No. _____

IN THE

Supreme Court of the United States

LEVAR BROWN

Petitioner,

v.

KELLY SANTOS,

Respondent.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
(Pet. App. A - E)

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NOT FOR PUBLICATION

FILED

FEB 19 2026

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEVAR BROWN, Petitioner-Appellant, v. CHARLES SCHUYLER, Warden, Respondent-Appellee.	No. 23-55536 D.C. No. 2:21-cv-03355-VAP-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Argued and Submitted February 10, 2026
Pasadena, California

Before: OWENS, VANDYKE, and H.A. THOMAS, Circuit Judges.

California state prisoner Levar Brown appeals from the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his 2015 conviction for first-degree murder. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. As the parties are familiar with the facts, we do not recount them here. We affirm.

We do not decide whether the California Court of Appeal ("CCA") erred in

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

rejecting Brown's third-party culpability evidence under 28 U.S.C. §§ 2254(d)(1) and 2254(d)(2), as any error was harmless. Brown is "not entitled to habeas relief based on trial error unless [he] can establish that it resulted in actual prejudice." *Bradford v. Paramo*, 100 F.4th 1088, 1101 (9th Cir. 2024) (alteration in original) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). This means that the constitutional error must have a "substantial and injurious effect or influence in determining the jury's verdict" for the court to grant habeas relief. *Brecht*, 507 U.S. at 637 (citation omitted).

Given the prosecution's direct evidence incriminating Brown and the relatively weak third-party evidence exculpating Brown, any error arising from excluding the third-party evidence fails to meet *Brecht*'s prejudice standard. Here, the prosecution presented "direct evidence incriminating" Brown, including eyewitness testimony, physical evidence, and DNA evidence. *Bradford*, 11 F.4th at 1103. Compared to Brown's proposed exculpatory evidence, it cannot be said that "[t]he proffered third-party culpability evidence was particularly powerful." *Cf. id.* (finding prejudice given the prosecution's lack of direct evidence incriminating the defendant); *Lunbery v. Hornbeak*, 605 F.3d 754, 759, 762 (9th Cir. 2010) (finding prejudice where the prosecution's "sole significant evidence against [the defendant] was her confession").

Accordingly, even if the CCA erred in excluding the third-party evidence,

such error was harmless under *Brecht*. And given this harmlessness, we need not determine the equitable tolling issue.

AFFIRMED.[1]

[1] We grant Brown's motion for judicial notice. **Dkt. 27.**

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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Levar Brown,

Plaintiff,

v.

Michael Martel,

Defendant.

Case No. 2:21-cv-03355-VAP-JCx

Order DENYING Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 1) and DENYING a Certificate of Appealability

On April 19, 2021, Petitioner Levar Brown ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). (Doc. No. 1.) Respondent Trent Allen[1] ("Respondent") filed an Answer ("Answer") on August 15, 2022. (Doc. No. 26.) Petitioner filed a Traverse ("Traverse") on September 2, 2022. (Doc. No. 28.)

I. BACKGROUND

After two mistrials, one on account of a hung jury,[2] Petitioner was convicted in a third trial in the Los Angeles Superior Court for the 2010 murder of Claudio Johnson ("Claudio"). (Doc. No. 27-18 at 9 n.3.) Petitioner challenges his conviction on the ground that the trial court violated

[1] Trent Allen is the Acting Warden of Salinas Valley State Prison in Soledad, California, and is Petitioner's current custodian. (Doc. No. 26 at 1 n.1.)

[2] The jury voted 11-1 in favor of conviction. (*See* Doc. No. 27-18 at 9 n.3.)

his constitutional right to present a complete defense by refusing to allow evidence of third-party culpability. (*See* Petition at 5.)

A. Evidence Presented at Trial[3]

At trial, Claudio's twin brother Claudious Johnson ("Claudious") testified that on the morning of May 30, 2010, he witnessed a gunman wearing a gray hooded sweatshirt and "a stocking cap with holes cut out to see" pointing a gun at Claudio's head. (*Id.* at 3.) Claudious was on the second-floor porch of the apartment building where he lived, and Claudio and the gunman were outside near an adjacent ground floor parking area. (*Id.* at 2-3.) According to Claudious, the gunman yelled out for Claudious to come downstairs and threatened to shoot Claudio if Claudious did not comply. (*Id.* at 3.) Although Claudious initially started towards the stairs with the intention of helping his brother, he quickly thought better of it, turned around, and ran into his apartment. (*Id.*) It was then that Claudious heard a shot ring out. (*Id.*) Claudious came out of his apartment, saw Claudio lying on the ground, and witnessed the gunman fleeing on foot. (*Id.*) An autopsy subsequently showed that Claudio died from a single gunshot wound to the back of his head. (*Id.* at 5.)

Claudious testified that because the stocking covering the gunman's face was made of sheer fabric, he could identify the gunman, and that he had recently seen the gunman driving an old Cadillac past his apartment

[3] The Court has independently reviewed the state court record. *See Nasby v. McDaniel*, 853 F.3d 1049, 1053 (9th Cir. 2017). Many of the facts set forth below are drawn from the California Court of Appeal's decision on direct review and are consistent with the record. (*See* Doc. No. 27-18.)

building on three separate occasions. (*Id.* at 3.) After the shooting, Claudious identified Petitioner as the gunman in a six-pack photo display. (*Id.* at 6.) At the preliminary hearing, Claudious stated that Petitioner was not the gunman, but at trial, Claudious again asserted that Petitioner was, in fact, the gunman. (*Id.*) Claudious explained that he had been purposefully untruthful at the preliminary hearing because he was angry and had been planning to "[t]ake matters into [his own] hands," but that he later realized it would be wrong to do so. (*Id.* at 6-7.)

On the morning of the shooting, witness F.M. was sitting on her front porch around the corner from the apartment building where Claudious lived. (*Id.* at 3.) She testified that she heard a gunshot, and that around 30 to 40 seconds later, she observed a man in a light gray hoody and a stocking covering his face walk quickly down her street from the direction of the gunshot. (*Id.* at 3-4.) She also stated that she noticed a bulge in the front pocket of the man's hoody. (*Id.* at 4.) The man got into a gray Cadillac parked across the street from F.M.'s house, "put the car in reverse and slammed on the gas pedal," "lost control of the car, because [it] started swerving," and then crashed into a parked Toyota Camry. (*Id.*) A few seconds later, the Cadillac took off. (*Id.*) F.M. then dialed 9-1-1 and told the operator that the Cadillac's license plate was something close to 6LEW16. (*Id.*)

On June 3, a few nights after the shooting, police stopped a gray Cadillac for having a broken tail-light. (*Id.* at 5.) The car was registered to Petitioner, who was driving, and had the plate number 6LEA210. (*Id.*)

Police later gained access to the Cadillac after Petitioner sold it and matched a broken tail-light piece recovered from the crime scene with the Cadillac's damaged tail-light assembly. (*Id.*) When police showed F.M. a photograph of the Cadillac, she identified it as the car she had seen drive away on the morning Claudio was shot. (*Id.*)

In addition to the Cadillac, Petitioner also owned a Land Rover. (*Id.*) On the night of the shooting, police found the key to a Land Rover about ten feet from Claudio's body. (*Id.* at 4-5.) At trial, Petitioner's ex-girlfriend identified the key as belonging to Petitioner. (*Id.* at 6.) She recognized the key because one of the key's buttons had been damaged. (*Id.*) She further testified that Petitioner would never let anyone else drive his Cadillac or Land Rover. (*Id.*)

Police found another key at the scene of the shooting that unlocked the front door of Petitioner's apartment. (*Id.*) They also found a library card and two supermarket rewards cards. (*Id.* at 5.) Single source DNA samples[4] obtained from the keys and the cards matched Petitioner's DNA. (*Id.* at 6.)

Petitioner, for his part, offered the testimony of L.D., one of Claudious's neighbors. (*Id.* at 7.) L.D. stated that on the morning of the shooting, she went to her window and saw a man with his back to her holding a gun to Claudio's head. (*Id.*) She witnessed the gunman firing a

[4] Single source DNA samples are samples with only one genetic contributor.

single shot and running down the street. (*Id.*) According to L.D., she got a glimpse of the gunman's face when he removed the hood from his head and briefly turned around to look at the scene of the shooting. (*Id.*) She admitted that she "didn't get a good look at him really," but also testified that she was "a hundred percent sure" that Petitioner was not the gunman. (*Id.*)

B. Motion in Limine

Prior to the trial, Petitioner had filed a motion in limine seeking to present evidence that Michael Hughley ("Hughley"), also known as "Knockdown," had been the shooter. (*Id.* at 8.) The motion asserted that Hughley was a member of a gang that controlled the neighborhood where the shooting had occurred, that Hughley had been arrested a few months after the shooting in possession of a gun that matched the description Claudious had given the police, *i.e.*, a rusted steel revolver with wooden grips, and that Hughley knew a set of keys had been dropped at the scene despite the fact that this information had not been released to the public. (*Id.*) The motion also claimed, based on police interviews with Claudious and Claudious's sister, that a gang member known as Knockdown and a friend of Knockdown's had been harassing Claudious's family ever since they moved into their apartment, that Knockdown had sexually harassed Claudious's sister verbally, and that on the day before the shooting, Knockdown had threatened Claudio with a gun. (*Id.* at 8-9.) The police interviews also revealed that Claudious had at some points stated that: (1) he did not see the gunman; (2) that he did see the gunman and that the gunman was a gang member known as Knockdown; and (3) that the gunman might have been a friend of Knockdown's. (*Id.* at 9.)

In opposing the motion, the People acknowledged Claudious's inconsistent testimony but noted that Claudious had subsequently identified Petitioner as the gunman in a photo array. (*Id.*) The People also asserted that on August 17, 2010, L.D. stated that Knockdown was not the shooter after being shown a photograph of Knockdown. (*Id.*) L.D. further explained that she had previously seen Knockdown in the neighborhood, and that she thought the shooter was someone who she had seen hanging out with Knockdown. (*Id.* at 8-9.)

The trial court announced that it was inclined to deny Petitioner's motion to introduce third-party culpability evidence because there was no "direct or circumstantial evidence that [Hughley] . . . was physically present at any time close to the shooting." (*Id.* at 10.) In response to this tentative denial, Defense counsel suggested, and the court agreed, that the motion should be held in abeyance, and that Defense counsel could re-raise the motion if developments arose during the trial that might cause the court to change its mind. (*Id.* at 11.) Defense counsel never raised the issue again. (*Id.*)

C. Procedural History and Grounds for Relief

On December 10, 2015, the jury in Los Angeles County Superior Court Case No. BA426270 ("State Case") found Petitioner guilty of first degree murder with a firearm use enhancement. (Doc. No. 27-3 at 108.) On January 14, 2016, the trial court in the State Case sentenced Petitioner to 50 years to life in state prison. (*Id.* at 117-19.)

1. Direct Appeal

Petitioner appealed, and on January 24, 2018, the California Court of Appeal rejected Petitioner's challenge to the trial court's denial of his motion to present third-party culpability evidence but held that Petitioner was entitled to an additional two days of presentence custody credit. (Doc. No. 27-18.) On April 11, 2018, the California Supreme Court denied a petition for review without comment. (Doc. No. 27-20.) Almost one year later, on April 2, 2019, the trial court awarded Petitioner an additional two days of presentence custody credit. (Doc. No. 27-32 at 57-58.)

2. State Habeas Proceedings

On April 2, 2018, Petitioner, proceeding *pro se*, filed a habeas corpus petition in the California Court of Appeal. (Doc. No. 27-21.) On April 12, 2018, the California Court of Appeal denied the petition, stating that "to the extent petitioner claims the trial court erred by refusing to permit him to present evidence of third-party culpability, the contention was raised and rejected in the [direct] appeal." (Doc. No. 27-22.) The court therefore concluded that "petitioner is procedurally barred from raising the contention again." (*Id.*)

On April 25, 2018, Petitioner filed a habeas corpus petition in the California Supreme Court. (Doc. No. 27-23.) On August 8, 2018, the California Supreme Court denied the petition with citations. (Doc. No. 27-24.) On September 4, 2018, Petitioner filed a second habeas corpus petition in the California Supreme Court. (Doc. No. 27-25.) On March 13, 2019, the California Supreme Court again denied the petition with citations.

(Doc. No. 27-27.) On March 19, 2019, Petitioner filed a petition for writ of certiorari in the United States Supreme Court challenging the California Supreme Court's denial of his habeas corpus petition. (Doc. No. 27-28.) The United States Supreme Court denied certiorari on October 7, 2019. (Doc. No. 27-29.)

Soon after filing the petition for writ of certiorari, but before the United States Supreme Court denied the petition, Petitioner on March 22, 2019 filed a third habeas corpus petition in the California Supreme Court. (Doc. No. 27-30.) The California Supreme Court denied the habeas corpus petition with citations on June 19, 2019. (Doc. No. 27-31.)

3. Federal Habeas Proceedings

Petitioner also sought habeas corpus relief in federal court. On January 3, 2018, he filed a habeas corpus petition in this Court. (Doc. No. 27-33.) His second amended petition asserted that: (1) the state trial court violated his constitutional right to present a complete defense by refusing to allow evidence of third-party culpability; and (2) that he received ineffective assistance of counsel at trial. The Court denied the petition without prejudice because Petitioner had not exhausted his ineffective assistance of counsel claim. (Doc. Nos. 27-34, 27-35.) On March 27, 2019, Petitioner filed a second habeas corpus petition in this Court asserting the same claims as before, and the Court again denied the petition because Petitioner had not exhausted his second claim. (Doc. Nos. 27-36, 27-37, 27-38.)

On April 19, 2021, Petitioner filed the present Petition, asserting only that the state trial court erred by refusing to allow him to present evidence of third-party culpability.

II. LEGAL STANDARD

Federal courts may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal courts are required to be "highly deferential" to state court decisions regarding a petitioner's federal claims. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation and internal quotation marks omitted). Accordingly, when a state court has adjudicated a petitioner's federal claim on the merits, federal habeas relief may not be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam). The AEDPA standard is intentionally difficult to meet, *Beaudreaux*, 138 S. Ct. at 2558, and the petitioner has the burden of showing that federal habeas relief is warranted, *Pinholster*, 563 U.S. at 181.

Even if a petitioner shows that the state court erred, either in misapplying clearly established federal law or in making an unreasonable determination of the facts, "a federal court cannot grant relief without first applying . . . the test . . . outlined in *Brecht*." *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022). "Citing the need to afford appropriate respect to final state-court decisions that have already endured direct appeal," the Supreme Court in *Brecht* held that "a state prisoner seeking to challenge his conviction in collateral federal proceedings must show that the error had a 'substantial and injurious effect or influence' on the outcome of his trial." *Id.* at 1519 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). "[U]nder *Brecht* a petitioner may prevail by persuading a federal court that it . . . should harbor 'grave doubt'—not absolute certainty—about whether the trial error affected the verdict's outcome." *Brown*, 142 S. Ct. at 1525 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)).

III. DISCUSSION

A. Substantial and Injurious Effect

In evaluating a state court's adjudication of a petitioner's federal claim, federal courts "look through" an unexplained decision to "the last related state-court decision that . . . provide[s] a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Here, the Court "look[s] through" the California Supreme Court's silent denial of Petitioner's federal claim and considers the California Court of Appeal's reasoned opinion denying the claim on direct review. *See id.*; *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

The California Court of Appeal acknowledged that "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." (Doc. No. 27-18 at 12 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 320 (2006)). It did not, however, decide whether the Constitution permitted the trial court's exclusion of Petitioner's proposed third-party culpability evidence. Instead, the California Court of Appeal determined that any error made by the trial court was harmless under the reasonable probability standard set forth by the California Supreme Court in *People v. Watson*, 46 Cal. 2d 818 (1956). (Doc. No. 27-18 at 14 ("[W]e do not find it reasonably probable that [Petitioner] would have obtained a more favorable result had the third party culpability evidence been admitted.").)

The California Court of Appeal erred in applying the *Watson* standard to dispose of Petitioner's constitutional claim. *Watson* establishes a test for determining whether an error was harmless under state law, and not whether an error was harmless under federal law. *See People v. Ayala*, 24 Cal. 4th 243, 264 (2000). Under Supreme Court precedent, the beneficiary of a constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). It was therefore "an unreasonable application of clearly established federal law for the California Court of Appeal to evaluate [Petitioner's] claim under the less stringent *Watson* standard." *Hall v. Haws*, 861 F.3d 977, 992 (9th Cir. 2017).

Although the California Court of Appeal was required to apply *Chapman*'s beyond a reasonable doubt standard on direct review of the trial court's actions in the State Case, this Court applies the more forgiving *Brecht* standard on collateral review of the California Court of Appeal's judgment. *See Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) ("We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*, *supra*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman*.").

Applying the *Brecht* standard, the Court does not find the exclusion of third-party culpability evidence to have had a substantial and injurious effect on the outcome of Petitioner's trial. As the California Court of Appeal observed, "the evidence that [Petitioner] was the perpetrator was extremely strong." (Doc. No. 27-18 at 13.) Claudious identified Petitioner as the shooter, and this identification was corroborated by: eyewitness testimony that moments after the shooting, a man got into what was almost certainly Petitioner's Cadillac[5] and drove off; the testimony of Petitioner's ex-girlfriend that Petitioner would not allow anyone else to drive his Cadillac; the discovery of Petitioner's apartment key and Land Rover key near the scene of the shooting; and single-source DNA evidence tying Petitioner to the keys and cards dropped at the scene.

[5] Not only did the eyewitness's recollection of the license plate number closely match Petitioner's Cadillac's actual license plate number, the tail-light pieces found at the scene matched the damage to Petitioner's Cadillac's tail-light.

The evidence Petitioner sought to introduce, in comparison, was weak. Claudio's prior statement that the gunman may have been someone known as Knockdown is undermined by his other statement that the gunman may have instead been someone who worked with Knockdown, as well as his subsequent identification of Petitioner as the man who shot his brother. None of the remaining evidence places Knockdown at the scene of the shooting. Indeed, Petitioner's own witness L.D., who had testified that Petitioner was not the shooter, had also stated that Knockdown was not the shooter.

At best, evidence of Hughley's presence in the neighborhood and previous harassment of Claudious's family demonstrate a motive and opportunity for Hughley to shoot Claudio. But such evidence does not by itself raise a reasonable doubt as to Petitioner's guilt. *See People v. Hall*, 41 Cal. 3d 826, 833 (1986) ("[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt.").

Petitioner did seek to introduce other evidence of Hughley's involvement in the crime, including Hughley's possession of a gun that matched an eyewitness description and Hughley's knowledge of the presence of keys at the crime scene, and the Court cannot say with absolute certainly that the evidence, when viewed cumulatively, would not have raised a reasonable doubt in the jury's minds. The *Brecht* standard does not, however, permit the Court to disturb a final state court judgment based on the mere possibility that a jury may have come to a different

conclusion. As the evidence pointing to Hughley as the perpetrator is far weaker than the overwhelming evidence placing Petitioner at the scene of the crime, the Court does not harbor "grave doubts" that the trial court's exclusion of Petitioner's third-party culpability evidence had a "substantial and injurious effect or influence" on the verdict. Accordingly, the Court declines to grant habeas relief for Petitioner's sole claim.

B. Limitation Period

Even if the Petition had merit, it is barred by AEDPA's one-year limitation period as set forth at 28 U.S.C. § 2244(d). As relevant here, § 2244(d)(1)(A) provides that the limitation period shall run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

The trial court sentenced Petitioner on January 14, 2016. (Doc. No. 27-3 at 117-119.) Following a remand from the California Court of Appeal, the trial court awarded Petitioner additional presentence custody credit on April 2, 2019. (Doc. No. 27-32 at 57-58.) The trial court's correction of Petitioner's presentence custody credit changed Petitioner's sentence and resulted in a new judgment. *See Gonzalez v. Sherman*, 873 F.3d 763, 769 (9th Cir. 2017) ("[I]n California, a court's recalculation and alteration of the number of time-served or other similar credits awarded to a petitioner constitutes a new judgment."); *Burton v. Stewart*, 549 U.S. 147, 156 (2007) ("The sentence is the judgment."). As Petitioner did not appeal the April 2,

2019 judgment, the judgment became final—and the limitation period began to run—on June 3, 2019, when the time to file an appeal expired.[6]

Petitioner filed the instant Petition on April 19, 2021, one year and 320 days after his conviction became final. The Petition is therefore untimely unless the limitations period is tolled for at least 320 days.

§ 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2). All but the last of Petitioner's state habeas corpus petitions were filed and denied before the limitations period began to run on June 3, 2019. They therefore have no tolling effect. *See Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008) (holding that a filing that "would otherwise have tolled the running of the [§ 2244(d)] federal limitations period, [but] was denied before that period had started to run, [has] no effect on the timeliness of the ultimate federal filing").

As for the last habeas corpus petition that Petitioner filed in the California Supreme Court, the order denying it cited *In re Clark*, 5 Cal. 4th 750, 767-69 (1993) to state that "courts will not entertain habeas corpus claims that are successive." (Doc. No. 27-31.) Successive petitions are not "properly filed" within the meaning of § 2244(d)(2) and do not toll the

[6] Petitioner had sixty days to appeal. *See* Cal. R. Ct. 8.308(a). Since the sixty-day period ended on June 1, 2019, a Saturday, Petitioner's time to appeal was extended to the next business day on June 3, 2019. *See* Cal. R. Ct. 1.10(a).

limitations period. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) ("For tolling to be applied . . . , the petition cannot be untimely or an improper successive petition."). Petitioner's last state habeas corpus petition therefore also has no tolling effect.[7]

Finally, as § 2244(d)(2) only permits tolling for "State post-conviction or other collateral review," Petitioner's petition for writ of certiorari filed in the United States Supreme Court and his previous federal habeas corpus petitions have no tolling effect. *See Lawrence v. Florida*, 549 U.S. 327, 337 (2007) ("the filing of a petition for certiorari before this Court does not toll the statute of limitations under § 2244(d)(2)"); *Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)").

Accordingly, the Court declines to grant habeas relief for the separate reason that the Petition is untimely.

C. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts states that a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11, Rules Governing 28 U.S.C. § 2254 Cases. A certificate

[7] The California Supreme Court denied Petitioner's last state habeas corpus petition on June 19, 2019. Even if the petition tolled the limitations period, however, it would only have tolled it by only fifteen days, far short of the 320 days needed to render the instant Petition timely.

of authority should issue if Petitioner shows, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Although jurists of reason may find it debatable whether the state trial court's exclusion of third-party culpability evidence denied Petitioner his constitutional right to present a complete defense, the same jurists would not find it debatable that the Petition is untimely under 28 U.S.C. § 2244(d). The Court therefore declines to issue a certificate of appealability.

IV. CONCLUSION

For the reasons stated above, the Court DENIES the Petition and DISMISSES this action with prejudice. To the extent Petitioner requests a certificate of appealability, that request is also DENIED.

IT IS SO ORDERED.

Dated: 5/17/23

Virginia A. Phillips
Senior United States District Judge

Court of Appeal, Second Appellate District, Division Three - No. B269810

S247216

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

LEVAR BROWN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEVAR BROWN,

Defendant and Appellant.

B269810

(Los Angeles County Super. Ct. No. BA426270)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Judge. Affirmed as modified and remanded with directions.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Levar Brown raises contentions of trial and sentencing error following his conviction by jury of first degree murder with a firearm-use enhancement (Pen. Code, §§ 187, 12022.53, subd. (b)–(d)).[1] For the reasons discussed below, the judgment is affirmed as modified and remanded with directions.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Claudious Johnson testified that in May 2010,[2] he lived on the top floor of a two-story apartment building on Figueroa Street in Los Angeles with his twin brother Claudio Johnson, another brother, their mother, and their sister. Claudio and Claudious were 20 years old. The family had just moved into the apartment at the beginning of May.

Around 7:00 a.m., on May 30, Claudious saw Claudio go out the back door of the apartment, which opened onto a porch from which there were stairs leading down to a parking area behind the apartment building. This is where Claudio parked his car. As he usually did each morning, Claudio was going to his car to "get a smoke." Claudious subsequently heard a man, not Claudio, in the backyard repeatedly yelling " 'Where you from?' " and " 'What you got?' " Claudious testified he rushed outside

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

[2] All further date references are to the year 2010 unless otherwise specified.

hoping Claudio was not in trouble. From the porch, Claudious saw Claudio and another man at the edge of the parking area. The man was pointing a gun at Claudio's head.

The gunman was wearing a gray hooded sweatshirt (or "hoody") with the hood pulled over his head. He also wore "a stocking cap with holes cut out to see." This stocking covered the upper part of the gunman's face. Because the stocking was made of a sheer fabric, like pantyhose, Claudious could see the gunman's face through it. Claudious testified that three times recently he had seen the gunman driving an old Cadillac past Claudious's apartment building.

Claudious yelled at the gunman, saying: " 'He don't bang [i.e., asserting that Claudio was not in a gang]. Don't shoot him, he don't bang.' " The man responded by pointing the gun at Claudious and telling him to come downstairs. When Claudious said he was not going to come down, the man said, "If [you] don't I'm gonna kill him." Claudious testified he got mad and initially started toward the stairs with the idea of helping his brother, but then thought better of it and turned around. As he ran back to the door of his apartment, Claudious heard the gunman tell Claudio to "[g]et on his knees," and he saw Claudio comply. Claudious ran back into the apartment to "tell my mom that her son [was] about to get killed." When a shot rang out, Claudious ran back outside. He saw Claudio lying on the ground and the gunman fleeing on foot.

On the day of the shooting, F.M. was living on Flower Street, around the corner from the victim. At about 7:00 a.m. she was sitting on her front porch when she heard a gunshot. Thirty to 40 seconds later, she saw a man walk swiftly down 59th Place and turn onto Flower Street. The man was wearing a light gray

hoody. He had the hood over his head and he had a stocking covering his face. The stocking was a "silver silk silhouette stocking" like a "stocking for your hair." It covered the man's eyes, nose, and mouth, but not his chin. (3RT 1537, 1539-1540.) The man seemed to be coming from the direction of the gunshot. There was a bulge in the front pocket of his hoody.

The man unlocked the driver's side door of a gray Cadillac parked across the street from F.M.'s house, got in, and started the engine. The man "put the car in reverse and slammed on the gas pedal," "lost control of the car, because [it] started swerving," and then crashed into the rear of F.M.'s neighbor's Toyota Camry, which was parked on the street. After a few seconds, the Cadillac drove off. F.M. gave a 9-1-1 operator what she thought was a partial license plate number from the Cadillac: 6LEW16.

Los Angeles Police Department Officer Edward Pernesky and his partner happened to be just blocks away and were the first responders to the shooting scene. Claudious flagged them down and said his brother had been shot. Pernesky found Claudio lying face down in "the parking lot in the alley area to the rear of the [apartment building]." He appeared to have been shot in the back of the head. Pernesky could not find a pulse and Claudio was later pronounced dead at the scene. Claudio's mother and sister were crying hysterically at the foot of the apartment's rear staircase, so Pernesky went over to talk to them. His partner was still interviewing Claudious. Pernesky allowed Claudio's mother to go over to her son's body to say a last goodbye.

While waiting for an ambulance to arrive, Pernesky "canvassed the area" for evidence. He found "two sets of car keys" about ten feet from Claudio's body. One set contained the

key to a Land Rover. The other set had two keys, a Los Angeles Public Library card, a Ralph's supermarket rewards card, and an Albertson's supermarket rewards card. No gun, bullets, or bullet casings were found. A block away on Flower Street, police found the damaged Camry across from F.M.'s house. Pieces of a broken tail-light assembly were lying in the street near the Camry.

Claudio was pronounced dead at 7:14 a.m. The autopsy subsequently showed he had died from a single gunshot wound to the head, the bullet entering the back of his head and exiting his forehead.

A few nights after the shooting, on June 3, police stopped a 2000 gray Cadillac because its left tail-light was not working. The Cadillac's tail-light assembly was broken. The car's license plate number was 6LEA210 and the car was registered to defendant Brown, who was driving. Asked if he was in a gang, Brown said that he was.

On June 27, Brown's Cadillac was towed and impounded after having been left on the street in the Marina Del Rey area for a few weeks. Brown retrieved his car from the tow yard on July 10. In August, a man purchased the Cadillac and sold it to a junkyard. When the car was subsequently recovered by the police, it still had a broken left tail-light. The broken tail-light piece recovered from the crime scene matched the Cadillac's damaged tail-light assembly. When police showed F.M. a photograph of Brown's Cadillac, she identified it as the car she had seen drive away after Claudio was shot.

In addition to the Cadillac, Brown also owned a Land Rover. On July 21, Brown went to a California Highway Patrol office and reported that his Land Rover had been stolen on June 28. Brown explained that after his Land Rover became

disabled on the 10 Freeway, a tow truck arrived, drove his car away, and he never saw it again.

Brown's ex-girlfriend testified Brown had owned a Land Rover and a Cadillac, and that he would not let anyone else drive these cars. She also identified one of the keys recovered from the shooting scene as Brown's Land Rover key, which she recognized because one of the key's buttons had been damaged.

The police discovered that one of the other keys found at the shooting scene unlocked the front door of Brown's apartment. The library and supermarket rewards cards found at the shooting scene were also linked to Brown. "Single source" DNA samples (meaning samples to which there had been only one genetic contributor) obtained from the keys and the cards found at the crime scene were tested against DNA taken from both Brown and Claudio. Claudio was excluded as a contributor, but the DNA profile matched Brown. Based on a statistical calculation, one in 400 quintillion unrelated people (or one in "50 billion Earths") would have been expected to have this profile.

Claudious identified Brown as the gunman in a six-pack photo display and then again at trial. At the preliminary hearing, however, Claudious testified that Brown was not the gunman. At trial, Claudious testified he had been purposefully untruthful at the preliminary hearing because he was angry and had been planning to take matters into his own hands: "I didn't want to tell the truth so [Brown] can get out and I . . . take it on my hands. Take matters into my hands." Claudious testified that after his brother's killing, he and his father started going to a group meeting at their church; Claudious had been going to this meeting twice a week ever since. He explained that, as a result of talking to his father and the people at church, he realized

"tak[ing] matters into [his] own hands" was the wrong thing to do.

2. *Defense evidence.*

L.D. was a neighbor of Claudio's family. On the morning of May 30, she was awakened by somebody yelling, " 'Get on the ground. Get on the ground.' " She went to her window and saw a man with his back to her holding a gun to Claudio's head. She heard Claudious say, " 'Leave my brother alone. My brother don't bang.' " The gunman responded, " 'If you don't come out I'm gonna shoot.' And when [Claudious] slammed the door, that's when the . . . gunshot went off . . . " The gunman was wearing a gray or white hoody.

After firing the single shot, the gunman ran down 59th Place toward Flower Street. When he reached the corner, he removed the hood from his head, turned around, and looked back toward the shooting scene. L.D. testified that this was when she got a look at his face:

"Q. Did you make eye contact with him?

"A. Yes, sir.

"Q. And did you recognize him?

"A. I thought he looked like somebody in the neighborhood, but I'm not for sure."

L.D. testified that this moment was the only time she saw the gunman's face. Because she thought the gunman might have seen her in that moment, L.D. quickly shut her window blinds. Although L.D. admitted that she "didn't get a good look at him really," she also testified that she was "a hundred percent sure" the gunman was not Brown.

3. *Procedural history and trial outcome.*

Following Brown's conviction by jury of first degree murder with an enhancement for personally and intentionally discharging a firearm and causing death during the commission of murder (§§ 187, 12022.53, subd. (d)), he was sentenced to a prison term of 50 years to life.

CONTENTIONS

Brown contends on appeal that (1) the trial court prejudicially erred by denying his motion to present third-party culpability evidence, and (2) his presentence custody credits were miscalculated.

1. *In limine motion regarding third-party culpability evidence.*

Brown filed an in limine motion seeking to present evidence of third-party culpability. Emphasizing the gang aspect of Claudio's shooting, the motion suggested that Michael Hughley, also known as "Knockdown," had been the shooter. The motion asserted Hughley was a member of the 59 Hoover Crips gang, which allegedly controlled the neighborhood where the shooting occurred. The motion further asserted Hughley had been arrested a few months after the shooting in possession of a gun that matched the description Claudious had given police (a rusted steel revolver with wooden grips) and that Hughley knew a set of keys had been dropped at the scene, information allegedly not released to the public. The motion also relied on police interviews with Claudious and his sister during which the following information had been learned: a gang member in the neighborhood they knew as Knockdown, along with a friend of his, had been harassing the family ever since they first moved into the apartment; Knockdown had sexually harassed

Claudious's sister verbally; and on the day before the shooting, Knockdown had threatened Claudio with a gun.

The People acknowledged that, as demonstrated by the police interviews cited in Brown's motion, Claudious had given contradictory identifications of the gunman over the course of time. In his initial police interviews, Claudious inconsistently told detectives that he did not see the gunman; that he did see the gunman, who was a gang member from the neighborhood named Knockdown; and that the gunman might have been a friend of Knockdown's. Claudious subsequently identified Brown as the gunman in a photo array, but testified at the preliminary hearing that Brown was not the gunman. Then, at two subsequent trials (before Judges Rappe and Ohta),[3] Claudious testified Brown had been the gunman. The People also asserted that "[o]n August 17, 2010, [L.D.] was shown a photographic lineup which included a photograph of Knockdown. She specifically stated that Knockdown was NOT the shooter. She told the detectives that Knockdown was someone she had seen in the neighborhood in the past. She further explained that she

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[3] The proceedings leading to Brown's conviction were very convoluted. The records of his prior trial proceedings (which are by no means complete) indicate the following chronology: Initial trial proceedings were held by Judge Rappe and ended in a mistrial in March 2014; a retrial before Judge Egerton was terminated when the People dismissed the proceeding because of a missing witness in July 2014; a further retrial before Judge Ohta ended in a hung jury (which voted 11-1 for conviction); and the current retrial before Judge Clarke took place in 2015.

thought the shooter was an individual who she had seen hanging out with Knockdown."[4]

After noting that it had read the many motion papers filed by each side, the trial court tentatively announced it was inclined to deny Brown's motion to introduce third-party culpability evidence: ". . . I have scoured these facts and looked for direct or circumstantial evidence that the person that the defense proposes as the suspicious third party, Mr. Hughley . . . , was physically present at any time close to the shooting. These facts, as I understand it, include a single actor, basically execution style, having a person kneel down and shooting him in the head. Witnesses have not described more than one actor." "The defense can always argue that some other person perpetrated the offense, and it's mistaken identity, etcetera. But to argue that a specific person is actually the one who did it, and not the defendant, the defense needs to link that other specific person to the perpetration of the crime by either direct or circumstantial evidence, and I found none. [¶] There's abundant information that would make that potential person a suspect, in that he would have motives, or that he was a person who acted in an unkindly way towards the decedent or people close to him. But I saw nothing that would place that third party at the crime scene, or acting in any way that might be called perpetration of the crime."

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[4] As authority for this assertion, the People cited page and line numbers from "transcripts [of police interviews] previously provided to the court by defense as attachments to defendant's Motion to Admit Third Party Evidence." Although the transcripts are not part of our record on appeal, Brown has not challenged the accuracy of the People's factual recitation.

Invited to respond, defense counsel did not dispute the fact that L.D. had told police Knockdown was definitely not the person who shot Claudio. Defense counsel said only, "Well, Your Honor, I was going to suggest to the court that we hold this whole motion in abeyance. Nothing's going to be discussed in opening statement concerning Mr. Hughley or Knockdown, and I don't think —" The court interrupted counsel to say, "[I]t's always open. I think that the ruling I make is based on the evidence I expect. And that doesn't mean that things couldn't change, that something develops during the trial . . . that causes me to change it." Defense counsel concurred with this approach, and never raised the issue again.

2. *Legal principles.*

" 'A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt.' " (*People v. Sandoval* (1992) 4 Cal.4th 155, 176.) The seminal case regarding third party culpability evidence is *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*): "To be admissible, the third-party [culpability] evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's *possible* culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*" (*Id.* at p. 833, italics added.) "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it

is admissible [citation] unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion [citation]." (*Id.* at p. 834.)

"Relevant [third-party culpability] evidence may be excluded under Evidence Code section 352 if it creates a substantial danger of undue consumption of time or of prejudicing, confusing, or misleading the jury. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 578.) As the United States Supreme Court in *Holmes v. South Carolina* (2006) 547 U.S. 319 [126 S.Ct. 1727] (*Holmes*), explained: "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. [Citations.] Plainly referring to rules of this type, we have stated that the Constitution permits judges 'to exclude evidence that . . . poses an undue risk of . . . "confusion of the issues." ' [Citation.] [¶] A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. [Citations.]" (*Id.* at pp. 326–327.)

"We review [a] trial court's ruling [excluding third-party culpability evidence] for abuse of discretion. [Citation.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1242.) If the trial court has erred, that error is tested on appeal under the *Watson* standard. (*Hall, supra*, 41 Cal.3d at p. 836 [citing *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) and stating: "In these circumstances, we conclude it is not reasonably probable that a result more

favorable to defendant would have been reached in the absence of the error."]; accord *People v. Geier* (2007) 41 Cal.4th 555, 582–583, overruled on other grounds by *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527] [even assuming trial court erred by excluding third party culpability evidence, error was harmless under *Watson*].)

3. *Discussion.*

We conclude that, even assuming arguendo the trial court abused its discretion by refusing to admit the proposed third party culpability evidence, any error was clearly harmless. Therefore, we affirm Brown's judgment of conviction.

We agree with Brown that there were various facts pointing to Hughley (whom the police apparently investigated) as a possible suspect. But the evidence that Brown was the perpetrator was extremely strong. There was a significant gang element to the shooting, with the gunman uttering the challenge: "Where you from?," and there was evidence that Brown was a gang member. In addition to Claudious's eyewitness identification, both key rings found at the crime scene contained keys and cards linked to Brown; DNA evidence tied Brown to the keys dropped at the scene and excluded Claudio; a neighbor provided eyewitness testimony that moments after the shooting, a man got into Brown's Cadillac and drove off; Brown's ex-girlfriend testified Brown would not allow anyone else to drive his Cadillac; and the broken tail-light pieces found at the scene matched the damage to Brown's Cadillac's tail-light. Brown's story about the theft of his Land Rover (i.e., that he did not report the theft of his car by a private tow truck driver for three weeks) lacked credibility and suggested he wanted to distance himself from the keys found at the scene.

Additionally, the theory that Hughley was the gunman was *directly contradicted* by L.D.'s statement to police that she was certain Hughley had not been the gunman. Hence, the strongest trial evidence exculpating Brown as the gunman (L.D.'s testimony that Brown was not the person who shot Claudio), came from the *same source* who would have provided the strongest testimony undercutting Brown's third party culpability theory (L.D.'s testimony that she was certain Hughley was not the gunman). Brown does not suggest, nor do we see, how he would have been able to overcome this credibility contradiction, i.e., convince the jury that L.D. was credible in one of her eyewitness identifications, but not credible in the other. Hence, we do not find it reasonably probable that Brown would have obtained a more favorable result had the third party culpability evidence been admitted. (See *Watson*, *supra*, 46 Cal.2d at p. 837.)

Contrary to Brown's assertion, the trial court's ruling, even if it was erroneous, did not amount to a constitutional violation of his right to put on a defense. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] As we [have] observed . . . , this principle applies perforce to evidence of third-party culpability. . . ." (*Hall*, *supra*, 41 Cal.3d at p. 834–835.)

We conclude that tested by the *Watson* standard, any error in excluding the proffered third-party culpability evidence was harmless.

2. *Brown's presentence custody credits must be recalculated.*

Brown contends, and the Attorney General properly agrees, that the trial court miscalculated his presentence custody credits.

Brown was arrested on April 11, 2011, and sentenced on January 14, 2016. The trial court awarded him actual presentence custody time for only 1,738 days, but a proper calculation—which gave him credit for both the day of arrest and the day of sentencing—would have resulted in 1,740 days. (See *People v. Morgain* (2009) 177 Cal.App.4th 454, 469 ["defendant is entitled to credit for the date of his arrest and the date of sentencing"]; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [day of sentencing counted for presentence custody credits even though it was only partial day].) We will order this error corrected.

3. *Sentencing claim based on new law.*

Brown contends he is entitled to the benefit of a new sentencing statute that went into effect on January 1, 2018. We agree.

In post-argument briefing, Brown contends that, as a result of Senate Bill 620, signed by Governor Brown on October 11, 2017, this matter must be remanded for the trial court to exercise discretion as to whether to strike the section 12022.53, subdivision (d) enhancement. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike a sentencing enhancement under that section. The new provision states as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.

The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Senate Bill 620 went into effect January 1, 2018. Because appellant's conviction is not yet final, appellant is eligible to have the matter remanded for resentencing because the amended statute granting discretion to the trial court has the potential to lead to a reduced sentence. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].)

The Attorney General, however, argues that we should not remand because no reasonable court would exercise its discretion to strike Brown's firearm-use enhancement, as this is " 'a case in which the factors in aggravation so powerfully outweigh any possible excuse that we can say with confidence that no more favorable result is likely on resentencing.' (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615–616, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16.)" We disagree. It is well-recognized that, in the first instance, sentencing issues are to be decided by the trial court. Here, the trial court originally had no sentencing discretion to exercise because the Penal Code mandated a term of 25 years to life for first degree murder without special circumstances, and a consecutive term of 25 years to life for the firearm enhancement. (See §§ 190, subd. (a), 12022.53, subd. (d).) Under the amended

statute, the trial court now has such discretion. Accordingly, because the record does not disclose whether the trial court would have stricken the firearm-use enhancement if it had had discretion to do so, a remand for resentencing is necessary.

DISPOSITION

The judgment is affirmed as modified and remanded with directions. The judgment of conviction is affirmed. Brown is entitled to an additional two days of presentence custody credit, for a total of 1,740 days. The matter is remanded for the limited purpose of having the trial court determine whether to strike Brown's section 12022.53, subdivision (d), firearm-use enhancement. The trial court is directed to prepare and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J. DHANIDINA, J.*

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

ATTORNEY GENERAL

COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and **Respondent**

No. BA426270-01

01)Levar Brown,

Volume **3** of **3** Volumes
Notice of appeal filing date: **01/19/16**

Defendant(s) and **Apppellant**

CLERK'S TRANSCRIPT
Page 316 to 472

Appearances:

Counsel for Plaintiff:

THE ATTORNEY GENERAL

Counsel for Defendant:

Appeal from the Superior Court,
County of Los Angeles

Honorable Edmund W. Clarke, Judge

Date Mailed to:
Defendant (in pro per)
Defendant's Trial Attorney
Defendant's Appellate Attorney APR 01 2016
District Attorney
Attorney General

03/03/16 M.G.

SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY

000426

The People of the State of California Plaintiff vs. LEVAR BROWN, Defendant	Case Number BA426270	Department 115
	VERDICT (Guilty) COUNT 1 First Degree	

FILED
Superior Court of California
County of Los Angeles
DEC 10 2015
Sherri R. Carter, Executive Officer/Clerk
By Yolanda Reza Deputy

We, the Jury in the above-entitled action, find the Defendant, LEVAR BROWN, guilty of the crime of FIRST DEGREE MURDER of CLAUDIO JOHNSON, in violation of Penal Code Section 187(a), a felony, as charged in Count 1 of the Information.

We further find the allegation that in the commission of the above offense, that said defendant personally and intentionally discharged a firearm, to wit: a handgun, which caused great bodily injury or death to CLAUDIO JOHNSON, within the meaning of Penal Code Section 12022.53(d) to be TRUE. ("TRUE" or "NOT TRUE")

We further find the allegation that in the commission of the above offense, that said defendant personally and intentionally discharged a firearm, to wit: a handgun, within the meaning of Penal Code Section 12022.53(c) to be TRUE. ("TRUE" or "NOT TRUE")

We further find the allegation that in the commission of the above offense, that said defendant personally used a firearm, to wit: a handgun, within the meaning of Penal Code Section 12022.53(b) to be TRUE. ("TRUE" or "NOT TRUE")

This 10th day of December, 2015, Juror Seat # 6

JID # 14671863 Foreperson Signature

VERDICT (Guilty)

ABSTRACT OF JUDGMENT—PRISON COMMITMENT—INDETERMINATE

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED)

000438

CR-292

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: LOS ANGELES

FILED
OS ANGELES SUPERIOR COURT
JAN 20 2016
ERRI R. CARTER, OFFICER/ CLERK
BY LEKESHA WORKU, DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: LEVAR BROWN
AKA:
CII NO.: A09447247
BOOKING NO.: 2703367 ☐ NOT PRESENT
DOB: 04/17/1977

BA426270-01 -A
-B
-C
-D

☐ COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT ☐ AMENDED ABSTRACT

DATE OF HEARING	DEPT. NO.	JUDGE
01/14/2016	115	EDMUND WILLCOX CLARKE, JR

CLERK	REPORTER	PROBATION NO. OR PROBATION OFFICER	☐ IMMEDIATE SENTENCING
YOLANDA REZA	ROSALINA NAVA	X-1721560	

COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	☑ APPTD.
HILARY L. WILLIAMS	JOSEPH SHEMARIA BP	

1. Defendant was convicted of the commission of the following felonies:

☐ Additional counts are listed on attachment
_____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY: JURY	COURT	PLEA	CONCURRENT	CONSECUTIVE	654 STAY
01	PC	187(A)*	1ST DEGREE MURDER	2010	12 /10 / 15	X					
					/ /						
					/ /						
					/ /						
					/ /						
					/ /						

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL
01	PC 12022.53(D)	25 LIFE					25 LIFE

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☐ LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts _____
5. ☐ LIFE WITH THE POSSIBILITY OF PAROLE on counts _____
6. a. ☐ 15 years to Life on counts _____ c. ☐ _____ years to Life on counts _____
   b. ☑ 25 years to Life on counts 1 d. ☐ _____ years to Life on counts _____
   PLUS enhancement time shown above
7. ☐ Additional determinate term (see CR-290).
8. ☐ Defendant was sentenced pursuant to ☐ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.61 ☐ PC 667.7 ☐ other *(specify)*:

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-292 [Rev. January 1, 2012]

ABSTRACT OF JUDGMENT—PRISON COMMITMENT—INDETERMINATE

Pen. Code, §§ 1213, 1213.5

CR-292

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: LEVAR BROWN 000439

BA426270-01 -A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. **Restitution Fines:**

Case A: $2,000. per PC 1202.4(b) forthwith per PC 2085.5; $2,000. per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case B: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case C: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case D: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

b. **Restitution per PC 1202.4(f):**

Case A: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case B: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ *Victim name(s), if known, and amount breakdown in item 12, below. ☐ *Victim name(s) in probation officer's report.

c. **Fines:**

Case A: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. **Court Security Fee:** $40. per PC 1465.8. e. **Criminal Conviction Assessment:** $30. per GC 70373.

10. TESTING: a. ☐ Compliance with PC 296 verified b. ☐ AIDS per PC 1202.1 c. ☑ other *(specify)*: DNA PER PENAL CODE 296

11. REGISTRATION REQUIREMENT: ☐ per *(specify code section)*: _____

12. Other orders *(specify)*:

13. IMMEDIATE SENTENCING:
☐ Probation to prepare and submit post-sentence report to CDCR per PC 1203c.
Defendant's race/national origin: BLACK

14. EXECUTION OF SENTENCING IMPOSED
a. ☑ at initial sentencing hearing
b. ☐ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1170(d).)
e. ☐ other *(specify)*:

15. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	1738	1738	0 [ ] 2933 [ ] 2933.1 [ ] 4019
B			[ ] 2933 [ ] 2933.1 [ ] 4019
C			[ ] 2933 [ ] 2933.1 [ ] 4019
D			[ ] 2933 [ ] 2933.1 [ ] 4019

Date Sentence Pronounced	Time Served in State Institution
01 14 2016	DMH [ ] CDC [ ] CRC [ ]

16. The defendant is remanded to the custody of the sheriff ☑ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☑ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ other *(specify)*:

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
	JANUARY 20, 2016