter and was in a splint for some time after that. He presented medical evidence that as of October 24, 1997—some three months after the murder—his wrist was still swollen and painful and had only about 50 percent of normal strength and movement. There was no evidence that J. Quesada ever visited Cleland's home, took money from her, or telephoned her. As with Cleland, on this record it is not possible to conclude that the combined effect of the admission of J. Quesada's statement in violation of his *Miranda* rights and the prosecutor's commission of *Griffin* error did not contribute to the guilty verdicts.

II.-VII.[FN**]

FN** See footnote *, *ante*.

DISPOSITION

The convictions of Rebecca Cleland and Jose Quesada are reversed, and the matter is remanded for retrial. The conviction of Alvaro Quesada is affirmed.

We concur: JOHNSON and MU NOZ (AURELIO), JJ.[FN***]

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

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